



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

Port of Townsville Limited and
Far North Queensland Ports Corporation Limited

in respect of

joint tendering and licensing arrangements
for harbour towage services

Authorisation number: A91545

Date: 26 October 2016

Commissioners: Sims
 Rickard
 Schaper
 Court
 Featherston

Summary

The ACCC proposes to grant authorisation to Port of Townsville Limited and Far North Queensland Ports Corporation Limited to jointly tender to procure towage services for the ports of Cairns, Mourilyan, Lucinda and Townsville.

The ACCC considers that the proposed conduct is likely to result in public benefits in the form of transaction cost savings and co-ordination efficiencies and is not likely to result in significant detriments. For the reasons outlined in this draft determination the ACCC is satisfied that the proposed conduct is likely to result in public benefits that would outweigh the likely public detriments, including any lessening of competition.

The ACCC proposes to grant authorisation until 30 June 2024.

The ACCC understands it is the Port Authorities' intention to grant exclusive licences for the provision of towage services at the ports, following the competitive tender process. This conduct is not included in this application for authorisation. The parties have lodged separate notifications seeking statutory protection for any third line forcing conduct that might arise in requiring port users to acquire towage services from a nominated exclusive provider. Given the relatively small number of towage jobs at these ports, the ACCC considers it is unlikely that an incumbent towage provider would be subject to any significant threat of competition. As such, running a competitive tender to grant an exclusive licence can be an efficient way to generate competition for the right to provide the towage services in circumstances where there is otherwise unlikely to be competition to provide the services.

On 4 August 2016, the ACCC granted interim authorisation to enable Port of Townsville Limited and Far North Queensland Ports Corporation Limited 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.

Interim authorisation will continue until the ACCC's final determination comes into effect or is otherwise revoked.

The ACCC seeks submissions in response to this draft determination before making its final decision.

The application for authorisation

1. On 8 July 2016, Port of Townsville Limited on behalf of itself and Far North Queensland Ports Corporation Limited (the **Applicants**) lodged an application for authorisation¹ (A91545) with the ACCC. The Applicants are seeking authorisation

¹ Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the Competition and Consumer Act 2010 (the CCA). Applicants seek authorisation where they wish

to jointly tender to procure towage services for the ports of Cairns, Mourilyan, Lucinda and Townsville (the **Ports**).

2. Authorisation is sought until 30 June 2024, which comprises the awarding of a contract for a five year initial term plus an option for the Applicants to extend for up to two years.
3. The Applicants also requested interim authorisation to jointly prepare and issue RFT documents, separately evaluate tender responses, (including interviewing and meeting with respondents), consulting with each other following their respective evaluations and awarding and negotiating towage licence agreement(s) and tug berth licence agreements to the successful respondent(s). Interim authorisation was granted on 4 August 2016, on the basis that any agreements be subject to a condition precedent of final authorisation being granted by the ACCC.

The proposed conduct

4. The Applicants propose to jointly conduct a competitive tender process to procure towage services at the Ports. The competitive tender will be conducted pursuant to Queensland Procurement Policy. Specifically, the Applicants propose to:
 - jointly prepare the RFT and associated documents, including draft towage licence agreements and agreements to govern the use of berths of tug vessels (under tug berth licence agreements) of the towage service providers(s)
 - release the RFT and associated documentation (such as draft towage licences and tug berth agreement) to the market
 - separately evaluate tender responses (including interviewing and meeting with respondents)
 - consult with each other following their respective evaluations
 - award and negotiate towage (exclusive) licence agreement(s) and tug berth licence agreements to the successful respondent and
 - give effect to the towage licence agreement(s) and tug berth licence agreements between the Applicants and the successful tenderer(s), including the commencement of towage services at the Ports from 1 July 2017

(the **proposed conduct**).

5. The RFT will invite tenderers to submit tender responses for one, some or all of the following exclusive towage licence combinations:
 - a. Two separate exclusive towage licences for:
 - i. Ports of Cairns and Mourilyan
 - ii. Ports of Townsville and Lucinda.
 - b. Two separate exclusive towage licences for:

to engage in conduct which is at risk of breaching the CCA but nonetheless consider there is an offsetting public benefit from the conduct. Detailed information about the authorisation process is available in the ACCC's Authorisation Guidelines at www.accc.gov.au/publications/authorisation-guidelines-2013.

- i. Ports of Cairns, Mourilyan and Lucinda
 - ii. Port of Townsville
 - c. Three separate exclusive towage licences for:
 - i. Ports of Mourilyan and Lucinda
 - ii. Port of Cairns
 - iii. Port of Townsville.
 - d. One exclusive towage licence for the ports of Cairns, Mourilyan, Lucinda and Townsville.
6. The Applicants will separately evaluate tenders to determine the response best suited to their respective needs.²
7. Towage licences will include terms that impose maximum (but not minimum) charges based on the outcome of the competitive tender, that the towage service provider(s) may charge Port Customers.

The Applicants

8. The Applicants are Queensland government owned corporations and are responsible for the development and management of certain Queensland ports. The Applicants submit that they seek to secure reliable, safe, efficient and cost-effective towage services for the ports and their customers.
9. Port of Townsville Limited is responsible for the development and management of the ports of Townsville and Lucinda. Far North Queensland Ports Corporation is responsible for the development and management of the ports of Cairns and Mourilyan, as well as other ports in Far North Queensland. Under the *Transport Infrastructure Act 1974 (Qld)* the Applicants have a duty to administer and approve towage services for the benefit of their customers which includes granting exclusive towage licences.

Background

Australian harbour towage industry

10. The Australian harbour towage industry received a total of 31,090 vessel calls in 2013/14. One of the largest ports in Australia - Port Hedland was expected to undertake 22,482 towage jobs in 2015/16.³ The Port of Gladstone - Queensland's largest multi-commodity port - was expected to reach approximately 9,000 towage jobs by 2015.⁴
11. In 2015/16, Port of Townsville undertook 2,199 towage jobs, Port of Cairns undertook 315, Port of Mourilyan 66 and Port of Lucinda 42.

² Application, p.4.

³ ACCC, Statement of Reasons in respect of notification N96171, 19 December 2013 p.7.

⁴ ACCC Decision in respect of a notification lodged by Gladstone Ports Corporation Limited regarding towage services at the Port of Gladstone, 1 May 2009, p.16. The ACCC notes that it was unable to obtain recent data on towage job numbers at other ports in Australia.

12. Generally, towage services are required to assist vessels negotiate restricted clearances in channels and berth areas.⁵ The requirements of towage services in individual ports depends on the physical characteristics of the port, weather conditions, the design and size of the ships handled and service levels specified by shipping lines.⁶
13. Svitzer Australia Pty Ltd (**Svitzer**) entered the industry in 2007 when it acquired Adsteam Marine Group and is now the largest towage operator in Australia. Svitzer operates 100 vessels and 80 tugboats in Australia and has a presence in 35 Australian ports.⁷ In 2014, Smit Lamnalco acquired PB Towage Australia, the second largest towage provider in Australia. Smit Lamnalco is active in approximately eight ports in Australia with a total of 29 vessels offering a combination of harbour towage and terminal services.⁸
14. Port operators are able to use licences for towage service to specify standards and pricing. Licences that are non-exclusive allow for multiple service providers in the port while exclusive licences prevent the entry of other service providers. In many Australian ports only one towage service provider operates, regardless of the arrangement imposed by the port operator, because the scale of operations at the port is insufficient to sustain more than a single operator.
15. In the past, ports such as Brisbane, Botany, Melbourne and Newcastle have operated with more than one towage service provider. However, over time these second operators have exited. The ACCC understands that on the east coast of Australia, Port of Brisbane is currently the only port in Australia operating with more than one towage service provider.
16. In 2002, the Productivity Commission examined the Australian harbour towage industry in its report *Economic Regulation of Harbour Towage and Related Services* (the PC Report).
17. The PC Report found that most, if not all, Australian ports can efficiently support only one towage service provider in the longer term.⁹ The provision of towage services in individual ports might therefore be said to exhibit natural monopoly characteristics. The PC Report suggested that the strongest evidence of the natural monopoly characteristics of harbour towage is that even in the large ports where entry is open, only one operator seems to have been able to survive.¹⁰
18. The PC Report considered that economies of scale for a (minimum) tug fleet (and one operator) could be exhausted at around 8000 tug jobs per year.¹¹ The PC Report also commented that in the future, a few Australian ports (Melbourne, Sydney and possibly Brisbane) may be able to accommodate more than one provider.
19. The PC Report considered that there is little scope for sustainable long-term competition for towage services within most, if not all Australian ports (that is, competition *in the market*).¹² The PC Report also considered that competitive

⁵ IBIS World Industry Report I5219, Navigation, Towage and Services to Water Transport in Australia, January 2016, p.11.

⁶ Ibid.

⁷ Ibid p.23.

⁸ <http://smitlamnalco.com/press/pacific-basin-sells-harbour-towage-business-to-smit-lamnalco>

⁹ Productivity Commission, *Inquiry Report No. 24, Economic Regulation of Harbour Towage & Related Services*, 2002, 74.

¹⁰ Ibid.

¹¹ Ibid XXVII.

¹² Productivity Commission, *Inquiry Report No. 24, Economic Regulation of Harbour Towage & Related Services*, 2002,

tendering for the right to provide towage services in a port offers an alternative and potentially more effective mechanism for promoting competition ‘for’ the towage market in a port, resulting in more efficient pricing and service outcomes.¹³

Harbour towage at the Ports

20. Queensland’s coast is serviced by 15 trading ports, two community ports and three smaller ports located from Brisbane in the south-east of the state, to Burketown in the north-west.¹⁴



Source: Queensland Department of Transport and Main Roads, Trade Statistics for Queensland Ports for the five years ending 30 June 2015.¹⁵

XLV – XLVI.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ <http://www.tmr.qld.gov.au/Business-and-industry/Transport-sectors/Ports/Trade-statistics-for-Queensland-ports.aspx>.

Townsville Port

21. The Port of Townsville is located in an artificial harbour 1,360 kilometres north of Brisbane at the mouth of Ross Creek near the Townsville city centre.¹⁶ The Port of Townsville is the sixth largest port in Queensland and is the major regional port for north Queensland.
22. The port services the north-east and north-west minerals provinces that contain copper, zinc, lead, phosphate, magnetite and coal.¹⁷ There are currently two tugs available for towage stationed in Townsville.¹⁸
23. According to the Applicants, in 2015/16 there were 2,199 towage jobs at the Port of Townsville, down from 2,243 in 2013/14 and 2,228 in 2014/15. The Applicants advise the downward trend in towage jobs at the port is due to the recent closure of Queensland Nickel Pty Ltd in February 2016.¹⁹
24. Port of Townsville Limited currently has an exclusive licence for towage services at the Port of Townsville with Smit Lamnalco which will expire on 30 June 2017.

Cairns Port

25. The Port of Cairns is a small multi-purpose regional port that caters for a diverse range of customers including bulk and general cargo, cruise shipping, fishing fleet and reef passenger ferries.²⁰ The port's bulk cargo includes petroleum products, sugar, molasses, fertiliser and liquid petroleum gas.²¹ There are currently two tugs available for towage stationed at the port of Cairns.²²
26. According to the Applicants, in 2015/16 there were 315 towage jobs at the Port of Cairns, down from 553 in 2013/14 and 530 in 2014/15.
27. Far North Queensland Ports Corporation Limited currently has an exclusive licence for towage services at the Port of Cairns with Svitzer which will expire on 30 June 2017.

Mourilyan and Lucinda Ports

28. The Port of Mourilyan's main trade is the export of raw sugar and molasses from the Innisfail, Babinda, Tully and Atherton Tableland's sugar-growing districts.²³ There are currently two tugs available for towage stationed at the Port of Mourilyan.²⁴
29. The Port of Lucinda is located approximately 100 kilometres from north Townsville and is dedicated to the export of raw sugar from the Herbert River sugar-growing district.²⁵ The Port of Lucinda does not have a residential tug boat fleet and utilises tugs from Mourilyan which service the port as required.

¹⁶ Trade Statistics for Queensland Ports for the five years ending 30 June 2015, p.24.

¹⁷ Ibid.

¹⁸ Port Procedures for Shipping at Port of Townsville, September 2016, p.55

¹⁹ Svitzer submission 26 July 2016 p.3.

²⁰ Trade Statistics for Queensland Ports for the five years ending 30 June 2015, p.27.

²¹ Ibid.

²² Port Procedures and Information for Shipping- Cairns, September 2016, p.59.

²³ Trade Statistics for Queensland Ports for the five years ending 30 June 2015, p.31.

²⁴ Port Procedures for Shipping – Mourilyan, September 2016, p.37

²⁵ Trade Statistics for Queensland Ports for the five years ending 30 June 2015, p.23.

30. According to the Applicants, in 2015/16 there were 66 towage jobs at Mourilyan and 42 at Lucinda.
31. The Applicants jointly have one exclusive licence for towage services at the Ports of Mourilyan and Lucinda with Svitzer which will expire on 30 June 2017.

Towage jobs for last three years at the Ports

32. Based on information provided by the Applicants, the number of towage jobs at the Ports in the previous three financial years is summarised below.

Port	Towage Jobs 2013/14	Towage Jobs 2014/15	Towage Jobs 2015/16
Townsville	2243	2228	2199
Cairns	553	530	315
Mourilyan	66	44	66
Lucinda	40	31	42

Consultation

33. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process. The ACCC invited submissions from 60 potentially interested parties, including suppliers, customers, relevant industry associations, and relevant regulatory bodies.
34. The ACCC received seven public submissions from interested parties in relation to the substantive authorisation.
35. Townsville Shipping Agencies, Smit Lamnalco and Ports Australia made submissions in support of the application for authorisation.
36. Pacific Tug opposes the proposed structure of the RFT and therefore does not support the application for 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' 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.
37. Svitzer submits that there is insufficient information available to make a submission on the application for authorisation, but in principle is opposed to exclusive licences. Svitzer also submits that since the PC Report, there have been material changes to the Australian towage industry such as the development and growth of the 'partnership models'. Svitzer also submits that towage jobs do not provide an accurate metric to determine the number of towage operators a port can accommodate.
38. The submissions by the Applicants and interested parties are considered as part of the ACCC's assessment of the application for authorisation.

39. 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/authorisation.

ACCC assessment

40. The ACCC's assessment of the proposed conduct is carried out in accordance with the relevant net public benefit tests²⁶ contained in the *Competition and Consumer Act 2010* (Cth) (the **CCA**). In broad terms, the ACCC may grant authorisation if it is satisfied that the likely benefit to the public from the proposed conduct would outweigh the likely detriment to the public, including from any lessening of competition.

Relevant areas of competition

41. The ACCC considers that precise identification of the relevant areas of competition is not required for the purpose of assessing this application for authorisation.
42. The ACCC considers the areas of competition likely to be affected by the proposed conduct are:
- the provision of harbour towage services at each of the Ports.
 - the provision of harbour towage services in Far North Queensland
 - the provision of harbour towage services in Australia.

Future with and without the conduct

43. To assist in its assessment of the proposed conduct against the authorisation tests, the ACCC compares the benefits and detriments likely to arise in the future with the conduct for which authorisation is sought against those in the future without the conduct.
44. The ACCC notes that harbour towage services have been, and are currently, provided under exclusive licences issued in respect of the Ports of Townsville, Cairns and the Ports of Mourilyan and Lucinda combined²⁷ – as provided for by the *Transport Infrastructure Act 1994 (Qld)*. The ACCC understands that it is the relevant Port Authorities' preference to continue to operate exclusive licences at these Ports into the future.
45. The ACCC notes that the imposition of a condition by the Port Authorities' that users of the Ports acquire the services of an exclusively licensed towage service provider is not part of the proposed conduct for which authorisation is sought. The Applicants have lodged separate notifications²⁸ to obtain statutory protection for any potential third line forcing conduct that may arise in requiring port users to acquire harbour towage services from a nominated (third party) provider – namely the holder of the exclusive licence. Given that the notified exclusive licence arrangements are contingent upon the proposed conduct the subject of this

²⁶ Subsections 90(5A), 90(5B) and 90(8).

²⁷ See <http://registers.accc.gov.au/content/index.phtml/itemId/776499> - N93272, N96697, N93283, N96641, N96642, N93775.

²⁸ The Applicants lodged exclusive dealing notifications N99117 & N99118 on 25 May 2016. The Applicants notified the ACCC that they propose to provide access to the Ports on condition that Port Customers requiring towage services, acquire those services from the holder of an exclusive licence. The Applicants propose to engage in the notified conduct following the competitive tender process (which is the subject of A91545).

authorisation application, the ACCC intends to finalise its assessment of the notifications at the time it completes its assessment of this application for authorisation.

46. However, in light of concerns raised by interested parties in relation to the use of exclusive licences in the context of this authorisation application, the ACCC has made some preliminary comments about the use of exclusive licences at the Ports in the following section.

Use of exclusive licences

47. Interested parties have raised concerns that the proposed conduct will result in the Port Authorities granting an exclusive licence or exclusive licences (depending on the preferred licencing combination) to the successful towage service provider(s) at the conclusion of the tendering process.
48. The Port Authorities submit that the licence or licences granted will impose obligations to ensure towage services are made available to all customers of the Ports.²⁹ Likewise, they also submit that Port Customers will be required to use the towage services provider(s) that are awarded exclusive licences for the relevant Ports.³⁰
49. Svitzer and Pacific Tug expressed concern that granting exclusive licence(s) in these circumstances, would remove competitive pressure throughout the life of the licence or licences, holding back growth and innovation in the provision of towage services at the ports.³¹
50. The ACCC accepts that the licensing of towage service providers on an exclusive basis may prevent competition (or the threat of it) in the provision of towage services over the period of the licence at ports. However, the ACCC considers that exclusive licences can also enhance efficiency by providing greater certainty of volume to towage service providers and promoting competition 'for' the market in circumstances where there is unlikely to be competition 'in' the market. These issues are discussed in more detail below.

Loss of dynamic competition

51. The ACCC considers that, in some circumstances, the grant of an exclusive licence to supply towage services at a port can prevent entry by other towage operators, including those who might be able to offer innovative models for providing towages service from operating in the port, for the duration of the exclusive licence.
52. Svitzer submits that exclusive licensing in ports may hold back growth and innovation in competition for the provision of towage services as the creation of local monopolies through these licences leads to a decrease in service, inherent loss of flexibility and responsiveness to growth or reductions in port operations, increased overall costs and a reduction in the available towage work in a region.³²
53. The ACCC also notes Svitzer's submission that there has recently been development and growth of 'partnership models' for the provision of towage

²⁹ Application, p.4.

³⁰ Application, p.5.

³¹ Pacific Tug (Aust), submission 5 August 2016, p.1 & Svitzer submission 5 August 2016, p.2-3.

³² Svitzer submission, 5 August 2016, p.2.

services, such as Rivtow Marine in Port Hedland and Hay Point.³³ The ACCC is also aware of arrangements whereby towage providers at low-volume ports employ crew on a casual basis. The ACCC understands that these models have led to towage service providers being able to offer their services at lower prices to port users than traditional approaches.

54. The ACCC accepts that granting an exclusive licence can remove competitive pressure for towage service providers to innovate or pass through the benefits from cost reductions during the period of the licence. However, the likelihood and scope of this occurring will be reduced in circumstances where new entry into the relevant Ports is unlikely, and as such there is likely to be little competitive pressure on a towage service provider under a non-exclusive licence (discussed further at paragraphs 58 - 63 below). The ACCC also considers that a further tender process will be conducted in five to seven years at which time all potential towage service providers will be able to present further bids which will reflect any industry innovation or cost-reductions that have arisen.

Certainty of volume

55. The Applicants submit that respondents to a competitive tender process for an exclusive licence are more likely to have the confidence to submit more competitive pricing because they have a much higher degree of certainty about the volume of work that they would receive if their bid is successful.³⁴
56. The ACCC considers that the grant of exclusive licences across the Ports, or some combination thereof, as part of the proposed conduct is likely to give towage service providers greater certainty as to the volume of work they will receive if their bid is successful.
57. In this case, the exclusive licence options whereby the Ports are grouped together means that towage providers are able to bid for the combined volume of more than one Port. The ACCC considers that this is likely to create cost savings from economies of scale which will be reflected in towage service providers' bids. The ACCC considers that this is likely to result in lower costs and a higher degree of competition for the exclusive licence and hence lower prices for Port users.

Promoting competition 'for' the market

58. Ordinarily, competition in a market is likely to deliver the most efficient outcome. However a competitive market may not be sustainable under conditions of natural monopoly. A natural monopoly exists where a single firm can service the prevailing level of demand at a lower (average) cost than two or more firms.
59. The ACCC considers that particular features of the harbour towage industry mean that it is likely to exhibit natural monopoly characteristics. A high proportion of the costs of harbour towage operations are fixed costs (particularly the upfront capital cost of the tug fleet) – that is they do not vary with the level of utilisation of the services. As the number of jobs increases, the average costs of providing towage services decreases.
60. In its review of the Economic Regulation of Harbour Towage Services in 2002, the Productivity Commission (**PC**) considered that (on average) economies of scale in

³³ Svitzer submission, 5 August 2016, p.2.

³⁴ Application (N99117 & N99118) p.4.

towage services may be exhausted at around 8000 towage jobs per year. The ACCC acknowledges that the PC Report is dated but considers that the economic theory underpinning the PC's analysis remains relevant.

61. The ACCC considers that based on the volume of towage jobs at the Ports being substantially lower than 8000 per year, even allowing for changes in the industry since 2002, the Ports are likely to only efficiently sustain one towage service provider. This is the view of the Applicants and the ACCC also notes Svitzer's submission that based on the configuration and nature of vessel movements in the Ports, it may be appropriate to have only one towage operator in each port or region.³⁵
62. The ACCC considers that for the smaller ports, the prospects of a competitor entering is likely to be very low and therefore the competitive discipline applied to an incumbent towage provider by the threat of entry is unlikely to be effective.
63. The ACCC considers that compared to the Ports operating with a single towage provider without an exclusive licence, the grant of one or more exclusive licences to supply towage services at the Ports is likely to increase competition for the provision of harbour towage services at the Ports by providing an incentive for competitors of the incumbents to tender for the market where they may have not been prepared to compete in the market. This is particularly the case in light of the coordination efficiencies as a result of the structure of the RFT referred to above. Towage prices will then reflect this competition for the period of the licence.

Conclusion

64. As a result, the ACCC considers that in the likely future without the proposed conduct:
 - the current exclusive licences would continue to run until 30 June 2017
 - prior to this time the Applicants would be likely to individually seek tenders to provide for future towage services under exclusive licences at the Ports.

Public benefit

65. The CCA does not define what constitutes a public benefit and the ACCC adopts a broad approach. This is consistent with 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.³⁶

66. The Applicants submit that the proposed conduct is likely to result in public benefits from:
 - transaction cost savings
 - co-ordination efficiencies
 - improved marine safety.

³⁵ Svitzer submission, 29 September 2016, p.1

³⁶ *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.

Transaction cost savings

67. The ACCC considers that the proposed conduct is likely to result in public benefit in the form of transaction cost savings. In particular the proposed conduct is likely to avoid the duplication of a number of tender-related tasks such as preparing of tender documents, issuing the RFT to the market, negotiating and awarding towage licence arrangements which the Applicants would otherwise undertake individually.
68. The ACCC understands that the costs of running a tender process are significant.
69. As such, the ACCC accepts the Applicants' submission that the proposed conduct will deliver cost savings to both the Applicants and towage service providers that respond to the RFT because the Applicants will not have to conduct multiple separate tender processes and towage service providers only need to prepare a tender response in one tender process.³⁷
70. The ACCC notes that the extent of the saving may be partially reduced by the structure of the RFT – which includes options for tenderers to tender in response to a range of up to four options. Tenderers are likely to incur some additional cost if preparing tenders in response to more than one option. However, the ACCC considers that running and participating in a single tender process with multiple options is still likely to be at a significantly lower cost than running and participating in multiple tender processes.

Co-ordination efficiencies

71. The Applicants submit that by combining their service needs into a single tender, it doubles the number of ports that prospective towage service providers may tender for, making it more attractive for prospective tenderers and increasing competition between towage service providers.³⁸
72. The applicants also submit that the structure of the RFT allows for tenders that involve the sharing of tug vessels between the Ports which enables a lower number of tug vessels to underpin a tender proposal than would otherwise be necessary if sharing and coordination did not occur.³⁹
73. However, Pacific Tug submits that potential co-ordination efficiencies are limited to the smaller volume ports because:

The size of vessels visiting Townsville demands dedicated, primary tugs of greater capacity, than those required in the low-volume ports. There are no cost-efficiencies to be gained by using high-capacity tugs in low-volume ports with smaller ships.⁴⁰

74. The ACCC considers the conduct enables towage providers to propose approaches that involve greater co-ordination of the provision of towage services across all, or within subsets of, the four ports in ways that capture potential economies of scale or scope. This would result in public benefit by reducing the overall cost of providing the services and this saving is likely, at least in part, to be passed through to port users in the form of lower harbour towage prices as a result of the competitive tender.

³⁷ Application, p.7

³⁸ Ibid.

³⁹ Ibid

⁴⁰ Pacific Tug (Aust) submission, 22 July 2016, p.4

Improved marine safety

75. The Applicants submit that given the proximity of the four ports to each other, the RFT will provide Port Managers with the ability to share tug vessels between all four Ports, ensuring back-up availability for scheduled vessel dockings, unexpected breakdowns and for tug vessels to be deployed for an emergency response (such as the grounding of a ship that may threaten the Great Barrier Reef).⁴¹
76. However, Pacific Tug submits that there is no evidence to support this claim, and states:

The points raised by the applicant in this regard are fundamental requirements of towage service in ports throughout Australia. Therefore, we consider this a moot point, as it can be assumed, regardless of the structure of the RFT. Pacific Tug provides towage service in ports and has tendered for service in other ports around Australia, and back-up availability and emergency response capacity are normal service requirements.⁴²

77. The ACCC considers that all, or virtually all, of the marine safety requirements the Applicants identify would likely still be achieved without the proposed conduct – for example by specifying them in licence terms and conditions. As such, the ACCC does not consider the conduct is likely to result in significant public benefits through improved marine safety.

Conclusion on public benefit

78. By avoiding duplication of tender processes, the ACCC considers the proposed conduct is likely to result in public benefits through transaction cost savings. It is also likely to result in public benefits from efficiencies by enabling greater co-ordination of harbour towage services between some or all of the four Ports, reducing the cost of providing those services.

Public detriment

79. The CCA does not define what constitutes a public detriment and 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 society including as one of its principal elements the achievement of the goal of economic efficiency.⁴³

80. Interested parties have identified two key potential public detriments from the proposed conduct.
81. First, that the aggregation of the four Ports' demand for towage services will make the task so large that it will foreclose some potential towage providers from bidding.
82. Second, that following aggregation of the tender processes, the Ports will grant an exclusive licence(s) (as opposed to an open licence) preventing port users from seeking out alternative towage providers and removing the pressure of competition to drive innovation.

⁴¹ Application, p.7

⁴² Pacific Tug (Aust) submission 22 July 2016, p.3

⁴³ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683

Aggregation forecloses participation in the tender

83. Pacific Tug submits that:

The implication of combining service options for Townsville with the other ports is to exclude most towage providers in the market, with the exception of the two multi-national, European-based companies, which are also the incumbent providers (Svitzer and Smit Lamnalco). ... The asset investment required to deliver service in Townsville exceeds \$25 million ... The asset investment for each of the other three ports is estimated at between \$4 million and \$5 million and therefore a level of investment that is within reach for all of the market providers.⁴⁴

84. The Applicants state that:

The separable portion of the RFT means that providers are not faced with the potential barrier-to-entry of having to submit a tender response to service all four of the Ports.

This allows smaller towage service providers to submit bids for the towage licence combinations in the separable portions for which they have capabilities. Smaller towage service providers are also more likely to be able to offer more flexible crew rosters. This will provide substantial cost benefits in low-volume ports such as Cairns, Lucinda and Mourilyan and in situations where tug vessels have low utilisation rates.⁴⁵

85. The ACCC considers that if the Applicants were proposing to only seek tenders in relation to one entity providing harbour towage services aggregated across all four ports, that this might have the effect of foreclosing smaller providers of towage services from participating in the tender.

86. However, the RFT sets out four options for parties to tender against – including options to tender just to provide towage services for the Ports of Mourilyan and Lucinda, Cairns and Mourilyan and Cairns, Mourilyan and Lucinda. Each of these options allow smaller providers to tender without having to invest additional capital to meet the greater demands of Port of Townsville were they to win.

87. Further, the Applicants will separately evaluate tender responses based on their respective Ports' towage requirements.

88. As a result, the ACCC does not consider there is likely to be significant detriment arising from the proposed conduct foreclosing participation in the tender.

Loss of competition through exclusive licences

89. The ACCC considers that in the future without the proposed conduct, the Applicants would be likely to continue their existing practice of separately issuing exclusive licences for towage service providers to operate at the ports of Townsville, Cairns and Mourilyan/Lucinda (rather than issuing non-exclusive licences).

90. In a future with the proposed conduct, depending upon which licence combination is ultimately chosen following the tender process, at its widest, the proposed conduct may result in a single exclusive licence being issued for towage services across all of the four Ports.

⁴⁴ Pacific Tug (Aust) submission 22 July 2016, p.2

⁴⁵ Application, p.7

91. However, given that, in a future without the conduct, it is likely that exclusive licences would be issued at each Port and given that the Ports are likely to only efficiently sustain one towage service provider, the ACCC does not consider that grouping the exclusive licences itself gives rise to any significant public detriment.

Balance of public benefit and detriment

92. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.
93. The ACCC considers that the proposed conduct is likely to result in public benefits in the form of transaction cost savings and co-ordination efficiencies. The ACCC does not consider that the proposed conduct is likely to result in significant public detriments.
94. For the reasons outlined in this draft determination the ACCC is satisfied that the proposed conduct is likely to result in a public benefit that would outweigh the likely public detriment, including the detriment constituted by any lessening of competition that would be likely to result.

Length of authorisation

95. The CCA allows the ACCC to grant authorisation for a limited period of time.⁴⁶ 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.
96. In this instance, the Applicants seek authorisation until 30 June 2024. This period covers a proposed five year period for exclusive licence(s), with an option to extend for up to two years.
97. The ACCC considers that there is a trade-off to be made in choosing an appropriate period for the proposed exclusive licence(s). The longer the period, the greater the likely benefits of increased certainty and hence potentially lower towage prices. However, the shorter the period between competitive tenders, the lower the potential for detriments from forgone competitive pressure to innovate and find ways to reduce costs in towage service delivery.
98. The ACCC considers the proposed five year period, with an option to extend for two years, is appropriate in these circumstances. As such, the ACCC considers it appropriate to grant authorisation until 30 June 2024.

Draft determination

The application

99. Application A91545 was made using a Form A, under subsection 88(1) and (1A) of the CCA. Authorisation is sought to make and give effect to the proposed conduct, as outlined in paragraph 104.

⁴⁶ Subsection 91(1).

100. Authorisation is sought as the proposed conduct may be an exclusionary provision under the cartel provisions of the CCA and/or within the meaning of section 45 of the CCA.

101. Subsection 90A(1) of the CCA requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

102. For the reasons outlined in this draft determination the ACCC is satisfied, pursuant to sections 90(5A), 90(5B) of the CCA, that in all the circumstances the conduct for which authorisation is sought is likely to result in a public benefit that would outweigh any likely detriment to the public constituted by any lessening of competition arising from the proposed conduct.

103. Further, the ACCC is satisfied, pursuant to section 90(8) of the CCA, that in all the circumstances the conduct for which authorisation is sought is likely to result in such a benefit to the public that it should be allowed.

Conduct which the ACCC proposes to authorise

104. The ACCC proposes to grant authorisation A91545 to Port of Townsville Limited and Far North Queensland Ports Corporation to:

- jointly prepare the RFT and associated documents, including draft towage licence agreements and agreements to govern the use of berths of tug vessels (under tug berth licence agreements) of the towage service providers(s)
- release the RFT and associated documentation (such as draft towage licences and tug berth agreement) to the market
- separately evaluate tender responses (including interviewing and meeting with respondents)
- consult with each other following their respective evaluations
- award and negotiate (exclusive) towage licence agreement(s) and tug berth licence agreements to the successful respondent and
- give effect to the towage licence agreement(s) and tug berth licence agreements between the Applicants and the successful tenderer(s), including the commencement of towage services at the Ports from 1 July 2017.

105. The ACCC proposes to grant authorisation until 30 June 2024.

106. This draft determination is made on 26 October 2016.

Next steps

107. The ACCC now seeks 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.