



Port of Townsville Limited – application for authorisation A91545 Interim authorisation decision 4 August 2016

Decision

The Australian Competition and Consumer Commission (the **ACCC**) has granted interim authorisation in respect of the application for authorisation lodged by the Port of Townsville Limited on behalf of itself and Far North Queensland Ports Corporation Limited (the **Applicants**) on 8 July 2016.

Interim authorisation is granted to enable the Applicants to:

- jointly prepare and issue a Request for Tender (**RFT**) and associated documentation
- separately evaluate tender responses, including interviewing and meeting with some or all of the respondents to the RFT
- jointly consult with each other following their respective evaluations of tender responses; and
- negotiate and award towage licence agreement(s) and tug berth licence agreements to the successful respondents, subject to a condition precedent of final authorisation being granted by the ACCC.

The application for authorisation

The Applicants seek authorisation to jointly conduct a competitive tender process to procure towage services for the ports of Cairns, Mourilyan, Lucinda and Townsville (**Ports**). The Applicants will jointly prepare and issue an RFT that will comprise of four towage service licence alternatives:

- (a) Two separate exclusive towage licences for:
 - i. Ports of Cairns and Mourilyan; and
 - ii. Ports of Townsville and Lucinda.
- (b) Two separate exclusive towage licences for:
 - i. Ports of Cairns, Mourilyan, Lucinda; and
 - ii. Port of Townsville.
- (c) Three separate exclusive towage licences for:
 - i. Ports of Mourilyan and Lucinda
 - ii. Port of Cairns; and
 - iii. Port of Townsville.

- (d) One exclusive licence for the Ports of Cairns, Mourilyan, Lucinda and Townsville.

Towage service providers may submit a tender response for one, some or all of the exclusive towage licence combinations within each of the separable alternatives listed above. The Applicants seek authorisation until 30 June 2024.

The Applicants propose to provide access to the Ports on the condition that vessels requiring towage services acquire those services from the holder of an exclusive towage licence. The Applicants lodged a notification in relation to this proposed exclusive dealing conduct on 25 May 2016.

The authorisation process

Authorisation provides protection from legal action for conduct that may otherwise breach the competition provisions of the *Competition and Consumer Act 2010* (the **Act**). Broadly, the ACCC may grant authorisation if it is satisfied that the benefit to the public from the conduct outweighs any public detriment, including from a lessening of competition. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

Interim authorisation

Section 91 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.

The Applicants have sought interim authorisation in order for them to issue an RFT by no later than 31 August 2016 given that current towage licences are due to expire on 30 June 2017, and there is significant lead-time required for a towage provider to commence towage services under a new licence agreement.

Consultation

The ACCC sought submissions from 60 interested parties potentially affected by this application and received two responses.

Smit Lamnalco did not comment on the request for interim authorisation, but fully supports the substantive authorisation.

Pacific Tug opposes the proposed structure of the RFT and therefore does not support the interim authorisation. Pacific Tug submits that the application for authorisation is predicated on an assumption that the ports have 'low levels of demand, lumpy investment and economies of scale'¹ but this is not the case with the Port of Townsville. Pacific Tug considers that the Port of Townsville should not be combined under an exclusive licence with any of the other Ports because this would give a competitive advantage to larger multinational companies which have larger fleets to draw on.

In response, the Applicants state that the Port of Townsville is (and is likely to remain for the period of the proposed authorisation) a relatively small regional port. They also submit that the proposed RFT is not designed to favour larger operators, rather it is intended to maximise competition and the range of responses likely to be received. The Applicants emphasise that each separable portion option and each of the exclusive towage licences within them are alternatives.

¹ In line with the recommendations in the Productivity Commission Report No. 24 dated 20 August 2002.

Further information in relation to the application for authorisation, including any public submissions received by the ACCC as this matter progresses, may be obtained from the ACCC's website www.accc.gov.au/authorisations.

Reasons for decision

In granting interim authorisation, the ACCC took the following factors into account:

- the relevant areas of competition are unlikely to be permanently altered if interim authorisation is granted. The Applicants will continue to give effect to existing towage licences and any new towage licence agreement and tug berth licence agreement entered into, is subject to a condition precedent of final authorisation being granted by the ACCC.
- interim authorisation is likely to enable the Applicants to commence a tender process with enough time before their existing towage licence agreements expire on 30 June 2017.
- there is limited likelihood of anti-competitive detriment during the period of interim authorisation. Each of the Applicants will conduct its own evaluation of responses to the Request for Tender.
- interim authorisation is likely to enable a range of towage service providers, including those that do not currently service the Ports, to submit a tender response and prepare for commencement of services if successful.

The ACCC also had regard to the submission by Pacific Tug but notes the Applicants' submission that the tender process is intended to maximise competition and the range of bids that are likely to be received from the market without favouring a particular part of that market. The ACCC considers that Pacific Tug's concern may be addressed fully in the consideration of the substantive authorisation and should not prevent the grant of interim authorisation.

Reconsideration of interim authorisation

The ACCC may review the interim authorisation at any time. The ACCC's decision in relation to the interim authorisation should not be taken to be indicative of whether or not the final authorisation will be granted.