



Determination

Application for authorisation AA1000587 lodged by
the Eastern Metropolitan Regional Council (**EMRC**), the City of
Bayswater, the Town of Bassendean and the Shire of Mundaring
in respect of
a Regional Waste Collection Service
Authorisation number: AA1000587

Date: 27 May 2022

Commissioners: Cass-Gottlieb
Keogh
Rickard
Brakey
Carver
Crone
Ridgeway

Summary

The ACCC has decided to grant authorisation to the Eastern Metropolitan Regional Council (EMRC), the City of Bayswater, the Town of Bassendean and the Shire of Mundaring (the Applicants) in relation to the establishment of a Regional Waste Collection Service, where each of the 3 Participating Councils will enter into and give effect to a service agreement on the same or substantially similar terms with the EMRC. The Participating Councils are in Perth and make up 7% of households in the Perth metropolitan area. The Participating Councils will acquire the following services from the EMRC exclusively (except in limited circumstances where the EMRC approves otherwise): general waste, recyclables, Food Organics Garden Organics, bulk waste collection, and specified ancillary services.

The ACCC considers that the Proposed Conduct is likely to result in public benefits in the form of environmental benefits arising from the consistent branding of bins and collection vehicles in the Participating Councils, resulting in increased diversion of waste from landfill, and some transaction cost savings.

Interested parties, in particular competing waste service providers in Perth, raised several concerns about the likely impact of the Proposed Conduct. The ACCC has carefully considered these issues and concludes that while there is potential for some public detriment to arise from the Proposed Conduct, there are factors that reduce the likelihood of detriment arising and which limit the extent of any detriments, should they arise.

In particular, the ACCC has considered the potential for the Proposed Conduct to result in some public detriment in the form of:

- reduced competition in the supply of collection and ancillary waste services, and
- the provision of less efficient and higher-priced services to the Participating Councils, for reasons including the EMRC obtaining an exclusive 10-year contract without a competitive tender process.

The ACCC considers that the likelihood of either of these public detriments arising is low, and to the extent any detriment arises it would be limited.

In relation to the first potential public detriment, the ACCC considers that the Proposed Conduct, which involves sponsoring a new entrant, is likely to result in an increase (rather than a decrease) in competition, and that interested parties' concerns are more appropriately characterised as a loss of a (private) commercial opportunity to tender, rather than a loss of competition across the market. The Participating Councils comprise only a small proportion (7%) of households in metropolitan Perth and any exit of smaller waste service providers would most likely be in response to more intense competition from other suppliers seeking to replace council customers lost to the EMRC, which will benefit end consumers.

In relation to the second potential public detriment, the EMRC is likely to have an incentive to offer a competitive service and to innovate, and there are checks and balances in place to help ensure that the EMRC will provide a competitive service. In particular, the Participating Councils engaged consultants to review and model the feasibility of the proposal in order to make an informed decision that engaging the EMRC would be in their best commercial interests. Also, other waste service providers, who currently provide services to other councils in the Perth metropolitan region, can compete for a Participating Council's contract after their 10-year service

agreement with the EMRC expires, and can still supply some waste services to Participating Councils in limited circumstances.

The ACCC has also considered the following potential public detriments, which it is satisfied are unlikely to arise:

- the potential for the EMRC's competitive advantages to result in a misallocation of resources. The ACCC accepts that the EMRC has satisfied itself it meets its competitive neutrality obligations, including neutralising any competitive advantage through cost reflective pricing; and is therefore not displacing a more efficient market option as a result of any artificial competitive advantages
- the potential for the EMRC to recover losses from its collections service via disposal service charges from its 5 member councils (3 of whom are participating in the conduct). The ACCC notes the EMRC's submission that it does not use its secondary waste fund to fund operational expenditures and would similarly not use it to subsidise the Proposed Conduct. The ACCC also considers it has not been demonstrated that the Proposed Conduct would relax the constraints on the EMRC such that it could raise rates to non-Participating Councils for waste disposal services, and
- the potential for the EMRC to 'creep' into other services or create a precedent for future applications.

The ACCC is therefore satisfied, on balance, that the Proposed Conduct is likely to result in a public benefit that would outweigh the likely public detriment, and therefore result in a small net public benefit.

The ACCC has decided to grant authorisation until 30 June 2033, rather than until 2040 as requested. This allows for a one-year planning period to establish the service and then for all Participating Councils to enter and give effect to a 10-year service agreement with the EMRC (except for the Shire of Mundaring's recycling services, which would continue to be provided under its existing contract with a commercial service provider until 2028).

If the Applicants wish to re-apply for authorisation after the period of authorisation expires, or seek to vary the terms of their authorisation (for example, by adding other service streams or further participating councils), the ACCC will assess any such application afresh on its merits. That is, it will re-assess whether the net public benefit test is met or continues to be met, taking into account evidence of whether claims regarding public benefits and public detriments have resulted. Similarly, the ACCC will assess any similar applications from local or regional councils on a case-by-case basis.

1. The application for authorisation

- 1.1. On 1 November 2021, the Eastern Metropolitan Regional Council (**EMRC**), the City of Bayswater, the Town of Bassendean and the Shire of Mundaring (**Participating Councils**) (together, the **Applicants**) lodged application for authorisation AA1000587 with the Australian Competition and Consumer Commission (**ACCC**). The Applicants are seeking authorisation in relation to the establishment of a Regional Waste Collection Service, where each of the Participating Councils will jointly negotiate and administer, and enter and give effect to, service agreements with the EMRC, as described in more detail at paragraph 1.9 below. The Applicants seek authorisation until October 2040.
- 1.2. This application for authorisation AA1000587 was made under section 88(1) of the *Competition and Consumer Act 2010* (Cth) (**Act**). The ACCC may, in response to an application, grant authorisation which provides businesses with protection from legal action under specified competition provisions in Part IV of the Act, for arrangements that may otherwise risk breaching those provisions in the Act, but are not harmful to competition and/or are likely to result in overall public benefits.

The Applicants

- 1.3. The Applicants are:
- the EMRC, which is a Regional Local Government in Perth¹ that is comprised of 5 constituent member councils: the City of Bayswater, the Town of Bassendean, the City of Kalamunda, the Shire of Mundaring and the City of Swan² (**Member Councils**). Two Member Councils (the City of Kalamunda and the City of Swan) are not participants in the Proposed Conduct.
 - the City of Bayswater (**Bayswater**)
 - the Town of Bassendean (**Bassendean**), and
 - the Shire of Mundaring (**Mundaring**).

The EMRC

- 1.4. The EMRC currently provides services in waste management, resource recovery, environmental management and regional development in Perth's Eastern Region to both its Member Councils and other organisations and bodies. The EMRC is governed by the EMRC Council, which includes 2 councillors appointed from each Member Council.³
- 1.5. The EMRC currently owns and operates the Hazelmere Resource Recovery Park and Red Hill Waste Management Facility on behalf of its Member Councils. At the Hazelmere Resource Recovery Park, the EMRC processes, repairs and dismantles materials and waste for resale to the public or for reuse in industry – for example, converting waste timber into saleable animal bedding. At the Red Hill Waste Management Facility, the EMRC disposes of Member Council waste in engineered landfills and recovers scrap steel, cardboard, plastics, glass, e-waste and household hazardous waste at a Community Recycling Centre. The EMRC also operates 3

¹ Established under section 3.61 of the *Local Government Act 1995* (WA) in November 1993.

² The City of Belmont was also previously a Member Council of the EMRC, but from 30 June 2021, it had withdrawn from the EMRC.

³ [Amended Application Received](#), 15 November 2021, [1.1].

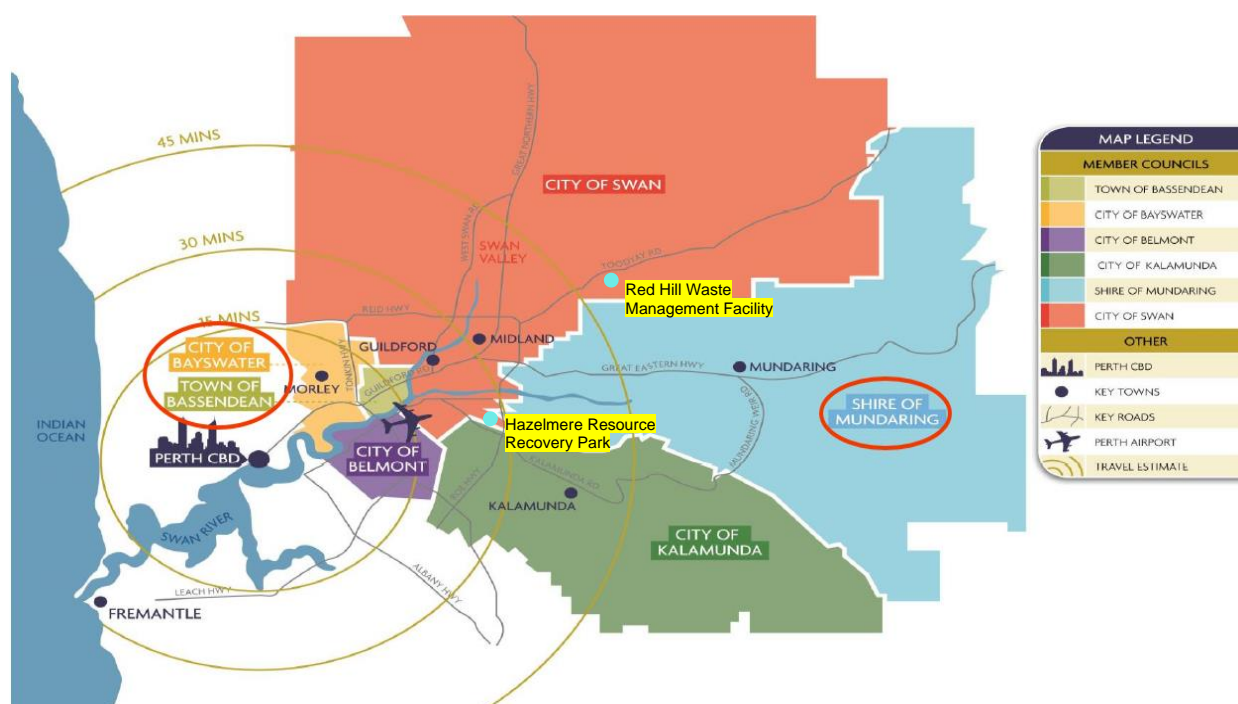
Member Council-owned waste transfer stations. The EMRC is currently tendering for a commercial-scale facility to process all Food Organics Garden Organics (FOGO) waste from Member Councils.⁴

- 1.6. In addition to waste management and disposal services, the EMRC also provides environmental management⁵ and regional development services.⁶

The Participating Councils

- 1.7. Each Participating Council is a Local Government and a body corporate⁷ situated in what is called the Perth Eastern Region (as shown on **Figure 1** below). The Perth Eastern Region forms the eastern part of the broader region of Perth Metropolitan councils, which is comprised of 29 Local Government Areas (LGAs).

Figure 1: Map of Participating Councils



- 1.8. The 3 Participating Councils currently acquire the majority of their collection and ancillary waste services from private industry service providers (as shown in **Table 1** below). However, they also acquire some other waste management services from the EMRC (including waste education, resource recovery at its Hazelmere Resource Recovery Park, waste recovery/disposal at its Red Hill Waste Management Facility, environmental management, and regional development services).

⁴ [Amended Application Received](#), 15 November 2021, [2.3].

⁵ Such as the 'Re-energising Perth's Eastern Region' project, a collaborative energy efficiency project co-funded by the EMRC, the Participating Councils and the Australian Government: <https://www.emrc.org.au/sustainability/environmental-services/environmental-projects/re-energising-perth-s-eastern-region.aspx>; <http://www.environment.gov.au/apps/energy/ceep/ceep-eastern-metropolitan-regional-council-final-report.pdf>.

⁶ The EMRC, [Resource Recovery Update](#), September / October 2009, accessed 2 December 2021.

⁷ Established under section 2.5 of the *Local Government Act 1995* (WA).

Table 1: Sizes and current waste service providers for Participating Councils

	Bassendean	Bayswater	Mundaring
Sizes of households and waste tonnages** (proportion of all metro councils)			
Population	15,800 (1%)	68,200 (4%)	39,131 (2%)
Rateable properties*	6,182 (1%)	27,000 (4%)	14,651 (2%)
Land area	10km ² (0.2%)	33km ² (1%)	634km ² (13%)
General waste	5,570 tonnes (1.2%)	16,504 tonnes (3.5%)	8,235 tonnes (1.7%)
Recyclables	1,447 tonnes (1%)	5,347 tonnes (3%)	3,631 tonnes (2%)
FOGO	0 tonnes	0 tonnes	0 tonnes
Verge Bulk	331 tonnes (1%)	6,461 tonnes (11%)	1,207 tonnes (2%)
Collection service providers			
General waste (contract expiry)	SUEZ <ul style="list-style-type: none"> Fortnightly 140Lt MGB*** Weekly 240Lt MB Fortnightly 240Lt MBG (2022 + 5-year option) 	Cleanaway <ul style="list-style-type: none"> Fortnightly 240Lt MBG (30 June 2023 + 5-year option) 	Volich <ul style="list-style-type: none"> Weekly 140Lt MGB (30 June 2023)
Recyclables (contract expiry)	Suez (2022 + 5-year option)	Cleanaway (30 June 2023 + 5-year option)	Cleanaway (30 June 2028)
FOGO (contract expiry)	Suez (2022 + 5-year option)	Cleanaway (30 June 2023 + 5-year option)	N/A
Bulk verge (contract expiry)	Suez (2022 + 5-year option)	N/A	Steann (30 June 2023)
Street litter (contract expiry)	Suez (2022 + 5-year option)	Cleanaway (30 June 2023 + 5-year option)	Volich (30 June 2023)
Skip bins (contract expiry)	N/A	Cleanaway (30 June 2023 + 5-year option)	N/A
Tip passes	4 per year (no charge)	3 per year (in lieu of skip bins)	1 tip pass to transfer stations (3 general waste disposal and unlimited recyclables)
Customer service	Provided by contractor	In-house & Cleanaway for bulk bin orders	
Transfer station	Red Hill (owned by EMRC)	Bayswaste (managed by EMRC)	Coppin/Mathieson Rds (managed by EMRC)

*Rateable properties statistics are based on the latest available ABS census data at the time of this decision i.e. 2016.

**Waste tonnage statistics are inclusive for the 19-20 calendar year. FOGO collection in Bassendean started in August 2020, Bayswater in March 2021 and Mundaring does not currently have FOGO collection.

***MGB: Mobile garbage bins.

The Proposed Conduct

1.9. The Applicants seek authorisation in relation to the establishment of a Regional Waste Collection Service operated by the EMRC, where the Participating Councils jointly negotiate and administer, and enter and give effect to, service agreements with the EMRC on the same or substantially similar terms, for the provision of the following services:⁸

- Domestic kerbside collection of:
 - Mixed general waste
 - Co-mingled dry recyclables
 - Food Organics Garden Organics (**FOGO**) collection as part a 3-bin system
 - Incidental commercial waste collection services to small businesses with services equivalent to domestic kerbside collection services
 - Bin maintenance, repair and replacement
 - Bulk waste collection service (mixed or specific) for the collection of larger household waste that cannot be disposed of within normal household bins
 - Event waste management
 - Street litter and illegal dumping management, and
 - Customer service (i.e. contact point for enquiries, complaints etc.)
- (together, **collection and ancillary waste services**)

(the **Proposed Conduct**).

1.10. Waste disposal and processing, commercial and industrial waste collection services, and construction and demolition waste collection services are not a part of the Proposed Conduct.⁹

1.11. The Applicants propose that the EMRC would develop an operations depot, own and operate a waste collection vehicle fleet and hire necessary staff. The EMRC currently plans to use its Hazelmere Resource Recovery Park to locate the operations depot and waste collection vehicles, as well as the associated service centre and customer service centre.

⁸ [Amended Application Received](#), 15 November 2021; [Applicants – clarification of proposed conduct](#), 25 January 2022.

⁹ [Amended Application Received](#), 15 November 2021, [2.1].

- 1.12. The Participating Councils will be required to acquire the collection and ancillary waste services from the EMRC exclusively, except in the following limited circumstances. The EMRC may allow Participating Councils to acquire some of the collection and ancillary waste services from alternative suppliers, but this would only be by exception and require the EMRC's approval (as discussed in paragraphs 3.92 to 3.93 below). The Applicants submit that the intention is for the EMRC to provide a 'full service to Participating Councils for rateable properties in their LGA on a standard contractual arrangement.'¹⁰ In relation to disposal and processing, the Participating Councils would continue to have the ability to use the EMRC's Red Hill and Hazelmere Resource Recovery Park facilities to process their waste if they choose, as they currently do.
- 1.13. The Applicants submit that the Proposed Conduct is not expected to directly affect any existing contracts as the intention is that Participating Councils will join the service agreement as their existing contracts expire. The Applicants are seeking authorisation until October 2040 because each Participating Council's contract length will be 10 years, and the latest that any Participating Council's service agreement would commence would be 2028 (for Mundaring's recycling services), as follows:¹¹
- Bassendean: 2022, if the EMRC was ready (otherwise 2023, whereby Bassendean would exercise a one-year extension option to its current contract)
 - Bayswater: 2023 (or 2028, if Bayswater were to exercise a 5-year extension option to its current contract)
 - Mundaring: 2023 (general waste, bulk verge and street litter) and 2028 (recycling).
- 1.14. The Applicants advise it is intended that the EMRC's Regional Waste Collection Services be offered to other councils at a later date, which may give rise to a new authorisation application.¹² However, the ACCC notes that the current application for authorisation is only made in respect of the EMRC and the Participating Councils, and authorisation is not currently sought for any other councils to participate in the Proposed Conduct.

Other authorisations

- 1.15. In broad terms, competition laws require businesses to operate independently of their competitors when making decisions about the prices they charge or are willing to pay, which businesses they deal with, and the terms and conditions on which they do business.
- 1.16. It is common practice throughout Australia for groups of councils to seek authorisation to collaborate and jointly procure waste services via a competitive tender process.¹³

¹⁰ In response the draft determination, SUEZ Recycling & Resource Recovery Pty Ltd submitted that there was significant inconsistency in how the Proposed Conduct was described at 3.61 of the Draft determination (as 'restricted to domestic waste from the 3 Participating Councils'), and the Applicants' statement that the EMRC intends to 'provide a full service to Participating Councils for rateable properties and schools' ([Amended Application](#) at 2.1; [Draft Determination](#) at [1.12]), which is clearly broader than domestic properties: [SUEZ submission](#), 9 March 2022, [4.10]. In response, the Applicants clarified that:

- 'rateable properties' refers to rateable properties that receive the equivalent of a domestic collection service and does not encompass services beyond the services outlined in the seven bulleted points at 2.1 of the Application, and
- the reference to schools is to be removed as there is a State Government supply agreement for schools: [Applicants' response to request for further information](#), 14 April 2022, [4].

¹¹ [Applicants' response to interested party submissions and ACCC request for further information](#), 6 December 2021.

¹² [Amended Application Received](#), 15 November 2021, [2.1].

¹³ See for example: [Gippsland Waste and Resource Recovery Group AA1000560](#); [Metropolitan Waste and Resource Recovery Group & Ors \(recycling sorting\) AA1000451](#); [Surf Coast Shire Council & Ors AA1000568](#).

This authorisation is sought on the basis that, as the councils may be in competition with each other to acquire waste services, an agreement between them to acquire services exclusively from one provider may be at risk of breaching competition law absent the legal protection provided by authorisation. The objective of such collaboration is generally to reduce transaction costs, pool resources and expertise, and achieve economies of scale.

- 1.17. This application differs in some respects, however, from the joint council waste procurement applications that are typically considered by the ACCC. This application involves a group of councils seeking to jointly outsource their waste service provision to their Regional Local Government body, rather than to a private sector provider. The ACCC is not generally called on to assess situations in which a council supplies waste management services to other councils, and/or engages in some form of self-supply. The EMRC would be a new provider of municipal collection and ancillary waste services in the Perth metropolitan region.

2. Consultation

- 2.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 2.2. The ACCC invited submissions from a range of potentially interested parties including waste and recycling service providers, industry bodies, government agencies/bodies and other councils within the Perth metropolitan region.
- 2.3. In response to the application for authorisation (and prior to the release of the ACCC's draft determination), the ACCC received 5 submissions from interested parties, summarised below:
- The Western Australian Department of Water and Environmental Regulation (**WA DWER**) **supports** the application on the condition that the services are tested on the open market at regular intervals, and are consistent with State policy as it exists from time to time (including Local Government waste plans required under the *Waste Avoidance and Resource Recovery Act 2007* (WA) (**WARR Act**)).
 - JJ Richards & Sons Pty Ltd (**JJ's Waste**) **objects** to the application on the basis that: it will preclude JJ's Waste from tendering for a significant proportion of the Perth municipal waste market; there is a risk of 'creep' into the EMRC providing services to the commercial and industrial sector; and it blocks competitors which can lead to inefficiencies in the delivery of services.
 - SUEZ Recycling & Resource Recovery Pty Ltd (**SUEZ**) **objects** to the application because: the Applicants seek to circumvent existing competitive tendering processes by taking control of waste streams from 3 councils; the application fails to substantiate a net public benefit or explain why there will be no substantial lessening of competition; the application contains unsubstantiated statements and at least one inaccurate statement; and the Proposed Conduct does not satisfy the 'executive functions test' under section 3.18(3) of the *Local Government Act 1995* (WA) (**Local Government Act**) as it would duplicate services currently provided by private industry, or comply with the Western Australia (**WA**) Government Policy Statement on Competitive Neutrality for public sector organisations.¹⁴

¹⁴ The WA Policy Statement on Competitive Neutrality was issued in accordance with the Competition Principles Agreement, as agreed by the Council of Australian Governments in April 1995 to implement the National Competition Policy.

- The City of Belmont **objects** to the application because: it submits that it does not satisfy the 'executive functions test' under s 3.18(3) of the Local Government Act as it would duplicate services already provided by private industry; the economies of scale and anticipated financial benefits for Participating Councils could easily be realised through a tender process; and the EMRC may extend its collection and ancillary waste services to other councils which could further impact private sector entities.
 - A confidential interested party **objects** to the application because: it will create the potential for the EMRC to operate in the commercial and industrial sector in which councils in Perth have been operating at a continual loss; there is a conflict of interest in allowing the EMRC to grow a commercial arm within its business units; and there are no limits on the EMRC seeking to change its offering into commercial and industrial or construction and demolition in the future, or engaging with other non-member councils.
- 2.4. On 10 February 2022, the ACCC issued a draft determination proposing to grant authorisation until 30 June 2033.
- 2.5. The ACCC received 3 submissions from interested parties in response to the draft determination. All 3 submissions oppose the application for authorisation.
- 2.6. A pre-decision conference was requested by The Waste and Recycling Industry Association of Western Australia (**WRIWA**) on behalf of its members and other interested parties and was held on 25 March 2022. A further 2 submissions were received from interested parties following the pre-decision conference.
- 2.7. Submissions made after the draft determination as well as during and in response to the pre-decision conference include:
- it is unlikely that the Proposed Conduct will deliver better education services as part of the Proposed Conduct than what is already provided by the WA Waste Authority (via WasteSorted and Better Bins Programs) and by the EMRC
 - any transaction costs savings resulting from the Proposed Conduct would be very minor, 'one off' savings
 - the geographical area occupied by the 3 Participating Councils is the more appropriate market definition, not the entire Perth metropolitan region
 - the Proposed Conduct may lead to higher prices for residents of the Participating Councils because: the EMRC will need to pass on its full cost base as the services are being established; the EMRC will not be able to provide bundled prices for commingled recyclables collections and processing; prices are unlikely to be lower because of lighter bins or optimised routes; and competitive pricing is more likely to result from a competitive tender process
 - the EMRC's reference to pricing its collections services as an 'open book' price with a set profit margin suggests that the cost component would be variable and passed on to the Participating Councils with a fixed margin, which is not how the Participating Councils currently seek or accept collection service prices from private industry
 - sponsorship of a new entrant is not likely to result in increased competition for the acquisition of waste services in either:

- the geographical area occupied by the Participating Councils (as there will be no meaningful competition for 10 years, and there has been no competition to award these exclusive contracts)
- the broader Perth metropolitan market (as there is no suggestion that the EMRC will compete in the broader Perth metropolitan market)¹⁵
- the Proposed Conduct will lead to a reduction in competition because: there are only 14 councils (not 26) remaining in Perth which are ‘fully contestable’; the Proposed Conduct may result in the exit of smaller waste service providers from the market; and the Proposed Conduct may impact on the likelihood of new entry
- there is a risk of cross-subsidisation between the collection and disposal services provided by the EMRC
- as a regional Local Government body, the EMRC operates with certain economic advantages compared to private industry, which it may use to subsidise the costs of its service, including: exemption from most taxes and charges; exemption from legal reporting requirements; government guarantees on debts; lower cost of capital; ability to purchase inputs from other government businesses at concessional prices; and freedom from the threat of takeovers, and
- granting authorisation will establish a precedent which other LGAs may rely on for future authorisation applications involving regional waste collection services.

2.8. In summary, the Applicants submit in response that:

- the consistent branding of bins and collection vehicles across the Participating Councils under the Proposed Conduct will drive higher quality source separation of waste and lower contamination across bins
- the EMRC intends to offer its collection and ancillary waste services to other LGAs at a later date
- the economies of scale from a joint approach to market for recycling bins to be processed at the one material recovery centre by the Participating Councils would deliver similar cost savings as a bundled recycling collection and processing service
- the EMRC’s secondary waste reserve is not used to fund operational expenditures and would not be used to cross-subsidise the Proposed Conduct
- the EMRC does not have considerable and significant economic advantages compared to private industry, and will not subsidise the cost of its operation from other activities. In contrast to private industry, the EMRC is required to publicly advertise fees and charges, meeting agendas and minutes, financials and expenditures in a transparent manner.
- the EMRC has elected to adopt a full cost attribution model to ensure that it complies with its competitive neutrality obligations and will price the waste services on a commercial basis and adopt cost reflective pricing, and

¹⁵ Before the draft, interested parties raised concerns that EMRC may engage with councils (outside of the Member Councils) and become too large a competitor in the market ([An Interested Party submission](#), 19 November 2021; [City of Belmont submission](#), 19 November 2021). Conversely, SUEZ submits that there is no suggestion that the EMRC will operate as a new entrant in the broader metropolitan Perth market, competing with other waste service providers ([SUEZ submission](#), 11 April 2022, [1]).

- the arrangement with the Participating Councils will be via contracts with a locked-in rate negotiated with agreed margins and agreed costings.
- 2.9. The issues raised by interested parties, and the Applicants' responses, are discussed in detail in the ACCC assessment section below.
- 2.10. Public submissions by the Applicants and interested parties are on the [Public Register](#) for this matter, as well as a record of the pre-decision conference.

3. ACCC assessment

- 3.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 3.2. The Applicants have sought authorisation for the Proposed Conduct on the basis that it would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act,¹⁶ may substantially lessen competition within the meaning of section 45 of the Act and/or may constitute exclusive dealing within the meaning of section 47 of the Act. Consistent with subsection 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (**authorisation test**).

Relevant areas of competition

- 3.3. To assess the likely effect of the Proposed Conduct, the ACCC identifies the relevant areas of competition likely to be affected by the Proposed Conduct.
- 3.4. The Applicants submit that the Proposed Conduct impacts the provision of waste collection services. They note the existence of a potential supplier-customer dynamic between LGAs in WA: LGAs may choose to outsource domestic waste services and invite private industry and other councils to bid; or may engage another council directly, which is common practice, specifically in regard to waste disposal and LGA-owned landfills.
- 3.5. The ACCC considers that the Participating Councils may also compete on some factors when acquiring collection services, such as the price they are willing to pay suppliers, the volume of waste they can offer and how they structure their requirements. For example, as SUEZ noted in its submission prior to the draft determination, individual councils can configure how collection services are tendered, such as tendering for collections services together (particularly general waste and recycling) or splitting these services among different suppliers.¹⁷ In practice, however, the ACCC notes that any such competition – at least in relation to waste volume and structuring of requirements – is likely to be limited.
- 3.6. In the draft determination, the ACCC identified the relevant geographic area for assessing the Proposed Conduct as the Perth metropolitan area, consisting of 29 LGAs.¹⁸ SUEZ originally submitted that it was more appropriate to consider each

¹⁶ In response to WRIWA's submission, the Applicants initially stated that 'the Proposed Conduct clearly fails this definition of Cartel Conduct...': [Applicants' response to submission by WRIWA](#), 23 March 2022, p.2. The Applicants subsequently clarified this by explaining that the EMRC will still seek authorisation in respect for the cartel conduct provisions (s45AD) of the Act: [Applicants' response to request for further information](#), 14 April 2022, [1]-[2].

¹⁷ [SUEZ submission](#), 19 November 2021, p.7.

¹⁸ [Draft Determination](#), 10 February 2022, [3.7].

Participating Council area as a relevant market.¹⁹ In its submission following the draft determination, SUEZ contended that, 'the geographical area occupied by the 3 Participating Councils together or alternatively, the entire geographical area serviced by the EMRC as part of the Proposed Conduct, is a more appropriate demarcation [for the relevant market(s)].'²⁰

- 3.7. The ACCC continues to consider the relevant geographic area of competition to comprise the entire Perth metropolitan area. In reaching this view, the ACCC has considered the conduct for which authorisation is being sought and the likely constraints on the Applicants as they engage in that conduct.
- 3.8. In this instance, where the Participating Councils seek to jointly acquire collection and ancillary waste services from a new supplier who is also an Applicant (being the EMRC) and whose entry would be enabled by the joint acquisition, the role of market definition is to highlight the main constraints on the purchasing and pricing policies of those 3 councils and on the EMRC as a new supplier. This assists the ACCC to assess the likely competitive effects of the Proposed Conduct. The key risk from any joint acquisition conduct is that the purchasers could use their enhanced position to drive down the prices, service quality and/or overall output of suppliers. The constraints on the Participating Councils as acquirers of collection and ancillary waste services include the demand for collection and ancillary waste services from other councils in the area that suppliers of these services formerly supplying the Participating Councils could turn to if the Participating Councils attempted to exercise their enhanced market (or monopsony) power. The ACCC notes that established suppliers such as SUEZ and JJ's Waste each supply collection services across the Perth metropolitan area and could redeploy Perth-based staff and equipment across that area as needed. Likewise, the constraints on the EMRC as a new supplier of collection and ancillary waste services include the supply of these services by other firms that do or could supply similar services – none of which limits their scope of actual and potential supply to the Participating Councils or to a single or small subset of councils in the Perth area. Therefore, in both cases, the ACCC maintains the view that a Perth-wide geographic market is appropriate.
- 3.9. The ACCC therefore remains of the view that the areas of competition relevant to considering the application are the supply and acquisition of the following services in the Perth metropolitan region:
- general waste, recycling, FOGO and bulk waste collection
 - bin maintenance, repair and replacement
 - event waste management
 - street litter management and illegal dumping management
 - customer service for the above services, and
 - landfill and resource recovery services.
- 3.10. The ACCC notes that of the 29 Perth metropolitan councils, the Participating Councils represent an estimated 7% of all Perth households, with the other 26 councils representing the remaining 93% of all Perth households (discussed further in paragraphs 3.72 to 3.76 below).

¹⁹ [SUEZ submission](#), 19 November 2021, p.7.

²⁰ [SUEZ submission](#), 9 March 2022, p.6.

Future with and without the Proposed Conduct

- 3.11. In applying the authorisation test, the ACCC compares the likely future with and without the Proposed Conduct. The Applicants submit that the future without the Proposed Conduct could be the status quo, with Participating Councils seeking their own contracts via the Western Australian Local Government (**WALGA**) Preferred Supplier Panel (discussed further in paragraphs 3.19 and 3.22 below). The Applicants also submit that the EMRC could manage an expressions of interest and tender process to benchmark the outsourcing of the combined 3 Participating Councils' collections.
- 3.12. Given the current practice of the Participating Councils, the ACCC considers that in the likely future without the Proposed Conduct, each of the Participating Councils would continue with their respective contracts for the acquisition of collection and ancillary waste services until the end of their contract periods. The Participating Councils would then individually enter new contracts for those services (either with their existing service provider or a new provider), likely via the WALGA Preferred Supplier Panel. Additionally, the EMRC would continue to provide the other services it already provides to Member Councils, such as waste disposal and recovery services, as described in paragraphs 1.4 to 1.6 above.
- 3.13. The ACCC notes that the Applicants also raise the possibility of the EMRC carrying out some form of joint expressions of interest and tender process in the future. Setting aside the question of whether the Applicants would make a new authorisation application before undertaking some other form of joint conduct, the ACCC considers insufficient detail has been provided to support a conclusion that such a process is likely to occur in the future without the Proposed Conduct.

Public benefits

- 3.14. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (**Tribunal**) which has stated that in considering public benefits:

...we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.²¹

- 3.15. The Applicants submit that they seek to engage in the Proposed Conduct to provide a centralised Regional Waste Collection Service that will result in public benefits in the form of:

- cost savings and regional efficiencies
- greater economies of scale
- environmental benefits.

- 3.16. The Applicants submit that the Resource Recovery Project is consistent with the WA Government's Waste Avoidance and Resource Recovery Strategy (2030) (**Waste**

²¹ *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

Strategy). They submit that aligning the Proposed Conduct with the Waste Strategy will provide a mechanism to achieve the WA Government's targets and objectives under the Waste Strategy and provide increased consistency in waste service planning and management in the Participating Councils.

3.17. The ACCC has considered the following potential public benefits:

Transaction cost savings

3.18. The Applicants submit that the Proposed Conduct will reduce negotiation and transaction costs when tendering for new waste services, as well as procurement and contractor management workloads, for Participating Councils. The Applicants submit that the costly and time-consuming tender process acts as a barrier to re-tendering in the event of performance issues with an appointed supplier which, when coupled with potential disruptions to services, provides a degree of power to incumbent suppliers over councils.²²

3.19. The ACCC requested that the Applicants provide an estimate of the expected reduction in transaction costs for the Proposed Conduct and the time period over which the reduction is expected to occur. In response, the Applicants stated that they expect the initial costs each Participating Council will incur in managing and monitoring the service will be similar to their current expenditure under contracts with private sector providers procured through the WALGA Preferred Supplier Panel (an estimate of which was provided to the ACCC on a confidential basis). This includes the costs of setting up administration and invoicing systems, monitoring performance, attending monthly performance meetings, monitoring data, and contract budget management. However, the Applicants submitted that the Participating Councils' service agreements with the EMRC should not require the same level of contract management as private sector contracts. The Applicants submitted that the costs of each Participating Council should reduce as the contracts proceed and confidence grows in service delivery and reporting, with savings expected to eventuate after the second year of the Regional Waste Collection Service.²³ The Applicants also expect that the number of staff hours involved in monitoring the service across Participating Councils will be alleviated as a result of EMRC's reporting being tailored to, and agreed to by, the Participating Councils. Therefore, the savings would be seen in the number of hours across multiple Participating Councils that staff would need to be involved in managing the service.²⁴

3.20. In response, SUEZ submits:

- transaction cost savings are likely to be minimal (if they eventuate at all) because the WALGA Preferred Supplier Panel is an existing procurement arrangement that provides councils with a cost-effective and simplified process to purchase collection and ancillary waste services
- it is possible transaction costs may increase under the Proposed Conduct, given it will require several councils to work together, reach agreement and resolve matters. This will require additional internal coordination and may add an administrative burden that outweighs any potential transaction costs savings, and
- the public tender process typically leads to increased competition and lower prices and should not be criticised on the basis that it involves time and costs.²⁵

²² [Amended Application Received](#), 15 November 2021, [8.3].

²³ [Applicants' response to ACCC request for further information re costs of service](#), 4 February 2022.

²⁴ [Applicants' response to ACCC request for further information](#), 14 April 2022, [9].

²⁵ [SUEZ submission](#), 9 March 2022, [3.2].

- 3.21. WRIWA submits 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. WRIWA notes that it will be leading the WA industry response to reduce these costs by arguing for longer contracting periods. WRIWA also submits that most of the proposed transaction cost savings raised by the Applicants could be achieved by better coordination among the Participating Councils without the necessity for internal direct provision of waste services.²⁶
- 3.22. The ACCC considers that the Proposed Conduct is likely to result in some transaction cost savings compared to the likely future without, where each Participating Council individually procures services through the WALGA Preferred Supplier Panel (which does already aim to streamline procurement to an extent by only using suppliers who have been pre-qualified and appointed by WALGA)²⁷ and manages the ongoing administration of individual contracts (as noted in paragraphs 3.11 to 3.13 above). This is particularly the case for Mundaring, which currently engages 3 service providers for 4 different waste streams. The ACCC notes that while any savings in the number of staff hours spent monitoring the service are expected to eventuate after the second year of the Regional Waste Collection Service, we consider those savings would be likely to continue to be realised for the duration of the term of authorisation.
- 3.23. On the other hand, the ACCC further considers that any transaction cost savings will be partially offset by the additional costs that Participating Councils may incur in the coordination and administration of their service agreements, such as attending joint meetings. For example, the Applicants note that any 'across the board' adjustments to services, such as if Western Australia were to move towards a 4-bin system, would require agreement from all Participating Councils.²⁸ The EMRC would consider how best to accommodate this adjustment, consult with the Participating Councils on how best to implement it to meet their needs, then make a recommendation. Conversely, a minor adjustment to one Participating Council's services (such as altering the number of bulk waste collections per year) could be implemented by varying the relevant individual service agreement as agreed between the relevant Participating Council and the EMRC, and would not require the separate agreement of all Participating Councils.²⁹
- 3.24. Overall, the ACCC considers that the Proposed Conduct is likely to result in a public benefit in the form of some transaction cost savings, in particular over the longer-term.

Improved efficiencies

- 3.25. Prior to the draft determination, the Applicants submitted that the Proposed Conduct will service a greater number of households and a greater land area, which will result in economies of scale in the delivery of services and thereby assist to reduce financial risk and increase operational certainty for Participating Councils.
- 3.26. The Applicants initially relied on a review of the model for the Regional Waste Collection Service conducted in 2020 by Talis Consultants (**2020 Talis Consultants report**), which found that there was potential for the EMRC to provide a cost competitive service to its Participating Councils based on the participation of all 6

²⁶ [WRIWA Submission](#), 24 February 2022, p. 2.

²⁷ WALGA, [Preferred Supplier FAQ](#), accessed 2 December 2021. Under the *Local Government (Functions and General) Regulations 1996*, a tender exemption applies to Preferred Supply Panels.

²⁸ [Applicants' response to ACCC request for further information](#), 15 November 2021.

²⁹ [Applicants' response to ACCC request for further information](#), 15 November 2021.

Member Councils (at that time).³⁰ SUEZ queried (as part of its submission set out in paragraph 3.33 below) the Applicants' statement that 'any cost benefits would likely be realised through efficiencies in services provided if most and preferably all Member Councils committed to a service agreement'³¹ – suggesting this indicates that the level of participation (and therefore of efficiencies and cost savings) is still uncertain.³²

- 3.27. The Applicants subsequently acknowledged that since Talis Consultants provided its initial business case, 3 Member Councils have removed themselves from the arrangement, meaning the economies of scale have changed and the lift rates are therefore not as cost competitive for the collection and ancillary waste services.
- 3.28. However, the Applicants submit that, overall, efficiencies will be similar to the private sector and the EMRC can still provide a competitive collection service compared to private sector providers. They consider that based on revised modelling undertaken for only 3 Participating Councils (provided to the ACCC on a confidential basis), in the initial roll out of the service, the cost per service will be equal to or more than the private sector until all 3 Participating Councils are fully participating and the efficiencies are realised. The Applicants note that the revised modelling does not reflect the likelihood that the EMRC's cost per service for **general** waste should be reduced for Participating Councils using 3 bins (currently Bayswater and Bassendean), because their general waste bins will be lighter by an estimated 15.8%, thereby allowing trucks to service more properties on each run and save costs in driver time, fuel and maintenance.
- 3.29. Further, the Applicants highlight that the EMRC's modelled cost per service does not include any reductions in the cost per service resulting from the optimisation of collection routes (as described in paragraph 3.31 below), although have advised (both prior to and after the draft determination) that they do not have an estimate of the magnitude of these savings at present.³³ The Applicants also note that the EMRC can purchase waste vehicles, fuel, lubricants, vehicle parts and systems at competitive levels using the WALGA Local Government and state government contract arrangements.
- 3.30. Further, the Applicants submit that there are non-monetary public benefits to the Proposed Conduct, including the EMRC:
- providing further investment in resource recovery
 - focusing on continuous improvement of service, flexibility and consolidation of resources – particularly for litter management, event waste management, non-rateable properties, and reactive services (such as illegal dumping, spills, and bulk waste services). The Applicants submit that the Proposed Conduct would reduce the replication of internal waste management resources for each Participating Council and provide opportunities to consolidate existing council staff, pool resources, develop a centralised call centre, and develop a central

³⁰ This 2020 report followed an initial report from 2008, when the EMRC engaged Bowman & Associates Pty Ltd to conduct a feasibility assessment of the proposal for an in-house collection and ancillary waste service. This 2008 report was based on the participation of 6 councils who were members at the time. It found that such an arrangement would not represent a significant cost saving, with the initial capital investment of \$26 million netting an annual return of \$0.5 million (or less than 2%), and further consideration was deferred.

³¹ [Amended Application Received](#), 15 November 2021, p.9.

³² [SUEZ submission](#), 19 November 2021, p.4.

³³ [Applicants' response to ACCC request for further information re costs of service](#), 4 February 2022; [Applicants' response to ACCC request for further information](#), 14 April 2022, [21(d)].

waste information database to assist in policy development, monitoring and evaluation of service delivery and investment decisions

- affordably conducting trials of new services at minimal additional cost to improve efficiencies, monitor performance, and react to service changes if required
- introducing new services as a region (such as FOGO, glass or plastic film collections) by capitalising on existing resources, and
- collecting a greater range of information for reporting, data analysis and feedback about trends, education and changes that can improve efficiency and enable innovation. This would include conducting waste audits to monitor household behaviour and behaviour change, and conducting long-term forecasts regarding population growth, thereby enabling improved planning of the Participating Councils' domestic waste requirements.

3.31. The Applicants also submit that, compared to a situation where the Participating Councils each contract separately with private sector providers, the Proposed Conduct will reduce transport distances of vehicles from a centralised depot and optimise collection routes through the region. Collection vehicles would be able to service more than one Participating Council in any run which will assist to optimise collection routes. The Proposed Conduct will allow vehicles to attend missed services without the need to send out another vehicle, creating efficiencies in the service. The Applicants' 2020 Talis Consultants report cost model has factored in a substantial investment in appropriate route optimisation software and onboard monitoring systems (that factor in traffic conditions, school zone restrictions, driver hours and breaks, vehicle fuel consumption and range), which they submit is critical to high quality service delivery. The Applicants also submit that the optimisation of truck runs provides cost efficiencies by reducing the number of trucks required for the service, the number of trucks on the road and driver time, thus reducing costs (including driver wages and operational costs such as diesel and petrol and maintenance) and assisting to extend the life of the waste collection vehicles.

3.32. Further, the Applicants submit that the disposal location (Hazelmere) being closer to the majority of the Participating Councils will lead to fewer vehicles sharing the road. They note, however, that while the efficiency of housing the trucks at the Hazelmere depot is still likely to stand, the shared depot management costs (such as mechanical support services) may not be optimised in the same way as if they were housed with a larger fleet.

3.33. SUEZ submits that:

- the EMRC fails to demonstrate how it would achieve greater economies of scale compared to established private industry operators, many of which (like SUEZ) have access to national and international research, development, technological innovations and buying power. The EMRC would be required to establish a collection service from scratch (in circumstances where there are established service providers with economies of scale), which would require significant capital investment in plant, technology, software development and personnel, which would all need to be recovered from Participating Councils (and ultimately their residents)
- the statement that the Proposed Conduct will reduce transport distances is unsubstantiated. Private industry operators have well established and strategically located depots across Perth to reduce transport distances between depots and disposal sites, and

- waste collection services require ongoing substantial capital investment in new technologies to drive continuous improvement and ensure service offerings remain at least equal to those of its competitors, and such capital expenditure requires a substantial customer base to achieve genuine economies of scale.³⁴
- 3.34. The City of Belmont similarly submits that economies of scale and the anticipated financial benefits for Participating Councils could just as easily be realised through a tender process that combines the volumes and needs of all the Participating Councils, awarded to a suitable contractor from the private sector.³⁵
- 3.35. In response to the City of Belmont's submission, the Applicants submit that the EMRC has been investigating opportunities for a regional waste collection service since 2007. Their discussions with private sector contractors and council in-house teams indicate that the scope of savings by consolidating contracts is actually quite small, and that the bulk of the observed savings are due to highly efficient operations being run in-house.
- 3.36. Following the draft determination, SUEZ raised 2 new issues relating to the likely increase in prices under the Proposed Conduct. In particular, SUEZ submits that:
- the Proposed Conduct may lead to higher prices because the EMRC will have to pass on the full cost base to the Participating Councils as the services are being established, and
 - the EMRC will not be able to provide bundled prices for commingled recyclables collections and processing (as SUEZ currently provides to the Town of Bassendean), as the EMRC does not currently operate a material recovery facility.³⁶
- 3.37. SUEZ also submitted it is unlikely that lighter bins or optimisation of service routes will lead to any cost savings, and certainly not cost savings which would be substantial enough to meaningfully reduce service rates over the authorisation period.³⁷
- 3.38. In response to SUEZ's submission regarding likely price increases, the Applicants confirm that the EMRC will be passing on the full cost base to the Participating Councils as the services are being established.³⁸ In response to SUEZ's submission regarding bundled prices, the Applicants submit that the economies of scale from a joint approach to market for recycling bins to be processed at the one material recovery centre by the Participating Councils would deliver similar cost savings to a bundled recycling collection and processing service. The Applicants note that the EMRC currently provides general waste landfill disposal and FOGO processing to the Participating Councils at a member rate, in addition to waste education, resource recovery, environmental management and regional development services.³⁹

³⁴ [SUEZ submission](#), 19 November 2021, p.5-7.

³⁵ [City of Belmont submission](#), 19 November 2021.

³⁶ [SUEZ submission](#), 9 March 2022, [4.2(a)-(b)].

³⁷ [SUEZ submission](#), 9 March 2022, [4.2(c)].

³⁸ Prior to the draft determination, the Applicants had submitted that Swan was going to be the original council to join - providing the initial base fleet and support services to transition (including experienced drivers and supervisors), and providing the economies of scale for the mechanics services and repairs, customer services and management to build on. Without Swan, the Participating Councils will instead absorb a significant proportion of the set-up costs, and there is a staffing risk with recruiting drivers and supervisors who are not already experienced in the region: [Applicants' response to interested party submissions and ACCC request for further information](#), 6 December 2022, p.2. The Applicants later clarified that it was incorrect that Swan could have provided the initial base fleet and support services to enable the EMRC to transition into such a collection service; rather what was originally considered (in 2007) was that either the EMRC or the City of Swan could provide an in-house regional waste collection service: [Applicants' response to ACCC request for further information](#), 14 April 2022, [21(c)].

³⁹ [Applicants' response to request for further information](#), 14 April 2022, [21(a)-(b)].

ACCC view on improved efficiencies

- 3.39. The ACCC notes that, in contrast to the City of Belmont's submission, the ACCC is not comparing the Proposed Conduct against a future in which the Participating Councils tender jointly for a private sector provider for their combined volume, but a future in which each Participating Council tenders individually (using the WALGA Preferred Supplier Panel).
- 3.40. As noted in paragraph 3.12 above, in the most likely future without the Proposed Conduct, private sector providers, including some large established operators, would continue to service a number of councils in the Perth metropolitan region concurrently, as they do now. The ACCC considers that, if one or more Participating Councils contracted individually with such a private sector provider, that provider may already have or could achieve similar or greater economies of scale compared to those that the EMRC could achieve by combining the 3 Participating Councils' collection and ancillary waste service requirements (for example, from the EMRC consolidating resources and developing a centralised call centre). In any event, based on the material provided to date, including the EMRC's own submission that the economies of scale have changed due to there being only 3 (rather than 6) Participating Councils, the ACCC does not have sufficient information before it to conclude that economies of scale are likely to result from the Proposed Conduct.
- 3.41. As acknowledged by the Applicants, and reflected in cost modelling it provided to the ACCC confidentially, in the initial roll out of the service, the EMRC's cost per service for general waste, recycling and FOGO collection services will be equal to or more than the private sector. The modelling indicates that (at least initially) the EMRC's service will be more expensive for Bassendean and Bayswater for all 3 streams, but cheaper for Mundaring for both its collection services (general waste and recycling). However, as noted above, the Applicants submit that for Participating Councils using 3 bins (Bassendean and Bayswater), their cost per service for general waste may be lower than the modelled costs due to lighter bins, although this reduction is not expected to affect the EMRC's modelled costs for recycling and FOGO collection. Further, the Applicants expect that the EMRC's modelled cost per service will be further reduced as a result of efficiencies from the optimisation of collection routes. The ACCC does not have sufficient evidence to conclude that the EMRC's costs of collection services would be lower, overall, than the private sector over the modelled period (2023 to 2033).
- 3.42. To the extent cost savings are realised, the ACCC considers these efficiencies may be achieved because the Proposed Conduct may enable the EMRC to optimise collection routes and better utilise its fleet, including realising efficiencies from housing the fleet at the Hazelmere depot located close to (although not within any of) the Participating Councils' LGAs. However, the Applicants have not provided further evidence to substantiate their claims about such cost savings, or any estimate of their likely magnitude. The ACCC notes that any efficiencies generated from the design of more efficient collection routes across Participating Councils are likely to be confined to LGAs located close to each other. As Mundaring is not adjacent to the other Participating Councils but sits around 10km to the east, and its recycling stream would not be included in the Regional Waste Collection Service until 2028, the potential magnitude of this benefit is likely to be reduced. In addition, the ACCC does not have sufficient material to be satisfied that the Proposed Conduct is likely to result in efficiencies from route optimisation or consolidation and centralisation of resources that are greater than the future without the Proposed Conduct. This is because the ACCC expects that large, established private sector providers holding multiple council contracts may also be able to achieve similar efficiencies.

3.43. The ACCC considers that, compared against the future without, the Proposed Conduct may result in other efficiencies due to the EMRC's vertical integration as a landfill and resource recovery site operator (for example, allowing it to optimise the scheduling of disposals at its sites), and by enabling the EMRC to gather more wide-ranging data and more efficiently trial, monitor and implement new services. However, the ACCC has not been provided with sufficient material to be satisfied the magnitude of any likely efficiency gains is likely to be greater than what could be achieved by private sector providers. Further, it would likely be some time before the EMRC establishes its services and such efficiencies begin to be realised, which would likely reduce the potential magnitude of these benefits, at least in the short term.

Improved environmental outcomes

3.44. The Applicants submit that the Proposed Conduct will contribute to achieving the Waste Strategy objective to 'protect the environment by managing waste responsibly', and its targets for waste reduction, by:

- providing a standardised service across the region, which will play an important role in educating residents and minimising contamination, therefore maximising diversion of waste from landfill. The Applicants note that there is already some consistency across Participating Councils for waste collection services but submit there are differences in presentation and allowable bin content, as well as considerable variation in bulk waste collection and street litter information. The Applicants submit that lack of consistent messaging can generate confusion and result in contamination issues, which can reduce the value of recoverable resources and result in loads of recyclables or organics being sent to landfill
- reducing transport distances of vehicles from a centralised depot and optimising collection routes, thereby reducing traffic congestion, air and noise pollution, fuel expenditure and carbon emissions, and
- upgrading of plant and equipment which will allow for newer, greener and more efficient technologies.⁴⁰

3.45. SUEZ submits that:

- the services included in the scope of the Regional Waste Collection Service are collection services and as such have no direct impact on waste recovery⁴¹
- as the operator of one of Perth's largest landfills, the EMRC is arguably not incentivised to divert waste away from landfill⁴²
- the WA Government (through the Waste Authority's WasteSorted and Better Bins Program) already supports councils to deliver consistent and standardised kerbside collection systems. The EMRC also provides education services to Member Councils as part of its existing disposal services. It is unclear how the EMRC would deliver further standardisation or more consistent messaging to reduce 'confusion' that results in contamination while still accommodating individual community requirements for Participating Councils. The needs of a city-based council such as Bayswater are arguably very different to those of a predominantly rural area such as Mundaring⁴³

⁴⁰ [Amended Application Received](#), 15 November 2021, p.34.

⁴¹ [SUEZ submission](#), 19 November 2021, p.6.

⁴² [SUEZ submission](#), 19 November 2021, p.6.

⁴³ [SUEZ submission](#), 19 November 2021, p.4; [SUEZ submission](#), 9 March 2022, [3.1(b)].

- if residents in 7% of Perth households are provided with more consistent education services, then any environmental benefits arising from that education are unlikely to be meaningful⁴⁴
- as noted above in paragraph 3.33, the statement that the Proposed Conduct will reduce transport distances is unsubstantiated,⁴⁵ and
- a regional council would not be in the same position to offer innovations to Participating Councils as private industry can, due to the long-term nature of the R&D and substantial costs involved. It queries how often the EMRC is proposing to upgrade its plant and equipment to allow for 'newer, greener and more efficient technologies'.⁴⁶

3.46. In relation to SUEZ's concerns, the Applicants submit that:

- the EMRC has adopted the principles of the Waste Strategy, which include targets for a 10% reduction in per capita municipal solid waste by 2025 and a 70% increase in waste material recovery by 2030
- the consistent branding of bins and collection vehicles will mean that the residents in the Participating Councils will get the same messaging about the different bin systems, recycling and resource recovery that will drive higher quality source separation of wastes and lower contamination in the different bins, as well as deliver environmental benefits from the reduction in waste going to landfill. At present, there are 3 different collection contractors servicing each Participating Council which means 3 lots of branding and potentially 3 lots of waste education messaging. For example, rather than the 3 Participating Councils currently having different messaging for residents regarding what is allowed in their recycling bin (due to the 3 contractors using different materials recycling facilities), the EMRC would contract with one materials recycling facility resulting in consistent messaging to households about their disposal behaviour. Collection vehicles would also have the same livery and messages related to waste disposal, recycling and resource recovery, EMRC contact information etc.⁴⁷
- the WA Waste Authority does not provide education services directly but funds a range of programs to support the Waste Strategy, and
- describing Mundaring as a rural community is not accurate. Mundaring considers itself a medium-sized Perth metropolitan LGA with a mix of urban and rural residential areas. Mundaring residents are just as receptive to the EMRC education services as the inner-city councils of Bassendean and Bayswater, and perhaps more so.⁴⁸

3.47. The ACCC notes that the EMRC currently provides a number of waste education services and programs to the Participating Councils. The EMRC's waste education team is also a member of the Consistent Communication Collective, a forum overseen by WALGA that ensures consistent communication in relation to waste management.⁴⁹

⁴⁴ [SUEZ submission](#), 9 March 2022, [3.1].

⁴⁵ [SUEZ submission](#), 19 November 2021, p.6.

⁴⁶ [SUEZ submission](#), 19 November 2021, p.6.

⁴⁷ [Applicants' response to ACCC request for further information](#), 9 May 2022.

⁴⁸ [Applicants' response to submission by SUEZ Recycling & Recovery Pty Ltd](#), 24 March 2022; [Applicants' response to request for further information](#), 14 April 2022, [11], [19].

⁴⁹ [Applicants' response to request for further information](#), 14 April 2022, [17].

- 3.48. The ACCC considers that to the extent the Proposed Conduct enables the EMRC to provide more consistent education services to Participating Councils and therefore maximise diversion from landfill, this will likely result in a public benefit. However, as the EMRC already provides consistent waste education services to all Member Councils and the WA Waste Authority already provides funding for the WasteSorted and Better Bins Programs, the ACCC considers that any public benefit in this form is likely to be small, and confined to the consistent branding of bins and collection vehicles in the Participating Councils, resulting in increased diversion of waste from landfill.
- 3.49. The ACCC has also considered whether collection vehicles are able to be used more efficiently, which may lead to lower greenhouse gas emissions than are emitted at present. The Applicants submit that the EMRC would need to adopt incremental changes and technologies for its service to remain competitive with private sector providers, as the City of Swan currently does. The ACCC considers that the EMRC has an incentive to upgrade its plant and equipment to 'newer, greener and more efficient technologies'. However, the ACCC considers it likely that in the future without the Proposed Conduct, private sector providers with multiple council contracts could achieve similar public benefits from decreasing greenhouse gas emissions by reducing their vehicle transport distances and route optimisation, and by upgrading to greener and more efficient technologies. As such, the ACCC does not accept that these are likely public benefits arising from the Proposed Conduct.
- 3.50. The ACCC therefore considers that the Proposed Conduct is likely to result in a public benefit in the form of some environmental benefits arising from the consistent branding of bins and collection vehicles in the Participating Councils, resulting in increased diversion of waste from landfill. In any future application for re-authorisation of the Proposed Conduct, the ACCC would expect to see evidence of environmental benefits having eventuated.

ACCC conclusion on public benefit

- 3.51. The ACCC considers that the Proposed Conduct is likely to result in some public benefits from some transaction cost savings and environmental benefits. While the ACCC considers that the Proposed Conduct has the potential to result in some small efficiencies, we do not have sufficient information to conclude that these would be greater than what could be achieved without the Proposed Conduct; nor do we consider the Proposed Conduct is likely to result in increased economies of scale.

Public detriments

- 3.52. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

...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.⁵⁰

- 3.53. The Applicants submit that there will be little or no public detriment from the Proposed Conduct.
- 3.54. The ACCC has considered the following potential public detriments:

⁵⁰ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- (a) reduced competition between Participating Councils in the acquisition of collection and ancillary waste services, and reduced competition in the Perth metropolitan region in the supply of collection and ancillary waste services. This includes the potential:
- to provide the EMRC with monopoly power
 - to remove competition ‘for the market’
 - to reduce the proportion of the market remaining contestable
 - to impact on smaller providers (such as those who service Mundaring) and new entrants, and
 - harm to the service levels and pricing experienced by the Participating Councils
- (b) a misallocation of resources
- (c) the EMRC recovering losses from its collections service via disposal service charges to Member Councils (2 of which are not Participating Councils), and
- (d) potential to ‘creep’ into other services or create a precedent for future applications.

Reduced competition between councils in the acquisition of waste services and Reduced competition for the supply of services

Pre-draft determination: Interested parties’ submissions and the Applicants’ responses

- 3.55. SUEZ and JJ’s Waste submitted that the Proposed Conduct seeks to circumvent existing competitive tender processes and removes the opportunity for these services to be provided by any private sector operators for around 20 years. JJ’s Waste noted that it has invested heavily in establishing operations in Perth and the proposal will preclude it from tendering for a significant proportion of the Perth municipal waste market represented by the 3 Participating Councils in the near vicinity of JJ’s Waste’s newly-purchased depot in Bayswater. SUEZ also questioned whether it would be feasible for small suppliers such as Volich Waste Contractors Pty Ltd (**Volich**) to continue to operate, as SUEZ understands its only council customer is Mundaring.
- 3.56. JJ’s Waste considered that, without contestability for such a long period, the EMRC will inevitably face no competitive pressure to reduce cost and improve service performance. SUEZ submitted that councils should periodically test the market through a competitive tender or quote process as this allows them to review services, realign targets, adopt new innovations and respond to changed market conditions. SUEZ also submitted that the application is unclear about how contract prices would be set by the EMRC, and questions whether the EMRC will have appropriate controls on cost escalations (such as those typically in council tenders or WALGA Requests for Tender) to ensure a cost-effective outcome is achieved for residents in the absence of a competitive process.
- 3.57. Similarly, the WA DWER submitted that council collaboration that leads to improved coordination of services – such as in-house services provided by a council such as the EMRC – may reduce open market competition. The WA DWER submitted that in-house services provided by any one council may lack financial and technical responsiveness compared to commercial operations, and suffer from a reluctance to invest when this impacts on rates or borrowing. The WA DWER submitted that in-house services should be tested on the open market at regular intervals to ensure they

provide best value for money and meet all customer needs. It therefore submitted that, given the proposed duration of the Proposed Conduct, the authorisation should:

- be contingent on the delivery of waste services that are consistent with State policy as it exists from time to time (including Local Government waste plans required under the WARR Act), and
- provide for periodic reviews to confirm it continues to deliver a net benefit to the community.

3.58. The Applicants submitted that:⁵¹

- potential suppliers have access to a substantial channel of opportunities among the 26 additional LGAs across the Perth metropolitan area; these opportunities will increase with the expansion to a 3-bin system (adding FOGO by 2025); and for the majority of potential suppliers, waste collection is typically just one component of their potential business (in addition to waste disposal or recovery, and commercial and industrial or construction and demolition collection, disposal and processing). In relation to JJ's Waste's specific situation, the Applicants note that JJ's Waste is a recent entrant to the Perth market for commercial waste (not household waste) and submit that JJ's Waste's recent investments are a matter for them and their risk
- a reasonable contract term is required in order to recover the cost of capital invested in waste collection services, and typically these contracts are 10 years total
- given the Regional Waste Collection Service model is based on the efficient service currently provided by the City of Swan, the EMRC would need to continue to adopt the incremental service efficiencies and technologies that Swan has in order to remain cost competitive with private sector providers – noting that the EMRC intends to offer its service to other Local Governments at a later date. This includes modernising fleet (which the EMRC can access cost competitively through the WALGA preferred supplier agreements), using the latest route optimisation software, conducting independent market reviews every 5 years to ensure the service is cost competitive (like many other councils that provide in-house waste services do), and providing regular service reports to each Participating Council regarding bin presentation rates, missed services etc. (like many other private sector providers do)
- the EMRC has shown a proactive response to government policy direction and service improvements (including the circular economy and FOGO process) and an EMRC-operated waste service would allow for constant review, trials and improvements which align with the region's and State's objectives. Regarding the WA DWER's submission, they add that the EMRC has adopted the principles of the WA Government's Waste Strategy and the *Waste Avoidance and Resource Recovery Strategy 2030 Action Plan*, prepared a Local Government waste plan and assisted some Member Councils to prepare their own waste plans
- in the unlikely event the EMRC and Participating Councils were to grossly mismanage the collection service, the WA Government can award collection services to third parties under the WARR Act. This serves to ensure that the Applicants provide an efficient, effective and innovative service

⁵¹ [Amended Application Received](#), 15 November 2021, p.31; [Applicants' response to interested party submissions and ACCC request for further information](#), 6 December 2021, p. 3, 9, 13 and 15.

- the EMRC has over 25 years' experience in the management of household waste and dealing with collection contractors. This includes the establishment of best practice landfill at Red Hill and development of the Hazelmere site; and qualified and experienced staff who have worked in the private sector in the waste collection business, including providing services to contractors such as Cleanaway and SUEZ and advocating with these businesses on behalf of Member Councils (for example, assisting them to develop tender requests for their own collection services). The Applicants also submit that they have collaborated extensively with the City of Swan in developing a cost model for the Regional Waste Collection Service and Swan's expertise would be available as required as the EMRC progressively implements this service, and
- in relation to SUEZ's concern about contract prices, the Applicants initially submitted that pricing for the Regional Waste Collection Services was unknown but would be based on a first principles cost build up commercial lift rates at contract commencement, with provision for rate reviews at designated intervals which are similar to commercial operators and using similar relevant price indices.⁵² On 19 January 2022, the Applicants provided revised modelling for the 3 Participating Councils which outlined the cost per service for the EMRC's service and compared this to the private sector (discussed further in paragraph 3.28 above).

Potential to provide the EMRC with monopoly power

- 3.59. Prior to the draft determination, an anonymous interested party submitted that with the Proposed Conduct, the EMRC becoming vertically integrated via its Red Hill landfill site and other recycling processing sites would be developing a monopoly over a large amount of municipal waste, thereby becoming 'too large a competitor'. This party submitted that the EMRC or its Member Councils could also deny planning approval to other competing waste facilities within its own area of influence and effectively control the ability of private sector providers to expand or develop their business.
- 3.60. The Applicants submitted that the EMRC already has several waste and recycling facilities in its region which compete with the private sector. The Applicants submitted that the EMRC does not regulate planning approvals in its region as that is a matter for the Member Councils, and there is an appeal process.⁵³
- 3.61. Regarding the anonymous interested party's submission that the EMRC's vertical integration and its ability (or the ability of the Participating Councils) to deny planning approvals could provide the EMRC with monopoly power over a large amount of municipal waste, the ACCC considers that the Proposed Conduct would not alter the way the EMRC's Red Hill and Hazelmere Resource Recovery Park sites currently operate. All Member Councils already dispose of their household waste at Red Hill (and some of their green waste) and can dispose of bulk verge waste at Hazelmere. There is no information to suggest the EMRC would bar competing service providers which service the City of Kalamunda and the City of Swan (or other councils whose service providers use these sites, if they in fact do so at present) from continuing to do so. There are further constraints on the EMRC, namely the availability of alternative landfill or resource recovery sites, and the new waste to energy sites in Kwinana and East Rockingham currently under development.⁵⁴

⁵² [Applicants' response to ACCC request for further information](#), 15 November 2021.

⁵³ [Applicants' response to interested party submissions and ACCC request for further information](#), 6 December 2021, p.6.

⁵⁴ East Rockingham Waste to Energy, [Converting Perth's Waste into sustainable energy](#), accessed 19 January 2022; Australian Government: Australian Renewable Energy Agency (ARENA), [Kwinana Waste to Energy Project](#), accessed 19 January 2022.

3.62. Regarding the potential for the EMRC or Member Councils to deny competitors' planning approvals, the ACCC does not have sufficient information to determine how likely or significant a risk this is. Regardless, the ACCC considers that this risk would exist with or without the Proposed Conduct given that the EMRC currently owns landfill and resource recovery sites, and any ability or incentive for the EMRC or the Member Councils to deny competitors' planning approvals is unlikely to significantly change with the Proposed Conduct.

Post-draft determination: Further submissions

Removal of competition 'for the market'

3.63. A number of parties queried some of the ACCC's conclusions in its draft determination, which stated that:

- The Participating Councils may ordinarily be considered each other's competitors for the acquisition of the collection and ancillary waste services in the Perth metropolitan region. However, under the Proposed Conduct, the Participating Councils would not be combining to acquire services from existing private waste services suppliers but would instead be sponsoring the entry of a new supplier of waste services, which would not usually be characterised as a 'lessening of competition'. Further, to the extent the EMRC is able to provide a more efficient service than existing suppliers, this is likely to result in the Participating Councils *increasing* the quantity and quality of the waste services they use.
- Nonetheless, the Proposed Conduct would be likely to exclude other waste service providers from supplying the 3 Participating Councils with the collection and ancillary waste services outlined in paragraph 1.9 above (except in limited circumstances) until at least 2033 (and potentially until 2038 in relation to Mundaring's recycling stream). This could potentially lead to the EMRC providing the Participating Councils with services inefficiently (or lowering their quality over time), increasing prices to Participating Councils, or failing to innovate and adapt. Also, the EMRC would be a new provider of municipal collection and ancillary waste services, meaning its ability to deliver a competitive service is untested.
- However, a number of factors mitigate, to some extent, the risk of the public detriments identified arising. These factors are discussed further at paragraphs 3.87 to 3.93 below.

3.64. At the pre-decision conference, JJ's Waste sought clarity over the statement 'by sponsoring a new entrant, the proposed conduct is likely to result in an increase in competition.'⁵⁵ SUEZ has submitted that:

- it cannot be said there has been an increase in competition in the areas the 3 Participating Councils acquire waste services (as there will be no competition in the geographic area for 10 years, nor competition to award the exclusive contract)
- there is no suggestion the EMRC will enter the broader Perth metropolitan market, competing with other waste services providers,⁵⁶ and

⁵⁵ [Pre-Decision Conference](#), 25 March 2022, p.4.

⁵⁶ [SUEZ submission](#), 11 April 2022, [1].

- regarding the ACCC's conclusion that sponsoring of a new supplier would not usually be characterised as a 'lessening of competition', the lack of competition 'for' the market itself represents a lessening of competition.⁵⁷
- 3.65. In respect of the final point raised by SUEZ, WRIWA similarly submits that any lessening of industry's right to tender in an open market is anti-competitive.⁵⁸
- 3.66. At the pre-decision conference, JJ's Waste submitted that the mitigating circumstances that may offset any potential detriment are ambiguous and potentially intangible.⁵⁹
- 3.67. In response, the Applicants note that the EMRC is creating competition (whereas industry is rationalising) and has embraced a more holistic approach to waste management focusing on resource recovery and reaching net zero carbon emissions. The Applicants submit that the EMRC is simply expanding its core activities to enable a vertically integrated network of community-owned waste and resource recovery assets which will minimise exposure to an ongoing reduction of industry players and the current reactive nature of industry. The Applicants reiterate that the EMRC intends to offer its collection services to other Local Governments at a later date (which they note may lead to a new authorisation application to the ACCC).⁶⁰
- 3.68. On the issue of market definition, the ACCC considers (as noted in paragraphs 3.7 to 3.8 above), that the relevant geographic area of competition is the entire Perth metropolitan area rather than the areas for which the 3 Participating Councils acquire waste services. In this instance, other than the Participating Councils themselves, the effects of the Proposed Conduct would be most directly felt by private waste collection firms such as SUEZ and JJ's Waste and by other actual and potential customers of those suppliers.
- 3.69. In relation to the Proposed Conduct being likely to result in an *increase* in competition by sponsoring a new entrant, the ACCC considers that by enabling the Participating Councils to jointly take supply from the EMRC as a new entrant, the Proposed Conduct should not only confer a benefit on those councils who are choosing to contract with the EMRC in preference to established suppliers, but will *likely increase rather than decrease* the strength of rivalrous conduct between established waste collection suppliers for the business of other councils in the Perth metropolitan area. That is why the ACCC took and maintains the view in the draft determination that the Proposed Conduct is likely to result in an *increase* (rather than a decrease) in competition in the Perth metropolitan area. In addition, the ACCC notes that the Proposed Conduct would result in the EMRC being established as an additional supplier, which means it could seek to become an option for other councils in the Perth metropolitan area in the future. This should further enhance the likelihood that the Proposed Conduct will increase, rather than decrease, the strength of rivalrous conduct between established waste collection suppliers for the business of other councils in the Perth metropolitan area. The ACCC considers that SUEZ and WRIWA's references to the loss of the industry's ability to tender for the supply of waste collection services to the Participating Councils is more appropriately characterised as a loss of a (private) commercial opportunity to tender, rather than a loss of competition across the market.

⁵⁷ [SUEZ submission](#), 9 March 2022, [4.4(d)].

⁵⁸ [WRIWA submission](#), 7 April, p.1.

⁵⁹ [Pre-Decision Conference](#), 25 March 2022, p.4.

⁶⁰ [Applicants' response to submission by WRIWA](#), 23 March 2022, p.3; [Applicants' response to interested party submissions](#), 21 April 2022, [8],[9].

- 3.70. SUEZ also appears to suggest that the awarding of an exclusive contract for 10 years in and of itself represents a *lessening* of competition. For the same reasons as explained in paragraph 3.69 above, the ACCC disagrees with this interpretation of how the Participating Councils' intention to enter a long-term contract influences competition in the relevant market. This is because not only may the Participating Councils perceive that a long-term contract provides them with larger commercial benefits than a shorter-term contract, but, if anything, a long-term contract may promote *even stronger rivalry* between established waste collection suppliers for the business of other councils in the Perth area than a shorter-term contract.
- 3.71. In any case, for the sake of clarity, alternative service suppliers who were not afforded the commercial opportunity to tender for this contract are only excluded from servicing any given Participating Council for the period of authorisation. This period comprises a 10-year period for the service agreement (expected to consist of a 7-year service agreement and the option for yearly extension for up to 3 years⁶¹), which the Applicants advise is the standard contract length for waste collection services, plus a short pre-planning period.⁶² The ACCC generally accepts that contract lengths need to reflect the length of time needed for parties to be able to recoup their initial investment.

Proportion of the market remains contestable

- 3.72. In the draft determination, the ACCC stated that the rateable properties in the areas of the Participating Councils comprise 7% of the Perth metropolitan region, with 26 of the total 29 councils remaining. We noted that if the other 8 councils – whom we understood to currently have in-house waste collection services – were further deducted, there would be 18 councils in the Perth metropolitan region that were contestable for private sector providers.
- 3.73. SUEZ disagreed with this calculation, submitting that there are only 14 councils remaining which are fully contestable, given 5 councils have full in-house collection services and 7 have partial in-house collection services. Further, SUEZ submitted that the statement that the Participating Councils represent 7% of rateable properties in the Perth metropolitan region does not distinguish between councils that tender and those that keep some or all services in-house. If councils with all in-house services are excluded, the Proposed Conduct represents a higher proportion of the Perth metropolitan market than 7%.⁶³ Relatedly, WRIWA submits that the argument that the Proposed Conduct constitutes only a small part (7%) of the market is 'faulty', and any reduction in industry's access to market share negatively impacts them.⁶⁴
- 3.74. The Applicants submit that they do not disagree with SUEZ's calculations as a representation of the current share of services undertaken by private industry, but do disagree with its conclusions. The Applicants consider that it is not appropriate to distinguish between councils with an in-house or external waste collection service when considering the appropriate market area, as the chosen model will change over time as the council sees fit. The Applicants therefore consider that those councils who

⁶¹ While the Applicants did, in one submission, note that a typical contract is 5 years plus extension options of up to another 5 years ([Applicants' response to interested party submissions and ACCC request for further information](#), 6 December 2021, p.9), the ACCC has relied on the 7-year length given it was cited in both the original application and a further information request: [Amended Application Received](#), 15 November 2021, [2.4]; [Applicants' response to ACCC request for further information](#), 13 December 2021, p.1.

⁶² [Amended Application Received](#), 15 November 2021, [2.4]; [Applicants' response to ACCC request for further information](#), 13 December 2021. Based on the expiries of the Participating Councils' existing contracts, the intention is for each to enter a 10-year service agreement around June 2023. The only exception would be Mundaring's recyclables collections stream, given that that contract does not expire until 2028.

⁶³ [SUEZ submission](#), 9 March 2022, [4.4(a)].

⁶⁴ [WRIWA submission](#), 7 April 2022, p.1.

retain all or some collections services in-house are not restricted from tendering for those services should they wish to, leaving 26 councils across the Perth and Peel region for private sector operators to tender their work.⁶⁵

- 3.75. Based on SUEZ's and the Applicants' submissions, the ACCC now understands that there are a total of 14 councils with no form of in-house waste collection services. Some councils with in-house services may be partially contestable for certain service streams, or contestable soon if their contracts are shortly expiring. While the ACCC agrees with the Applicants' submission⁶⁶ (except to note that the 3 Participating Councils are *also* not restricted from procuring from the private sector, at least after their initial 7-year service agreement ends), the ACCC notes that it may be less likely that councils with established in-house services will procure from the private sector.
- 3.76. In light of the above, the ACCC remains of the view that there are sufficient opportunities for other providers to remain active in the Perth metropolitan region, WA and broader Australian markets – particularly the 2 companies which currently hold contracts to supply all collections services to Bassendean and Bayswater (except bulk verge), who have extensive operations around Australia.⁶⁷ Therefore, it continues to appear unlikely that the Proposed Conduct would result in the exit of established operators to the point that the other Perth area councils would end up paying more for waste collection services than they would otherwise.

Impact on smaller providers (such as those who service Mundaring) and new entrants

- 3.77. In the draft determination, the ACCC acknowledged that for smaller providers, such as Volich and Steann Pty Ltd (**Steann**) who currently service Mundaring, there is a risk that losing their existing contracts to the EMRC may affect their ability to continue operating in the market. However, we considered that this risk would exist with or without the Proposed Conduct; that is, smaller service providers would also be at risk of losing their contracts to another service provider if each of the Participating Councils individually conducted a tender process.
- 3.78. Following the draft determination, Steann submitted that operating in its field is labour intensive and requires a large investment in equipment and employees. Steann noted that its viability is threatened if it has no work for its full-time staff. It submitted that Mundaring is very different to the other Participating Councils in terms of scale and Steann's delivery model suits the extremely large semi-rural area and greater block size. Steann's perception is that it has been the acceptable collateral damage necessary for this proposal to proceed.⁶⁸
- 3.79. SUEZ submitted that Volich does not operate generally in the Perth metropolitan area and the competitive advantage it offers over other private sector providers is being locally situated in a large rural area. SUEZ considers that, without the Proposed Conduct, Volich and Steann have a good chance of maintaining their contracts when they come up for tender; but *with* the Proposed Conduct, it queries the extent to which they could compete in the broader Perth metropolitan area and whether they may exit the market.⁶⁹

⁶⁵ [Applicants' response to submission by SUEZ Recycling & Recovery Pty Ltd](#), 24 March 2022, [28]; [Applicants' response to ACCC request for further information](#), 14 April 2022, [7].

⁶⁶ [Applicants' response to ACCC request for further information](#), 14 April 2022, [7].

⁶⁷ For example, SUEZ states that it currently provides kerbside collection services to 14 Perth Councils: [SUEZ submission](#), 9 March 2022, [2].

⁶⁸ [Steann submission](#), 11 April 2022.

⁶⁹ [SUEZ submission](#), 9 March 2022, [4.4(b)].

- 3.80. The Applicants note Steann's concerns and describe the circumstances in which Participating Councils would be allowed to continue acquiring or tender anew for certain services (as discussed in paragraphs 3.92 to 3.93 below).
- 3.81. The ACCC acknowledges that, without the Proposed Conduct, smaller providers would be likely to have the opportunity to tender for the services they currently provide. With the Proposed Conduct, while it may still be possible for smaller providers to supply discrete service streams (as noted by the Applicants), there is no certainty as to when or whether this would be permitted (as discussed in paragraph 3.93 below). Ultimately, however, the ACCC considers the effect on competition generally, rather than harm to individual competitors, because our focus is on the impact on consumers. In this case, any exit of smaller waste service providers would most likely be in response to more intense competition from other suppliers seeking to replace council customers lost to the EMRC. This suggests that the net effect on competition is unlikely to be negative.
- 3.82. Relatedly, following the draft determination, SUEZ raised concerns that the Proposed Conduct may impact on the likelihood of new entry as potential new entrants look for different opportunities in other areas. This, SUEZ submits, is because a market with a transparent pipeline of opportunities for suppliers is more likely to be dynamic compared to a market with a single Local Government provider being awarded a long-term exclusive contract without a competitive tender process.⁷⁰
- 3.83. The Applicants reject SUEZ's proposition. The Applicants submit that SUEZ's opinion is speculative and subjective and say that it is not supported by any relevant objective facts or data, particularly given that the relevant market area is the Perth metropolitan area and the Proposed Conduct will service only 7% of households in this market.⁷¹
- 3.84. The ACCC considers that, for the reasons explained above, any reduction in new entry due to the Proposed Conduct is likely to reflect the more vigorous competition stemming from the conduct rather than from a lessening of competition. The ACCC has not received any evidence to suggest that the Proposed Conduct would deter new entry. Further, the ACCC reiterates its views in relation to the geographic dimension of the market, and the contestability of other councils in the Perth metropolitan area for which new entrants could tender to supply services (discussed at paragraphs 3.7 to 3.8). While some parties could be deterred from entering because there is a 10-year contract in place for the Participating Councils, the ACCC considers public detriment from new entrants being deterred from entering the Perth metropolitan market more broadly (for example via a reduction in the offer of new and innovative services, or an increase in prices) is unlikely to arise.
- 3.85. The ACCC therefore does not consider that the Proposed Conduct is likely to result in a public detriment of this nature.
- 3.86. The ACCC further considers that the risk of the public detriments identified above arising is mitigated to some extent for the reasons outlined from paragraphs 3.87 to 3.93 below.

⁷⁰ [SUEZ submission](#), 9 March 2022, [4.4(e)].

⁷¹ [Applicants' submission in response to SUEZ Recycling and Resource Recovery Pty Ltd](#), 24 March 2022, [4.4(d)].

Checks and balances to help ensure the EMRC provides an efficient and cost competitive service

- 3.87. Regarding the risk of decreased service levels, following the draft determination SUEZ submitted that private providers are driven to innovate because of the competitive nature of the market, but as the EMRC will be appointed for 10 years without competition, it will face no incentive to innovate or to improve its services. Further, it disputes the Applicants' statement that ratepayers 'hold their respective Councils accountable for any inefficient services, including essential waste services...' ⁷², noting that ratepayers will not have sufficient information to judge whether the EMRC's services are consistent with or better than other service providers, or at a competitive price. ⁷³
- 3.88. Steann submits that it agrees with other interested parties that the proposal could create a more costly, less efficient service which is protected from the competitive marketplace. ⁷⁴
- 3.89. Regarding SUEZ's submission that there will be a lack of competition during this 10-year period, although there has been no tender process for the contract, the ACCC considers that this primarily goes to the likelihood that the Participating Councils will ultimately benefit from the Proposed Conduct rather than whether or how competition across the market as a whole will be affected. In this respect, the ACCC remains of the view that there are checks and balances in place to help ensure that the EMRC is providing cost effective and reasonably priced services to the Participating Councils as its customers (and in turn, residents of those Participating Councils). The ACCC notes that the feasibility of an in-house waste collection service has been the subject of consideration since at least 2008, and the consultants recently engaged by the Participating Councils (all of which currently procure collection and ancillary waste services through private providers) advised that the revised Regional Waste Collection Service model was a viable proposition. In addition, the EMRC has indicated it will take steps to develop and publicly consult on a business plan in respect of the Regional Waste Collection Service to comply with requirements for engaging in a 'major trading undertaking' under section 3.59 of the Local Government Act, ⁷⁵ which will provide some degree of transparency over the proposal, including for market participants. More broadly, the ACCC also notes the Applicants' submission that under the WARR Act and subsidiary legislation each respective LGA is responsible for the safe management of their LGA's domestic waste. ⁷⁶
- 3.90. The ACCC also considers that both the EMRC and private providers will be incentivised to some extent during the authorisation period to offer quality and cost competitive services, as each will be seeking to retain their current council customers as well as potentially attract new council customers. This is because after this period expires (or even earlier, after the initial 7-year service agreement ends), each Participating Council could consider whether to procure those services from the private sector or seek a further agreement with the EMRC. The EMRC therefore has incentive to provide a cost competitive and efficient service to meet contract KPIs so the Participating Councils will want to renew their contracts and other councils will want to join. Participating Councils could also terminate the service agreement in certain

⁷² [Amended Application Received](#), 15 November 2021, [8.3].

⁷³ [SUEZ submission](#), 9 March 2022, [4.5].

⁷⁴ [Steann submission](#), 11 April 2022.

⁷⁵ [Applicants' response to ACCC request for further information](#), 9 May 2022.

⁷⁶ [Amended Application Received](#), 15 November 2021, [8.1]; *Waste Avoidance and Resource Recovery Act 2007* (WA).

circumstances, including if the EMRC was unable to meet certain KPIs embedded in the contract.⁷⁷

- 3.91. Further, the EMRC will conduct independent market reviews every 5 years to ensure the service is cost competitive and provide regular service reports to each Participating Council. The ACCC also recognises that the EMRC has experience in the management of household waste and dealing with collection contractors. Additionally, we recognise that the WA Government's ability to appoint an alternative service provider provides somewhat of a safeguard, although it understands that this would only be done in limited circumstances.⁷⁸

Providers can still supply limited waste services to the Participating Councils

- 3.92. There are some circumstances in which Participating Councils can acquire waste services from service providers other than the EMRC, although this is subject to the EMRC's approval. Following the draft determination, the Applicants clarified that Participating Councils would be allowed to continue acquiring, or tender anew, for vergeside bulk waste collection (mixed bulk general waste and green waste) or specialist collection of specific items such as mattresses, whitegoods or hazardous waste, should EMRC be unable to provide that service.⁷⁹ The Applicants submit that the factors the EMRC would consider in determining whether to grant such a request would include the timing of the request, the effect on the EMRC's collection service (in terms of disruption to the service, fleet utilisation and financial impact) and whether that service is linked to a specialist processor of that waste stream.⁸⁰
- 3.93. Although this possibility exists, the ACCC notes that it is subject to the EMRC's approval and it is not clear when it would be available (for example, when the EMRC would be 'unable to provide' a service). The ACCC has therefore not placed significant weight on this as a mitigating factor to the risk of public detriment from the Participating Councils paying higher prices because we do not have sufficient information to assess how it would operate in practice and its potential impact.

Misallocation of resources

EMRC's competitive advantages may lead to a misallocation of resources

- 3.94. Prior to the draft determination, SUEZ submitted that the EMRC's annual reports stated that it supports the Competition Principles Agreement (being the agreed principles to implement the National Competition Policy (**NCP**)) and that public enterprises are required to review their operations to ensure they have no competitive advantage, or disadvantage, in comparison to the private sector. SUEZ questioned whether the EMRC has or intends to conduct such a review in respect of the Proposed Conduct.

⁷⁷ [Applicants' response to ACCC request for further information](#), 15 November 2021, p.3.

⁷⁸ The WARR Act allows a State Government official to issue a waste collection permit to contract out Local Government waste services to third party providers, if the waste management techniques employed by the Local Government are not consistent with modern practice, and if the third-party applicant for the waste collection permit is capable of carrying out improved waste collection: s 56(3). Modern practice is defined as any relevant code of practice made by the Waste Authority or if there is no code of practice, the advice of the Waste Authority: s 57.

⁷⁹ [Applicants' response to ACCC request for further information](#), 14 April 2022, [5].

⁸⁰ [Amended Application Received](#), 15 November 2021, [2.1].

- 3.95. JJ's Waste submitted that it has no objection to corporatised council-owned entities competing for provision of municipal services under the NCP protocols,⁸¹ but establishing precedents for the growth of uncontested services is unlikely to result in efficient outcomes for the community.
- 3.96. In response, the Applicants submitted that they were satisfied that the requirements of the NCP are met. They submitted that the NCP is not a prohibition on a local/regional government providing a facility or service that private operators also provide. The NCP requires that the Local Government must neutralise the net competitive advantage it has as a result of government ownership, which is done through appropriate cost and pricing strategies.⁸²
- 3.97. A number of interested parties have raised the issue of competitive neutrality in submissions following the draft determination, including orally at the pre-decision conference:
- SUEZ submits that it is relevant when applying the public interest test in the Act that the WA Government has this policy, and the Proposed Conduct involves the EMRC enjoying a competitive advantage against private firms by being awarded an exclusive 10-year contract without other firms having the opportunity to tender for it.⁸³ SUEZ noted it has no objection to competing with the EMRC on a level playing field⁸⁴
 - WRIWA submits that the EMRC operates with a number of advantages compared to private industry which are of significant economic value (i.e. being exempt from most taxes and charges, except GST at Red Hill, and corporations law reporting; government guarantees on debts; potentially lower cost of capital; concessional prices for purchasing inputs from other government businesses; and freedom from the threat of takeovers) and will leverage these advantages. WRIWA submits that the EMRC does not have to operate the Regional Waste Collection Service at a profit but can subsidise the cost of operation using its non-commercial advantages. WRIWA also notes that any lessening of industry's right to tender in an open market is anti-competitive,⁸⁵ and
 - Steann submits it is disconcerting for the ACCC to flout the WA Government Policy on Competitive Neutrality for public sector organisations and circumvent the tendering process.⁸⁶
- 3.98. In response, the Applicants submit that the EMRC does not have considerable and significant economic advantages as WRIWA suggests, nor is it subsidising the cost of the Regional Waste Collection Service from other activities. The Applicants clarified that:
- the EMRC will adopt a full cost attribution model, and will price waste services on a commercial basis and adopt cost reflective pricing, which would 'neutralise' all of the following potential competitive advantages that the EMRC has:⁸⁷

⁸¹ As noted above, the WA Government Policy Statement on Competitive Neutrality for public sector organisations was issued in accordance with the Competition Principles Agreement, as agreed by the Council of Australian Governments in April 1995 to implement the National Competition Policy.

⁸² [Applicants' response to interested party submissions and ACCC request for further information](#), 6 December 2021, p.8.

⁸³ [SUEZ submission](#), 9 March 2022, [4.9]; [SUEZ submission](#), 11 April 2022, [4]; [Pre-decision Conference](#), 25 March 2022, p.5.

⁸⁴ [SUEZ submission](#), 11 April 2022, [4].

⁸⁵ [WRIWA submission](#), 7 April 2022, p.2.

⁸⁶ [Steann submission](#), 11 April 2022.

- reduced direct costs of operating due to using its own land
- indirect subsidy in the form of sharing costs, by making existing significant infrastructure available without recovery of costs and overheads
- operating without pressure of business risk (though it does)
- access to Treasury funding at a less than the commercial rate (though approval of Member Councils is highly unlikely)
- no requirement to obtain commercial rate of return on CAPEX (though it faces the same pressure to)
- the EMRC does pay council rates and GST, is exempt from Corporations Law, pays landfill levies, is not protected by the State Government for bad debts, has no taxing power, and does not get concessional [rates] for inputs from other government businesses. They acknowledged that the EMRC is free from threat of takeovers⁸⁸
- the EMRC may face a number of competitive disadvantages, including government policy and reporting requirements, Ministerial intervention, more expensive and less flexible employment terms and conditions, being subject to Parliamentary scrutiny,⁸⁹ and transparency (in that it must publicly advertise fees, charges, meeting agendas, financial details and expenditures)⁹⁰
- the EMRC does not report to any outside body, but private businesses can lodge complaints regarding non-compliance to the Department of Local Government (Principle CN.9 of the WA Local Government Clause 7 Competition Policy Statement),⁹¹ and
- the EMRC is not subsidised by charges through rates to ratepayers, therefore competes in a similar way to industry (including charging all products and services under a participants' agreement, and tracking cost centres based on sites and activities).⁹² The EMRC considers itself a part of industry.⁹³

ACCC view

3.99. The Competition Principles Agreement states that the objective of competitive neutrality policy is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities. Government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership. The principles under this agreement only apply to the business activities of publicly-owned entities, not to the non-business, non-profit activities of these entities.⁹⁴

3.100. The WA Policy Statement, issued in accordance with the above, outlines a number of competitive advantages and disadvantages that Government businesses face relative to existing or potential private competitors, and adds:

⁸⁷ [Applicants' response to ACCC request for further information](#), 14 April 2022, p.1.

⁸⁸ [Applicants' response to interested party submissions](#), 21 April 2022, p.3.

⁸⁹ [Applicants' response to ACCC request for further information](#), 14 April 2022, [25(a)-(d)].

⁹⁰ [Pre-decision Conference](#), 25 March 2022, p.6; [Applicants' response to interested party submissions](#), 21 April 2022, p.3; [Applicants' response to submission by WRIWA](#), 23 March 2022, p.4.

⁹¹ [Applicants' response to ACCC request for further information](#), 14 April 2022, [26]-[30].

⁹² [Applicants' response to interested party submissions](#), 21 April 2022, p.3.

⁹³ [Applicants' response to submission by WRIWA](#), 23 March 2022, p.4; [Pre-decision Conference](#), 25 March 2022, p.6.

⁹⁴ Federation, [Competition Principles Agreement](#), 3.(1), accessed 2 May 2022.

- in the absence of competitive neutrality, government businesses may use any net competitive advantage they enjoy to charge prices which do not match their full resource costs, which has an economic ramification in terms of resource allocation⁹⁵
 - the application of competitive neutrality involves the introduction of measures which effectively neutralise any net competitive advantage flowing from government ownership. This includes the reform of specific advantages or disadvantages, or requiring the agency to adopt commercial principles in the pricing of its goods or services (i.e. to charge prices that fully recover all costs incurred in their supply).⁹⁶
- 3.101. The ACCC notes that authorisation would provide legal protection to the Applicants from the competition provisions in Part IV of the Act, but it does not alter any other existing legal restrictions or policy settings regarding Local Government in Western Australia. Further, the ACCC's role is to consider whether the Proposed Conduct before it meets the authorisation test, and not to otherwise assess compliance with that policy or whether collection services are most appropriately provided by a government or a private sector provider.
- 3.102. In light of this, the ACCC accepts that the EMRC has satisfied itself it meets the NCP requirements, including neutralising any competitive advantage through cost reflective pricing. Any competing private business that wishes to raise a competitive neutrality complaint should be able to do so with the WA Department of Local Government (under Principle CN.9).
- 3.103. The ACCC notes that there are factors which may provide the EMRC with a competitive advantage, which could therefore create the potential for it to displace a more efficient market option and lead to a misallocation of resources. However, we consider that these factors would exist with or without the Proposed Conduct. For example, there is an existing legislative exemption that means the Participating Councils are not required to invite tenders where services are to be supplied by a regional local government⁹⁷, although there are consultation requirements in respect of a 'major trading undertaking' as referred to at paragraph 3.89 above.⁹⁸ The ACCC's role is to assess whether the Proposed Conduct is likely to result in public benefits that outweigh the likely public detriments. In this case, public detriments could arise from the EMRC displacing a market option that would be more efficient – that is, lower cost or higher service quality – *due to* the EMRC's advantages from public ownership, such that this leads to a misallocation of resources. However, given the EMRC has stated that it has neutralised any competitive advantage through cost reflective pricing, and there are other checks and balances in place to help ensure that the EMRC is providing a cost effective and competitive service described in paragraphs 3.89 to 3.91 above, the ACCC does not consider it likely that the Proposed Conduct is likely to result in a public detriment of this nature.

Other restrictions on government bodies

- 3.104. Prior to the draft determination, SUEZ and the City of Belmont submitted that the Proposed Conduct does not satisfy the 'executive functions test' under section 3.18(3)

⁹⁵ Government of Western Australia, [Policy Statement on Competitive Neutrality](#), p.1-2, accessed 2 May 2022.

⁹⁶ Government of Western Australia, [Policy Statement on Competitive Neutrality](#), p.5, 12 and 15, accessed 2 May 2022.

⁹⁷ Local Government (Functions and General) Regulations 1996, regulation 11 (2)(e); [Applicants' response to ACCC request for further information](#), 9 May 2022.

⁹⁸ Local Government Act, section 3.59; [Applicants' response to ACCC request for further information](#), 9 May 2022.

of the Local Government Act as it would duplicate services already provided by private industry.

- 3.105. Section 3.18(3) of the Local Government Act states that a Local Government 'is to satisfy itself' that (amongst other things) services it provides do not duplicate, 'to an extent that the Local Government considers inappropriate', services provided by other bodies or persons, whether public or private.
- 3.106. SUEZ and the City of Belmont submitted that the Proposed Conduct attempts to duplicate waste collection services that are already provided to the Participating Councils efficiently and effectively by private operators (including SUEZ), and that there are numerous other private sector providers able to provide these services.
- 3.107. In response, the Applicants submitted that the suggestion that providing a waste collection service is outside the purpose of a regional council is incorrect. They noted that the EMRC's Establishment Agreement provides for the EMRC to undertake activities including the removal, processing, treatment and disposal of waste. The Applicants submitted that they have considered the application of section 3.18 of the Local Government Act to the proposed Regional Waste Collection Service, and they are satisfied that the provision's requirements are met. They also note that this provision is similar to, and should be read with, the EMRC's competitive neutrality obligations above.⁹⁹
- 3.108. Further, the Applicants submitted that the provision of waste collection services within the Perth metropolitan area is already provided efficiently and effectively by numerous individual councils, which it notes are typically large metropolitan councils, such as: the City of Swan; the Cities of Perth, Stirling and Wanneroo (members of the Mindarie Regional Council); and the Cities of Canning, Melville, Fremantle and Cockburn (members of the Southern Metropolitan Regional Council).
- 3.109. Following the draft determination, SUEZ submitted that, while the ACCC is not in a position to assess whether or not a body is duplicating services, from a policy perspective and with reference to the public benefits test which the ACCC must apply, it is clear that:
- the WA Parliament saw fit to pass this legislation, and
 - the services intended to be provided by the EMRC do in fact duplicate services provided by others (including SUEZ), contrary to the intention of the legislation.¹⁰⁰
- 3.110. The Applicants reject SUEZ's proposition and note that it is up to each individual Council of a Local Government to determine whether the waste collection service will be operated by that Local Government, another Local Government or a private operator.¹⁰¹
- 3.111. Section 3.18(3) of the Local Government Act requires a Local Government to 'satisfy itself' that the services it provides meet a particular standard, and the ACCC is not in a position to determine what that body should or should not consider an 'inappropriate' duplication of services under that test. The ACCC remains satisfied that the Applicants have considered the application of this section, though, and believe the Proposed

⁹⁹ [Applicants' response to interested party submissions and ACCC request for further information](#), 6 December 2021, p.7-8.

¹⁰⁰ [SUEZ submission](#), 9 March 2022, [4.8].

¹⁰¹ [Applicants' response to submission by SUEZ Recycling & Recovery Pty Ltd](#), 24 March 2022, [42].

Conduct will comply with it.¹⁰² The ACCC further accepts that there are other councils in the Perth metropolitan region who self-supply collection and ancillary waste services, rather than outsourcing to the private sector. Any authorisation granted by the ACCC does not override the requirements on councils to comply with other legislation.

Potential for the EMRC to recover losses from its collections service via disposal service charges to Member Councils

- 3.112. Following the draft determination, SUEZ submitted that the Proposed Conduct may enable the EMRC to cross-subsidise its provision of waste collection services by raising its charges for waste disposal and therefore compete unfairly with private operators, which may distort competition. It notes that the EMRC's commercial disposal rate is consistent with the current market rate in Perth (\$149.09 (ex GST) / tonne), but it charges \$187.50 (ex GST) / tonne to Member Councils for FOGO and waste tipped at EMRC facilities— which includes additional charges for Member Councils (not commercial customers) being a 'Secondary Waste' charge (\$38 / tonne) and a 'Comprehensive Waste Education Strategy' levy (\$4.50 / tonne).¹⁰³ SUEZ cited an example which it submitted demonstrated that the EMRC's own Council has historically approved the spending of the Secondary Waste Reserve for operational expenses— suggesting there is no limit on the EMRC's ability to use this reserve to fund activities associated with the Proposed Conduct.¹⁰⁴
- 3.113. In response to the ACCC's information request, SUEZ agreed with the ACCC that there are constraints on the EMRC raising its rates for waste disposal services (including the availability of alternative landfill or resource recovery sites and new waste to energy sites). However, SUEZ stated that it was referring to the ability to recover any collection activity losses through the Member Council disposal rate, as Member Councils are not afforded the same opportunity to seek alternative disposal arrangements and already pay above the market rate.¹⁰⁵
- 3.114. In response, the Applicants submitted that Participating Councils do pay above market rate for disposal services but only because they pay an additional charge (\$38 / tonne) that goes to the Secondary Waste Reserve which is used to fund capital expenditure on resource recovery projects (e.g. the Hazelmere Waste Transfer Station, the Hazelmere Wood Waste to Energy Plant and the proposed FOGO Processing Plant at Red Hill), and is not used to fund operational expenditures. Therefore, the Applicants submit that this charge would not be used to cross-subsidise the Proposed Conduct. The Applicants add that the Council also needs to approve allocations from the reserve and the EMRC is audited by the Office of the Auditor General. In relation to the example cited by SUEZ, the Applicants clarified that this example was an approval for initial capital/set up costs for Member Councils, not operational costs.¹⁰⁶
- 3.115. The ACCC accepts the EMRC's explanation that its Secondary Waste Reserve is not used to fund operational expenditures. It notes that SUEZ's argument focuses on the EMRC recovering any collection activity losses through charges to *Member Council's* disposal rates. The EMRC could theoretically raise the base charge (\$149.09) above the market rate – but the ACCC considers the Member Councils would have regard to

¹⁰² [Applicants' response to interested party submissions and ACCC request for further information](#), 6 December 2021, p.8.

¹⁰³ [SUEZ submission](#), 9 March 2022, [4.7].

¹⁰⁴ [SUEZ submission](#), 11 April 2022, [5].

¹⁰⁵ [SUEZ submission](#), 11 April 2022, [5].

¹⁰⁶ [Applicants' response to submission by SUEZ Recycling & Recovery Pty Ltd](#), 24 March 2022, [37]; [Applicants' response to interested party submissions](#), 21 April 2022, p.5.

this increased rate when choosing who to engage for waste disposal services. SUEZ has not demonstrated how the Proposed Conduct would relax existing competitive constraints on the provision of these services such that EMRC's waste disposal customers would accept higher commercial rates for those services. Nor has it been argued that there is a risk of the EMRC raising its disposal rates for *other* customers, or that the constraints on the EMRC doing so have been changed. The ACCC has therefore not accepted this as a likely public detriment.

Potential to 'creep' into other service streams or create a precedent for future applications

- 3.116. JJ's Waste submits that even if the EMRC proposal is for the moment restricted to domestic waste only, there is a risk of 'creep' into provision of services to the commercial and industrial sector, thereby impacting on JJ's Waste and the waste industry even further. The anonymous interested party expresses similar concerns that it sees no limits on the EMRC seeking to operate in the commercial and industrial or construction and demolition sectors. The anonymous interested party notes there is a track record of councils in Perth already operating in the commercial and industrial sector at a continual loss because they are competing with the private sector at well below the market rate.
- 3.117. In response, the Applicants submit that the Proposed Conduct is restricted to domestic waste from the Participating Councils and is not about the EMRC expanding its commercial offering into construction and demolition or commercial and industrial. The Applicants note that the EMRC already provides commercial waste disposal services (at its Red Hill and Hazelmere sites), and it does not run its operations at a loss and then have to impose on its members to subsidise the business. Rather, the EMRC runs surplus budgets, accumulates these surpluses in designated reserves and returns accumulated funds to Member Councils when appropriate.
- 3.118. Relatedly, following the draft determination, WRIWA submitted that granting this proposal will establish a precedent and other LGAs can argue that the ACCC cannot then deny granting others. WRIWA queries whether the commercial industry should prepare then to exit the market or for a playing field that is very far from level.¹⁰⁷
- 3.119. The ACCC must assess the Proposed Conduct that is presented in the application before it, which in this case, does not extend to the EMRC providing either commercial and industrial or construction and demolition services to the Participating Councils. The ACCC acknowledges that by establishing operations in the municipal waste collections and ancillary services market, this may make it easier for the EMRC to expand their operations into other service streams, such as commercial and industrial and construction and demolition, in future. However, the ACCC expects that if the Applicants propose to expand the Proposed Conduct in this way, they will seek authorisation to the extent they consider it may be required, and the ACCC would assess any such application afresh, on its merits. That is, it will re-assess whether the net public benefit test is met, taking into account evidence of whether their claims regarding public benefits and public detriments have resulted. Similarly, the ACCC will assess any similar applications from local or regional councils on a case-by-case basis. The granting of this authorisation should therefore not be taken as 'setting a precedent' that future applications will also be granted.

¹⁰⁷ [WRIWA submission](#), 7 April 2022, p.1.

ACCC conclusion on public detriment

- 3.120. The ACCC considers that public detriment in the form of reduced competition between councils for the acquisition of collection and ancillary waste services or reduced competition in the supply of collection and ancillary waste services is unlikely to arise from the Proposed Conduct – rather, the ACCC considers that competition in the supply of collection and ancillary waste services across the Perth metropolitan area will likely *increase*. The ACCC further notes that the Participating Councils comprise only a small proportion (7%) of households in metropolitan Perth and any exit of smaller waste service providers would most likely be in response to more intense competition from other suppliers seeking to replace council customers lost to the EMRC, which will benefit end consumers.
- 3.121. The ACCC accepts that the EMRC would be obtaining an exclusive 10-year contract without a competitive tender process and there is a possibility that the Participating Councils could end up receiving less efficient and higher priced services. However, this risk is likely to be mitigated to a large extent because the EMRC is likely to have an incentive to offer a competitive service and to innovate, noting there are some checks and balances in place to help ensure that the EMRC will do so. In particular, the ACCC notes that the Participating Councils have assessed that engaging the EMRC is in their best commercial interests; and other waste service providers can compete for a Participating Council's contract after their service agreement with the EMRC expires (see further paragraphs 3.130 regarding the proposed length of authorisation) and can still supply some waste services in limited circumstances.
- 3.122. Additionally, the ACCC does not think it likely that the Proposed Conduct would result in a public detriment in the form of the EMRC displacing a more efficient market option, leading to a misallocation of resources, as a result of any net competitive advantages; or the EMRC seeking to recover losses from its collections service via disposal service charges to Member Councils.

Balance of public benefit and detriment

- 3.123. The ACCC considers that the Proposed Conduct is likely to result in public benefits from some transaction cost savings and environmental benefits. While the ACCC also considers that the Proposed Conduct has the potential to result in some small efficiencies, we consider that such efficiencies could likely be achieved without the Proposed Conduct (i.e. with Participating Councils contracting individually with private sector providers) and therefore does not accept that these are likely public benefits arising from the Proposed Conduct. The ACCC does not have sufficient information to conclude that the Proposed Conduct is likely to result in increased economies of scale.
- 3.124. The ACCC considers that the Proposed Conduct is unlikely to result in public detriment due to reduced competition between Participating Councils for acquiring collection and ancillary waste services, or reduced competition in the market for supplying these services. Rather, the ACCC considers that competition in the supply of collection and ancillary waste services across the Perth metropolitan area will likely *increase* as a result of the Proposed Conduct, which the ACCC has had regard to in considering the overall balance of likely public benefits and detriments. To the extent there is a risk of detriments arising, there are mitigating factors which would limit the magnitude of any detriments. Further, the ACCC considers that the Proposed Conduct is unlikely to result in public detriment in the form of misallocation of resources or EMRC recovering losses from its collections service via disposal charges to Member Councils.

3.125. Subject to limiting the length of authorisation until 30 June 2033 (as described in the following section), for the reasons outlined in this determination, the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

Length of authorisation

3.126. The Act allows the ACCC to grant authorisation for a limited period of time.¹⁰⁸ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

3.127. In this instance, the Applicants seek authorisation until October 2040, which they submit is due to:

- a 20-month pre-planning period
- a rolling start across Participating Councils as waste service contracts expire, with the last service contract due to expire in 2028
- a proposed agreement of a minimum of 10 years, which aligns with a typical long-term service agreement of 7 years and the option for yearly extension for up to 3 years, which is the generally accepted term for a kerbside collection contract. This means that where a Participating Council commences its services agreement in 2028, the end of the maximum contract period would be 2038
- electric and hydrogen powered collection vehicles are likely to be introduced during the next 10 years and the durability and depreciation of these new technologies (fleet, fuel, charging and servicing) is likely to be longer, so a longer contract term will become the norm, and
- the EMRC planning to use its Hazelmere Resource Recovery Park to locate the waste collection vehicles and associated service centre and customer service centre. With progressive uptake of the Regional Waste Collection Service by Member Councils this may require another site to house all the plant and equipment and staff which will take time to acquire and relocate.

3.128. The ACCC notes the EMRC's submission that one reason for seeking authorisation until 2040 is because a progressive uptake of the Regional Waste Collection Service by other Member Councils may require the EMRC to spend time acquiring and relocating to another site to house all the plant and equipment and staff. However, the ACCC notes that only the EMRC and the 3 Participating Councils have sought authorisation in this Application.

3.129. The ACCC also notes that although authorisation is sought until 2040, the Applicants are proposing that each Participating Council's collection and ancillary waste services agreement will only run for up to 10 years. Participating Councils might then seek to enter a subsequent service agreement with the EMRC for whatever period is left until 2040 (around 7 to 8 years, except for Mundaring's recycling stream), or could procure those waste services from the private sector.

¹⁰⁸ Subsection 91(1).

- 3.130. As noted in paragraph 3.125 above, the ACCC has decided to grant authorisation until 30 June 2033. This would allow a pre-planning period of around 1 year (beginning after authorisation comes into effect), and then a 10-year period for the service agreements (which the Applicants advise is the standard contract length for collection and ancillary waste services). Based on the expiries of the Participating Councils' existing contracts, the EMRC's intention is for each to enter a 10-year service agreement around June 2023 (although Bassendean could commence its service agreement in the second half of 2022 if the EMRC were ready then). The only exception would be Mundaring's recyclables collections stream, given that that contract does not expire until 2028. After 30 June 2033, the Applicants may re-apply for authorisation if they wish to, and the ACCC would then review if the authorisation test continues to be met.

4. Determination

The application

- 4.1. On 1 November 2021, the Eastern Metropolitan Regional Council (**EMRC**), City of Bayswater, Town of Bassendean and the Shire of Mundaring (together, the **Applicants**) lodged application AA1000587 with the ACCC, seeking authorisation under subsection 88(1) of the Act.¹⁰⁹

The authorisation test

- 4.2. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 4.3. For the reasons outlined in this determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 4.4. Accordingly, the ACCC has decided to grant authorisation.

Conduct which the ACCC has decided to authorise

- 4.5. The ACCC has decided to grant authorisation AA1000587 to the Applicants in relation to the establishments of a Regional Waste Collection Service operated by the EMRC, where each Participating Council will jointly negotiate and administer, and enter and give effect to, service agreements with the EMRC on the same or substantially similar terms, for the provision of the collection and ancillary waste services, as described in paragraph 1.9 and defined as the Proposed Conduct. For the avoidance of doubt, the ACCC notes that the Proposed Conduct extends only to the collection and ancillary waste services referred to in paragraph 1.9, and not to other services such as waste disposal and processing.
- 4.6. Authorisation is granted in relation to the provisions in Division 1 of Part IV, section 45 and section 47 of the Act.

¹⁰⁹ After lodgement, the Applicants provided a subsequent amended version of the application for authorisation and a number of submissions clarifying the application, all of which are available on the [ACCC's public register](#) for this matter.

4.7. The ACCC has decided to grant authorisation AA1000587 until 30 June 2033.

5. Date authorisation comes into effect

5.1. This determination is made on 27 May 2022. If no application for review of the determination is made to the Australian Competition Tribunal it will come into force on 18 June 2022.