



Draft Determination and Interim Authorisation

Application for authorisation
lodged by
Gladstone Regional Council
in respect of
joint procurement of recyclables processing services.
Authorisation number: AA1000524

2 September 2020:

Commissioners: Sims
Keogh
Court
Ridgeway

Summary

The ACCC proposes to grant authorisation to Gladstone Regional Council (GRC), to enable GRC and the local governments of Rockhampton Regional Council, Livingstone Shire Council and Central Highlands Regional Council, (together, the Participating Councils) to jointly procure recyclables processing services.

The Participating Councils wish to enter into and give effect to contracts, arrangements or understandings regarding the joint procurement of recyclables processing services from Kriaris Transport at the Rockhampton Material Recovery Facility.

The ACCC considers the proposed conduct is likely to result in some transaction cost savings, economies of scale and environmental benefits. The proposed conduct is likely to result in little, if any, public detriment.

The ACCC proposes to grant authorisation until 31 December 2023.

The ACCC has decided to grant interim authorisation to enable the Participating Councils to commence negotiations with Kriaris Transport on the contract terms for recyclables processing services while the ACCC continues to consider the substantive application for authorisation. Interim authorisation does not extend to the Participating Councils entering into agreements with Kriaris Transport.

Next steps

The ACCC invites submissions on this draft determination by close of business on 17 September 2020 before it makes its final decision.

1. The application for authorisation

- 1.1. On 22 July 2020, the Gladstone Regional Council (**GRC**), on behalf of itself and the local governments of Rockhampton Regional Council, Livingstone Shire Council and Central Highlands Regional Council, (together, the **Participating Councils**) lodged application for authorisation AA1000524 with the Australian Competition and Consumer Commission (the **ACCC**) to jointly procure recyclables processing services for three years. This application for authorisation AA1000524 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.2. The ACCC may grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching the competition law but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.3. GRC also requested interim authorisation to enable collaboration between the Participating Councils prior to their respective existing contractual arrangements expiring on 31 December 2020. The request for interim authorisation is discussed further in section 6.

The Proposed Conduct

- 1.4. Authorisation is sought for the Participating Councils to enter into and give effect to contracts, arrangements or understandings regarding the joint procurement of the Relevant Services, which are described below.
- 1.5. The Participating Councils propose to collaboratively procure the services of Kriaris Transport Pty Ltd and negotiate contractual terms in relation to the following recyclables processing services:
 - The collection of all recyclable waste from each Participating Council's nominated transfer location, which may include transfer stations and waste management facilities (excluding Rockhampton Regional Council and Livingstone Shire Council);
 - The transport of the recyclable waste from the nominated transfer location to the Material Recovery Facility (**MRF**) (excluding Rockhampton Regional Council and Livingstone Shire Council);
 - The storage and sorting of all recyclable waste; and
 - The subsequent processing, transport, marketing and sale of recyclable waste and disposal of any waste which is not recyclable waste.

(the **Relevant Services**)

- 1.6. Together, paragraphs 1.4 and 1.5 form the **Proposed Conduct**.
- 1.7. The Participating Councils have each resolved, under section 235(a) of the *Local Government Regulation 2012* (Qld), that there is only one supplier who is reasonably available to provide the relevant recycling services. Accordingly, the Participating Councils are not required to undertake a tender process with respect to engagement of a service provider.
- 1.8. The Participating Councils propose to jointly negotiate the main terms of the contract, including terms in relation to the services to be provided and the costs of the services. Some contract terms, such as those related to transportation of waste to the Rockhampton MRF, may be negotiated separately between some Councils and Kriaris Transport.
- 1.9. The Participating Councils would then enter into individual contracts with Kriaris Transport based on the jointly (and any separately) negotiated terms.
- 1.10. The individual contracts are proposed to be for an initial term of one year, with options of a maximum of two years (a total of three years).

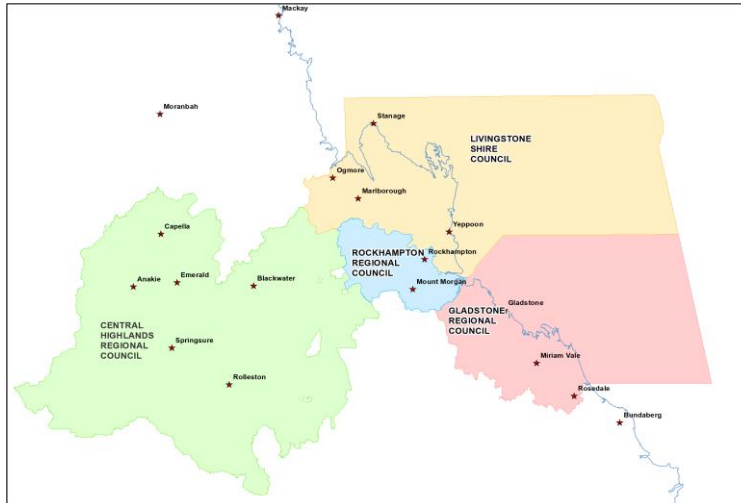
2. Background

- 2.1. The region administered by the Participating Councils has a total area of over 88,646 square kilometres and a population of approximately 211,703 as at 30 June 2019, which is projected to increase to 265,353 by 2041.¹

The geographic location of the region is depicted in Figure 1 below.

¹ GRC, 21 July 2020, Application for authorisation to collaboratively procure recyclables processing services, section 5.2, available: [ACCC Public Register for GRC](#)

Figure 1: Location of the Participating Councils



Source: Gladstone Regional Council

Current arrangements for recyclables processing

- 2.2. Currently, each of the Participating Councils collect recyclables from the kerbside. Opal Packaging Australia Pty Ltd is contracted separately by each of the Participating Councils to process recyclables at the Rockhampton MRF. Opal Packaging Australia has advised that it does not wish to extend the contracts with each of the Participating Councils beyond the current contract period, which expires on 31 December 2020.
- 2.3. The Rockhampton MRF, which is owned and operated by Kriaris Transport, is located within the Rockhampton Regional Council local government area and is the only MRF located within a:
 - 150km radius of the nominated transfer locations of Gladstone Regional Council and Livingstone Shire Council; and
 - 300km radius of the nominated transfer location of Central Highlands Regional Council.
- 2.4. Other Queensland MRFs are located in:
 - Mackay
 - Bundaberg
 - Murgon (west of the Sunshine Coast)
 - Townsville
 - Sunshine Coast
 - Logan (south of Brisbane)
 - Cairns.
- 2.5. It is common practice throughout Australia for groups of local councils to collectively tender and contract for waste services. The objective of such collaboration is to reduce transaction costs, pool resources and expertise, and achieve economies of scale.
- 2.6. The ACCC has previously authorised around 30 arrangements of this type, concluding that they were likely to result in net public benefit through improved quality of services at lower cost to the participating councils. Many of these arrangements have involved the procurement of waste processing services.

- 2.7. The Proposed Conduct is similar to a number of those that the ACCC has previously authorised.

3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including neighbouring regional councils, other MRFs, the local government association, Opal Packaging and Kriaris Transport.²
- 3.3. The ACCC received one submission, from Bundaberg Regional Council, which supports the application, submitting that the Proposed Conduct is likely to facilitate resource sharing and efficiencies, resulting in economies of scale by combining recyclables for processing and increasing the diversion of waste from landfill.³
- 3.4. Public submissions by GRC and Bundaberg Regional Council are available on the [Public Register 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. GRC has sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act, may substantially lessen competition or be a concerted practice within the meaning of section 45 of the Act. Consistent with subsection 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 (the **authorisation test**).
- 4.3. In assessing the Proposed Conduct, the ACCC considers:
- the relevant areas of competition likely to be affected by the Proposed Conduct will primarily affect the supply of recyclables processing services in the region in and around Rockhampton Queensland, and
 - in the likely future without the Proposed Conduct, each Participating Council would likely separately negotiate contract terms for recyclables processing services with Kriaris Transport, the owner of the Rockhampton MRP, which is the closest MRP to the Participating Councils.

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:

² A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

³ Bundaberg Regional Council, 5 August 2020, *Submission*, Available: [ACCC Public Register for GRC](#)

*...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.*⁴

Transaction cost savings

- 4.5. GRC submits that jointly negotiating contract terms results in transaction cost savings for Kriaris Transport and the Participating Councils, compared to each Council negotiating all contract terms individually with Kriaris Transport.
- 4.6. The ACCC accepts that the Proposed Conduct is likely to result in transaction cost savings for the Participating Councils and Kriaris Transport. Councils would be able to combine resources to negotiate common terms for the contract and Kriaris Transport would negotiate one set of common terms instead of four. The ACCC notes that some contract terms will be negotiated by individual councils taking into account regional issues, such as distance to the MRF.

Economies of Scale

- 4.7. GRC submits that the Proposed Conduct will result in economies of scale by:
- Jointly negotiating contract terms, which result in spreading the Rockhampton MRF fixed and variable operating costs across the Participating Councils so that each Council pays a lower gate fee than it would pay if it negotiated contract terms individually. The gate fee is the price per tonne to process recyclables; it decreases as the processed waste per annum increases (i.e. the more waste processed the less is paid).
 - Allocating aggregated volumes of recyclable material to the currently underutilised MRF, increasing its viability, and improving the likelihood of the facility processing at least 11 000 tonnes of recyclable waste each year, which is considered to be the minimum amount of waste for the facility to remain viable. As a result of improving operating cost efficiencies, the MRF owner is more likely to invest in technology to further improve plant efficiency.
- 4.8. The ACCC notes that the Proposed Conduct includes joint negotiation by the Participating Councils on the cost of processing services. Accordingly, the ACCC accepts that the Proposed Conduct is likely to result in the Participating Councils paying a lower gate fee for recyclables processing services than they would otherwise pay if they negotiated the cost of processing services individually.
- 4.9. The ACCC considers a lower gate fee is likely to incentivise the Participating Councils to continue to have their recyclables processed at the Rockhampton MRF and facilitate the viability of the MRF. This is likely to result in some public benefit.

Environmental Benefits

- 4.10. GRC submits that without a local MRF facility, all potentially recyclable waste collected from the Participating Councils local government areas may be unable to be processed and may go to landfill. This would have environmental impacts and be contrary to all Local and State Government waste strategies and policies which encourage resource recovery through recyclable processing and attempts to divert waste from landfill.

⁴ 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.

- 4.11. GRC submits that in the absence of the proposed collaborative procurement, there is significant risk that Central Highlands Regional Council will not have an economically viable option for the processing of its relatively low volume of recyclables, which needs to be transported over a greater distance than the other Councils.
- 4.12. GRC also submits that without the Proposed Conduct, Rockhampton Regional Council, Gladstone Regional Council and Livingstone Shire Council are also at risk of being left without any economically viable option for processing their recyclables, which may result in recyclable waste being disposed of in landfill.
- 4.13. The ACCC accepts that without the Proposed Conduct, individually, the Participating Councils are likely to pay more for recyclables processing, resulting in some or all of recyclable waste being diverted to landfill. To the extent that the Proposed Conduct avoids this, the ACCC considers the Proposed Conduct results in a public benefit.

Public detriments

- 4.14. 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.⁵

- 4.15. GRC submits that there is no discernible public detriment as the Rockhampton MRF is the only facility reasonably available to the Participating Councils to process recyclables.
- 4.16. The ACCC considers that public detriments may arise as a result of arrangements such as these where the joint procurement group (which would otherwise compete to acquire the relevant services) comprises a substantial portion of the market and it reduces competition for providers of the relevant services.
- 4.17. The ACCC considers that the Proposed Conduct is likely to result in minimal, if any public detriment, as:
- It is limited to the Participating Councils entering into and giving effect to contracts, arrangements or understandings regarding the joint procurement of the Relevant Services.
 - There is only one MRF located in Rockhampton which the Participating Councils can consider as a viable option for recyclable processing services. The nearest MRFs are in Mackay, approximately 340 km to the north of Rockhampton and Bundaberg, approximately 280 km to the south of Rockhampton and therefore transportation to these MRFs is likely to result in additional costs for the Participating Councils.
 - Each of the Participating Councils have independently resolved that there is only one supplier that is reasonably available to provide the relevant recycling services.
 - Kriaris Transport does not oppose the Proposed Conduct.
- 4.18. The proposed three year contract term between each of the Participating Councils and Kriaris Transport is relatively short for the procurement of recyclable processing services. At the end of the contract term, the Participating Councils could again re-assess whether there are other viable options for recyclable processing services.

⁵ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

Balance of public benefit and detriment

4.19. The ACCC considers that the Proposed Conduct is likely to result in public benefits in the form of:

- Transaction cost savings
- Economies of scale
- Environmental benefits

4.20. The ACCC considers that the Proposed Conduct is likely to result in minimal, if any, public detriment due to its narrow scope and there is currently only one MRF which the Participating Councils consider as a viable option for recyclable processing services.

4.21. Therefore, for the reasons outlined in this draft determination, the ACCC is satisfied 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

4.22. The Act allows the ACCC to grant authorisation for a limited period of time.⁶ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriments 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.

4.23. In this instance, GRC seeks authorisation for

- the period up to 31 December 2020, when the current individual contractual arrangements will end, to conduct the collaborative procurement process for the relevant services, including the negotiation and execution of the contracts
- a maximum three year operating term for each of the contracts entered into between each of the Participating Councils and Kriaris Transport.

4.24. GRC submits that the proposed three-year contract term is short in industry terms for contracts for relevant services and are intended to allow the Participating Councils sufficient time to gauge the effectiveness of the service provider in achieving maximum resource recovery and diversion from landfill and to also allow each Council to develop a longer term strategy for resource recovery.

4.25. During the life of the contracts the Participating Councils will consider their options for procuring a further longer term contract (which would commence at the expiry of the contracts with Kriaris Transport) and will seek re-authorisation from the ACCC at that time.

4.26. Based on the information provided, the ACCC proposes to grant authorisation for a period of three years, until 31 December 2023.

⁶ Subsection 91(1)

5. Draft determination

The application

- 5.1. On 22 July 2020, GRC lodged application AA1000524 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. GRC seeks authorisation for the Proposed Conduct. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 5.3. 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.
- 5.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct 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, including any lessening of competition.
- 5.5. Accordingly, the ACCC proposes to grant authorisation.

Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to grant authorisation AA1000524 to enable the Participating Councils to enter into and give effect to contracts, arrangements or understandings regarding the joint procurement of recyclable processing services from Kriaris Transport as described in paragraphs 1.4 and 1.5 and defined as the Proposed Conduct.
- 5.7. The ACCC proposes to grant authorisation in relation to the following provisions of the Act: Division 1 of Part IV of the Act, and section 45 of the Act.
- 5.8. The ACCC proposes to grant authorisation AA1000524 until 31 December 2023.
- 5.9. This draft determination is made on 2 September 2020.

6. Interim authorisation

- 6.1. At the time of lodging the application, GRC requested interim authorisation to enable collaboration between the Participating Councils in advance of the expiry of their respective existing contractual arrangements on 31 December 2020. GRC submits that this will:
 - enable continuity of service for residents within the Participating Councils, and
 - prevent the Participating Councils being required to divert recyclable materials to landfill which will attract a waste levy.
- 6.2. GRC submits that for the Participating Councils to be able to continue to effectively deal with recyclable waste, it is imperative that the new contracts commence on 1 January 2021.

- 6.3. Section 91(2) of the Act allows the ACCC to grant interim authorisation where the ACCC considers it appropriate to allow the parties to engage in specified conduct while the ACCC is considering the substantive application for authorisation.
- 6.4. In granting interim authorisation, the ACCC has taken into account:
- That there is a need for interim authorisation to enable the Participating Councils to commence joint negotiations on contractual terms for recyclables processing services to be provided by Kriaris Transport so that these services can continue without interruption when each Council's current processing contract with Opal Packaging ends on 31 December 2020.
 - Interruption to recycling services is likely to be harmful for the Participating Councils, as they would need to transport recyclables to an alternative facility, store recyclables or divert recyclables to landfill.
 - The relevant areas of competition are unlikely to be permanently altered if interim authorisation to engage in negotiations is granted.
 - Based on its assessment to date, the Proposed Conduct is likely to result in some public benefit and is unlikely to result in significant public detriments.
- 6.5. The ACCC grants interim authorisation to GRC to enable the Participating Councils to commence joint negotiations with Kriaris Transport on contract terms for recyclables processing services, as described at paragraph 1.5. Interim authorisation does not extend to the Participating Councils entering into, or giving effect to, any agreements with Kriaris Transport.
- 6.6. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until interim authorisation is revoked.

7. Next steps

- 7.1. The ACCC now invites submissions in response to this draft determination by close of business 17 September 2020. In addition, consistent with section 90A of the Act, GRC or an interested party may request that the ACCC hold a conference to discuss the draft determination.