

# Form A

Commonwealth of Australia

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

## **EXCLUSIONARY PROVISIONS AND ASSOCIATED CARTEL PROVISIONS: APPLICATION FOR AUTHORISATION**

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection(s) 88 (1A)/88 (1) of the *Competition and Consumer Act 2010* for an authorisation:

- to make a contract or arrangement, or arrive at an understanding, a provision of which would be, or might be, a cartel provision within the meaning of Division 1 of Part IV of that Act and which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding that is, or may be, a cartel provision within the meaning of Division 1 of Part IV of that Act and which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act.
- to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of section 45 of that Act.

*(Strike out whichever is not applicable)*

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

### **1. Applicant**

- (a) Name of Applicant:  
*(Refer to direction 2)*

The applicant is Port of Townsville Limited ACN 130 077 673 (**POTL**).

A91545

POTL makes this application on behalf of itself and on behalf of Far North Queensland Ports Corporation Limited ACN 131 836 014 (**FNQPC**).

Together, POTL and FNQPC are referred to as the '**Port Managers**' in this application.

- (b) Description of business carried on by applicant:  
(Refer to direction 3)

POTL is a Queensland Government Owned Corporation responsible for the development and management of the Port of Townsville and Lucinda in Queensland.

- (c) Address in Australia for service of documents on the applicant:

Eddie Scuderi  
Corrs Chambers Westgarth  
Level 42, 111 Eagle Street  
Brisbane QLD 4000

## 2. **Contract, arrangement or understanding**

- (a) Description of the contract, arrangement or understanding, whether proposed or actual, for which authorisation is sought:  
(Refer to direction 4)

### ***Background to proposed arrangement***

Towage services provided by tug vessel operators play an essential role in overcoming the limited manoeuvrability of ocean-going ships in Australian ports.

Tug vessels assist ships on arrival and departure and help protect other vessels and port infrastructure from damage.

The physical characteristics of each port determine its towage service needs. Weather conditions, ship size and design, port authority regulations, pilotage guidelines and the needs of shipping lines also affect the towage service needs of port managers.

POTL and FNQPC are Queensland Government Owned Corporations responsible for the development and management of certain Queensland ports.

POTL is responsible for the development and management of the ports of Townsville and Lucinda in Queensland.

FNQPC is responsible for the development and management of the ports of Cairns, Cape Flattery, Karumba, Mourilyan, Skardon River, Quintell Beach, Thursday Island, Burketown and Cooktown.

There are 20 ports in Queensland, approximately 11 of these use towage services.

### ***Proposed joint procurement***

The Port Managers propose to jointly conduct a competitive tender process to procure towage services for the ports of Cairns, Mourilyan, Lucinda and Townsville (**Ports**). The Port Managers will do so on a voluntary basis. The location of the Ports is shown (among other Queensland ports) on the map on the following page.



Port Customers will be required to use the towage service provider(s) that are awarded exclusive licences for the relevant Ports following the RFT process. Any exclusive dealing conduct that may arise as a result of the Port Managers requiring Port Customers to exclusively use those towage service provider(s) is the subject of an exclusive dealing notification lodged by the Port Managers with the ACCC on 12 May 2016.

Given that both POTL and FNQPC are Queensland Government Owned Corporations, the competitive tender process will be conducted pursuant to the Queensland Procurement Policy (published by the Queensland Government). This will involve the Port Managers jointly preparing and issuing a Request for Tender that will comprise four alternative separable portions, as summarised below:

- a) Two separate exclusive towage licences for:

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- Ports of Cairns and Mourilyan; and
  - Ports of Townsville and Lucinda.
- b) Two separate exclusive towage licences for:
- Ports of Cairns, Mourilyan and Lucinda
  - Port of Townsville.
- c) Three separate exclusive towage licences for:
- Ports of Mourilyan and Lucinda;
  - Port of Cairns; and
  - Port of Townsville.
- d) One exclusive licence for the Ports of Cairns, Mourilyan, Lucinda and Townsville.

There is therefore the potential for up to three towage service operators to be awarded towage licences following completion of the procurement process.

Potential towage service providers may submit a tender response for one, some or all of the exclusive towage licence combinations within each of the separable portions summarised above.

The Port Managers will jointly prepare the tender documentation. The procurement process will be managed by POTL. The Port Managers will each undertake separate evaluations of the tender submissions to determine the response best suited to their respective needs.

The performance of towage services is a 'controlled activity' (as defined under the *Transport Infrastructure Act 1994* (Qld)) at the Ports for which a licence is required from POTL (for the ports of Townsville and Lucinda) and from FNQPC (for the ports of Cairns and Mourilyan).

The licensing of towage services is regulated under the *Transport Infrastructure Act 1994* (Qld) and towage licence agreements made between POTL and FNQPC (as applicable) and each towage service provider.

The table below summarises current towage licence arrangements in place at the Ports:

Port	Service provider and exclusive towage licence holder	Commencement date	Expiry date
Lucinda and Mourilyan	Svitzer Australia Pty Ltd (Svitzer)	1 April 2008	30 June 2017
Cairns	Svitzer	12 May 2015	30 June 2017
Townsville	Smit Lamnalco Towage (Australia) Pty Ltd	1 July 2010	30 June 2017

The towage licences that are proposed to be granted to the successful towage service provider(s) will be exclusive licences that impose obligations on those providers to ensure that towage services are made available to all customers of the Ports including vessel masters and owners, charterers, shipping agents, and other parties that may have a need for towage services at the Ports (**Port Customers**).

Likewise, Port Customers will be required to use the towage service provider(s) that are awarded exclusive licences for the relevant Port. As mentioned earlier, any exclusive dealing conduct that may arise as a result of the Port Managers requiring Port Customers to exclusively use those towage service provider(s) is the subject of an exclusive dealing notification lodged by the Port Managers with the ACCC.

The towage licence will also include terms that impose maximum (but not minimum) charges that the towage service provider(s) may charge Port Customers. Towage service providers are permitted to contract with Port Customers using the 'United Kingdom Standard Conditions for Towage and other Services' (as revised from time to time), published by the British Tug Owners Association. These terms are normally used for towage services performed in British Ports however they are also used by towage service providers in other countries, including Australia.

### ***Interim authorisation***

As noted above, the current towage licences relevant to the Ports are due to expire on 30 June 2017.

Due to the lead-time required for a towage service provider to prepare, acquire necessary vessels, personnel and resources and be in a position to start delivering towage services, it is necessary for the Port Managers to release the proposed joint Request for Tender to the market by no later than 31 August 2016.

Given this timeframe, and the time that it may take for a determination on final authorisation to be made, the Port Managers request that the ACCC grant **interim authorisation** within 28 days of the date of this application for the following conduct:

- a) the Port Managers to cooperate with each other to prepare the RFT and associated documentation that will accompany the RFT, including draft towage licence agreements and agreements to govern the use of berths by tug vessels (under tug berth licence agreements) of the towage service provider(s);
- b) release of the RFT and associated documentation (ie draft towage licences and tug berth agreement) to the market;
- c) evaluation of tender responses to the RFT, including any interviews and meeting with some or all of the respondents to the RFT;
- d) the Port Managers consulting with each other following their respective evaluations; and
- e) awarding and negotiating towage licence agreements and tug berth licence agreements to the successful respondents (those agreements will be subject to a condition precedent of final authorisation being granted by the ACCC).

### ***Final authorisation***

Final authorisation is sought for:

- a) the conduct in paragraphs a) to e) above the subject of the request for interim authorisation; and
  - b) giving effect to the towage licence agreement(s) and tug berth licence agreements between the Port Managers and each of the successful tenderers, including the commencement of towage services at the Ports on and from 1 July 2017 through to the expiry of those agreements (which may not expire until 30 June 2024).
- (b) Description of those provisions of the contract, arrangement or understanding described at 2 (a) that are, or would or might be, exclusionary provisions and (if applicable) are, or would or might be, cartel provisions:

*(Refer to direction 4)*

POTL and FNQPC are potentially competitors with each other for the supply of port services to their respective customers.

Because POTL and FNQPC propose to work together to jointly procure, negotiate and contract with one or more towage service providers over terms, conditions and prices, the arrangement is potentially an exclusionary provision which may contravene section 45 of the *Competition and Consumer Act 2010* (Cth).

It will also be necessary for the Port Manager to allocate tug vessel resources between them during the term of any awarded towage service contracts so as to meet shifting demand and to achieve efficiencies in tug vessel utilisation between the Ports.

- (c) Description of the goods or services to which the contract, arrangement or understanding (whether proposed or actual) relate:

Port services, including towage and related services.

- (d) The term for which authorisation of the provision of the contract, arrangement or understanding (whether proposed or actual) is being sought and grounds supporting this period of authorisation:

Authorisation is sought for the period ending 30 June 2024. This period will cover the potential term of the towage contract (5 year initial term from 1 July 2017 plus an option to extend for up to 2 years).

### **3. Parties to the proposed arrangement**

- (a) Names, addresses and descriptions of business carried on by other parties or proposed parties to the contract or proposed contract, arrangement or understanding:

None.

- (b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:  
*(Refer to direction 5)*

Port of Townsville Limited of 1 Benwell Road, Townsville QLD 4810 is a Queensland Government Owned Corporation responsible for the development and management of the Port of Townsville and Lucinda in Queensland.

Far North Queensland Ports Corporation Limited of Corner Grafton and Hartley Streets, Cairns QLD 4870 is a Queensland Government Owned Corporation responsible for the development and management of the ports of Cairns, Cape Flattery, Karumba, Mourilyan, Skardon River, Quintell Beach, Thursday Island, Burketown and Cooktown in Queensland.

### **4. Public benefit claims**

- (a) Arguments in support of application for authorisation:  
*(Refer to direction 6)*

### ***Transaction cost savings***

The joint procurement of the towage services by the Port Managers will deliver material cost savings to both the Port Managers and towage service providers that respond to the RFT. The Port Managers will not have to conduct two separate procurement processes and towage service providers need only prepare a response to one tender.

### ***Improved purchasing power***

By conducting a joint procurement, the Port Managers can combine their service needs into the one tender. This means that the number of ports that prospective towage service providers may tender for is doubled, increasing competition between towage service providers for the services.

### ***Reducing barriers-to-entry for smaller towage service providers***

The separable portion structure 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, leading to an increase in the range of service providers that are likely to compete for the towage services.

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.

### ***Improved marine safety and redundancy between Ports***

The Ports are located in geographic proximity to each other. The RFT will provide the 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).

### ***More efficient use of tug vessel fleet***

By combining the four Ports in the one tender, sharing of tug vessels between the Ports can be achieved. This allows a lower number of tug vessels to be tendered than would otherwise be necessary if sharing and coordination could not occur.

- (b) Facts and evidence relied upon in support of these claims:  
(see answer to question 4(a), above).

## 5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (c) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

*(Refer to direction 7)*

While the towage services the subject of the proposed arrangement between the Port Managers is limited to the Ports, those towage services are acquired by a wide range of Port Customers. Vessel owners and operators directly acquire the towage services from the towage licence holder working at the relevant Port.

The towage service providers may also be called-upon to assist in protecting the Great Barrier Reef from shipping incidents such as vessels running aground. These services would be provided outside the Ports the subject of this application.

Towage vessels are capable of moving between ports up and down the East Coast of Australia.

While POTL does not consider that it is necessary for the ACCC to precisely define the relevant market in order to make its decision, POTL submits that the relevant area of competition is at least as wide as the market for port services in Queensland and is not limited to the four ports the subject of this application.

## 6. Public detriments

- (a) Detriments to the public resulting or likely to result from the contract arrangement or understanding for which authorisation is sought, in particular the likely effect of the contract arrangement or understanding, on the prices of the goods or services described at 2 (c) and the prices of goods or services in other affected markets:

*(Refer to direction 8)*

The Port Managers submit that the proposed conduct will not result in any significant public detriment and any public detriment that may arise will be significantly outweighed by the public benefits discussed above.

The separable portion approach that will be adopted by the Port Managers in the RFT will encourage competition while the joint procurement approach will lead to efficiencies in tug fleet use, improved safety and improved redundancy across the four Ports.

- (b) Facts and evidence relevant to these detriments:

(see answer to question 6(a), above).

**7. Contracts, arrangements or understandings in similar terms**

- (a) This application for authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding:
- (b) Is this application to be so expressed?  
No.
- (c) If so, the following information is to be furnished:
  - (i) description of any variations between the contract, arrangement or understanding for which authorisation is sought and those contracts, arrangements or understandings that are stated to be in similar terms:  
(Refer to direction 9)  
  
Not applicable.
  - (ii) Where the parties to the similar term contract(s) are known — names, addresses and descriptions of business carried on by those other parties:  
(Refer to direction 10)  
  
Not applicable.
  - (iii) Where the parties to the similar term contract(s) are not known — description of the class of business carried on by those possible parties:  
  
Not applicable.

**8. Joint Ventures**

- (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Competition and Consumer Act 2010*)?  
No.
- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?  
Not applicable.
- (c) If so, by whom or on whose behalf are those other applications being made?  
Not applicable.

**9. Further information**

- (a) Name, postal address and telephone contact details of the person authorised by the applicant seeking authorisation to provide additional information in relation to this application:  
  
Eddie Scuderi  
Corrs Chambers Westgarth

Level 42, 111 Eagle Street  
Brisbane QLD 4000

Dated 8 July 2016

Signed by/on behalf of the applicant



.....  
(Signature)

Eddie Scuderi.....  
(Full Name)

Corrs Chambers Westgarth.....  
(Organisation)

Partner.....  
(Position in organisation)

## **DIRECTIONS**

1. Use Form A if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision and which is also, or might also be, an exclusionary provision. Use Form B if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision or a provision which would have the purpose, or would or might have the effect, of substantially lessening competition. It may be necessary to use both forms for the same contract, arrangement or understanding.

In lodging this form, applicants must include all information, including supporting evidence, that they wish the Commission to take into account in assessing their application for authorisation.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which authorisation is sought.
4. Provide details of the contract, arrangement or understanding (whether proposed or actual) in respect of which the authorisation is sought. Provide details of those provisions of the contract, arrangement or understanding that are, or would or might be, exclusionary provisions. Provide details of those provisions of the contract, arrangement or understanding that are, or would or might be, cartel provisions.

In providing these details:

- (a) to the extent that any of the details have been reduced to writing, provide a true copy of the writing; and
  - (b) to the extent that any of the details have not been reduced to writing, provide a full and correct description of the particulars that have not been reduced to writing.
5. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
  6. Provide details of those public benefits claimed to result or to be likely to result from the proposed contract, arrangement or understanding including quantification of those benefits where possible.
  7. Provide details of the market(s) likely to be effected by the contract, arrangement or understanding in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the application for authorisation.

8. Provide details of the detriments to the public, including those resulting from any lessening of competition, which may result from the proposed contract, arrangement or understanding. Provide quantification of those detriments where possible.
9. Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.
10. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, and descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.

7 July 2016

Ms Esther Slocombe  
Company Secretary & Legal Counsel  
Port of Townsville Limited  
PO Box 1031  
Townsville QLD 4810

By Email: [eslocombe@townsville-port.com.au](mailto:eslocombe@townsville-port.com.au)

Dear Madam

### **APPLICATION FOR AUTHORISATION TO ACCC**

We refer to the proposed joint procurement between Far North Queensland Ports Corporation Limited (**FNQPCL**) and Port of Townsville Limited (**POTL**) for the grant of one or more exclusive towage licences for the ports of Cairns, Mourilyan, Lucinda and Townsville.

FNQPCL consents to POTL preparing and lodging an application for authorisation with the ACCC on behalf of POTL and FNQPCL with respect to the proposed joint procurement (including evaluation and award of contracts) and for giving effect to the resulting towage service licence agreement(s) and berth licence(s).

FNQPCL also consents to a copy of this letter being submitted to the ACCC with the application.

Please contact us should you require further information

Yours faithfully



Michael Colleton

### **GENERAL MANAGER COMMERCIAL**

Enquiries: Michael Colleton, (07) 4052 3888  
Email: [Michael.colleton@portsnorth.com.au](mailto:Michael.colleton@portsnorth.com.au)  
Our Ref: MCmc

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