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**Small Business
Commissioner**

SOUTH AUSTRALIA

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Dear Mr Jones

Council Solutions applications for authorisation AA1000419 (processing) and AA1000420 (ancillary)

Thank you for the opportunity to provide a submission on the above applications in response to my attendance at the pre-decision conferences held in Adelaide on Monday 22 October 2018.

Impact on small business

My concerns centre on the process by which Council Solutions has undertaken a tender to the market for these applications in the absence of ACCC formal approval, and I take this opportunity to restate my concerns about the impact of this process on small business operators.

In his submission to the ACCC, Mr Colin Tsang of PolyTrade succinctly points out the impacts of these proposals:

*"The tenders have all been advertised at the same time, which means the ability for separate companies to submit competitive bids for their area of specialization will be severely compromised. All services announced together, and alternative offers encouraged favours only the largest 2 or 3 waste service providers who can offer multiple services which will be lack of equal opportunity to all processors. This will reduce competition in the industry."*¹

Financial matters

It appears that Council Solutions is still unable to clearly quantify the financial benefits which will flow to the respective councils given the variability in the tender process.

¹ Submission to ACCC dated 5 October 2018 from Colin Tsang - Polytrade



It is noted that WRASA² has identified that the data used in the tender documentation is between three and nine years old. This hardly allows for accurate costing and estimations required in the tender process.

I share the concerns of WRASA in relation to the risks and uncertainty of the scheduled services on which payment is based, including that the payment may be based on the number of “lifts” which could result in higher prices. It is anti-competitive to use Force Majeure clauses to cover government action and market fluctuations, such as I have raised previously in relation to the impact on Australian recyclables from the China Sword crisis.

Tender process

There remains widespread concern about the process being undertaken by Council Solutions in relation to the above (and previous) applications.

The National Waste Recycling Industry Council (NWRIC) has made some important observations that market innovation and public good is maximised where:

- The number of market opportunities is maximised.
- The number of competitors who can bid for those market opportunities is maximised.
- The transparency and availability of tender documents is maximised.
- Market opportunities occur frequently and evenly. That is, they are spread evenly over time, rather than aggregated into a single event.
- The size of the resultant activity is optimal with respect to asset and supervisory utilisation.

In relation to the issue of transparency, one example of this relates to bank guarantees. While there was some assurance at the pre-decision conference on 22 October 2018 from Mr Wright representing Council Solutions that:

“...historically no bank guarantees have been required and there is no reason why this should not continue”,

in my view, this is a significant commercial and competitive factor which will adversely impact small businesses tendering for the work.

Banks generally require the applicant to lodge significant assets to back the face value of the bank guarantee. These are funds which are then “tied up” for the duration of the contract. Such a burden on a small (or large) business is unreasonable, expensive and likely to lead to a reduction in the number of parties bidding for the contracts and therefore there is an anti-competitive element to this requirement. Large businesses tend to have access to capital on a much greater scale than small businesses and can deal with issues such as bank guarantees through their capital management processes.

It is noted that the current tender process appears to have effectively led to the exclusion of one current participant in the market, Trevor Hatch Waste & Recycling, due to the level of investment required. In his submission to the ACCC dated 11 October 2018 Mr Hatch says that:

² Submission to ACCC dated 3 October 2018 from Waste & Recycling Association of South Australia

“As a small business who currently services these councils, if I can no longer tender for their work, I cannot see that this increases competition. If the hard waste cost to residents increases by moving to an on-call service, I cannot see how this is of public benefit.”³

Similarly, Mr Matthew Quinn from SA Composters notes:

“The capital requirements and the scale to receive the material from all of the Councils (which we believe is required to lodge a competitive bid) would not be financially possible and therefore we could not tender. A tender for only one of the Councils would not be considered by Council Solutions.”⁴

WRASA points out that the bulk bin, hard waste and street bin collection services are incompatible, and it is unprecedented that they are being contracted together. I submit that this statement warrants further review by the ACCC.

It is of great concern that the pricing and repricing models proposed again favour big business at the expense of smaller operators. It is my understanding that the tender price must be held for 270 days, and that any price adjustments and repricing cannot occur for a minimum of two and a half years and up to five years. This puts small operators at a considerable disadvantage in that they may not have the ability to handle increases in cost inputs to the degree of a larger operator who may be operating across the state, and indeed national, waste management services sector.

For the above reasons, as Small Business Commissioner, I oppose these two applications.

Review of ACCC’s decision

Finally, I am minded that during these processes many claims and counterclaims have been made in support of, or criticism of, the applications concerned.

At the pre-decision conference on 22 October 2018, Mr Wright of Council Solutions submitted that:

“What this is about is public benefit. There will be a public benefit. And there is likely to be an increase in competition.”

I note that the ACCC has authorised 30 arrangements of this type, concluding that these are likely to result in a net public benefit through improved quality of services at low cost to the councils participating. I further note that a number of small businesses have expressed concern that the ACCC is not taking into account the long-term impacts of these types of decisions on small business.

Given the significance of the ACCC’s decision in relation to each of the Council Solutions applications for its waste management services and the impact it will have on small business, should the ACCC be minded to grant these two applications (noting that the first application has already been approved), then I ask that the ACCC reviews any such

³ Submission to ACCC dated 11 October 2018 from Mr Trevor Hatch – Trevor Hatch Waste & Recycling

⁴ Submission to ACCC dated 11 October 2018 from Mr Matthew Quinn – SA Composters

decision in five years' time to determine whether the behaviour has delivered the public benefits promised and that competition in the market has not been lessened.

If you would like to discuss my further submission in further detail, please do not hesitate to contact me on 08 8303 0927 or john.chapman@sa.gov.au.

Yours sincerely



John Chapman
Small Business Commissioner

1st November 2018