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| From Andrew Whiteside | Date 29 May 2024 | |
| Direct [REDACTED] | Email [REDACTED] | |
| To Naomi Menon | Organisation Australian Competition and Consumer Commission | Email exemptions@accc.gov.au |
| And to Miriam Kolacz | | |

Our Ref AYW:9043782.004

Dear Ms Menon

AA1000667-1 – Barwick’s submission regarding Southern Waste Solutions’ application for interim and final authorisation

We continue to act for the Copping Refuse Disposal Site Joint Authority trading as Southern Waste Solutions (**SWS**) regarding the proposed Copping Regional Organics Facility Project (**CROF Project**).

We refer to SWS’s application for interim and final authorisation dated 4 April 2024 (**Application**) and B G & J M Barwick Pty Ltd’s (**Barwick’s**) submission regarding the Application dated 17 May 2024 (**Barwick’s Submission**).

We are instructed to respond to Barwick’s Submission as set out below:

1. Outline of response

- 1.1 SWS submits that Barwick’s Submission generally demonstrates, in all the circumstances, that:
 - 1.1.1 the proposed conduct would result, or be likely to result, in a benefit to the public;
 - 1.1.2 that benefit would outweigh the detriment to the public (if any) that would result, or be likely to result, from the conduct; and
 - 1.1.3 Barwick’s considers that its proposed project would *better* advance the public benefit than SWS’s project, however SWS submits that:
 - (a) this is not the legal test in section 90(7) of the *Competition and Consumer Act 2010* (Cth) (**Act**); and

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- (b) there is no basis for the ACCC to be satisfied that Barwick's project would in fact proceed, whether or not interim and final authorisation sought by SWS in its Application is granted or withheld.

1.2 For these reasons, SWS submits that Barwick's Submission should not prevent the ACCC from granting:

1.2.1 interim authorisation on an urgent basis; and

1.2.2 subsequent final authorisation.

1.3 Further, in paragraph 1.3 of Barwick's Submission, Barwick's incorrectly states that SWS has omitted critical information in the Application relevant to the ACCC's assessment, namely, Barwick's development of a new organic waste processing facility in southern Tasmania due to begin operations in 2025. In paragraph 12.2 and footnote 13 of the Application, SWS states:

Barwick's has also been chosen as the successful applicant for \$3 million of seed funding to establish a regional organic waste processing facility at Boyer in southern Tasmania. See, Roger Jaensch, Minister for the Environment, Tasmania, 'Successful proponent of southern organic waste processing facility announced' (Publication, 12 May 2022) ...

2. Test for authorisation

2.1 As you know, section 90(7)(b) of the Act requires the ACCC to be satisfied in all the circumstances that:

2.1.1 the proposed conduct would result, or be likely to result, in a benefit to the public; and

2.1.2 the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.

2.2 We note that there is no requirement or scope for the ACCC to consider which of two or more competing proposed projects would *better* give effect to the public benefit when making this assessment. The focus of the test is and must be on the conduct specified in the application under consideration.

3. The proposed conduct would result, or be likely to result, in a benefit to the public

3.1 We refer to paragraphs 9 and 19 to 23 of the Application, which set out the rationale of the proposed conduct and significant benefits to the public that are likely to result from the proposed conduct.

3.2 Barwick's Submission confirms that the proposed conduct would result, or be likely to result, in a benefit to the public.

3.3 Barwick's Submission confirms that:

3.3.1 there is a strong market need for alternative and more environmentally friendly organic waste processing services, such as through in-vessel composting (see, for example, paragraphs 5.5, 5.10 and 5.15 of Barwick's Submission);

3.3.2 there are environmental benefits due to the proposed utilisation of an in-vessel composting method, which is a more efficient and environmentally friendly method of composting than open-air windrow composting that is currently being utilised in southern Tasmania (see paragraphs 4.7 and 5.5 of Barwick's Submission). SWS believes that Barwick's Submission in many respects supports the environmental benefits described in the Application;

- 3.3.3 there are policy goals at both the Commonwealth and Tasmanian level that need to be achieved, including under the National Waste Policy Action Plan 2019 and the Tasmanian Draft Waste Action Plan 2019 (paragraphs 5.23 and 5.24 of Barwick’s Submission);
- 3.3.4 additional jobs from an additional organic waste processing facility will be created (see paragraphs 5.25 and 5.26 of Barwick’s Submission); and
- 3.3.5 there will be benefits from community education on the use of the FOGO system (see paragraph 5.13 of Barwick’s Submission).

4. The benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct

- 4.1 As set out in paragraph 24 of the Application, SWS acknowledges that the proposed conduct may lessen competition in the acquisition of processing services for organic waste in southern Tasmania. However, any public detriment would be outweighed by the public benefits described in the Application, including those confirmed by Barwick’s Submission.
- 4.2 Barwick’s Submission states that the proposed conduct is likely to result in net public detriment on the basis that Barwick’s will likely be required to abandon its plans to build and operate the Boyer Facility. Barwick’s further submits that this would result in environmental, economic and competition detriments (paragraph 1.5.a of Barwick’s Submission). We address this in paragraph 2 above in relation to the appropriate legal test and paragraphs 5 to 8 below in relation to the facts of the Application.
- 4.3 Given that Barwick’s has not secured finance for the Boyer Facility, if the ACCC does not authorise the proposed conduct, there is still a substantial risk that the Boyer Facility will not proceed and that if the interim and final authorisation are not granted, none of the public benefits described in the Application and Barwick’s Submission are realised.
- 4.4 SWS submits that the public detriments described in Barwick’s Submission may arise in the future with and without the proposed conduct, and therefore the public detriments may not be relevant to the assessment under section 90(7) of the Act.¹

5. Environmental detriments

- 5.1 Barwick’s Submission does not state that the proposed conduct will result in any environmental detriment except that the environmental benefits may be realised to a greater extent and more immediately in the likely future without the proposed conduct.
- 5.2 This is based on Barwick’s Submission that the Boyer Facility will have a greater capacity and will operate earlier than the CRO Facility (paragraph 5.6 of Barwick’s Submission).
- 5.3 SWS submits that the test under section 90(7) does not require the ACCC to determine whether the public benefit would be greater or more immediate in a counterfactual scenario. We address this further in paragraph 10 below.

6. Economic detriments

- 6.1 Barwick’s Submission states that the proposed conduct will likely result in non-Participating Councils and producers of commercial organic waste in southern Tasmania having no access, or very limited access, to in-vessel composting or equally environmentally friendly organic waste processing services given the limited capacity of the CRO Facility and the high likelihood the Boyer Facility will not operate. This is considered in paragraph 7 below.

¹ *Re Tabcorp Holdings Ltd* [2017] ACompT 5 at [31].

- 6.2 Barwick's Submission also states that the Participating Councils have other options to achieve positive economic outcomes, such as collectively negotiating the acquisition of organic waste processing services (see paragraph 5.16 of Barwick's Submission). However, this statement neglects the fact that there is currently no facility in southern Tasmania that can process the Participating Councils' organic waste to the proposed standard of the CRO Facility.
- 6.3 At this stage, SWS submits that it is too early to tell if Barwick's could provide greater economic benefits to the Participating Councils and the general public by processing the Participating Councils' organic waste volumes at the proposed Boyer Facility.
- 6.4 As set out in the Application, the proposed conduct would result in increased efficiencies by the aggregation of the Participating Councils' waste volumes and resources. This is likely to provide potential suppliers of organic waste processing services the opportunity to achieve a more efficient scale of operation in the delivery of processing services and facilitate lower average costs for each Participating Council (see paragraphs 9.12.3 and 20 of the Application).

7. Competition detriments

- 7.1 Barwick's Submission submits that the proposed conduct may result in:
- 7.1.1 Barwick's not having access to compete for 49% of the current FOGO and GO waste produced by Councils in southern Tasmania. As set out in paragraph 16.1 of the Application, SWS estimates that Clarence City Council and Kingborough Council collected approximately 15% and 19% of the GO and FOGO generated by the southern Tasmanian region councils in 2023, respectively.² Sorell Council was not included as it only offers kerbside GO collection on an ad hoc basis upon request by ratepayers. If Sorell Council is included, it only collected approximately 500 tonnes of GO and FOGO in 2023;³
 - 7.1.2 lack of long term contracts (5 years or more) with Participating Councils; and
 - 7.1.3 Barwick's likely being unable to access finance or unable to access finance on acceptable terms.
- 7.2 If SWS's gate fees are not competitive in the market, SWS does not expect the Participating Councils to commit to volumes being deposited at the CRO Facility.
- 7.3 One of the purposes of SWS approaching the market is to obtain pricing for establishing and operating the CRO Facility, which will then be used to establish SWS's costs and proposed gate fees. Pending that process being completed and the Participating Councils considering the commercial offering, the Participating Councils need not enter into a binding commitment for the processing of FOGO and GO with SWS.
- 7.4 Barwick's also submits that in circumstances where Veolia or Cleanaway is the successful tenderer, where capacity allows, it is likely the waste collection provider would preference the CRO Facility for processing organic waste rather than acquire organic waste processing services from another supplier (see paragraphs 5.17.d and 5.20 of Barwick's Submission). SWS does not agree with this submission. The Contractor would likely only preference the CRO Facility for processing organic waste in circumstances where it is more efficient to do so. As set out in the Application, SWS will charge a gate fee, as determined by SWS (see paragraphs 5.7, 5.8, 7.3.7 and 8.1 of the Application). SWS would not expect the Contractor to preference the CRO Facility if there were more competitive gate fees available to the Contractor's customers. Additionally, the CRO Facility will only be available to the

² Based on research conducted on behalf of SWS by MRA Consulting in February 2024.

³ Sorell Council, *Waste Management Strategy* (Publication, 2023), 7
<<https://www.sorell.tas.gov.au/wp-content/uploads/2023/03/Waste-Management-Strategy-2023.pdf>>.

Contractor's customers to the extent that capacity has not been used by the Participating Councils.

- 7.5 The scope of the proposed conduct described in the Application does not include preferencing the processing of organic waste collected from the Contractor's own customers (see paragraph 5.20 of Barwick's Submission). SWS denies that it would permit the Contractor to do so.
- 7.6 Further, Barwick's Submission states that the proposed Boyer Facility will have a 46,000 tonne capacity from 2026. As set out in the Application, SWS has projected that Participating Councils will process approximately 16,000 tonnes in 2026 increasing to approximately 26,000 tonnes by 2049 and the CRO Facility is anticipated to have a capacity of between 20,000 tonnes to 30,000 tonnes per annum.
- 7.7 SWS considers that Barwick's Submission does not clearly explain why another facility could not service volumes of FOGO and GO collected outside the Participating Councils in the market, particularly where the Participating Councils would contribute approximately one third of the full capacity of the Boyer Facility and there are other sources of FOGO and GO waste available in southern Tasmania.
- 7.8 In particular, research conducted on behalf of SWS by MRA Consulting Group estimates that,⁴ in addition to non-Participating Councils' FOGO and GO, there is approximately 100 kilotonnes per annum of commercial organic waste generated by the market in southern Tasmania.⁵ This is consistent with the former Tasmanian Minister for the Environment's media release dated 12 May 2022, which states that the 'new facility at Boyer will process up to 24,000 tonnes of organic waste per annum and will complement Barwick's existing facilities at Oatlands and Bridgewater to allow them to expand their total processing capacity of 113,000 tonne per annum to 165,000 tonne per annum'.⁶ SWS is unaware of the reasons why the proposed capacity of the Boyer Facility has increased from 24,000 tonnes to 46,000 tonnes since May 2022.
- 7.9 Based on research conducted on behalf of SWS by MRA Consulting Group, SWS assessed that approximately 9,600 tonnes per annum of the 100 kilotonnes per annum of commercial organic waste in the market could potentially be suitable for processing by the CRO Facility (including fish and poultry mortalities and wastewater treatment sludge).⁷ That commercial organic waste represents only a portion of the organics waste industry. However, SWS does not currently intend to process the remaining available commercial waste at the CRO Facility.
- 7.10 Further, Jenkins Hire Pty Ltd and Mr Timothy Jenkins have been convicted of a number of environmental offences relating to the discharge of liquid controlled waste into the Plenty River in the Derwent Valley.⁸
- 7.11 SWS submits that further reliance on the Interlaken and Jenkins Hire facilities referred to in Barwick's Submission would result in public detriment. Both facilities use an on farm style

⁴ Based on research conducted on behalf of SWS by MRA Consulting in April 2021.

⁵ See also, "Tasmanian Organics Research Report" published by the Department of Natural Resources and Environment Tasmania, February 2022, page 130, available at <https://nre.tas.gov.au/Documents/Tasmanian%20Organics%20Research%20Report%202022.PDF>.

⁶ Roger Jaensch, Minister for the Environment, Tasmania, 'Successful proponent of southern organic waste processing facility announced' (Publication, 12 May 2022), <https://www.premier.tas.gov.au/site_resources_2015/additional_releases/successful_proponent_of_southern_organic_waste_processing_facility_announced>.

⁷ Based on research conducted on behalf of SWS by MRA Consulting in April 2021.

⁸ Environment Protection Authority, Tasmania, 'Jenkins Hire Pty Ltd convicted of causing material environmental harm' (Publication, 27 February 2024), <<https://epa.tas.gov.au/news/jenkins-hire-pty-ltd-convicted-of-causing-material-environmental-harm>>.

open-air windrow composting method rather than the more environmentally friendly technology proposed at the CRO Facility.

- 7.12 Based on the above and the resource constraints in the market described in paragraph 18.1.1 of the Application, if the proposed conduct is not authorised by the ACCC, SWS considers there is a material risk that there will not be sufficient competition in the market for efficient organic waste processing in southern Tasmania.

8. Substantially lessening competition

- 8.1 Barwick's submits that the proposed conduct may have the likely effect of substantially lessening competition in both the organic waste processing market and, potentially, the waste collection market in southern Tasmania (paragraphs 1.5.b, 5.17 of Barwick's Submission).
- 8.2 SWS considers the proposed conduct will create favourable competition in the current and future market and increases public benefit.
- 8.3 SWS does not consider that the proposed conduct may have the likely effect of substantially lessening competition in the waste collection market in southern Tasmania as the proposed conduct does not include scope for collection services. Each Participating Council would still maintain separate contracts for the collection of organic waste.

9. Delayed achievement of government objectives

- 9.1 Barwick's Submission states that the environmental benefits will be realised to a greater extent and more immediately in the likely future without the proposed conduct.
- 9.2 As stated above, SWS submits that the test under section 90(7) does not require the ACCC to determine whether the public benefit would be greater or more immediate in a counterfactual scenario. We address this further in paragraph 10 below.

10. Public benefit 'greater and more immediate'

- 10.1 Barwick's submits that 'a net public benefit will be realised more immediately and to a greater extent in the future without the proposed conduct by Barwick's constructing and operating the Boyer Facility' (paragraph 8.1 of Barwick's Submission).
- 10.2 SWS submits that the test under section 90(7) does not require the ACCC to determine whether the public benefit would be greater or more immediate in a counterfactual scenario.
- 10.3 Rather, the test is whether the proposed conduct would be likely to result in a benefit to the public and if so, the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.
- 10.4 As set out above, SWS submits that the benefit outweighs any detriment to the public that would result, or be likely to result, from the proposed conduct. We refer to paragraph 25 of the Application, which sets out SWS's view of the future without the proposed conduct.

11. Interim authorisation

- 11.1 SWS does not consider that the ACCC granting interim authorisation will result in the public detriments described in Barwick's Submission.
- 11.2 Given that any contract entered into between SWS and the successful tender would be subject to the ACCC granting final authorisation, SWS submits that undertaking the RFT process to appoint a contractor to design, build and operate the CRO Facility would not

prevent Barwick's from still pursuing contracts to process organic waste and progressing finance for the Boyer Facility.

- 11.3 Additionally, if the ACCC grants interim authorisation, and subsequently, determines not to grant final authorisation, the market is likely to be in the same position as it was before granting interim authorisation.
- 11.4 SWS expects that any reluctance from councils to commit to contracts longer than 1 year for FOGO and GO waste processing services, and as a result (as submitted by Barwick's) any issues with Barwick's obtaining finance for the Boyer Facility, would continue at least until a final determination is made by the ACCC regarding the CROF Project.
- 11.5 Accordingly, SWS considers that Barwick's Submission should not prevent the ACCC from granting interim authorisation on an urgent basis.
- 11.6 SWS reiterates its reasons for requesting interim authorisation set out in the Application and its letter to the ACCC regarding urgent interim authorisation dated 13 May 2024.

12. Applications referred to in the Application

- 12.1 We confirm that paragraph 26.2.3 of the Application should refer to authorisation number AA1000604.

13. Conclusion

- 13.1 Despite Barwick's Submission, SWS submits that:
 - 13.1.1 significant benefits to the public are likely to result from the proposed conduct;
 - 13.1.2 it is not clear if the public benefits of the proposed conduct will exist without the proposed conduct; and
 - 13.1.3 even if the ACCC determines that the Boyer Facility is likely to provide public benefits as described in Barwick's Submission, at best, any consideration of the public benefits of the likely future without the proposed conduct should be considered as highly uncertain for the reasons expressed in Barwick's Submission, which are largely impacted by factors outside the proposed conduct (such as financing).
- 13.2 SWS considers that Barwick's Submission should not prevent the ACCC from granting interim authorisation on an urgent basis.

Please do not hesitate to contact me if you have any queries.

Yours sincerely



Andrew Whiteside
Partner