

The General Manager  
Adjudication Branch  
The Australian Competition and Consumer Commission  
PO Box 3131  
Canberra  
ACT 2601  
Dear Sir / Madam,



**Commonwealth of Australia**

*Competition and Consumer Act 2010 – subsections 88(1A) and (1)*

**SUBMISSIONS BY INTERESTED PARTY REGARDING APPLICATION FOR AUTHORISATION FOR AGREEMENTS AFFECTING COMPETITION OR INCORPORATING RELATED CARTEL PROVISION:**

In response to the submission made by Redlands City Council to the Commission dated 20 May 2015, Waste, Recycling Industry Association (Qld) Inc the peak body representing the waste management and recycling services industry participants in Queensland, makes the following submissions on behalf of its members.

The application is for authorisation of:

1. a contract, arrangement or understanding which would be or might be a cartel provision within the meaning of Division 1 Part IV of the Act or might also be an exclusionary provision within the meaning of s45 of that Act;
2. to give effect to a contract arrangement or understanding that is or might be a cartel provision or an exclusionary provision within the meaning of s45 of the Act;
3. to make a contract arrangement or understanding, a provision of which would have the purpose or would or might have the effect of substantially lessening competition within the meaning of s45 of that Act; or
4. to give effect to a provision of a contract arrangement or understanding which has the purpose or has or may have a substantial lessening of competition under the meaning of s45 of the Act.

We note the Redland City Council's application is made on behalf of itself and on behalf of Brisbane City Council (the **Applicant Councils**).

**SUBMISSIONS IN RESPONSE TO THE APPLICATION:**

**1. Is there a Contract Arrangement of Understanding**

The Applicant Councils propose to jointly procure, negotiate and contract for the supply of waste and recycling collection services pursuant to a 16 year contract term commencing in 2018. The tender contract proposes to cover residential kerbside and community waste collection services.

**2. What is the Market**

The application seeks to define the market in paragraph 2 headed "Background" to the attached supporting information as greater south-east Queensland region. A map and population and waste volume statistics are provided by the Applicant Councils but not the remainder of that proposed definition of the market.

Waste, Recycling Industry Association (Qld) ABN 50 986 260 101

We submit that this definition of the market is too narrow and fails to consider the consumers of the exchangeable and substitutable services as well as the pool of available suppliers and the geographic areas the competing service providers actually or potentially service.

The market is defined by the service and the geographic area.

The market service is residential waste and recycling collection, green waste collection and kerbside and community collection, then the geographic segregation of the market is all of Queensland. The customers are the Queensland Local Councils and Shires. The ultimate consumers are Queensland rate payers. The service suppliers are the waste and recycling service companies operating in that geographically defined market. There are no barriers to competition nor legal justification to segregate out only part of that market being south east Queensland when the same services and the same services provider service all other regions of Queensland. We submit that because south east Queensland is the most heavily populated area and therefore requires the most capital intensive waste and recycling collection contracts, this is no justification to isolate it from the rest of the relevant market operating under the same laws, with the same or substitutable services and potentially supplied by the same service providers.

The population of Queensland as at December 2013 was 4,691,000. The area of Queensland stretches a coastline of nearly 7,000km and has a total area of 1,852,642km<sup>2</sup>. The jurisdiction of Shires and City Councils within this area creates a disproportionate cost in the providing of essential services such as waste collection depending upon how sparsely the population is located. The population of Brisbane was 2.24 million in June 2013<sup>1</sup>. Furthermore the additional population of the Redland City Council for 2011 was 138,670<sup>2</sup>, which would bring the combined total of the Applicant Councils to 50% of the Queensland population.

We submit that the greatest incentive, and opportunity for innovation and development of the industry, the ability to fund research and development in vehicle and equipment design, and lead policies and best practices that these are fostered by regular and intense competition for the waste and recycling services contracts that have the capability to support these innovations and that these mainly are for services delivered within the more densely populated regions within Queensland.

Our submission that the market (and therefore the relevant public) is the whole of Queensland is based on the following:

- (a) interchangeable services namely the collection of waste, green waste and recyclables are required to be provided under legislative frameworks enshrined by the State Government to all domestic properties and that these are in each regional jurisdiction including local towns throughout shires as well as all city councils;
- (b) substitutable equipment and facilities are required whether in a regional town or city of Brisbane albeit that the size and quantity of vehicles may differ;
- (c) in each case the ultimate consumers are rate payers, required by law to pay for these services;
- (d) the same laws, in particular the *Local Government Act 1993* and the *Local Government Act 2009* apply to the requirement that the Queensland Shires and City Council must provide waste management services to rate payers across Queensland although we note there is additional legislation in the *Brisbane City Council Act*;
- (e) as the market currently stands, small councils can and do attract the tenders of service providers to the waste and recycling industry market throughout Queensland;
- (f) that south east Queensland has higher population and therefore more complex and capital intensive waste management contracts does not justify it being a separate market.

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<sup>1</sup> Australian Bureau of Statistics  
[www.abs.gov.au/ausstats/abs@.nsf/previousproducts/3218.0Main%20features2612-13?opendocument&tabname=summary&prodno=3218.0&leisure=2012-2013&num=&view=#PARALINK4](http://www.abs.gov.au/ausstats/abs@.nsf/previousproducts/3218.0Main%20features2612-13?opendocument&tabname=summary&prodno=3218.0&leisure=2012-2013&num=&view=#PARALINK4)

<sup>2</sup> Redland City Council web site

Whilst the effect is the Applicant Councils have a slightly smaller percentage of market share of the broader Queensland market compared with south east Queensland, the number of ultimate consumers who form the public for the purpose of the public benefit and public detriment test must consider the impact on the whole market area and any other relevant members of the public.

### 3. Threshold Question

Before considering this application the Commission is obliged to consider if there is or may be a breach of the provisions for which relief is sought.

The Councils are competitors for the services of waste and recycling industry suppliers<sup>3</sup>. There is proposed to be a contract arrangement or understanding between competitors<sup>4</sup> because the Memorandum of Understanding (referred to in the Application but not disclosed) is a contract between the competitors. Further the joint conduct of the tender process will require an arrangement and understanding between the competitors. The provisions in these contracts, arrangements and understanding are not fully disclosed to us but from the admissions in the application, will as a minimum, address matters which are cartel purposes<sup>5</sup> including:

- (a) sharing of information regarding prices for which services are likely to be acquired<sup>6</sup>.
- (b) allocating geographical areas of the market between parties to the contract arrangement or understanding<sup>7</sup>.
- (c) limiting the capacity of other parties to supply the services by the excessively long term of the proposed tender contract<sup>8</sup>.

We submit that the threshold question in relation to cartel prohibitions is triggered.

The contract, arrangement or understanding is likely to have the effect of substantially lessening competition by tying up more than 50% of the market for an excessively long term of 16 years in a restricting arrangement thereby closing it to competition from the waste and recycling service providers. Current tenure and industry standard practice is that contracts are let for seven (7) years with extensions of up to additional three (3). Total contract term being ten (10) years. This proposed breach of s45 is further evidenced by the proposed parallel conduct. The likely effect will be to exclude all unsuccessful service and all equipment providers from this proportion of the market for an excessively long term of 16 years. Once the threshold question has been triggered the Commission must not grant the application if public detriment outweighs public benefit<sup>9</sup>. Our submission illustrates why public detriment clearly outweighs any perceived public benefit.

### 4. Who are the Public

Case law indicates that public benefit is something that will benefit the community generally<sup>10</sup>. In particular public benefit is not limited to the benefits of the particular consumers, purchasers and users, but rather must take into account the market as a whole.

In *Re Howard Smith Industries Pty Ltd*<sup>11</sup>, the Trade Practices Tribunal decided that the public was wider than simply consumers. Our submission is that the public in this case, is the rate payers and other ultimate consumers of waste and recycling collection services throughout the whole of Queensland.

Economies of scale and considerable cost savings in the supply of goods and services to certain consumers of the Applicant Councils will not create a benefit to the public as a whole if the effect

<sup>3</sup> Section ssZZRD(4)(d)

<sup>4</sup> Section 44ZZRD (1) of the Act

<sup>5</sup> Section 44ZZRD of the Act

<sup>6</sup> Section 44ZZRD (2) (d) of the Act

<sup>7</sup> Section 44ZZRD (b)(iii) of the Act

<sup>8</sup> Section 44ZZRD (a)(iii) of the Act

<sup>9</sup> Section 90(9A) of the Act

<sup>10</sup> *Queensland Co-Op Milling Association Limited* (1976) 25FLR 169 and *Re Travel Industries Automated Systems Pty Ltd* (1993) ATPR (Com) 50-131

<sup>11</sup> (1977) FLR 385

is to distort the market. This position was reinforced in *Re Qantas Airways Limited*<sup>12</sup> where public benefits needed to take into account considering efficiencies to the welfare standard as appropriate rather than just to the more limited consumer welfare of the consumers directly affected by the transaction.

Whilst it is recognised that competition is not, of itself, a benefit, it is the effect of a productive and dynamic and efficient market that is at stake in the Applicant Council's application. The failure of efficiency is recognised a public detriment<sup>13</sup>. By creating a long term, potentially single supplier contract the efficiency of the market as a whole will be severely compromised with inevitable repercussions for efficiency within the relevant public, namely the rate payers and other ultimate consumers of waste and recycling collection services throughout Queensland.

## 5. What is the Public Benefit

The Consumer Competition Commission in *Re ACI Operations Pty Ltd*<sup>14</sup> determined the following non-exhaustive list were considered to be relevant to constituting the public benefit:

- economic development including encouragement of research and capital investment;
- fostering business efficiency particularly when it results in improved competitiveness;
- industrial rationalisation resulting in more efficient allocation of resources at a lower or contained unit product cost;
- expansion of employment or prevention of unemployment through efficient industries;
- employment growth in particular regions;
- industrial harmony;
- assistance to make small business efficient including promoting competitiveness;
- improvement in quality and safety services and expansion of consumer choice;
- supplying better information to consumers and to business to permit informed choices;
- promotion of equitable dealings in the market;
- promotion of industry cost savings resulting in a contained lower price at all levels of the food chain;
- development of import replacements;
- growth of export markets;
- steps to protect the environment.

## 6. Application of Public Benefit test in these circumstances indicates an overwhelming Public detriment

We submit that the effect of the combined tender would not create any public benefit and will create a long term detriment to the public of Queensland and to the market generally across Queensland applying the criteria in *Re ACI Operations Pty Ltd*.

These detriments include the following.

- (a) The extremely lengthy 16 year contract potentially awarded to just one supplier would preclude all others from competing for greater than 50% of the market for a substantial period of time resulting in significant dislocation of the waste and recycling service

<sup>12</sup> (2004) ATPR 42-027

<sup>13</sup> *Re Australian Association of Pathology Practices Inc* (2004) 180 FLR 44

<sup>14</sup> (1991) ATPR (Com) 50-108

providers of industry. By halving the effective competition area within Queensland the likely result would be an exit of competition of waste and recycling collection service providers from Queensland. Whilst rationalisation of the industry is not considered by the Commission to be detrimental in isolation, in these circumstances the impact would be the substantial reduction in incentive to compete in Queensland where the remaining contracts were of a significantly lesser commercial value and often involve providing services in regional areas spread over large distances. To promote an efficient market there needs to be opportunity to compete equally not just for the most difficult commercial contracts in the regional areas but also the more lucrative commercial contracts on a regular basis.

- (b) The scale of the services to be tendered for would commercially restrict the number of suppliers who were capable of tendering at all for such a large project due to the capital costs required. Already a lesser number of competitors have the fiscal capability to tender for Brisbane City Council waste and recycling contracts. By increasing this to include Redlands City Council (with its complexities of island collections) this issue is exacerbated. Because of the existing dominance of the Brisbane City Council's proportion of the Queensland market, even small incremental increases to the scale of the Brisbane City Council tender creates a significant lessening of competition. By combining the Applicant Councils the substantial lessening of competition likely to occur is material.
- (c) The proposed tender will result potentially in one supplier for greater than 50% of the waste and recycling collections throughout Queensland, resulting in a long term dislocation of the existing suppliers to the market, and likely to reduce the number of suppliers to the market during the term of that contract resulting in significant less competition for future tenders after that contract. This would result in a long term disadvantage for the rate payers of the Applicant Councils, not to mention the significant detriment on the public throughout the state of Queensland.
- (d) A long term contract tying up greater than 50% of the waste stream across Queensland would significantly reduce the incentive for technical development, efficiencies, improvement in productivity and performance within the industry. Industry is largely self-regulated at this stage and the largest drivers for continual improvement is the competitive nature of the existing structure of the market. This would be significantly damaged if greater than 50% of the waste stream is no longer available within any commercially foreseeable time. Examples of innovation and technical development within the industry in recent times includes vehicle engine design that meet and exceed high international emission standards, vehicle design changes to accommodate Australian operating conditions, compactor design and capability, compactor paddle design, vehicle tracking and camera systems, GPS and other household logging instrumentation systems, as well the materials currently used in compactor and chassis manufacturer. By removing the competition for the largest waste and recycling contracts, the impacts to local and Australian equipment service providers will be profound as it eliminates any ability for unsuccessful bidders of equipment from any future consideration for up to 16 years. This will inherently impact all industry innovation and removes all incentives that will occur over such a long period.
- (e) The proposed joint tendering process would not encourage economic development and research or capital investment. The number of trucks and staff would remain materially unchanged, as this is dependent totally upon the number of collection services, not the number of competitors operating within the Applicant Councils' territory. This would potentially make other trucks owned by competitors redundant and likely have a negative effect on economic growth and at worst a detriment to economic growth. The delivery of the combined tender service would be unlikely to be any material change to the number of personnel or capital equipment that would be required whether the service was performed collectively or as separate contracts.
- (f) The tender would not create any material efficiency even for the two Applicant Councils, let alone the public. Both Councils must exercise suitable levels of due diligence to ensure they have contracted prudently and they must each continue to monitor compliance and performance of the waste and recycling management contracts to satisfy their respective obligations under the *Local Government Act 2009* to provide utility

services to the rate payers. Both Councils would need to separately monitor and account for performance.

- (g) There would be no contribution to economic or employment growth within regional areas. As a result of the aforementioned the likely result of the proposed combined tender would be a dislocation of the market and potentially result in less competitors willing to compete for the less lucrative regional and other contracts. This is likely to result in a detriment to the wider public.
- (h) There would be a detriment to the efficiency of small business because small service providers of waste related activities in Council, ie dead animal contracts, bulky kerbside materials, skip services, would be very unlikely to be able to competitively tender for these other contracts and services against the power of a single contractor operating a fleet of more than 250 vehicles with the accompanying company and business systems and manpower that will be required to support these. The proposed possible segmenting of parts of the tender service would defeat the very benefit which the Applicant Councils claim to seek through lower administration requirements. Although the Memorandum of Understanding Appendix 1 to this submission has not been disclosed to us on the grounds of confidentiality, separable portions bids will increase administration which the Applicant Councils claim to be seeking to reduce. We submit the suggestion of separable portions is merely proposed to give the appearance of not substantially lessening competition with little or no real opportunity for such bids to be accepted.
- (i) There would be no particular incentive for the improvement of quality or safety of the services even within the Applicant Councils' areas and certainly not within the wider public. In particular there would be a reduction rather than an expansion of consumer choice of service providers.
- (j) There would be no promotion of equitable dealings within the market and in fact potentially a negative effect on the equitable dealings within the market with just potentially one company having access to greater than 50% of the total Queensland market. Of particular concern is the dangerous precedent this would create within the remainder of south east Queensland councils. We draw the Commissions attention to Section 59(1) of the Local Government Act 1993 which entitled local governments to enter into arrangements or make contract between themselves for exercising jurisdiction within their own areas. There has already been one example of this with between Ipswich City Council. That process is lawful, provided it does not offend other laws<sup>15</sup> such as the anti-competitive prohibitions. By authorising this joint tender the Commission would create a precedent for other Councils to override the anti-competitive prohibitions protecting the public as a whole. In a worst case scenario there could be eventually only one joint tender for the whole of the south east Queensland waste streams leaving only the remote and regional Councils to bear the burden of the resulting dislocation to the waste and recycling service providers in industry.
- (k) There is no likelihood of enhanced development and import replacements or growth of export markets nor steps to protect the environment likely to arise out of the joint tender rather than separating these contracts out as separate tenders for shorter contract terms.
- (l) The Redlands City Council in particular will receive an unfair advantage in their negotiations gained from receiving the otherwise confidential pricing, maintenance costs, scheduling and logistics data provided by the tenderers, to the proposed joint tender.
- (m) Contract terms for undertaking waste and recycling services to Councils are inextricably linked to the life expectancy of equipment used for that service in this case vehicles and truck mounted compactors. Current system designs and all equipment currently used throughout Australia and in many other nations are designed to have a contract term of a maximum 10 years. This is due to the stresses placed upon all equipment used and whilst it undergoes regular contract maintenance after a period of 10 years the continual use of plant used to service more than 1100 properties per day, 5 days every week for 52 weeks a year, over a 10 year period this would require every vehicle including truck chassis, engines and compactors to be either totally replaced or totally rebuilt to last another 6 years of the contract period. In the case of a combined Brisbane City Council,

<sup>15</sup>

Section 30 Local Government Act 1993

Redlands contract industry estimates are that a contract of this size this will need a fleet of up to 250 vehicles each of which will either have to be totally rebuilt or actually replaced outside all known and standard operating periods. It is unreasonable to any contract bidder to understand or even have knowledge of what vehicle design and or capital allowances must be carried for the full term and for that far into the future. The cost and risks associated with these projections would have to be built into the original tender price for all combined services thus an unknown capital forward carrying estimate will have to be borne by all Brisbane and Redland ratepayers over the full 16 year term to support the combined tender arrangement. This directly increases Brisbane ratepayer costs who overall as the largest partner in this proposed arrangement have to bear the increased cost burden for the full duration of two eight year terms.

- (n) There is already example of anti-competitive business behavior by a Queensland Local Government providing waste and recycling services to its commercial ratepayers across its rate base<sup>16</sup>. If the Applicant Councils include multi-unit dwelling (MUDS) in these future joint service requirements, this will give both Councils an unfair competitive advantage and direct ability to stop all private commercial operators of conducting service offerings to businesses in these expanding developments.

## 7. Public Benefit Claims

The Applicant Councils claim to be public benefits:

- (a) Transaction Cost Savings

The Applicant Councils argue that the conduct of a joint tender will enable significant time and resources to be saved by them (particularly Redlands City Council) in a more efficient tender process.

Firstly, we submit that even for the Applicant Councils there will be little if any benefit. Both Councils will need to provide the detailed data and information relevant to their particular jurisdictions and will need to assess the tender responses for that data in order to comply with their responsibilities to their rate payers. In particular the Redland City Council, who was proposing not to manage the tender process, will need to provide material information in relation to the logistics for collection of waste from Coochiemudlo Island, Karragarra Island, Lamb Island, Perulpa Island, Russell Island and Stradbroke Island. It is difficult to see that there could be significant fulfillment of Redland City Council's obligations under the *Local Government Act 2009* ensuring the proper conduct of its obligations to supply the utility services without firstly a detailed understanding of the tender documents and the information input into those documents and secondly, an adequate review and final approval insofar as it affects Redland City Council of the services providers to its rate payers and all elected Council representatives interests of constituents being fairly protected. Any potential efficiency is unlikely to relieve Redland City Council of any significant proportion of its existing fiduciary and legislative duties.

Secondly, we submit that the public benefit test is not satisfied by a benefit just to the Applicant Councils (even if there actually is one). Rather a public benefit must consider the public as a whole. No such benefit has been identified by the Applicant Councils who bear this onus of proof.

- (b) Improved Purchasing Power

A stronger bargaining power which the Applicant Councils achieved by the proposed single tender process will be achieved by the fact that they are jointly privy to confidential information and private disclosure of pricing information otherwise considered anti-competitive and prohibited by the Act. As mentioned above, this may or may not result in some minor efficiencies or cost saving for the Applicant Councils, but it will come at an enormous cost to the market and the overall public detriment will significantly outweigh any costs savings of these two participants in the market.

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<sup>16</sup> Ref ACCC 1496499 25 January 2013- Queensland Competition finding Sunshine Coast Regional Council

Again, the public benefit must be for the general public and the Queensland market as a whole. No such benefit is identified and indeed there is a significant potential public detriment in respect of reduced competition, reduced incentive to innovate, no economic benefits to the wider community, and potentially long term dislocation of the waste and recycling services industry.

These public detriments need to be put ahead of the alleged possible benefits to two Applicant Councils seeking to acquire services at a lower price by sharing price sensitive information.

(c) Increased Efficiencies and Economy of Scale

We disagree with this submission. The number of trucks to be used and the number of drivers required and other support staff is a factor primarily determined by the number of collections and the volume of waste that can be conducted on a daily basis. Vehicles can only service a certain number of bins per day; hold specified cubic capacity of product presented and collected and every vehicle must then travel to known discharge points. The total numbers will not be materially changed by combining the tenders. We expect that any efficiencies or economies of the scale would be minimal, at best, and again of benefit only to the Applicant Councils. Any potential benefit to them would be significantly outweighed by the public detriment to the public as a whole.

We submit the application should be rejected.

A handwritten signature in black ink, appearing to read 'Rick Ralph', with a long horizontal flourish extending to the right.

**Rick Ralph**  
**Chief Executive Officer**  
**Waste, Recycling Industry Association (Qld) Inc**