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21 March 2001

Australian Competition & Consumer Commission
PO Box 1199
DICKSON ACT 2602



Attention Joanne Palisi

Dear Madam

**APPLICATION FOR AUTHORISATION
WESTERN SYDNEY WASTE BOARD**

We act for Western Sydney Waste Board. We have been instructed to make an application for authorisation pursuant to section 88(1) of the *Trade Practices Act* on our clients' behalf.

We **enclose** the application together with a cheque for \$7,500 in respect of the lodgement fee.

We will be happy to provide any further information requested, and our clients are also willing to attend a conference to brief the officer dealing with the application. We would appreciate some indication of how long the officer thinks the application will take to process.

Yours faithfully

A handwritten signature in black ink that reads 'Michael Bradley'.

Michael Bradley
for GADENS LAWYERS

Enc

FORM B

COMMONWEALTH OF AUSTRALIA

Trade Practices Act 1974 – subsection 88(1)

**AGREEMENTS AFFECTING COMPETITION:
APPLICATION FOR AUTHORISATION**

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 88(1) of the *Trade Practices Act 1974* for an authorisation under that subsection to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of that Act.

1. (a) **Name of applicant:**

Western Sydney Waste Planning and Management Board, a statutory authority established under the *Waste Minimisation and Management Act 1995* (NSW) (WMMA), of Suite 203, 30 Campbell Street, Blacktown NSW (WSWB).

(b) **Short description of business carried on by applicant:**

Management and co-ordination of waste planning and management within the Region for the WSWB as defined in the WMMA, including the council areas of nine local councils.

(c) **Address in Australia for service of documents on the applicant:**

Gadens Lawyers, Skygarden Building, 77 Castlereagh Street Sydney NSW 2000, attention Michael Bradley.

2. (a) **Brief description of contract, arrangement or understanding and, where already made, its date:**

Details are contained in Attachment A.

(b) **Names and addresses of other parties or proposed parties to contract, arrangement or understanding**

WSWB constituent councils

Bankstown City Council Civic Centre, The Mall Bankstown NSW 2200	Holroyd City Council 16 Memorial Avenue Merrylands NSW 2160
Baulkham Hills Shire Council 129 Showground Road Castle Hill NSW 2154	Liverpool City Council 1 Hoxton Park Road Liverpool NSW 2170
Blacktown City Council 62 Flushcombe Road Blacktown NSW 2148	Parramatta City Council Darcy Street Parramatta NSW 2150
Fairfield City Council Avoca Road Wakeley NSW 2217	Penrith City Council 601 High Street Penrith NSW 2750
Hawkesbury City Council George Street Windsor NSW 2756	

3. **Names and addresses of parties and other persons on whose behalf application is made:**

Not applicable.

4. (a) **Grounds for grant of authorisation:**

See Attachment A.

(b) **Facts and contentions relied upon in support of those grounds:**

See Attachment A.

5. **This application for authorisation may be expressed to be made also in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the above-mentioned contract, arrangement or understanding.**

(a) **Is this application to be so expressed?**

Yes.

(b) **If so, the following information is to be furnished:**

(i) **the names of the parties to each other contract, arrangement or understanding:**

Not applicable.

(ii) **the names of the parties to each other proposed contract, arrangement or understanding which names are known at the date of this application:**

As per the proposed arrangement the subject of this application.

6. (a) **Does this application deal with a matter relating to a joint venture (see section 4J of the *Trade Practices Act 1974*)?**

No.

(b) **If so, are any other applications being made simultaneously with this application in relation to that joint venture?**

Not applicable.

(c) **If so, by whom or on whose behalf are those other applications being made?**


Not applicable.

7. **Name and address of person authorised by the applicant to provide additional information in relation to this application:**

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Skygarden Building, 77 Castlereagh Street Sydney 2000
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Dated 21/3/01

Signed on behalf of the applicant



ATTACHMENT A

TO APPLICATION FOR AUTHORISATION BY WESTERN SYDNEY WASTE PLANNING AND MANAGEMENT BOARD UNDER SECTION 88(1) OF THE TRADE PRACTICES ACT 1974

1. BACKGROUND TO APPLICATION

The Western Sydney Waste Planning and Management Board (**WSWB**) is a statutory authority established under the *Waste Minimisation and Management Act 1995* (NSW) (**WMMA**). It is one of eight regional Waste Boards established under the WMMA, covering the entire Sydney metropolitan area. There is in addition a ninth Waste Board covering the South-Eastern region of New South Wales, based in Queanbeyan.

The WSWB's region covers an area of 4,404 square kilometres and comprises the local government areas of nine councils, being those of Bankstown, Baulkham Hills, Blacktown, Fairfield, Hawkesbury, Holroyd, Liverpool, Parramatta and Penrith. The region incorporates a population in excess of 1.4 million residents.

The objectives of the WSWB are set out in section 17 of the WMMA and are as follows:

- (a) to co-ordinate the waste services provided in and for the Waste Board's waste management region (whether by carrying out such services, arranging for them to be carried out or otherwise co-ordinating their provision for the region);
- (b) to ensure that the constituent councils adopt efficient waste management practices and policies; and
- (c) to operate in accordance with the principles of ecologically sustainable development contained in section 6(2) of the *Protection of the Environment Administration Act 1991*.

The functions of the WSWB are set out in section 18 of the WMMA and include the following:

- (a) to establish management and charging policies for the waste services provided by the constituent councils;
- (b) to carry out, or enter into arrangements for carrying out, waste services and recycling services in respect of the waste generated in its waste management region;
- (c) to enter into arrangements for the recycling of waste;
- (d) to develop handling, sorting and waste management principles for waste generators in its waste management region;
- (e) to charge fees for any of the services provided by the Waste Board;
- (f) to enter into arrangements with any person for the performance of services, or for the supply of goods, plant, machinery or material, with respect to the exercise by the Waste Board of its functions.

Under section 19 of the WMMA, the Waste Boards are required to prepare and implement a regional waste plan, which includes proposed strategies and targets for managing and reducing waste in the region. The WSWB has prepared its regional waste plan, which was approved by the Minister in July 1998 and deals with the planning and management of non-hazardous, solid waste issues. Under section 21(2), the constituent councils are obliged to comply with the plan.

As part of the regional waste plan, the WSWB has planned to establish a network of five Pre-treatment Facilities in the region as a key step in the conversion of domestic waste into resource streams. Currently the WSWB region disposes of over 400,000 tonnes of municipal solid waste to landfill per annum. The Pre-treatment Facilities are designed to address this issue by presenting waste as a reusable resource rather than as a waste for disposal, currently to landfill.

The first facility is planned for the South Windsor Landfill and will have the capacity to process 50,000 tonnes of municipal waste per annum.

This application is expressed to include all five proposed pre-treatment facilities, as it is proposed that they will operate contractually in the same manner, and they will raise identical issues as are canvassed by this application.

2. THE WASTE "MARKET"

For definitional purposes, the waste stream in Sydney is generally divided into three categories, being municipal, commercial and industrial, and construction and demolition. The proposal the subject of this application relates exclusively to municipal waste.

Municipal waste consists of domestic waste (household garbage bins), domestic recycled, other domestic (special clean up or pick up services from households) and other council waste (eg from parks and gardens). The collection and disposal of all of this waste is the responsibility of the local council.

Almost all of the domestic waste (88% in 1996) is disposed of to landfill. It contains large volumes of potentially recyclable or compostable materials. Approximately two thirds of it is organic (and therefore compostable), the remainder being high calorific (plastic, timber, textiles) and inert materials.

According to the latest available statistics, municipal waste represents approximately 25% of the total waste produced in the WSWB region, or 11% of the total waste produced in the Greater Sydney region (which includes all of the Waste Board regions).

The population of the WSWB region represents 37% of the Greater Sydney Region population and produces 33% of the total municipal waste for Greater Sydney.

(source for statistics: waste data, EPA; population data, ABS)

3. THE PRE-TREATMENT STRATEGY

The WSWB has developed a plan in accordance with its regional waste plan for the pre-treatment of all municipal solid waste which is currently disposed of to landfill. The pre-treatment stage is not intended to achieve the sole purpose of reducing the volume of waste before it is put into landfill. Rather, it is the first stage of a wider strategy to achieve the full utilisation of the waste for resources re-use. The following table illustrates the overall strategy. The clear intent is to convert the waste, so far as it can be, into a range of reusable resources.

The WSWB plans to establish five pre-treatment facilities, all located within its region. The following table indicates the proposed capacities, locations and timing.

Facility	Capacity	Location	Anticipated tender timing	Anticipated operation commencement
Facility 1	50,000 tonnes	Windsor	Tender issued	End of 2002
Facility 2	100,000 tonnes	Moorebank area	Sept 2001	End of 2003
Facility 3	150,000 tonnes	Prospect area	Sept 2002	End of 2004
Facility 4	50,000 tonnes	Lower Baulkham Hills	Sept 2003	End of 2005
Facility 5	100,000 tonnes	Penrith/St Marys	Sept 2003	End of 2006
Total	450,000 tonnes			

The term pre-treatment refers to the initial receipt and primary separation of secondary resources from municipal waste. It is a low technology process and it is tailored to accept heterogeneous materials of indeterminate constituent quality (mixed wastes) and perform an initial separation of the wastes into certain basic and homogeneous secondary resource streams.

The pre-treatment process will accept all municipal waste. During the process the waste will be pulverised within a rotating drum process over a period of up to 20 hours. All the organic material will break down to particles smaller than 40mm in diameter with the harder plastics and larger organic material remaining. This will create two main resource streams:

- an organic stream that typically contains vegetable and animal matter, paper, cardboard. It is moist and highly putrescible, and readily decomposed under natural conditions.
- a high calorific stream that typically contains plastic, waxy paper and cardboard, timber and textiles. It is relatively dry and non-putrescible, and will not readily decompose.

Each of the two streams is likely to contain inert mineralised materials and ferrous and non-ferrous metals that are capable of being removed to produce a third and fourth stream.

4. SECONDARY RESOURCE USE

The WSWB aims by its strategy to facilitate diversity in the secondary resource market which currently does not exist. The current lack of a viable market arises because operators will not commit to the large capital expenditure required in the absence of a secured source of pre-treated materials. The WSWB's strategy will address this by providing guaranteed access to this material.

The resource streams produced by pre-treatment are capable of further processing by secondary resource users to use directly or as part of more refined products.

Examples of secondary resource streams are:

- Organic stream
 - fuel (energy recovery) (co-firing and methane gas from anaerobic digestion)
 - industrial chemicals (ethanol, acetic acid and charcoal)
 - soil additives (compost, vermiculture, sub-soil remediation, digestate from anaerobic digestion)
- High calorific stream
 - mixed plastic reuse
 - fuel (supplementary alternative fuels)
 - industrial chemicals (monomer recovery)
 - fibre recovery

These uses have been confirmed in the Alternative Waste Management Technologies & Practices Inquiry report, commissioned by the Minister for the Environment (May 2000).

5. THE PROPOSED CONTRACT, ARRANGEMENT OR UNDERSTANDING

The process so far undertaken by the WSWB is as follows. In mid 1998 it undertook a worldwide pre-qualification process for pre-treatment technologies. This determined that eight pre-treatment technologies satisfied the requirements of the pre-qualification process.

In July 1999 the WSWB called for proposals from technology providers and operators to accept, process and market or utilise the pre-treatment output streams as a secondary resource. This process produced proposals from 16 companies in six re-use categories, being plastics reuse, power, compost, vermiculture and charcoal production.

In October 2000 the WSWB issued tender documentation for the first pre-treatment facility at South Windsor. The WSWB proposes to enter into a contract with an operator with

respect to the pre-treatment facility, which will be known as the Build Own Operate (BOO) Contract.

In all stages of implementation the WSWB will tender for the delivery of contracts to obtain best value for money for its constituent councils.

Pursuant to the BOO Contract, the contractor will provide all of the expertise to design, build, own, maintain and ultimately decommission the facility.

The BOO Contract has four stages:

- Stage 1 – including the preparation of design of the works, development approval and all other approvals and licences (no more than 12 months);
- Stage 2 – including the design development, documentation preparation and construction and commissioning of the works (no more than 12 months);
- Stage 3 – to operate and maintain the pre-treatment facility for a 15 + 5 year contract period;
- Stage 4 – including the decommissioning and removal of the pre-treatment facility at the end of the contract period.

The BOO contract will include the following features.

- (a) The parties to the BOO contract will be the WSWB and the contractor. The WSWB will contract separately with each constituent council pursuant to which the council will pay the WSWB a specified rate per tonne of waste delivered to the facility and pre-treated. In addition, the operator will take a lease of the land on which the facility is located from Hawkesbury Council, and the WSWB will enter into a separate contract with Hawkesbury Council to deal with the operational issues arising from the fact that the facility will be located adjacent to Hawkesbury's landfill.
- (b) In addition to the pre-treatment facility, the contractor is to construct a gatehouse, weighbridge, visitor facility, drop-off centre for residents of the local council area, public signage and any external road junction improvements.
- (c) The facility will process municipal waste only, with a target capacity of 50,000 tonnes per annum.
- (d) The WSWB will not guarantee any minimum tonnage to be supplied to the facility.
- (e) The contractor has the opportunity to source "Other Waste" in the pre-treatment facility (under the BOO contract, Other Waste has the same meaning as Municipal Solid Waste except that it is not delivered to the pre-treatment facility by WSWB or its authorised contractors).
- (f) The contractor will be paid a fee per tonne by the WSWB for waste which is processed to the standard specified in the contract. The rate per tonne will reduce with increases in total tonnage.

- (g) Any processed waste which does not meet the specified standard will be rejected and the cost of disposal or reprocessing this waste will be borne by the contractor.
- (h) The contractor is responsible for removing unprocessable items from the received waste.
- (i) The contractor is allowed to pre-treat waste from sources other than the WSWB's constituent councils, but subject to the terms specified in the BOO contract.
- (j) The WSWB has the right to terminate the contract for convenience during Stage 1 but not subsequently.
- (k) The contract specifies a testing and sampling process.
- (l) The contract is for a term of 15 years with a once only extension of 5 years exercisable at the sole discretion of the WSWB.
- (m) The waste is owned by the relevant council before it arrives at the facility. Upon unloading, ownership will transfer to the contractor. After pre-treatment, any waste which meets the pre-treatment standard will become the property of the WSWB to direct to secondary resource re-use.

The aspect of the proposed arrangements which raises a potential concern with respect to Part IV of the *Trade Practices Act* (and in our submission the only aspect) is that it is proposed that the WSWB and each constituent council will agree that the council will commit to supply a certain gross tonnage of municipal waste to the pre-treatment facility.

6. EFFECT ON COMPETITION

The applicants have received advice that there is some potential that the arrangements set out above may cause the Waste Boards and/or the councils to infringe section 45(2)(a)(ii) of the *Trade Practices Act*. It is submitted that no question arises of the arrangements having the purpose of substantially lessening competition, and that the only question for consideration is whether they would have the likely effect of substantially lessening competition.

It is submitted that the relevant market for the assessment of any effect on competition is the market for the receipt, treatment and disposal or re-use of untreated municipal waste collected by councils within the Sydney metropolitan region.

It is arguable in our submission that the relevant market is in fact wider than this, and includes commercial and industrial waste as well. However, it appears that the latter form of waste is generally collected and dealt with by councils separately from municipal waste, so for the purposes of this submission it is proposed to restrict the definition to municipal waste.

As for the geographical extent of the market, it is submitted that this most likely covers the regions of all of the eight Waste Boards, that is the entire Sydney metropolitan region. There is no basis for proposing that a market of smaller geographical extent is appropriate.

Although in some regions the vast majority of waste is disposed of within that region, there is also considerable transportation of waste between regions.

If the above market definition is correct, then it is not likely that the proposed conduct will have any significant negative effect on competition in that market. Should the Commission think otherwise, the succeeding sections address the public benefits which it is submitted will outweigh any anti-competitive effect.

With respect to the effect on competition, it is noted that the waste to be covered by the arrangement represents only 25% of the total waste stream in the WSWB region and 11% of the total waste stream within the Sydney metropolitan area.

The proposed arrangement can, according to the WSWB, only effectively proceed if the WSWB is able to obtain from its constituent councils a guarantee that they will supply certain minimum quantities of waste to the pre-treatment facility. The guarantee will be contained in a co-operation agreement between the WSWB and councils specifying the tonnages required to be supplied. These tonnages will be 20,000 tonnes from Hawkesbury Council and 15,000 tonnes each from Penrith and Blacktown Councils. Absent that guarantee, the proposed operator of the facility will have no security of supply of waste and will be unwilling to commit capital to the necessary infrastructure for the facility. The guarantee is also necessary to ensure that the WSWB will have access to a secured volume of pre-treated waste emanating from the facility, so that it can commit to arrangements with secondary resource providers, who will also need to make extensive capital infrastructure commitments in order to be able to process the pre-treated waste.

It is also submitted that the proposed arrangement will in one respect at least have a pro competitive effect, in that it will stimulate the development of a market for acquisition and re-use of secondary resources produced by the pre-treatment facility. The WSWB's intervention to bring about the implementation of a pre-treatment process is essential in this development.

Absent the WSWB's intervention, it is likely that the constituent councils will have no cost effective alternative but to continue sending almost all municipal waste they collect to landfill. They individually lack the resources to cause the infrastructure to be acquired or built for any other method of dealing with the waste stream. In part, this is why the WMMA was enacted and the Waste Boards established.

7. EXCLUSIONARY PROVISION

The applicants have received advice that there is a possibility that the proposed arrangement might be viewed as containing an exclusionary provision as per section 45(2)(a)(i) of the *Trade Practices Act*. While this possibility is considered remote, it was thought prudent to canvass the issue as part of this application.

It may be arguable that the WSWB's constituent councils are competitive with each other with respect to the supply of untreated domestic waste. This waste has the potential, currently unrealised, to provide a stream of secondary resources for re-use and/or recycling. While the councils themselves do not stand to ever earn a profit from the sale of this waste, the waste itself does have a value, as is evidenced by this proposal itself.

Therefore, it is arguable that, absent the aspect of this arrangement whereby the councils are committed to supply minimum quantities of waste to the pre-treatment facility, they would be competitive with each other with respect to the supply of that same waste. The potential acquirers include the pre-treatment facility and existing landfill operators.

It might further be arguable that a purpose of the arrangement is to restrict the ability of the councils to supply waste to whoever and wherever they want. Clearly, this is not the primary purpose of the arrangement, that purpose being one of public benefit and fulfilment of the WSWB's statutory objectives and functions. We would submit that any proscribed purpose which might exist does not constitute a substantial purpose of the arrangement and therefore an exclusionary provision does not come into existence for the purposes of the Act.

8. PUBLIC BENEFITS

The proposed conduct will bring about numerous benefits to the general public.

- 8.1 As noted earlier, at present almost all of the domestic waste produced in the WSWB region is disposed of to landfill. It is an obvious and accepted principle that landfill is an inefficient and environmentally detrimental mode of disposal of waste. One of the primary reasons for the creation of the Waste Boards was the recognised need to reduce the reliance on landfill for disposal of waste and move to more sustainable methods.
- 8.2 Apart from the simple fact that there is an absolute limit to the availability of landfill space, which will become exhausted within a measurable time from now, the majority of domestic waste can form the basis of a reusable resource, which is currently being wasted. This aspect has been canvassed earlier in this application.
- 8.3 The proposed arrangement is designed to attract infrastructure into the region to enhance service levels economically and environmentally. The region is of sufficient size and population to attract investment in infrastructure.
- 8.4 It is important to view the proposal in its proper context, and not as an isolated venture. The pre-treatment facility will be the first step in a co-ordinated strategy devised by the WSWB to bring about more efficient use and disposal of the waste stream within its region. The WSWB has extensively researched the potential for secondary use of the municipal waste stream, and is confident that there exists a substantial potential market for the pre-treated waste which the facility will produce. The public will enjoy significant benefits from the enhancement of the secondary resource industry, including lower waste disposal costs in the long run, cheaper products from secondary raw materials and preservation of virgin resources.
- 8.5 The benefits to the public in environmental terms are seen as follows:
 - (a) reduced air and noise pollution through collection vehicles travelling significantly shorter distances – it has been estimated that the locations of the proposed five pre-treatment facilities will realise travel savings for council garbage vehicles in the region from current landfills with a halving of travelling distances from 2.4 million km per annum to 1.2 million km;

- (b) reduced reliance on and optimised use of landfill resources;
 - (c) organisation of service logistics across the region through a reduction in numbers of collection vehicles and increased servicing capability;
 - (d) virgin resources will be conserved by the higher recovery and reuse of recyclables.
- 8.6 WSWB has conducted a detailed economic and financial analysis of the pre-treatment facility proposal by comparison with the alternative methods of disposing of the same waste stream. The detail of this analysis is available, but in summary the WSWB has concluded that from a financial and economic viewpoint, the pre-treatment facility proposal is marginally more attractive than the alternatives (existing landfill, long haul landfill and new regional landfill). We note also that landfill costs have in fact risen since the analysis was undertaken, making the pre-treatment facility proposal somewhat more attractive.
- 8.7 The combination of the councils in contracting jointly will enable the councils to negotiate a better deal in financial and service terms than they would be able to achieve individually. It should be noted that the councils have elected to participate in this arrangement voluntarily.
- 8.8 The proposed arrangement is in accordance with the regional waste plan developed by the WSWB in pursuance of its objectives and functions set out in the WMMA, and approved by the Minister. In pursuing this arrangement, the WSWB is fulfilling its purpose of co-ordinating and managing waste within its regions and promoting efficient and environmentally sound waste practices.
- 8.9 While waste collection, processing and disposal is a substantial industry with very large turnover, and therefore warrants being subject like any other industry to the overview of the *Trade Practices Act*, there is an overriding public interest in the most effective management of waste, because of the enormous and growing problems of waste production and disposal faced by every society. Therefore, any conduct which will lead to more effective handling of waste is of substantial benefit to the public, beyond just economic considerations.

9. CONCLUSION

In the above circumstances, it is submitted that the significant and numerous public benefits which will flow from the proposed conduct will outweigh any detriment caused by a lessening of competition, if such lessening of competition is found to be likely to occur.

Further, it is submitted that, should the Commission conclude that the proposed arrangement contains an exclusionary provision, the same public benefits are such that the arrangement should be allowed to be made notwithstanding that conclusion.

The WSWB intends to pursue its strategy, commencing with the establishment of the five pre-treatment facilities, in accordance with the timetable outlined above, subject to the outcome of this application.