



Draft Determination

Application for authorisation
lodged by
Logan City Council & Ors
in respect of
collective tendering for waste processing services
Authorisation number: AA1000437

13 May 2019

Commissioners:

Sims

Keogh

Court

Featherston

Summary

The ACCC proposes to grant authorisation to enable five Councils in South East Queensland (Logan, Ipswich, Redlands, Lockyer Valley and Somerset) to collectively tender for, and potentially procure, waste processing services.

The ACCC proposes to grant authorisation until 31 December 2050.

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

1. The application for authorisation

- 1.1. On 13 February 2019, Logan City Council, Ipswich City Council, Redland City Council, Lockyer Valley Regional Council and Somerset Regional Council (the **Councils**) lodged application for authorisation AA1000437 with the Australian Competition and Consumer Commission (the **ACCC**). The Councils are seeking authorisation to collectively tender (and subsequently enter into contracts) for waste processing services, until 31 December 2050. This application for authorisation AA1000437 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.2. The ACCC can grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching the law but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.3. The Councils also requested, and on 29 March 2019 the ACCC granted under subsection 91(2) of the Act, interim authorisation to enable them to commence an expression of interest process while the ACCC is considering the substantive application.

The Councils

- 1.4. The Councils are five South East Queensland Councils, namely:

- Logan City Council
- Ipswich City Council
- Redland City Council
- Lockyer Valley Regional Council
- Somerset Regional Council

(the **Councils**).

- 1.5. Each Council is responsible for and delivers waste management services within its local government area. Each Council is within the South East Queensland region and is adjacent to one or more of the participating Councils.



- 1.6. The Councils advise that, of the 2,128,666 tonnes of municipal solid waste generated in the South East Queensland region in 2016-17, the participating Councils generated approximately 21%.
- 1.7. The participating Councils have a combined population of around 750,000 people.

1.8. The population and municipal waste tonnage of each Council is listed in the table below.

Council	Estimated tonnage of municipal waste (2016/17)¹	Population
Logan City Council	188,490	320,000
Ipswich City Council	108,546	210,000
Redland City Council	109,967	155,000
Lockyer Valley Regional Council	26,690	40,000
Somerset Regional Council	15,088	23,000
Total	448,781	748,000

The Proposed Conduct

1.9. The Councils are seeking authorisation to jointly investigate, and potentially procure, a regional approach to resource recovery and/or waste disposal services through a competitive two stage procurement process (as set out below). The services will be limited to the processing or disposal of resources and/or waste, and will not include any collection services, or the operation of existing waste transfer stations and shops to sell reclaimed materials at landfill sites. The waste streams involved are:

- residual waste – being waste that has not been sorted for recycling or beneficial reuse
- recyclable waste – being items and materials that have been collected for the purposes of recycling or other forms of beneficial reuse
- organic waste – being garden and/or food waste collected for the purposes of beneficial reuse
- regulated waste – wastes as defined in Schedule 7 of the *Environmental Protection Regulation 2008* (Qld) of primarily domestic origin, and
- problematic waste – being items that are currently not recovered that have a potential resource value for recycling or beneficial reuse (such as polystyrene and mattresses)

(the **Proposed Conduct**)

Rationale

1.10. The Councils advise they each recognise that some existing methods of waste processing and disposal, including landfill disposal, may not be sustainable in the long term. It was identified that some of the Councils needed to embark on a similar procurement process for future resource recovery and waste disposal services, and that all Councils were interested in a joint approach to waste management solutions.

1.11. The Councils believe that a regional procurement approach provides an opportunity to encourage commercial investment in innovative and viable waste management solutions through long-term secured access to volumes of waste that are greater than

¹ Estimates provided by the Councils in their application for authorisation.

that available from any one Council. The Councils wish to consider alternative waste treatment technologies and solutions, including energy from waste solutions, and believe their collective waste volumes may make these accessible to the Councils.

The proposed procurement process

- 1.12. The Councils plan to commence the procurement process with a public invitation for Expressions of Interest (EOI). The invitation for EOIs will seek responses for a broad range of resource recovery and/or waste disposal services, for any one or more resources and/or waste types, and for services for any one or more of the Councils.
- 1.13. The EOIs will be evaluated by a committee comprising a representative from each Council.
- 1.14. Following the EOI process, the Councils may invite shortlisted EOI respondents to engage in an Early Tenderer Involvement (ETI) process. Respondents will be invited to become familiar with the Councils' requirements, allowing respondents to provide more detail on their proposal with a view to allowing the Councils to refine their objectives and requirements for the project before proceeding to the tender stage. Participation in the ETI process will be a condition precedent to the submission of a tender.
- 1.15. The Councils will request tenders from those respondents who participated in the ETI process. Any Request for Tenders (RFT) process will contain:
 - details of the proposed resource recovery and/or waste disposal services
 - the terms and conditions of the bespoke contract to be entered into with the successful tenderer(s) for the implementation and delivery of the services
 - the specification and other plans and documentation generated through the ETI process (if any), and
 - pre-determined evaluation criteria.
- 1.16. Tenders will be evaluated by a committee comprising a representative from each participating Council against pre-determined evaluation criteria included within the RFT and based on sound contracting principles.
- 1.17. The Councils will decide whether to invite respondents to provide regional services for all Councils, for more than one of the Councils, or for their individual local government area. One or more Councils may also decide to have no further participation in the procurement process.
- 1.18. The participating Councils will together negotiate and enter into a contract or contracts with the successful tenderer(s).

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 on the Councils' application for authorisation and request for interim authorisation from a range of potentially interested parties including waste disposal companies, industry associations, and government bodies.²

² A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

- 2.3. The ACCC received two submissions from interested parties in relation to the application.
- 2.4. Hitachi Zosen Inova Australia Pty Ltd (a global company providing biological and thermal Energy from Waste processing facilities) was supportive of the authorisation application, and the length of authorisation sought, submitting that aggregating waste volumes helped achieve sustainable and affordable projects, and that capital intensive waste processing facilities require contracts in the range of 20 to 30 years to be affordable.
- 2.5. The Waste, Recycling Industry Association (Qld) (WRIQ) (which represents 90 Queensland-based waste companies from multi-nationals to family businesses) does not support the application, unless the Councils surrender their powers to mandate the collection of commercial and industrial waste by Council providers. If the Councils use this authorisation to procure a large new waste facility being built, and if the Councils were to mandate collection of commercial and industrial waste by their nominated providers, they could direct that this waste be sent to that new facility. WRIQ is concerned that including commercial and industrial waste in the arrangements would have negative impacts on competition for waste collection and waste processing services, and remove choice for producers of commercial and industrial waste.
- 2.6. Public submissions by the Councils and interested parties are on the Public Register for this matter.³

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 Councils 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 Act and may substantially lessen competition within the meaning of section 45 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).
- 3.3. As part of its assessment the ACCC has taken into account:
 - the application and submissions received from the Applicants and interested parties
 - other relevant information available to the ACCC
 - the likely future without the Proposed Conduct that is the subject of the authorisation. In particular, the ACCC considers that, absent the Proposed Conduct, it is likely that each Council will continue to individually seek and contract for the processing or disposal of the relevant waste streams, and
 - the relevant areas of competition likely to be affected by the Proposed Conduct, particularly competition between suppliers and acquirers of services relating to the processing and disposal of various waste streams, in South East Queensland.

³ <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/logan-city-council-ors-lcc>

Public benefits

- 3.4. The Act 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.*⁴

- 3.5. The Councils submit that the Proposed Conduct is likely to result in many benefits, including:
- cost savings in the procurement process and contract management, compared to each Council incurring these costs individually
 - environmental benefits, through making available innovative alternate solutions for resource recovery and waste disposal (resulting in a reduction of waste to landfill and an increase in recovery and reuse)
 - increased competition through providing waste volumes, contract size and contract length likely to attract new prospective service providers into the market, and
 - stimulation of long-term investment (in the form of new infrastructure development and a new resource recovery market), resulting in beneficial flow-on effects for the wider economy.
- 3.6. The ACCC is satisfied, based on the information before it, that the Proposed Conduct is likely to result in substantial public benefits in the form of:
- increased competition through encouraging new entrants, and encouraging tenderers to provide more competitive tenders than they may otherwise
 - economic benefits through reduced transaction costs, through reducing the total administrative, legal, preparation and evaluation costs borne by the Councils and waste service providers in conducting the tenders, and managing the contracts, separately
 - environmental benefits, by allowing the Councils access to innovative alternative solutions for resource recovery and waste disposal, which increase the recovery of resources from collected waste and therefore decrease the amount of waste disposed of in landfill.

Public detriments

- 3.7. 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.*⁵

4 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.

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

3.8. The Councils submit that there is no real risk of a decrease in competition as a result of the Proposed Conduct, because the purpose of the joint procurement is to increase the competition for service delivery. The Councils note that:

- their proposed approach allows service providers to choose whether to tender for any number of Council areas, and as a result there are no expected preclusions for service providers in the joint procurement process
- the Councils make up approximately 21% of the South East Queensland local government waste services market, so there are still adequate avenues for service providers to continue to deliver services for resource recovery and/or waste disposal even if they are not successful in tendering through the joint procurement
- the Councils hope the joint procurement will stimulate new markets, particularly in the resource recovery sector in the region, whereby new businesses will be established.

Commercial and industrial waste

3.9. The ACCC understands that there is potential, under current legislation, for Queensland Councils to choose to include charges within rates to fund collection of commercial and industrial waste, in addition to municipal waste. If any of the participating Councils chose to do this, the waste processing service used for the collection of commercial and industrial waste would be determined by the Council.

3.10. The ACCC understands that, in general, the tonnage of commercial and industrial waste is broadly similar to the tonnage of municipal waste collected,⁶ and therefore that commercial and industrial waste is a significant area of competition for waste service providers.

3.11. WRIQ has expressed a concern that Queensland Councils currently have the power to compel all those who generate commercial and industrial waste to use the Council's nominated waste collection services, and that the Councils may invoke this power in order to provide feedstock (i.e. large volumes of waste) to meet their obligations under a long-term contract committed to as a result of the Proposed Conduct. If the Councils involved in the Proposed Conduct did this, WRIQ submits it would be detrimental to competition between providers of waste related services. Specifically, WRIQ submits that mandating the inclusion of commercial and industrial waste would:

- distort the normal operating environment of waste related services in the private sector
- act as a significant deterrent for private sector investment in future waste management infrastructure
- remove choice and flexibility for commercial and industrial customers to procure commercial waste services through normal competitive processes.

3.12. The Councils have responded that they do not currently use their legislative powers to oblige commercial property owners to have their waste collection service provided by Councils, and that they do not have any plans to do so.

3.13. The ACCC has conducted its assessment of the Proposed Conduct on the basis that it only relates to municipal solid waste. This is consistent with the Councils' submission

⁶ Queensland Government, *Recycling and waste in Queensland 2018*.

that they do not currently, and do not plan, to use their legislative powers to oblige commercial property owners to have their waste collection service provided by Councils. Accordingly, we do not expect the concerns raised by WRIQ to arise in practice.

3.14. If this changes (i.e. if the Councils were to use their legislative powers in this way at some point in the future), this may alter the ACCC's assessment of the benefits and detriments of the Proposed Conduct. This would likely constitute a material change in circumstances and therefore may prompt a review of any authorisation by the ACCC, which could result in its revocation if the ACCC considered it was likely that the benefits of the Proposed Conduct no longer outweighed the detriments.

ACCC view

3.15. The ACCC considers that the Proposed Conduct is likely to result in minimal public detriments because:

- waste service providers will be free to tender to supply as many, or as few, Councils as they elect
- there are significant population and waste streams in the South East Queensland region not covered by the Proposed Conduct, which remain open for providers of waste processing and disposal services, such that this procurement process is unlikely to lessen competition for future contracts, and
- each Council is free to choose its own service provider on an individual basis.

Balance of public benefit and detriment

3.16. 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

3.17. The Act allows the ACCC to grant authorisation for a limited period of time.⁷ 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.

3.18. In this instance, the Councils seek authorisation until 31 December 2050.

3.19. The Councils advise they intend to finalise the procurement process by the end of 2020.

3.20. The Councils additionally advise that a potential contract term of up to 30 years may be required to support the level of investment required from a service provider offering any larger accepted solution. For example, the Councils submit that most large-scale Energy-from-Waste plants are often supported by contracts longer than 25 years in length.

3.21. Hitachi Zosen Inova Australia Pty Ltd submits that biological and thermal solutions to waste disposal are capital intensive and therefore require contracts in the range of 20 to 30 years to be affordable.

⁷ Subsection 91(1)

- 3.22. Based on the information currently before it, the ACCC considers it is appropriate to grant authorisation until 31 December 2050, to allow for long term contracts to be signed to support the building of large scale waste processing facilities.

4. Draft determination

The application

- 4.1. On 13 February 2019, the Councils lodged application AA1000437 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 4.2. The Councils seek authorisation for Proposed Conduct.
- 4.3. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 4.4. 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.
- 4.5. 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.
- 4.6. Accordingly, the ACCC proposes to grant authorisation.

Conduct which the ACCC proposes to authorise

- 4.7. The ACCC proposes to grant authorisation AA1000437 to enable the Councils to collectively tender for waste processing services, and to subsequently make and give effect to contracts with service providers for those services, as described in paragraph 1.9 and defined as the Proposed Conduct.
- 4.8. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
- 4.9. The ACCC proposes to grant authorisation AA1000437 until 31 December 2050.
- 4.10. This draft determination is made on 13 May 2019.

5. Next steps

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