

CONFIDENTIAL ITEMS 2003 – SEPTEMBER 2022

#	Date	Item Title	Confidential Order Details	Item being kept confidential - Agenda/ Attachment/ Minutes	Reason regarding retention or recommend-action to release	Resolution Regarding Action	Last Review Date	Next Review Date	Date Released
83	16 Dec 2013 (special)	Adelaide Hills Region Waste Management Board	<p>Section 90 (3) (i) Order</p> <p>1. Pursuant to Section 90(3)(i) Pursuant to Section 90(2) of the Local Government Act 1999 the Council orders that all members of the public except Chief Executive Officer, General Manager Corporate Services, General Manager Infrastructure and Projects, General Manager Planning and Development, General Manager Council Services and the Minute Secretary be excluded from attendance at the meeting for Agenda Item 3.1.</p> <p>The Council is satisfied that pursuant to Section 90(3)(i) of the Act, the information to be received, discussed or considered in relation to this Agenda item is information relating to: -</p> <p>litigation that the Council believes on reasonable grounds will take place involving the Council or an employee of the Council in that legal advice as to the chances of success of potential litigation involving the Adelaide Hills Region Waste Management Authority (a regional subsidiary) and Southern Waste Resource Co Pty Ltd ought not be made available to the public as it could detrimentally affect the Council's</p>	Report & attachments.	<p>Section 91(7) Order</p> <p>Pursuant to Section 91(7) That having considered Agenda Item 3.1 Confidential Report: Adelaide Hills Region Waste Management Authority in confidence under 90(2) and 3(i) of the Local Government Act 1999, the Council pursuant to Section 91(7) of the Act orders that the report, and attachments be retained in confidence until 6 months after the matter</p>	<p>Note the report. Report; attachments be retained in confidence until 6 months after the matter is resolved or such lesser period as may be determined by the Chief Executive Officer and that this order be reviewed every 12 months.</p>	5 Sep 22	Within 12 months	<p>Minutes on web within 5 days of meeting date.</p> <p><i>Report, Attachments released on website 30 September 2022</i></p>

CONFIDENTIAL ITEMS 2003 – SEPTEMBER 2022

#	Date	Item Title	Confidential Order Details	Item being kept confidential - Agenda/ Attachment/ Minutes	Reason regarding retention or recommendation to release	Resolution Regarding Action	Last Review Date	Next Review Date	Date Released
			<p>position if the court case is commenced.</p> <p>The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because the disclosure of this information may compromise the Council's position if the court case is commenced.</p> <p>Section 91(7) Order</p> <p>3. Pursuant to Section 91(7)</p> <p>That having considered Agenda Item 3.1 Confidential Report: Adelaide Hills Region Waste Management Authority in confidence under 90(2) and 3(i) of the Local Government Act 1999, the Council pursuant to Section 91(7) of the Act orders that the report, and attachments be retained in confidence until 6 months after the matter is resolved or such lesser period as may be determined by the Chief Executive Officer and that this order be reviewed every 12 months.</p>		is resolved or such lesser period as may be determined by the Chief Executive Officer and that this order be reviewed every 12 months.				

3. CONFIDENTIAL REPORTS

3.1 REPORT TITLE: CONFIDENTIAL REPORT: ADELAIDE HILLS REGION WASTE MANAGEMENT AUTHORITY

DATE OF MEETING: 16 DECEMBER 2013

FILE NUMBER: 40/080/031-5

Purpose:

To inform Council that District Council of Mount Barker (DCMB) has received advice of a pre action notice of claim from Southern Waste ResourceCo (SWR) against Adelaide Hills Region Waste Management Authority (AHRWMA).

Summary – Key Issues:

1. Advice has been received of a pre action notice of claim from Southern Waste ResourceCo Pty Ltd (SWR) against Adelaide Hills Region Waste Management Authority (AHRWMA), provided as attachment 1.
2. Claim No 1 amounts to \$6,869,000 and claim No. 2 amounts to \$2,437,720 which totals \$9,306,720.
3. A SWR proposal has been received which if pursued could represent a significant change to the historic way AHRWMA has operated its waste business.

Recommendation:**Section 90 (3) (i) Order**

1. Pursuant to Section 90(3)(i)

Pursuant to Section 90(2) of the Local Government Act 1999 the Council orders that all members of the public except Chief Executive Officer, General Manager Corporate Services, General Manager Infrastructure and Projects, General Manager Planning and Development, General Manager Council Services and the Minute Secretary be excluded from attendance at the meeting for Agenda Item 3.1.

The Council is satisfied that pursuant to Section 90(3)(i) of the Act, the information to be received, discussed or considered in relation to this Agenda item is information relating to:

- litigation that the Council believes on reasonable grounds will take place

involving the Council or an employee of the Council in that legal advice as to the chances of success of potential litigation involving the Adelaide Hills Region Waste Management Authority (a regional subsidiary) and Southern Waste Resource Co Pty Ltd ought not be made available to the public as it could detrimentally affect the Council's position if the court case is commenced.

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because the disclosure of this information may compromise the Council's position if the court case is commenced.

2. That the report be noted.

Section 91(7) Order

3. Pursuant to Section 91(7)
That having considered Agenda Item 13.1 Confidential Report: Adelaide Hills Region Waste Management Authority in confidence under 90(2) and 3(i) of the Local Government Act 1999, the Council pursuant to Section 91(7) of the Act orders that the report, and attachments be retained in confidence until 6 months after the matter is resolved or such lesser period as may be determined by the Chief Executive Officer and that this order be reviewed every 12 months.

Background:

1. The Adelaide Hills Region Waste Management Authority (AHRWMA) is a regional subsidiary comprised of four councils (District Council of Mount Barker, Rural City of Murray Bridge, Alexandrina and Adelaide Hills) established under Section 43 of the Local Government Act, 1999.
2. Prior to 13 February 2013 the Authority operated the Hartley Landfill at Callington where member councils' waste was disposed. This landfill had been operated under a licence agreement with the Landowners since 1991.
3. At its meeting held 3 December 2012 DCMB endorsed the AHRWMA Board's resolution to accept a settlement proposal from SWR. Following commitment from all AHRWMA member Councils, the AHRWMA executed an agreement with SWR and relocated its landfill operations from Hartley to Brinkley on 13 February 2013.
4. On 13 February 2013 SWR took possession of the Hartley landfill, and the AHRWMA's Environment Protection Authority (EPA) licence was transferred to SWR together with all associated liabilities.

5. On 16 July 2013 AHRWMA received a letter from Botten Levinson, solicitors for SWR, making claims in relation to the Hartley site and allegations of misrepresentations in relation to future waste contracts. This was subsequently forwarded to member councils on 18 September 2013.
6. The AHRWMA board assessed the claims as formulated by SWR in their 16 July 2013 letter and the AHRWMA strongly refuted these claims.
7. On 7 August 2013 SWR submitted an offer to DCMB seeking to secure DCMB's waste tonnes at the Hartley landfill in return for a discounted rate per tonne over a five-year period. I advised that the offer be considered by AHRWMA first and DCMB would take direction from AHRWMA.
8. Subsequently, on 20 September 2013 SWR submitted a revised offer through AHRWMA seeking to secure member council tonnes at the Hartley landfill in return for an improved discounted rate per tonne and over a longer period of time of seven years with an option to extend by a further three years.
9. I am advised AHRWMA's previously adopted business and long term financial plans included the investment in, and operation of, the Brinkley landfill. In adopting these plans, AHRWMA had assumed the commitment of member council tonnes and allowed for a 55% loss of commercial tonnes due to competition from the Hartley landfill. It was considered by AHRWMA that the SWR offer to attract all member councils' tonnage would be a significant shift in strategic direction for the AHRWMA and have a potentially disastrous impact on the AHRWMA's ability to remain solvent.
10. The AHRWMA's first quarter financial results show a greater than anticipated reduction in commercial tonnes (approximately 90%) due to pricing competition. In addition, anticipated waste tonnes from Alexandrina Council have not been sent to the Brinkley landfill, however other member councils have participated as planned. This has resulted in a significant turnaround in financial performance with the first budget review showing a net loss and potential future significant liquidity issues.
11. On 21 November 2013 the AHRWMA resolved that having considered the financial and non-financial analysis of AHRWMA continuing with its current adopted Business and Long Term Financial Plans compared to becoming a landfill client, AHRWMA commits to the preferred future direction being to continue to send member councils' waste streams to AHRWMA's Brinkley operation for the next 7 years and respond to SWR accordingly. Additionally, that this arrangement only be reviewed if unforeseen issues with the AHRWMA operations and financial position arise.

12. When this outcome was communicated to DCMB I raised that the AHRWMA had not pursued all possible commercial outcomes with SWR. I indicated that DCMB would not commit long term to any option until I was satisfied that all possible commercial negotiation options were fully pursued with SWR. I also advised that no other council had committed to any option and it is my understanding that at this point in time it remains that no other council has formally committed to any option.
13. With some encouragement from myself, on 4 December 2013. Mr Michael Lorenz, Executive Officer AHRWMA, Mr David Peters, General Manager Corporate Services, DCMB, and myself met with the SWR senior management to explore possible commercial options for consideration.
14. At that meeting some scenarios were put forward whereby if member councils were to accept the SWR offer, AHRWMA could continue to provide services to its member councils by considering the SWR offer as a wholesale rate and adding a rate per tonne above this to fund its current other value-adding services. SWR raised compliance issues and associated tidy up costs as per the previous allegations and indicated that these would need to factor in to any outcome. It was put strongly by DCMB that if any agreement were to be pursued, it would require SWR to agree not to pursue any damages or claims. I was seeking that if a commercial agreement be struck it would be done in the spirit of any potential litigation by SWR no longer being considered.
15. SWR indicated at the meeting that they had a writ ready to go but confirmed this would be placed on hold whilst AHRWMA made an assessment of commercial options, with the potential for this matter to be determined at a planned SWR board meeting in mid-December.
16. I have attached for your information the covering letter from Botten Levinson to the statement of claim which outlines the notice of claim. (attachment 1.)
17. Additionally, I have attached emails I have written encouraging a commercial outcome. The emails were despatched because I had been reliably informed the potential for litigation was imminent and SWR had not been able to access the AHRWMA for an update.

Discussion:

18. Pursuant to court proceedings this notice must be issued before any claim can be filed.
19. AHRWMA has 14 days within which to respond to the notice of claim. Due to the Christmas period if proceedings were to be issued they would not be filed and served until the New Year.

20. Mr Michael Lorenz will be meeting with AHRWMA lawyers on Monday 16 December 2013 to prepare a response after which time further information will be provided.

Community Engagement:

Informing only	Website
----------------	---------

Policy:

NA

Budget:

AHRWMA has provided a consistent surplus in recent years as well as a cash dividend last year. There is a risk this year that a considerable net loss position will occur and if the event of solvency issues a cash injection will be required.

Statutory/Legal:

Legal representation will be sought in relation to this matter.

Staff Resource Requirements:

Additional management time will be involved to assess potentially high risk legal issues.

Environmental:

NA

Social:

NA

Risk Assessment:

DCMB has majority equity holdings within AHRWMA which exposes DCMB to greater litigation risk should defence of the claim be unsuccessful.

Asset Management:

NA

Conclusion:

Competition from the private sector in the waste management stream area has given rise to new operational and legal challenges for AHRWMA which will impact on the way DCMB does business in the future.

Key Contact

Andrew Stuart, Chief Executive Officer

Attachments

1. Letter from Botten Levinson Rule 33 Notice, 12 December 2013
2. Email from Andrew Stuart, Chief Executive Officer to AHRWMA member CEOs 4 December 2012

bottenlevinson

Attachment 1 to Item 16.1

development & environment lawyers

Our ref: JAL/213168

12 December 2013

Mr Scott Lumsden
Wallmans Lawyers
GPO Box 1018
ADELAIDE SA 5001

By email: scott.lumsden@wallmans.com.au

Dear Scott

Southern Waste ResourceCo Pty Ltd v Adelaide Hills Region Waste Management Authority - Rule 33 Notice

This firm acts for Southern Waste ResourceCo Pty Ltd (**SWR**). I write to provide notice of a claim against the Adelaide Hills Region Waste Management Authority (**AHRWMA**) for the purposes of Rule 33 of the Supreme Court Rules.

Offer to settle

SWR will settle Claim 1 herein for **\$6,869,000.00**.

SWR will settle Claim 2 herein for **\$2,437,720**.

Claim 2 is made further to and in the alternative to Claim 1.

Details of claim 1

The details of claim 1 are set out in the attached draft statement of claim. It is based in part on representations made by the AHRWMA including representations by Mr Lorenz and Mr Salver to SWR.

In summary SWR claims that as a result of entering into the agreement dated 11 February 2013 ("**the agreement**") to procure the rights to operate the Hartley Waste Depot ("**Hartley depot**") from the AHRWMA, SWR has paid or incurred costs and losses of over **\$6,869,000** comprising -

- 1.1 The purchase price under the agreement of \$900,000 (plus GST of \$90,000);
- 1.2 Stamp duty of \$48,465.08;

jap:213168_051.docx

140 south terrace
adelaide sa 5000
po box 6777
halifax street sa 5000

t 08 8212 9777
f 08 8212 8099
e info@bllawyers.com.au
w www.bllawyers.com.au

- 2 -

- 1.3 Legal fees of \$150,000 (to date);
- 1.4 Liability to the land owner for the base rate royalty for operation of the Hartley depot of \$100,000 per year over a term of 20 years (a net present value of \$1.264m);
- 1.5 Capital investment of plant and equipment of \$249,626.85;
- 1.6 Losses to end of September of \$14,413 (which will continue to accrue);
- 1.7 Lost profits (net present value) of \$1.33m;
- 1.8 Cell capping liability of at least \$2,023,000 (estimated by AHRWMA);
- 1.9 Post closure liability of at least \$800,400 (estimated by AHRWMA); and
- 1.10 Interest.

Details of Claim 2

The details of claim 2 are set out in the attached draft statement of claim.

In summary SWR claims that SWR has suffered loss because it relied on representations made by the AHRWMA in entering into the agreement relating to available cell space (**"the cell space representations"**) and warranties about compliance and management of the landfill (**"the compliance representations"**). AHRWMA also indemnified SWR for loss or damage suffered in relation to the compliance warranties and representations.

The breach of the warranties have caused SWR loss and damage of \$2,377,720 comprising -

- 1.11 Cost to rectify cells 5A, 5B and 6 \$935,720 (estimated);
- 1.12 Cost of construction and installation of proper leachate management system \$300,000;
- 1.13 Loss of cell 6 space \$1,102,000 (estimate);
- 1.14 Litter tent replacement \$15,000;
- 1.15 Monitoring of groundwater under direction of the EPA - \$25,000 (incurred to date);

SWR alleges the breaches set out in Schedule C of the agreement in relation to EPA licence condition 16 and LEMP clauses 5.1 and 5.5, (**"the Schedule C compliance breaches"**). The breaches are negligent and actionable at common law and constitute a breach by AHRWMA of the Environment Protection Act actionable under section 104(1)(e) of that Act and the Development Act (actionable under section 85 of that Act). The loss and damage suffered by SWR arising from the Schedule C compliance breaches is \$60,000 comprising -

– 3 –

1.16 \$50,000 to erect a 1.8m high wire mesh fence around the perimeter of the site;

1.17 \$10,000 to establish vegetation screening;

Pursuant to Rule 33(4) you have 14 days to respond in writing to this notice.

Yours faithfully



James Levinson
BOTTEN LEVINSON
Mob: 0407 050 080
Email: jal@bllawyers.com.au

Enc. Draft statement of claim.

RELEASED

Attachment 2 to Item 16.1

Andrew Stuart

From: Andrew Stuart
Sent: Wednesday, 4 December 2013 2:36 PM
To: Peter Dinning; p.bond@murraybridge.sa.gov.au; aaitken@ahc.sa.gov.au; representatives
Cc: CGG
Subject: RE: Adelaide Hills Waste Management Authority
Attachments: Letter to Chair AHRWMA 29 November 2013.docx

Importance: High

This morning I met with representatives of ResourcecoSimon Brown , Jim Fairweather , Chris P.

Resourceco requested the meeting .
 Also attending were Michael Lorenz and David Peters (DCMB)

I am offering this email advice for your information .
 I have been concerned with the entry of Resourceco (effectively taking over AHWMA's site at Hartley) and the AHWMA "relocating" to Brinkley.
 Effectively I have anticipated this development as a " game changer "
 A situation has developed where there are now two landfills servicing the region and arguably the region is not big enough to support two .
 In addition there is pending a legal dispute between Resourceco and AHWMA .
 Furthermore Recent numbers indicate that the AHWMA has lost commercial tonnage to Resourceco and combined with Resourceco's attractive (aggressive ? price setting) a commercial competition is underway . The implications are the AHWMA has less tonnage therefore it has implications for its finances .
 The above is a thumbnail sketch of the current picture .
 I encourage you to acquaint yourselves of the current status via your Board members and Michael Lorenz .
 I am not a AHWMA board member .
 I guess the biggest concern I have is that Resourceco warrant that they seek a commercial outcome with the Authority essentially they would ask that the AHWMA direct members current tonnage to Hartley .
 Resourceco are offering a ten year term at rates lower than the AHWMA rate – indexed to CPI .
 In return my understanding is that any legal action will be dropped . And – it means Resourceco also have the ownership of risk in managing the landfill operationally and longterm .
 I think there exists the basis of a deal that I strongly encourage the AHWMA to objectively and commercially evaluate .
 I also believe there is plenty of work the AHWMA can continue to offer eg potentially manage a form of subcontracted service to Resourceco, manage the Brinkley site (potentially as a site kept in reserve as insurance) , negotiate freight/transport deals, continue to be involved in transport station services and the list goes on
 Resourceco have represented their intentions to offer members of AHWMA competitive access to other services such as contaminated waste, construction waste and aggregate waste services and they indicated their intention to aim for a significant (30 percent ?) recoverable target – something which would be of great interest to councils I think .

From my perspective I would find it difficult to commit DCMB tonnages to AHWMA until such time as the AHWMA have a look at the total offering by Resourceco and an evaluation of risk and return – I do not believe this has happened in an objective way to date nor do I think the Resourceco offering has been fully identified to the Board to date .

So I have encouraged Michael to provide information to the Board with the benefit of today's discussion to consider the proposition by Resourceco with commerciality foremost and set aside any personal history perceived or real .

Also attached is a draft letter that I prepared – it provides context – it is draft and after todays discussion I may decide to not send it .

Thankyou in anticipation you will bring yourselves up to speed on this issue .

Andrew Stuart

Chief Executive Officer

D 08 8391 7236

RELEASED

13/112021

29 November 2013

Adelaide Hills Region Waste Management Authority
Attention Michael Lorenz
cc Chair Cllr Barry Laubsch

Dear Michael

Thank you for providing an overview of AHRWMA's general position with respect to the Authorities' cost from Hartley to Brinkley, contracting of Resource at Hartley and subsequent developments.

I hope this letter confirms and clarifies concerns I have expressed and some actions I would encourage the AHRWMA to investigate or pursue.

Further, I appreciate you sharing the resolutions of the AHWMA Board's for Item 5.6.

I understand the Board's decision to seek long term tonnage commitments from member councils. To assist in the Board's endeavours and to assist me in advising DCMB, I offer the following:

1. Commercial Negotiations

Has the Board formally explored a commercial negotiation with Resource Co? If not, why not?

Background

My understanding from Resource Co is that they have sought a mutually beneficial commercial deal and have been frustrated that they have not been afforded that opportunity. In a corporate sense, in my opinion the Board has a duty to the "shareholders" to examine options that deliver the best outcome. So, on that basis I can't

understand why the Board has not entertained a commercial discussion with Resource Co. More to the point, I ask that a commercial opportunity be examined with Resource Co before I offer any advice to my Council to support committing tonnage to AHWMA .

It can be expected that in the absence of a commercial mutually acceptable outcome that Resource Co will initiate a legal challenge which would prove costly irrespective of outcome.

2. Equity Model

Will the Board review the equity model of AHRWMA?

Comments

The equity model in broad terms operates on a cumulative basis – as a consequence by its operation Mt Barker has the greatest exposure and Adelaide Hills follows closely to any unforeseen liabilities. It can be argued that DCMB/AH has the greatest equity but I can't establish what material benefit this offers? It has been largely a book entry (except for one dividend.)

With this in mind, a review of the equity model and with the benefit of hindsight may have suggested that instead of a transfer of equity splits from Hartley to Brinkley that the total proceeds from the Hartley disposal be distributed in full according to the equity at the date of sale and the equity at Brinkley be reset to zero for all subsidiary members at the date of AHWMA relocation to Brinkley .

I am also uncomfortable about the liability for any pre-existing remediation issues associated with Brinkley – I am not assured this matter has been thoroughly dealt with and properly documented .

If my understanding is correct then I have come to the view that the equity model is flawed and in particular the transfer of equity to Brinkley, the disbursement of proceeds and the exposure to litigation from Resource Co.

Summary

These concerns are challenging to express in words and I would be pleased to address the Board to further explain if desired.

Proposed requested next steps:

1. Seek a commercial outcome by meeting with Resource Co
2. Examine and review equity model
3. Consider
 - a. Consider distribution of proceeds in full from Hartley
 - b. Reset equity to zero at Brinkley
Or provide
 - c. Indemnification for pre-existing liabilities at Brinkley
 - d. Indemnification against litigation at Hartley

Yours sincerely

Andrew Stuart
CHIEF EXECUTIVE OFFICER

RELEASED