

24 March 2022

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

Dear Ms Kolacz

EMRC Ors Application for Authorisation (AA1000587)

The EMRC has reviewed the second submission lodged by SUEZ Recycling & Recovery Pty Ltd (SUEZ) dated 9 March 2022 after their substantial initial submission and we attach advice from Moray & Agnew which addresses the issues raised by SUEZ in this latest submission.

In addition, we make the following comments. In section 3.1 of their submission, SUEZ state:

- “(c) The relevant education services may be more effective when they are tailored to the unique requirements of the residents and the demographics in a particular council. The Participating Councils have different unique requirements and demographics – for example Bayswater and Bassendean are both inner city council areas, whereas Mundaring is a rural council area. We accordingly consider it unlikely that the proposed ‘consistent’ education services will be more effective than the current education services provided”.

EMRC Response

The EMRC has provided a waste education service for its member Councils and to support its various community engagement and education activities since the early 2000's. The member Council service includes regular meetings between the waste education team and relevant officers in the member Councils, development of the annual Waste & Recycling Guide tailored for each Council, promotion of waste minimisation, supporting the member Councils at community events to promote recycling and sustainable waste management, providing training for Earthcarers and responding to member Council queries. Since 2020, the EMRC has also assisted two member Councils (the Town of Bassendean and the City of Bayswater) prepare for and transition to weekly FOGO collections. So, as well as this existing service, under the Proposed Conduct, the EMRC will also be providing consistent messaging through the customer service centre, dealing with enquiries and complaints, messaging on bins and collection vehicles and the regional waste collection staff.

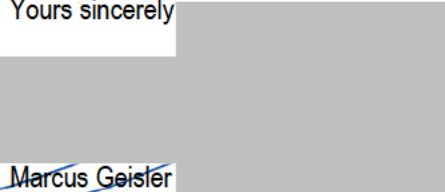
When there are three different service providers, as exists now, there is always the potential for different messaging, different responses to queries and complaints, different collection vehicle branding as these same vehicles have to service Councils outside the EMRC member Councils.



Also, SUEZ refer to the Shire of Mundaring as a rural community which is not accurate. Mundaring consider themselves a medium sized Perth Metropolitan local government 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, perhaps more so.

We trust this addresses the issues raised by SUEZ.

Yours sincerely



Marcus Geisler
Chief Executive Officer

Attachment

Legal Advice – Moray & Agnew regarding Suez submission of 9 March 2011 (D2022/05128)

23 March 2022

Chief Project Officer
Eastern Metropolitan Regional Council
226 Great Eastern Highway
BELMONT WA 6104

Attention: Stephen Fitzpatrick

By Email: [REDACTED]

ABN 49 831 870 580

Contact

Philip Mavor
[REDACTED]

Partner

Anne Wood

Our reference

PJM/451891

Your reference

Dear Stephen

ADVICE ON SUEZ SUBMISSION IN RESPONSE TO ACCC DRAFT DETERMINATION

Thank you for your instructions in this matter.

INSTRUCTIONS

1. The Eastern Metropolitan Regional Council (**EMRC**) seeks our advice on the Suez submission (**Suez Submission**) dated 9 March 2022 on the draft determination (**Draft Determination**) on the Proposed Conduct issued by the Australian Competition & Consumer Commission (**ACCC**) on 10 February 2022.

ACCC DRAFT DETERMINATION

2. The ACCC is an independent Commonwealth statutory authority whose role is to enforce the *Competition and Consumer Act 2010* (Cth) and a range of additional legislation, promoting competition, fair trading and regulating national infrastructure for the benefit of all Australians. Where a business (or local government) is concerned that their proposed conduct may give rise to a breach of the competition provisions of the Act, they can seek authorisation from the ACCC. If the ACCC is satisfied that the relevant legal test is met and grants authorisation, this removes the risk of legal action under the competition provisions.
3. Acting under its statutory authority, the ACCC reviewed and considered the EMRC application and all submissions made by interested industry stakeholders (including Suez) before making a determination 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 result or be likely to result for the Proposed Conduct, including any lessening of competition.

THE SUEZ SUBMISSION

4. We set out below our comments under each heading of the Suez Submission.

LEVEL 30, EXCHANGE TOWER, 2 THE ESPLANADE, PERTH WA 6000

PO BOX 5747, ST GEORGES TCE WA 6831

T +61 8 6317 0400 | F +61 8 9325 5016

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moray.com.au

Sydney Melbourne Brisbane Canberra Newcastle Perth

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Para 1 Executive Summary

5. In the Suez Submission¹ Suez states that, taken as a whole, Suez does not agree that the EMRC demonstrated that the Proposed Conduct will lead to a net public benefit, with the position of Suez being that the claimed public benefits are so marginal and theoretical that in practice they are unlikely to be realised, and certainly will not outweigh the real and practical public detriments associated with the Proposed Conduct.
6. The EMRC rejects the proposition that the claimed public benefits are so marginal and theoretical that in practice they are unlikely to be realised, and will not outweigh the real and practical public detriments associated with the Proposed Conduct.
7. The ACCC was required to determine whether 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. This requires that the ACCC interpret the facts before it and take a view of the likelihood of an event occurring or not occurring.
8. The ACCC was entitled to interpret the information and facts before them and make its determination as it did. The ACCC was entitled to determine that it was 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.
9. Where the issue is whether something is 'likely' or 'not likely' to occur, it is not surprising that Suez (a major industry operator) seeks in each case to interpret such likelihood in a manner that suits its own interests. In our opinion much of the Suez submission contains a lot of speculation and heavily caveated terms 'may be', 'could be', 'also possible' 'consider it unlikely' and limited facts or evidence to support its view.

Para 2 – About Suez

10. In the Suez Submission Suez acknowledges it is one of the largest waste collection operators in Perth, "*currently providing kerbside collection services to 14 Perth councils; collecting some 70, 000 bins per day.*"² It is unlikely that the Proposed Conduct will negatively impact the operations of Suez.

Para 3 - Claimed Public Benefits are Insignificant

3.1 No real environmental benefits

11. The Suez Submission at para 3.1 on environmental benefits in our opinion raises and seeks to re-argue facts and issues already raised in its original submission to the ACCC, and already considered by the ACCC.
12. This includes at para 3.1(a) comments that the WA Waste Authority (A State Government Body implementing the Waste Avoidance and Resource Recovery Strategy) runs the WasteSorted and Better Bins Program.³
13. In the opinion of the EMRC, the Suez arguments in para 3.1(b) and (c) are speculative and subjective opinion, and are not supported by any relevant objective facts or data.
14. Suez comments that:

¹ Suez Submission at para 1.

² Suez Submission at para 2.

³ See Suez Submission at para 3.1(a) and Draft Determination at 3.38

- (a) the proposed educational benefits will benefit only 7% of households and will therefore be meaningless, and
- (b) private operators such as Suez have significant research and developer budgets and genuine economies of scale that could be leveraged to implement real environmental benefits,

ignore the fact that the EMRC has adopted the principles of the Waste Strategy and has considerable operational, development and strategic capability, and is speculative and subjective opinion not supported by any relevant objective facts or data.

3.2 No real transaction cost savings

- 15. The Suez Submission at para 3.2 of the Suez Submission on transaction cost savings, in our opinion raises and seeks to re-argue facts and issues already raised in its original submission to the ACCC, and already considered by the ACCC.
- 16. This includes Suez argument that the proposed transactional cost savings will likely be minimal due to WALGA having an existing Preferred Supplier Panel arrangement already in place.⁴
- 17. In our opinion the Suez comment in para 3.2 that “*Our view is that the competitive process should not be criticised on the basis that it involves time and costs*” is an acknowledgment by Suez that the Proposed Conduct may result in transactional cost savings.
- 18. Suez’s other comments and views in para 3.2 are speculative and subjective opinion not supported by any relevant objective facts or data.

Para 4 - Public Detriments are significant

4.1 Overview of key public detriments

- 19. In para 4.1 Suez contends that there are no real public benefits associated with the Proposed Conduct, and any benefit would be outweighed by:
 - (a) the likelihood of higher collection service prices, which will ultimately be borne by residents;
 - (b) the reduction in competition as a consequence of the Proposed Conduct; and
 - (c) the real risk of a reduction in the level of service that councils and residents will receive in circumstances where the EMRC is untested, and has been appointed as an exclusive service provider without any competitive tender process or prior experience.
- 20. Suez is raising issues already considered by the ACCC. The EMRC addressed these issues in para 3.53 of the Draft Determination. The ACCC’s view of inter alia these issues is set out in para 3.54 to 3.59 of the Draft Determination.

4.2 Increased prices

- 21. Suez acknowledges that it has not reviewed the EMRC confidential price modelling EMRC provided to the ACCC, but makes comments under the headings:

⁴ See Suez Submission at para 3.2 and Draft Determination at 3.18

- (a) The EMRC will need to pass on the full cost base as the services are being established;
 - (b) No bundled prices may lead to higher prices;
 - (c) Prices are unlikely to be lower because of lighter bins or optimised routes;
 - (d) A competitive process is more likely to lead to competitive pricing.
22. EMRC rejects the comments and opinion of Suez contained in para 4.2. These are not new issues and our opinion the Suez comments on the feasibility of the proposed EMRC pricing is speculative and subjective opinion not supported by any relevant objective facts or data, particularly given Suez has not reviewed the EMRC confidential price modelling.

4.3 Defining the market to consider the impact on competition

23. The ACCC has considered the Proposed Conduct by reference to the Perth Metropolitan area.
24. Suez submits in para 4.3 of the Suez Submission that the relevant market area should be limited to the Participating Council areas. The EMRC totally rejects this proposition.
25. This issue was raised and considered by the ACCC in paragraphs 3.6, 3.7, and 3.8 of the Draft Determination.
26. Suez does not raise any new issues, and is seeking to re-argue the same point.

4.4 Reduction in competition

27. The EMRC rejects the argument by Suez that (even in the Perth metropolitan area is taken as the market) the market is only 14 councils (and not 26) since some councils have an in-house service. This is a repeat of the contention in para 4.3 of the Suez Submission, and was considered by the ACCC in paragraphs 3.6, 3.7, and 3.8 of the Draft Determination.
28. We otherwise note that the waste collection services of various councils will vary from time to time, as elected councillors come and go. A council may elect to have an in-house waste collection service or tender for an industry waste collection service provider and this will change over time as the Council sees fit. It is not appropriate to distinguish between councils with an inhouse or external waste collection service when considering the appropriate market area.
29. In our opinion Suez does not raise any new issues in para 4.4 that had not been considered by the ACCC in the Draft Determination, and that the comments of Suez are largely speculative and subjective opinion not supported by any relevant objective facts or data.
30. In para 4.4 other issues raised by Suez include:
- (a) The possible exit of small waste service providers was considered by the ACCC in para 3.56 of the Draft Determination.
 - (b) The proposed 10 year period is dealt with in para 1.13, 3.78, and 3.80 of the Draft Determination. The EMRC otherwise notes that a reasonable contract term is required in order to recover the cost of capital invested in waste collection services, and typically these contracts are 5 years plus extension options of up to another 5 years (i.e. a 10-year total term).

- (c) The lessening of competition was raised as an issue by Suez in para 2.3 of the Draft Determination. The ACCC dealt with this issue in para 3.54 and 4.4.

At para 4.4 the ACCC stated:

“For the reasons outlined in this draft 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.” (our underline)

- (d) Potential loss of dynamic markets and impact on new entry. The EMRC rejects the proposition that the Proposed Conduct will act as a barrier for new entry into the market. This is speculative and subjective opinion not supported by any relevant objective facts or data, particularly given the relevant market area is the Perth metropolitan area, and the Proposed Conduct will service only 7% of households in this market.

4.5 Risk of reduced service levels

31. The EMRC rejects the proposition by Suez that there may be the risk of reduced service levels. The Suez comments are largely speculative and subjective opinion not supported by any relevant objective facts or data.
32. This issue was considered by the ACCC in para 3.56 of the Draft Determination, which inter alia notes:

“There are checks and balances in place to help ensure that the EMRC is providing a competitive service, including that the EMRC will conduct independent market reviews every 5 years to ensure the service is cost competitive (and aligns with the region’s and State’s objectives) and provide regular service reports to each Participating Council. The ACCC considers that the EMRC has incentive to provide cost competitive and efficient services to meet KPIs under its service agreement so that Participating Councils will renew their contracts and other councils will be encouraged to join the arrangements (noting the potential for further applications for authorisation). Participating Councils could terminate the service agreement in certain circumstances, including if the EMRC was unable to meet certain KPIs imbedded in the contract.²⁴ The ACCC recognises that the EMRC has experience in the management of household waste and dealing with collection contractors. It also recognises that the State 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.”

4.6 Proposed Conduct will not give rise to efficiencies that outweigh the impact on competition

33. The ACCC considers the Proposed Conduct could potentially result in some efficiencies in the supply of the relevant collection and ancillary waste services. However, it does not have sufficient information to conclude that these efficiencies would be greater than what could be achieved without the Proposed Conduct (where the Participating Councils individually enter into contracts with a private sector provider via a Western Australian Local Government Preferred Supplier Panel) and has therefore not accepted these as a likely public benefit at this time (see para 3.35 of the Draft Determination).
34. However (notwithstanding the comments in para 3.35), taken as a whole, the ACCC considered the EMRC Application and associated documentation, and determined the following (in para 4.3 and 4.4 of the Draft Determination):

“4.3. 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.

4.4. For the reasons outlined in this draft 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.”

35. In the opinion of the EMRC the Suez comments are largely speculative and subjective opinion, and are not supported by any relevant objective facts or data.

4.7 Risk of cross-subsidisation

36. The Suez comments on the risk of subsidisation between the collections and disposal services provided by the EMRC are largely speculative and subjective opinion, and are not supported by any relevant objective facts or data.
37. The \$38/tonne charge for member Council waste as part of their disposal rate goes into a reserve for the purpose of funding capital expenditure on resource recovery projects like the Hazelmere Waste Transfer Station, the Hazelmere Wood Waste to Energy Plant and the proposed FOGO Processing Plant at Red Hill Waste Management Facility. The reserve isn't used to fund operational expenditures and wouldn't be used to cross subsidise the Proposed Conduct. Council needs to approve allocations from the reserve and the EMRC is audited by the Office of the Auditor General. Businesses like SUEZ, on the other hand, have no public disclosure requirements and would be quite capable of cross subsidizing their waste collection costs from other parts of their business. SUEZ provide no public information about their business financials whereas Cleanaway, being a publicly listed company, does have financial reports on their website.

4.8 Duplication of services provided by local government

38. Para 3.63 of the Draft Determination states that:

“SUEZ and the City of Belmont submit that the Proposed Conduct does not satisfy the ‘executive functions test’ under section 3.18(3) of the Local Government Act as it would duplicate services already provided by private industry.”

39. This was addressed by the ACCC in para 3.71 of the Draft Determination as follows:

3.71. Section 3.18(3) 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 is satisfied that the Applicants have considered the application of this section, and further accepts that there are other councils in the Perth metropolitan region who self-supply their own waste collection 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.

40. It appears that in para 4.8 (of the Suez Submission) Suez is seeking to extend the proposition that local government should not duplicate services that could be provided by private operators, to the contention that local governments should not duplicate services that could be provided by local government. Private waste operators would have very little work if this was the case.
41. The EMRC rejects this proposition, and notes the ACCC comment in para 3.72 of the Draft Determination:

3.72. *More broadly, the ACCC's role is to consider whether the Proposed Conduct before it results in a net public benefit, and not to otherwise assess whether such services are most appropriately provided by a government or a private sector provider.* (our underline)

42. EMRC notes 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.

4.9 Proposed Conduct is not consistent with National Competition Policy

43. This issue was raised by Suez in para 3.67 of the Draft Determination. It was addressed by the ACCC in para 3.68 as follows:

"3.68. In response, the Applicants submit that the suggestion that providing a waste collection service is outside the purpose of a regional council is incorrect. They note that the EMRC's Establishment Agreement provides for the EMRC to undertake activities including the removal, processing, treatment and disposal of waste. The Applicants submit 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 section's requirements, and those of the National Competition Policy, are met."

44. The EMRC is satisfied that the requirements of the National Competition Policy have been met.
45. The Suez comments on the National Competition Policy are largely speculative and subjective opinion, and are not supported by any relevant objective facts or data.

4.10 Scope of the Proposed Conduct is not clear

46. EMRC considers the scope of the Proposed Conduct is clear from the Draft Determination.
47. The issue of 'creep' was addressed by the EMRC and ACCC in para 3.60 to 3.62 of the Draft Determination as follows:

"3.60. 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.

3.61. In response, the Applicants submit that the Proposed Conduct is restricted to domestic waste from the 3 Participating Councils and is not about the EMRC expanding its commercial offering into construction and demolition or commercial and industrial. They 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.

3.62. 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 the public benefits and detriments of such conduct based on the facts at the time.”

48. Suez comments on the scope of services under the Draft Determination are largely speculative and subjective opinion.
49. The issue of ‘creep’ of the Proposed Conduct into the provision of services to the commercial and industrial sector has already been addressed in the response to JJ’s Waste in the Draft Determination. The description of the Proposed Conduct is quite clear in the Application for Authorisation dated 15 November 2021, there is no ambiguity as suggested by Suez.

Para 5 – Conclusion

50. The EMRC rejects the conclusion in para 5 of the Suez Submission.
51. In the opinion of EMRC, Suez is largely seeking to re-argue facts and issues already raised in its original submission to the ACCC, and already considered by the ACCC in making the Draft Determination.
52. The Suez comments and opinions in the Suez Submission are largely speculative and subjective opinion, and are not supported by any relevant objective facts or data.

If you have any queries or would like clarification please do not hesitate to contact our Philip Mavor.

Yours faithfully
MORAY & AGNEW

