

Waste & Recycling Association of South Australia Inc.

11 April 2016

Ms Lyn Camilleri
Director - Adjudication
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

By email: adjudication@acc.gov.au

Attention: MsTess Macrae

Dear Ms Macrae

**Your reference: 58822 - Council Solutions & Others
ACCC Authorisation Application No. A91520**

We would like to thank the ACCC for providing the opportunity of the Pre Decision Conference to convey relevant facts from the Adelaide waste and recycling industries in respect to our submission that ACCC ought to reject the Council Solutions proposal.

We provide for your consideration two further items:

1. A summary of unsubstantiated claims made by Ms Taryn Alderdice on behalf of Council Solutions at the Pre Decision Conference and brief comments regarding each of those claims.
2. A summary of net public benefit/detriment issues.

The information gathered by our members and advisers shows that the Council Solutions Application, even in a modified form, with a shorter term for example, will result overwhelmingly in **net public detriment**.

South Australian Councils are currently providing “the best service with the least cost” and results from metropolitan Adelaide, and also elsewhere in Australia, demonstrate that this proposal will reverse the South Australian waste and recycling community’s successful results.

The Council Solutions Application establishes the potential for Council Solutions gaining a dominant market influence, resulting in difficult trading conditions for local businesses, loss of local jobs, and reduced service outcomes for the public. For these reasons we ask the ACCC to reject the Application.

We are available for discussion with the ACCC as required and would be happy to provide further information should the ACCC have additional queries about the waste industry.

Yours sincerely

John Fitzpatrick
Public Officer
Waste and Recycling Association of South Australia Inc.



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1. Claims made by Council Solutions at the Pre Decision Conference

Set out below are Council Solutions' assertions and our response:

- 1) *Council Solutions frame their proposal on the current successful waste diversion by South Australia and objectives to further increase that diversion*

In fact, South Australia is a national leader in waste diversion and the evidence shows that the establishment of a large tender such as the Council Solutions proposal will actually provide poorer waste diversion results.

- 2) *Council Solutions invited other Councils to participate - and only Port Adelaide accepted*

Other non Constituent Councils in South Australia have shown their assessment of the Council Solutions proposal and their ability to execute the waste management contract across all waste streams by declining to participate in the tender.

Only Port Adelaide, whose current CEO instigated the Council Solutions "mega-tender" process as Charles Sturt CEO, accepted as a "customer" Council. Two Constituent Councils decided not to participate, even though their contract end dates aligned with the Council Solutions proposal.

- 3) *Council Solutions appease the group by saying they will do an ACCC application for Onkaparinga in the future if they or anyone else decide to join*

It is a fact that it is significantly more difficult to gain the up front approval for the waste tender than it is to add an extra Council on to the process 3 years down the track. Furthermore, Onkaparinga will increase the geographical spread of the participating Councils, further deteriorating the State's ability to effectively cluster Councils for efficient waste infrastructure investment.

- 4) *Council Solutions claim East Waste goes out to tender*

East Waste may tender for recyclables processing or organics processing; however the East Waste collection services are definitely **not tendered**. They are in effect like a Council performing their own services. There is no contract term. Exit costs for a Council that wants to switch providers from East Waste amount to 2 years of waste charges, providing a very high barrier to exit.

- 5) *Council Solutions say they will do an RFP first to sound out the market*

The RFP format which Council Solutions are proposing will not be confidential so tenderers will be unable to provide any valuable information of significant commercial worth, as it will remove any advantage they may have for the subsequent tender process. This will result in an ineffective process with the addition of an extra costly step into the process with no benefit.

- 6) *Council Solutions expect the market to "determine and propose the best model"*

Council Solutions assert the market will work seamlessly to deliver the best "whole of group" solution. This is not a commercial reality.

Because of the risk involved with working with other companies and being responsible for them as a subcontractor, for example, companies want to avoid "whole of group" in favour of targeted tenders that minimise risk and reduces prices tendered.

An example is Maitland & Ors, where only 2 non conforming tenders were received for the combined "collection and processing" tender, then, after the failure of that tender process, 6 conforming tenders were received for the subsequent amended "processing only" tender.

And this was only for one waste stream: organics. Council Solutions is proposing for all 3 waste streams. Council Solutions state that the 14 year term is linked to waste disposal.

The 14 year term may be appropriate for an AWT but there are two points to be made here.

First, AWT planning needs to be driven by the State, as it is a key infrastructure investment, and the economics of such facilities are such that only 1 or 2 facilities may be built for Metropolitan Adelaide.

Secondly, combining a 14 year disposal contract with other services at varying terms results in compromised terms, poor testing of markets from avoidance of future tenders (because 5 Councils and all waste services is very difficult), and a major risk element, as contractors may be left in the future with a disposal contract but not their preferred collection or processing service provider.

7) Council Solutions state they have allowed 3 years for implementation

This demonstrates the complexity of the project and the dangerous lack of clarity of the proposal. If a Council was to tender individually or a group of Councils were to tender (without an extra administrative layer) for a specific service, for example, an organics processing facility, they could allow 12-18 months, excluding construction of a facility which may take another 1 to 5 years, depending on the type. The tendering costs are increased as all Councils still need to participate in the process and check each step and the risks to contractors are increased, as they are submitting pricing for a period further into the future.

8) Council Solutions claims that for processing, new infrastructure requires a longer term

This is an assertion without any substance. Recycling facilities often improve their systems and resource recovery by retrofitting new components, for example, sort glass into different colours to get higher prices at market. Serious research needs to be undertaken into potential solutions and industry consultation needs to be thorough, to ascertain what tender documents should look like and the method used by all other tenders in metropolitan areas, and regional areas also, should be observed. Consideration ought to be given to the synergistic benefits of clustering of services, on the basis of creating specific Council clusters for specific aspects of waste services. Having a service delivery model based on individual Councils or groupings of perhaps two geographically adjacent Councils, depending on total numbers, provides the best outcome for Councils and the public, for the collection component of the services. Because the current operators have 8 Councils each, they are able to invest at any time that suits, with the market and other operating conditions.

9) Council Solutions say the ACCC has provided approvals for 13-21 years before

Council Solutions have asked for 17 years, which as the St George experience shows, can be extended.

Up to 21 years has been granted previously however not for all waste services. We refer to the information on pages 7, 8 and 9 of our conference presentation. This shows that only 3 applications for (1) organics processing only, (2) collection only and (3) recyclables processing only have been approved by the ACCC, and never an application for all waste services. In addition we would argue, as others did, that the "collection only" application had an inappropriate term due to accounting standards having a maximum depreciation period for truck/equipment life of just 10 years.

10) Council Solutions say they expect standard market contract terms, mainly with processing

Standard market terms may include 3 or 4 different terms for the services. This will see alternative tenders proliferate in various combinations, the prices submitted will explode in number and the risk surrounding a requirement for the market to develop the best solution will be impossible to quantify.

11) Council Solutions note they have requested time up front to streamline

If the process and associated tendering costs is going to be more efficient, it is curious that Council Solutions say so much extra time is required.

12) Council Solutions claim tendering is “always intensive work for Councils”, taking Councils 12 to 18 months

We observe that it will now be taking Council Solutions 3 years plus. Yet, Councils will still need to be intensely involved at each step in the process. The additional cost is the need for agreement between all of the Councils on all of their waste services. 31 combinations of 5 Councils and 15 combinations of 4 services. Hence, no cost savings and likely an increase in costs.

Interestingly, Council Solutions 2014/15 Annual Report shows a massive increase in legal, consulting and staff costs, presumably due to work on this tender. Additional costs will still be incurred by individual Councils as they check contracts and align the proposed tender with their own waste strategy. The complexity of this tender will be to the Councils' and public detriment.

13) Council Solutions claim there are cost duplications in current tendering processes

Our research shows that the Council Solutions process will more costly and more time consuming than the current tendering process, but they will merely be trading one form of analysis for another, as the individual Councils (or Council Solutions on their behalf) will need to go through a complex combined tender assessment and agreement process in respect to their own waste strategy, remembering that each has slightly different and customised services. The Council Solutions will result in net public detriment.

14) Council Solutions claim that one set of documents and advertising will minimise time, even if only one Council

The advertising cost of the tender is next to nothing as it goes on to the SA government tendering website. Even if 5 ads were placed in the Advertiser the cost is about \$35 per ad.

In regards to the documents as detailed in our conference presentation, the Councils will still need to read through and check internally the tender documents. They may even have their in house or external legal advisors check it as each Council must look after its own interests. Assuming no disagreements about alignment or compromise between the 5 Councils and Council Solutions, the costs will be at least the same. Once Councils are unsure about any part of the joint document and are unable to compromise (a highly likely scenario) then the costs of the process will escalate.

15) Council Solutions point out that tenderers will only have to tender once

Again, as outlined by John Hogarth from Peats Soils, he is expecting that for his service only (organics processing) he will have to do 6 tenders instead of 5, as he needs to submit individually as well as jointly. In fact, it is our view that Mr. Hogarth has underestimated the work. Because any Council can opt out of the process after tenders are submitted, there are

31 combinations of Councils that John and all other tenderers will need to consider. This claim by Council Solutions is absolutely misleading. In any case, tenderers look forward to the opportunity to provide a submission to a potential Council customer. It is the complexity and risk introduced into a tender that discourages tenderers and increases prices.

16) Council Solutions claim that there are advantages with regards to boundaries and missed bins and fleet consolidation

No substantiation for this claim has been provided and this claim is misleading in regards to net public benefit. All previous ACCC applications show adjoining boundaries of 40-60%. For Council Solutions it is an incredibly low 6.62%.

These points need to be made on this:

- (1) Councils are invoiced large amounts for disposal and processing of waste and so trucks cannot be used to collect from bins from more than one Council in one load as waste liabilities for each Council would be unable to be quantified.
- (2) Our research of the evidence and experience of our members often over 50 years shows that the optimal size for a municipal collection service is 20,000 to 50,000 households. Higher numbers see losses in efficiency and public detriment.

17) Council Solutions claim that a certain recyclables processor could set up in SA if they had more tonnes

The issue is not that they are short of tonnes - each major contractor has 40% of the market - but that the recycling market is in a terrible state at present with no light at the end of the tunnel. The fact is that transport to Melbourne is cheaper for one processor than building a new recycling facility in the current market. This large scale rationalisation towards interstate processing also removes the container feedstock for the Scouts Recycling organisation which has 10 depots and over 100 staff, and subsidises one of the most popular Scouts programs in the Nation.

18) Council Solutions state that benefits are linked to a common operator and it is unlikely Councils would split streams

Council Solutions cannot claim flexibility of separability and ability for small to medium organisations to tender on one hand and then claim economies of scale and efficiencies on the other hand. It is true that Councils prefer fewer contractors to avoid grey areas between contracts. The fact that Council Solutions are bringing together, separable or not, these 5 Councils and all 4 services weighs heavily in favour of multinationals and to the detriment of the public and Councils.

19) Council Solutions state that there would be smaller bank guarantees for smaller companies

This assertion is without foundation and contrary to the real world experience.

The standard for bank guarantees is 5-10% of the annual contract sum, however looking at the most recent example, Maitland & Ors (Cessnock and Singleton) for their organics collection only (no processing and no recycling or garbage), the guarantee is \$350,000 per Council, (reduced from \$1,050,000). For Singleton Council only, this means the bank guarantee is about 100% of the annual sum. If a smaller business tenders for just hard waste for example, their bank guarantee may be beyond their means. The main point however is that their tender is unlikely to succeed as Council Solutions will favour fewer contractors. If a hard waste tender is released on its own, the businesses that are expert in that field will tender. Certain specialist fields do not fit the likes of a multinational that may ironically win the overarching contract.

Commissioner's comments about Council Solutions presentation

- *One issue is whether small business will be able to tender or not*

Small business will be able to tender under the Council Solutions Application for any part of the wider services, but the reality is that Councils and Council Solutions will be seeking to minimise contractors. Indeed the first scenario noted in their Application is one where a single contractor has the whole contract for all 5 Councils and all 4 services. If smaller businesses want to be involved as subcontractors, additional margin will need to be built in which either increases costs to the public or reduces a small business's chance of being involved. The evidence from elsewhere in Australia shows that bigger contracts attract the multinationals and small to medium businesses are shut out. Brisbane, for example, had only 2 tenderers and when a contractor for the related service for collection of dead animals went out of business, the service contract went to the incumbent waste service provider without going to tender.

- *There is mention that Council Solutions have no preconception about period or tenderers*

This ambiguity adds complexity and cost to the tender process which ultimately results in higher risk and prices. A project with no direction ends up nowhere or everywhere. Vagaries by Councils at time of tendering increase both tendering costs and also risk, which increases prices.

- *There is mention that financial requirements may not be a barrier*

As mentioned above, financial requirements probably won't be a barrier for small to medium enterprises to tender for the smaller part of the services. However, to have any chance of winning work they will need to tender for a large part of the work, at which point financial requirements including capital required and bank guarantees will be overwhelming. The truth is that all examples elsewhere show that as the tenders grow bigger the successful tenderers are the bigger companies. And the evidence shows that this is not to the public's benefit if the size of the contract is greater than the 20,000-50,000 household optimum, especially where the Councils are geographically distant.

- *It is mentioned that subcontracting may be a possibility*

Subcontracting will add in extra margin and contract complexity and risk. The tendering costs that Council Solutions is trying to avoid (but won't) are actually far less than the gains made by establishment of a contract that is designed for each individual Council in terms of optimum economies of scale, tailored service requirements and standards and waste diversion objectives in line with the Council strategy.

2. A Summary of Net Public Benefit / Detriment Issues

Council Solutions claim in their Application without substantiation or quantification that a public benefit will result from the following assumptions:

1. *Transaction cost savings for both Participating Councils and Suppliers/Operators;*
2. *Improved purchasing power, leading to lower costs for Participating Councils;*
3. *Greater economies of scale and efficiency, underwriting investment in infrastructure;*
4. *Environmental benefits from the increased efficient diversion of waste from landfill; and*
5. *Improved incentive for new market entrants or expansion.*

They also claim that there will be no significant public detriment. Again, no quantification has been provided.

In the absence of Council Solutions Application providing any substantiation of their claims for net public benefit our members and independent advisors have spent considerable time and resources in a short time frame to collate and articulate such evidence to the ACCC as justification for a complete rejection of the Council Solutions Application due to overwhelming public detriment.

Area of Public Benefit or Detriment	Description	Benefit or Detriment	Impact of shorter terms and separated contracts
Assertion 1: Transaction cost savings			
Tendering Costs - process	The claim that tendering costs are reduced with a joint tender is absolutely false. In fact Councils must agree internally PLUS agree with several other Councils at each step of the process. Council entities involved increase from 5 to 6. The 1% fee imposed by Council Solutions is significant in a low margin market running on 7% profit margins.	Net public detriment through increased costs of tendering for each Council.	The process aspect of tendering costs will still be present as Councils will still need to check each step.
Tendering Costs - prices	The unprecedented number of Councils and waste services in the Council Solutions proposal results in a dramatic increase in tendering complexity. With Councils able to opt out there are 31 combinations of pricing tenderers must cost up instead of 5. Each alternative tender (2 or 3 are common) will double the number of prices required for submission. 3 alternative tenders will generate an average 4712 prices per tenderer.	Net public detriment through increased costs of tendering (many more prices to evaluate) and very high risk of missing best outcome for ratepayers.	The tendering costs will still be present as alternative tenders will still be presented and Councils will still have to manage 31 combinations.

Area of Public Benefit or Detriment	Description	Benefit or Detriment	Impact of shorter terms and separated contracts
Assertion 2: Improved purchasing power leading to lower costs			
Competition	The grouping of Councils and grouping of their waste services for a tender is biased to large multinationals as Councils prefer fewer contractors to manage. This means the larger tenders favour the larger companies, as has been demonstrated many times elsewhere. Smaller operators may still be able to tender but (1) will face significant financial barriers to entry, and (2) will have no competitive advantage as they did have when tenders were released at different times or when their new innovation or local service was not diluted into an overarching contract.	Legal restriction - lessening of competition Net public detriment due to less competition. Adelaide's current dynamic waste industry produces the highest service levels and diversion rates for ratepayers at the lowest cost. The introduction of a mega tender will disrupt this agility that currently benefits the Councils and public.	A reduced term or separable services will still favour 1 or 2 large multinationals at the expense of small businesses and their employees.
Market Share	Council Solutions assert 37% market share for all waste services, however as East Waste Councils contracts have no end dates and are not open to tenders, Council Solutions represents a substantial 63% of the tenderable market. Accounting for all Councils in a buying group, only 11% remains open to individual tender.	Legal restriction - lessening of competition. Net public detriment through loss of competition, higher prices to the public and loss of jobs	Separating services or reducing the contract terms has no impact on reducing the substantial market share of Council Solutions. The market available to tender remains at 11%.

Area of Public Benefit or Detriment	Description	Benefit or Detriment	Impact of shorter terms and separated contracts
Assertion 3: Economies of Scale			
Economies of Scale	Optimal waste contract size for economies of scale is attained at 20,000* households as all fixed costs are covered at this point. Beyond this size all costs are direct variable costs so no additional efficiencies are available and service quality decreases. Due to the current market structure and high competition levels, Adelaide Councils currently have the cheapest prices in Australia. Where Regional Subsidiaries have formed (NAWMA and East Waste), their waste expenditure is 22% higher than optimally sized Councils. *See Prof B. Burgan Cost benefit analysis p6	Net public detriment through higher prices to Councils and ratepayers, with lower service quality and poorer waste diversion.	Amending the contract term or separating services has no impact on contract breakeven points. Hence, no economies of scale are gained above 20,000 households.
Geographic Spread	The 5 Participating Councils have only 6.62% of boundaries in common. This provides low potential for reducing transport to disposal costs and crucially it permanently disturbs the potential for effective state planning of waste infrastructure and the ability for neighbouring Councils to cluster for transport efficiency and public benefit.	Net public detriment through incorrect clustering of Councils and loss of long term infrastructure opportunities	No, this issue is the overarching reason why this Application should be rejected. This collection of Councils hampers South Australia's ability to make the most effective and efficient investments in critical long term waste infrastructure

Area of Public Benefit or Detriment	Description	Benefit or Detriment	Impact of shorter terms and separated contracts
Assertion 4: Environmental Benefits			
W a s t e D i v e r s i o n	The Application claims that the tender will deliver improved waste diversion. Council Solutions framed their Application and PDC speech around South Australia's Waste Strategy for 2015-2020. In fact, the evidence shows that SA is already leading the nation in waste diversion and where larger contracts are involved the waste diversion is poorer.	Net public detriment from Council Solutions restricting the market and individual Councils' ability and flexibility to improve waste diversion that has been fundamental to South Australia's current success model.	The grouping of Councils for several services (landfill, recycling, organics and collection) will still see compromises and restrict essential flexibility on new waste diversion initiatives.
Recycling a n d O r g a n i c s P r o c e s s i n g	The Application with its large market share will have the ability to distort the market and remove from the Adelaide market one or more major players. This could include Peats Soils or Jeffries, between them servicing almost all of Adelaide with Organics processing and arguably the main contributors to South Australia's current standing as a leader in innovation. In addition, Council Solutions are seeking to collect several Councils to tender for recyclables processing and collection when the recyclables market is at its weakest in decades. This will commit Councils to high recycling costs unnecessarily for an unprecedented long period of time. It is the market that drives investment. Even though SKM have half the recycling market in Adelaide they are still not investing in a recycling facility because their Melbourne model is cheaper.	Net public detriment due to market distortion possibly forcing major recycling and organics players / innovators out of the market. Net public detriment due to tendering at time of low recycling rates. Extensions to existing arrangements would be the best solution here.	A shorter term minimises the impact to a degree however the Application will still be in the net public detriment due to potential business/site closures and resultant job losses.

<p>Precedent applications</p>	<p>The Council Solution application is not comparable to prior ACCC applications due to:</p> <ol style="list-style-type: none"> 1. No new environmentally beneficial services to ratepayers 2. Number of services 3. Term up to 17 years irrespective of service type and taxation amortization periods 4. Number and size of Councils involved resulting in a substantial 63% of tenderable market 	<p>Unlike prior applications, the Council Solutions proposal provides no public benefit as no new services are offered to ratepayers.</p>	<p>A change to the contract term or separable services has no impact as Council Solutions are not proposing to provide new environmental services to Councils or ratepayers.</p>
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Area of Public Benefit or Detriment	Description	Benefit or Detriment	Impact of shorter terms and separated contracts
Assertion 5: New Market Entrants			
Contract Term	The Application term of 17 years with possible 14 year contract term has the potential to lock away a large part of Adelaide's waste services from competition and innovation for an inappropriate period. Our experience shows (both for and against us) that it is simple for a contractor to extend a contract to the maximum term without providing added value to Council. For example, a company winning a 7 year term will be in the box seat to extend to 14 years without going to market, especially if they have other parts of the broader waste contract.	Legal restriction - lessening competition Net public detriment from Councils and the ratepayers locked out from accessing new service innovations and service savings for 17 years. Competition disincentivised from participating in the market.	There will still be no net public benefit and extensions with a joint tender are often easier (ref: St George 5 year extension with the ACCC) because the tender process is so complicated for the Councils to go through.
Precedent tenders	The ACCC application for joint tendering in Maitland cited by Council Solutions opposes their assertion that larger tenders attract new entrants to tender. Although the Maitland tender was far less complex than the Council Solutions proposal, no conforming tenders were received. The Councils then resorted to separate tendering and received 6 conforming Processing tenders and 4 companies attended the Collection pre tender briefing.	Public detriment through reducing companies that tender resulting in reduced competition. No public benefit is offered as no additional service is provided as in the Maitland case. No public benefit as all major companies currently operate in the South Australian market.	No public benefit from shortening term or separating services as they are already separated and no new service is offered to ratepayers.