Advice to Local Government NSW

Re: Amendments to waste tendering requirements

under the *Local Government (General Regulation) 2021* (NSW)

A. Introduction and summary

1. I am instructed by the Local Government NSW. Local Government NSW is an independent organisation that exists to serve the interests of NSW councils, being the bodies politic constituted by ss 219-224A of the ***Local Government Act*** *1993* (NSW).

2. Section 748 of the Local Government Act empowers the making of regulations. On 15 December 2023 the *Local Government (General) Amendment (Tendering) Regulation (No 2) 2023* (NSW) (**Waste Tendering Regulation**) was made in exercise of that power. The Waste Tendering Regulation amended Part 7 of the existing *Local Government (General)* ***Regulation*** *2021* (NSW), which governs tendering for contracts for which a council is required by s 55 of the Act to invite tenders.

3. The questions I have been asked in connection with the Waste Tendering Regulation, and my answers in short, are as follows:

   Question 1: How would the amendments made by the Waste Tendering Regulation be construed?

   Answer: Broadly, the amended Regulations seek to require that successful tenderers offer continuing employment on equal or better terms to employees who currently provide "domestic or other waste management services" to councils through an "undertaking" to that effect, and prevent councils from accepting tender submissions absent satisfaction by relevant unions of as much. However, explained in Parts B and C below, the precise effect of the amendments is elusive.

Question 2: What difficulties, if any, will application of, and compliance with, the amendments made by the Waste Tendering Regulation present?

Answer: The amended Regulations are internally inconsistent and poorly drafted which will create confusion. The Regulations interfere with the relationships between incumbents and their employees; affect a far broader range of services and service providers than may have been intended; are clearly unworkable in their application to service providers and employees who provide services to multiple clients; substantially advantage incumbents and reduce competition in the market for waste services; and with no legitimate basis, provide unions with a broad and unreviewable veto power in respect of waste management arrangements, hindering the operation of tender processes with flow on adverse cost and service quality consequences. Each of these matters are likely to make compliance with the amended Regulations difficult and will result in adverse effects for councils, tenderers, employees, ratepayers and the public.

Question 3: Do the amendments made by the Waste Tendering Regulation conflict with any laws of the Commonwealth?

Answer: It is distinctly possible that insofar as the amended Regulations require corporate tenderers to provide an undertaking to offer continuing employment on the same terms to existing employees, a Court will hold it is inconsistent with the prohibition imposed by s 45 of the *Competition and Consumer Act 2010* (Cth) (**CCA**) on entry by "corporations" into a contract or arrangement, or arrival at an understanding, which includes a provision of which has the purpose or is likely to have the effect of substantially lessening competition. If so, that aspect of the amended Regulations is invalid by force of s 109 of the Commonwealth *Constitution*. The

interdependence of the scheme of the amended Regulations, in turn, means it is distinctly arguable that other requirements are invalid insofar as they would otherwise apply in respect of corporate tenderers and tenders.

B. Construction of the Waste Tendering Regulation

4. A council must prepare "tender proposal documents" for a proposed tender that comply with the requirements of reg 170 (see reg 167(2)(b), (3), 168(5)(b), (6)). Regulation 170, with the amendments made by the Waste Tendering Regulation underlined, provides:

> (1) The tender proposal documents relating to a proposed contract must—
>
> (a) give details of the work to be carried out, the goods or facilities to be provided, the services to be performed or the property to be disposed of…
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> (b) specify the criteria on which the assessment of tenders will be based, and
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> (c) specify the name of a person to whom requests for information concerning the proposed contract may be addressed and how the person can be contacted, and
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> (d) indicate whether formal tender documents must be submitted in relation to the tender and, if so, how they may be obtained, and
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> (e) if the proposed contract is for the performance of domestic or other waste management services, specify—
>
> (i) details of the individual employees who currently provide the service, and
>
> (ii) the terms on which the individuals are employed.
>
> (1A) (Repealed)
>
> (2) The information under subsection (1)(e) must be included in a way that protects the privacy of the individuals by—
>
> (a) removing identifying information, or
>
> (b) aggregating data from multiple individuals.

(3) The information under subsection (1)(e) is not required to be included if the council cannot reasonably obtain access to the information.

(4) If a council amends tender proposal documents after they have been issued to persons, it must take all reasonably practicable steps to inform the persons of the amendments.

5. "Domestic or other waste management services" are broadly defined in reg 164, following the amendments, to mean "the storage, treatment, processing, collecting, removal, disposal, destruction, sorting or recycling of domestic waste and other waste".

6. Regulation 173 provides for the submission of tenders by tenderers in response to an invitation to tender accompanied by such "tender proposal documents". With the amendments made by the Waste Tendering Regulation underlined, it provides:

(1) A tender submission must be submitted in writing, including, subject to subsection (2), by electronic means.

(2) A tender submission may not be submitted by electronic means unless the submission by electronic means is effected by a secure mechanism, including an encryption-based technology, that ensures the tender submission cannot subsequently be altered.

(3) Unless sent by electronic means, a tender submission must be sent or delivered in a sealed envelope.

(4) A tender submission for the performance of domestic or other waste management services must be accompanied by an undertaking made by the tenderer if the tender proposal document contains the information required by section 170(1)(e).

(5) In the undertaking, the tenderer must undertake to ensure—

(a) the individuals will be offered employment to continue to provide the service, and

(b) for an individual who accepts the offer of employment—

(i) the employment will be on at least the same terms as the individual's current employment, and

(ii) the employment will be taken to be a continuation of the individual's current employment with no loss of entitlements, and

(iii) the tenderer will pay the annual increase in the individual's base rate pay in accordance with—

(A) the applicable industrial instrument, or

(B) if there is no applicable instrument—the Local Government (State) Award.

(6) An individual, to which an undertaking relates, may take action to enforce the undertaking as if the undertaking were a contract between the tenderer and the individual.

(7) Subsection (6) does not prevent or limit the action the council may take to enforce the undertaking.

7. Regulation 177 then governs the consideration of tender submissions by councils. With amendments made by the Waste Tendering Regulation underlined, it relevantly provides:

(2) The council may only consider a tender submission—

(a) submitted to the council before the deadline specified in the invitation to tender, and

(b) submitted in the way specified in the tender proposal document, and

(c) that otherwise complies with this part.

8. Finally, reg 178 governs the acceptance of tender submissions by councils. With amendments made by the Waste Tendering Regulation underlined, it relevantly provides:

(1) After considering the tender submissions for a proposed contract, the council must either—

(a) accept the tender submission that, having regard to all the circumstances, appears to it to be the most advantageous, or

(b) decline to accept any of the tender submissions.

(1A) A council must not accept a tender submission for a proposed contract if the tender submission is accompanied by an undertaking referred to in section 173, unless—

(a) the council has consulted with each relevant registered organisation, and

(b) each registered organisation is satisfied that appropriate industrial arrangements will be in place to ensure compliance with the undertaking during the life of the contract.

(2) A council must ensure that every contract it enters into as a result of a tender submission accepted by the council is with the successful tenderer and in accordance with the tender (modified by any variation under section 176)…

9. A "registered organisation" is defined by reg 178(4), following the amendments, to mean:

(a) an organisation within the meaning of the *Fair Work (Registered Organisations) Act 2009* of the Commonwealth, or

(b) an industrial organisation of employees within the meaning of the *Industrial Relations Act 1996*.

10. Taken together, the effect of the amendments made by the Waste Tendering Regulation are, subject to the ambiguities and difficulties I advert to in Part C below, as follows:

(a) Unlike in respect of any other kind of goods or service, to make bespoke provision for the acquisition of "domestic or other waste management services" by councils. The definition of this key concept is broad, mindful that it is not restricted to a broad class of services relating to "domestic waste", but includes a broad class of services relating to "other waste" — each of which are themselves undefined.

(b) To require councils, when seeking tenders for such services to give unspecified "details" of all individual employees (apparently, albeit not expressly, whether of the council or an existing tenderer) who currently

provide "the service" and the terms of which those individuals are employed (reg 170(1)(e)). Identifying information is to be removed or information aggregated to preserve the privacy of employees (reg 170(2)). Information need not be included by a council if the council cannot reasonably obtain access to the information — eg, if the current employees are of a third party (rather than council employees) who refuses to provide them.

(c) To require any tender submission for "domestic or other waste management services" to be accompanied by an "undertaking" to the effect that the tenderer will offer the existing employees (whether of council or the existing tenderer) continuing employment "on at least the same terms" and with entitlements continued, and annual pay increases in accordance with previously applicable industrial instruments or awards (reg 173(4), (5)). Individual employees may enforce this undertaking "as if it were a contract between the tenderer and the individual" (reg 173(6)).

(d) A council may only consider a tender submission if it "otherwise complies with this Part" (reg 177) — viz, Part 7 of the Regulation, which includes reg 173. Accordingly, the apparent intent is that a council can only "consider" a tender submission if an undertaking compliant with reg 173 has been provided by the tenderer.

(e) Finally, a council cannot accept a tender submission accompanied by the undertaking referred to in reg 173 unless it has consulted with every "relevant" Commonwealth or NSW registered organisation and every such registered organisation "is satisfied that appropriate industrial arrangements will be in place to ensure compliance with the undertaking during the life of the contract" (reg 178(1A)). In other words, every "relevant" registered organisation must be satisfied that existing employees (whether of council or the existing tenderer) will have, for the life of the new contract, continuing employment "on at least the same terms" and with

entitlements continued, and annual pay increases in accordance with previously applicable industrial instruments or awards. A "relevant registered organisation" includes not only relevant unions of employees but also relevant unions of employers (employer organisations), which would potentially include registered organisations such as Local Government NSW and/or the Waste Contractors and Recyclers Association.

C. Ambiguous, unworkable operation of the Waste Tendering Regulation

11. In my view, the amended Regulations are ambiguous, unworkable and apt to produce adverse consequences for councils, tenderers, employees, ratepayers, and the general public — including through a lessening of competition in the market for "domestic and other waste management services".

C.1 "Domestic and other waste management services"

12. The definition of "domestic and other waste management services" upon which the amended regulations hinge is broad, encompassing a wide range of services, including in connection with "other waste services" (eg, collection of waste from parks and gardens and *ad hoc* community events, public toilet cleaning, etc).

13. Prior to the Waste Tendering Regulation amendments, reg 170(1)(e) had required, in respect of tender proposals in respect of proposed contracts for "domestic and other waste management services" "of the same kind as those performed under a contract in force immediately before the tenders are invited" the specification of "the information which must be submitted about the continuity of employment of workers employed or engaged by the contractor under the existing contract to perform the domestic or other waste management services (the existing workers)", which information was required to include the matters referred to in reg 170(1A) about whether and on what terms existing employees would be offered employment or engagement with the contractor.

14. The same definition of "domestic or other waste management services" as presently appears in reg 164 then appeared in reg 170(4).

15. In picking up the older reg 164 definition divorced from its original context, the amended Regulations have substantially widened its scope. Whereas previously, understood in the context of reg 170(1)(e) the concept was confined only to domestic or waste management services "of the same kind as those performed under a contract in force immediately before the tenders are invited" (so as to exclude eg, services previously provided in connection with a past *ad hoc* community event), it now may extend to "domestic and waste management services" of any kind, whether pursuant to a contract in force immediately before the tender or otherwise.

16. Further, the definition appears unsuited to its new and far more significant and substantive role within the scheme of the amended Regulations. It is apt to capture, for example, services provided to councils by the operators of waste processing and treatment plants. I am instructed that such plants simultaneously provide services to many councils, as well as to other government and commercial clients. "Employees" of such plants accordingly provide services to many clients simultaneously — rather than only to a single council.

17. It is most unclear how the substantive amended Regulations are intended to operate with respect these simultaneous service providers and "employees", having apparently been framed on the incorrect assumption that service providers and "employees" provide the services exclusively to a single council. Their application to such simultaneous service providers would appear to undermine the provision of services to other clients (including other councils and government clients) by requiring tenderers to offer their competitors' "employees" employment. As much is particularly so by reason of the ambiguity of the concept of "employees", adverted to in Part C.2 below.

C.2 "Employees"

18. The amended Regulations do not delineate the "employees" who provide "domestic and other waste management services" for the purposes of regs 170(1)(e) and 173(4)-(5).

19. The concept is accordingly apt to capture not only, eg, drivers of waste collection vehicles, but also many other employees of an existing provider of "domestic and other waste management services" — including, for example, administrative employees. As much reflects the plain and ordinary meaning of the term "employee", coupled with the broad and ambiguous scope of the concept of "domestic and other waste management services" (see Part C.1 above).

20. The amended Regulations are thus liable to require that a council include under reg 170(1)(e) information regarding, and a tenderer offer the reg 173(4)-(5) undertaking in respect of, many or perhaps all employees of an existing contractor (or the council itself).

21. Further, and relatedly to the problems adverted to in Part C.1 above, the concept of "employee" is also apt to capture employees who provide "domestic and other waste management services" to multiple councils and/or other government or commercial clients. As explained in Part C.1, the provision of the reg 173(4)-(5) undertaking may thus undermine the provision of services to other clients.

C.3 Regulation 170(1)(e) requirement to include "details" of "employees" in tender proposals

22. The obligation imposed on councils by reg 170(1)(e) of the amended Regulations to include "details" of "employees" who provide "domestic and other waste management services" and the "terms on which the individuals are employed" in tender proposal documents is apt to produce adverse consequences.

23. No obligation is imposed by reg 170 on an incumbent contractor to provide the information the subject of reg 170(1)(e) to a council (whether in full or in de-identified form). To the contrary, reg 170(3) acknowledges that as much may not occur.

24. It is likely that incumbent contractors will not voluntarily provide a council with information sufficient to compile the reg 170(1)(e) information about its employees. It is a trite observation that an incumbent will have no interest in

helping to enable its competitors to offer its employees employment. As much might also be inconsistent with obligations of confidence owed by the incumbent to its employees, or with its obligations (if an "APP Entity") under the *Privacy Act 1988* (Cth) — mindful the disclosure would be for a "secondary purpose" within the meaning of Australian Privacy Principle 6 and, absent any requirement to provide the information, disclosure could not be said to be required by law.

25. However, regardless of the fact that the reg 170(1)(e) information may not have been provided by the incumbent, a tenderer appears to be required to offer the reg 173(4)-(5) undertaking to provide the incumbent's employees with employment. Tenderers would understandably be unwilling to give such a *carte blanche* undertaking without adequate knowledge of the liability being assumed, advantaging the incumbent and reducing competition.

C.4 Regulation 173(4)-(5) undertaking

26. The broad and unworkable scope of the providers of "domestic and other waste management services" and "employees" who would be subject to a tenderer's reg 173(4)-(5) undertaking has been addressed in Parts C.1 and C.2 above.

27. However, beyond this, the undertaking required by reg 173(4)-(5) is itself ambiguous, unworkable and apt to produce adverse consequences.

28. *First*, by requiring that a tenderer offer "continuing" employment to the incumbent contractor's employees, reg 173(5)(a) causes a tenderer to commit the tort of inducing breach of contract. No immunity against such liability is expressly offered by the amendments to tenderers.

29. *Second*, by deeming any employment to be a "continuation of the individual's current employment with no less of entitlements", reg 173(5)(b)(ii) would cause councils to in effect pay twice in respect of the same entitlements and place incumbents at a significant competitive advantage. If a council has arrangements with an existing contractor, amounts attributable to the costs of the incumbent's provision of accrued but unused entitlements to its employees will have been paid

by the council through the fees charged for past services. If council were to shift contractors, the new contractor would be obliged to provide those accrued entitlements to the transferring employees. Mindful that there is no mechanism by which the monetary value of the accrued entitlements might be transferred from the prior contractor, the new contractor will simply increase the fees it charges a council to cover this new liability. This would mean that a council would pay twice in respect of the same entitlements if it switched contractors. In turn, this would place incumbent contractors at a significant competitive advantage. A council would be under significant commercial pressure to retain an incumbent contractor because it would be more expensive for it to switch to a new contractor who may be more efficient. Ultimately, this puts the council at risk of increased service costs which in turn would be paid by ratepayers.

30. *Third* and relatedly, it is unclear how reg 173(5)(b)(ii) is intended to interact with the requirements of enterprise agreements, awards or employment contracts which may stipulate that an employee be paid out in respect of accrued entitlements upon the cessation of employment. It is hard to see how an undertaking given by the new tenderer that "employment will be taken to be a continuation of the individual's current employment" could override any such obligations imposed on the incumbent.

31. *Fourth*, reg 173(4)-(5) would require a tenderer to offer "continuing employment" to an incumbent's employees even when the tenderer has sufficient staff to provide the proposed services. Given that it is likely that a tenderer would not be willing or able economically to employ staff who have no work to perform, this would serve to 'lock in' the incumbent provider (or require a tenderer to lay off its existing staff) to fulfil the obligation imposed by this regulation. Again this would place incumbents at a substantial competitive advantage in any tender process.

32. *Fifth*, the reg 173(5)(b)(i) requirement that the continuing employment offered by a tenderer be "on at least the same terms as the individual's current

employment" is apt to limit the ability of councils and waste management service providers to innovate in order to improve services, decrease costs and/or respond to changing social or technological circumstances. For example, a contractor would be unable to alter transferring employees' working hours, places of work or methods of work. This would also introduce a dichotomy within a contractor's existing workforce and transferring employees, potentially disadvantaging existing employees. A flow on consequence would again be to place incumbents at a substantial competitive advantage, mindful that they would not be so limited.

C.5 Regulation 177(2)(c) no "consideration" requirement

33. Regulation 177(2)(c) is unworkable. Prior to the Waste Tendering Regulation, reg 177 was focused exclusively on procedural requirements applicable to consideration by a council of a tender submission — namely the time within which a tender submission must be made and the form in which it must be submitted.

34. Reg 177 has now, by reg 177(2)(c), been expanded into a catch all provision which purports to prevent a council from considering a tender submission which does not comply with all requirements of Pt 7 — including the substantive requirements of reg 173 with respect to the provision of the "undertaking".

35. It is logical and workable to prevent consideration of submissions made out of time or in an incorrect format.

36. However, to prevent consideration of submissions on the basis that the reg 173 "undertaking" is substantively deficient (or the submission does not comply with any other substantive requirements of Pt 7) is unworkable; it is logically necessary to consider a submission in order to form a view as to whether the "undertaking" is compliant with the substantive requirements of reg 173 (or the submission with other substantive requirements of Pt 7).

C.6 Regulation 178(1A) union veto power

37. The provision by reg 178(1A) of the amended Regulations of a veto power to each "relevant" union in respect of proposed contracts is ambiguous and unworkable. This broad power gives each "relevant" union ultimate power to determine whether a council can accept a tender submission regardless of whether it is in the best interests of the Council, ratepayers and residents to do so.

38. *First*, it is ambiguous which unions would be "relevant" to a tender and so conferred with the reg 178(1A) power. The "relevant" unions would vary from tender to tender; multiple unions may be "relevant" — or claim to be relevant — to a single tender.

39. *Second* and connectedly, if a council accepted a tender after one or more unions were "satisfied" in accordance with reg 178(1A), a further union might come forward and claim to be "relevant". Were this to occur, reg 178(1A) might well make the entered contract unlawful.

40. *Third*, no criteria are prescribed by reg 178(1A)(a) by which the sufficiency of a council's "consultation" with "relevant" unions is to be determined.

41. *Fourth*, no time limits are prescribed within which "relevant" unions must determine whether they are satisfied. This, coupled with the multivariate consultation process required with all "relevant" unions, may protract tendering processes, and limit councils' ability to procure services.

42. *Fifth*, the requirement imposed by reg 178(1A)(b) that "relevant" unions be "satisfied" that "appropriate industrial arrangements will be in place to ensure compliance with the undertaking for the life the contract" is ambiguous and apt to produce adverse effects:

    (a) The "satisfaction" requirement is subjective. In other words, a council is prohibited from entering into a contract if any "relevant" union is not

subjectively satisfied even if, objectively, "appropriate industrial arrangements" are in fact in place: see *Buck v Bavone* (1976) 135 CLR 110 at 118-119; *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360.

(b) No criteria are prescribed which limit the matters to which unions can or must have regard to in forming the state of subjective "satisfaction".

(c) The broad and ambiguous concept of "appropriate industrial arrangements" together with the absoluteness of "ensuring" such arrangements are in place and the difficulties associated with the meaning and effect of the undertaking (see Part C.3 above) make the extent of that which a union might expect of a council and tenderer most unclear.

(d) A council and tenderer may be unable to proceed with a contract in the face of even unreasonable opposition of a union. Unlike a decision of a governmental decision maker, a decision of a union to oppose a contract may not be subject to judicial review.

43. *Sixth* and relatedly, no dispute resolution mechanism is prescribed by reg 178(1A) to resolve impasses between a council, a tenderer and one or more unions. Neither the Fair Work Commission nor the Industrial Relations Commission has the power to override the requirements of reg 178(1A) under the *Fair Work Act 2009* (Cth) or the *Industrial Relations Act 1996* (NSW), or determine whether a union has unreasonably failed to be satisfied of the proposed arrangements.

44. Each of these matters would ultimately provide the incumbent provider with a competitive advantage, increasing the barriers to provision of services at a more competitive or efficient level by a new tenderer.

C.7 Conclusion

45. Taken together, the amended Regulations appear to:

(a) be internally inconsistent and poorly drafted;

(b) undermine relationships between incumbents and their employees;

(c) affect a far broader range of services and service providers than may have been intended;

(d) be unworkable in their application to service providers and employees who provide services to multiple clients;

(e) substantially advantage incumbents and reduce competition in the market for waste services, with flow on adverse cost and service quality consequences for councils, their ratepayers and the broader community; and

(f) provide unions with a broad and unreviewable veto power in respect of waste management arrangements, preventing or protecting tender processes with flow on adverse competition, cost and service quality consequences.

D. Conflict between the Waste Tendering Regulation and s 45 of the *Competition and Consumer Act 2010* (Cth)

46. Section 109 of the Commonwealth *Constitution* provides that when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid.

47. Accordingly, to the extent to which the amended Regulations are inconsistent with any law of the Commonwealth, those amendments are invalid or inoperative (noting the State law which is ultimately inconsistent would be s 748 of the Local Government Act, which authorised their making: see *Flaherty v Girgis* (1987) 162 CLR 573 at 588).

48. The canonical example of the inconsistency which s 109 resolves in favour of a law of the Commonwealth is where State and Commonwealth laws create duties which are incapable of simultaneous obedience: see eg *Worth Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428 at [65].

49. Section 45 of CCA prohibits entry by "corporations" into a contract or arrangement, or arrival at an understanding, which includes a provision of which has the purpose or is likely to have the effect of substantially lessening competition.

50. Section 45 does not directly bind a council. Most clearly, this is because a council is not a "corporation" for the purposes of s 45: see s 4(1) of the CCA and s 220(2) of the Local Government Act.

51. Section 45 does, however, bind providers of "domestic and other waste management services" to the extent to which, as is almost invariably the case, they are corporations. Such private corporations do not enjoy any derivative Crown immunity against the application of s 45: see s 220(3) of the Local Government Act; cf *ACCC v NSW Ports Operations Hold Co Pty Ltd* (2023) 296 FCR 364 at [386]ff.

52. It follows that if compliance by corporate providers of "domestic and other waste management services" with the duties imposed on them by the Waste Tendering Regulation amendments would cause them to act contrary to the duty imposed on by s 45 of the CCA, the Waste Tendering Regulations are, by force of s 109 of the *Constitution*, invalid in their application to those incumbent and prospective providers.

53. In my view, it is distinctly arguable that the Waste Tendering Regulation amendments are inconsistent with s 45 of the CCA and therefore invalid in their application to corporate incumbent and prospective providers of "domestic and other waste management services". This is because, in short, it is distinctly arguable that:

(a) The provision by a corporate tenderer of the undertaking required by reg 173(4)-(5), enforceable as a contract by subject employees by force of reg 173(6), is a form of "contract, arrangement or understanding" as between the tenderer, council and employees.

(b) The terms of that "contract, arrangement or understanding" are to the effect of the matters specified in reg 173(5).

(c) Those terms would likely have the effect of substantially lessening competition in the market for "domestic and other waste management services" or a significant section of that market (eg, provision to councils): see generally *ACCC v NSW Ports Operations Hold Co Pty Ltd* [2021] FCA 720 at [894]-[925]. This is because the terms of the undertaking appear likely to have the various anti-competitive effects adverted to in Part C above, substantially advantage incumbent providers of "domestic and other waste management services". Expert economic analysis would be required in order to form a settled view on this point of substantive competition law.

54. While, if accepted, this argument would only directly invalidate reg 173(4)-(6) in their application to corporate tenderers, the balance of the Waste Tendering Regulation amendments seem to form part of a "package of interrelated provisions which appear intended to operate fully and completing according to its terms" or not at all" — reg 173(4)-(6) being so fundamental to the scheme of the [amendments] and thus so bound up with the remaining provisions that severance of the offending provisions would leave standing a residue of 'provisions which [could] never [have been] intended to [be] enact[ed]'" given their "radically different and essentially ineffective" status: see *Bell Group NV (In Liq) v Western Australia* (2016) 260 CLR 500 at [29], [69]-[71].

55. Accordingly, it is distinctly arguable that none of the Waste Tendering Regulation amendments have any application in respect of corporate tenderers or tenders. If so, the no consideration requirement imposed by reg 177(2)(c) and union veto power conferred by reg 178(1A) are also invalid in their application

to such tenderers and tenders — with the consequence that a council would be free to accept a tender by a corporate tenderer which was not accompanied by the undertaking, irrespective of the views of "relevant" unions.

56. Given that, as explained, s 45 of the CCA does not directly bind councils, corporate tenderers are best place to challenge the validity of the Waste Tendering Regulation amendments. This being said, it is also arguable that a council would have standing, as a council would have a special interest in the subject matter of such a challenge over and above that enjoyed by the public generally given their role in the tendering process and adverse impacts the reduction in competition has on them: see generally *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493.

57. A challenge might be commenced in the original jurisdiction of the High Court. To the extent that the State is unwilling to either demur or agree to a special case in which the purpose or likely effect of substantially lessening competition is accepted, that factual issue might be remitted to the Federal Court for hearing and determination pursuant to s 44(2) of the *Judiciary Act 1903* (Cth): see eg *Palmer v Western Australia* (2012) 272 CLR 505 at [15].

58. I so advise.

Arthur Moses SC
New Chambers

26 February 2024