21 October 2016

Adjudications
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601
By email: adjudication@accc.gov.au

Dear Sir/Madame

Further Submission Opposing Council Solutions & Ors Application for Authorisation Draft Determination and Interim Authorisation Number A91520

We refer to the Australian Competition and Consumer Commission's (**ACCC**) Draft Determination and Interim Authorisation No. A91520 dated 11 February 2016 (**Draft Determination**) and the South Australian Waste Industry Network's (**SAWIN**) previous submissions opposing the Draft Determination, including a legal opinion by William Houghton QC of Counsel dated 1 April 2016 (**enclosed** for your ease of reference).

We write to re-iterate SAWIN's opposition to the Draft Determination by **enclosing** Counsel's further memorandum of advice dated 20 October 2016 for your immediate attention and consideration.

Following Counsel's memorandum of advice dated 1 April 2016 which recommended that SAWIN appeal the ACCC's final Determination if it is in line with the Draft Determination, Counsel provided this further memorandum of advice dated 20 October 2016 which sets out his legal analysis on the meaning of "public benefit". As you would know, "public benefit" is a key element of one of the requirements that Council Solutions & Ors must meet in order for their application for authorisation to be successfully granted.

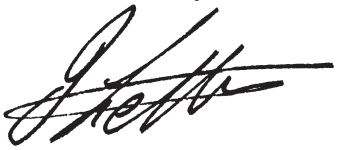
Counsel clearly maintains his view that Council & Ors have **not** satisfied the requirement that there will be a benefit to the public and that this benefit will outweigh the detriment that will be caused by the anti-competitive conduct. On this basis, Counsel is of the view that the ACCC cannot issue a final determination in line with the Draft Determination based on Council & Ors' current application.

Mr Houghton QC is a leading barrister based in Victoria who predominantly practises in the area of commercial and administrative law with particular expertise in competition law. On this basis, we respectfully request that the ACCC takes into account Counsel's well-considered views and legal opinion before issuing its final determination.

We would welcome the opportunity to participate in further consultation with you on this matter if you would find that helpful.

Please contact me on 0412 311 371 of via email at john.fetter@sawin.com.au if you have any questions.

Yours faithfully



John Fetter
Secretary

IN THE MATTER OF:

SOUTH AUSTRALIAN WASTE INDUSTRY NETWORK

and

COUNCIL SOLUTIONS REGIONAL AUTHORITY

and

THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

FURTHER MEMORANDUM OF ADVICE

1. I have previously given written advice in this matter by Memorandum dated 1 April 2016. My instructors now seek my further advice as to the proper construction of section 90(5A) of the **Competition and Consumer Act 2010** and, in particular, the meaning of the phrase "benefit to the public" and whether that benefit would outweigh the detriment to the public constituted by a lessening of competition.

2. Section 90 (5A) provides as follows:-

> *The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:*
>
> *(a) that the provision would result, or be likely to result, in a benefit to the public; and*
>
> *(b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:*
>
> *(i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and*
>
> *(ii) the provision were given effect to.*

3. In my earlier Memorandum, I summarised the principles that should be applied as follows:

   (a) the onus is on the party seeking authorisation to satisfy the Commission that the benefit to the public will outweigh the detriment to the public constituted by the lessening of competition;

   (b) the Commission has to look to the future to consider the likely shape of the future with or without the conduct in question (the counterfactual);

   (c) the task requires an understanding of the functioning of the relevant markets either with or without the conduct for which authorisation is sought;

   (d) the Commission must compare the position which would be likely to exist in the future based on a "real chance" if the authorisation were granted with the position if the authorisation was not granted;

   (e) the phrase "benefit to the public" is not defined in the Act but prior decisions concerning these provisions have emphasised that the concept of public benefit is wide and constitutes anything of benefit to the community generally;

   (f) the Tribunal looked at this question most closely in the case of **Re Qantas Airways Limited [2004]** ACompT 9; [2004] ATPR 42 – 027 where the Tribunal held that there must be "a real chance and not a mere possibility, of the benefit of detriment eventuating. It is not enough that the benefit or detriment is speculative or a theoretical possibility. There must be a commercial likelihood that the applicants will… act in a manner that delivers or brings about the public benefit… the benefit or detriment [must] in a tangible and commercially practical way be a consequence of the relevant agreements if carried into effect and must be sufficiently capable of exposition (but not necessarily quantitatively so) rather than 'ephemeral or illusory'".

4. In my earlier Memorandum, I set out at some length passages of the Tribunal in **Re Qantas Airways Limited** (supra). I shall not repeat them. In my view, however, that case sets out the correct principles to be applied when looking at this concept of "benefit to the public".

5. I am now asked to advise as to whether there is any further case law or legislative provisions concerning the meaning of "real chance" and "commercial likelihood" when considering this question of benefit to the public or detriment which were the phrases used by the Tribunal in the **Qantas Airways** decision at [156].

6. My researches have not revealed any other competition cases in which the Tribunal (or a court) have further considered the meaning of these phrases "real chance" and "commercial likelihood". The decision of the Tribunal in **Qantas Airways** has, however, been followed and applied in a number of subsequent cases. The Tribunal in that case was comprised of the president, Justice Goldberg and two members, Mr Latta and Professor Round. Both the late Justice and the members were experienced and skilled in this area of the law. Accordingly, it is not surprising that the detailed reasoning of that Tribunal has been followed and applied in subsequent cases.

7. But I think that what is clear upon a proper construction of section 90(5A) is that an applicant for authorisation must be able to show not just a "chance" that the public will benefit but a "commercial likelihood" that, if authorisation is granted, the conduct will bring about a benefit to the public which will outweigh the detriment. Mere assertion that that will be the case is not enough. And mere speculation that there will be a benefit to the public is clearly not enough.

8. This construction of subsection (5A) is reinforced by the requirement that the Commission has to be "satisfied in all the circumstances" that the provision would result in a benefit to the public and that that benefit would outweigh the detriment to the public. In my opinion, the Commission could only be "satisfied" if there is before the Commission sufficient robust empirical evidence and rigorous academic support from the applicant (who bears the onus) for a conclusion to be drawn that there is a real chance, as opposed to a mere chance or possibility, of the benefit eventuating and that there is a commercial likelihood that the conduct which is sought to be approved will bring about the benefit to the public which will outweigh the detriment.

9. As the Tribunal held at [201] in the **Qantas Airways** decision, "there must be a factual basis for concluding that the public benefits are likely to result". At [204], the Tribunal emphasised that "the nature of public benefits needs to be defined with some precision, a degree of precision which lies somewhere between quantification in

numerical terms at one end of the spectrum and general statements about possible or likely benefits at the other end of the spectrum".

10. It is always important, in construing any statutory provision, to consider statutory context. Part VII of the Act, dealing as it does with authorisations for, in essence, exemptions from the anti-competitive provisions of the Act, needs to be seen in its context. The Act prohibits anti-competitive conduct unless an applicant can show, to the positive satisfaction of the Commission, that the benefit to the public outweighs the detriment of the anti-competitive conduct proposed. The evidence and material upon which an applicant relies must therefore be more than merely persuasive or merely tipping the balance. That material and evidence must be sufficient to satisfy the Commission that the benefit to the public outweighs the detriment.

11. Accordingly, to look at the question as being one of "balance of probabilities" is not, in my view, helpful. The Commission must reach a positive conclusion that it is satisfied. In that context, one can see that "real chance" and "commercial likelihood" means more than simply tipping the scales one way or the other. In other words, a case that would result in a conclusion that it was more likely than not that there exists a chance that the public benefit will outweigh the detriment is not enough.

12. I have previously commented adversely upon the lack of empirical evidence that might support the rather bald assertions of the applicant that there is a benefit to the public which outweighs the detriment. I have noted that there is a surprising omission of economic analysis and empirical data relied upon by the applicant.

13. The Tribunal had occasion to look at this question of evidence and materials in **Telstra Corporation Ltd (No 3)** [2007] ACompT 3. A question that arose in that case was whether Telstra could demonstrate that the regulator below had erred in the calculation of the weighted average cost of capital (WACC). Telstra relied upon the evidence of a Professor Bowman. In assessing the evidence of Professor Bowman, the Tribunal said this at [471] – [472]:

> *471 While Professor Bowman's indicated preference for adding one standard deviation to the best estimate of the WACC could be said by some to be conservative in allowing for estimation error and the asymmetric consequences of such error, Professor Bowman provided no empirical*

justification or support for his preferred approach, nor did he cite any literature that confirmed the acceptability or reasonableness of his advocacy for setting the WACC at a level one standard deviation above the Commission's best point estimate. To that extent we regard his report as lacking the convincing demonstration necessary to satisfy us that his method was reasonable in the current circumstances.

472 This is not to say that we reject the possibility that the approach advocated by Professor Bowman might be able usefully to inform the Tribunal in the future on the procedures necessary to provide a commercially, and socially, realistic estimated WACC value. But a more robust demonstration in terms of empirical justification and acceptability both commercially and in terms of rigorous academic support would be necessary. In the present matter, such a demonstration has not occurred and therefore we cannot be satisfied that the process advocated by Telstra to compensate for asymmetric errors (if they do in fact exist) in estimating WACC values is reasonable.

14. Earlier, the Tribunal examined one of the submissions made by Telstra in that case when it said at [450] as follows:

450 Telstra assumed that setting a WACC that was too low would deter investors. However, different investors will inevitably have different attitudes to risk. Setting the WACC below the true value may deter some investors and therefore result in less investment taking place in the short run, but it will not be likely to cause all investors to cease providing funds. Of course, the service provider might be forced to cut back on maintenance or service quality if it perceived the return on these investments to be too low, but no evidence was advanced by Telstra that consumers' valuations of different levels of quality was asymmetric. It is possible, at least in theory, that consumers might value lower quality, or less innovation, that might follow from less than efficient levels of investment no differently than they value the surplus lost from greater-than-efficient quality, or wasteful innovation, that could arise from too much investment.

15. The point to be made from this case is that mere assertion that there will be benefit to the public and that this benefit will outweigh the detriment that will be caused by the anti-competitive conduct is quite insufficient. Any application for authorisation under Part VII must be supported by robust empirical justification and rigorous analysis. In my view, this is lacking in the present application.

DATED: 20 October 2016

Owen Dixon Chambers West

W.T. HOUGHTON QC

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IN THE MATTER OF:

SOUTH AUSTRALIAN WASTE INDUSTRY NETWORK

and

COUNCIL SOLUTIONS REGIONAL AUTHORITY

and

THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

MEMORANDUM

1. I attach herewith a Memorandum of Advice suitable for distribution to the ACCC.

2. As discussed in conference with my instructing solicitor and client, if this matter is to proceed further to the Australian Competition Tribunal for review of the final Determination of the Commission, it will be necessary to retain the services of an economist to give expert evidence concerning relevant market or markets and the public benefits versus detriments of the proposed authorisation.

3. I should also note that if the matter proceeds to the Tribunal, it is highly likely that the applicant will also have the benefit of its own expert evidence which will, no doubt, contradict the evidence of our expert.

4. Care should be taken in retaining expert witnesses. Recourse should be had to the Federal Court Practice Direction regarding expert witnesses in that regard.

5. Should my instructors have any further queries, they should not hesitate to contact me.

DATED: 1 April 2016

W.T. HOUGHTON

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IN THE MATTER OF:

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THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

MEMORANDUM OF ADVICE

1. My instructing solicitors act for the South Australian Waste Industry Network ("**SAWIN**") which is an industry body that represents participants in the waste disposal, recycling and collection industry in South Australia. Council Solutions Regional Authority ("**Council Solutions**"), a consortium of councils established pursuant to the provisions of the **Local Government Act 1999 (SA)**, has received interim authorisation and a draft determination from the Australian Competition and Consumer Commission ("**the Commission**") authorising its proposal to jointly tender, negotiate and jointly contract for the service streams known as:

   (a) waste collection services;

   (b) receiving and processing of recyclables;

   (c) receiving and processing of organics; and

   (d) waste disposal services

   within the metropolitan Adelaide area. These service streams all relate to municipal solid waste.

2. SAWIN is opposed to the Commission granting final authorisation and my advice is sought as to whether there are grounds to review or appeal any final determination to the Australian Competition Tribunal ("**the Tribunal**") and the prospects of success of such a review or appeal. In my opinion, for the reasons that follow, there are grounds

to review any final determination to the Tribunal and the prospects of success of such an appeal are good.

3. By application dated 30 November 2015, Council Solutions made an application to the Commission pursuant to sections 88(1A) and 88(1) of the **Competition and Consumer Act 2010** ("**the CCA**") for an authorisation:

   (a) to make a contract or arrangement, or arrive at an understanding, a provision of which would or might be a cartel provision within the meaning of the CCA;

   (b) to give effect to a provision of a contract, arrangement or understanding that is or might be a cartel provision within the meaning of the CCA;

   (c) to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose or effect of substantially lessening competition within the meaning of the CCA; and

   (d) to give effect to a provision of a contract, arrangement or understanding which provision has the purpose or effect of substantially lessening competition within the meaning of the CCA.

4. Applications for authorisations are dealt with under Part VII of the CCA. Essentially, applicants for authorisation seek an immunity from the Commission in relation to certain anti-competitive provisions of the CCA. In this case, Council Solutions seeks an immunity against the provisions of the CCA which prevent, generally speaking, a cartel provision and conduct that has the effect of substantially lessening competition. If an authorisation is granted, Council Solutions is permitted to enter into a contract, arrangement or understanding or which give effect to a contract, arrangement or understanding even if they contain a cartel provision or are anti-competitive. The effect of the granting of an authorisation is that, whilst it remains in force, no party to the contract, arrangement, understanding or conduct will be in breach of Part IV of the CCA by entering into or giving effect to it (see section 88(1)(c)-(e) and section 88(6)).

5. Section 90 of the CCA provides that the Commission shall not grant an authorisation in respect of the cartel provision unless it is satisfied in all the circumstances that:

(a) the provision would result, or be likely to result, in a benefit to the public; and

(b) the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made or the provision was given effect to (see sub-section (5A)).

6. Similarly, the Commission must not grant an authorisation in respect of a provision of a contract, arrangement or understanding that may be a cartel provision unless it is satisfied that the provision is likely to result in a benefit to the public and that the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that will result from giving effect to the provision (sub-section (5B)).

7. The guiding principles relating to grants of authorisations can be summarised as follows:

(a) first, it is for the party seeking authorisation to satisfy the Commission (or, on appeal, the Tribunal) that benefit to the public is likely and that there will be sufficient public benefit to outweigh any likely anti-competitive detriment. It is up to the applicant to establish the factual basis for the authorisation applied for (see **Re Tooth & Co. Ltd** (1979) 39 FLR 1);

(b) secondly, since the likely benefits and detriments to be considered are those that would result from the proposed conduct, the Commission (or, on appeal, the Competition Tribunal) is required to consider the likely shape of the future both with and without the conduct in question (sometimes called the counterfactual); and

(c) thirdly, that task will generally entitle an understanding of the functioning of the relevant markets with and without the conduct for which authorisation is sought.

See, generally, **Re Queensland Stock & Station Agents Association** (1989) 87 ALR 321 at 338.

8. The test posited by section 90 has been described as the "future-with-and-without test". That is to say, the Commission should, in carrying out its task in weighing the relevant public benefits and detriments, compare the position which would, or would be likely to, exist in the future, based on a "real chance" if the authorisation were granted with the position if the authorisation was not granted (see **Re Queensland Independent Wholesalers Limited** (1995) 132 ALR 225 at 235 and 276).

9. There is an assumption that the provision which is sought to be given effect to or the contract, arrangement or understanding that is sought to be approved is, in itself, anti-competitive or would lead to a substantial lessening of competition. The Commission must come to a view that the arrangement in question has public benefits which outweigh the detriments. This concept of "public benefit" is not defined in the CCA. In cases concerning these provisions, however, the Tribunal has described this concept of public benefit as being of anything of benefit to the community generally (see, for instance, **Re 7-Eleven Stores Pty Ltd** [1994] ATPR 41-357).

10. This question of public benefit or detriment was looked at extensively in the Tribunal decision of **Re Qantas Airways Limited** [2004] ACompT 9; [2004] ATPR 42-027 where the Tribunal held at [156]:

> "Thus, for a benefit or detriment to be taken into account, we must be satisfied that there is a real chance, and not a mere possibility, of the benefit or detriment eventuating. It is not enough that the benefit or detriment is speculative or a theoretical possibility. There must be a commercial likelihood that the applicants will, following the implementation of the relevant agreements, act in a manner that delivers or brings about the public benefit or the lessening of competition giving rise to the public detriment. We must be satisfied that the benefit or detriment is such that it will, in a tangible and commercially practical way, be a consequence of the relevant agreements if carried into effect and must be sufficiently capable of exposition (but not necessarily quantitatively so) rather than "ephemeral or illusory", to use the words of the Tribunal in **Re Rural Traders Co-operative (WA) Ltd** (supra) at 263."

11. The Tribunal went on to deal with the meaning of the term "benefit to the public" as follows:

"163 The expression "benefit to the public" in s 90 of the Act has been interpreted broadly by the Tribunal, beginning with QCMA where the Tribunal said at 510 that public benefit included:

> *"anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress".*

164 In **Re Rural Traders Co-operative (WA) Ltd** (supra) the Tribunal said at 261-262:

> *"It is undesirable to attempt to fix in advance the limits of what the concept of 'benefit to the public' encompasses or to exclude, in advance, from its ambit any contribution to the legitimate aims pursued by society".*

165 More recently, the Tribunal in **Re 7-Eleven Stores Pty Ltd** (supra) expanded on the wide ambit of this definition and observed at 42,677:

> *"Plainly the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources. We bear in mind that (in the language of economics today) efficiency is a concept that is usually taken to encompass 'progress'; and that commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency".*"

12. The Tribunal then went on to consider the question of the quantification of benefits. The Tribunal commenced as follows:

"201 The Act does not require an applicant for authorisation to quantify, in precise terms, the benefits claimed to arise if authorisation is granted. However, there must be a factual basis for concluding that the public benefits are likely to result. In **Re Howard Smith**, the Tribunal said in relation to mergers at 392 that:

> *"Often it will be difficult to measure the public benefit from a merger in precise quantitative terms. At the time of a commission or tribunal hearing the claimed benefits of the merger are largely prospective. Indeed, the applicant companies themselves may not be able to*

> *estimate the likely commercial benefits accurately until after the merged venture has been in operation for some time. Apart from the commercial benefits there can be a variety of possible economic and social benefits and detriments flowing from a merger. Some of these may have to be expressed in qualitative rather than quantitative terms, because of the absence of suitable statistical information. Nevertheless, general statements about possible or likely benefits are not usually helpful to the tribunal in making its assessment if they cannot be backed up by some factual material." [Emphasis added]*

202 The Tribunal left open the question of the nature and extent of the factual material required to support the existence of a relevant public benefit. Over the decades which have passed since **Re Howard Smith** it has become apparent that the Tribunal needs to enunciate in somewhat greater detail the nature and extent of the factual material required to support the existence of a public benefit.

203 An accurate, objective quantification of public benefits is difficult, in part because benefits have to be estimated for some period in the future and so their magnitude becomes a matter not only of empirical estimation based on assumptions but also one of statistical likelihood. Data, assumptions and models can be, and indeed in this proceeding have been, hotly contested.

204 We consider that the nature of public benefits needs to be defined with some precision, a degree of precision which lies somewhere between quantification in numerical terms at one end of the spectrum and general statements about possible or likely benefits at the other end of the spectrum. Whilst the diverse and speculative nature of potential benefits makes it impossible to lay down any definitive test of the degree to which, or manner in which, benefits should be quantified, the following observations should be borne in mind by any party seeking to assert a likely benefit.

205 Benefits must be of substance and have durability. In **Re Rural Traders Co-operative (WA) Ltd** (supra) the Tribunal concluded at 262-263 that:

"the net or overall benefit which the tribunal finds would result from the proposed acquisition must be seen by the tribunal to be of substance as distinct from ephemeral or illusory."

206 Any estimates involved in benefit analysis should be robust and commercially realistic, in the sense of being both significant and tangible. The assumptions underlying their calculation must be spelled out in such a way that they can be tested and verified. Care must be taken to distinguish between one-off benefits and those of a more lasting nature. Appropriate weighting will be given to future benefits not achievable in any other less anti-competitive way, and so the options for achieving the claimed benefits must be explored and presented.

207 Whilst we recognise that public benefits are easy to assert, but are much harder to prove in advance of their creation, that does not deter us from demanding a high standard of commercial and social accountability in the estimates presented to us. Accordingly, we do not believe that there is anything to be gained by fanciful and speculative modelling of benefits where the underlying assumptions are not clearly spelled out, where the estimates have not been subject to rigorous sensitivity analysis, and where the estimating process is not wholly transparent. Further, we observe that point estimates of the estimated dollar value of benefits purport to give the estimates a level of specificity that cannot be justified in most circumstances.

208 All other things being equal, detailed quantification is the best option. However, quantification at all costs is not required by the Act, and has never been sought by the Tribunal. There are diminishing returns to the quantification exercise. Benefits should be quantified only to the extent that the exercise enlightens the Tribunal more than the alternative of qualitative explanation.

209 Where benefits cannot be quantified in monetary terms, they can still be claimed in qualitative terms. The authorisation test is, after all, a balancing exercise that requires judgment over a wide range of tangible and intangible factors. The final result will depend on the relative weight assigned to each of these factors."

13. I have set out these passages at some length because I consider the applicant in this case has failed to establish that the proposed benefits outweigh the proposed detriment. In order to demonstrate that point, it is necessary to set out in some detail the submissions of Council Solutions in its application and the conclusions reached by the Commission in its draft Determination.

14. Council Solutions is established pursuant to section 43 of the **Local Government Act 1999 (SA)**. That section allows two or more councils to establish a regional subsidiary to provide particular services or perform particular functions. The body has corporate status. In this case, the regional subsidiary is established by the cities of Adelaide, Charles Sturt, Marion, Tea Tree Gully, Port Adelaide Enfield and Onkaparinga. The City of Onkaparinga is not presently an applicant for authorisation because it has entered into its own arrangements which expire in 2021. I am instructed that it is considered possible or even likely that, in the future, Onkaparinga will join in the proposed conduct of the other councils which Council Solutions presently represent in the application for authorisation.

15. The authorisation is expressed to be in relation to a proposal by Council Solutions and five of its six constituent councils to jointly tender, negotiate and contract for the supply of:

    (a) waste collection services;

    (b) receiving and processing of recyclables;

    (c) receiving and processing of organics; and

    (d) waste disposal services.

16. In addition, the applicants also propose to make joint decisions regarding the ongoing administration of any resulting contracts. The term for which authorisation is being sought is for a total period of 17 years comprising a three year period for the joint procurement process, a standard market operating term (said to be, for waste collection, around 10 years; for processing recyclables and organics, around 10 years, and for waste disposal, around eight years) together with the capacity to accept a longer than standard market operating term of up to 14 years where the proposal is

linked to infrastructure investment, environmental initiatives or economic development.

17. The application attaches a Supporting Submission which makes a number of assertions. The first assertion is that the proposed conduct will result in no material public detriment. There is no evidence that might support that assertion. The public benefits which Council Solutions point to include the following:

    (a) transaction cost savings for participating councils and suppliers/operators;

    (b) improved purchasing power leading to lower costs for participating councils;

    (c) greater economies of scale and efficiency, underwriting investment in infrastructure;

    (d) environmental benefits from the increased efficient diversion of waste from landfill; and

    (e) improved incentive for new market entrants or expansion.

18. Each of these proposed public benefits are described in more detail in the Supporting Submission. There is very little empirical data or economic analysis that might be said to support these perceived public benefits. There are, however, a number of references to previous determinations of the Commission in respect of municipal or regional councils around Australia gaining authorisations for similar conduct.

19. However, these applications for authorisations turn on their own facts and I consider them to be of marginal relevance in giving support to the present application for authorisation. For instance, the length of the terms sought in the various authorisations vary widely, the service streams vary widely and the analysis of the particular markets diverges widely.

20. Council Solutions deals with its analysis of the market at pages 13-16 of its Supporting Submission. It submitted that the relevant area of competition was the collection of waste, disposal of waste and receiving and processing of recyclables and organics within the Adelaide metropolitan area. It submitted that the service streams comprised in the proposed tenders had different characteristics and were not

substitutable for one another. It identified three main sources of waste being municipal solid waste, commercial and industrial waste and construction and demolition waste.

21. The application dealt with the first source, municipal solid waste, as the second and third sources were predominantly managed by the private sector via separate contracts. It was submitted that even if a sole supplier or operator was awarded a contract in each service stream for all participating councils, that may not greatly alter the current market structure as many of the participating councils were currently independently with the same supplier or operator in each service stream.

22. There then followed a brief survey of competition in the respective service streams and the market participants. It should be noted that one opponent of the authorisation being granted, namely, the Waste and Recycling Association of South Australia ("**WRASA**") in its submission dated 21 March 2016 took issue with the empirical data relied upon by Council Solutions in its application at page 31. The variance in these figures is significant. I set out below a table which demonstrates the variances between the application by Council Solutions and the submission of WRASA.

	Council Solutions claimed market share	WRASA claimed market share for Council Solutions
Garbage	8.2%	34.61%
Recycling	1.3%	36.52%
Organics	4.6%	34.28%

23. Returning to the application of Council Solutions, at page 17 of its Supporting Submission, it set out its submissions on the counterfactual. If authorisation was not granted for the proposed conduct, it was submitted that each of the participating councils would continue to issue individual tenders for each of the service streams which would be likely to significantly diminish the ability of participating councils to realise costs savings, efficiencies and environmental benefits sought by the proposed conduct. It was submitted that these higher transaction costs and higher contract rates would have to be passed on to ratepayers; that there would be fewer suppliers and operators that would tender because of the additional administrative burden of five individual tenders and contracts for each service stream; that proposals for infrastructure upgrades would be delayed or lost and there would be a possible lack of

consistency between contract terms which would inhibit suppliers and operators to achieve economies of scale and reduction of operational risk.

24. As previously noted, Council Solutions did not point to any significant public detriment that might occur if the authorisation was granted. It did, however, at page 17 of its Supporting Submission point to a number of factors which were described as public benefits. These were set out as follows:

(a) a tender process would be public and allow for the maximum number of suppliers and operators to compete;

(b) the structure of the proposed tenders was that more than one supplier or operator might be successful in each of the four service streams and that participating councils retained the right to accept or reject particular tenders;

(c) there would be a pre-tender briefing with potential tenderers;

(d) suppliers would be free to compete for contracts with other consortia of Adelaide metropolitan councils and operators would be able to offer services to customers other than participating councils; and

(e) the joint tender was not limited to suppliers or operators who could service all five participating councils given that the tender process would allow for suppliers or operators to provide services to individual participating councils as well as to all participating councils or groups of participating councils which would not result in fewer organisations having the capability to participate.

25. Again, these assertions were not supported by reference to any factual material, empirical data or economic analysis.

26. SAWIN put in a submission in opposition to the application on 8 January 2016. It took issue with the assertions that tendering and negotiating costs would be saved and that larger scale operations would necessarily lower costs because transport was a significant component of the cost of providing services. It pointed to its concern that in the receiving and processing of recyclable and organics market, the awarding of one contract to one operator might lead to other operators leaving the industry.

27. Council Solutions responded to the submission of SAWIN on 19 January 2016. As to cost saving concerns, Council Solutions submitted that prices would be sought from suppliers for providing the particular service on a "whole of group" basis, a regional or geographic split or to individual participating councils. It was said that it was not the intention of the applicant to require only one service provider to service the five participating councils but to let the market determine the best aggregation of the volume offered.

28. On 11 February 2016, the Commission published its Draft Determination and interim authorisation. The Commission proposed to grant authorisation to Council Solutions for a term of 17 years to enable it and the participating councils to jointly tender for the supply of waste, recyclables and organics collection and processing services. It also granted interim authorisation to that proposed conduct. The Commission did not consider it necessary to precisely identify the relevant areas of competition but considered that the relevant areas were those for the provision of the service streams in the Adelaide metropolitan region. The Commission generally agreed with the submissions of Council Solutions as to the likely public benefits. It did not identify any particular public detriment but set out SAWIN's submission that there was a risk that one of the two operators in the processing of recyclables may leave the market as might one or more of the three main players in the organics market. The Commission concluded that the likely public benefits would outweigh the detriment including the detriment, if any, constituted by any lessening of competition. It also agreed with the applicant that the term of the authorisation be for 17 years.

29. Again, the Commission's general agreement with the assertions contained in the Supporting Submission of Council Solutions was lacking in factual material, empirical data or economic analysis that might have given support to those assertions.

30. Thereafter, between 16 February and 11 March 2016, a number of businesses (and others) lodged submissions opposing the Draft Determination and seeking a pre-determination conference. A pre-determination conference was held in Adelaide on 21 March 2016.

31. On 11 March 2016, SAWIN submitted a response to the Draft Determination. It criticised the lack of any detailed analysis of what constituted the market in the Draft

Determination. It submitted that the population and properties that were covered by the services provided by the East Waste Council Group should be removed from the market. That group undertook waste collection services on behalf of a number of its member councils which were no longer available for tender to third party service providers. It pointed out that there was already a council group which jointly tendered for waste collection services known as NAWMA Council Group which comprised three metropolitan councils. It pointed out that if Onkaparinga was to join the Council Solutions group in 2021 when its current contracts expired, that group would represent approximately 63% of the market for waste collection services in the Adelaide metropolitan area. It submitted that to approve an authorisation that put over 60% of the market into a joint tender could only have the effect of lessening competition. Because of the existence of other joint tendering groups, by 2021 only approximately 15% of the market would be available to tender to small and medium businesses that currently operate waste collection services in the market. In addition, SAWIN pointed to two barriers to entry that would increase dramatically being the increased cost of bank guarantees and the increased fleet that would be required to service the larger areas being tendered. This would have the affect of forcing smaller companies out of the bidding process or confining them to sub-contract roles. This would increase the administrative costs.

32. I have previously referred to the WRASA submission of 21 March 2016 and its assertion that the market analysis of Council Solutions was factually incorrect. It should also be noted that WRASA submitted a cost benefit and assessment of the proposal on 9 March 2016 which contained further useful empirical data. I mention this because it is this sort of data and analysis that would have been of assistance to the Commission in coming to its draft Determination.

33. In my view, there is a surprising omission of economic analysis and empirical data contained in the application for authorisation of Council Solutions and in the Draft Determination of the Commission. That, on its own, would be sufficient to overturn any final Determination on appeal to the Tribunal.

34. In due course, if the Commission issues a final Determination in line with the draft Determination, section 101 of the CCA provides that a person dissatisfied with a determination by the Commission can apply to the Tribunal for review of the

determination. If the Tribunal is satisfied that the person seeking a review has a sufficient interest, the Tribunal must proceed to review the determination. In my opinion, SAWIN is a person that has a sufficient interest it being a trade association representing the interests of 12 suppliers or operators in the waste collection market of the Adelaide metropolitan area.

35. Section 102 provides that the Tribunal may make a determination affirming, setting aside or varying the determination of the Commission and, for the purposes of the review, may perform all the functions and exercise all the powers of the Commission. The Tribunal is not limited to the material that was before the Commission. It proceeds by way of rehearing. It can obviously have regard to the material before the Commission and the reasons of the Commission but must reach its own conclusions on the material before it (see, for instance, **Re Herald and Weekly Times Limited** (1978) 17 ALR 281 at 295).

36. In summary, I would recommend that if the Commission's final Determination is in line with its draft Determination, SAWIN should appeal to the Tribunal. I think that there are sufficient grounds to proceed with a review in the Tribunal based upon the inadequate analysis of the market carried out by the Commission and the lack of any analysis or real analysis of the possible benefits and detriments that might be expected to arise by reason of the authorisation of the proposed conduct. I consider that the appeal should succeed for the reasons outlined above.

DATED: 1 April 2016

Owen Dixon Chambers West **W.T. HOUGHTON QC**

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