

23 March 2022

Ms Miriam Kolacz  
Acting Assistant Director  
Competition Exemptions/Mergers, Exemptions and Digital  
Australian Competition & Consumer Commission  
Level 4, 271 Spring Street  
MELBOURNE 3000

Dear Ms Kolacz

#### **EMRC Ors Application for Authorisation (AA1000587)**

Thank you for your email confirmation of the pre-decision conference to discuss the Eastern Metropolitan Regional Council and Ors draft determination on Friday, 25 March 2022 at 9:00am AWST (12:00pm AEST).

In relation to the submission lodged by the WRIWA, we wish to make the following comments.

"WRIWA considers the proposal represents:

- An anticompetitive agreement (s.45) "...engage with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition." (pg2 ACCC Guidelines on concerted practices) The proposal will preclude our members from competing for work and exclude them from
- work they are currently performing.
- Cartel conduct, (s.45 AD)
- The parties to this proposal will exclude competition from the market and negotiations will no longer be transparent.
- Exclusive dealings (s.47) ACCC Exclusive Dealings "exclusive dealing occurs when one person trading with another imposes some restrictions on the other's freedom to choose with whom, in what, or where they deal"
- The proposal will prevent the member councils from negotiation with the market, and our members would be excluded from tendering for the work."

#### **EMRC Response**

We note that your members are predominantly involved in waste sorting and recycling activities and that only one of your members, Cleanaway, is currently contracted to one of our participating Councils for all of its kerbside collections and one other for their recycling bin collection. Cleanaway are a dominant provider in waste collection in the Perth metropolitan area and service and have 21% of the market share of general waste collections and 28% of the market share of recycling collections. The Proposed Conduct would hold approximately 7% of the general waste market share leaving 93% (62% as private industry providers and 31% as in-house services) open to competitive public tender, so this would represent a minor impact on the private industry providers and even more so on the WRIWA providers (Cleanaway).

The fact that the Proposed Conduct will preclude your members from competing for work and exclude them from work they are currently performing for the Participating Councils as their existing contracts expire does not in itself constitute an anti-competitive agreement because of the test applied which is that the proposed Conduct “has or is likely to have the effect, of substantially lessening competition”. The EMRC waste collection service would hold approximately 7% of the general waste market which will not have the effect of substantially lessening competition. The ACCC has considered this in making its draft determination.

In relation to the comment about Cartel Conduct, *the Competition and Consumer Act* defines cartel conduct as follows:

A cartel exists when businesses agree to act together instead of competing with each other. This agreement is designed to drive up the profits of cartel members while maintaining the illusion of competition.

There are certain forms of anti-competitive conduct that are known as cartel conduct. They include:

- price fixing, when competitors agree on a pricing structure rather than competing against each other
- sharing markets, when competitors agree to divide a market so participants are sheltered from competition
- rigging bids, when suppliers communicate before lodging their bids and agree among themselves who will win and at what price
- controlling the output or limiting the amount of goods and services available to buyers.

The Proposed Conduct clearly fails this definition of Cartel Conduct as none of these forms of anti-competitive conduct is proposed or even possible. The fact that one WRIWA member will be unable to continue to provide waste collection services to two of the Participating Councils at the end of their contracts does not constitute cartel conduct. In relation to WRIWA's comment that the Proposed Conduct will cause negotiations to no longer be transparent, the EMRC understands that contract negotiations between the WRIWA members and Councils are always conducted in a confidential manner and lift rates negotiated in the contracts are not public information, so there is no loss of transparency as claimed.

“EMRC argues in its submission that:

- the establishment of a Regional Waste Collection Service will provide a benefit not derived from the provision of services by private enterprise broadly in the areas of economic and environmental benefit.
- the Regional Waste Collection Service should be considered as it uniquely can provide these benefits. WRIWA rejects this proposition:

### **Economic Benefit**

WRIWA has long argued that the current contract model, used by councils to outsource waste and recycling services, is inequitable, outdated and inevitably raises the costs to both councils and private enterprise.

The WA Government's Waste Avoidance & Resource Recovery Strategy Action Plan 2030 points to the necessity for consideration of Best Practice Contracting. The WA Department of Water and Environmental Regulation and the WA Waste Authority will be prioritising this issue in 2022.

WRIWA will be leading the WA industry response which is intended to reduce costs for both councils and private enterprise. Some of these costs are identified in the EMRC submission, such as short contracts which raise costs. WRIWA will be arguing for longer contracting periods which not only lower councils' costs of tendering but also reduce private sector costs. Overall, improvements in contract conditions result in overall cost savings but require both parties to work together.

Most of the proposed 'Cost saving and regional efficiencies' listed on page 21 of the EMRC submission could be achieved by better coordination among the member councils without the necessity for internal direct provision of waste services.

### **Environmental Benefits**

WRIWA rejects the assertion that the current contractual arrangements for waste collection within EMRC members' local government areas are deficient in terms of environmental protection.

WRIWA members have led the way in environmental management of waste and recycling in WA with our members investing extensively in upgrading and providing new best practice environmental facilities. In 2021 Cleanaway completed the construction of Australia's most efficient and environmentally compliant Material Recovery Facility. The MRF leads any other in Australia in terms of the efficiency of its resources recovery which is 99.5% for both fibre and plastics recovery and has a state of the art fire prevention and detection system."

### **EMRC Response**

The EMRC and its member Councils have been considering a regional waste collection service since 2007 and as part of this process, the alignment of contract expiry dates has been a key consideration and has been largely achieved and underpins the Proposed Conduct. Our largest member Council, the City of Swan has historically managed its collection in-house and prefers to continue that because of customer service and other efficiencies.

WRIWA argues for longer contract periods without detailing this in any way. Our Participating Councils have typically entered into 5-year contracts with the private sector which is fairly standard. The EMRC proposes to use ten-year contracts with the Participating Council which would seem to align with the WRIWA position.

What the EMRC referred to as environmental benefits from the Proposed Conduct includes:

- providing a standardised service, consistent messaging and thus reduced contamination issues and improved resource recovery.
- Reduced transport distances of vehicles from a centrally located depot at the EMRC's Hazelmere Resource Recovery Park, thereby reducing traffic congestion, air and noise pollution, fuel expenditure and carbon emissions.

We note WRIWA's comments in relation to the recently completed Cleanaway Materials Recovery Facility and trust this facility can continue to achieve efficient and environmentally compliant operation. The precursor to this plant burnt to the ground after only a short period of operation. We have inspected the GO Organics compost processing facility at Gingin and such an installation would not be considered by DWER as state of the art for the metropolitan area where most of the organic waste is generated, nor would it be able to process all of the future metro organic volume.

In conclusion, the EMRC is creating competition, whilst the industry is unfortunately rationalising (Veolia-SUEZ) and the EMRC has embraced a more holistic approach to waste management focussing on resource recovery and Net ZERO.

The EMRC is simply expanding its core activities to enable a vertical integrated network of community owned waste and resource recovery assets to maximise engagement of the waste generator, eg our community members. This in turn will minimise exposure to an ongoing reduction of industry players, as well as the current reactive nature of industry in the establishment of WARR infrastructure and services.

WRIWA argues that LGA waste operations are potentially heavily subsidised by charges through the rates to rate payers.

This potentially could occur in a regular LGA, however is definitely not applicable to the EMRC and we note the following:

1. EMRC does not have rate payers but customers.
2. All product and services supplied are charged under a participants agreement or contract.
3. The current customer landfill tonnage split is 56% from member councils and 44% commercial customers (such as the WRIWA members and other industries).
4. EMRC track their cost centres based on sites and activity, just as any WRIWA member would do.
5. EMRC has an annual budget, monthly reporting and strategic planning cycle.
6. The EMRC owners are 5 LGAs, has a governing board (Council) which determines investments and budgets. A similar governance to the WRIWA members and any other professional business.

From a transparency point of view, EMRC is actually disadvantaged compared to WRIWA members and other industry players:

- a. The EMRC fees and charges are publicly advertised, this is not widely adopted by industry.
- b. The EMRC council agendas and minutes are publicly available.
- c. The EMRC financials and expenditures are detailed in these agendas, down to individual creditors and amounts. These are monthly reports.
- d. The EMRC cannot borrow or raise funds, so it requires to operate at a surplus and create reserves to enable expansion into future activities.

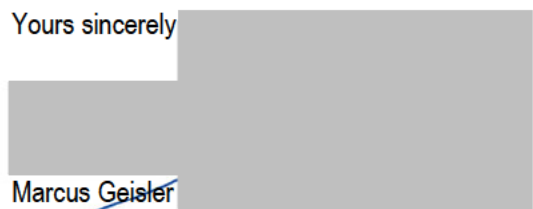
Whilst the EMRC is governed under the LG Act, it considers itself to be industry, as do the various levels of government. In its latest funding opportunity, Food Waste for Healthy Soils, the WA State Government as well as the Federal Government considered EMRC as 'industry'.

The EMRC participates as an active member and leader in several industry associations such as the Australian Landfill Owners Association (ALOA), promoting best practice waste and resource recovery and improving the industry standard overall. The EMRC is also a member of the Australian Organics Recycling Association (AORA) which includes private sector operators and local governments focussed on best practice organics processing and regulation. We would think that should be the thrust of WRIWA as well, not to limit existing service providers in their expansion.

All the WRIWA members listed in the objection are either suppliers or customers of the EMRC and we look forward continuing to work with industry. EMRC would welcome the opportunity to potentially join WRIWA.

We believe it to be vital to work together as one industry to enable WA to achieve its targets of the State WARR 2030 Strategy. Working together to build capacity and capability are key to our effort.

Yours sincerely

  
Marcus Geisler  
Chief Executive Officer