



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

Cairns Regional Council
Douglas Shire Council and
Mareeba Shire Council

in respect of

joint procurement of
waste collection services

Date: 31 October 2016

Authorisation number: A91544

Commissioners:
Sims
Rickard
Schaper
Court
Featherston

Summary

The ACCC proposes to grant authorisation for 12 years to Cairns Regional Council, Douglas Shire Council and Mareeba Shire Council (the Councils) to conduct a joint procurement process for waste collection services.

Next steps: The ACCC will seek submissions in relation to this draft determination before making its final decision. The Councils and interested parties may also request the ACCC to hold a pre-decision conference to allow oral submissions on the draft determination.

The application for authorisation

1. On 28 June 2016, Cairns Regional Council on behalf of itself, Douglas Shire Council and Mareeba Shire Council (the **Councils**) lodged application A91544 with the ACCC seeking authorisation for the Conduct described below.
2. At the time of lodging the application, the Councils sought interim authorisation to engage in the Conduct while the ACCC considers the substantive application. The ACCC granted interim authorisation on 26 July 2016. Interim authorisation does not allow the Councils to give effect to any waste collection contracts. Any contracts entered into are subject to the ACCC granting final authorisation. Interim authorisation remains in place until it is revoked or the date the ACCC's final determination comes into effect.

The Conduct

3. The Councils seek authorisation to jointly discuss the procurement of waste collection services, jointly negotiate and enter into an agreement that will govern the procurement process, jointly prepare and issue a Request for Tender document, separately evaluate tender responses, and separately negotiate and enter into waste collection contracts between each Council and one or more successful waste collection contractors (the **Conduct**).
4. Cairns Regional Council proposes to issue a Request for Tender document on behalf of the three Councils. Waste collection contractors will be invited to bid for some or all of the local government areas of the Councils. The Request for Tender will likely consist of four separable portions, being waste collection services in the local government area(s) of:
 - Cairns Regional Council, Douglas Shire Council and Mareeba Shire Council combined;
 - Cairns Regional Council;
 - Douglas Shire Council; and
 - Mareeba Shire Council.
5. Each Council will separately evaluate tender responses and consult with each other before entering into waste collection contracts. The Councils may all decide to use the same waste collection contractor, or may each select a different contractor. In any case, each Council will enter into a separate contract with the waste collection contractor.
6. The processing of the collected waste will not form part of the scope of the procurement or the resulting waste collection service contracts. Each Council proposes to tender for the following waste collection services:

Source	Type	Council		
		Cairns	Douglas	Mareeba
Domestic	Waste	Y	Y	Y
	Recycling	Y	Y	Y ¹
Commercial	Waste	N	Y	N
	Recycling	N	Y	N
Public place	Waste	Y ¹	Y	Y
	Recycling	Y ¹	Y	Y
Council Facilities		Y	Y	Y

7. The Councils seek authorisation for 12 years, which consists of a 9 year initial contract term, two options to extend for 12 months on each occasion, and an additional 12 month option as required to conduct a future procurement process.

Background

The Councils

8. The Councils are local government authorities incorporated under the *Local Government Act 2009* (Qld). The Councils are located in north Queensland covering the urban area of Cairns, the coastal area to the north of Cairns including Port Douglas and Mossman, and the area inland from the Cairns Regional and Douglas Shire Councils:



Figure 1 – Maps of the Councils' local government areas.

9. Cairns Regional Council has a significantly larger population and generates a greater volume of waste than the other two councils combined. Although Mareeba and Douglas Shire Councils each have significantly lower population density than Cairns Regional Council, the majority of residents of all three councils are within one hour by road from the Cairns CBD.²

Council	Area (km ²)	Pop'n	Kerbside waste (t)	Kerbside recyclables (t)
Cairns	4 135 km ²	163 496	47 000	11 000
Douglas	2 436 km ²	11 911	4 000	1 300
Mareeba	53 610 km ²	21 859	6 000	Not collected

¹ The Councils submit that they may potentially tender for these services.

² For further details refer to the Mareeba Shire Council Planning Scheme zone map (https://msc.qld.gov.au/download/planning/planning_schemes/2.-Zoning-Maps.pdf) and the Douglas Shire Council Planning Scheme zone map (<https://douglas.qld.gov.au/download/Douglas-Shire-Council/Zoning-Maps-70K-1-to-11.pdf>) Accessed: 15 September 2016.

10. The Applicants submit that the Conduct is consistent with the *Queensland Waste Avoidance and Resource Productivity Strategy (2014-2024)* issued by the Queensland government which states that: “strategic regional collaboration can effectively maximise the benefits from shared services, infrastructure and expertise to deliver viable, accessible and sustainable local resource recovery solutions.”³

Similar authorisations

11. The ACCC has previously considered a number of authorisation applications for joint tendering and contracting for various waste management services. The ACCC has only considered two previous applications solely for the collection of waste and recyclables (that is, excluding processing services). These applications were made by:
- three councils within the St George Region in Sydney (A91019). The ACCC granted authorisation for 12 years in 2006, comprising of a 2 year tendering process and 10 year contract term. On 14 September 2016, the ACCC re-authorised the arrangements to allow the councils to extend their existing joint contract until 2 February 2023.
 - Redland City Council and Brisbane City Council (A91500). The ACCC granted authorisation for 19 years in 2015, comprising of a three year period for the joint procurement process and a 16 year operation term (8 years with an option to extend for a further 8 years).
12. The ACCC also notes that a number of authorisations involving waste collection have permitted councils to extend their contracts by between one and five years.⁴

The Councils’ submission

13. The Councils submit that joint procurement is likely to result in the following public benefits:
- by attracting a wider range of waste collection contractors to submit tender responses, those local government with a smaller population will be able to consider a wider range of tender responses than if they were to attempt to procure the waste collection services independently;
 - environmental and public health benefits resulting from improved and standardised levels of waste collection services, including increased recycling rates across the Councils;
 - efficiencies and transaction cost savings due to reduced duplication of resources for both the Councils and service providers in preparing and responding to tenders;
 - increased purchasing power for the Councils due to economies of scale, leading to lower costs; and
 - alignment with best practice waste strategies which promote regional collaboration in service delivery.

³ The *Queensland Waste Avoidance and Resource Productivity Strategy (2014-2024)* Principle 4 attached to the Councils’ submission.

⁴ A91530 Georges River Council and Rockdale City Council; A91500 Redland City Council & Brisbane City Council; A91401 Northern Sydney Regional Organisation of Councils, A91361; Wollongong City Council & Shellharbour City Council; A91289 Hunter Resource Recovery, A91180 Hurstville City Council & Ors; and A91143 & A91167 Southern Sydney Regional Organisation of Councils.

14. The Councils submit that the Conduct is unlikely to result in any detriment to the public or competition.
15. The Councils submit that the relevant market is at least as wide as the Queensland market for the supply of waste collection services to residential and commercial premises and street bin locations.
16. By issuing a tender in separable portions, the Councils submit that smaller waste collection contractors will be able to enter bids for an individual council area. Each Council is free to accept bids from contractors for their council if such a bid is more favourable than a single contractor servicing multiple councils.

Public consultation

17. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process.
18. The ACCC sought submissions on the application for interim authorisation and substantive application for authorisation from a range of interested parties potentially affected by this application, including waste and recycling service providers, industry associations and neighbouring councils.
19. The ACCC received one public submission from J.J. Richards & Sons Pty Ltd (**J.J. Richards**). J.J. Richards did not comment specifically on the application for authorisation or whether the Conduct would likely result in public benefits or detriments, but expressed concern about a growing number of applications by local government authorities to conduct joint waste collection tender processes. J.J. Richards submits that a reduction in the number of waste tender processes will also reduce competition, stifle innovation and the introduction of new technology which would otherwise result in improved efficiency, reduced cost, better quality of services and a positive impact on the environment.
20. The ACCC will seek submissions on the draft determination. In addition, the Councils or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.
21. Copies of all public submissions may be obtained from the ACCC's website: www.accc.gov.au/authorisationsregister.

ACCC evaluation

22. The ACCC's evaluation of the Conduct is in accordance with the relevant net public benefit tests contained in the Act.⁵ The relevant tests broadly state that the ACCC shall not grant authorisation unless it is satisfied that the likely benefit to the public would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result.
23. In its evaluation of the Conduct the ACCC has taken into account:
 - The applications and submissions received from the Councils and interested parties;
 - Information available to the ACCC from consideration of previous relevant matters;
 - The likely future without the Conduct for which authorisation is sought (see paragraphs 25-26);

⁵ Subsections 90(6), 90(7), 90(5A) and 90(5B).

- The relevant areas of competition likely to be affected by the Conduct. The ACCC notes that the application for authorisation relates to waste collection services only and excludes waste processing services. The relevant areas of competition considered by the ACCC for the purpose of this application are the supply of the following municipal waste collection services in Cairns and the surrounding region:
 - i. kerbside collection of domestic waste and recyclables;
 - ii. collection of commercial waste and recyclables;
 - iii. collection of public place waste and recyclables;
 - iv. collection of waste from council facilities.
- The 12 year period for which authorisation has been sought.

The future with and without

24. To assist in its assessment of the Conduct against the authorisation tests the ACCC compares the likely future with the conduct that is the subject of the authorisation to the likely future without the conduct that is the subject of the authorisation. The ACCC will compare the public benefits and detriments likely to arise in the future where the conduct occurs against the future in which the conduct does not occur.
25. The ACCC considers that without the Conduct, each Council would conduct separate tenders for a provider of the required services independently of each other as currently occurs. Prospective waste collection contractors would submit separate tender responses to each council.

Public benefit

26. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it 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.⁶
27. The ACCC considers that the Conduct is likely to deliver public benefits in the form of:
 - Transaction cost savings
 - Improved efficiencies
 - Improved environmental outcomes.

Transaction cost savings

28. The ACCC considers that the Conduct is likely to result in transaction cost savings compared to the scenario where each Council conducts its own separate tender processes.
29. The Conduct will enable each Council to avoid expending time and resources associated with calling separate tenders, including some duplicated administrative costs.
30. The Conduct may also result in transaction cost savings for waste collection service providers that bid to supply services to all three Councils. Those

⁶ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

providers will only be required to participate in one tendering process, potentially reducing their administrative burdens.

31. The ACCC notes that any transaction cost savings from joint waste services procurement are likely to be offset to some degree by the additional costs that participating councils incur to coordinate to run the tender process. Given that the Conduct only involves three councils and one service stream, the ACCC considers that coordination costs are not likely to be material in this matter.

Efficiencies

32. The ACCC considers that the aggregation of the Councils' waste collection requirements is likely to facilitate a number of efficiencies.
33. Due to their small populations, Douglas Shire Council and Mareeba Shire Council cannot individually offer a waste collection contract of a size which is likely to allow a waste collection operator to achieve an efficient scale of operation. The ACCC considers that the Conduct addresses this issue by allowing these two small councils to combine their requirements with those of Cairns Regional Council.
34. By combining the collection requirements of geographically proximate participating councils, the Conduct is likely to create the opportunity for a waste collection operator to lower costs by optimising collection routes and better utilising its fleet (for example, by using spare trucks to covers repairs and breakdowns across the participating councils). In this instance, the Councils' Local Government Areas are contiguous with the majority of residents clustered within approximately one hour by road from the Cairns central business district.
35. The ACCC also considers that the Conduct is likely to allow the participating councils to achieve improved efficiencies in activities related to waste collection but not usually provided by suppliers. For example, collaboration is likely to result in lower average costs for community education projects (for example by sharing the cost of developing and producing joint community information) and savings from sharing land which Councils may supply for depots to house suppliers' trucks.

Improved environmental outcomes

36. The ACCC considers that the Conduct is likely to result in public benefit in the form of improved environmental outcomes to the extent that it contributes to the introduction of a recyclables collection service in Mareeba Shire Council.
37. The ACCC notes that recyclables are currently collected in both Cairns Regional Council and Douglas Shire Council. As noted above, the Conduct is likely to facilitate sharing of information and experience between the Councils. To the extent that this enables Mareeba Shire Council to draw on the experience of the other Councils and commence the collection of recyclables, the ACCC considers that the Conduct is likely to result in public benefit by contributing to the promotion of recycling and increased diversion of waste from landfill.
38. To the extent that collaborative education projects improve waste management practices at the household level and increase the quality of recyclables, this is also likely to result in a public benefit in the form of improved environmental outcomes.

Summary of public benefit

39. In summary, the ACCC considers that the Conduct is likely to result in public benefits, including: transaction cost savings, efficiencies and improved environmental outcomes.

Public detriment

40. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:
- ...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.⁷
41. The ACCC acknowledges the submission by J.J. Richards and notes that there are a number of groups of councils around Australia which have been authorised to jointly tender and contract for waste management services. In assessing the public benefits and detriments of joint arrangements between local government authorities, the ACCC has considered existing authorisations in the relevant areas of competition, as well as factors including the effect of the arrangements on competition, innovation and the introduction of new technology.
42. The ACCC considers that the Conduct is likely to result in minimal if any public detriment. The ACCC considers that the tender process will ensure that there is competition between waste collection contractors to win the contract. Allowing waste collection contractors to bid for separable portions may also enable a smaller contractor the option to enter bids for an individual Council, which may attract a larger number and range of competing bids. Each Council is also free to accept a bid for one of the separable portions of the tender if such a bid is more attractive than a joint bid.

Balance of public benefit and detriment

43. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the Conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.
44. For the reasons outlined in this draft determination the ACCC is satisfied that the likely benefit to the public would outweigh the minimal, if any, likely detriment to the public including any lessening of competition.
45. Accordingly, the ACCC is satisfied that the relevant net public benefit test is met.

Length of authorisation

46. The Act allows the ACCC to grant authorisation for a limited period of time.⁸ This allows 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.
47. Given the ACCC's conclusion on likely public benefits and detriments, the ACCC proposes to grant authorisation for 12 years.

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

⁸ Subsection 91(1).

Draft Determination

The application

48. On 28 June 2016, Cairns Regional Council on behalf of itself, Douglas Shire Council and Mareeba Shire Council (the **Councils**) lodged application for authorisation A91544 with the ACCC. Application A91544 was made using Form B Schedule 1, of the Competition and Consumer Regulations 2010.
49. The application was made under subsection 88(1) and (1A) of the Act as the Conduct may contain a cartel provision and may have the effect of substantially lessening competition within the meaning of section 45 of the Act.

The net public benefit test

50. For the reasons outlined in this determination, the ACCC considers that in all the circumstances the Conduct for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.

Conduct for which the ACCC proposes to grant authorisation

51. The ACCC proposes to grant authorisation for 12 years to allow Cairns Regional Council, Douglas Shire Council and Mareeba Shire Council to jointly discuss the procurement of waste collection services, jointly negotiate and enter into an agreement that will govern the procurement process, jointly prepare and issue a Request for Tender document, separately evaluate tender responses, and separately negotiate and enter into waste collection contracts between each Council and one or more successful waste collection contractors (the **Conduct**). The joint procurement relates to the collection of domestic waste, recycling and bulk bin; commercial waste and recycling; public place waste and recycling; and collection from Council facilities.
52. This draft determination is made on 31 October 2016.

Interim authorisation

53. On 26 July 2016, the ACCC granted interim authorisation to allow Cairns Regional Council, Douglas Shire Council and Mareeba Shire Council to jointly discuss the procurement of waste collection services, jointly negotiate and enter into an agreement that will govern the procurement process, jointly prepare and issue a Request for Tender document; separately evaluate tender responses; and separately negotiate and enter into waste collection contracts between each Council and one or more successful waste collection contractors, subject to the ACCC issuing a final determination granting authorisation.
54. Interim authorisation remains in place until it is revoked or the date the ACCC's final determination comes into effect.

Next steps

55. The ACCC now seeks submissions on the draft determination. In addition, the Applicants or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the CCA.