

## S48 Prudential Management Review - Waste Services

<b>Originating Officer</b>	Unit Manager Contracts - Colin Heath
<b>Corporate Manager</b>	Manager Finance - Ray Barnwell
<b>General Manager</b>	General Manager Corporate Services - Vincent Mifsud
<b>Report Reference</b>	GC190312F02

**Confidential**



**Confidential Motion**

1. That pursuant to Section 90(2) and (3)(b)(i)(ii) and (d)(i)(ii) of the *Local Government Act 1999*, the Council orders that all persons present, with the exception of the following persons: Adrian Skull, Vincent Mifsud, Abby Dickson, Tony Lines, Kate McKenzie, Craig Clarke, Ray Barnwell, Colin Heath, Victoria Moritz and Jaimie Thwaites be excluded from the meeting as the Council receives and considers information relating to the Waste Services Tender, upon the basis that the Council is satisfied that the requirement for the meeting to be conducted in a place open to the public has been outweighed by the need to keep consideration of the matter confidential given the information contains commercial information that would on balance, be contrary to the public interest.

**NOTE:**

### REPORT OBJECTIVE

The purpose of this report is to seek Council's endorsement of:

1. The independently prepared S48 Prudential Management report in relation to the Council Solutions Waste Services tender, as attached at Appendix 1, and the City of Marion participating in this tender process;
2. Council committing its yellow bin municipal commingled domestic recyclables to SRWRA, should a proposed Materials Recovery Facility (MRF) be found to be financially viable through the completion of an independently prepared S48 Prudential Management report.

### RECOMMENDATION

**That Council provide its endorsement of the:**

1. Independently prepared S48 Prudential Management report in relation to the Council Solutions Waste Services tender, as attached at Appendix 1, and the City of Marion participating in this tender process;
2. Council committing its yellow bin municipal commingled domestic recyclables to SRWRA, should a proposed Materials Recovery Facility (MRF) be found to be financially viable through the completion of an independently prepared S48 Prudential Management report.
3. In accordance with Section 91(7) and (9) of the *Local Government Act 1999* the Council orders that this report, S48 Prudential Management Review - Waste Services, any appendices and the minutes arising from this report having been considered in confidence under Section 90(2) and (3)(b) and (d) of the Act, except when required to effect or comply with the Council's

**resolution(s) regarding this matter, be kept confidential and not available for public inspection for a period of 12 months from the date of this meeting. This confidentiality order will be reviewed at the General Council Meeting in December 2019.**

## DISCUSSION

### Finance and Audit Committee Feedback

At its meeting on 26 February 2019 the Finance and Audit Committee (FAC) considered the "S48 Prudential Management Review - Waste Services" report (FAC190226F01) and sought feedback from Mr Geoff Whitbread, independent expert engaged to prepare the S48 report, who:

- verified that he had completed the report and provided assurance that the relevant due diligence has been completed. He had been provided sufficient information to conclude that the administration can recommend to Council to proceed subject to keeping a close eye on the risks identified.
- indicated that this report doesn't cover the topic of "China Sword" however the risk identified is a political reputational risk that will need to be managed by each of the Councils.
- indicated that he didn't see any reason as to why the tender wouldn't proceed however the Councils should consider the appointment of a probity auditor and advisor for the tender due to the high profile of the Councils, the large financial impact of the tender, the potential media interest, to ensure the process is sound and the associated risks are mitigated.

The FAC resolved to:

1. *Notes the Independently prepared S48 Prudential Management report in relation to the Council Solutions Waste Services tender.*
2. *Recommends to Council that the City of Marion participate in the waste management tender process;*
3. *Recommends to Council that Council should commit its yellow bin municipal commingled domestic recyclables to SRWRA, in the event that a proposed Materials Recovery Facility (MRF) be found to be financially viable through the completion of an independently prepared S48 Prudential Management report.*

### Council Solutions Open Market Waste Tender

The City of Marion is one of 4 councils together with Adelaide City, Charles Sturt and Port Adelaide Enfield councils who have sought Australian Competition and Consumer Commission ("ACCC") authorisation to undertake collaborative procurement of Waste Management Services which incorporates:

- Waste collection services, covering:
  - kerbside collection of the mobile garbage bin (MGB) services;
  - supply and maintenance of MGBs;
  - street litter bin collection services;
  - bulk bin collection services for higher density areas and/or Council owned facilities.
- receiving and processing of recyclables;
- receiving and processing of organics; and
- receiving and disposal or processing of residual waste (N/A for CoM as we have SRWRA).

The collaborative procurement approach is on the basis of 3 separate Requests for Tender (RFT) with different service scopes being released for:

1. Kerbside Collection
2. Processing & Disposal
3. Ancillary Services

The ACCC has granted favourable Final Determinations for all 3 RFT's granting authorisation to Council Solutions to jointly procure Kerbside Waste Collection Services (RFT1) on 12 October 2018 and for Waste Processing Services (RFT2) and Ancillary Waste Services (RFT3) on 23 November 2018.

Council Solutions is currently in the process of assessing tenders.

Potential SRWRA Materials Recovery Facility (MRF)

SRWRA is investigating the potential for a new MRF to manage municipal commingled domestic recyclables collected throughout the region.

An independently prepared Prudential Report in accordance with S48 of the Local Government Act is required and will be prepared for SRWRA and the three constituent councils to assess the financial viability of a MRF.

Should the outcome of the S48 report prove favourable and approval is received to design, build and operate a MRF then it would be appropriate for Marion, Holdfast Bay and Onkaparinga councils to commit and direct their yellow bin municipal commingled domestic recyclables to SRWRA. Independent legal advice attached as Appendix 2 indicates that it would actually be incumbent on the constituent councils to do so.

Current Waste Contract

Marion's existing waste contract (excludes receiving and disposal or processing of residual waste as we have this with SRWRA) is with Solo Resource Recovery ("Solo"), established after a collaborative market tender with West Torrens in 2005 (refer SGC210605F01).

- 21 June 2005 - Confidential Tender Assessment report approved appointment of SOLO for 7 year term;
- 12 June 2012 - Confidential Kerbside Waste Collection Contract Extension with SOLO for a further 5 year term and 1 month term to 30 April 2018;
- 27 June 2017 - Confidential Kerbside Waste Collection Contract Extension with SOLO for a further 2 year term to 30 April 2020.

Council's budgeted net cost for Solo in the current 2018/19 financial year is \$4.1 million which is for collection of all 3 bin types, processing of recyclables and organics, and street litter bin collection.

**Attachment**

#	Attachment	Type
1	Appendix 1 Prudential Report Waste Services Feb19	PDF File
2	Appendix 2 Legal Advice re SRWRA MRF	PDF File

## CITY OF MARION: PRUDENTIAL REPORT ON WASTE MANAGEMENT SERVICES

(February 2019)

### The Purpose of a Prudential Report

The *Local Government Act 1999* (“the Act”) at section 6(b) defines the role of a Council to include the provision and coordination of “various public services and facilities and to develop its community and resources in a socially just and ecologically sustainable manner”. This, of course, requires decisions to be made about resource allocation, and in particular, a balanced focus on community benefit and financial sustainability. Prudent decisions value the community outcomes/benefits against the cost of achieving those outcomes<sup>1</sup>.

The provision of waste management services is a fundamental activity of a local council. It behoves a Council to provide such a service in a thoroughly efficient, safe, hygienic and environmentally responsible manner. Waste education, capture, collection and disposal is more complex than the ordinary person would contemplate. Without doubt the provision of waste management services ranks highly in the mind of the community – it is a “hygiene” factor – one that it is expected to be delivered seamlessly, but if it goes wrong for any reason the Council soon learns about it and suffers the resultant reputational damage. Hence the importance of getting it right in all aspects. And an independent prudential assessment is a step in the right direction in the deliberation of the best delivery solution.

### Legislative Requirement

Section 48 of the Act<sup>2</sup> requires a Council to:

- a. have prudential “policies, practices and procedures” that must be applied to all projects to ensure the Council:
  - acts with due care, diligence and foresight; and
  - identifies and manages risks associated with a project; and
  - makes informed decisions; and
  - is accountable for the use of council and other public resources.
  
- b. obtain an independent prudential report prior to a Council entering into a project which entails a relatively large financial commitment. The Act at s 48 (1) mandates a prudential report for consideration by the Council if the

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<sup>1</sup> Financial Sustainability, Information Paper 27 **Prudential Management**, Local Government Association, S.A., February 2015.

<sup>2</sup> refer attachment 2.

proposed project exceeds identified financial thresholds or where a Council considers it necessary or appropriate.

In commissioning this prudential report it had been determined by the Council's administration that such a report was necessary particularly as the annual operating budget ("opex") will be a significant amount (refer attachment 1 – The Brief).

### **Statement of Independence**

Section 48 (4) of the Act requires the prudential report be prepared by "a person whom the council reasonably believes to be qualified to address the prudential issues" and subsection (4a) requires the report "must not be prepared by a person who has an interest in the relevant project".

The author provided the administration with a statement of competence to undertake the report in advance of commissioning the task. The author has no interest in the relevant project as defined in sections 48 (6a) and (6b).

### **Council's Prudential Management**

Section 48 (aa1) requires the Council to have "policies, practices and procedures" established.

The City of Marion adopted a Prudential Management Policy (11 December 2012). Clause 7 says the policy is supported by internal practices and procedures. The policy also appropriately references a number of other policies including on procurement and risk management.

This report makes no observation as to the adequacy or efficacy of the policies.

Further, this report only considers the proposal from a City of Marion perspective as the other involved councils will determine their own prudential requirement.

### **The Project**

The proposed project is in collaboration with the Cities of Adelaide, Charles Sturt and Port Adelaide Enfield ("the Participating Councils") auspiced through Council Solutions<sup>3</sup> an entity of the respective councils<sup>4</sup> established solely to provide improved purchasing opportunities (including by economies of scale) and outcomes to the constituent councils through collaborative procurement.

The scope of the Project will provide the Participating Councils with a comprehensive portfolio of up to 8 services:

- Kerbside collection of MGBs (waste, recycling & green waste);

<sup>3</sup> Established pursuant to s 43 of the Local Government Act 1999... "for the purposes of promoting procurement and service delivery amongst the constituent councils".

<sup>4</sup> Port Adelaide Enfield Council is not a member of Council Solutions but is party to the proposal.

- Supply and maintenance of the bins;
- Receipt and processing of recyclables;
- Receipt and processing of organics;
- Receipt and disposal or processing of residual waste (Marion will continue to use the Southern Region Waste Resources Authority (“SRWRA”))
- Multi-unit collection of bulk bins (including the supply and maintenance of the bins);
- Kerbside collection and processing or disposal of hard waste (optional for Marion);
- Collection and disposal of park and footpath litter and/or recycling bins.

These services will be provided through:

- 3 separate Requests For Tender (“RFT”) for the supply of waste management services in each of the Participating Council areas:
  - **RFT #1:**
    - domestic kerbside collection of mobile garbage bins including:
      - domestic waste;
      - recyclables;
      - green waste, and
    - supply and maintenance of mobile garbage bins.
  - **RFT #2:** receiving and processing of recyclables and green waste.
  - **RFT #3:** provision of ancillary services, for example:
    - bulk bin collection services for higher density areas and/or council owned facilities;
    - occasional hard waste collection (optional/ad hoc);
    - park/footpath litter and recycling bins;
    - public litter, and
    - supply and upkeep of public dog litter bags.

### **Specificity of this Report**

This report is independently prepared and specific to the City of Marion’s component of the project and its obligations pursuant to section 48 of the Act.

The contents of the report are based on desk-top due diligence (on the papers) from information requested by the author and supplied by officers of the City of Marion and Council Solutions.<sup>5</sup> Conclusions or opinions expressed in the report are derived from information gleaned from the papers, other publicly available documents and the experience and knowledge of the author.

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<sup>5</sup> Which include various consultant reports, officer reports and minutes of meetings.

## The Australian Competition and Consumer Commission

The Participating Councils through Council Solutions were required to gain the approval of the Australian Competition and Consumer Commission (“ACCC”) to proceed with each RFT – specifically to satisfy section 45AD of the *Competition and Consumer Act 2010* relating to cartel conduct and anti-competitive agreements under section 45; which requires a net public benefit, and/or there will be no substantial lessening of competition as a result of the proposed conduct.

Applications were made for each RFT package arguing the case that the relevant provisions of the Act would not be offended by conducting a collaborative competitive tender, evaluation and contract negotiation process from the tender responses.

**RFT #1:** was submitted on 14 March 2018 and approval (authorisation) was received from the ACCC on 12 October 2018.

**RFT #2:** was submitted on 4 May 2018 and approval (authorisation) was received from the ACCC on 23 November 2018.

**RFT #3:** was submitted on 4 May 2018 and approval (authorisation) was received from the ACCC on 23 November 2018.

In preparing this prudential report, each of the 3 submissions to the ACCC were reviewed. Each submission was comprehensive and adequately addressed the required matters. Each authorisation response from the ACCC was also comprehensive.

The 3 submissions and Determinations are in the public domain<sup>6</sup>.

### Prudential Report Components Pursuant to s48 (2)

**(a) *The relationship between the project and relevant strategic management plans***

Ostensibly the cost of managing the waste stream cycle of any council is high (ie. it is one of the highest cost centres in a council budget). Revenue from waste is proportionally low compared to the aggregated cost. Thus, concentration on cost control (in a responsible way) is crucial.

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<sup>6</sup> <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register>

The following council plans were perused for their relevance to waste management:

- Community Vision – Towards 2040
- Strategic Plan (2017) 2017-2019
- Business Plan (2016) 2016-2019
- Long Term Financial Plan (2018) 2018-2028
- Asset Management Plan
- Annual Business Plan 2018-2019

It is noted though that the issue of waste management receives little notation save for:

- the Strategic Plan states “*We will encourage our community to minimise waste going to landfill, and we will adopt best technologies and methods for recycling of green-waste and other waste*”;
- the waste services opex is 11.39% of budget (down from 15% in 2017/18), and
- there is a general emphasis on collaboration with other agencies, including other councils in order to reduce/contain costs and improve services.<sup>7</sup>

**(b) *The objectives of the Development Plan in the City of Marion***

[text provided by City of Marion]<sup>8</sup>

“We have reviewed the RFT’s of the tender against the objectives of the City of Marion Development Plan and provide the following advice:

**Objectives of the Development Plan**

The City of Marion Development Plan contains a General Section relating to waste. The objectives of this section relate to:

- Development that avoids/minimises the production of waste
- Development that considers the disposal of waste
- Development that considers waste treatment systems
- Development of waste management facilities.

**Review of RFT’s against the Development**

The Development Plan is silent on the provision of essential waste services and the above objectives relate to development only. The tender proposal does not propose any “development” (as defined by Section 4 of the Development Act 1993) therefore there appears to be no correlation between the objectives of the Development Plan and the proposed waste tender. This is summarised in more detail below:

<sup>7</sup> This reflects the author’s best endeavour review.

<sup>8</sup> provided courtesy Stephen Zillante, City of Marion

- **RFT #1 – Domestic kerbside collection:** Does not require development approval, is an essential service on public land which is not considered by the City of Marion Development Plan.
- **RFT #2 – Receiving and processing of recyclables and green waste:** It is assumed that this would occur at an existing waste management facility. Should the tender require the construction/alteration of a waste management facility then the objectives of the Development Plan would apply.
- **RFT #3 – Provision of ancillary services:** Does not require development approval, is an essential service on public land which is not considered by the City of Marion Development Plan.”

**(c) *The expected contribution of the project to the economic development of the local area, the impact that the project may have on businesses carried on in the proximity and, if appropriate, how the project should be established in a way that ensures fair competition in the market place***

The administration advises the proposed project essentially provides the same level of service to the Marion community as currently exists; the differentiation being the proposal seeks “smarter” ways to carry out the task(s). This connotes cost reduction/containment and better ways to manage waste into the future – for example by better data capture to assist in informing future decisions.

With respect to the project contribution to economic development<sup>9</sup>, the council’s Economic Development Policy makes the following reference:

*“a commitment to environmental sustainability and a reduction of the carbon intensity of businesses is needed to help ensure the long term sustainability of the local economy”.*

The project appears to neither add to nor detract from the status quo. There is no evidence of any negative impact on business carried on in the council’s jurisdiction.

In relation to fair competition in the market place this was addressed by the ACCC (refer above).

**(d) *The level of consultation with the local community, including contact with persons who may be affected by the project and the representations that have been made by them, and the means by which the community can influence or contribute to the project or its outcomes***

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<sup>9</sup> The term “economic development” is not defined in the legislation but it is generally regarded as meaning an improving living environment for the community and for business to prosper.

The Community Consultation and Engagement Policy advises the Council is committed to effective community engagement regarding decisions that have an impact on the people who live, work, study, conduct business and use the facilities or public places in the City of Marion.

Given the new waste management service is not likely to vary in a material way from the exiting services, a community engagement process appears unnecessary. If it was to be undertaken it is unlikely to generate information of sufficient weight to alter the decision making process. However, if the community was to be affected (eg. change in collection frequency, new recycling arrangements etc), it would be advisable to choose a suitable method of engagement at the appropriate time.

**(e) *If the project is intended to produce revenue, revenue projections and potential financial risks***

This criterion is not relevant to the Project.

**(f) *The recurrent and whole-of-life costs associated with the project including any costs arising out of proposed financial arrangements***

This assessment criterion, and to a lesser extent (g) below, are difficult to apply to this project. Local Government projects generally relate to construction of amenities and facilities and are mostly discretionary to the Council. Other “essential” services of road construction and maintenance and drainage construction are specifically exempt from assessment (s 48 (3)).

The materials available for this prudential report component are insufficient at present for detailed due diligence review. Until the City of Marion is in receipt of responses to the RFT’s, any assessment of recurrent and whole-of-life costs will be entirely based on assumptions around expected response ranges from tenderers. No such formal estimate calculations have been provided for diligence purposes.

Reports have been prepared by management consultants that demonstrate potential savings that are able to be generated by virtue of a collective negotiation process, namely:

- The Rawtec<sup>10</sup> report: Joint procurement opportunities for municipal kerbside collections (section 3.2)<sup>11</sup>;

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<sup>10</sup> <http://rawtec.com.au>

<sup>11</sup> Rawtec Pty Ltd Report to Council Solutions (31 March 2015) [supplied in Confidence by Council Solutions for this report].

- Wright Corporate Strategy<sup>12</sup> report: Stage 1 - Recommend the Optimal Packaging of Waste Service Streams (Goals and benefits, page 19)<sup>13</sup>; and
- Wright letter re: Estimate of Financial Benefit for Participating Councils from Collaborative Procurement (dated 14 September 2017).

The Rawtec report and Wright Corporate Strategy report utilise two methods to make an assessment of potential savings that may be generated:

1. **Rawtec:** utilises a bottom-up approach to estimate the potential savings for each area of cost associated with delivering a kerbside collection project of the kind being considered based on various annual contract values. The report estimates a potential saving to all councils of ~A\$1.16m per year (~5.8% of annual contract value) for a contract in the range of A\$10-20m per year or A\$2.14m per year (~7.1% of annual contract value) for a contract in the range of A\$20-30m per year.
2. **Wright Corporate Strategy:** utilises a comparable contracts approach to assess potential savings that are able to be achieved by collective negotiation: ie. for receipt and processing of comingled recyclables, a 29% savings to pre-existing agreements at Clarence, Glenorchy and Hobart councils; and collection of kerbside mobile garbage bins for municipal solid waste, a 21% savings to pre-existing agreements at St George group of councils.

Wright Corporate Strategy in correspondence (14 September 2017) adopts the work completed as part of the Rawtec report to quantify the potential savings for kerbside collection that are likely to accrue to each council forming the collecting tendering group. The estimated benefit to accrue to the City of Marion in the order of \$45 - 256k per year.

Prima facie, these reports appear reasonable based on the assumption both Rawtec and Wright have an appropriate level of knowledge and experience that underpins the information contained in their advices.

For completeness there appears to be 2 options going forward:

Firstly, while identification of potential savings is an element of the assessment required to understand the expected recurrent and whole-of-life costs associated with a project, a spreadsheet analysis could be prepared of the indicative/expected recurrent and whole-of-life costs for the project in advance of assessment of the RFT's. This should not require preparation of a

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<sup>12</sup> [www.wrightstrategy.com](http://www.wrightstrategy.com)

<sup>13</sup> Wright Corporate Strategy Pty Ltd working report (4 July 2017) [supplied in Confidence by Council Solutions for this report].

significant additional body of work. This model can then be compared to the results when the preferred RFT's are determined.

The alternative is to wait for the responses to RFT's to form an assessment of the recurrent and whole-of-life costs that are likely to be achieved and committed to contract. This could then be compared to the current known (or historic) costs to understand the recurrent savings to be achieved and the whole-of-life costs.

**(g) *The financial viability of the project, and the short and longer term estimated net effect of the project on the financial position of the council***

Being derivative to a proper assessment of the recurrent and whole-of-life costs associated with the project, this component can only be properly satisfied once the cost structure has been reasonably and sufficiently ascertained.

The City of Marion's Long Term Financial Plan 2018-2028 is predicated on the council being financially sustainable over the period. Given that the proposed waste services model is expecting material savings through a collaborative tender approach, should improve the financial position of the council (the very purpose of undertaking the collaborative approach). Thus, it is envisaged that this project will be financially viable for the City of Marion (on the basis that current, more expensive waste management arrangements are considered financially viable within the council's near-medium-long term financial framework).

**(h) *Any risks associated with the project, and the steps that can be taken to manage, reduce or eliminate those risks (including by the provision of periodic reports to the chief executive officer and to the council)***

A risk profile register on the project was prepared by Council Solutions dated September 2018<sup>14</sup>. As expected, the register identified a number of risks with the project and rated each risk for likelihood against consequence utilising a standard matrix format with nominated mitigation actions. The component categories are:

- ACCC approvals;
- procurement processes;
- project management;
- commercial;
- legal;
- political;
- probity; and

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<sup>14</sup> It is not known if the Board of Council Solutions reviewed and accepted this risk analysis.

➤ reputational risks.

The author offers comment on what are considered key risks matters from an independent project observer perspective:

1. **The ACCC's authorisation to proceed** with each of the proposed RFT's – discussed above. This risk is now abated.
2. **The veracity of the assumptions made** in the Rawtec and Wright reports that were relied upon to generate the model going forward. The due diligence undertaken has demonstrated the reasonableness of the assumptions based on the consultants' knowledge of the industry, market place and historical performance. Also relevant is the experience and knowledge of the Participating Council representatives which should not be under-valued.
3. **The quality of the commercial advice** that underpins the structure of the tender process. From the papers commercial advice was/is supplied by BDO Australia, a mid-tier national business services advisory firm, together with consulting legal advisors, Rawtec and Wright consultants and the Councils representatives. It is reasonable to accept the commercial aspects have or will receive appropriate attention.
4. **There are enough players in the market place** to ensure competitive pricing and performance on each of the contract packages. The assessment in the consultant reports (particularly the Wright report) indicates this factor of risk exposure is low except in the area of recyclables which is a national concern at present (China Sword policy).
5. **The issue of recyclable materials** - To mitigate the risk that may result from the limited market for recyclables SRWRA has indicated it is looking at the possibility of developing a recycling centre<sup>15</sup>. The media report (emanating from a SRWRA press release) advises that if a business case "stacks up" the facility could be operating from July 2020. The administration advises that if this does eventuate the recycling materials collected from the Marion jurisdiction would likely be processed by the SRWRA facility. How this scenario may impact on the Project has not and cannot be considered in the context of this report.
6. **How the RFT packages are constructed** to be put to the market place. The due diligence indicates this critical issue has been well thought through in terms of separating RFT's to encourage the prospect of quality competition; staging the RFT's to market thus allowing sufficient time to

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<sup>15</sup> Reference Adelaide Advertiser 28 November 2018.

manage the process; offering commercially reasonable contract durations to provide certainty; and providing opportunities in the RFT's for innovation, alternative practices and flexible responses etc.

7. **Good documentation** of the RFT's to market and ultimately the various contracts. This is important for certainty (clarity), contract administration, any possible dispute issues and protection of the public interest. Mid-tier Adelaide commercial law firm Cowell Clark has been engaged.
8. **Quality of the evaluation team and documentation/record of the process.** Council Solutions prepared a paper<sup>16</sup> summarising the key tasks and inputs required to establish the contracts and the role of Council Solutions, Participating Councils and the specialist service providers in the process. This appears to be soundly based. It can be expected that Council Solutions personnel are competent (procurement is Council Solutions *raison detre*), the specialist service providers are engaged for their special expertise and the nominated Participating Councils procurement staff are also competent. The paper also discusses the role of a probity advisor – which is an important inclusion. It is likely that the appointment of an independent probity auditor would improve the due diligence practices adopted as part of the project. The Participating Councils should also insist on ensuring competent records are kept of all procurement meetings to prove integrity of the procurement process.
9. **If one or more of the Participating Councils withdraws** from the procurement process or wishes to alter the course of the procurement it may materially challenge/compromise the process and outcome. This is a matter for the councils to manage.
10. **The management of the contracts after being awarded.** It is unclear from the papers what the ongoing role of Council Solutions is in the day to day administration of the contracts; and what, if any, interaction will exist between Council Solutions and each of the participating Councils.

However, and regardless, the waste management contracts that the City of Marion is likely to enter into will be one of the largest recurrent expenditures (opex) in the annual budget. Furthermore, the performance of the contract(s) is community sensitive – for reasons of public health, convenience, public expectation etc (reputational damage). Good contract management is expected to deliver the expectations and obligations of both the contractor(s) and the Council. The adage “a contract is only as good as it is managed” is apt.

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<sup>16</sup> Untitled (Waste Management Services Project), undated, comprising 7 pages.

**11. Exogenous factors.** Mitigating exogenous events (if any) is typically best achieved by being alert to external influences and constant and diligent monitoring. Being in a consortium of councils, and with Council Solutions, any established communications between the parties would be prudent to upkeep.

Given the importance and value (financial viz 11.39% of annual opex) of the waste management contracts to the Council it is recommended that the administration be required (at least annually) to formally report to the Council by report (and minuted) on the performance of the waste management contracts.

**(i) *The most appropriate mechanisms or arrangements for carrying out the project***

This review identifies that a number of models were considered for the most economic, responsible and durable approach to waste management for the immediate future.

The Rawtec report also provided advice on issues of scale and geography relevant to the 3 bin system to help inform the design of any potential future procurement.

The report addressed a number of cogent issues including:

- The potential opportunities to achieve economies of scale (in relation to both the cost of running each truck and the number of trucks required);
- The likely optimum size of a collection contract, beyond which negative marginal returns comes into play;
- The influence that the geography of the councils involved have on these opportunities (eg. the likely requirements for additional depot infrastructure to be established; common boundaries needed to be able to efficiently share trucks across council areas);
- Whether economies of scale and/or the geographic characteristics are improved via the involvement of other neighbouring councils who are not currently participating in the project;
- Whether a single collection contract offers the best outcome (eg. could the potential economies of scale from a single contract be outweighed by longer term impacts on competition in the market);
- If more than one contract is preferred how these should be structured (eg. how many and which councils involved);
- Other than financial savings, the other likely criteria relevant to decisions about the optimal number of collection contracts (eg. environmental, economic development and/or customer service).

Additionally, matters in relation to landfill, sorting of recyclables and organics processing for each of the processing/disposal streams:

- Whether a single contract offers the best opportunities;
- If more than one contract is preferred how should these be structured (eg. how many and which councils involved?)<sup>17</sup>

Wright Corporate Strategy provided strategic advice on various options for structure and delivery and on how to meet the ACCC concerns following the initial rejected application, including the following tasks:

- review the final determination by the ACCC;
- review the scope of waste management services;
- review and validate the goals and benefits sought;
- assemble an evidence base to support the benefits;
- workshop with Council Solutions and the Councils' representatives, and
- prepare and submit a report to Council Solutions recommending next steps.<sup>18</sup>

The Wright Corporate Strategy report also provided information and commentary about other various approaches to waste collection, processing and disposal by other local governments in Australia (particularly where the councils had consortia relationships). It is noted that direct comparisons between consortia are difficult because of the large number of variables at play but the analysis does provide useful evidence about what works and what to be wary about.

The report identified the various suppliers in the South Australian market against the various components of a full waste collection, processing and disposal stream; and offered commentary on their capacity to satisfactorily achieve the particular requirement(s). This analysis identified, if packaged correctly, that each component of the waste stream to be tendered would create enough competitive tension from likely providers to elicit competitive pricing. This argument seems to be supported by the evidence submitted to the ACCC in response to its concerns – as previously discussed.

Recommended contract durations are a significant consideration with regards to packaging the RFTs for tender. The Wright Corporate Strategy report addresses this based on their knowledge of the industry and through demonstration of an understanding the drivers which will be factors in the tenderers' calculations. For example, for RFT #1 the key factor will be the

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<sup>17</sup> See footnote 11.

<sup>18</sup> See footnote 13.

tenderers' anticipated return for capital employed (ie. a supplier's investment in vehicles/trucks to undertake the tasks required by the respective councils).

Both consulting companies have sound credentials and significant long-term experience in the waste industry. Both have consulted widely in the waste collection, processing and disposal domain for local government.

It is considered the packaging of waste management services for the Participating Councils into 3 separate RFTs offered to the market in a planned staggered timetable, for the periods recommended, with flexible options contained therein, is an appropriate arrangement.

### Summation

The recommended approach for the Participating Councils to collaboratively go to the market with 3 separate but staggered (in terms of timing) RFTs appears, based on the evidence educed and advised by the consultants, to be a pragmatic and responsible way forward. This approach also allows each participating council the ability to build into the contract conditions specific idiosyncratic matter (if any) for that council area.

The recommended nominated contract terms:

- **RFT #1:** 7 years with a 3 year extension option;
- **RFT #2:** 7 years with a 3 year extension option; and
- **RFT #3:** 3 years with 3 by 1 year extension options,

appear to be soundly based. Additionally, innovative offers and offers for different terms for contracts is encouraged. It is proposed the RFT conditions will allow for the submission of alternative/non-conforming tenders to allow flexibility for tenderers to offer such initiatives (including a variation to the nominated term where considered necessary).

This due diligence review has not evinced any material issue or concern for the City of Marion to not proceed or to recommend modification to what is proposed.

### Additional Comments

The issue of managing e-waste appears not to be considered in the proposal.

It may be prudent to consider the appointment of a Probity Auditor (in addition to the intention to appoint a probity advisor) to be included in the evaluation process. As the tender dollar values are expected to be significant and material to the overall budgets of participating councils, it may provide independent security to ensure integrity of the process.

There appears to be no account for the cost to the council for establishing the project. These costs (including payments to Council Solutions) should be accounted for in the final financial analysis.

It is noted a Probity Plan has been prepared by Council Solutions for the project. It is recommended that this plan be considered/endorsed by Council Solutions Audit Committee.

In response to the concern about the future market for recyclable materials (China Sword policy) the SRWRA (partly owned by the City of Marion) has announced its intention to consider developing its own materials recovery facility. This proposal should be subject to its own due diligence when appropriate.

END

### **Acknowledgments**

The author acknowledges the helpful assistance of Vincent Mifsud, Colin Heath and Stephen Zillante of the City of Marion and Bruce Wright of Council Solutions for access to the relevant materials.

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**ATTACHMENT 1****CITY OF MARION: BRIEF****Background Information**

The CoM is one of 4 councils together with Adelaide City, Charles Sturt and Port Adelaide Enfield councils who have sought Australian Competition and Consumer Commission (“ACCC”) authorisation for a collaborative procurement of Waste Management Services which incorporates:-

- waste collection services, covering:
  - kerbside collection of the mobile garbage bin (MGB) services;
  - supply and maintenance of MGBs;
  - bulk bin collection services for higher density areas and/or Council owned facilities.
- receiving and processing of recyclables;
- receiving and processing of organics; and
- receiving and disposal or processing of residual waste (N/A for CoM as we have SRWRA).

The collaborative procurement approach is on the basis of 3 separate Requests for Tender (RFT) with different service scopes being released for:

1. Kerbside Collection
2. Processing & Disposal
3. Ancillary Services

The ACCC has granted favourable Final Determinations for all 3 RFT’s granting authorisation to Council Solutions to jointly procure Kerbside Waste Collection Services (RFT1) on 12 October 2018 and for Waste Processing Services (RFT2) and Ancillary Waste Services (RFT3) on 23 November 2018.

Marion’s existing waste contract (excludes receiving and disposal or processing of residual waste as we have this with SRWRA) is with Solo Resource Recovery (“Solo”) through a collaborative market tender with West Torrens in 2005.

- 21 June 2005 - Confidential Tender Assessment report approved appointment of SOLO for 7 year term;
- 12 June 2012 - Confidential Kerbside Waste Collection Contract Extension for a further 5 year term and 1 month term to 30 April 2018;
- 27 June 2017 - Confidential Kerbside Waste Collection Contract Extension for a further 2 year term to 30 April 2020.

Council’s budgeted net cost for Solo in the current 2018/19 financial year is \$4.1 million which is for collection of all 3 bin types, processing of recyclables and organics, and street litter processing.

## ATTACHMENT 2

**Part 3—Prudential requirements for certain activities****48—Prudential requirements for certain activities**

- (aa1) A council must develop and maintain prudential management policies, practices and procedures for the assessment of projects to ensure that the council—
- (a) acts with due care, diligence and foresight; and
  - (b) identifies and manages risks associated with a project; and
  - (c) makes informed decisions; and
  - (d) is accountable for the use of council and other public resources.
- (a1) The prudential management policies, practices and procedures developed by the council for the purposes of subsection (aa1) must be consistent with any regulations made for the purposes of this section.
- (1) Without limiting subsection (aa1), a council must obtain and consider a report that addresses the prudential issues set out in subsection (2) before the council—
- (b) engages in any project (whether commercial or otherwise and including through a subsidiary or participation in a joint venture, trust, partnership or other similar body)—
    - (i) where the expected operating expenses calculated on an accrual basis of the council over the ensuing five years is likely to exceed 20 per cent of the council's average annual operating expenses over the previous five financial years (as shown in the council's financial statements); or
    - (ii) where the expected capital cost of the project over the ensuing five years is likely to exceed \$4 000 000 (indexed); or
    - (iii) where the council considers that it is necessary or appropriate.
- (2) The following are prudential issues for the purposes of subsection (1):
- (a) the relationship between the project and relevant strategic management plans;
  - (b) the objectives of the Development Plan in the area where the project is to occur;
  - (c) the expected contribution of the project to the economic development of the local area, the impact that the project may have on businesses carried on in the proximity and, if appropriate, how the project should be established in a way that ensures fair competition in the market place;
  - (d) the level of consultation with the local community, including contact with persons who may be affected by the project and the representations that have been made by them, and the means by which the community can influence or contribute to the project or its outcomes;
  - (e) if the project is intended to produce revenue, revenue projections and potential financial risks;
  - (f) the recurrent and whole-of-life costs associated with the project including any costs arising out of proposed financial arrangements; the financial

- viability of the project, and the short and longer term estimated net effect of the project on the financial position of the council;
- (g) any risks associated with the project, and the steps that can be taken to manage, reduce or eliminate those risks (including by the provision of periodic reports to the chief executive officer and to the council);
  - (h) the most appropriate mechanisms or arrangements for carrying out the project;
  - (i) if the project involves the sale or disposition of land, the valuation of the land by a qualified valuer under the *Land Valuers Act 1994*.
- (2a) The fact that a project is to be undertaken in stages does not limit the operation of subsection (1)(b) in relation to the project as a whole.
- (3) A report is not required under subsection (1) in relation to—
- (a) road construction or maintenance; or
  - (b) drainage works.
- (4) A report under subsection (1) must be prepared by a person whom the council reasonably believes to be qualified to address the prudential issues set out in subsection (2).
- (4a) A report under subsection (1) must not be prepared by a person who has an interest in the relevant project (but may be prepared by a person who is an employee of the council).
- (4b) A council must give reasonable consideration to a report under subsection (1) (and must not delegate the requirement to do so under this subsection).
- (5) A report under subsection (1) must be available for public inspection at the principal office of the council once the council has made a decision on the relevant project (and may be available at an earlier time unless the council orders that the report be kept confidential until that time).
- (6) However, a council may take steps to prevent the disclosure of specific information in order to protect its commercial value or to avoid disclosing the financial affairs of a person (other than the council).
- (6a) For the purposes of subsection (4a), a person has an interest in a project if the person, or a person with whom the person is closely associated, would receive or have a reasonable expectation of receiving a direct or indirect pecuniary benefit or a non-pecuniary benefit or suffer or have a reasonable expectation of suffering a direct or indirect detriment or a non-pecuniary detriment if the project were to proceed.
- (6b) A person is closely associated with another person (the **relevant person**)—
- (a) if that person is a body corporate of which the relevant person is a director or a member of the governing body; or
  - (b) if that person is a proprietary company in which the relevant person is a shareholder; or
  - (c) if that person is a beneficiary under a trust or an object of a discretionary trust of which the relevant person is a trustee; or
  - (d) if that person is a partner of the relevant person; or
  - (e) if that person is the employer or an employee of the relevant person; or

- (f) if that person is a person from whom the relevant person has received or might reasonably be expected to receive a fee, commission or other reward for providing professional or other services; or
  - (g) if that person is a relative of the relevant person.
- (6c) However, a person, or a person closely associated with another person, will not be regarded as having an interest in a matter—
- (a) by virtue only of the fact that the person—
    - (i) is a ratepayer, elector or resident in the area of the council; or
    - (ii) is a member of a non-profit association, other than where the person is a member of the governing body of the association or organisation; or
  - (b) in a prescribed circumstance.
- (6d) In this section, \$4 000 000 (indexed) means that that amount is to be adjusted for the purposes of this section on 1 January of each year, starting on 1 January 2011, by multiplying the amount by a proportion obtained by dividing the CPI for the September quarter of the immediately preceding year by the CPI for the September quarter, 2009.
- (6e) In this section—
- employee** of a council includes a person working for the council on a temporary basis;
- non-profit association** means a body (whether corporate or unincorporate)—
- (a) that does not have as its principal object or 1 of its principal objects the carrying on of a trade or the making of a profit; and
  - (b) that is so constituted that its profits (if any) must be applied towards the purposes for which it is established and may not be distributed to its members.
- (7) The provisions of this section extend to subsidiaries as if a subsidiary were a council subject to any modifications, exclusions or additions prescribed by the regulations.

30 October 2018

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Dear Mr Mifsud

### POTENTIAL SRWRA MRF

I refer to your email request for advice on behalf of the three Constituent Councils of the Southern Region Waste Resource Authority (Marion, Holdfast Bay and Onkaparinga) in relation to the possibility of SRWRA, together with its joint venture partners (IWS/Veolia), establishing a MRF at the SRWRA landfill site.

My advice in response to your question whether the Councils can commit their 'yellow bin' recyclables to a SRWRA MRF without undertaking a tender process, is below.

### RELEVANT PRINCIPLES

The fundamental principles to be considered in responding to your question are –

- section 49 of the *Local Government Act 1993* ("the Act") provides for all SA councils to develop and maintain procurement policies, practices and procedures directed towards obtaining value in the expenditure of public funds, providing ethical and fair treatment of participants and ensuring probity, accountability and transparency in procurement. Therefore, councils prepare and adopt policies on contracts and tender practices that, relevantly, address the contracting out of services, the cost-effective delivery of services and the use of local goods and services;
- however, it is important not to lose sight of the fact that whilst section 49 of the Act contemplates these matters and approaches, it also recognises that councils may enter into contracts for the provision of goods or services, without first undertaking an open tender or other public or market process (see section 49(2)(c) of the Act);
- the legislative intent of section 49 of the Act can, therefore, be seen, amongst other things, to be to focus councils on obtaining value in procurement processes but without any legislative mandate to do so through any particular process. Accordingly, section 49 of the Act does not (and cannot be said to) and, consistent with a long-held administrative law principle, require councils to surrender decision-making to the blanket application of policy; and
- it is also necessary to consider in the context of the above, the purpose, intent and objective of section 43 of (and Schedule 2 to) the Act in terms of the ability of councils to

jointly establish a regional subsidiary for their individual and collective benefit. Councils are able to do so to provide specified services or to carry out specified activities or to perform functions on their behalf. Relevantly, section 7(b) of the Act expressly recognises council functions to include public health services in the nature of waste control and disposal services or facilities. A regional subsidiary may, therefore, be established to undertake functions that would otherwise be undertaken by the constituent councils or by the councils individually or collaboratively, engaging with the private sector to provide them under contractual arrangements.

### RELEVANT CONSIDERATIONS

When the above considerations are applied to this matter, it is to be noted that the Constituent Councils (the Cities of Marion, Holdfast Bay and Onkaparinga) have collaborated to establish SRWRA as a regional subsidiary to carry out the services/undertake the functions, on their behalf, which are set out in the Objects and Powers of the Charter of SRWRA. That is, SRWRA exists primarily for the benefit of those Councils. The relevant functions are, of course, those associated with waste management, an essential public health service. This collaborative approach to service delivery in waste management, provides immediate and lasting economies of scale for the benefit of the Constituent Councils and, in turn, their communities. Accordingly, it is entirely appropriate for the Councils to endeavour to support their financial, economic and community interests by utilising the services of their subsidiary, not only because of their equity stakes in SRWRA and their statutory guarantee of the liabilities of SRWRA but also for the purposes of continuing to achieve the demonstrated community economic outcomes that SRWRA has been established to provide and does provide for the communities of the Councils.

In this context, the statutory guarantee of liabilities of SRWRA that is provided by the Councils is, necessarily, related to the performance of the Objects and Purposes of SRWRA. It does not, therefore, make any commercial or logical sense for a Constituent Council to be subject to the statutory guarantee of the liabilities of SRWRA, only to then undertake a tender or other contestability exercise for the provision of that same service. In fact, to do so, can be considered to give rise to a risk management issue for the Councils which, in turn, are then required to manage two separate risk profiles.

As a consequence of the legislative scheme within which the Councils have established SRWRA as a regional subsidiary, there is no requirement for a separate contract for services to be in place with SRWRA or for the Councils to undertake any 'market testing' for the purposes of, potentially, then, sourcing those same requirements through a third-party private sector provider. Accordingly, there is no place for any 'open tender' or other market process in circumstances where the Councils are performing their statutory functions through the medium of their own corporate entity. To require SRWRA to compete in an 'open tender process', is contrary to the reasons for the existence of SRWRA and contrary to the interests of the Councils and their communities. Indeed, the establishment of SRWRA and the outsourcing of the services for which SRWRA has been established to a third-party provider will have a, potentially, negative impact on the viability of SRWRA and a, consequent, adverse impact on the Councils and their communities.

### ADVICE

My advice is that for any of the Constituent Councils to commit their 'yellow bin recyclables' (or, indeed, any other waste streams) to SRWRA is entirely consistent with the purposes for which

the Councils established SRWRA and is squarely within the Objects and Purpose of SRWRA. When regard is had to the legal position that section 49 does not impose on or require of the Councils, any particular procurement process and that SRWRA undertakes waste management activities on behalf of its Constituent Councils for services that the Councils are required to undertake, the Councils may not only choose to refer such waste stream(s) to SRWRA but, from a commercial, risk, economic and community perspective are probably required to do so. Whilst the Act does not and the section 49 policies of the Councils should not require the Councils to expose this service (these services) to any form of tender, expression or other process (unless the intention is that they be provided by a third-party), the policies should specifically recognise that they have no application to services which the Councils choose to source through a regional subsidiary of which they are a constituent.

In response to your specific question, therefore, my advice is that the Councils are not required to undertake any specific procurement process in the nature of tender or expression or proposal or other market testing, but may, instead, by Council approval, commit the yellow bin recyclables waste stream to SRWRA.

Let me know if I can assist further.

Yours sincerely  
KELLEDYJONES LAWYERS



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