



Australian  
Competition &  
Consumer  
Commission

# **Draft** Determination Application for authorisation

**lodged by**

**Hurstville City Council, Kogarah Municipal Council  
and Rockdale City Council**

**in respect of**

**a proposal to jointly tender and contract for the provision of all waste and recycling collection services in the local government areas of each council**

**Date: 22 February 2007**

**Authorisation no.: A91019**

**Public Register no.: C2006/2022**

**Commissioners:** Samuel  
Sylvan  
King  
Martin  
McNeill  
Smith  
Willett

# Summary

The ACCC proposes to grant authorisation to Hurstville City Council, Kogarah Municipal Council and Rockdale City Council to tender jointly and to enter into contracts for the provision of all waste and resource recovery collection services covering the local government areas of the three councils until 30 June 2018.

## **The authorisation process**

The Australian Competition and Consumer Commission (ACCC) can grant immunity from the application of the competition provisions of the *Trade Practices Act 1974* (the Act) if it is satisfied that the benefit to the public from the conduct outweighs any public detriment. The ACCC conducts a public consultation process to assist it in determining whether a proposed arrangement will result in a net public benefit.

## **The application for authorisation**

On 27 October 2006, the St George Region of Councils (SGROC), comprising Hurstville City Council, Kogarah Municipal Council and Rockdale City Council (the Applicants), lodged an application for authorisation to jointly tender and contract for the provision of all waste and resource recovery (recycling) collection services in their local government areas. The Applicants submit that they will run a single tender process to award three separate contracts (one for each council) operating under one cross-boundary set of services.

The Applicants have requested authorisation for up to 10 years from the date of commencement of the services.

## **Public detriment**

The ACCC considers that the anti-competitive detriment arising from the proposed conduct is likely to be minimal.

## **Public benefit**

The ACCC is satisfied that several of the public benefit claims made by the Applicants have substance. In particular, the ACCC considers that the proposed arrangements are likely to produce efficiencies in relation to the collection of waste and recycling, which will result in cost savings for the municipalities and ratepayers.

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

On balance, the ACCC considers that the public benefits are likely to outweigh the public detriments.

## **Length of authorisation**

The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.

In this instance, the ACCC proposes to grant authorisation until 30 June 2018.

## **Interim authorisation**

Interim authorisation was granted to the Applicants on 23 November 2006, allowing them to begin a joint tender process for waste and recycling kerbside collection services in the Region, while the ACCC considers and evaluates the merits of the application.

The Applicants did not seek interim authorisation to enter into any contracts at the conclusion of the tender process.

## **The next steps**

The ACCC will now seek further submissions from the Applicants and interested parties in relation to this draft determination prior to making a final decision. The Applicants and interested parties may also request that a conference be held to make oral submissions on the draft determination.

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## List of abbreviations used in this draft determination

ACCC	Australian Competition and Consumer Commission
commercial waste and recycling collection	Inert, solid or industrial waste generated by businesses, industries and institutions (such as schools, hospitals, universities, nursing homes and government offices), but excluding construction and demolition waste, municipal solid waste, clinical and related waste and hazardous waste
local government area	As used in <i>Local Government Act 1993</i> (NSW)
resource recovery	Removal from the waste stream of material which can be reused or recycled for other purposes
SGROC	St George Region of Councils
SSROC	Southern Sydney Regional Organisation of Councils
the Act	<i>Trade Practices Act 1974</i>
the Applicants	Hurstville City Council, Kogarah Municipal Council and Rockdale City Council, (collectively the St George Region of Councils)
the Region	The area comprising the St George Region of Councils
waste	Those materials generally disposed of at solid waste or inert landfills, not including materials such as medical or hazardous wastes

# 1. Introduction

## Authorisation

- 1.1 The Australian Competition and Consumer Commission (ACCC) is the independent 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 ACCC 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 ACCC for what is known as an ‘authorisation’.
- 1.3 The ACCC 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 ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.5 After considering submissions, the ACCC issues a draft determination proposing either to grant the application or deny the application.
- 1.6 Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions on the draft determination.
- 1.7 The ACCC then reconsiders the application, taking into account the comments made at the conference (if one is requested) and any further submissions received, and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC 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 benefit to the public or reduce the public detriment.

## The application for authorisation

- 1.8 On 27 October 2006, the St George Region of Councils (SGROC), comprising Hurstville City Council (Hurstville), Kogarah Municipal Council (Kogarah) and Rockdale City Council (Rockdale) (collectively, the Applicants), lodged an application for authorisation A91019. The Applicants seek authorisation to enter into arrangements that may breach section 45 of the *Trade Practices Act 1974* (Cth).<sup>1</sup>
- 1.9 The application for authorisation is discussed in greater detail in Chapter 3 of this draft determination.

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<sup>1</sup> SGROC, Application for authorisation, received 27 October 2006.

## Interim authorisation

- 1.10 The ACCC granted interim authorisation to the Applicants on 23 November 2006 to commence the tender process. The Applicants did not seek interim authorisation to enter into any contracts at the completion of the tender process.

## Chronology

- 1.11 Table 1.1 provides a chronology of significant dates in the consideration of this application.

**Table 1.1 Chronology of application for authorisation A91019**

<b>DATE</b>	<b>ACTION</b>
27 October 2006	Application for authorisation lodged with the ACCC, including an application for interim authorisation.
15 November 2006	Closing date for submissions from interested parties in relation to the request for interim authorisation.
23 November 2006	Interim authorisation granted to the Applicants to conduct a joint tender process.
1 December 2006	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
22 December 2006	Closing date for the Applicants' response to interested party submissions. A late response was received on 31 January 2007.
22 February 2007	Draft determination issued.

## 2. Background to the application

### The Applicants

- 2.1 The Applicants are all councils for the purposes of the *Local Government Act 1993* (NSW). The local government areas administered by the Applicants are located in inner Sydney, south of the central business district, and have a combined area of approximately 74 square kilometres. A map of the inner Sydney local council boundaries is included in Appendix A.
- 2.2 The three municipalities have a combined population of around 229,350. The rate of population growth in each of the three municipalities is as follows:
- Hurstville – 1% pa
  - Kogarah – 5.4% pa
  - Rockdale – 0.94% pa

The demand for waste collection and recovery services is a function of population size and of affluence: as disposable incomes rise, consumption and the creation of waste also rise.<sup>2</sup>

- 2.3 There are approximately 85,580 residential properties in the St George Region. The Applicants consider that each local government area has a number of similarities in terms of their single dwellings, multi unit residential dwellings and commercial and industrial land uses. Specifically, the Applicants note that the majority of residences in each municipality are detached single dwelling houses, but there are also large numbers of multi unit dwellings in each area.
- 2.4 The multi unit dwellings in the Hurstville and Kogarah local government areas are predominantly located in three storey ‘walk-up home units’. In Hurstville, a number of higher density high rise and mixed use (commercial and residential) buildings have been constructed in recent years. The multi unit dwellings in Rockdale are a combination of three storey ‘walk-up’ home units and high rise dwellings, with an increasing proportion of mixed use buildings.
- 2.5 There are approximately 23,250 businesses in the Region, about 18,000 of which are located in Rockdale. Kogarah has the smallest concentration of businesses, while Hurstville contains the major concentration of commercial office and retail space in the Region. It is the preferred location for small and medium sized businesses in the financial, insurance, medical and real estate sectors, as well as Government departments and community services.

### Waste and recycling collection

#### Residential waste and recycling collection

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<sup>2</sup> Department of Environment and Conservation NSW, *NSW Waste Avoidance and Resource Recovery Strategy and Performance Report 2006 – Consultation Draft*, September 2006, pages 19 – 20; IBISWorld, *Waste Disposal Services in Australia*, 16 August 2006, page 6.

2.6 Under the *Local Government Act 1993* (NSW), each local council must provide, manage and/or operate a waste and recycling collection service for residents within their local government area.<sup>3</sup>

### **Commercial waste and recycling collection**

2.7 Councils are not obliged to provide commercial waste and recycling collection services. Despite this, the Applicants compete with private companies for the provision of commercial collection services within their local government areas.

2.8 Hurstville provides 2,020 waste and 135 recycling services to approximately 820 commercial premises. Kogarah provides 1,280 waste and 750 recycling services to 700 commercial premises. These represent only a part of the total commercial waste and recycling collection services provided to businesses in Hurstville and Kogarah. The Applicants did not discuss the commercial services provided by Rockdale.

### **Existing arrangements for waste and recycling collection in the Region**

2.9 All three councils currently provide waste and recycling collection services supplied by the following contractors:

- Hurstville: Cleanaway Municipal Services, under a 10 year contract that expires in May 2010.
- Kogarah: Cleanaway Municipal Services, under a 10 year contract that expires in November 2009.
- Rockdale: Collex Waste Management, under a 10 year contract that expires in February 2008.

2.10 The Applicants submit that the current servicing arrangements vary between the three councils due to the following factors:

- difficult to access sites;
- special purpose arrangements (eg. households with infirm residents); and
- the capacity of on-site waste storage requirements.

### **Current tonnages**

2.11 The current tonnages of material collected in the three municipalities is summarised in Table 2.1

**Table 2.1 Tonnages of material collected between 01.01.05 and 31.12.05**

	<b>Waste</b>	<b>Clean Up</b>	<b>Recycling</b>	<b>Green Waste</b>	<b>TOTAL</b>
Hurstville	15,316	1,993	8,568	6,578	<b>32,455</b>
Kogarah	10,688	1,755	6,362	4,489	<b>23,294</b>
Rockdale	23,622	4,230	9,865	693	<b>38,410</b>
<b>TOTAL</b>	<b>49,626</b>	<b>7,978</b>	<b>24,795</b>	<b>11,760</b>	<b>94,159</b>

<sup>3</sup> SGROC, Supporting submission for authorisation application, received 27 October 2006, page 9.

2.12 The Applicants submit that any joint waste collection contract would be the largest contract in New South Wales and the fifth largest contract in Australia.

## **Industry characteristics**

### **Market concentration and barriers to entry**

2.13 The Applicants submit that the waste and recycling services industry is dominated by a small number of service providers.

2.14 This is supported by an IBISWorld industry report released in 2006, which states that:

- the waste industry (which includes waste and recycling collection and disposal services) displays medium concentration;<sup>4</sup>
- the three largest players in the industry provide collection services to about 30 percent of all households in Australia, mainly through contracts with municipalities;<sup>5</sup>
- industry concentration is higher in the commercial and industrial waste segment of the industry.<sup>6</sup>

2.15 According to the IBISWorld report, barriers to entry into the industry are high for the following reasons:

- the cost of equipment for use in collection, transfer and disposal of waste;<sup>7</sup>
- the length of existing service contracts;<sup>8</sup>
- the cost, time and effort involved in compliance with regulations and licensing arrangements;<sup>9</sup>
- the capital expense associated with landfills, and the fact that vertically integrated operators can gain competitive advantages;<sup>10</sup>
- the market share of existing operators, which can hinder new entrants in establishing sufficient demand to justify investment in larger-scale plants.<sup>11</sup>

### **Competition in the industry**

2.16 The IBISWorld industry report indicates that, despite the medium level of concentration and the high barriers to entry, competition in the industry is strong and increasing.<sup>12</sup> It considers that this has kept prices down, and has led to an increase in the range and standard of services provided.<sup>13</sup>

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<sup>4</sup> IBISWorld, *Waste Disposal Services in Australia*, 16 August 2006, pages 3 and 11.

<sup>5</sup> Ibid, page 11.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid, page 13.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid, page 7.

<sup>13</sup> Ibid, pages 7-8.

## Waste Avoidance and Resource Recovery

- 2.17 In 2001, the NSW Government enacted the *Waste Avoidance and Resource Recovery Act* (the WARR Act). The purpose of the WARR Act is to reduce the amount of waste generated in NSW, to optimise the recovery of useable resources from waste, and to manage residual waste in a manner which is environmentally responsible.<sup>14</sup>
- 2.18 Under the WARR Act, Resource NSW was created as a government agency responsible for developing a framework for, and supporting the implementation of, state-wide, regional and local programs for avoiding waste and recovering resources.<sup>15</sup>
- 2.19 Resource NSW developed the *Waste and Resource Recovery Strategy 2003* (Waste Strategy 2003), which was designed to guide all sectors of the community in relation to targets for waste avoidance and resource recovery, and to provide a framework for action. The Waste Strategy 2003 has recently been updated by the *NSW Waste Avoidance and Resource Recovery Strategy and Performance Report 2006 – Consultation Draft* (Waste Strategy 2006).
- 2.20 One of the broad targets of Waste Strategy 2006 is to increase to 66% the level of diversion of municipal waste from landfill by 2014.<sup>16</sup> The level of diversion was 26% in 2000.<sup>17</sup> The Applicants submit that the way in which waste services are delivered will need to be changed if the target of 66% is to be achieved. Specifically, the Applicants submit that the most effective way of managing waste collection activities is through a set of collective arrangements at a subregional level. In support of this approach, the Applicants quote from a government consultation paper entitled *Local Government Action Plan contributing to waste reduction and resource recovery in NSW*, which states the following:

Although most Council's [sic] in the Sydney Metropolitan Area (SMA) and Extended Regional Area (ERA) provide a range of recovery Services, opportunities exist to improve the range and intensity of these services to increase the quantity and quality of resource recovery. Councils could also facilitate the development of the resource recovery and processing sector by marshalling critical mass through collective tendering.<sup>18</sup>

- 2.21 Similarly, Waste Strategy 2006 states the following:

Opportunities to expand and rationalise existing council infrastructure and services, such as waste collection in the commercial and industrial small to medium enterprise areas will continue to need support, as well as groups of councils working collaboratively to introduce regionally based resource recovery technologies.<sup>19</sup>

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<sup>14</sup> Resource NSW, *NSW Waste Avoidance and Resource Recovery Strategy 2003*.

<sup>15</sup> Ibid.

<sup>16</sup> Department of Environment and Conservation NSW, *NSW Waste Avoidance and Resource Recovery Strategy and Performance Report 2006 – Consultation Draft*, September 2006, page 25.

<sup>17</sup> Ibid.

<sup>18</sup> SGROC, Supporting submission for authorisation application, received 27 October 2006, page 12, quoting from: Department of Environment and Conservation NSW, *Local Government Action Plan contributing to waste reduction and resource recovery in NSW*, December 2003, pages 28 – 29.

<sup>19</sup> Department of Environment and Conservation NSW, *NSW Waste Avoidance and Resource Recovery Strategy and Performance Report 2006 – Consultation Draft*, September 2006, page 29.

- 2.22 Waste Strategy 2006 also notes that '[s]everal councils have improved their municipal waste management through adopting better practice in collection systems'<sup>20</sup>, and comments that 'co-operative agreements between groups of councils are delivering regional processing arrangements that aggregate the waste and recyclable material'.<sup>21</sup>

## **Existing authorisations**

- 2.23 The Applicants are members of the Southern Sydney Regional Organisation of Councils (SSROC), which comprises 11 councils. The ACCC has previously considered applications for authorisation lodged by SSROC. These are summarised below.

### **Authorisations A30204 and A90861**

- 2.24 On 6 June 2002, authorisation A30204 was granted to the councils of SSROC to engage in collective negotiations with operators of material recycling facilities, to appoint one facility to sort, receive, store, process and dispose of dry recyclable material for 10 years. The successful tenderer would also be required to construct at least one materials recovery facility in the geographic area encompassed by the councils.<sup>22</sup> On 12 February 2003, this authorisation was revoked and substituted by A90861, which was in almost the same terms, apart from the period of authorisation allowed for the tender process.
- 2.25 In assessing the application, the ACCC considered that the possibility of anti-competitive detriment arising from an increase in the price of products created from dry recyclable material was minimal, due to the existence of down-stream processors which appeared to have sufficient market power to resist significant price increases. Public benefits resulting from the arrangement included improved business efficiency and environmental benefits resulting from an increase in recycling facilities.

### **Authorisation A90926**

- 2.26 Authorisation A90926 was granted to SSROC on 13 April 2005 for a joint tender and contract in relation to the transfer, processing and disposal of residual (general) waste. Authorisation was granted for a contract term of up to seven years.
- 2.27 In granting the authorisation, the ACCC considered that the anti-competitive detriment from the conduct would be minimal. The public benefits included improved service efficiencies (resulting in lower fees to ratepayers) and increased competition in the market, achieved by providing incentives in terms of critical mass for new providers to compete to supply these services to SSROC.

### **Authorisation A90980**

- 2.28 On 8 March 2006, the ACCC granted authorisation A90980 to SSROC to jointly seek expressions of interest, tender and contract with service providers deemed suitable to

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<sup>20</sup> Ibid, page 15.

<sup>21</sup> Ibid.

<sup>22</sup> Authorisation 30204 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.

provide waste transfer, processing and disposal services for dry (or hard) waste collected within their respective local government areas.

- 2.29 The ACCC considered that the anti-competitive detriment resulting from the arrangements was likely to be minimal. In fact, the proposed arrangements were likely to increase competition in the market for waste transfer, processing and disposal services. Among the public benefits that the ACCC identified were: potential improvement in business efficiency, improvements in resource allocation, promotion of cost savings and environmental benefits.

### **3. The application for authorisation**

- 3.1 The Applicants seek authorisation to jointly tender and contract for the provision of all waste and resource recovery (recycling) collection services covering the local government areas of the three councils.
- 3.2 The joint tender will relate to all residential premises and participating business premises within the combined local government areas. As noted already, the joint contracts would be the largest in New South Wales and the fifth largest in Australia.
- 3.3 The arrangement potentially raises concerns under the competition provisions of the Act. Consequently, the Applicants have lodged an application for authorisation with the ACCC.
- 3.4 The Applicants have indicated that their intention is to have one tender process resulting in three separate contracts (one for each council), although performance of the contracts will be organised to create one set of services that operates across municipal boundaries. The Applicants describe the proposed arrangement as a 'joint collection contract', although each council will be responsible for managing its own individual contract.
- 3.5 The Applicants seek authorisation for up to 10 years from the date of commencement of the collection services.
- 3.6 As noted above, each council currently has a contract in place for the provision of collection services within its local government area. These contracts are nearing their completion dates, and are scheduled to end on different dates. Consequently, the collection services the subject of this authorisation application will commence on different dates for each municipality.
- 3.7 The Applicants anticipate that the contracted services will commence in Rockdale in February 2008.

## **4. Submissions received by the ACCC**

- 4.1 The Applicants provided a supporting submission with their application for authorisation.
- 4.2 The ACCC sought submissions regarding the proposed conduct from a range of interested parties, and received public submissions from:
- GRL Investments Pty Ltd (Global Renewables);
  - Remondis Pty Ltd (Remondis); and
  - Veolia Environmental Services (Australia) Pty Ltd (Veolia).
- 4.3 Global Renewables supports joint tendering by local government for the provision of waste services, and therefore supports the application.
- 4.4 Remondis has indicated that, in principle, it has no objection to the Applicants' joint tender and contract for the provision of waste and recycling collection services. However, Remondis submits that the Applicants must give all waste management companies the opportunity to participate in the tender. Remondis would be concerned if the Applicants used a selective tendering process. The ACCC understands that the Applicants will give all waste management companies the opportunity to tender for the joint contracts.
- 4.5 Veolia supports regional waste management initiatives, but takes the view that the proposed arrangements may not necessarily result in the most efficient and effective provision of services. Veolia submits that greater economic and environmental benefits would be achieved if the Rockdale and Kogarah contracts were extended to 2010 and the joint tender and contract process were conducted at that time.
- 4.6 The views of Veolia and the Applicants are outlined and discussed in the ACCC's evaluation of the proposed conduct in Chapter 6 of this draft determination.
- 4.7 Copies of public submissions are available from the ACCC website ([www.accc.gov.au](http://www.accc.gov.au)) by following the 'Public Registers' and 'Authorisations Public Registers' links.

## 5. The net public benefit test

- 5.1 The ACCC may only grant authorisation where the relevant test in section 90 of the Act is satisfied.
- 5.2 The Applicants lodged their application for authorisation A91019 under section 88(1) of the Act, to make and give effect to 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. The relevant tests for this application are found in sections 90(6) and 90(7) of the Act.
- 5.3 In respect of the making of and giving effect to the arrangements, sections 90(6) and 90(7) of the Act state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
- the provision of the proposed contract, arrangement or understanding would result, or 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 result, or be likely to result, if the proposed contract or arrangement was made and the provision concerned was given effect to.

### Application of the tests

- 5.4 The Australian Competition Tribunal (the Tribunal) has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition.<sup>23</sup>
- 5.5 However, the Tribunal has previously stated that regarding the test under section 90(6):
- [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.<sup>24</sup>
- 5.6 Consequently, given the similarity of wording between sections 90(6) and 90(7), when applying these tests the ACCC can take most, if not all, detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

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<sup>23</sup> *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT9, at paragraph 67.

<sup>24</sup> *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2, at 42788. See also: *Media Council case* (1978) ATPR 40-058, at 17606; and *Application of Southern Cross Beverages Pty Ltd, Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200, at 42,763, 42766.

## Definition of public benefit and public detriment

- 5.7 Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.<sup>25</sup>

- 5.8 Public detriment is not defined in the Act either, but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>26</sup>

## Future with-and-without test

- 5.9 The ACCC applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.<sup>27</sup>

- 5.10 Under this test, the ACCC 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 ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.

## Length of authorisation

- 5.11 The ACCC can grant authorisation for a limited period of time.<sup>28</sup>

## Conditions

- 5.12 The Act also allows the ACCC to grant authorisation subject to conditions which the ACCC considers necessary in order to satisfy the net public benefit test.<sup>29</sup>

## Future and other parties

- 5.13 Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

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<sup>25</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357, at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012, at 17,242.

<sup>26</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357, at 42,683.

<sup>27</sup> *Australian Performing Rights Association* (1999) ATPR 41-701, at 42,936. See also for example: *Australian Association of Pathology Practices Incorporated* (2004) ATPR 41-985, at 48,556; *Re Media Council of Australia* (No.2) (1987) ATPR 40-774, at 48,419.

<sup>28</sup> Section 91(1) of the Act.

<sup>29</sup> Section 91(3) of the Act.

- persons who become party to the contract, arrangement or understanding at some time in the future<sup>30</sup>
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>31</sup>

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<sup>30</sup> Section 88(10) of the Act.

<sup>31</sup> Section 88(6) of the Act.

## 6. ACCC evaluation

- 6.1 The ACCC's evaluation of the proposed joint tender and contracts is in accordance with the net public benefit test outlined in Chapter 5 of this draft determination. As required by the test, it is necessary for the ACCC to assess the likely public benefits and detriments flowing from the arrangement.

### The market

- 6.2 The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market(s) affected by that conduct.
- 6.3 The Applicants have not made a submission regarding their view of the relevant markets that may be affected by their proposed conduct.

### Residential waste and recycling collection

- 6.4 The Productivity Commission has recently noted arguments in favour of viewing household waste collection within a municipality as a natural monopoly.<sup>32</sup> It considered that for each municipality, 'competition for the market' is more effective than 'competition within the market'.<sup>33</sup> In fact, it indicated that competition within such a market is rare (that is, allowing households to contract individually for the collection of waste),<sup>34</sup> and that it may not produce the most efficient outcomes.<sup>35</sup> Competition for the market is effected by local councils conducting periodic tenders.
- 6.5 There are 38 municipalities in the Sydney Metropolitan Area.<sup>36</sup>

### Commercial waste and recycling collection

- 6.6 In contrast to the situation regarding household waste collection, there appears to be a competitive market for the provision of commercial waste collection services within local government areas. The competitors include local councils and private companies.
- 6.7 The volume and composition of waste from some commercial and industrial enterprises contrasts with the volume and composition of residential waste, and this may account for differences in market characteristics.

### Service providers

- 6.8 There are a number of service providers operating in the Sydney Metropolitan Area that provide waste and recycling collection and disposal services. It is likely that a number of these suppliers could participate in the tender.

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<sup>32</sup> Productivity Commission 2006, *Waste Management*, Report no. 38, Canberra, page 115.

<sup>33</sup> Ibid, pages 115 – 116.

<sup>34</sup> Ibid, page 115, citing OECD 2002, 'Competition in local services: solid waste management', *OECD Journal of Competition Law and Policy*, vol. 3, no. 4, pages 117 – 170.

<sup>35</sup> Productivity Commission 2006, *Waste Management*, Report no. 38, Canberra, page 115.

<sup>36</sup> See <[www.epa.nsw.gov.au/wr/lgacodes.htm](http://www.epa.nsw.gov.au/wr/lgacodes.htm)>

## **The ACCC's conclusions regarding the market**

- 6.9 For the purposes of assessing this application, the ACCC considers that the relevant field of competition is the market for waste and recycling collection services within the Sydney Metropolitan Area.<sup>37</sup>
- 6.10 The ACCC does not consider that its assessment will be strongly influenced by possible variations in precise market definition.

## **The counterfactual**

- 6.11 As noted in Chapter 5 of this draft determination, the ACCC applies the 'future with-and-without test' in order to identify and measure the public benefits and public detriments generated by proposed conduct.
- 6.12 The Applicants submit that if authorisation were not granted, it is likely that they would continue to operate their waste services on a council-by-council basis.
- 6.13 The ACCC notes Veolia's submission in which it recommends extending both the Rockdale and Kogarah arrangements to 2010. However, this cannot be a relevant consideration in the current application for authorisation. Given the Applicants' submission, the ACCC considers that the Applicants would, in the absence of authorisation, run individual tender processes and enter into individual contracts at the completion of those processes.

## **Public detriment**

- 6.14 The Applicants submit that the proposed arrangements will promote competition and equitable dealings in the market. In particular, they submit that the tender process will allow the maximum number of service providers to compete for the contract. Further, the Applicants argue that the proposal is not likely to restrict competition as the contract will go to tender again after 10 years, which will allow competitors in the market to present further competitive bids.

## **Veolia's submission in relation to the proposed conduct**

- 6.15 As noted above, Veolia supports regional waste management initiatives, but takes the view that the proposed arrangements may not necessarily result in the most efficient and effective provision of services.
- 6.16 Veolia submits that making changes to the scheduled waste collection days is fraught with problems if not handled correctly. It argues that attempting to change collection days two or three times (as each contract commences) will create added costs and various service problems.

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<sup>37</sup> Department of Environment and Conservation NSW, *Local Government Action Plan contributing to waste reduction and resource recover in NSW*, December 2003, page 16; see also Department of Environment and Conservation NSW, *NSW Waste Avoidance and Resource Recovery Strategy and Performance Report 2006 – Consultation Draft*, September 2006, page 5.

- 6.17 Veolia also submits that service providers can generally negotiate significant discounts based on order size, and that consequently, all plant and equipment needs should be purchased at one time. Veolia argues that if the collection services commence at different times, then this will minimise the benefits associated with purchasing all plant and equipment needs at once.
- 6.18 Veolia is concerned that the phased introduction of a regionalised collection system will result in underutilisation of plant and equipment. It notes difficulties in obtaining and deploying suitable vehicles and finding a site suitable for garaging and operating the vehicle fleet. In particular, Veolia considers that if the fleet of vehicles and an operating site suitable for performing all three contracts is obtained prior to the commencement of the first contract, sub-optimal use of these resources will occur until performance of the third contract commences. Veolia also notes that suitable bins can be acquired at better prices and deployed more efficiently if the purchase and roll out are not staggered to accommodate the different commencement dates for each contract.
- 6.19 Veolia also considers that the staggered commencement of the three contracts will create difficulties in the provision of labour, which would adversely affect the efficiency of the service provided by the successful tenderer. Veolia submits that being able to provide a total service from commencement allows for the most efficient service planning and provision.
- 6.20 The Applicants claim that the proposed arrangements will produce a number of efficiencies. Veolia submits that the differences in the commencement dates of the three contracts will dissipate some of those efficiency gains. It concludes that the issues resulting from the different commencement dates will impair the ability of service providers to prepare and submit an optimal service proposition and will result in the participating councils not receiving a cost competitive service relative to other collection service models.

### **The Applicants' response to Veolia's submission**

- 6.21 On 31 January 2007, the Applicants lodged a response in relation to Veolia's submission.
- 6.22 In their response, the Applicants acknowledge that several collection runs may need to be adjusted as the regional collection service is rolled out. However, the Applicants do not agree that changes to scheduled collection days will lead to increased costs, service problems, contamination of bins or missed service issues.
- 6.23 The Applicants argue that there is no evidence to suggest that the phased introduction of a regionalised collection service will be more costly, and suggest that Veolia's submission is based on the incorrect assumption that waste services remain static over time.
- 6.24 In response to Veolia's submission that the most optimal approach to resource allocation involves purchasing all plant and equipment at one time, the Applicants argue that such an approach is not necessarily in the interests of all collection contractors, who may find such large purchases difficult to co-ordinate with their cash-flow. The Applicants also point out that even though the collection services will commence on different dates, the successful tenderer will have the security of all three contracts, and will be able to negotiate competitively with a range of equipment suppliers.

- 6.25 In relation to Veolia’s arguments regarding equipment underutilisation, the Applicants note that experienced collection contractors must be flexible in order to respond to seasonal or logistical changes, and that this flexibility may facilitate the transitional phase of the regionalised collection service. Similarly, the Applicant submits that an experienced and skilled collection contractor would be expected to have well-established systems in place in order to deal with the impact of fluctuating business activities on labour utilisation.
- 6.26 In relation to Veolia’s claim that a suitable site for garaging and operating the fleet will be grossly underutilised during the first two years of its operation, the Applicants submit that the potential tenderers will have the opportunity to make strategic decisions in this regard, and may choose to separately lease any extra capacity on a short term basis, or use it for other commercial activities.

### **The ACCC’s response to Veolia’s submission**

- 6.27 While there may be some merit to Veolia’s argument that a simultaneous introduction of contracts could lead to greater efficiencies than the staggered introduction of contracts, the ACCC must assess the public benefits and detriments of the proposed arrangements compared to the counterfactual of continued individual collection contracts. In any event, given the staggered expiry of the current contracts, endeavours to introduce simultaneous commencement dates could, in itself, be problematic.

### **The ACCC’s view regarding public detriment**

- 6.28 The ACCC notes that, by allowing a single company to provide waste and recycling collection services to the Applicants for the next 10 years, the proposed arrangements will foreclose the opportunity for competition regarding collection services in the St George Region for a significant period of time. However, the ACCC considers that, in this context, the proposed arrangements will not restrict competition in the long term.
- 6.29 The proposed arrangements conform to industry practice, in which contracts may operate for 7 to 10 years.<sup>38</sup> This gives successful tenderers sufficient time to amortise the considerable equipment expenses required to perform their contracts.<sup>39</sup> A shorter contract period might not improve competition in the market, particularly if it had the effect of diminishing the commercial value of the contract and discouraging potential tenderers from submitting bids. Nor would it add to efficiency, if the contractors had to charge higher prices in order to recoup their capital expenditure in a shorter period, or use cheaper but less efficient equipment. It is, of course, in the interests of councils to tender for periods of time that they consider likely to deliver efficient prices.
- 6.30 The ACCC understands that a further tender process will be conducted when the proposed contracts end in 2018. This will allow other potential suppliers of the services to present further bids, which will create a competitive environment for the provision of waste and recycling collection services as potential suppliers bid for the market. The result will mitigate any loss of competition during the term of the contract, and benefit the Applicants over the life of the contract.

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<sup>38</sup> IBISWorld Industry Report, *Waste Disposal Services in Australia*, 16 August 2006, page 13.

<sup>39</sup> Ibid.

- 6.31 Furthermore, the arrangements apply to only three of 38 councils in the Sydney Metropolitan Area. Given the number of contracts potentially available in the market, suppliers of waste and recycling collection services will have opportunities to bid for other contracts that will be put to tender by councils or regional groups of councils in the Sydney Metropolitan Area. In the ACCC's view, the proposed arrangements will not substantially lessen competition in the market for the provision of waste and recycling collection services in the Sydney Metropolitan Area by removing a significant number of opportunities to bid for contracts.
- 6.32 The ACCC also notes that detriments resulting from any loss of competition, eg. increased prices or lower quality services, would ultimately be borne by the Applicants and their ratepayers. It is unlikely that the Applicants would seek to engage in conduct which would diminish the welfare of their residents and local businesses, which mitigates any remaining concerns regarding reductions in competition.

### **The ACCC's conclusion on public detriment**

- 6.33 The ACCC considers that the anti-competitive detriment generated by the proposed arrangements is likely to be minimal.

### **Public benefit**

- 6.34 The Applicants consider that collective arrangements are the most effective way of managing waste collection activities, and submit that the joint tender and contracts will deliver public benefits, including benefits to the Applicants, the communities they serve and the businesses willing and able to tender for the contracts.

### **The Applicants' public benefit claims**

- 6.35 The Applicants have identified a number of public benefits which they believe will flow from the proposed conduct, including:
- a reduction in collection costs as the number of services collected increases;
  - the ability to provide commercial collection services at more competitive rates due to the economies of scale associated with having one service provider;
  - reductions in littering and illegal dumping;
  - operational efficiencies from streamlining collection systems and patterns, and designing routes that cross municipal boundaries;
  - optimal utilisation of vehicles, leading to a reduction in the number of vehicles;
  - improved ability to introduce new services by combining the resources of the three councils;
  - the ability to optimise servicing arrangements to suit the needs of specific developments;
  - cost savings in the acquisition of bins, consistency of bin type throughout the region, and the ability to offer a number of bin alternatives in specific types of developments;

- cost savings through rationalisation in the provision of educational programs and resource materials, and economies of scale which will enable the Applicants to provide more thorough education programs;
- reduction in waste disposal costs due to product demand; and
- an increase in the market for processing waste with the potential to increase diversion of waste from landfill.

6.36 Further, the Applicants submit that a high level of service quality would be maintained, and the arrangements will provide an opportunity to combine the best features of their existing contracts in the new contracts.

6.37 A more detailed discussion of the public benefits claimed by the Applicants follows.

*Collection efficiencies and cost savings*

6.38 The Applicants submit that their proposed conduct will result in collection efficiencies due to the streamlining of collection systems and patterns, improvements to route design, the optimisation of fleet efficiencies, a reduction in the total number of collection vehicles, and the optimisation of servicing arrangements to suit the needs of specific developments. This will lead to significant cost savings.

6.39 The Applicants also submit that their proposed arrangements will give rise to a reduction in the cost of waste disposal, the acquisition of bins (see paragraphs 6.44-6.45) and the provision of education programs (see paragraph 6.43).

6.40 In support of this claim, the Applicants submit that the recent waste disposal and recycling tender processes conducted by the Southern Sydney Regional Organisation of Councils (SSROC):

- resulted in estimated operational cost savings in excess of \$2.5 million per annum through significant transport savings, reduced gate fee costs, shared educational costs, wider range of product for disposal at lower cost, and transaction cost sharing for procurement of services;
- produced very competitive pricing structures for the disposal of product tendered;
- offered financial benefits for councils to improve community performance through the introduction of a wide ranging education program; and
- introduced new facilities which greatly reduced the transport costs of disposal to the Councils participating in this contract.

6.41 The Applicants have indicated that if this application for authorisation is granted, then their anticipated cost savings will be passed onto ratepayers, by pegging or lowering their domestic waste charges.

6.42 Veolia agrees that there are many advantages to combining the waste and recycling collection services for three local government areas. In particular, it submits that the ability to schedule collection days across the entire region to suit collection logistics is an 'enormous benefit that will provide tangible savings to all concerned including the

environment.<sup>40</sup> However, as noted, Veolia considers these benefits may be lower than might otherwise be the case as the Applicants may attempt to change collection days two or three times, which ‘will create added costs, service problems and contamination and missed service issues’.<sup>41</sup>

#### *Joint education programs*

6.43 The Applicants claim that the proposed conduct will give rise to savings in relation to the provision of educational programs. Local government in New South Wales is responsible for providing education and information services about sustainable waste management and increased resource recovery.<sup>42</sup> The Applicants note that the proposed arrangements will enable them to provide better education services at a reduced cost. Standardised materials and programs can be delivered, as the collection service will be the same in the three municipalities. The Applicants see this as an opportunity to improve the scope and quality of their education programs.

#### *Bins*

6.44 The Applicants submit that the proposed arrangements will increase their purchasing power in relation to the procurement of bins and other equipment, resulting in cost savings.

6.45 The Applicants also consider that their ability to provide consistent bin types and sizes throughout the Region, and their ability to offer a number of bin alternatives to specific types of developments, will deliver a public benefit. The Applicants claim that these public benefits will flow from the increase in service levels brought about by the collective arrangements.

#### *Improved services*

6.46 The Applicants consider that the economies of scale achieved by having a single service provider will allow them to offer more competitive commercial collection rates. They also consider that the proposed arrangements will allow them to increase their market share in the provision of commercial collection services.

6.47 The Applicants further submit that the proposed arrangements will give them a greater ability to introduce new and specialised services (eg. E-waste programs), and suggest that there will be a reduction in litter and illegal dumping due to the increased number of services and service levels to be provided as part of the regionalised collection system.

6.48 In addition, the Applicants submit that the collection services will be consistent across all three local government areas, and will be underpinned by a principle of Total Quality Management, thereby ensuring that the standard of waste collection is high.

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<sup>40</sup> Veolia, Submission to the ACCC, received 15 November 2006, page 1.

<sup>41</sup> Ibid, page 2.

<sup>42</sup> Department of Environment and Conservation NSW, *Local Government Action Plan contributing to waste reduction and resource recovery in NSW*, December 2003, pages 33 – 34.

### *Improved contracts*

- 6.49 The Applicants consider that the joint tender process will provide them with the opportunity to ‘put together’ what has worked best for each of them in their individual collection contracts. Furthermore, the Applicants plan to conduct a pilot study to learn from the successes and failures of other local authorities in applying waste technologies.

### *Diversion of waste from landfill*

- 6.50 The Applicants claim that the proposed arrangements will allow them to increase the diversion of waste from landfill. This benefit would meet the objectives of the New South Wales Government, and fulfil the Applicants’ obligations under the New South Wales waste initiatives.<sup>43</sup> If the proposed arrangements aid the diversion of recyclable materials from the waste stream, the volume of waste going to landfill will be reduced, with resulting environmental benefits.

## **The ACCC’s view regarding public benefit**

### *Collection efficiencies and cost savings*

- 6.51 The ACCC considers that the Applicants can anticipate savings by combining waste and recycling collection operations for the municipalities. Streamlining the collection patterns by crossing municipal boundaries can provide opportunities to improve the utilisation of expensive equipment, which may also lead to a reduction in the number of vehicles required. The efficiencies from streamlining collection patterns are also likely to aid in the logistics of waste and recycling collection, which should also save on costs.

### *Improved services*

- 6.52 The ACCC accepts that the proposed arrangements may enable the service provider to tailor collection services to suit particular requirements of some users. This could also help to increase usage, adding to the efficiency benefits of the proposed arrangements and reducing littering and illegal dumping. Similarly, co-ordinated action across the three municipalities could assist in the collection of new types of waste, such as E-waste (eg. computer equipment and mobile phones).<sup>44</sup> This type of waste may require innovation to develop an optimal method of collection and disposal.<sup>45</sup> A single service provider collecting this type of waste in the three local government areas may be better positioned to develop such innovations.
- 6.53 The Applicants claim that the service provider will be able to offer businesses in the three municipalities more competitive rates for commercial waste and recycling collection services. Consequently, it could attract more work from local businesses, which would further exploit the potential efficiencies obtainable from the proposed arrangements. The ACCC considers that this could be a substantial public benefit of the proposed arrangements. Attracting waste and recycling collection work from businesses could increase the economic efficiency of the service, and enhance the environmental benefits.

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<sup>43</sup> Department of Environment and Conservation NSW, *NSW Waste Avoidance and Resource Recovery Strategy and Performance Report 2006 – Consultation Draft*, September 2006.

<sup>44</sup> *Ibid*, pages 20 and 37.

<sup>45</sup> *Ibid*, page 48.

Some of the benefits would not be captured in the financial aspects of the arrangements, as an increase in the number of businesses using the Applicants' preferred tenderer would reduce the number of other waste collection vehicles working in the three municipal areas.

#### *Joint education programs*

- 6.54 In relation to the savings on educational costs, the ACCC considers that the councils could achieve some cost reductions by sharing resources and by using common, consistent material throughout the three municipalities.
- 6.55 The ACCC notes that the Applicants have claimed savings on educational costs as a benefit of an earlier authorisation. The quantity of additional future savings is likely to diminish. However, to the extent that the existing situation requires different material to be communicated within the three municipalities, the proposed arrangements will permit further harmonisation of that material. This is likely to lead to some further cost savings. In this regard, the ACCC notes the Applicants' submission that the proposed arrangements could allow for delivery of 'more thorough education programs'.<sup>46</sup> The ACCC considers that enhancements to existing education programs would be a public benefit.

#### *Reduced waste disposal costs*

- 6.56 The Applicants claim that the joint contracts will reduce the costs of waste disposal. In assessing this public benefit, the ACCC notes that the Applicants already operate under a single contract for the disposal of waste, which has produced substantial savings. The joint contracts for waste and recycling collection may capture some additional savings on waste disposal. However, the ACCC considers that any additional benefit from cost savings on the disposal of waste may be small.

#### *Bins and other equipment*

- 6.57 The ACCC considers that the Applicants may be able to obtain some cost savings in relation to the procurement of bins and other equipment due to an increase in purchasing power. Having a consistent bin type throughout the region may also provide some logistical benefits at the point where waste and recyclable materials are collected.
- 6.58 The ACCC notes the submission from Veolia that the potential benefits to be obtained from bulk purchasing may be dissipated due to the staggered starting times of the three contracts. However, the ACCC considers that the proposed arrangements will produce some public benefits due to the Applicants' increased purchasing power, even if a different set of arrangements would have produced more significant public benefits.

#### *Cost savings to be passed on to ratepayers*

- 6.59 The proposed collection arrangements are likely to produce efficiencies, which will benefit the public. Furthermore, given the statutory obligations imposed on municipal councils in relation to tendering, and the electoral accountability to which the Applicants

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<sup>46</sup> SGROC, Supporting submission for authorisation application, received 27 October 2006, page 10.

are subject, the benefits of any cost savings will be passed onto residents, ratepayers and local businesses. This may take the form of a reduction or pegging of charges.

#### *Improved contracts*

6.60 The ACCC considers that there may be some benefit to be gained from combining each council's experience of negotiating and drafting contracts for waste and recycling collection, particularly in relation to the preparation of contracts. The size of this benefit is difficult to estimate. However, the ACCC is satisfied that the Applicants can obtain this benefit.

#### *The Applicants' obligations*

6.61 The ACCC notes that the Applicants have obligations under the NSW Government's waste disposal and resource recovery initiatives. One such obligation is to contribute to a reduction in the use of landfill.<sup>47</sup> This is achieved, in part, by increasing the amount of recyclable material extracted from municipal waste. The Government's policy emphasises the benefits of separating recyclables from waste at the source.<sup>48</sup> The economic benefits of reducing landfill and increasing the volume of recyclables has been contested by the Productivity Commission. However, the proposed arrangements conform to the policy initiatives of the Government, the councils are obliged to support those initiatives, and the ACCC notes that the public benefits of doing so are widely accepted.

#### *Environmental benefits*

6.62 The ACCC considers that the proposed arrangements are likely to result in some (although not necessarily large) environmental benefits by helping to reduce land fill and increase recovery and use of recyclable materials. These benefits may be enjoyed by those within the Region as well as the broader community.

#### **The ACCC's conclusion on public benefit**

6.63 The ACCC considers that several of the Applicants' public benefits claims have substance. In particular, the ACCC concludes that the proposed arrangements are likely to produce efficiencies in relation to the collection of waste and recycling, which will result in cost savings for the municipalities and ratepayers.

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

6.64 The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the joint tender and the resulting contracts are likely to result in a public benefit that will outweigh any public detriment.

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<sup>47</sup> Department of Environment and Conservation NSW, *Local Government Action Plan contributing to waste reduction and resource recovery in NSW*, December 2003, pages 14 – 15; Department of Environment and Conservation NSW, *NSW Waste Avoidance and Resource Recovery Strategy and Performance Report 2006 – Consultation Draft*, September 2006, pages 12 – 15, 25 and 29 – 30.

<sup>48</sup> Department of Environment and Conservation NSW, *NSW Waste Avoidance and Resource Recovery Strategy and Performance Report 2006 – Consultation Draft*, September 2006, page 13.

- 6.65 In the context of applying the net public benefit test at section 90(8)<sup>49</sup> of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.<sup>50</sup>
- 6.66 The ACCC considers that the public detriments generated by the proposed conduct are likely to be minimal.
- 6.67 The ACCC is satisfied that the proposed arrangements will produce the following public benefits:
- increased efficiency and cost reductions;
  - improved service delivery, including better adaptation to particular needs;
  - environmental benefits; and
  - better education, which will add to the service delivery, efficiency and environmental benefits.
- 6.68 On balance, the ACCC considers the public benefits are likely to outweigh the public detriments.

## Length of authorisation

- 6.69 The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.
- 6.70 In this instance, the Applicants have requested that ‘the authorisation period be given for up to a ten (10) year Contract from the date of the commencement of services.’<sup>51</sup>
- 6.71 The ACCC considers that, given the significant capital outlays required to perform a contract for municipal waste and recycling collection, a 10 year contract is likely to encourage competition by making the tender attractive to a larger pool of industry participants than if authorisation were granted for a shorter period of time. The ACCC also considers that a 10 year contract will lead to efficiency gains, but notes that authorisation for a longer term will not necessarily enhance those efficiency gains, as the need to replace expensive equipment will eventually arise.
- 6.72 In addition, the ACCC notes that councils in NSW have been encouraged to limit the terms of their waste contracts in order to maintain maximum flexibility in responding to new and emerging technologies for recovering waste.<sup>52</sup> A term longer than 10 years may inhibit such flexibility, and would increase the anti-competitive detriments associated

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<sup>49</sup> The test stated in section 90(8) of the Act is, in essence, that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

<sup>50</sup> *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5, at paragraph 22.

<sup>51</sup> SGROC, Supporting submission for authorisation application, received 27 October 2006, page 13.

<sup>52</sup> Department of Environment and Conservation NSW, *NSW Waste Avoidance and Resource Recovery Strategy and Performance Report 2006 – Consultation Draft*, September 2006, page 13.

with the proposed arrangements by locking other service providers out of the St George Region for too long.

- 6.73 As such, the ACCC proposes to grant authorisation to the St George Region of Councils (Hurstville City Council, Kogarah Municipal Council and Rockdale City Council) to conduct a joint tender for the provision of waste and recycling collection services and to offer the successful tenderer three contracts to provide one service jointly in the St George Region until 30 June 2018.

## **7. Draft determination**

### **The application**

- 7.1 On 27 October 2006, the St George Region of Councils lodged an application for authorisation A91019 with the Australian Competition and Consumer Commission (ACCC).
- 7.2 Application A91019 was made using Form B in Schedule 1 of the Trade Practices Regulations 1974. The application was made under subsection 88 (1) of the Act to:
- make and give effect to 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.
- 7.3 In particular, the St George Region of Councils seeks authorisation to conduct a joint tender for the provision of waste and recycling collection services and to offer three contracts to the successful tenderer to provide one service jointly in the three municipalities comprising the Region.

### **The net public benefit test**

- 7.4 For the reasons outlined in Chapter 6 of this draft determination, the ACCC considers that in all the circumstances the arrangements for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements.

### **Conduct for which the ACCC proposes to grant authorisation**

- 7.5 The ACCC proposes to grant authorisation to the St George Region of Councils to conduct a joint tender for the provision of waste and recycling collection services and to offer the successful tenderer three contracts to provide one service jointly in the three municipalities comprising the Region until 30 June 2018.
- 7.6 This draft determination is made on 22 February 2007.

### **Interim authorisation**

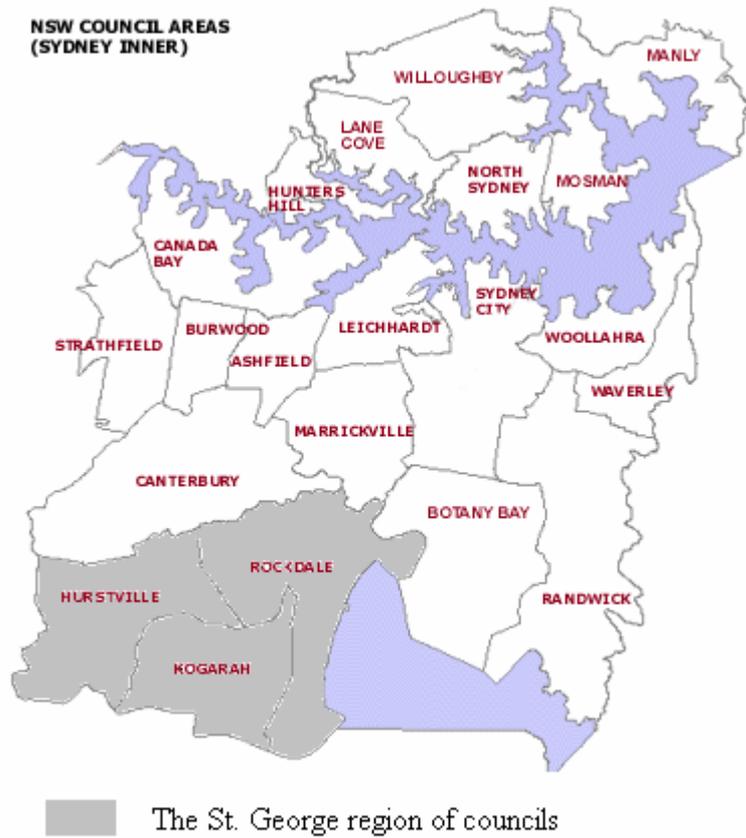
- 7.7 At the time of lodging the application, the St George Region of Councils requested interim authorisation to commence the joint tender for waste and recycling collection in the Region. The ACCC granted interim authorisation on 23 November 2006.
- 7.8 Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

### **Further submissions**

- 7.9 The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

# Appendixes

## A — Map of Inner Sydney Local Council Boundaries



Source: New South Wales Department of Local Government, Map Inner Sydney Local Council Boundaries, February 2004, viewed 30 November 2006, <[http://www.dlg.nsw.gov.au/DLG/DLGHome/documents/Downloads/MAP\\_INNERSYDNEY\\_2004.gif](http://www.dlg.nsw.gov.au/DLG/DLGHome/documents/Downloads/MAP_INNERSYDNEY_2004.gif)>.