



Business SA Submission:

Council Solutions Application(s) for Authorisation AA1000419 and AA1000420

June 2018

Executive Summary

Local councils are generally considered responsible for a core set of services – ‘rates, roads and rubbish.’ Waste management is a key element of a local council’s ‘rubbish’ service provided to ratepayer businesses and households. Waste processing and ancillary waste services, in addition to waste collection, are the primary components of this service.

Council Solutions has lodged an application in the Australian Competition & Consumer Commission to allow joint procurement of waste processing services and waste ancillary services.

Business SA recognises that members in the Cities of Adelaide, Charles Sturt, Marion and Port Adelaide Enfield may benefit from these applications. Furthermore, Business SA supports broader amalgamations of councils, particularly in metropolitan areas, to realise the types of efficiencies which can come through economies of scale.

These potential benefits to ratepayers may also cause public detriment for other groups, such as participants in the waste processing and waste ancillary service industries. Business SA is concerned insufficient evidence has been provided to substantiate asserted benefits, which would go some way in offsetting potential public detriment. Business SA would also welcome an undertaking from the Applicants to adopt the South Australian Industry Participation Policy, or elements of such.

Business SA is further concerned about the proportion of the waste processing market affected by the Proposed Conduct, and the capacity of this market to adapt given significant challenges imposed by international decisions. The ancillary services stream application suffers from the lack of shared boundaries between the Participating Councils.

Business SA’s membership is predominantly comprised of rate-payers in subject council areas however we also have members in the waste processing and ancillary waste services industries. As such, we do not expressly support or oppose the application, instead we have identified a range of factors the ACCC should consider when making its determination.

Introduction

Business SA, South Australia's Chamber of Commerce and Industry, was formed in 1839 and has approximately 3,500 members across every industry sector, from micro businesses right through to listed companies. Our members employ some 140,000 South Australians. Business SA is a not-for-profit business membership organisation which advocates on behalf of members and the broader business community for sustainable economic growth in South Australia and the nation. Business SA has members in all corners of South Australia, from the central business district, to greater metropolitan Adelaide and to the regions. These members, and those non-member businesses in the broader community, may be directly or indirectly affected by the conduct proposed in Council Solutions' Application(s) for Authorisation AA1000419 (**Processing Streams Application**) and AA1000420 (**Ancillary Streams Application**) (collectively, **the Applications**).

Given the significant degree of overlap between these applications, both will be dealt with in this Business SA submission. As will be demonstrated, similar benefits and detriments exist within the Processing Stream Application and the Ancillary Stream Application as with Application AA1000414 (**Waste Collection Application**). As such, this submission will rely in part on information provided in our submission regarding Application AA1000414.

Business SA's varied membership has members operating in the processing services stream and/or the ancillary services stream. These members, and non-member businesses in the processing/ancillary services streams will be directly affected by the Proposed Conduct should it be approved. These businesses may be negatively affected by the Proposed Conduct.

Business SA also has over 1000 members in the Participating Councils alone. These members, members outside the Participating Councils' districts, and non-member businesses in South Australia more broadly, expect their council to properly process waste products and to ensure ancillary services are provided. Ratepayers such as businesses and households deserve the best value for their money in council expenditure. These members and non-members may positively benefit from the Proposed Conduct should it be approved.

As with our Waste Collection Application response, given the varied interests represented within Business SA's membership, and our consideration of the broader business community in general, we have assessed Council Solutions' applications for the processing stream and ancillary services streams from a range of perspectives. As part of this assessment we have also considered a similar application made by Council Solutions in 2015 and determined by the Australian Competition & Consumer Commission (**ACCC**) in 2016. Business SA participated in the previous application and while some of the concerns we raised there were addressed, other concerns remain in these applications and new concerns have arisen.

Business SA recognises factors weighing in support of these applications, and factors weighing against. The factors in support mainly relate to adaptations made following the previous application's 2016 rejection, such as a request for tender approach, potential education improvements and potential probity efficiencies. The factors against these applications largely reiterate concerns already raised by Business SA and other parties. Issues such as insufficient evidence, the size of the market potentially impacted, the current state of recycling market and lack of shared boundaries weigh against granting these applications.

Previous application

1. This is not the first application lodged by Council Solutions on behalf of the Participating Councils to the ACCC for joint procurement of waste services. An application was made on 30 November 2015 by Council Solutions on behalf of the Participating Councils¹ (**2015 Application**) for authorisation to jointly procure, negotiate and contract for the supply of four streams of waste services: waste collection services, receipt and processing of recyclables, receipt and processing of organics, and waste disposal services (**the service streams**).² The ACCC invited interested parties to comment on the 2015 Application and to further submit following a Draft Determination.
2. Business SA provided a submission as an interested party on 11 March 2016.³ In this submission we highlighted the importance of local councils seeking to deliver efficiency improvements to benefit all ratepayers. We recognised the potential savings which could be achieved should the 2015 Application be approved. However, we also expressed concern regarding the size of the Adelaide waste services market which would become controlled, and the impact this would have on the ability of smaller waste management businesses to compete. Business SA also submitted the South Australian Industry Participation Policy (**SAIPP**) should apply to local government procurement(s).
3. The 2015 Application was determined by the ACCC in December 2016 (**Previous Decision**). The ACCC denied the 2015 Application as it was not satisfied in all the circumstances the proposed conduct subject to authorisation in the 2015 Application would likely result in a public benefit which would outweigh any likely public detriment caused by lessened competition.⁴
4. Business SA provides this background as many of the points raised in our previous submission remain relevant for the Processing Stream Application and the Ancillary Stream Application.

Business SA's position on local councils

5. Business SA has long advocated for councils to achieve efficiencies for the benefit of their ratepayers. We have been strong supporters of council amalgamations in greater metropolitan Adelaide. South Australia's 68 local councils serve an average of 24,790 people each, well out of step of the 55,100 person average for councils in Queensland, New South Wales and Victoria.⁵ Amalgamations present an opportunity for efficiencies and economies of scale to be realised. This will improve services for businesses and households within those council areas. We recognise that amalgamations may be considered a significant step. To this end we view collaborative conduct, such as that proposed in these applications, as a potential method for councils to apply their resources effectively and achieve results for their constituents. However, Business SA remains concerned with certain elements of the applications.

¹ As well as the City of Tea Tree Gully, not a participating council for AA1000414.

² Council Solutions, '[Application for Authorisation of a Combined Waste Tender Process](#)', Authorisation Number A91520, 30 November 2015, 1.

³ Business SA, '[Interested Party Submission](#)', 11 March 2016.

⁴ Australian Competition & Consumer Commission, *Determination*, A91520, 20 December 2016, [293]-[294].

⁵ Business SA, '2018 Charter for a More Prosperous South Australia' 22 February 2018, 46.

6. Business SA has also long advocated for better consistency across municipal boundaries. Businesses operating in South Australia must comply with a broad array of laws and regulations. In many cases with good reason, such laws appropriately protect public interests and ensure the business' social licence is not abused. An area of complexity for business however is where laws and regulations differ between council areas. Tender requirements are a relevant example. To the greatest extent possible we have advocated for consistent regulations and requirements across council districts.⁶ These applications provide an opportunity for improvement in this area and with proper management they could lessen or even remove differences between the Participating Councils' requirements.

Factors in support of the Processing Streams and Ancillary Streams Applications

Use of RFT approach

7. As discussed in relation to the Waste Collection Application,⁷ use of an RFT approach may be a factor in support of the Applications. The RFT approach is preferable to the RFP approach previously proposed. Business SA also welcomes efforts to increase consistency between councils, particularly regarding regulations and requirements imposed on business.

Reduced replication and potential legal/probity efficiency gains

8. Business SA considers that the Proposed Conduct in both of the Applications may result in tender process cost savings and efficiencies. By jointly procuring waste services there should be a reduction in replicated work within the Participating Councils, as suggested by the Applicants at page 23 in the Processing Streams Application. Further, by jointly procuring technical, legal and probity advice through Council Solutions each council will not be required to engage their own advisors. On its face, these factors would suggest the costs incurred by councils would be less than without the Proposed Conduct; an indirect benefit for ratepayers of the Participating Councils.
9. While such outcomes may occur, Business SA notes the ACCC's findings in the Previous Decision on this point. The ACCC found that the proposed conduct in that application (similar to the Proposed Conduct of the Applications) 'is likely to reduce or remove some duplication by participating councils of tender-related tasks...'⁸ The ACCC contextualised this finding however by noting the complexity inherent with trying to coordinate multiple councils and that on balance, net transaction cost savings will be difficult to achieve.⁹ Given the switch from an RFP approach to RFT, and the splitting of tenders, such complexities may have been reduced.
10. Business SA takes this opportunity to acknowledge the Applicants' review of the LGA Model Contract as it applies to recyclables processing. The Applicants state the review is to ensure 'appropriate commercial and risk sharing mechanisms (e.g. rise and fall provisions) support fair, sustainable and transparent contract arrangements in light of the current volatility in the market.'¹⁰ It is promising that the Applicants have considered the state of the recycling market.

⁶ Ibid 47.

⁷ Business SA, 'Council Solutions Application for Authorisation AA100414' 26 April 2018, [13]-[15].

⁸ Previous Decision, [103].

⁹ Ibid [104]-[106].

¹⁰ Processing Streams Application, 25.

11. As will be discussed later, we are concerned that the state of the recycling market may not support the approval of the Applications at this stage. Regardless of the outcome of the Applications, we encourage the Applicants, particularly the Participating Councils, to apply a properly adapted Model Contract to future arrangements they make with recycling processing service suppliers.

Potential improved community education

12. The Proposed Conduct in the Applications may improve community education regarding proper waste management. The Processing Streams Application states ‘the Participating Councils will work together to develop targeted educational material relevant to key issues, for example combined messaging across the Participating Councils where diversion is lowest, translated consistent messaging for those from non-English speaking backgrounds or targeted contamination reduction drives.’¹¹ Business SA also recognises statements that a consistent message throughout the Participating Councils may improve community knowledge such that contamination rates are lowered.¹²
13. The ACCC also considered this point in the Previous Decision. In that decision, the ACCC found that the proposed conduct would likely improve the efficiency of development and implementation of community education programs.¹³ However, the ACCC also noted that ‘the participating councils can and do undertake their own community education programs.’¹⁴ Ultimately, while the ACCC accepted this public benefit it found that, compared to the future where each council undertakes its own community engagement programs, the efficiency gains were likely to be small. Business SA does not consider there to be any reason for the ACCC to depart from this finding when determining the Applications.
14. It is important that Business SA note at this point however that the Participating Councils are not currently prevented from cooperating regarding educational materials. While approval of the Application may give impetus for the Participating Councils to coordinate education materials, we do not consider it a prerequisite. Advice regarding proper disposal of recyclables, and steps to avoid contamination, is highly unlikely to vary between council areas. While branding, format and particulars (such as bin collection days) for the council area may currently vary, the key information will likely remain the same.

Potential public benefit

15. Business SA also recognises comments in the Previous Decision regarding minor public benefits which could be achieved regarding recyclables receipt and processing, and organics receipt and processing. Regarding recyclables, the ACCC found in the Previous Decision that ‘aggregation of participating council recyclable volumes under the proposed conduct is likely to result in some minimal public benefits.’¹⁵ Similarly regarding organics, the ACCC found in the Previous Decision that aggregating organics from participating councils ‘is likely to result in some minimal public benefit in the form of improved efficiencies in the receipt and processing of organics.’¹⁶ Business SA raises these findings as similar minimal public benefits may arise on the Processing Stream and Ancillary Stream Applications.

¹¹ Ibid 28.

¹² Ibid.

¹³ Previous Decision, [125].

¹⁴ Ibid.

¹⁵ Ibid [154].

¹⁶ Ibid [166].

16. Business SA notes however the ACCC's comment regarding ongoing viable operation of MRFs. The ACCC accepted that the viability of these facilities depends on conditions in the end market for the relevant recyclable product.¹⁷ As will be discussed later in this submission, the recyclables market is currently facing very challenging circumstances; threatening the viability of local recycling facilities.

Factors against both the Processing Streams and Ancillary Streams Applications

17. These factors in support of the Applications should not be considered in isolation; concerns arise in the Processing Stream Application and the Ancillary Stream Application. Business SA submits these concerns may result in public detriment, both for members in the waste collection industry, and for ratepayers in Participating Councils and non-participating councils. The ACCC should bear these concerns in mind when issuing its draft determination, and if not adequately addressed by the Applicants, in the final determination.

Insufficient information provided

18. Business SA is concerned with the lack of data provided to support assertions in the Applications. We raised similar concerns regarding the Waste Collection Application at [34] of our submission. As with that application, insufficient evidence, particularly economic evidence, has been provided by the Applicants to demonstrate that the Proposed Conduct will achieve monetary benefit for affected ratepayers.
19. Both applications refer to a report from Wright Corporate Strategy.¹⁸ This report purportedly found significant benefits could be achieved through collaboration. This report has not been provided, either in full or redacted, to interested parties. Given this report seems to have particularly spurred these applications it should be provided to interested parties to consider.
20. Further information is omitted throughout the Applications. Both the Processing Streams Application¹⁹ and Ancillary Streams Application²⁰ state 'relevant documents have been provided to the ACCC... However as these are not public documents or are commercial in confidence they are *CONFIDENTIAL* and are not published on the public register' (emphasis in original). It is unclear what materials have been provided to the ACCC as 'relevant papers'. Business SA submits these papers, appropriately redacted, should be provided to interested parties for consideration.
21. The Applications also list public benefits that will occur and public benefits that are likely to occur, however little data is provided to back up these assertions. While we recognise that not all benefits will be easily quantifiable, a level of economic analysis should be provided given the scope of the Applications. For example, the Processing Streams Application suggest tender process cost savings and efficiencies are a public benefit that will occur as a direct result of the Proposed Conduct.²¹ Similar statements are made regarding tender process and contract management cost savings and efficiencies in the Ancillary Streams Application.²² Given these benefits relate to savings and efficiencies, and are suggested to directly result

¹⁷ Ibid [143].

¹⁸ Processing Streams Application, 7; and Ancillary Streams Application, 7.

¹⁹ Processing Streams Application, 14.

²⁰ Ancillary Streams Application, 14.

²¹ Processing Streams Application, 27.

²² Ancillary Streams Application, 33.

from the Proposed Conduct, Business SA submits economic data can and should be provided to support these assertions.

22. Overall, for applications of this size the interested parties should be provided all relevant information. Confidential materials provided to the ACCC in support of the Applications should be provided in redacted form to interested parties to substantiate the proposed benefits which will be, or at least are likely to be, achieved.
23. Business SA takes this opportunity to make clear that we will consider any modelling or data which supports claims made in the Applications, should the Applicants provide it. If this modelling demonstrates sufficient public benefit, particularly for ratepayer businesses, this will go some distance in easing our concerns (discussed later in this submission).

South Australian Industry Participation Policy

24. In Business SA's submission for the 2015 Application we indicated the SAIPP should apply to the waste tender process. At that time we submitted this would ensure local small to medium businesses would be given a 'fair opportunity' in the tender process.²³
25. The Applications do not indicate that the Applicants intend to apply the SAIPP when assessing tender bids. We recognise that the SAIPP's scope does not extend to local council. However, Business SA would welcome an undertaking from the Applicants to apply the SAIPP during the tendering process.
26. The SAIPP was established to ensure that South Australian small to medium sized businesses are given a fair and reasonable opportunity to tender for projects. Business SA supported the South Australian Government's efforts to implement this policy for the potential the SAIPP has to allow local businesses to compete for lucrative government contracts.

Factors against the Processing Streams Application

Market share concerns

27. Business SA submits the market share for recyclables tonnes provided in section 10.3 of the Processing Streams Application is misleading. The Applicants have stated that the Proposed Conduct for recyclables tonnes in the Processing Streams Application makes up only 1.8% of the recyclables processing market, with 5.6% comprising all other Greater Adelaide Region Councils and 92.6% comprised of C&I and C&D metropolitan sources.²⁴
28. Business SA submits the share of the market affected by the Proposed Conduct is much larger. Business SA has been advised that the equipment and procedures required to process C&I and C&D recyclables vary greatly from that required to process household recyclables; an understandable situation given the different types of recyclable content generated by these groups. Business SA has been further advised that many processors of household recyclable content do not also handle C&I and C&D recyclables for this reason.

²³ Business SA, '[Interested Party Submission](#)', 11 March 2016.

²⁴ Processing Streams Application, 17-18.

29. Consequently, Business SA submits the relevant market share for this aspect of the Proposed Conduct should be limited to household recyclables tonnes. Under this approach, the Proposed Conduct does not make up 1.8% of the market, it makes up 31.25% of the market. This is a significant proportion of total household recyclables content in the Greater Adelaide Region.

State of the recyclables market

30. South Australia's waste processing market is in a delicate position, the end markets for many recyclables have been significantly disrupted – leaving processors without buyers for their product. While local responses have been announced, the consequences of international decisions will continue to apply. Business SA is concerned that the Proposed Conduct could threaten the ongoing viability of materials recycling in South Australia, particularly for the unsuccessful tenderer(s).
31. As demonstrated above, the Proposed Conduct may affect up to 31.25% of the Greater Adelaide Region's recyclable tonnes. The above figure also does not include the proportion of recyclable tonnes already processed in house or by regional subsidiary, such as NAWMA. This will further reduce the 'available' portion of Greater Adelaide Region's recyclable tonnes once the Proposed Conduct and existing processing agreements are considered.
32. Should the Proposed Conduct of the Processing Streams Application be approved, this will leave the unsuccessful tenderer(s) unable to bid on close to one third of the Greater Adelaide Region's recyclable tonnes for up to 10 years. This, coupled with the proportion of the market already tied to processing through regional subsidiaries will leave little for suppliers to process. Given the challenging circumstances facing the industry at the moment this may even result in unsuccessful processors ceasing to operate. Further, if this situation eventuates we consider it unlikely new processors will rush to enter the market. The consequences of this outcome will be twofold – in the short term jobs will be lost, while in the long term it may entrench the successful tenderer as the dominant, or even sole, provider of waste processing services in South Australia (excluding regional subsidiaries).
33. Business SA submits the Proposed Conduct, particularly regarding recyclables processing, could threaten this challenged market. While market forces should ultimately decide which businesses continue operating through this challenging period, we encourage the ACCC to consider whether the Proposed Conduct is likely to exacerbate existing pressures when making its determination.

Factor against the Ancillary Streams Application

Importance of shared boundaries

34. The Ancillary Streams Application asserts that the Proposed Conduct will improve service efficiency and enable optimised collection routes; predicated largely on 'removal' of council boundaries between the Participating Councils.²⁵ Similar assertions were made in the Waste Collection Application. In our response to the Waste Collection Application we made clear our concern that the City of Marion's inclusion as a Participating Council will limit the extent to which any such benefits will be achieved.²⁶ We reiterate those submissions in relation to the Ancillary Streams Application.

Conclusion

As stated in our response to the Waste Collection Application, 'roads, rates and rubbish' are generally perceived to be the main function of councils. As we expressed in that response, ratepayers, households and businesses, expect and are entitled to effective and efficient waste management services through their local council. This of course includes processing and ancillary services. The Applications may provide some benefit to these stakeholders. Just as importantly however, the Applications may disadvantage other stakeholders.

The Applications may provide some benefit to Business SA's members within the Participating Councils. Council resources may be applied more efficiently if replication and probity costs are shared between the Participating Councils, rather than each incurring costs for largely the same services. Improved environmental outcomes may also be achieved through better education, though the ACCC has previously found that the extent of this gain is likely to be small. Consistent with the ACCC's previous decision, other minimal public benefits may be achieved in waste processing and ancillary services.

However, the Applications also cause Business SA concern – particularly regarding the impact of the Applications on the waste processing market in South Australia. Both applications suffer from a lack of economic data or modelling to support assertions. We would also welcome commitment from the Applicants to apply the SAIPP during the tender process; a submission made by Business SA during the previous determination and in our response to the Waste Collection Application.

Business SA is concerned the market share affected by the Proposed Conduct, specifically recyclable tonnes, has been underestimated. With over 30% of this market, rather than 1.8%, potentially affected by the Proposed Conduct a higher degree of scrutiny should be applied to the Processing Streams Application. This affected market share is troubling given the challenging circumstances currently facing the recycling market. The consequences of international decisions continue to be dealt with locally. We encourage the ACCC to consider whether the Proposed Conduct will exacerbate these challenges.

The Ancillary Streams Application suffers from similar issues to the Waste Collection Application. The benefits of shared boundaries are unlikely to be fully achieved given the geographic isolation and small proportion of shared boundaries between some of the Participating Councils.

²⁵ Ancillary Streams Application, 38.

²⁶ Business SA, 'Council Solutions Application for Authorisation AA100414' 26 April 2018, [22]-[25].

On balance, Business SA is more concerned regarding with the Processing Streams Application. While benefits may occur, detriments may also arise. Business SA would welcome the Applicants providing data or modelling which demonstrates the Proposed Conduct of the Applications will result in benefit for business ratepayers. Should sufficient business ratepayer benefit be demonstrated, this is likely to ease some of our concerns with the Applications.

Currently, South Australia has one of the most effective waste and recycling industries in the country. The Applicants acknowledge South Australia has highest diversion rate across Australia at 81.5%.²⁷ This demonstrates the relative strength of current policies and approaches. While the Applications may create some public benefit, they may equally cause public detriment. Such detriment may threaten South Australia's strong environmental performance in the long term, such as if local competition is weakened. Avoiding such an outcome should be a priority.

Should you require any further information or have questions, please contact Chris Klepper, Policy Adviser, on (08) 8300 0062 or chrisk@business-sa.com.



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²⁷ Processing Streams Application, 28-9.