

The General Manager
Adjudication Branch
The Australian Competition and Consumer Commission
PO Box 3131
Canberra
ACT 2601



Attention: Ms Hannah Ransom

Dear Ms Ransom,,

Commonwealth of Australia

Competition and Consumer Act 2010 – subsections 88(1A) and (1)

SUBMISSIONS BY INTERESTED PARTY REGARDING APPLICATION FOR AUTHORISATION FOR AGREEMENTS AFFECTING COMPETITION OR INCORPORATING RELATED CARTEL PROVISION:

In response to the submission Logan City Council & Ors Application for authorization AA1000437 dated 19/02/2019, Waste, Recycling Industry Association (Qld) Inc being the peak body representing the waste management and recycling services industry in Queensland, provides the following submission on behalf of its members.

The Applicants have sought authorisation to collectively tender for waste processing services. The services will be limited to the processing or disposal of resources and / or waste and will not include waste collection services, waste transport services, or the operation of existing waste transfer stations and tip shops. The Applicants are seeking authorisation until 31 December 2050 to provide a waste stream contract of sufficient length to underwrite investment in a new processing facility in the region.

We note the Logan City Council's application is made on behalf of itself and on behalf of Ipswich, Redlands, Lockyer Valley and Somerset Councils. (the **Applicant Councils**).

SUBMISSIONS IN RESPONSE TO THE APPLICATION:

1. Is there a Contract Arrangement of Understanding

The parties to this Application for Authorisation (the **Councils**) wish to jointly investigate, and potentially procure, a regional approach to resource recovery and/or waste disposal services through a competitive 2-stage procurement process. Offering combined waste volumes to the market may attract a service that may otherwise not be available to each individual Council. The services will be limited to the processing or disposal of resources and / or waste and will not include waste collection services, waste transport services, or the operation of existing waste transfer stations and tip shops.

2. What is the Market

The Councils are responsible for and deliver waste management services within their local government areas – there is no overlap with any other Council in terms of the area in which the services are provided. We submit that this definition of the market is too narrow and fails to consider the consumers of the exchangeable and substitutable services as well as the pool of available suppliers and the geographic areas the competing service providers actually or potentially service.

The market serviced is the processing or disposal of resources and / or waste and will not include waste collection services, waste transport services, or the operation of existing waste transfer stations and tip shops.

The combined amount of municipal solid waste generated in the Councils participating in this procurement is 448,781 tonnes which represents approximately 21% of the total SEQ amount. This is broken down for each participating Council area in the documents:

3. Application of Public Benefit test in these circumstances indicates an overwhelming Public detriment

There are many examples of anti-competitive business behavior by Queensland Local Government providing waste and recycling services to their ratepayers.¹

WRIQ's principle concern to the application is that Queensland Local Government currently has the powers to compel all commercial and industrial waste generators to mandate the use of Council's waste collection services, and disposal facilities – with no ability for those businesses to opt out. In 2012 the Queensland Competition Authority investigated a complaint of monopolization of Council Waste and Recycling Services and found Council to be in breach of National anti-competition laws. Council rejected the finding and since has not only expanded and reinforced its anti-competition position by locking all alternate service providers out of the local market, but over the last 12 – 18 months an additional 20 Queensland Local Governments have also expanded these market powers by introducing new Local Laws that regulate the activities of Waste. Included in that list is Logan City Council.

Refer attached correspondence to Logan City Council which outlined to Council in 2018, industry concerns in making its local law number 8. In response to this anti competition challenge the Queensland Treasury Corporation conducted in 2017 a review of the legislation and reported to government the proposed changes that must be made to remove the predatory powers of Local Governments.

At the timing of our response to this application, no action has yet been commissioned by the Queensland Government in resolving the issue, that provides a regulatory mechanism for removing this regulatory capability.

WRIQ argues there is significant risk that Councils may want to supplement their long-term obligations to also expand the supply feedstock to this contract arrangement by acting on these powers of regulating all waste activities in separate jurisdictions. This potentially distorts the normal operating environment to which the private sector has no influence or control. The commercial risks are therefore substantial.

Further, confirmation more Councils including Logan City Council have now given themselves the ability to invoke Local Laws thus adding to the current State legislative powers gives Local Government unnecessary influence and power as well the capability to control and monopolise by local regulation all waste related services (Solid, Liquid, Regulated and Gas). WRIQ argues Logan City Council has that regulatory power to direct additional feedstocks to Council controlled or contracted facilities. This type of behavior acts as a significant deterrent for private sector investment in future waste management infrastructure.

WRIQ acknowledges Council's role in providing its ratepayers with waste and recycling and other services to householders) and we understand these 5 Council's position respects to seeking the best outcomes for their domestic ratepayers. However, commercial and industrial customers, who are mainly small businesses, should not be allowed to be captured by default as involuntary participants in a Councils long term waste strategy, and all must be allowed choice and flexibility to procure commercial waste and recycling services through normal competitive processes as they see fit.

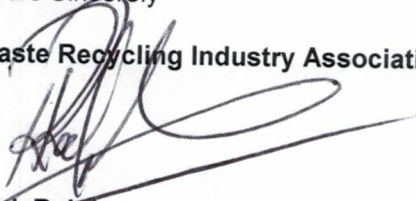
WRIQ offers that Council's Collective Procurement Alliances for waste processing can only be supported where Councils are prepared to surrender their broad powers of monopoly over commercial and Industrial waste activities including recycling services. It is on the basis that until those state and local government provisions and powers are removed and the protection of all private sector interests are made, WRIQ cannot give its endorsement to the application.

We submit the application should be rejected unless it is modified to reflect the Collective Procurement Alliances for waste processing amends any / all regulatory local laws and other powers to surrender their broad powers of monopoly over the private sector in particular commercial and Industrial waste and recycling activities

¹ QCA Report July 2012 Sunshine Coast Regional, Logan City Council Local law December 2017

Yours Sincerely

Waste Recycling Industry Association (QLD) Inc

A handwritten signature in black ink, appearing to read 'Rick Ralph', written over a horizontal line.

Rick Ralph
Chief Executive Officer

Attach 1

WRIQ Response to Logan City Council 2018
2017 Queensland Treasury Corporation report

January 21 2018

Chief Executive Officer
Logan City Council
PO Box 3226
Logan City Dc
QLD 4114

Attention: Chief Executive Officer

Dear Sir,

Proposed Amendment Local Law No. 8 (Waste Management) 2018

We refer to your public notification inviting submissions on the proposed **Local Law No 8** and the public interest testing of the possible anti-competitive provisions.

Objective of Proposed Local Law

The object of the Proposed Local Law is to protect the public health, safety and amenity related to waste management by—

- (a) regulating the storage, servicing and removal of 'waste'; and
- (b) regulating the disposal of 'waste' at a 'waste facility' and
- (c) ensuring that an act or omission does not result in—
 - (i) harm to human health or safety or personal injury; or
 - (ii) property damage or loss of amenity; or
 - (iii) environmental harm or environmental nuisance

This submission is made on behalf of the members of the Waste, Recycling Industry Association of Queensland Inc (**WRIQ**). WRIQ is the premier industry association in Queensland, representing more than 95 Queensland-based organisations ranging from large multi-national organisations through to small family-operated enterprises.

1. Executive Summary

- (a) WRIQ opposes the introduction of the proposed local law on the following basis:
 - (i) the proposed local law is anti-competitive and will result in higher prices for consumers without a commensurate increase in quality or innovation
 - (ii) there is no demonstrated or proven evidence to suggest any public or net benefit or of the mitigations of any perceived risk or harm to human health, safety or personal injury result the making of this outdated and unnecessary regulation

- (iii) the regulation being removed by government is a carryover from the Health Act of 1937. Its intention was to protect the community from the storage and safe removal of 'nightsoil' in the community
- (iv) there is no public benefit in introducing the proposed local law, insofar as the proposed local law relates to 'waste' and regulating the disposal of 'waste' at waste facilities
- (v) the introduction of the proposed local law will cause the Logan City Council (the **Council**) to violate the competitive neutrality principle
- (vi) the consultation process with respect to the proposed local law is flawed and lacks genuine community engagement. Its timing over the January holiday break when many business owners are absent or on leave, fails all probity of open transparency and is mischievous in its timing. It is not in line with the Competition Policy Guidelines and
- (vii) the Queensland Competition Authority found in June 2012 Sunshine Coast had a competitive advantage over its competitors in relation to waste and recycling services via the making of its own local law and that this advantage should be removed.

2. The proposed local law

- (a) The proposed local law is intended to replace Chapter 5A: Waste Management by Local Governments of the *Environmental Protection Regulations 2008* (the **Chapter 5A provisions**) and section 7 in Part 2A of the *Waste Reduction and Recycling Regulation 2011* (**section 7**). The Chapter 5A and section 7 provisions were scheduled to expire on 1 July 2018.
- (b) Research finds, the regulation expiring evolved from the Health Act 1937. The Environmental Legislation Amendment Bill (no 2) 1995, repealed the Refuse Management Regulation 1983, and the Sanitary Conveniences and Nightsoil Disposal Regulation 1976. The regulation was remade to become sub ordinate legislation under the Environmental Protection Act 1994.

Numerous modifications have regularly been made to the original regulatory wording, but none has ever assessed the relevance of it in a 2017 modern world. The State Government by allowing it to expire has demonstrated its confidence the regulation is no longer relevant in the current regulated environment as it oversees waste management activities and has no relevance or standing for remaking.

Demonstrating this historic link is important as it causes Council to reflect upon what is the actual intent and practical rationale for keeping the structure of a 1937 regulatory framework in a more modern world with fundamentally different waste management and recycling systems and practices. What is its environmental, safety or risk mitigation purpose and what is its relevance in a more efficient and first world operating environment?

The state government has confirmed to both WRIQ and the Local Government Association of Queensland (LGAQ) that the Chapter 5A provisions and section 7 will be extended until the second quarter of 2018 during which time it will make a new regulation resolving the need to make individual local laws.

- (c) The proposed local law allows the Council to designate areas within which it may conduct general waste or green waste collection¹. General waste is defined to include both domestic and commercial waste².
- (d) This is in line with powers currently granted under the Chapter 5A Provisions and section 7, however the objects of the proposed Local Law 1 are broadly stated and use the singular word "waste" rather than limiting the scope of the Council's to domestic, or even general, waste³.
- (e) The definition of the term Waste in the making of this law is stated as "waste" has the meaning given in the Environmental Protection Act 1994, and includes anything that is specified to be waste under a subordinate local law.
- (f) This indicates that Council may intend to expand the scope of the proposed local law to cover all types of waste and recyclables, in addition to domestic, commercial and green waste. This gives the proposed local law a broader scope than the Chapter 5A provisions. This broader scope cannot be justified by environmental concerns, health, public safety or community amenity. Environmental regulation and operating conditions of the waste management and recycling industry is well managed by existing legislation and the Department of Environment and Heritage Protection.

3. Industry's concerns about the proposed local law

- (a) WRIQ's members acknowledge that domestic waste management is one of the central roles of local government. Industry is not trying to usurp Council's legitimate role as the provider of domestic waste services as that system functions very well.
- (b) Industry is, however, gravely concerned that Council is seeking to further restrict competition in the commercial waste and recycling industry without proper consultation or genuine consideration of the impact of the proposed local law to its community, and in expanding its control over all waste activities in its jurisdiction.
- (c) WRIQ argues the public interest and state interest tests applied by Council lack all transparency and fail to genuinely engage and inform the community on such profound commercial impacts the amending of its local law will have on its ratepayers. The law fails to demonstrate the linking of the definition 'waste' with other definitions of 'general waste' provisions.

3.1 Anti-competitive provisions in the proposed local law

- (a) Pursuant to section 15(a) of the *Local Government Regulation 2012*, a provision is anti-competitive if it creates a barrier to:
 - (i) entry to a market; or
 - (ii) competition within a market.
- (b) The proposed local law is anti-competitive in that it allows Council to create a monopoly over commercial waste collection services in designated areas thereby creating a barrier to

¹ Section 5, proposed local law

² Schedule to the proposed local law

³ Section 2, Objective of local law

competition in that market. Its inclusion of the term 'waste' gives Council unilateral power to control and eliminate all competition within its jurisdiction.

- (c) In addition to WRIQ's concerns about the impact on competition in the commercial waste collection industry, the objects of the law show that the proposed local law may extend further than regulating the collection, storage and disposal of domestic and commercial waste and may extend to all forms of waste collection and disposal⁴. This creates significant investment and business risk to the industry and of great uncertainty for business moving forward. For example, the intent to regulate the disposal of 'waste' at waste facilities undermines all existing industry assets whose owners have invested locally, who employ local people and who have obtained the required state approvals for the operation of the facilities. It will also detrimentally impact all companies with investments and assets in the proximity to this area. The ability of Council to interfere in the market as it chooses creates great instability and gross uncertainty. It will discourage all future investment in the industry.
- (d) Council fails to provide any material evidence in its public interest test by the making of this law with the intention to designate an area for general waste or green waste collection that will not interfere in the market by it monopolising commercial waste collections. Such actions are anti-competitive. Business will be forced to use Council's prescribed services without any option to "opt out". This not only impacts the waste management and recycling industry, it also has a negative impact on businesses who are left unable to negotiate the best deal for their waste collection services or organise their waste and recycling collection operations in a manner that best suits their business needs. It impacts all national clients and interferes in the 'free competitive operating environment'.
- (e) Council has failed to present its case in the state interest test nor the protocol and background documents that cause the making of this law.

3.2 Introduction of the proposed local law will increase prices for consumers

- (a) As set out at paragraph 3.1(b) above, the introduction of the proposed local law will allow the Council to introduce a self-imposed monopoly over waste and recycling collection services in designated areas. The fact that Council will tender for collection services in designated areas is no answer to this problem. The tender will allow one or two large waste collection companies to dominate the market for a significant period. This will have the effect of freezing the market for the length of the tender and it is unlikely that smaller businesses could continue to operate during this period.
- (b) By forcing businesses in designated areas to use the Council's waste collection services, Council eliminates the ability of business to negotiate the best rates for their rate collection services and prices will increase. As smaller operators go out of business, there will be less incentive for the remaining large operators to compete on price.
- (c) Further, the fewer operators left in the marketplace, the less incentive for operators to innovate or introduce technology and deliver higher quality services.
- (d) Ultimately, the result of the proposed local law will be higher prices for lower quality and less innovative services.

3.3 No Public Benefit

- (a) In addition to those matters set out in clause 1(3) of the Competition Principles Agreement, guidance on matters to be considered when assessing the public benefit can also be found in

⁴ See: paragraph 2(c) above.

*Re ACI Operations Pty Ltd.*⁵ In that case the following, non-exhaustive list was considered to be relevant to constituting the public benefit:

- (i) economic development including encouragement of research and capital investment;
 - (ii) fostering business efficiency particularly when it results in improved competitiveness;
 - (iii) industrial rationalisation resulting in more efficient allocation of resources at a lower or contained unit product cost;
 - (iv) expansion of employment or prevention of unemployment through efficient industries;
 - (v) employment growth in particular regions;
 - (vi) industrial harmony;
 - (vii) assistance to make small business efficient including promoting competitiveness;
 - (viii) improvement in quality and safety services and expansion of consumer choice;
 - (ix) supplying better information to consumers and to business to permit informed choices;
 - (x) promotion of equitable dealings in the market;
 - (xi) promotion of industry cost savings resulting in a contained lower price at all levels of the food chain;
 - (xii) development of import replacements;
 - (xiii) growth of export markets;
 - (xiv) steps to protect the environment.
- (b) The effect of enacting the proposed local law would not create any public benefit and will create a long-term detriment to the public of Queensland and to the market generally across Queensland applying the criteria in *Re ACI Operations Pty Ltd* and the Competition Principles Agreement.
- (c) These detriments include the following:
- (i) The proposed local law interferes with the normal operating market environment by forcing upon all commercial ratepayers and other businesses Council controlled waste and recycling services. This will result in significant dislocation of businesses of waste and recycling service providers throughout the Logan City Council and reduces choice for commercial premises in choosing their waste services.
 - (ii) If all commercial waste and recycling services were to be provided by Council's single contractor this will have a detrimental effect on all other local business providers already operating within the region. Many small family businesses providing commercial waste and recycling services will be restricted by this law and as result companies will collapse and local families will be financially compromised.
 - (iii) Council having control over all general waste will likely result in one contractor having direct access to providing all waste and recycling collections in the Council area. This

⁵ (1991) ATPR (Com) 50-108

will result in a long-term dislocation of the existing suppliers to the market, and will reduce the number of suppliers to the market during the term of that contract. This would result in a long-term disadvantage for the commercial rate payers, not to mention the significant detriment on the public throughout the region due to the loss of competitive waste services providers.

- (iv) A Council imposed monopoly will significantly reduce the incentive for technical development, efficiencies, improvement in productivity and performance within the industry. Industry is largely self-regulated and the largest drivers for continual improvement is the competitive nature of the existing structure of the market. This would be significantly damaged if the waste stream is no longer available within any commercially foreseeable time.
- (v) Examples of innovation and technical development within the industry in recent times includes vehicle engine design that meet and exceed high international emission standards, vehicle design changes to accommodate Australian operating conditions, compactor design and capability, compactor paddle design, vehicle tracking and camera systems, GPS and other commercial logging instrumentation systems, as well the materials currently used in compactor and chassis manufacturer. Many of these innovations have a positive environmental impact, demonstrating that competition is positive for the environment while a lack of competition could stymie such beneficial developments.
- (vi) The proposed local law will not encourage economic development and research or capital investment. The number of waste disposal facilities trucks and staff will remain materially unchanged, as this is dependent totally upon the number of collection services, not the number of competitors operating within the Councils' territory. This would potentially make other facilities owned by competitors redundant and likely have a negative effect on economic growth.
- (vii) There would be no contribution to economic or employment growth within the Logan City Council area. In fact, if smaller operators were forced to close, this would have a detrimental impact on local employment within the region.
- (viii) There would be no incentive for the improvement of quality or safety of the services even within the Councils' areas and certainly not within the wider public. In particular there would be a reduction rather than an expansion of consumer choice of service providers.
- (ix) The State Government has announced Queensland will introduce a Container Refund Scheme (**CRS**) in July 2018. If the proposed local law is introduced, Council will control the recycling operations for all commercial property owners in designated precincts. Councils will, therefore, control all containers generated by all commercial premises cover by the proposed local law.
- (x) In the future, a local business owner may choose to provide its own container for recyclables covered by the CRS or alternately seek to take its bottles or cans to a local network operation, however it will still incur the full Council's rate charge regardless. Under the proposed law Council would have total control to determine what containers are approved for holding waste and recyclables and how these rules are applied.
- (xi) It is therefore very unlikely any business owner would choose to participate in the CRS and this may, in the long term, affect the success of the CRS.

- (d) The public benefit must be for the general public and the Queensland market as a whole. No such benefit is identified and indeed there is a significant potential public detriment in respect of reduced competition, reduced incentive to innovate, stymy technological development, no economic benefits to the wider community, and potentially long-term dislocation of the waste and recycling services industry that will be the result of the proposed local law.

3.4 Violation of the competitive neutrality principle

- (a) Under section 43 of the *Local Government Act 2009*, a local council conducting a business in competition with the private sector should not enjoy a net advantage over competitors only because the entity is the public sector. The competitive neutrality principle applies if the public benefit outweighs the costs of implementation.
- (b) For the reasons set out in section 2.2 above, there is no public benefit in enacting the proposed local law (insofar as it relates to commercial waste and regulating the disposal of 'waste' at waste facilities).
- (c) The imposition of a mandatory waste collection levy over businesses in designated areas, without an opt-out provision, will provide the Council with a competitive advantage because no commercial provider can charge a levy to a potential customer, even when the customer's preference is not to use the supplier's service.
- (d) In this respect, we note that in June 2012, in response to a complaint from WRIQ, the Queensland Competition Authority found provisions similar to the proposed local law that were enacted by the Sunshine Coast Council and that it violated the competitive neutrality principle. It maintains that violation in 2017 against the Authority findings.
- (e) Notably, the Council has not considered the use of tax and subsidy mechanisms as an alternative method to achieve their stated objectives.

3.5 Concerns about the consultation process

- (a) Under section 38 of the *Local Government Act 2009*, the Council cannot make a local law that contains an anti-competitive provision unless Council complies with the procedures prescribed under a regulation for the review of an anti-competitive process. Section 15(3) states that the procedures to be complied with are set out in the *National Competition Policy – Guidelines for Conducting Reviews on Anti-Competitive Provisions in Local Laws (Competition Policy Guidelines)*. A copy of the Competition Policy Guidelines is annexure B to these submissions.
- (b) Under section 4 of the Competition Policy Guidelines, the review process must include "meaningful consultation with relevant businesses about the anti-competitive provisions".
- (c) In WRIQ's view, the Council has failed to comply with these requirements for the review result it conducting its limited consultation period during the Christmas and New Year holiday period when business owners and the community are taking leave and businesses are closed or staffed differently. As set out at paragraph 2(a) above, the State Government is intending to extend the Chapter 5A Provision. As such, there is no justification for Council to rush through the consultation process, particularly given the significant impact the proposed law will have on local business.
- (d) WRIQ reserves its rights to make future submissions in respect to the proposed local law and / or challenge the proposed local law on the basis that Council has failed to follow the Competition Policy Guidelines.

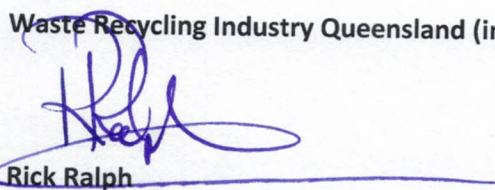
4. Conclusion

- (a) WRIQ strongly objects to the enactment of the proposed local law. As set out above, such law is anti-competitive and fails to deliver any public benefit. Further, the proposed local law will put the Council in a position to continue to breach the competitive neutrality principle enshrined in the *Local Government Act 2009*.
- (b) WRIQ does not consider that Council has adequately reviewed all alternative policy options as no tax and subsidy mechanisms appear to have been considered.

Finally, WRIQ remains concerned about the manner in which Council's review has been conducted and reserves its rights to challenge the proposed local law on this basis.

Sincerely Yours

Waste Recycling Industry Queensland (inc)



Rick Ralph

Chief Executive Officer