



Draft Determination and interim authorisation

Application for authorisation AA1000430

lodged by

Central Highlands Regional Council
Isaac Regional Council

to collectively tender and contract for the acquisition of waste collection services and to continue to give effect to an existing joint waste collection contract

Authorisation number: AA1000430

Date: 17 December 2018

Commissioners: Keogh
Featherston
Rickard

Summary

The ACCC proposes to grant authorisation to enable Central Highlands Regional Council and Isaac Regional Council to collectively tender and enter into a contract for the acquisition of waste collection services. The councils have indicated they intend to engage in some aspects of this procurement process jointly, some on an individual basis and other activities they will decide whether to engage collectively once tenders have been evaluated. Authorisation enables the councils to engage in such activities collectively, should they decide to do so. Interim authorisation was granted on 24 October 2018 to enable the councils to begin preparations for the collective tender process.

The ACCC proposes to grant authorisation until 4 October 2029, inclusive of any options to extend any waste collection contract entered into as a result of that process by either applicant.

The ACCC previously granted authorisation (A91087) in 2008 to the Central Queensland Local Government Association on behalf of four regional councils, including Central Highlands and Isaac Regional Council, to collectively tender for a range of waste services, including collection services.

Central Highlands and Isaac Regional Councils have entered into a waste collection contract under the 2008 authorisation (A91087) that runs until 4 October 2019. However, that authorisation will expire on 31 December 2018. In order to give the councils legal protection to continue to give effect to the current contract beyond 31 December 2018, the ACCC has today granted them interim authorisation and is also proposing to include authorisation for this conduct as part of the new authorisation (AA1000430).

The ACCC invites submissions in relation to this draft determination before making its final decision.

1. The application for authorisation

- 1.1. On 28 September 2018, Central Highlands and Isaac Regional Councils (the **Applicants**) lodged application for authorisation AA1000430 with the Australian Competition and Consumer Commission (the **ACCC**). The Applicants are seeking authorisation to jointly tender and contract for the acquisition of services for the collection of kerbside and bulk bin waste and recyclables for domestic and commercial premises; the collection of public waste and recyclables; and the collection of public waste located at council facilities. The Applicants are seeking authorisation for 10 years.
- 1.2. On 14 November 2018, the Applicants amended the application to also seek authorisation to continue to engage in the conduct authorised by the ACCC in 2008 under application for authorisation A91087, from the expiry date of authorisation A91087 until the end of the current contract with JJ Richards & Sons Pty Ltd (**JJ Richards**) on 4 October 2019.

(Together, the **Proposed Conduct**).
- 1.3. Application for authorisation AA1000430 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (the **CCA**). Under this provision, the ACCC can grant authorisation which provides businesses with an exemption from competition laws for arrangements that may otherwise risk breaching the law, provided they are

likely to result in a net public benefit, or, in some cases, are unlikely to substantially lessen competition.

- 1.4. In this case, the participating councils may be considered to be each other's competitor when seeking to procure waste collection services. By conducting aspects of the procurement process jointly rather than individually, they risk breaching competition laws. Accordingly, the Applicants have sought authorisation from the ACCC, which would give them legal protection to collectively tender and contract.

The Applicants

- 1.5. The Applicants are two local government councils in Central Queensland located adjacent to each other:
 - Central Highlands Regional Council has a resident population of 28,783 and an area of almost 54,000km²
 - Isaac Regional Council has a resident population of 24,275 and an area of almost 60,000km².

The Proposed Conduct

- 1.6. The Applicants are seeking authorisation for two discrete limbs of proposed conduct. The first relates to the tender and contracting process for the acquisition of waste collection services, as described in paragraphs 1.7 to 1.11 below. The second limb relates to the final nine months of the Applicants' existing waste collection contract, as described in paragraphs 1.12 to 1.16. Together, the two limbs make up the **Proposed Conduct**.

The Proposed Tendering Conduct

- 1.7. The Applicants are seeking authorisation to jointly tender for and procure services (including entering into a contract) for the collection of kerbside and bulk bin waste and recyclables for domestic and commercial premises; the collection of public waste and recyclables; and the collection of public waste located at council facilities (the **Proposed Tendering Conduct**). The Applicants' collective tender proposal does not involve waste processing services.
- 1.8. The Applicants propose to jointly prepare and advertise a Request for Tender (**RFT**) that will invite tenders to supply services to one or both of the council areas. As such, the RFT will consist of the following separable portions:
 - waste collection services for Central Highlands Regional Council and Isaac Regional Council
 - waste collection services for Central Highlands Regional Council only
 - waste collection services for Isaac Regional Council only.
- 1.9. As explained in the application lodged on 28 September 2018, the Applicants had originally intended to establish a single evaluation panel comprised of representatives of both councils to assess tender responses. It was proposed that it would be open to the evaluation panel to select one waste collection contractor to supply services to both local government areas or to select two different contractors, based on the evaluation criteria.
- 1.10. On 5 December 2018, the Applicants advised the ACCC that the above description of the tender evaluation process no longer accurately reflects the tender process the

Applicants intend to engage in. Rather than having a single evaluation panel, each Applicant will have its own tender evaluation panel, comprising of representatives selected only by that Applicant. Each panel will assess tender responses and select a supplier independently of each other. As with the original proposed arrangements, the Applicants may still select the same supplier to service both the councils or they may select a different supplier for each council. The ACCC therefore notes that while it is possible that the Applicants will decide to enter separate contracts with different suppliers, authorisation is sought to enable the Applicants to enter into a joint contract with the same supplier should that be the most attractive option arising out of the tender evaluation process.

- 1.11. In a letter dated 16 October 2018 clarifying the proposed conduct, the Applicants advised that Isaac Regional Council was considering including processing of recycling waste at a Material Recycling Facility in the tender, in addition to the above mentioned collection services. Central Highlands Regional Council, however, was not considering tendering for processing services.¹ On 14 November 2018, the Applicants advised the ACCC that Isaac Regional Council is no longer considering procuring this service as part of the proposed joint procurement process with Central Highlands Regional Council, and will seek to procure this service separately.²

The Existing Contract Conduct

- 1.12. The Applicants are also seeking authorisation to continue to give effect to their current waste collection contract, entered into following authorisation A91087 (the **Existing Contract Conduct**).
- 1.13. On 13 August 2008, the ACCC granted authorisation A91087 to the Central Queensland Local Government Association on behalf of four regional councils, including Central Highlands Regional Council and Isaac Regional Council, to collectively tender for the provision of waste, recyclables and ancillary waste services (including waste collection services) in their combined local government areas and offer contracts to the successful tenderers. Authorisation A91087 was granted until 31 December 2018.
- 1.14. At the time authorisation A91087 was granted, the four councils had expected to carry out the joint procurement process and announce the successful contractor in September 2008.³ However, the councils did not enter into a contract until 5 October 2009. The councils contracted with JJ Richards following authorisation A91087 under a seven year term with three extension options of one year each.⁴
- 1.15. Central Highlands Regional Council and Isaac Regional Council decided to exercise all three options to extend the waste collection contract with JJ Richards. As a result, the current contract expires on 4 October 2019. The ACCC understands that the other two councils did not renew the contract after the initial seven year term and instead decided to procure waste management services independently.
- 1.16. Where relevant, in this document the ACCC has assessed the Existing Contract Conduct alongside the assessment of the Proposed Tendering Conduct.

¹ Central Highlands Regional Council and Isaac Regional Council clarification of conduct, 16 October 2018, p. 1.

² Central Highlands Regional Council and Isaac Regional Council amended application, 14 November 2018, p. 2.

³ Central Queensland Local Government Association Determination, 13 August 2008, p. 13.

⁴ Central Highlands Regional Council and Isaac Regional Council amended application, 14 November 2018, p. 1.

Interim authorisation

- 1.17. At the time of application, the Applicants also requested interim authorisation to enable them to begin preparations for the Proposed Tendering Conduct. In particular, the Applicants sought interim authorisation to enable them to begin preparations for the collective tender process while the ACCC is considering the substantive application, including preparing and advertising tender documentation, evaluating responses, and negotiating and communicating with prospective bidders.⁵
- 1.18. On 24 October 2018, the ACCC granted interim authorisation under subsection 91(2) of the CCA in relation to certain aspects of the Proposed Tendering Conduct. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until interim authorisation is revoked.
- 1.19. As discussed in the preceding section, the Applicants' current waste collection contract entered into following authorisation A91087 with JJ Richards expires on 4 October 2019, but the authorisation itself expires on 31 December 2018. As a result, on 14 November 2018, the Applicants amended the application to also seek authorisation to continue to give effect to the current contract from 1 January 2019 until 4 October 2019. Given the ACCC's final determination will not be made prior to 31 December 2018, interim authorisation will allow the Applicants to continue to give effect to the current contract while the ACCC considers the substantive application.
- 1.20. Interim authorisation is considered further in section 6.

2. Background

- 2.1. It is common practice throughout Australia for groups of local councils to collectively tender and contract for waste services. The objective of such collaboration is to reduce transaction costs, pool resources and expertise, and achieve economies of scale.
- 2.2. The ACCC has previously considered several authorisation applications for joint tendering and contracting for various waste management services, including two previous applications from Queensland councils for joint tendering for the collection of waste:
 - On 9 December 2016, the ACCC granted authorisation to Cairns Regional Council, Douglas Shire Council and Mareeba Shire Council for 12 years to enable them to jointly procure and contract for waste and recyclables collection services.
 - On 8 October 2015, the ACCC granted authorisation to Redland City Council and Brisbane City Council to enable them to jointly procure, negotiate and contract for waste, green waste and recyclables collection services. Authorisation was granted for 19 years, comprising a three year period for the joint procurement process and a 16 year operation term (eight years with an option to extend for a further eight years).

3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.

⁵ See ACCC interim authorisation decision, dated 24 October 2018, available: [ACCC Public Register](#).

- 3.2. The ACCC invited submissions from nine potentially interested parties, including a number of waste service businesses and industry associations, inviting them to comment on the application for authorisation and request for interim authorisation.⁶
- 3.3. To date, the ACCC has not received any public submissions in relation to the application.
- 3.4. Public submissions by the Applicants are on the [Public Register](#) for this matter.

4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the CCA.
- 4.2. The Applicants have sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the CCA and may substantially lessen competition within the meaning of section 45 of the CCA. Consistent with subsections 90(7) and 90(8) of the CCA, 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 from the proposed conduct (**authorisation test**).

Relevant areas of Competition

- 4.3. To assess the likely effect of the Proposed Conduct, the ACCC will identify the relevant areas of competition likely to be impacted. The application for authorisation relates to waste collection services only and excludes waste processing services.
- 4.4. While the ACCC does not consider it necessary to precisely define the relevant areas of competition in assessing this application, the Proposed Conduct is likely to primarily affect the supply of waste collection services in the Central Queensland region.

Future with and without the Proposed Conduct

- 4.5. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 4.6. The ACCC considers that, in a future with the Proposed Tendering Conduct, the Applicants will conduct a joint procurement process for the streams of waste collection services. Service providers will be invited to submit tenders to supply services to both of the council areas or to each council area separately.
- 4.7. In a future without the Proposed Tendering Conduct, each council would likely conduct separate tender processes for a provider of the required services independently of each other. Prospective waste collection services providers would submit separate tender responses to one or both councils.
- 4.8. In a future without the Existing Contract Conduct, the ACCC considers that the Applicants may have to cease their current contractual arrangements when the existing authorisation A91087 expires on 31 December 2018. Each council would need to individually source waste collection services for any gap between the expiry of

⁶ A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

authorisation A91087 and the commencement of any future collectively acquired services.

Public benefits

4.9. The CCA does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

...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.⁷

4.10. Broadly, the Applicants submit that the Proposed Conduct would create transaction cost savings, increased efficiencies and economies of scale, resulting in cost savings that can be used to fund public projects that benefit ratepayers, and greater competition between potential service providers. The Applicants also submit that the Proposed Conduct may result in improved environmental outcomes. However, based on the information it has received, the ACCC does not consider the Proposed Conduct is likely to result in significant environmental improvements.

4.11. The ACCC considers the following public benefits are likely:

- Transaction cost savings
- Improved efficiencies
- Increased competition

Transaction cost savings

4.12. The ACCC considers that the Proposed Tendering Conduct is likely to provide transaction cost savings for both the Applicants and the service provider(s), compared to a scenario where each council conducts its own separate tender processes.

4.13. The Proposed Tendering Conduct will enable each council to combine some financial and human resources in conducting a joint procurement process, thereby reducing the time and resources associated with calling for separate tenders, including some duplicated administrative costs. Transaction cost savings are likely to be somewhat reduced in circumstances where multiple evaluation panels are assessing tender responses compared to a single evaluation panel.

4.14. The Proposed Tendering Conduct will also enable prospective waste service providers to tender for both councils (or each council individually) in a single tender process, rather than separate processes for each council.

4.15. Regarding the Existing Contract Conduct, the ACCC considers allowing the Applicants to continue to give effect to the collection contract entered into following authorisation A91087 will avoid transaction costs associated with re-negotiating individual contracts with service providers to cover the period from 1 January 2019 to 4 October 2019.

⁷ 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.

Improved efficiencies

- 4.16. The ACCC considers that by aggregating the Applicants' waste collection requirements, potential service providers are likely to be able to achieve a more efficient scale of operation than if the two councils only offered waste collection contracts individually. The Proposed Tendering Conduct is therefore likely to create the opportunity for more competitive bids which take advantage of economies of scale, compared to the situation without the Proposed Tendering Conduct i.e. where each council calls for tenders separately, with no option for service providers to supply to both council areas.
- 4.17. In addition, the Proposed Tendering Conduct is likely to create the opportunity for service providers to lower costs by optimising collection routes and better utilising their fleets.
- 4.18. Regarding the Existing Contract Conduct, the ACCC considers that allowing the Applicants to continue to give effect to their existing contract will avoid the additional administrative burden and additional service costs that may be incurred by the councils should they be required to revert to individual contracts for the period from 1 January 2019 to 4 October 2019.
- 4.19. In addition, it will allow the public benefits identified under authorisation A91087 to continue for that period, including transaction cost savings, efficiencies, and environmental benefits.
- 4.20. The ACCC considers that the Proposed Conduct is likely to result in a public benefit in the form of increased efficiencies.

Increased competition

- 4.21. The ACCC considers that the Proposed Tendering Conduct is likely to provide a greater incentive for potential suppliers to compete and submit tenders as it offers the opportunity for prospective suppliers to service both council areas (noting that they can also tender to service just one council area). By combining their purchasing power and offering the opportunity for a larger contract than the two councils could offer individually, with a total duration of up to 10 years (including three one-year renewal options), this is likely to be more appealing to a broader range of potential suppliers.
- 4.22. As such, the ACCC considers that the Proposed Tendering Conduct, when compared to a future without the Proposed Tendering Conduct (where there is no opportunity for suppliers to service both council areas jointly), is likely to result in a public benefit as it will likely increase competition between potential suppliers to provide waste collection services to the participating councils. All else being equal, this is likely to be reflected in the negotiated terms and conditions of service agreements, resulting in lower prices and/or better quality of waste collection services delivered to ratepayers.

Public detriments

- 4.23. The CCA 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.⁸

⁸ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- 4.24. The Applicants submit that there is unlikely to be any public detriment arising from the Proposed Tendering Conduct due to the separable nature of the contract.
- 4.25. The ACCC considers that public detriments may arise where a joint procurement group comprises a substantial portion of the market and therefore may reduce competition for providers of the relevant services (if, for example, the loss of such a large contract causes some providers to exit the market and new entry is unlikely).
- 4.26. In this case, however, the ACCC considers that the Proposed Tendering Conduct is likely to result in minimal public detriment.
- 4.27. The ACCC considers that as the two councils have relatively small populations, they are unlikely to represent a substantial portion of the relevant waste collection market. As such, the Proposed Tendering Conduct is not likely to limit the ability of unsuccessful tender applicants and other market participants to continue to compete for waste collection work. Further, the separable nature of the contract gives smaller suppliers the option to enter bids to supply collection services to an individual council, which means that the conduct allows for competition from a wide range of potential suppliers. The councils may select two different contractors to supply each area if suppliers' individual bids are more attractive than a joint bid.
- 4.28. Regarding the Existing Contract Conduct, the ACCC considers allowing the Applicants to continue to give effect to the collection contract entered into following authorisation A91087 is unlikely to result in public detriment as this limb of the Proposed Conduct has the effect of continuing the status quo in the market, and the ACCC has not identified any concerns that the conduct has led to detriments since authorisation was granted in 2008. Further, the Existing Contract Conduct will only be in effect for a relatively short period, that is, until 4 October 2019. While other prospective waste collection providers would be precluded from tendering to service the councils for this short period, they will be able to participate in the next tender process under the Proposed Tendering Conduct.

Balance of public benefit and detriment

- 4.29. For the reasons outlined in this draft 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

- 4.30. The CCA allows the ACCC to grant authorisation for a limited period of time.⁹ 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.
- 4.31. In this instance, the Applicants seek authorisation for the Proposed Tendering Conduct for 10 years, comprising a seven year contract term and three extension options each of one year.
- 4.32. The Applicants also seek authorisation for the Existing Contract Conduct to continue to give effect to their current waste collection contract entered into following authorisation A91087 beyond the expiry of that authorisation on 31 December 2018 and until the contract expires. This period comprises 1 January 2019 to 4 October 2019.

⁹ Subsection 91(1).

- 4.33. The ACCC did not receive any submissions in relation to the length of authorisation sought for the Proposed Conduct.
- 4.34. Given the assessment of public benefits and detriments likely to result from the Proposed Tendering Conduct, the ACCC proposes to grant authorisation to the Applicants until 4 October 2029, inclusive of any options to extend by either Council. The ACCC considers it would be practical to grant authorisation for a period of 10 years from the date of expiry of the Applicants' current collection contract on 4 October 2019.
- 4.35. Given the assessment of public benefits and detriments likely to result from the Existing Contract Conduct, the ACCC proposes to authorise the Applicants to continue to give effect to their current contract entered into following authorisation A91087 beyond 31 December 2018 and until it expires on 4 October 2019.

5. Draft determination

The application

- 5.1. On 28 September 2018, the Applicants lodged application AA1000430 with the ACCC, seeking authorisation to jointly procure waste collection services under subsection 88(1) of the CCA (the Proposed Tendering Conduct).
- 5.2. On 14 November 2018, the Applicants amended application for authorisation AA1000430 to also seek authorisation to continue to engage in the conduct authorised by the ACCC in 2008 under application for authorisation A91087, to continue to give effect to the contract entered into following that authorisation from the expiry of authorisation A91087 until 4 October 2019 (the Existing Contract Conduct).
- 5.3. Subsection 90A(1) of the CCA requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 5.4. Under subsections 90(7) and 90(8) of the CCA, 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.
- 5.5. 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.
- 5.6. Accordingly, the ACCC proposes to grant authorisation.

Conduct which the ACCC proposes to authorise

- 5.7. The ACCC proposes to grant authorisation AA1000430 to enable the Applicants to:
 - jointly tender and procure services (including entering into a contract) for the collection of kerbside and bulk bin waste and recyclables for domestic and commercial premises; public waste and recyclables; and waste located at council

facilities, as described in paragraphs 1.7 to 1.11 and defined as the Proposed Tendering Conduct, and

- continue to give effect to their existing waste collection contract entered into following authorisation A91087, as described in paragraphs 1.12 to 1.16 and defined as the Existing Contract Conduct.

5.8. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the CCA or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.

5.9. The ACCC proposes to grant authorisation for the Proposed Tendering Conduct until 4 October 2029. The ACCC proposes to grant authorisation for the Existing Contract Conduct until 4 October 2019.

5.10. This draft determination is made on 17 December 2018.

6. Interim authorisation

6.1. Given that the ACCC's final determination in relation to this application for authorisation will not come into effect before authorisation A91087 expires on 31 December 2018, the ACCC has also decided to grant interim authorisation in relation to the Existing Contract Conduct to enable the Applicants to continue to give effect to the current contract while the ACCC considers the substantive application. Interim authorisation in respect of this conduct will commence on 1 January 2019.

6.2. The ACCC has already granted interim authorisation in relation to certain aspects of the Proposed Tendering Conduct to enable the Applicants to begin preparations for the new collective tender process.

6.3. Subsection 91(2) of the Act allows the ACCC to grant interim authorisation where the ACCC considers it appropriate to allow the parties to engage in the conduct while the ACCC is considering the substantive application for authorisation.

6.4. Without interim authorisation in respect of the Existing Contract Conduct, the Applicants could be considered to be operating outside the protection provided by authorisation A91087 after the expiry of that authorisation on 31 December 2018. As such, interim authorisation enables them to continue to give effect to their existing joint waste collection contract with JJ Richards from 1 January 2019.

6.5. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

7. Next steps

7.1. The ACCC now invites submissions in response to this draft determination. In addition, consistent with section 90A of the CCA, the Applicants or an interested party may request that the ACCC hold a conference to discuss the draft determination.