



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Draft Determination and Interim Authorisation

Application for authorisation
lodged by
Toowoomba Regional Council and
Western Downs Regional Council
in respect of a
joint tender process

Authorisation number: AA1000550

16 August 2021

Commissioners: Keogh
Rickard
Brakey
Ridgeway

Summary

The ACCC proposes to authorise Toowoomba Regional Council and Western Downs Regional Council (the Applicants) to jointly prepare and advertise a request for tender (RFT) for waste and recyclables collection services, bulk haulage services, and processing services.

The councils will not engage in any joint activity after tenders are received. Each council will separately evaluate tenders from services providers, and separately negotiate and enter into individual contracts with the successful tenderers.

The ACCC considers that jointly preparing and advertising an RFT is likely to result in:

- public benefits in the form of reduced transaction costs for the councils and service providers, and some increased competition between service providers, and
- minimal public detriment.

Overall, the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit that would outweigh the likely public detriment.

The ACCC proposes to grant authorisation for 3 years.

The ACCC has also granted interim authorisation to enable the Applicants to commence discussions and prepare the RFT while the ACCC is considering the substantive application. Interim authorisation does not extend to the councils releasing the formal RFT.

The ACCC invites submissions in relation to this draft determination by 30 August 2021 before it makes its final decision.

1. The application for authorisation

- 1.1. On 2 April 2021, Toowoomba Regional Council (**TRC**) and Western Downs Regional Council (**WDRC**) (together, the **Applicants**) lodged application for authorisation AA1000550 with the Australian Competition and Consumer Commission (the **ACCC**).
- 1.2. The Applicants are seeking authorisation to jointly prepare and advertise a request for tender (**RFT**) for waste and recyclables collection services, bulk haulage services and processing services. This application for authorisation AA1000550 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.3. On 23 July 2021, following discussions with the ACCC to clarify the scope and duration of the conduct for which authorisation is being sought, the Applicants amended their application to seek authorisation for 3 years, rather than until 20 June 2033 as initially sought.
- 1.4. The Applicants have also requested interim authorisation to commence discussions and prepare the RFT to enable them to progress the tender process, as they intend to issue the RFT in February 2022.
- 1.5. The ACCC may grant authorisation, which provides businesses with protection from legal action under the competition provisions in Part IV of the Act for arrangements that may otherwise risk breaching those provisions, but are not harmful to competition and/or are likely to result in overall public benefits.

The Applicants

- 1.6. TRC and WDRC are local government authorities under the provisions of the *Local Government Act 2009* (Qld). Both councils are located in the Darling Downs Region and share one geographic boundary.
- 1.7. TRC and WDRC are among the 20 largest city councils in Queensland, providing services to populations of approximately 169,000 and 34,000 residents, respectively.
- 1.8. Toowoomba is Australia's second largest inland city, incorporating the regional centres of Toowoomba City, Cambooya, Clifton, Crows Nest, Goombungee, Greenmount, Highfields, Millmerran, Oakey, Pittsworth and Yarraman, along with numerous smaller townships.
- 1.9. The Western Downs region is separated into six areas including Dalby, Chinchilla, Murilla, Tara, Wambo and South Taroom.

The Proposed Conduct

- 1.10. The Applicants seek authorisation to jointly prepare an RFT, and for TRC, on behalf of itself and WDRC, to advertise and manage the RFT for the following services:

- waste and recyclables collection
- bulk haulage (includes the collection of recyclables, green waste and/or organics from a bulking up facility, and transport and deposit of recyclables, green waste and/or organics to a processor), and
- processing services (includes the receipt, processing, marketing and resale or treatment of material collected in any nominated waste collection service)

(together, **the Services**)

(the **Proposed Conduct**).

The procurement process

- 1.11. The Applicants have reached an agreement in relation to the procurement and evaluation process for the Proposed Conduct in a Memorandum of Understanding (**MoU**). Under the MoU, it is agreed that both Applicants will jointly prepare the RFT for the Services, while TRC will advertise and manage the RFT for the Services via a Vendor Panel for and on behalf of TRC and WDRC.
- 1.12. Under the Proposed Conduct, the RFT will be advertised as an open tender and will invite tenderers to submit separate responses to each Applicant. The RFT will invite tenderers to provide a response for some or all of the following services:
 - waste and recyclables collection services and bulk haulage and processing services for TRC, and/or
 - waste and recyclables collection services and bulk haulage and processing services for WDRC.
- 1.13. TRC and WDRC will separately assess each response through their own tender evaluation process. TRC and WDRC are each responsible for the development of their own tender evaluation panel, evaluation weighting and evaluation criteria. Responses to the RFT will be separately evaluated against the pre-determined evaluation weighting and criteria contained within the RFT and on sound contracting principles.

- 1.14. TRC and WDRC will then enter into separate negotiations and contract(s) with the successful tenderer(s) for their local government area.
- 1.15. The ACCC understands that the Proposed Conduct does not extend to any agreements between TRC and WDRC regarding pricing when jointly preparing the RFT.

Rationale for the Proposed Conduct

- 1.16. The Applicants submit that it is in the best interests of their respective communities to engage in the Proposed Conduct given the similarity of the Services, their current contracts having similar expiry dates (30 June 2023), and the anticipated cost-savings for rate payers.
- 1.17. The Applicants also submit that the Proposed Conduct will assist in contributing to State and Federal targets to reduce the amount of waste sent to landfill.

2. Background

- 2.1. The Applicants are responsible for the management of waste in their respective local government areas. The Applicants are located adjacent to one another, as shown in Figure 1 below.
- 2.2. The combined municipal solid waste for TRC and WDRC is approximately 6 percent of the municipal solid waste generated by south-east Queensland.

Figure 1: Map of Toowoomba and Western Downs Regional Councils



Types of waste collected

2.3. The Applicants provided the following table showing the types of waste collected by both councils:

Type of waste	TRC	WDRC
Residual waste – general household waste	Yes	Yes
Recyclable waste – nominated plastic, glass, paper, cardboard and other products that can be recovered in a typical Materials Recovery Facility (MRF)	Yes	Yes

Green waste – small prunings, cuttings, branches, lawn clippings and other materials as approved by Council	Yes	Optional
Organics – means any combination of food waste and green waste	Optional	No
Public place bin waste – litter placed in street and park bins	Yes	Yes
Hard waste – means for the purpose of a periodic or on call kerbside collection and disposal of bulky items up to but not exceeding two cubic metres in aggregate.	Optional	No
Dead animals – on call service to remove small deceased animals from council controlled roads and public parks	Yes	No

Services offered by councils

- 2.4. TRC and WDRC offer waste and recyclables disposal, bulk haulage, and processing services. The Applicants currently outsource these services to external service providers.
- 2.5. Both TRC and WDRC currently offer weekly residual waste collection and fortnightly recyclables collection of a 240L bin, through J.J. Richards and Sons Pty Ltd Waste & Recycling services. TRC also offers fortnightly green waste collection of a 240L bin as an opt-in service through the same provider.
- 2.6. J.J. Richards and Sons is also the current service provider to both councils for bulk haulage and processing services.

3. Consultation

- 3.1. The ACCC invited submissions from a range of potentially interested parties, including waste management companies, industry associations and government bodies. The ACCC received 3 submissions from interested parties, one in support of the application, and 2 with no objection, as follows:
 - The Department of Environment and Science (QLD) supports the application, indicating that the Proposed Conduct aligns with work currently being undertaken with the Applicants and the broader region to develop a regional waste management and infrastructure plan.
 - Hitachi Zosen Inova Australia Pty Ltd had no objection to the application for authorisation and request for interim authorisation.
 - The Queensland Department of State Development, Infrastructure, Local Government and Tourism did not have any specific comments on the application.
- 3.2. Public submissions are on the [public register page](#) for this matter.

4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. The Applicants have sought authorisation in relation to Division 1 of Part IV and s 45 of the Act. Consistent with subsections 90(7) and 90(8) of the Act, the ACCC must not

grant authorisation unless it is satisfied, in all the circumstances that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (**authorisation test**).

4.3. In making its assessment of the Proposed Conduct, the ACCC has considered:

- the application and other relevant information available to the ACCC, including information available to the ACCC regarding similar previous matters
- the relevant areas of competition likely to be affected by the Proposed Conduct, particularly the supply and acquisition of kerbside waste and recyclables collection in the south-east Queensland region, the supply and acquisition of bulk haulage services in the south-east Queensland region, and the supply and acquisition of waste and recyclables processing in the south-east Queensland region, and
- the likely future without the Proposed Conduct that is the subject of the authorisation. In particular, the ACCC considers that it is likely that each of the Applicants would individually prepare and issue their own RFTs and contracts for the Services.

Public benefits

4.4. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (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.¹

4.5. The Applicants submit that the Proposed Conduct will result in the following public benefits:

- an efficient procurement approach
- potential for savings through economies of scale
- maximising competitive tension within the waste industry
- sharing of costs for single procurement exercise, and
- cost savings in recyclable processing.

4.6. The ACCC notes the Proposed Conduct is limited to the preparation and advertising of the RFT, and there will be no joint conduct (such as joint contracts, joint administration of contracts or sharing of information from the tender process) after tenders are received. In these circumstances, the ACCC has considered the following public benefits:

Transaction cost savings

4.7. The Applicants submit that benefits will be achieved through the councils being able to, for example, share resources, avoid the duplication of administrative tasks, and jointly prepare and advertise the tender documents (including engaging a single consultant). The Applicants also submit that tenderers may identify savings because council RFTs will be released at the same time and will have similar specifications. The contracts

¹ 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.

used by the councils to engage the successful tenderer will also likely have structural similarities, however they will still be required to be negotiated separately.

- 4.8. Compared to the likely future without the Proposed Conduct, where each council acts individually, the ACCC considers that the joint RFT process is likely to lead to public benefits in the form of transaction cost savings for both the councils and tenderers, as identified above.

Greater competition between service providers

- 4.9. The Applicants submit that tendering for the Services jointly will encourage more service providers to submit tenders as they will have the opportunity to potentially secure a greater volume of waste. They note that the region in which the councils are located currently has one established waste contractor. Advertising the Services jointly may encourage other service providers that are not currently present in the region to submit tenders.
- 4.10. The ACCC notes that the Applicants will be separately assessing their respective tenders, and separately negotiating and entering into contracts with any service providers. The Proposed Conduct does not extend to joint acquisition of any of the Services by the Applicants and therefore any successful tenderer would not be able to secure the volumes of the two councils through a single contract.
- 4.11. However, the Proposed Conduct will still offer the opportunity for a service provider to secure individual contracts from two local government areas through a single process. The ACCC considers that this is likely to result in some increase in competition between service providers and this constitutes a small public benefit.

Public detriments

- 4.12. The Act does not define what constitutes a public detriment. 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 the society including as one of its principal elements the achievement of the goal of economic efficiency.²

- 4.13. The Applicants state that there should be no public detriment associated with the Proposed Conduct, and any potential detriment would nevertheless be outweighed by the benefit to the public.
- 4.14. The Applicants may be considered each other's competitors for the acquisition of waste and recyclables collection, bulk haulage and processing services in the south-east Queensland region. The Proposed Conduct removes an aspect of competition between the councils, who would otherwise issue separate RFTs.
- 4.15. However, as discussed earlier, each council will be evaluating submissions for their respective RFTs separately, and negotiating and entering into separate contracts for the Services. As a result, there is unlikely to be a lessening of competition in the acquisition of the Services between the Applicants.
- 4.16. The ACCC therefore considers that the Proposed Conduct is likely to result in minimal, if any, public detriment.

² Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

Balance of public benefit and detriment

4.17. For the reasons outlined in this draft determination, the ACCC considers that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

Length of authorisation

4.18. The Act allows the ACCC to grant authorisation for a limited period of time.³ 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

4.19. In this instance, the Applicants seek authorisation for a period of 3 years from the date the ACCC approves the application for authorisation. This period is intended to cover the Applicants' joint preparation and advertisement of the RFT, which they expect to advertise in February 2022 for eight weeks.

4.20. Following this, the Applicants (separately) expect to:

- conduct the tender evaluations, and enter into contracts with the successful tenderers by the end of June 2022. The length of the contracts to be awarded will be a maximum operating term of 10 years, being 8 years with 2 options to extend, both options being for a one year extension.
- provide a 6 to 9 month mobilisation period to the successful tenderers to allow for the purchase and commissioning of new trucks, recruitment and training of staff and the preparation of pre-submittal requirements, and
- have the contracts commence on 1 July 2023.

4.21. Accordingly, allowing for the possibility of some delay to the above proposed timing, the ACCC proposes to grant authorisation for 3 years commencing from the date the final determination comes into effect.

Draft determination

The application

4.22. On 2 April 2021, TRC and WDRC lodged application AA1000550 with the ACCC, seeking authorisation under subsection 88(1) of the Act.

4.23. TRC and WDRC seek authorisation for the Proposed Conduct described at paragraphs 1.10 to 1.15.

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

The authorisation test

4.25. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.

³ Subsection 91(1).

4.26. For the reasons outlined in this draft determination, the ACCC considers, in all the circumstances, that the Proposed Conduct described at paragraphs 1.10 to 1.15, would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct.

4.27. Accordingly, the ACCC proposes to grant authorisation.

Conduct which the ACCC proposes to authorise

4.28. The ACCC proposes to grant authorisation AA1000550 to enable the Applicants to jointly prepare and advertise a RFT for waste and recyclables collection services, and bulk haulage and processing services.

4.29. Authorisation is proposed to be granted in relation to Division 1 of Part IV and s 45 of the Act.

4.30. The ACCC proposes to grant authorisation AA1000550 for 3 years.

4.31. This draft determination is made on 16 August 2021.

5. Interim authorisation

5.1. In their original application, the Applicants applied for interim authorisation to enable them to commence discussions and prepare the RFT, and release the formal RFT.

5.2. On 3 August 2021, the Applicants advised that they only require interim authorisation to commence discussions and prepare the RFT, and not to release the RFT. This is because the ACCC will have made its final determination before the Applicants intend to release the RFT (which is expected to occur in February 2022 or later).

5.3. The ACCC has therefore decided to grant interim authorisation for the Applicants to commence discussions and prepare the RFT.

5.4. In granting interim authorisation, the ACCC has taken into account:

- The Applicants' need to commence preparations for the joint tender process to minimise risk of interruption of services.
- The relevant areas of competition are unlikely to be permanently altered if interim authorisation to commence preparations for the tender process, but not release the formal RFT, is granted.
- Based on its assessment above, the Proposed Conduct is likely to result in public benefits and is unlikely to result in significant public detriments.

5.5. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect, or the date on which the application for authorisation is withdrawn, or until the interim authorisation is revoked.

6. Next steps

6.1. The ACCC now invites submissions in response to this draft determination by 30 August 2021. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.