

Your Reference: A91520



**Small Business
Commissioner**
SOUTH AUSTRALIA

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Dear Ms Batten

Re: A91520 - Council Solutions' Application for Authorisation of a Combined Waste Tender Process – further submission of an interested party

I again write to you in my capacity as the South Australian Small Business Commissioner. As you are aware, I convene the Office of the Small Business Commissioner (OSBC) – an independent statutory office set up under *Small Business Commissioner Act 2011* (SA).

On 30 November 2015, *Council Solutions* made an Application to the ACCC (A91520) seeking an authorisation for their Application to grant it a 17 year authorisation “to conduct collaborative competitor tender processes”¹ ... “to enter into contracts on identical or near identical terms with each Supplier/Operator.”²

Overview and summary of my position as the Small Business Commissioner

As you are aware, Council Solutions is a consortia of five Adelaide metropolitan councils that was originally seeking a 17 year³ authorisation from the ACCC to permit it to lawfully exercise cartel behaviour (‘the Application’). After being lobbied by a broad cross-section of the entire waste industry (including the South Australian Waste Industry Network (SAWIN)), I formally opposed the Application for the reasons previously stated.

On 1 July 2016, my Office was advised that Council Solutions had lodged its “Written submission after Draft Determination” (the further submissions) as it was required to do by the ACCC.

Having read Council Solutions’ further submissions, my view continues to be that the Application is insufficient to warrant the ACCC’s approval.

¹ Council Solutions’ Supporting submission (Public Register Version), at page 1 (of the 24 page Application).

² Ibid.

³ I do note that the 17 year Authorisation period that was originally sought appears to have been wound back to 10 years - excerpt from an email received from Ms Taryn Alderdice dated 30 June 2016: “In consulting further with the industry, the Participating Councils have agreed to remove the option of a longer than standard operating term from the application. As such, the maximum contract term will be 10 years (including all extensions) for any Service Stream. This commitment has been made to the ACCC also in our written submission.”



My original position regarding the Application (as it was originally proposed) could be summarised as follows:

In any event, to warrant approval, the Application should be improved from a 24 page document that is scant on detail, to a robust Application that:

- is substantial and has been fully modelled;
- is sufficiently robust to underpin a \$30 million per annum spend;
- is transparent and able to be appropriately critiqued;
- contains a solid business case;
- has undergone an independent cost/benefit analysis; and
- considers the impacts on small business, jobs and employment in this mature business sector.

In my view, apart from one or two discreet aspects, very little about the application has changed.⁴

I therefore maintain my opposition to the Application for the reasons that I outline more fully below:

1. Despite my repeated urgings, Council Solutions have offered nothing by way of exposing the Application to any *"independent cost/benefit analysis"*; as part of a *"robust Application that is substantial and has been fully modelled."*
2. Whilst Council Solutions have gone to some trouble in their further submissions to set out the *"Public benefit claims"* as they see them, they have not convinced me how any benefits will flow through to ratepayers (as proxies for "the public"). Those benefits might well accrue to the 5 participant Councils, but there is little by way of evidence to assure me that any realised benefits will in fact be passed on to ratepayers.
3. Also despite my recommendations, Council Solutions have not adequately consulted with the waste industry stakeholders that are likely to be impacted - at least not to the point that the industry has advised me that they have been persuaded by Council Solutions' proposal.

No independent cost/ benefit analysis as part of a fully modelled and robust Application

Chief amongst these three criteria was that the Application should have *"undergone an independent cost/benefit analysis"*, as part of a *"robust Application that is substantial and has been fully modelled."*

Disappointingly, I note that Council Solutions have not even registered this in Section 3 of their submission under "Interested Party Concerns". This omission is of great concern to me.

⁴ I do welcome the following modifications to the Application, which in my view marginally strengthen it:

1. at 3.2.2 of the further submissions, Council Solutions appear to have positively embraced a de facto adoption of the Industry Participation Principles that underpin the *SA Industry Participation Policy* (SAIPP); and
2. at 3.3 of the further submissions, Council Solutions *"will only approach the market for a standard operating term of up to a maximum of 10 years including all extensions"*.

The further submissions clearly indicates that despite ample opportunity to do so (including an extension of time afforded to it by the ACCC), Council Solutions have elected not to undertake any such robust analysis – independent or otherwise. Accordingly, it is my submission that the Application fails at the first hurdle.

As part of its lobbying efforts in support of its Application, I met with Council Solutions on 26 May 2016 to discuss the concerns that I had outlined to the ACCC. I would have to say that unfortunately, the calibre of that lobbying was “average”. To me there was little by way of structured submissions, with the overall tenor of the lobbying exercise essentially being to “just trust us”.

With respect to those involved, I am afraid that my experience with these types of matters over many years means that I am unable to exercise that level of trust in the Application – one that appears to me to be lacking in sufficient rigour or detail.

At my meeting with Council Solutions, I repeatedly asked the question as to why there had not been any independent cost/ benefit analysis of the Application. My recollection is that Council Solutions’ response was that it was prohibited from doing so.

With respect, this simply beggars belief. There are many reputable Adelaide-based firms that could easily have undertaken such an analysis within the required timeframe – especially with access to the data that the five constituent Councils hold.⁵ This leaves me to speculate that perhaps the reason might have been some concern at the conclusions that such scrutiny might have produced.

I note Council Solutions have dismissed out of hand any concerns raised regarding the potential for the Application to “effectively exclude a significant number of small businesses from competing”.

*“Council Solutions submits that these submissions are without merit for the following reasons: ...”*⁶

With respect, the dismissal of those concerns for small business, whether warranted or not, would have been more credible if the Application had been subjected to an independent cost/ benefit analysis. As noted above, it has not.

In my view, this effectively undermines the credibility of the entire Application, as well as the myriad of assertions that Council Solutions have made in support of it.

Regarding exclusion from participation (of SMEs or otherwise), I note that Council Solutions concedes (at 3.3.2 on page 9 of the further submissions) that “while the work won’t be contestable after the contract award, there will be extensive competition to win the work through the RFP.”

This is exactly my point – once those industry players (including SMEs) have been excluded from this substantial tranche of Adelaide’s mature waste market, that exclusion is almost absolute. Nothing after the 10 year Authorisation period will allow for a simple reversion to the current arrangements. Those industry players will simply be lost to the waste sector, along with the many jobs that go with them.

⁵ In this regard I note that at page 40 of the further submissions that Council Solutions refer to BDO as providing “commercial and financial services”, whilst Edwards Marshall provide “probity services”.

⁶ At 3.2 of the further submissions on page 4.

Public Benefit/ Detriment – will the “benefits” accrue to the public?

I continue to question Council Solutions’ original assertion that if granted, the proposed cartel conduct will “*result in no material public detriment and significant public benefits ...*”.⁷ Nothing that has been put to me in the further submissions has convinced me to alter my view in this regard.

At paragraph 3.4 of the further submissions (pages 9 to 14), I note that Council Solutions have expanded on their “Public benefit claims”. Whilst these are informative and helpful to a degree, I do not believe that the points made are part of a balanced analysis.

This content would seem to be a positive dissertation of the ‘benefits’ side of the ledger that Council Solutions would prefer to articulate. To me however, it lacks the balance that would instil credibility. For example, there is no ‘SWOT’ analysis, nor any balancing of the “cons” against the “pros”, as one might expect to see discussed in a balanced and transparently constructed policy document.

It seems to me that if the various public benefits that have been described do arise, they will accrue to the various Councils. However, I can see no mechanism that assures that any such benefits will flow on to “the public (i.e. ratepayers)”. I make this point noting that for many years now, council rate increases have markedly outstripped CPI increases. To be able to support this aspect of the Application, I would need to better understand just how those benefits (if they can be realised) will flow to “the public”, many of whom are small businesses.

To date, I note the conspicuous absence of any input on this proposal by the elected members of the various Councils. This strikes me as odd.

I am not aware of any Mayor or Deputy Mayor that has championed the view that the ACCC’s granting of the Authorisation would represent an outstanding win for ratepayers. This leads me to wonder how much the various elected members of the 5 constituent councils actually know about the Application, or the effects that it could have on ratepayers. In making this point, I note that those persons that make up the waste industry are themselves ratepayers.

Council Solutions’ consultations with affected industry players – including SAWIN

During my meeting with Council Solutions on 26 May 2016, I specifically advised them that I had previously been approached by a significant cross-section of the waste industry – ranging from the largest industry stakeholders to the smallest.

I also advised Council Solutions that in my experience is unusual, opposition to the Application extended across the full gamut of the industry. On that basis, I strongly recommended that Council Solutions undertake open and meaningful consultation with the waste industry. I also advised that if and when I heard back from industry that their concerns had been addressed, I would then re-examine my objections to the Application.⁸

To properly monitor developments in this regard, I have maintained my liaison with SAWIN in the intervening period. I am aware therefore that SAWIN was also less than impressed by the content and tone of Council Solutions’ consultation, together with the lack of information

⁷ As per Council Solutions’ original Application of 30 November 2015.

⁸ I was aware that Council Solutions were meeting with industry participants (through the *South Australian Waste Industry Network* (‘SAWIN’)) within days of meeting with me.

that has been provided in response to SAWIN's further requests. At the time of writing, my understanding is that SAWIN maintains its opposition to the Application.⁹ Accordingly, it was unlikely that the current industry players, particularly the SMEs that are likely to be impacted by the granting of an Authorisation, will advise me that they are satisfied with Council Solutions' explanations in support of the Application.¹⁰

Improvements arising out of the further submissions

I do welcome the following modifications to the Application, which in my view marginally strengthen it:

- at 3.2.2 of the further submissions, Council Solutions appear to have positively embraced a *de facto* adoption of the Industry Participation Principles that underpin the *SA Industry Participation Policy* (SAIPP); and
- at 3.3 of the further submissions, Council Solutions "*will only approach the market for a standard operating term of up to a maximum of 10 years including all extensions*".

Closing remarks

Regardless of whether the value of the 'Service Streams' is \$30 million or \$42 million (see the discussion at 4.4.1 of the further submissions) this Application is too significant in its scope and its potential impacts on the relevant market to be simply waved though by the ACCC on the basis of "*just trust us*".

In my view, the ACCC should be extremely cognisant of the following factors when considering its final determination:

1. The Application covers a significant market share of metropolitan Adelaide. Council Solutions' five constituent councils cover 37% of rateable property and 35.3% of the population of metropolitan Adelaide.
2. As discussed earlier in these submissions, my most significant concern is Council Solutions' steadfast reluctance to expose its Application to any robust modelling, or any form of independent cost/ benefit analysis. On a \$30 million spend of ratepayer funds, this is simply an unacceptable stance.
3. As I have noted above, it is extremely unusual to be approached by the full gamut of an entire industry that is unified in its opposition to an Application such as this. For me, this factor alone is sufficient to indicate that there might well be fundamental market-based concerns with the Application.
4. There is nothing in the Application, or the further submissions, to support Council Solutions' contentions that any costs savings that might be realised if the Application was granted, would be remitted to ratepayers (or "the public"). Indeed, on one view it could be argued that Council Solutions have been careful not to make any such assertions. And if that is right, where then is the "public benefit"?

⁹ I reiterate that there are a number of waste industry players that decline to identify themselves openly to Council Solutions for fear of reprisals in any tender (or RFP) process – something that in itself is indicative of the tension surrounding this Application generally. The industry formed SAWIN as its representative body to convey its views to Council Solutions without necessarily exposing individual players within the industry group.

¹⁰ That said, I advise that in my further submissions, I have formed my own views with regard to Council Solutions' Application.

To be satisfied on this last point, it is my submission that the ACCC should be insisting on something stronger than *"The participating Councils are committed to delivering best value to their ratepayers."*¹¹

In summary, it is my view that Council Solutions' Application remains opinionated in that it simply dismisses any dissenting view, unbalanced in that it lacks any robust analytical basis and in almost every other aspect *"under-done"*.

It remains my strong view that if the Application is approved by the ACCC, the scope of the conduct that it will effectively condone will, more likely than not, result in a substantial lessening of competition in Adelaide's waste management market for a period of 10 years.

Even as modified by the further submissions, the Application has the potential to place a significant number of waste industry jobs in jeopardy at a time when South Australia's economy can least afford further contraction.


I reiterate my belief that granting the Application will likely "starve-out" any smaller competition from Adelaide's mature waste sector, which is a harsh outcome. If I am correct in this, that harsh outcome will not be able to be reversed to the status quo after the Authorisation period.

I remain sceptical that the "public benefits" forecast by Council Solutions will be passed on to ratepayers.

Accordingly, it remains my submission that the granting of the Authorisation would not outweigh the detriment to the public that would flow from the lessening of competition that would result if the Application is granted. Of prime importance to my Office is the effect on the small businesses that operate within this industry sector.

Should you have any further queries in relation to these submissions, please do not hesitate to contact me on (08) 8303 0927 or by e-mail to John.Chapman@sa.gov.au

Yours sincerely,


John Chapman
SMALL BUSINESS COMMISSIONER (SA)
18th July 2016

¹¹ Section 7 – Conclusion, at page 22 of the further submissions.