



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

Inner Sydney Waste Management Group of Councils

in respect of

its proposal to jointly tender and contract for services to transfer, process and dispose of food and garden organic waste and to market and sell any end products in the respective local government areas.

Date: 25 September 2008

Authorisation no.: A91096

Public Register no.: C2008/1172

Commissioners: Samuel
Kell
Schaper
Court
King
Willett

Summary

The ACCC proposes to grant authorisation to the six inner Sydney councils to jointly tender and contract for services to transfer, process and dispose of food and garden organic waste and market and sell any end products in the respective local government areas until 31 January 2020.

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 to determine whether a proposed arrangement results in a net public benefit.

The application for authorisation

The Inner Sydney Waste Management Group of Councils (ISWMG) proposes to jointly tender and contract for the services of a contractor or contractors deemed suitable to provide regional transfer, processing and disposal of food and garden organics, and the marketing and sale of any material or products derived from that transfer or processing in the respective local government areas.

Background

The ISWMG advises that its decision to lodge this application has been driven by a number of factors. These include a need to meet the New South Wales (NSW) State Government's Waste Avoidance and Resource Recovery targets by 2014, a desire to address the increasing costs of the Waste Levy and a shortage of land for landfill.

The arrangements are intended to divert waste from landfill, reduce council costs, reduce environmental harm and produce economic goods from waste.

Public detriment

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

Public benefit

The ACCC is satisfied that several of the Applicants' public benefit claims have substance. In particular, the ACCC concludes that the proposed arrangements are likely to produce efficiencies in relation to service delivery and administration, which will result in cost savings for the ISWMG and its ratepayers, and a reduction in environmental damage from waste production and management.

Balance of public benefit and detriment

Overall, the ACCC considers that, in all the circumstances, the likely public benefit generated by the proposed arrangements will outweigh the likely public detriment.

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 light of any changed circumstances.

In this instance, the ACCC considers that authorisation for a tender process of 12 months and a contract of 10 years is sufficient time to provide all potential bidders with a chance to compete for the contract.

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

ACCC	Australian Competition and Consumer Commission
AWT	alternative waste technology
DECC	Department of Environment and Climate Change NSW
ISWMG	Inner Sydney Waste Management Group of Councils
MBT	mechanical biological treatment
NSW	New South Wales
the Act	<i>the Trade Practices Act 1974</i>
WARR Strategy	Waste Avoidance and Resource Recovery Strategy
Waste Levy	The fee that waste facilities must pay for all waste received except waste that is recycled, re-used, recovered or processed.
WCRA NSW	Waste Contractors and Recyclers Association of New South Wales

1. Introduction

Authorisation

- 1.1 The Australian Competition and Consumer Commission (the 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 in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. 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 to either 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 commenting on the draft.
- 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 23 July 2008, the Inner Sydney Waste Management Group of Councils (ISWMG) lodged application for authorisation A91096 with the ACCC.
- 1.9 The ISWMG applied for authorisation of its proposal to jointly tender and contract for services to transfer, process and dispose of food and garden organics and to market and sell any end products to the respective local government areas.
- 1.10 The ISWMG seeks authorisation for a tender period of 12 months and an initial contract term of 10 years.

2. Background to the application

The Applicants

- 2.1 The ISWMG consists of six Local Councils as defined by the *Local Government Act 1993* (NSW), acting in accordance with section 8 of the Council's Charter. These councils are: Council of the Municipality of Ashfield; Auburn Council; Burwood Council; City of Canada Bay Council; Leichhardt Municipal Council; and Council of the Municipality of Strathfield (the Applicants).
- 2.2 The local government areas administered by the Applicants are located in inner Sydney, south-west of the central business district, and have a combined area of approximately 92 square kilometres. A map of the ISWMG local council boundaries is located at Appendix A.
- 2.3 One of the service functions of the Local Councils is the provision, management and/or operation of waste removal, transfer, processing and disposal. The six municipalities have a combined population of around 298 000 people. In financial year 2006-07, they collected approximately 40 000 tonnes of food and garden organic waste material.¹
- 2.4 The ISWMG is a voluntary association that was formed to develop cooperative solutions to the member councils' municipal waste and resource recovery management issues. Each of the member councils is a signatory to the Inner Sydney Councils Food and Garden Organics Processing Project, an agreement between the ISWMG councils to pursue a long-term strategy for the processing of co-collected municipal food and garden organics.
- 2.5 The ISWMG has designed arrangements to separate food and garden organic waste from the municipal waste stream and compost it to produce recycled organic goods and energy. These arrangements were devised in response to the following three key drivers.
- In 2003, the NSW State Government published its annual update of the Waste Avoidance and Resource Recovery Strategy (WARR Strategy), in which it issued targets for reducing municipal waste and increasing the recovery and use of secondary materials in the municipal waste stream. They include a target to increase recycling of municipal waste from a baseline of 26 per cent to 66 per cent by 2014.²
 - Under section 88 of the *Protection of the Environment Operations Act 1997*, waste facilities must pay a fee (the Waste Levy) for all waste received except waste that is recycled, re-used, recovered or processed. All food and garden organic waste that does not go to landfill is exempt from the Waste Levy.
 - There is also a shortage of landfill space in the Sydney metropolitan area and the ISWMG has encountered difficulty locating sites for new landfills. The

¹ ISWMG, Supporting submission for authorisation application, received 23 July 2008, page 3.

² Resource NSW, *Waste Avoidance and Resource Recovery Strategy 2003*, 2003, page 3.

ISWMG aims to divert waste from landfill and convert it to goods of economic value.

- 2.6 The purpose of the proposed collective tender and contract arrangements is to move towards meeting the WARR Strategy targets, address the Waste Levy and find a viable alternative to landfill.

The waste management services industry

Definition of food and garden organic waste

- 2.7 The application relates to food and garden organic waste. Food waste includes putrescible waste such as kitchen scraps. Garden organic waste consists of: putrescible garden organics (grass clippings); non-woody garden organics; woody garden organics; trees and limbs; and stumps and root balls. Both food and garden organic waste can be composted and the combustible gases produced via this process can be used to generate energy.³

Alternative Waste Technology

- 2.8 Alternative Waste Technology (AWT) offers a more sustainable waste management alternative to landfill. AWT facilities are designed to minimise environmental harm from waste management by recovering resources from the waste stream. AWT facilities may produce marketable goods, such as garden compost, and facilitate capture of greenhouse gases produced by decomposing organic matter. AWT may include mechanical separation methods, biological processes, thermal technologies and mechanical biological treatment (MBT).⁴
- 2.9 It is likely that the relevant type of AWT treatment in this case would be MBT. MBT combines the mechanical sorting of waste with a biological treatment. It may involve the following processes.
- Removing glass, plastic, paper, cardboard and metals for recycling
 - Producing compost
 - Capturing greenhouse gases
 - Using captured gases to generate electricity
- 2.10 WSN Environmental Solutions has suggested that up to 80 per cent of waste processed by MBT may be recoverable.⁵
- 2.11 Like the UR-3R AWT facility in Eastern Creek, a new facility may also be able to capture up to 100 per cent of biogas produced from waste processed in that facility.

³ ISWMG, Supporting submission for authorisation application, received 23 July 2008, page 5.

⁴ IbisWorld, Q9634 – *Waste Disposal Services in Australia - Industry Report: Segmentation*, 21 July 2008, page 3.

⁵ http://wasteservice.nsw.gov.au/dir138/wsn.nsf/Content/Education+and+Safety_Alternate+Waste+Technology, accessed 28 August 2008.

Existing waste management arrangements in the region

- 2.12 There are no existing organic waste disposal contracts to which any of the ISWMG councils are a party. Currently, all of the ISWMG councils deliver garden organics to WSN Environmental Services at Chullora, a facility located outside the region. The deliveries are on a gate fee basis.
- 2.13 Only Ashfield Council is currently party to a disposal contract for mixed-waste garbage containing food organics. As the contract does not specify the required content of the mixed waste, food organics may be separated from the mixed waste and redirected to a new contract.
- 2.14 The ISWMG submits that transfer from existing and disposal contracts will be phased to occur as existing arrangements permit.

Previous authorisations

- 2.15 On 6 November 2002, the ISWMG was granted authorisation A30205 to collectively tender and contract for sorting and disposal of dry recyclable material. There are no existing authorisations for joint tender for waste management services that relate only to municipal food and garden organic waste management.

Market concentration and barriers to entry

- 2.16 Information from a 2008 IbisWorld report⁶ indicates that there is currently a medium level of concentration in the market for all waste disposal services in Australia. The report estimates that the top four competitors account for about 53.6 per cent of total industry revenue, Australia-wide. This level is reported to be increasing through consolidation in the waste management industry and the trend is expected to continue.
- 2.17 While a number of Sydney waste management facilities were previously publicly owned, IbisWorld reports that there is currently a trend towards privatisation of the industry that is expected to continue as the required regulation, capital costs and technical expertise increase.
- 2.18 Barriers to entry into the provision of waste disposal services include high establishment costs, the lack of available land in the area and the standards of technology and regulation required. In the context of the current application, it is relevant to note that AWT is a relatively new type of waste management. As a result, there are few suitable waste management facilities currently available in the Sydney region.
- 2.19 Residents who oppose construction of a waste management facility in their area may also make siting and approval for such facilities difficult. A 2006 Productivity Commission report indicated that community concern was one of the greatest impediments to the development of a new waste management facility.⁷

⁶ IbisWorld, *Q9634 – Waste Disposal Services in Australia - Industry Report: Segmentation*, 21 July 2008, page 5.

⁷ Australian Productivity Commission, *Productivity Commission Inquiry Report – Waste Management*, No. 38, 19 December 2006, page 341.

Competition in the industry

- 2.20 IbisWorld states that the NSW waste treatment and disposal market is dominated by WSN Environmental Solutions. Landfills owned by local councils and a number of small private companies constitute the balance of the market.⁸
- 2.21 IbisWorld reports that most revenue from processing and disposal of all waste comes from commercial, industrial, construction and demolition companies, not municipal councils.⁹
- 2.22 Although there are relatively few competitors in this market, the ACCC considers this to be a product of prohibitively high barriers to entry. The ACCC considers that growth in the market for AWT waste management may stimulate competition in the waste management industry.

Current facilities in the market

- 2.23 The Sydney market for organic waste management has grown in recent years. There are currently two companies that have the facilities to provide the services required by the ISWMG. Other companies also have plans to establish new facilities.

WSN Environmental Solutions

- 2.24 Formerly known as Waste Service NSW, WSN Environmental Solutions is the trading name of the Waste Recycling and Processing Corporation. The statutory company is wholly owned by the NSW State Government and operates under the *Waste Recycling and Processing Corporation Act 2001*. It is the major provider of solid and industrial waste management services in the Sydney metropolitan area, operating 12 active waste and recycling facilities and collecting waste from 144 438 households.¹⁰
- 2.25 In its 2006-07 annual report, WSN Environmental Solutions indicated that it had supplied green energy to 25 000 households and recovered 404 064 tonnes of resources from waste that year. In 2007-08, WSN Environmental Solutions expects to be able to supply green energy to almost 40 000 households.
- 2.26 WSN Environmental Solutions operates four Class 1 landfills (licensed to accept putrescible materials) in Sydney and is in the process of building two more. In September 2004, WSN Environmental Solutions partnered with Global Renewables to establish the Eastern Creek UR-3R AWT facility in Sydney, at a cost of \$71 million.¹¹ The Eastern Creek facility is currently Sydney's only AWT facility for household garbage and processes around 11 per cent of Sydney's household waste.¹²

⁸ IbisWorld, *Q9634 – Waste Disposal Services in Australia - Industry Report: Segmentation*, 21 July 2008, page 2.

⁹ *Ibid.*

¹⁰ WSN Environmental Solutions, *A Climate for Change - Annual Report 2006-07*, 31 October 2007, page 5.

¹¹ IbisWorld, *Q9634 – Waste Disposal Services in Australia - Industry Report: Key Competitors*, 21 July 2008, page 14.

¹² WSN Environmental Solutions, *A Climate for Change - Annual Report 2006-07*, 31 October 2007, page 5.

- 2.27 WSN Environmental Solutions recently opened another AWT facility suitable for processing both food and garden organic waste. The Macarthur Resource Recovery Park in Jacks Gully, Narellan, opened earlier this year.¹³
- 2.28 WSN Environmental Solutions has indicated it intends to build AWT facilities across its Sydney network.¹⁴

Veolia Environmental Services

- 2.29 In 2006, Collex Waste Management's parent company, Veolia, rebranded the company Veolia Environmental Services. IbisWorld estimates that the company has the second-largest share of the waste disposal services market in Australia, at approximately 16.3 per cent.¹⁵
- 2.30 Veolia Environmental Services operates a bioreactor Class 1 landfill at Woodlawn, south of Goulburn, NSW. The site, which transports waste by rail, is scheduled for upgrade to allow for greater resource recovery, including recovery of gases from decomposing waste.

SITA Environmental Solutions

- 2.31 SITA Environmental Solutions is a subsidiary of SembSita Australia, which currently holds an 8.8 per cent share of the Australian waste disposal services market.¹⁶ SITA Environmental Solutions has made an application to develop a waste treatment facility at Kemps Creek in Sydney's west which is due for completion in April 2009. This facility would be able to accept source-separated aggregated food and organics for processing.

Others

- 2.32 At least one other suitable waste treatment facility tender is currently in the market.
- 2.33 The ISWMG submits that there are a range of companies that can accept and process garden organics as a source-separated material. The ISWMG submits that the Sydney market is currently dominated by dedicated compost-type companies such as Australian Native Landscapes and Camden Soil Mix.

¹³ http://wasteservice.nsw.gov.au/dir138/wsn.nsf/Content/Facilities_Jacks+Gully+Facility, accessed 1 September 2008.

¹⁴ http://wasteservice.nsw.gov.au/dir138/wsn.nsf/Content/Education+and+Safety_Alternate+Waste+Technology

¹⁵ IbisWorld, *Q9634 – Waste Disposal Services in Australia - Industry Report: Key Competitors*, 21 July 2008, page 1.

¹⁶ *Ibid.*

3. The application for authorisation

- 3.1 On 23 July 2008, the ISWMG lodged application for authorisation A91096 with the ACCC.
- 3.2 The ISWMG is seeking authorisation of its proposal to jointly tender and contract for the services of a contractor or contractors deemed suitable to provide regional transfer, processing and disposal of food and garden organics and the marketing and sale of any materials or products derived from that transfer or processing to the respective local government areas.
- 3.3 The ISWMG seeks authorisation for a tender period of 12 months and a contract period of 10 years. The contracted waste supply will be approximately 40 000 tonnes per annum.
- 3.4 The contractor will be expected to reduce the biologically active component of the waste it receives, managing any greenhouse gas emissions resulting from the decomposition of the organic material, and producing organically based products for resale.
- 3.5 The ISWMG submits that individual councils will continue to remain responsible for the collection and transportation of waste materials to the chosen contractor(s).
- 3.6 The ISWMG has lodged the application for authorisation with the ACCC because the proposed tender and contract arrangements potentially raise concerns under the anti-competitive conduct provisions of the Act. Section 45 of the Act prohibits collusive conduct in the form of contracts, arrangements or understandings having the purpose or effect of substantially lessening competition. Under the Act, the proposed conduct may constitute an agreement between competitors on price. Section 45A(1), in effect, deems a price fixing agreement to be in breach of section 45. Accordingly, any agreement between competitors to fix, control or maintain prices for goods or services is prohibited regardless of its purpose or effect on competition.¹⁷

¹⁷ Department of the Treasury, *Trade Practices Act Review, Chapter 7: Collective Bargaining*, January 2007. Available at <http://www.tpareview.treasury.gov.au/content/report/html/Chpt7.asp>, accessed 11 September 2008.

4. Submissions received by the ACCC

4.1 The ISWMG provided a supporting submission with its application for authorisation.

4.2 The ACCC also sought submissions from around 40 interested parties potentially affected by the application, including waste management companies, government agencies, industry associations and manufacturers of products in related industries.

4.3 The ACCC received public submissions from:

- Remondis Pty Ltd
- Waste Contractors and Recyclers Association of NSW (WCRA NSW)
- Department of Environment and Climate Change NSW (DECC).

4.4 All three submissions support the ISWMG's application for authorisation.

4.5 However, WCRA NSW submits that authorisation should be granted only where:

- the process of the arrangements follows the DECC service timelines
- the ISWMG adopts the NSW DECC model contracts
- all tender documents comply with the NSW Domestic Waste Code of Practice (WorkCover)
- all tender documents comply with the Better Practice Guide for Waste Management in Multi-unit dwellings.

4.6 The views of the ISWMG and interested parties are outlined in the ACCC's evaluation of the proposed arrangements in Chapter 6 of this draft determination. Copies of public submissions are available from the ACCC website (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.

Application A91096

- 5.2 The ISWMG lodged application for authorisation A91096 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 Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition.¹⁸
- 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.¹⁹
- 5.6 Consequently, given the similarity of wording between section 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.

¹⁸ *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.

¹⁹ *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.²⁰

- 5.8 Public detriment is also not defined in the Act 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.²¹

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.²²
- 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.²³

Conditions

- 5.12 The Act also allows the ACCC to grant authorisation subject to conditions.²⁴

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:

²⁰ 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.

²¹ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

²² 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.

²³ Section 91(1).

²⁴ Section 91(3).

- persons who become party to the contract, arrangement or understanding at some time in the future²⁵
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.²⁶

²⁵ Section 88(10).

²⁶ Section 88(6).

6. ACCC evaluation

- 6.1 The ACCC's evaluation of the ISWMG's proposed joint tender and contract arrangement 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 ISWMG's proposed joint tender and contract arrangements.

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 ISWMG submits that there are currently three separate relevant markets for kerbside collected waste materials:
- dry recyclable material
 - garden organics and
 - residual mixed waste, including food organics.
- 6.4 The ISWMG submits that there is also a developing market for co-collected food and garden organics.
- 6.5 All of these markets involve the service of accepting, handling, processing and disposal (by sale or otherwise) of waste materials.
- 6.6 The ACCC accepts the markets identified by the ISWMG to be relevant for the purposes of assessing this application for authorisation. The ACCC considers the relevant geographic dimension to these markets to be the Sydney region.
- 6.7 The ACCC has considered Sydney waste management markets on a number of previous occasions and generally concluded that they are competitive. The ACCC notes that this is the first time it has assessed an application relating to the handling of organic materials to be treated by AWT.
- 6.8 For the purpose of assessing this application, the ACCC considers the relevant area of competition affected by the proposed conduct to be the market for waste management services in the Sydney region.
- 6.9 The ACCC considers that its assessment in this case will not be strongly influenced by possible variations in market definition.

The counterfactual

- 6.10 As noted in Chapter 5 of this draft determination, in order to identify and measure the public benefit and public detriment generated by the conduct, the ACCC applies the 'future with-and-without test'.
- 6.11 The ISWMG submits that, if the authorisation is not granted, it is likely that members will continue to operate their waste services on a council-by-council basis.

- 6.12 In its submission to the ACCC, Remondis suggested that, without authorisation, the ISWMG would have difficulty finding a suitable service provider because of the limited number of suitable facilities in the Sydney metropolitan area. On an individual basis, the councils would not be able to offer the critical mass of organic waste required by waste management companies to amortise their costs. Remondis submitted that the ability of new entrants to the AWT waste management market to compete is dependent on the application being authorised.
- 6.13 On this basis, the ACCC concludes that, without authorisation, the councils of the ISWMG would continue to contract waste management services on an individual basis. These individual councils may or may not choose to contract services specifically for management of food and organic waste.

Public detriment

- 6.14 The ISWMG believes the proposed joint tender and contract arrangements will result in the following public detriments.
- The food and garden organic waste segment of the ISWMG's waste stream will be captured by one waste management company, without contest, for at least 10 years.
 - The high cost of land near the Inner Sydney region might result in costs of building a new facility being passed on to the ISWMG via the proposed contract.
- 6.15 There were no public detriment issues raised by interested parties.
- 6.16 An assessment of the public detriments likely to be generated by the ISWMG's proposed joint tender and contract arrangements follows.

Reduced number of suppliers for an extended period

Submissions

- 6.17 The ISWMG submits that the proposed conduct may reduce the number of potential individual suppliers of co-collected food and garden organics in the relevant market for a minimum of 10 years.
- 6.18 However, the ISWMG submits that it represents only a small proportion of the overall supply of waste organics. The amount of waste supply to be contracted (40 000 tonnes per annum) represents only 10 per cent of the current total council waste supply of 416 000 tonnes per annum.²⁷
- 6.19 The ISWMG also submits that there is a substantial supply of waste organics available from private generators of food and garden organics. The ISWMG submits that Sydney's commercial/industrial sector may generate approximately 250 000 tonnes of food waste. AWT facilities such as the EarthPower facility in Camellia, Parramatta, generate electricity from biogas derived almost exclusively from commercial organic waste sources.

²⁷ ISWMG, Supporting submission for authorisation application, received 23 July 2008, page 13.

- 6.20 The ISWMG also submits that the aggregation of source-separated food and garden organics will reduce the financial viability of the mixed residual waste stream collected from those councils by separating off the sought-after organics fraction in that residual waste stream.
- 6.21 The ISWMG submits that this is necessary to provide a critical mass of organic waste needed to attract as many tenderers as possible. The ISWMG submits that the guaranteed supply of food and garden organic waste will also allow the successful contractor to amortise their costs associated with the contract.

ACCC's view

- 6.22 The ACCC notes that the proposed arrangements are likely to result in a reduced number of individual suppliers of co-collected food and garden organic waste. However, the ACCC accepts that the councils of the ISWMG represent only a small proportion of the overall supply of waste organics and, therefore, the resulting public detriment is likely to be relatively small.

Higher land values and related service costs

Submissions

- 6.23 The ISWMG submits that the proposed contract will be highly likely to attract a tender based on delivering new infrastructure close to, if not located within, the region. While the Department of Planning has indicated the availability of certain land zonings for use by waste and resource recovery facilities, the continued high cost of land near the region may demand higher prices for organics processing in order to amortise those costs to the processor.
- 6.24 The ISWMG also submits that, so far, AWT facilities in Sydney have been built on existing landfill sites, reducing the land component of total project costs.

ACCC's view

- 6.25 The ACCC considers that, to the extent that the costs of higher land values are passed on, this may constitute a small public detriment. However, the ACCC considers this is likely to be offset by lower transport costs than would be incurred if the facility was in a more remote location.

ACCC conclusion on public detriments

- 6.26 The ACCC considers that the public detriment generated by the proposed arrangements is likely to be minimal.

Public benefit

- 6.27 The ISWMG submits the proposed joint tender and contract arrangements will deliver public benefits, including:
- increased competition
 - efficient service delivery

- appropriate infrastructure
 - resource recovery and environmental benefits
- 6.28 The ACCC applies a public benefit standard when determining the weight to be given to productive efficiency savings. That is, the ACCC will consider how much weight society considers should be attached to a public benefit. Of particular interest will be the number and identity of the proposed beneficiaries.
- 6.29 An assessment of the public benefits claimed by the ISWMG follows.

Increased competition

Submissions

- 6.30 The ISWMG submits that the likely effect of the proposed joint tender and contract arrangements will be to increase competition in the relevant markets by providing an incentive for waste management companies to invest in research and development of waste management technologies and research to improve the marketability of end products from the waste stream. In this way, the waste management companies may minimise landfill costs and levies.
- 6.31 The ISWMG submits that, by jointly tendering, the councils will provide a critical mass of waste organics supply sufficient to allow companies without established infrastructure, with innovative technologies, or without a secure supply of waste organics from other sources, to submit a competitive tender. The ISWMG submits that there is a strong chance that the contract will go to a new company, thereby reducing the market dominance of WSN Environmental Solutions.
- 6.32 The ISWMG submits that the successful tenderer may also be able to compete to provide services to other uncontracted councils near to the Inner Sydney region.
- 6.33 The ISWMG submitted that Leichhardt Municipal Council and City of Canada Bay Council have both recently completed successful trials of co-collected food and garden organics with an unnamed company.²⁸

ACCC's view

- 6.34 The ACCC considers the proposed arrangements may generate the claimed public benefit if the successful tenderer is a new company. However, the ACCC notes that there is also a possibility that the contract will not be awarded to a new company. WSN Environmental Solutions is currently the only waste management service provider in the Sydney area capable of processing food and organic waste by AWT and has two suitable facilities.
- 6.35 Regardless of which company the contract is ultimately awarded to, the ACCC considers that the greater threat of entry to the market by a new competitor, which is facilitated by the arrangements, will deliver benefits through competition in the tender process.

²⁸ ISWMG, Supporting submission for authorisation application, received 23 July 2008, page 6.

Efficient service delivery

Submissions

- 6.36 The ISWMG submits that the proposed joint tendering and contract arrangements will require only one contract to be constructed and managed, rather than six individual contracts. The ISWMG submits that this will produce administrative efficiencies.
- 6.37 The ISWMG also submits that the proposed arrangements would ensure consistency in the type of collection bin used and, therefore, a consistent mix of material delivered to the processing facility, requiring only one configuration of equipment. This may also produce materials handling efficiencies.
- 6.38 The ISWMG expects that full utilisation of key infrastructure and equipment will allow service providers to charge a lower gate fee per tonne of material delivered.
- 6.39 The ISWMG submits that the joint contract will also result in efficiency gains from reduced transport costs and the use of uniform promotional material.
- 6.40 Remondis submits that the proposed arrangements will result in collection, transport and waste treatment ‘benefits’. Remondis also submits that the arrangements are likely to result in savings to the councils on administration costs and contract price.

ACCC’s view

- 6.41 The ACCC considers that the proposed joint tender and contract arrangements are likely to deliver some efficiency gains and cost reductions in service delivery, particularly in administration of the arrangements and transportation and processing of the waste. While the ACCC notes that transportation efficiencies may be limited if the successful contractor does not build a facility in the Inner Sydney region, the ACCC considers that greater coordination in transport of waste will produce service delivery efficiencies regardless of where the waste management facility is located.

Appropriate infrastructure

Submissions

- 6.42 The ISWMG submits that the guaranteed waste supply and income afforded by the proposed arrangements would allow the successful waste management company to build infrastructure sufficiently close to the region and to tailor its facility to its supply, thereby amortising the costs of higher land value.
- 6.43 Remondis submits that the proposed arrangements will attract competitive tender bids offering a variety of technical solutions. However, Remondis also submits that, while a facility in the area would allow waste to be treated locally and may provide some local employment, suitable sites may be difficult to find in the Inner Sydney region.

ACCC’s view

- 6.44 The ACCC considers that, while there is a chance that the successful waste processor will build a facility in the region, there is also a chance that they will already have a suitable facility in another area or that the successful contractor will build a new facility

elsewhere. The ACCC notes that, while the guaranteed 10-year supply of municipal organic waste will afford the contractor(s) a greater ability to invest in technology, the likely establishment costs and operational costs of any new facility mean that the facility will need to be financially viable beyond expiry of the contract with the ISWMG. The ISWMG is also unlikely to be its only source of supply and so will not be the sole influence on the contractor's operational behaviour. However, the ACCC considers that the contractor is likely to tailor the scale of the facility to the region.

- 6.45 The ACCC considers that, if the proposed arrangements were able to attract facilities to the Inner Sydney region, this may be of financial benefit to the ISWMG and, through them, the residents of the region. Investment and employment gains associated with any new facility to be built are also likely to benefit the residents of the region. However, the ACCC notes that many residents may be likely to oppose the construction of a waste management facility in their area because of perceived externalities from the facility, such as dust, noise, odour and aesthetics, which may erode land values.²⁹ Diversion of traffic in the area and increased presence of heavy vehicles related to similar projects have also raised concerns from residents and local businesses in the past.³⁰

Resource recovery and environmental benefits

Submissions

- 6.46 The ISWMG submits that the aim of the proposed arrangements is to divert waste materials from landfill and convert them, at a cost, to a resource of some economic value. The ISWMG submits that this will result in reduced resource usage and lower environmental impact, including reduced risk of surface and ground water pollution from production of greenhouse gases and leachate.
- 6.47 The ISWMG submits that AWT treatment provides the opportunity to significantly reduce greenhouse gas emissions and the related odours from municipal waste by capturing them in the waste treatment process. These gases may then be used to generate electricity. They may also be of future benefit to the ISWMG, depending on the structuring of carbon offsets in the proposed national emissions trading scheme.
- 6.48 The ISWMG also submits that resource recovery facilitated by the arrangements would reduce the need for virgin materials and produce goods such as fertilisers for use on parks and gardens in the Inner Sydney region and elsewhere.
- 6.49 DECC submits that the proposed arrangements have the potential to have a high net impact on reduction of carbon emissions from organic waste that might arise if the waste were to go to landfill.
- 6.50 Remondis submits that landfilling options are unsustainable and supports the move to AWT. Remondis submits that an AWT solution would reduce the ISWMG communities' carbon footprint from waste processing and transportation. Remondis

²⁹ Australian Productivity Commission, *Productivity Commission Inquiry Report – Waste Management*, No. 38, 20 19 December 2006, page 38.

³⁰ NSW Government Department of Planning, *Major Project Assessment: WSN Alternative Waste Technology Facility, Jack's Gully*, August 2006, page 1.

also submits that the supply proposed for contract (40 000 tonnes per annum) is practical and would enable the ISWMG to develop and improve on positive environmental outcomes for residents.

ACCC's view

6.51 The ACCC considers that the proposed arrangements may result in public benefits in the form of reduced use of virgin resources and reduced negative environmental impact of municipal waste disposal. The ACCC also considers the proposed arrangements may create useable products from the treatment process. The likely beneficiaries of these effects include not only residents of the ISWMG region, but also the inhabitants of the greater Sydney region.

6.52 The ACCC notes the Productivity Commission Inquiry Report, *Waste Management*, published in December 2006, which questions the environmental benefits of AWT facilities. A key finding of the report was that:

The financial costs of alternative waste technologies (AWTs) and most dedicated energy-from-waste facilities are much higher than the financial costs of landfills. The environmental and other external benefits of using an AWT or energy-from-waste facility, rather than sending waste directly to a properly-located, engineered and managed landfill, appear to be small. Therefore, on balance modern landfills appear to have lower overall costs for the community than AWT or energy-from-waste facilities, and are likely to be preferred from a net community benefits perspective.³¹

6.53 The ACCC recognises that there are arguments for and against resource recovery and the environmental benefits of these arrangements. However, the ACCC notes that these benefits constitute only a part of the total net public benefit likely to result from the proposed arrangements. The ACCC considers that the public benefit resulting from the proposed arrangements would be sufficient to outweigh the likely public detriment even without these environmental benefits.

ACCC conclusion on public benefits

6.54 The ACCC is satisfied that several of the Applicants' public benefit claims have substance. In particular, the ACCC concludes that the proposed arrangements are likely to produce efficiencies in relation to: service delivery and administration, which will result in cost savings for the ISWMG and their ratepayers; and a reduction in environmental damage from waste production and management.

Balance of public benefit and detriment

6.55 The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangements are likely to result in a public benefit that will outweigh any public detriment.

³¹ Australian Productivity Commission, *Productivity Commission Inquiry Report – Waste Management*, No. 38, 19 December 2006, page 61.

6.56 In the context of applying the net public benefit test at section 90(8)³² of the Act, the Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.³³

6.57 The ACCC considers that the public detriments generated by the proposed conduct are likely to be minimal.

6.58 The ACCC is satisfied that the proposed joint tender and contract arrangements are likely to result in the following benefits to the public.

- increased efficiencies and cost reductions
- environmental benefits

6.59 Overall, the ACCC considers that, in all the circumstances, the likely public benefit generated by the proposed arrangements will outweigh the likely public detriment.

Length of authorisation

6.60 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.

6.61 In this instance, the ISWMG seeks authorisation for a 12-month tender process and a contract of 10 years. The ISWMG anticipates that the tender process will begin in January 2009 and the contract will begin in January 2010.

6.62 The ACCC notes Remondis' submission that new entrants should be allowed 24 to 36 months to obtain approvals, find a suitable site, undertake public consultation and construct a waste processing facility in reasonable proximity to the ISWMG region.

6.63 The ACCC also notes that the ISWMG has emphasised in its submission the importance of permitting sufficient time in the tender development and assessment period to allow competitors needing to construct their own facility a timeframe of one to three years. The ACCC considers the length of authorisation sought by the ISWMG is sufficient to promote competition in the tender.

6.64 As such, the ACCC proposes to grant authorisation to the ISWMG's proposed joint tender and contract arrangements until 31 January 2020.

³² The test at 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.

³³ Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22.

7. Draft determination

The application

- 7.1 On 23 July 2008 the ISWMG lodged application for authorisation A91096 with the Australian Competition and Consumer Commission (the ACCC).
- 7.2 Application A91096 was made using Form B, 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. The relevant tests for this application are found in sections 90(6) and 90(7) of the Act.
- 7.3 In particular, the ISWMG seeks authorisation to jointly tender and contract waste management services to accept, process, market and dispose of food and garden organics municipal waste from the six councils.

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 ISWMG for its proposal to jointly tender and contract for services to transfer, process and dispose of food and garden organic waste and to market and sell any end products in the respective local government areas until 31 January 2020.
- 7.6 This draft determination is made on 25 September 2008.

Further submissions

- 7.7 The ACCC will now seek further submissions from interested parties. In addition, the Applicants 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

