



Australian
Competition &
Consumer
Commission

Determination

Application for authorisation

lodged by

Council Solutions
Adelaide City Council
City of Charles Sturt
City of Marion
City of Tea Tree Gully
City of Port Adelaide Enfield

in respect of

joint procurement, negotiation and contracting of
waste collection
receipt and processing of recyclables
receipt and processing of organics
and waste disposal services

Date: 20 December 2016

Authorisation number: A91520

Commissioners: Sims
Rickard
Schaper
Cifuentes
Court
Featherston
Keogh

Summary

The ACCC has decided not to authorise Council Solutions, Adelaide City Council and the Cities of Charles Sturt, Marion, Tea Tree Gully and Port Adelaide Enfield to jointly procure waste collection services, receipt and processing of recyclables, receipt and processing of organics and waste disposal services.

The ACCC also revokes the interim authorisation granted to the Applicants on 11 February 2016.

In broad terms, the ACCC must not grant authorisation unless it is satisfied that the benefit to the public from the proposed conduct would outweigh the detriment to the public constituted by any lessening of competition.

On balance, the ACCC is not satisfied that the proposed conduct is likely to result in public benefits that would outweigh the likely detriments to the public constituted by the lessening of competition likely to arise from the proposed conduct.

On 30 November 2015, Council Solutions, on behalf of itself and Adelaide City Council and the Cities of Charles Sturt, Marion, Tea Tree Gully and Port Adelaide Enfield (the participating councils) (together, the Applicants) lodged application for authorisation A91520 with the ACCC, seeking authorisation to jointly procure, negotiate and contract for the supply of waste collection services, receipt and processing of recyclables, receipt and processing of organics, and waste disposal services (the service streams) for a period of 17 years.

On 11 February 2016, the ACCC issued a draft determination proposing to grant authorisation to the Applicants for 17 years and granted interim authorisation for the proposed conduct.

On 21 March 2016, a pre-decision conference was held at the request of a number of interested parties.

Following significant concerns raised by stakeholders in response to the ACCC's draft determination and at the pre-decision conference, the Applicants agreed to extend the statutory deadline for a final determination by the ACCC until 23 December 2016. During this additional time, the ACCC has consulted extensively with stakeholders including waste services suppliers, industry bodies, technical experts, Council Solutions, the individual participating councils and metropolitan Adelaide councils not participating in the arrangement.

The ACCC acknowledges the numerous submissions from small business operators, industry associations, the South Australian Small Business Commissioner and several Ministers raising concerns about the potential impact of the proposed conduct on competition, including in respect of small businesses. An extensive amount of information has been provided to the ACCC from both the Applicants and interested parties on a public and confidential basis. The ACCC has used this information to assess the likely public benefits and detriments from the proposed conduct, compared to the likely future without the proposed conduct where the participating councils individually procure their waste services.

It is common practice throughout Australia for groups of local councils to collaborate to jointly tender for the provision of waste services. The objective of such collaboration is to reduce transaction costs, pool resources and expertise and achieve economies of scale. The ACCC has previously authorised 27 arrangements of this type, concluding

that these were likely to result in a net public benefit through improved quality of services at lower cost to the councils participating in these arrangements.

Unlike the previous arrangements authorised by the ACCC, this application has faced a significant amount of opposition from interested parties. A key difference between this and previous matters is that the five participating councils propose to include all four service streams in a single tender using a Request for Proposal (RFP) process rather than the more traditional Request for Tender (RFT). The ACCC understands that, compared to the more prescriptive RFT, an RFP offers greater flexibility to the participating councils in the way that waste services might be offered and combined.

However, the ACCC recognises that this flexibility, and the combination of participating councils and service streams concerned, also introduces a level of uncertainty and complexity that has not previously been encountered by waste services suppliers. This has implications for competition in a number of ways which are discussed in the 'detriments' section.

The ACCC has concluded that the proposed conduct is likely to result in some public benefits in the form of:

- small improvements in efficient community education
- small improvements in efficiency in the supply of recyclables and organics processing
- small improvements in environmental outcomes.

On the other hand, the ACCC considers the proposed conduct is likely to result in some public detriment constituted by lessening of competition through:

- deterring or preventing some potential suppliers from tendering, or from submitting competitive bids
- reducing competition for the supply of waste services to participating councils in the longer term
- reducing competition for the supply of waste services to non-participating councils

On balance, having carefully reviewed and considered the large number of submissions received in this matter, the ACCC is not satisfied in all the circumstances that the proposed conduct is likely to result in public benefit that would outweigh public detriment constituted by the lessening of competition likely to result from the proposed conduct.

Given the ACCC determination to deny authorisation, the ACCC considers it appropriate to revoke the interim authorisation pursuant to s91(2AB) of the Act effective 11 January 2017.

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Abbreviations

ACCC	Australian Competition and Consumer Commission
Act	<i>Competition and Consumer Act 2010</i>
AWT	Alternative Waste Technologies
C&D	Construction and demolition waste
C&I	Commercial and industrial waste
Council Solutions	Council Solutions Regional Authority
East Waste	Eastern Waste Management Authority ¹
MGB	Mobile Garbage Bins
MRF	Materials Recovery Facility
MSW	Municipal Solid Waste
MUD	Multi-Unit Dwelling
NAWMA	Northern Adelaide Waste Management Authority ²
RFID	Radio-frequency identification
RFP	Request for Proposal
RFT	Request for Tender
SAWIN	South Australian Waste Industry Network
SRWRA	Southern Region Waste Resource Authority
SWL	Solid Waste Levy
WRASA	Waste and Recycling Association of South Australia

¹ East Waste is a Local Government Regional Subsidiary of the Adelaide Hills Council, City of Burnside, Campbelltown City Council, City of Norwood, Payneham & St Peters, City of Mitcham and the Corporation of the Town of Walkerville. See: <http://www.eastwaste.com.au/about-east-waste/>

² NAWMA is a Local Government Regional Subsidiary of the Cities of Salisbury and Playford and the Town of Gawler. See: <http://www.nawma.sa.gov.au/about/>

The application for authorisation

1. On 30 November 2015 Council Solutions, on behalf of itself, the Corporation of the City of Adelaide and the Cities of Charles Sturt, Marion, Tea Tree Gully and Port Adelaide Enfield (the **participating councils**) (together, the **Applicants**) lodged an application for authorisation (A91520) with the ACCC.
2. The Applicants are seeking authorisation to jointly procure, negotiate and contract for the supply of waste collection services, receipt and processing of recyclables, receipt and processing of organics and waste disposal services (together, the **service streams**) for a period of 17 years. Under the proposed arrangements no individual contract would be longer than 10 years.³
3. Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010 (the Act)*. The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Before making its final decision on an application for authorisation the ACCC must first issue a draft determination.⁴
4. On 11 February 2016 the ACCC issued a draft determination proposing to grant authorisation for 17 years.⁵ A pre-decision conference was requested by a number of parties following the draft determination and was held on 21 March 2016.
5. The Applicants also requested interim authorisation to enable them to engage in the proposed conduct while the ACCC considered the substantive application. On 11 February 2016 the ACCC granted interim authorisation for the proposed conduct, noting however that the Applicants will not enter into contracts for any service streams before the ACCC issues a final determination.

Conduct

6. Council Solutions, on behalf of itself and the participating councils, proposes to jointly tender, negotiate and contract for the supply of:
 - waste collection services
 - receiving and processing of recyclables

³ Council Solutions, Submission, 30 June 16, page 7.

⁴ Detailed information about the authorisation process is contained in the ACCC's Guide to Authorisation available on the ACCC's website www.accc.gov.au.

⁵ See ACCC decision dated 11 February 2016 available at <http://registers.accc.gov.au/content/index.php/itemId/1191251/fromItemId/278039>

- receiving and processing of organics
- waste disposal services
(the **proposed conduct**).⁶

7. In particular, the Applicants are seeking authorisation from the ACCC for:

- Council Solutions, on behalf of the participating councils, to jointly approach the market to conduct collaborative competitive tender processes for services within the service streams
- Council Solutions and the participating councils to evaluate the responses, in collaboration and individually
- Council Solutions to negotiate the contractual framework on behalf of the participating councils
- the participating councils to make their own decisions and individually enter into separate contracts on identical or near identical terms with each supplier/operator (the contracts for all services within the service streams will be on the same general terms and conditions)
- certain decisions regarding the ongoing administration and management of the resultant contracts to be made by the Applicants jointly or individually.⁷

8. The Applicants propose to conduct the tender processes for the service streams via a Request for Proposal (RFP).⁸ The RFP would specify the outputs required (including mandatory services) for each service stream. Further details about the proposed RFP process are set out at paragraph 22, below.

9. In their original application, the Applicants requested authorisation for 17 years comprising:

- a three year procurement process
- a standard market operating term for each service stream, and
- the capacity to accept a longer than standard market operating term of up to 14 years for a service stream, where a proposal is linked with infrastructure investment, environmental initiatives or economic development.⁹

10. In a further submission of 30 June 2016, the Applicants amended the scope of the conduct for which they sought authorisation to remove the ability to accept a longer term contract and to confirm that the Applicants propose to only approach the market for a standard operating term of up to a maximum of 10 years (including all extensions).¹⁰

⁶ Council Solutions, Supporting submission, 30 November 2015, page 4.

⁷ Council Solutions, Supporting submission, 30 November 2015, pages 5-6.

⁸ Council Solutions, Supporting submission, 30 November 2015, page 1.

⁹ Council Solutions, Supporting submission, 30 November 2015, page 9.

¹⁰ Council Solutions, Submission, 30 June 16, page 7.

11. Notwithstanding this amendment to the maximum standard operating term, the Applicants still seek authorisation for 17 years. They state that, following completion of the procurement process, the time requested for authorisation is to allow for:
- sufficient time between the award of the contract and commencement of services to allow for purchase and commissioning of necessary infrastructure
 - expiry of the participating councils' existing service agreements, with commencement of the contracts under the proposed conduct from 2020.¹¹

The Applicants

Council Solutions

12. Council Solutions Regional Authority (Council Solutions) is a regional subsidiary established in December 2012 in accordance with the *Local Government Act 1999* (SA). Its constituent councils are Adelaide City Council and the Cities of Charles Sturt, Marion, Onkaparinga, Salisbury and Tea Tree Gully.¹²
13. Council Solutions' primary purpose is to improve the financial sustainability of its constituent councils through collaborative strategic procurement, contract negotiation and management. This service can also be provided to other councils in South Australia.¹³
14. As a South Australian local government body, it is governed by the:
- *Local Government Act 1999*
 - *Local Government (Financial Management) Regulations 2011*
 - Council Solutions Regional Authority Charter 2012.¹⁴
15. Council Solutions is governed by a Board of Management comprising an independent Chairperson and the Chief Executive Officer of each constituent council.¹⁵

Participating councils

16. The participating councils are:

¹¹ Council Solutions, Submission, 30 June 16, page 8.

¹² The Cities of Onkaparinga and Salisbury are non-participating councils, which means that they do not form part of the proposed conduct and will not be involved in the Council Solutions tender process for which authorisation is sought.

¹³ Council Solutions, Supporting submission, 30 November 2015, page 4.

¹⁴ See for example Council Solutions Annual Report 2015/16, page 2.

¹⁵ <http://www.councilsolutions.sa.gov.au/>

- the Corporation of Adelaide City Council and the Cities of Tea Tree Gully, Charles Sturt and Marion (each being constituent members of Council Solutions) and
 - the City of Port Adelaide Enfield (which is not a constituent member of Council Solutions).
17. The participating councils are local government authorities and bodies corporate incorporated under the provisions of the *Local Government Act 1999 (SA)*. The functions of each participating council include providing services and facilities that benefit its area, its ratepayers and residents, and visitors to its area, in respect of waste collection and control or disposal services or facilities.¹⁶
18. Council Solutions and the participating councils submit that they will be subject to strict conflict of interest and confidentiality guidelines throughout the project.
19. The participating councils are situated within the Adelaide metropolitan area. A map showing the location of each of the participating councils is provided in Map 1, below.

Map 1: Location of the Participating Councils with the Metropolitan Adelaide area¹⁷



¹⁶ Section 6-8, *Local Government Act 1999 (SA)*.

¹⁷ Council Solutions, Supporting submission, 30 November 2015, page 5.

Overview of the proposed Council Solutions arrangement

20. The Applicants submit that the participating councils are committed to delivering best value to their ratepayers. They also appreciate that value is not limited to the concept of cost, but also includes quality of services, innovation, support to local industry and achieving each council's environmental goals.¹⁸

21. The Applicants consider that:

[t]he best way to carefully balance these considerations to produce the optimal result is through robust, transparent, competitive procurement processes. Where this is done collaboratively, there is a reduction in costs that each participating council bears for the process, there can be streamlining of specifications and mutual learning, and the greater opportunity can increase competition in the marketplace. In collaborating together, the participating councils can more fully realise best value.¹⁹

Request for Proposal

22. The Applicants intend to undertake procurement for the service streams via a RFP process.²⁰The Applicants submit that:

- an RFP allows for solution-based responses, allowing each tenderer to specify how best to deliver the minimum service elements²¹
- an RFP describes the scope of services required, including minimum service requirements and performance levels, and allows tenderers to propose the optimal approach to delivery to ensure the best outcomes²²
- there is no requirement for a 'conforming' bid prior to presenting innovation. The RFP will specify the outputs required (including mandatory services) for each service stream and then allow tenderers to submit how each proposes to meet these requirements using their creativity and innovation²³
- there will be no prescribed requirement in the RFP for service provision across multiple participating councils. There will be no requirement in the RFP for service provision across more than one service stream. Where tenderers choose to bid for multiple participating councils and/or service streams, they can advise if it is conditional on all being accepted²⁴

¹⁸ Council Solutions, Submission, 30 June 2016, page 22.

¹⁹ Council Solutions, Submission, 30 June 2016, page 22.

²⁰ Council Solutions, Submission, 30 June 2016, page 8.

²¹ Council Solutions, Submission, 30 June 2016, page 2.

²² Council Solutions, Submission, 30 June 2016, page 2.

²³ Council Solutions, Submission, 30 June 2016, page 2.

²⁴ See Council Solutions, Submission, 30 June 2016, page 2.

- the RFP process will be run in accordance with Council Solutions' Probity Plan, incorporating the Evaluation Plan which provides the framework and guidance for the tender evaluation process²⁵
- key aspects of industry consultation will include development and finalisation of the RFP document package, early notification of the upcoming release of the RFP to ensure the broadest awareness of the opportunity and industry briefing sessions during the RFP open period to explain the objectives, evaluation criteria, layout and structure of the RFP.²⁶

Evaluation

23. The Applicants submit that:

- the RFP evaluation criteria are anticipated to include (but are not limited to) service levels (quality), South Australian Industry Participation Policy (SAIPP)²⁷, environmental outcomes, whole of life cost and risk²⁸
- all tenders will be evaluated by Council Solutions, a working group consisting of representatives from each of the participating councils and other expert advisors as required. Council Solutions, on behalf of the working group, will recommend one or more operators or suppliers to the participating councils, for one or more service streams²⁹
- the participating councils will each consider offers to supply services to their jurisdiction and make an independent decision as to their preferred tenderer(s)
- a probity advisor will be engaged to attend all industry engagement meetings, briefings and presentations if required, major tender evaluation meetings, any negotiations and all other relevant meetings and will advise on probity matters for the duration of the tender processes.³⁰

Contract management

24. The Applicants anticipate that the day-to-day operational contract management will be undertaken by each participating council; however Council Solutions will have a role in ongoing contract management. The contract management role of Council Solutions is anticipated to be associated with aspects such as key

²⁵ Council Solutions, Supporting submission, 30 November 2015, page 6.

²⁶ Council Solutions, Submission, 30 June 2016, page 2.

²⁷ The South Australian Government's Industry Participation Policy (SAIPP) aims to ensure South Australian businesses are given full, fair and reasonable opportunity to be considered for contracts being undertaken in South Australia resulting from Government expenditure. See further: <http://www.industryadvocate.sa.gov.au/industry-participation-policy>.

²⁸ Council Solutions, Submission, 30 June 2016, page 80.

²⁹ Council Solutions, Supporting submission, 30 November 2015, page 6.

³⁰ Council Solutions, Supporting submission, 30 November 2015, page 6.

³⁰ Council Solutions, Supporting submission, 30 November 2015, page 6.

performance indicator (KPI) performance monitoring, resolution of any escalated issues and management of pricing reviews (if applicable).³¹

Service streams³²

Municipal waste collection

25. Waste collection services include kerbside, bulk bin, hard waste and parks and footpath collections and associated ancillary services (e.g. supply of mobile garbage bins³³). Each of the participating councils may require some or all of these services.
26. Kerbside collection includes collection of domestic waste, recyclables and organics in each of the respective council areas through utilisation of the three-bin system. Suppliers will be required to provide weekly and fortnightly services.
27. Bulk bin collection is the collection of waste from higher density multi-unit dwellings (MUD) where the use of the three-bin system is impractical and/or from council locations, such as depots and community centres. The frequency of this requirement would be at the nomination of the participating council.
28. Hard waste collection includes collection of larger household waste that cannot be captured within normal waste bins and will generally require manual collection. Suppliers will be required to provide this service at the participating councils' election. This service would be for domestic collection only.
29. Park and footpath collection includes the removal of waste and recyclables from public bins in parks, community spaces, public areas and on streets and footpaths. The frequency of this requirement would be at the nomination of the participating council.
30. The supply and maintenance of mobile garbage bins may also be required under waste collection services, which may include a requirement for radio-frequency identification (RFID) tags to be fitted with the supply of the mobile garbage bins. Alternatively, the supply and/or retrofitting of RFID tags may be required.
31. Council Solutions has confirmed that the provision of skip bins do not form part of the proposed conduct. Therefore the ACCC does not consider these services in its assessment.³⁴
32. It is anticipated that the initial requirement³⁵ for waste collection is as follows:

³¹ Council Solutions, Submission, 30 June 2016, page 85.

³² Information in this section is derived from Council Solutions & Ors Supporting Submission, 30 November 2015, pages 6-9.

³³ Mobile garbage bins are commonly known as 'wheelie bins'.

³⁴ Council Solutions, Submission, 30 June 2016, page 26.

³⁵ Under the proposed conduct, a participating council which does not anticipate requiring a service stream as an 'initial requirement' may elect in the future (during the period of

- kerbside collection: all participating councils
- bulk bin collection: all participating councils
- hard waste collection: all participating councils except the City of Marion
- park and footpath collection: the Cities of Charles Sturt and Tea Tree Gully
- supply and maintenance of mobile garbage bins: all participating councils.

Receipt and processing of recyclables

33. Recyclables include paper and cardboard, glass, plastics, aluminium and steel. Recyclables will be delivered to a materials recovery facility (MRF).
34. The receiving and processing of recyclables requires a single or multiple facilities to receive, screen and sort the recyclables according to material.
35. It is anticipated that the receipt and processing of recyclables will be an initial requirement of each of the participating councils.

Receiving and processing of organics

36. There are two main forms of organic waste: garden waste, such as grass clippings, pruning material, weeds and leaves, and food waste and scraps. Under a waste collection contract, organics will be delivered to a transfer or receiving facility.
37. The receiving and processing of organics requires a single or multiple transfer or receiving facilities to sort the organics to remove contaminants, compost to produce an end product (such as organic fertilizers, soil conditioners and mulches, renewable energy), and then market and sell the end product.
38. It is anticipated that the receipt and processing of organics will be an initial requirement of each of the participating councils except the City of Port Adelaide Enfield.

Waste disposal services

39. Waste disposal services comprises receiving, processing and/or disposal of residual kerbside waste, bulk bin waste, hard waste, waste from park and footpath collections, contaminated recyclables, contaminated organics, and organic waste delivered by residents under bulk drop off arrangements.
40. It is anticipated that waste disposal will be an initial requirement of each of the participating councils except the Cities of Marion and Port Adelaide Enfield.

authorisation) to be involved in a collaborative market approach for the service stream with the participating councils.

Consultation

41. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process. The submissions by the Applicants and interested parties are considered as part of the ACCC's assessment set out below.
42. The ACCC invited submissions from a range of interested parties potentially affected by this application, including waste and recycling service providers, industry associations and neighbouring councils.
43. Prior to the draft determination, only one public submission was received – from the South Australian Waste Industry Network (SAWIN).
44. The ACCC invited further submissions in response to its draft determination. A significant number of interested parties provided submissions.
45. A pre-decision conference was requested³⁶ and held in Adelaide on 21 March 2016. Attendees included representatives of Council Solutions and participating councils, waste services suppliers operators, industry associations and the South Australian Small Business Commissioner. Issues discussed at the conference substantially were reflected in post-draft determination written submissions from interested parties.
46. A copy of the conference record is available on the ACCC's public register.³⁷
47. The Applicants provided public submissions responding to issues raised by interested parties in June and November 2016.
48. The concerns raised by interested parties, and the response to these by Council Solutions, are addressed in further detail throughout this determination.
49. Following the draft determination, the ACCC also conducted a series of targeted market inquiries with key stakeholders, adjoining councils and the participating councils on a confidential basis. Information obtained in these market inquiries has informed the ACCC's assessment of this application.
50. In total, the ACCC received 35 public submissions from interested parties. Of the 35 public submissions:
 - Seven submissions were received from small to medium operators in the South Australian waste management sector. These submissions provided information and arguments in opposition to the proposed conduct.
 - Four submissions in similar terms were received from small to medium operators in the South Australian waste management sector. These

³⁶ Section 90A of the Act provides for a conference to be held to afford applicants and interested parties the opportunity to make oral submissions to the ACCC about the draft determination.

³⁷ <http://registers.acc.gov.au/content/index.phtml/itemId/1191251/fromItemId/278039>

submissions generally contended that the proposed conduct would have a detrimental effect on competition and will not deliver any compensating benefit.

- 24 submissions were received from third parties such as members of parliament, industry associations and small business advocates. Of these, all but two submissions raised concerns about the proposed conduct.

51. Copies of all public submissions may be obtained from the ACCC's website: www.accc.gov.au/authorisationsregister.
52. The ACCC also received a number of confidential submissions. The concerns raised in these submissions were consistent with public submissions opposing the proposed conduct. The issues, in broad terms, were raised with the Applicants and the Applicants' responses have been taken into account by the ACCC in its determination.

Previous authorisations

53. Each application for authorisation must be determined individually based upon its own facts and circumstances. The ACCC has previously authorised 27 arrangements involving joint tendering and contracting of waste service streams. These arrangements involved groups of councils in metropolitan and regional areas of New South Wales, Victoria, Queensland, Western Australia and Tasmania.
54. Seven of these previous authorisations involved multiple service streams. Of these, six involved a combination of collection and processing while the other one involved a combination of processing and disposal.
55. On a number of measures the application by Council Solutions is comparable with other authorisations. Specifically, of the previous 27 authorisations:
 - 13 applications involved five or more councils
 - eight applications were authorised for 17 years or longer
 - 15 applications covered a comparable (or greater) population
 - one waste collection application involved comparable (or greater) tonnages
 - seven recyclables processing matters involved comparable (or greater) tonnages
 - four organics processing matters involved comparable (or greater) tonnages
 - six waste disposal matters involved comparable (or greater) tonnages.
56. However, the Council Solutions application is the first one considered by the ACCC involving four service streams. The significant size, breadth and complexity of the conduct sought to be authorised (an RFP for four service streams across five councils) was a concern raised in many of the submissions opposing the application. Interested parties also distinguished the proposed conduct from previous ACCC authorisations in that the participating councils have limited common borders.

ACCC assessment

57. The ACCC's assessment of the proposed conduct is carried out in accordance with the relevant net public benefit tests³⁸ contained in the Act.
58. In broad terms, the ACCC may grant authorisation if it is satisfied that the likely benefit to the public from the proposed conduct would outweigh the likely detriment to the public constituted by any lessening of competition.
59. In its assessment of the application, the ACCC has taken into account:
 - the application and submissions received from the Applicants and interested parties³⁹
 - other relevant information available to the ACCC, including information from consideration of previous matters
 - the likely future with and without the proposed conduct that is the subject of the authorisation⁴⁰
 - the relevant areas of competition likely to be affected by the conduct
 - the authorisation period requested.

Relevant areas of competition

Applicants' submission

60. The Applicants submit that the relevant area of competition likely to be affected is that for the collection of waste, disposal of waste, and receiving and processing of recyclables and organics within the Adelaide metropolitan area.⁴¹
61. The Applicants note that the service streams have different characteristics and are not substitutable for one another, such that they may represent different areas of competition.⁴²
62. The Applicants submit that there are three main source sectors for waste, being Municipal Solid Waste (MSW)⁴³, Commercial & Industrial (C&I) waste and C&D (Construction & Demolition) waste. The Applicants submit that C&I and C&D

³⁸ Subsections 90(5A), 90(5B), 90(6) and 90(7).

³⁹ Please see the ACCC's Public Register for more details, including a list of parties consulted.

⁴⁰ For more discussion see paragraphs 5.20-5.23 of the ACCC's Authorisation Guidelines.

⁴¹ Council Solutions, Supporting Submission, 30 November 2015, page 13.

⁴² Council Solutions, Supporting Submission, 30 November 2015, page 13.

⁴³ MSW is municipal solid waste generated from domestic (household) premises and council activities such as street sweeping, litter and street tree lopping, and may also include waste dropped off at recycling centres, transfer stations and construction waste from owner/occupier renovations.

source sectors are predominately managed by the private sector via separate contracts with generators of those waste types.⁴⁴

63. The Applicants submit that the relevant market for:
- waste collection includes only municipal waste collection⁴⁵
 - the receiving and processing of recyclables and waste disposal includes municipal sources as well as C&I and C&D sources, given that operators have broader opportunities to secure source material than municipal sources
 - the receiving and processing of organics includes municipal sources as well as C&I sources, given that organics operators have broader opportunities to secure source material than municipal sources.⁴⁶
64. The Applicants note submissions from interested parties that member councils of East Waste should be excluded from the consideration of the participating councils' market share (see paragraphs 66-70 below). The Applicants submit that member councils of East Waste have shown a willingness to approach the market outside of the group and could exit if they found they would receive better value from the market by tendering on an individual council basis.⁴⁷

Interested parties' submissions

65. SAWIN submits that Council Solutions' application and the ACCC's draft determination lacked detailed analysis of what constitutes the market.⁴⁸
66. WRASA submits that sectors used to define the general waste, recyclables and organics markets must exclude C&I and C&D, as the materials collected and processed vary and the infrastructure requirement to service these sectors vary.⁴⁹
67. In defining the relevant areas of competition, the ACCC received submissions on the significance of the East Waste Management Authority (East Waste). East Waste is a Local Government Regional Subsidiary of the Adelaide Hills Council, City of Burnside, Campbelltown City Council, City of Norwood, Payneham & St Peters, City of Mitcham and the Corporation of the Town of Walkerville.
68. WRASA submits that while East Waste may tender for recyclables processing or organics processing its waste collection services are not open for tender. WRASA submits that the exit costs for an East Waste member council to switch providers amounts to two years of waste charges, providing a very high barrier to exit.⁵⁰
69. SAWIN and Senator John Williams submit that the member councils of East Waste should be excluded from the consideration of the relevant areas of

⁴⁴ Council Solutions, Supporting Submission, 30 November 2015, page 13.

⁴⁵ Council Solutions, Supporting Submission, 30 November 2015, page 14.

⁴⁶ Council Solutions, Submission, 30 June 2016, pages 61-63.

⁴⁷ Council Solutions, Submission, 14 November 2016, page 4.

⁴⁸ See submissions by SAWIN dated 11 March 2016 and 4 April 2016.

⁴⁹ WRASA, Submission, 16 September 2016, page 25.

⁵⁰ WRASA, Submission, 11 April 2016, page 2.

competition as this group does not competitively tender for waste collection and the apparent high cost of exit makes it prohibitive for a member council to leave.⁵¹

70. The South Australian Small Business Commissioner submits that East Waste accounts for around 15% of the metropolitan waste management market, meaning that if the current Application is granted, more than half of metro Adelaide's metropolitan waste management requirements would be annexed from competition.⁵²

ACCC view

71. The ACCC does not consider it necessary to precisely define the relevant areas of competition in assessing the proposed conduct.
72. On the demand side, the ACCC considers that councils are not likely to regard services supplied under the different waste streams (waste collection, organics processing, recyclables processing, waste disposal) as close substitutes. Opportunities for councils to substitute one type of waste collection service (kerbside collection, bulk bin collection, hard waste collection, or park and footpath collection) for another quickly and without significant switching costs in response to a change in price are likely to be limited.
73. On the supply side, the ACCC considers that it is unlikely that a supplier of services under one waste stream could profitably switch to supply a service under another waste stream quickly and without significant investment in response to a change in price. However, it is likely that a supplier of a waste processing service (either recyclables or organics) or a supplier of waste disposal services could profitably switch between municipal and non-municipal sources of waste quickly and without significant investment in response to a change in price.
74. Overall, the ACCC considers that the relevant areas of competition in terms of waste collection services are likely to be limited to municipal waste, while the other relevant waste services streams are likely to include non-municipal sources of waste.
75. The ACCC considers that the relevant areas of competition for assessing the effects of the proposed conduct include:
- market(s) for the supply of the following **municipal waste collection services** in metropolitan Adelaide:
 - kerbside collection of domestic waste, recyclables and organics
 - hard waste collection from households
 - bulk bin collection from businesses and higher density, multi-unit dwellings and

⁵¹ See submission by SAWIN dated 11 March 2016 and submission by Senator John Williams dated 24 February 2016.

⁵² South Australian Small Business Commissioner, Submission, 1 March 2016, page 4.

- park and footpath collection of waste and recyclables from bins in parks, community spaces and public areas
 - market(s) for the supply of **processing services for recyclables** in metropolitan Adelaide, including receiving and processing of paper, cardboard, glass, plastics, aluminium and steel from municipal and non-municipal sources
 - market(s) for the supply of **organic waste processing** services in metropolitan Adelaide, including receiving and composting of garden and food waste from municipal and non-municipal sources
 - market(s) for the supply of **waste disposal services** in metropolitan Adelaide, including for the following types of waste:
 - residual kerbside waste
 - bulk bin waste
 - hard waste
 - waste from park and public area collections
 - contaminated recyclables
 - contaminated organics
 - waste delivered by residents under bulk drop off arrangements.
76. The ACCC also has had regard to related areas of competition that may be affected by the conduct, including:
- the supply and maintenance of mobile garbage bins
 - the supply of collection vehicles
 - the supply of composted organic products (e.g. organic fertilisers, soil conditioners, mulches, renewable energy).

Future with and without

Applicants' submission

77. The Applicants submit that if the ACCC does not grant authorisation for the proposed conduct, each of the participating councils will issue individual tenders for each of the service streams and individually evaluate and negotiate the resulting contracts.⁵³
78. The Applicants also submit that the outcome of individual tender processes by each council may be similar to the outcomes described for the proposed conduct; that is, there may be single or multiple suppliers or operators providing the

⁵³ Council Solutions, Supporting submission, 30 November 2015, page 17.

services to each of the participating councils but without the claimed public benefits.⁵⁴

Interested parties' submissions

79. Interested parties' submissions broadly assume that the future without the conduct is the status quo; that is, each of the participating councils will issue individual tenders for each of the service streams, or across service streams, and individually evaluate and negotiate the resulting contracts.

ACCC view

80. To assist in its assessment of the proposed conduct against the authorisation tests, the ACCC compares the benefits and detriments likely to arise in the future with the conduct for which authorisation is sought against those in the future without the conduct the subject of the authorisation.

81. The ACCC considers that in the future with the proposed conduct:

- the Applicants will conduct a joint tender process, in the form of an RFP, allowing waste services suppliers to tender to supply any combination of service streams to any combination of participating councils, subject to the initial requirements of each participating council
- Council Solutions will play a central role in coordinating the tender process
- participating councils will be actively involved in assessing tender bids and deciding which outcome best meets their requirements.

82. The ACCC considers that in the future without the proposed conduct the participating councils are likely to:

- individually procure waste services
- tender for individual service streams or include multiple service streams in a single tender
- either use a Request for Tender or a Request for Proposal.

83. Where the participating councils individually procure waste services, the timing of each competitive tendering process is likely to vary because existing contracts are due to expire at different times. Participating councils would be free to offer and award contracts of a length of their choice.

⁵⁴ Council Solutions, Supporting submission, 30 November 2015, page 17.

Public benefits

84. The Act does not define what constitutes a public benefit and the ACCC adopts a broad approach. This is consistent with the Tribunal which has stated that the term should be given its widest possible meaning, and includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.⁵⁵

85. Having regard to information including the submissions of the Applicants and interested parties, the ACCC has considered whether the proposed conduct is likely to result in the following public benefits:

- transaction cost savings
- improved efficiencies through better contract management and community education
- facilitating improved efficiency in the supply of waste services
- stimulation of competition
- improved environmental outcomes.

Transaction cost savings

Applicants' submissions

86. The Applicants submit that tendering is a detailed process that involves considerable time and resources for councils, including the preparation of tender documents, advertising of tenders, receipt and evaluation of tenders and negotiation with the successful tenderers, followed by contract preparation, execution and ongoing administration.⁵⁶
87. The Applicants submit that collaborative tendering and contract processes would be significantly more efficient by eliminating the duplication of work by each of the participating councils.⁵⁷
88. Council Solutions advises that while a category expert from each participating council would assess the qualitative aspects, a central procurement expert from Council Solutions would assess the mandatory elements (such as insurances, licenses and accreditations and referees) and that this would result in transaction cost savings.⁵⁸

⁵⁵ *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

⁵⁶ Council Solutions, Supporting Submission, 30 November 2015, page 10.

⁵⁷ Council Solutions, Supporting Submission, 30 November 2015, page 10.

⁵⁸ Council Solutions, Submission, 30 June 2016, page 11.

89. Council Solutions would also coordinate the assessment of specialist criteria (such as workplace health and safety and financial capacity) by a small team from the participating councils or external advisors. Quantitative elements (such as pricing proposals) would be assessed by Council Solutions. By centralising the tender evaluations, there would be reduced duplication of these evaluations which further demonstrates transaction cost savings.⁵⁹
90. Council Solutions would also take the lead on negotiations on behalf of all participating councils and manage the final contract documentation.⁶⁰
91. The Applicants note suppliers would be able to submit a proposal for a service aggregation of their choosing and therefore, would only need to prepare servicing and pricing proposals for that service aggregation. Even if they chose to submit multiple aggregation options, the multiplication of the above criteria (i.e. proposals for each council running separate tenders) would still be eliminated, demonstrating clear transaction cost savings.⁶¹
92. The Applicants submit that councils are not profit making entities and cost savings would benefit ratepayers and enable resources to be used in the provision of other services to benefit their residents.⁶²

Interested parties' submissions

93. J.J. Richards & Sons anticipates that under the proposed conduct individual councils will still have input into all aspects of the tender process and will need to involve the same amount of internal and external resources. In addition to the meetings that would normally be held within each council, there will need to be combined meetings to resolve issues. Therefore, J.J. Richards & Sons considers it likely that transaction costs will increase overall.⁶³
94. WRASA submits that:
 - the costs of tendering and ongoing contract management grow exponentially with the number of councils working together
 - councils will have to be part of a difficult process where individual interests can go against the group or sub-group benefit
 - the complexity of the proposed conduct is likely to result in more transaction costs for tenderers and councils rather than reducing costs.⁶⁴
95. WRASA submits that Council Solutions has not specified any consideration of the true administrative cost of administering the proposed conduct, including the RFP process and Council Solutions' administrative levy.⁶⁵

⁵⁹ Council Solutions, Supporting Submission, 30 November 2015, page 11.

⁶⁰ Council Solutions, Supporting Submission, 30 November 2015, page 11.

⁶¹ Council Solutions, Supporting Submission, 30 November 2015, page 10.

⁶² Council Solutions, Supporting Submission, 30 November 2015, page 10.

⁶³ J.J. Richards, Submission, 10 March 2016, page 3.

⁶⁴ See WRASA, Submission, 21 March 2016, pages 24-27 and WRASA, Submission, 16 September 2016, page 6.

96. WRASA submits that Council Solutions should develop a procurement plan prior to seeking authorisation from the ACCC. WRASA considers that contract specification is often the most complex part of a procurement project, particularly where there is more than one council involved. WRASA further submits that development of a contract specification would allow each participating council to ensure that the contract contents are in its own best interest prior to the contract being released to the market.⁶⁶
97. WRASA further submits that the resources required for each council under the proposed conduct would be greater than when tendering via the standard tender process. WRASA submits that each Council would still perform due diligence at each step but given the added significant burden of agreeing or compromising on tender and contract terms with all other participating councils, none of which are guaranteed to participate as any council can opt out at any time. If any participating councils opted out, the remaining councils would have to recommence their assessment process as tendered pricing is generally conditional upon which councils are ultimately contracted.⁶⁷
98. SAWIN submits that if any of the service streams were to be sub-contracted, there would be a doubling of administrative costs at the sub-contractor level that would be passed on to the successful tenderer and ultimately to the relevant council.⁶⁸
99. Peats Soils queries the purported efficiency gains of the proposed conduct, as the specific requirements of the five councils are likely to be different. In these circumstances, even if a single tenderer is awarded the contract for a service stream, they would need to check that they are meeting each of the councils' individual sets of requirements. In effect, the supplier would be required to do six tenders rather than five (that is, to Council Solutions as well as the five individual councils).⁶⁹
100. An interested party who wishes to remain anonymous states that it would not be able to compete with larger rivals, and would be forced into a sub-contractor role along with other small businesses. Administrative costs will rise as a result of the second layer of management required to manage the sub-contracts.⁷⁰
101. The Australian Small Business and Family Enterprise Ombudsman submits that the Applicants have not provided certainty around the detail of whether specific elements such as hard waste or footpath collection will be separable portions of the RFP. In addition, the Ombudsman submits that the Applicants' suggestion of

⁶⁵ WRASA, Submission, 19 August 2016, page 4. See also WRASA, Submission, 16 September 2016, page 41.

⁶⁶ WRASA, Submission, 25 October 2016, pages 3-6.

⁶⁷ WRASA, Submission, 16 September 2016, page 21. See also WRASA, Submission, 11 April 2016, page 4.

⁶⁹ A91520 – Council Solutions & Ors – Pre-decision conference record, page 5.

⁷⁰ Anonymous, Submission, 22 February 2016.

further tender processes for separable portions appears to undermine the purported transaction cost savings from the proposed conduct.⁷¹

ACCC view

102. In general, the ACCC considers transaction cost savings can result from collaborative procurement by councils by facilitating the reduction or elimination of unnecessary duplication of costs incurred by councils and/or suppliers to conduct or participate in individual tender processes.
103. In this case, the ACCC considers that the proposed conduct is likely to reduce or remove some duplication by participating councils of tender-related tasks such as the preparation of tender documents, advertising of tenders, information sessions for prospective bidders, and some aspects of contract preparation.
104. However, the transaction cost savings for participating councils are likely to be significantly offset by the additional costs required to coordinate internally within the group of councils.
105. The ACCC considers that, all things being equal, the larger the number of councils and service streams in a collective procurement arrangement and the greater the complexity of the tender process, the greater the need for coordination within the bargaining group and the higher the coordination costs. In this case, under the proposed conduct, the tender process is complex, and each council will remain significantly involved in the tender evaluation and assessment process, and will have to liaise with each other council in addition to Council Solutions when selecting service providers.
106. This means that under the proposed conduct, the potential for the participating councils to realise (net) transaction cost savings will be limited because:
 - The participating councils will have representatives on the procurement working group (which is headed by Council Solutions) responsible for the design and implementation of the procurement process. This will involve coordination to determine the characteristics, objectives and preferences of each council.
 - Category experts from each participating council will assess the qualitative aspects of the proposals.
 - The councils will be actively involved in the decision making process and performing their own due diligence to be satisfied that a preferred bidder offers better contract outcomes than the council could achieve by not participating in the proposed conduct.
 - Each participating council will retain primary responsibility for the negotiation of contracts with preferred suppliers and the day-to-day operational contract management.
107. The ACCC also considers that the assessment of offers under the proposed conduct to determine which proposal is best for each council, and subsequent

⁷¹ ASBFEO, Submission, 21 October 2016, pages 1-2.

negotiation of contracts, is likely to be significantly more complicated and involve more coordination costs in situations where offers are contingent on other councils' acceptance of the offer.

108. The feedback from industry participants suggests that the impact of the proposed conduct on transaction costs borne by tenderers will vary.
109. On the one hand, the ACCC notes significant concerns raised by some interested parties that the proposed conduct would involve a high degree of complexity for tenderers because the number of councils and service streams involved significantly increases the permutations and pricing offers which suppliers have to consider, necessitating multiple alternative bids. Against this, the ACCC has received confidential submissions indicating that there will be some transaction cost savings for operators who intend to tender across multiple service streams and/or multiple councils, and have the internal resources and capability to participate in large complex procurement processes.
110. On balance, the ACCC considers that the complexity and uncertainty of the RFP will, at least initially, increase transaction costs for some suppliers, and decrease those costs for others.
111. Taking all of these considerations into account, on balance, the ACCC is not persuaded there will be a net public benefit as a result of the proposed conduct in the form of transaction cost savings.

Improved efficiencies through information sharing and coordination

112. The ACCC has considered two potential public benefits associated with efficiencies arising from information sharing and coordination facilitated by Council Solutions:
 - better contract management
 - improved community education.

Applicants' submission

113. Under the proposed conduct Council Solutions would have a role in the ongoing management of contracts and the Applicants submit this provides the opportunity for councils to collaborate and coordinate to develop innovative solutions to common contractual issues.
114. The Applicants submit that Council Solutions would establish a working group comprising of each participating council and Council Solutions (the Contract Working Group). The Contract Working Group would participate in joint activities (including the sharing of information) and decisions which may include, but not be limited to, assessment of supplier performance, pricing reviews, exercising

contract options, contamination management, customer service and community education.⁷²

115. The Applicants submit that there is a real chance that large scale changes in regulation could occur over the life of the contracts. By having one central body to manage contracts at a high level, this would reduce the cost of legal and specialist advice, and ensure consistency for contractors in light of any regulatory changes across the participating councils.⁷³
116. The Applicants also submit that robust contract management, appropriate contract terms and extension periods, and a collaborative approach with contractors regarding innovation, would facilitate the adoption of innovations developed through the life of the contract.⁷⁴
117. For example, if the market is unable to provide a waste-to-energy solution at the time of the RFP and yet provision of that solution will become available in the near future, the participating councils may elect to award a shorter term contract (or a shorter initial term with extension options) to allow an earlier market approach to investigate the change in the market.⁷⁵
118. In terms of community education, the Applicants submit it is generally the case that the participating councils and contracted waste providers work together to deliver community education programs.⁷⁶
119. The Applicants submit that the proposed conduct would allow for a unified strategy and education program to maximise the improvement in waste diversion rates in the shortest time. Through the proposed conduct, delivery of community education could be centralised through Council Solutions, which would reduce the duplication by the contracted waste provider in having to potentially deliver different education programs for each participating council. Where the education program proposed requires the employment of an education officer, this resource could be shared between the participating councils.⁷⁷
120. The Applicants also submit that the proposed conduct would allow the participating councils to target education programs to those areas of their communities that are not achieving the desired waste diversion rates. Where a larger scale education program is proposed by a respondent, there is also the opportunity to receive funding from Green Industries South Australia (formerly Zero Waste) to support the implementation which could see more innovative education programs, such as school visits to educate children, better take-up of benchtop food waste bins to improve diversion of food waste into the organics stream from landfill and any other proposal received from the market.⁷⁸

⁷² Council Solutions, Supporting submission, 30 November 2015, page 6.

⁷³ Council Solutions, Submission 14 November 2016, page 2.

⁷⁴ Council Solutions, Submission 14 November 2016, page 10.

⁷⁵ Council Solutions, Submission 14 November 2016, page 10.

⁷⁶ Council Solutions, Submission 14 November 2016, page 2.

⁷⁷ Council Solutions, Submission 14 November 2016, page 2.

⁷⁸ Council Solutions, Submission 14 November 2016, page 2.

Interested parties' submissions

121. In general, interested parties submit that the proposed conduct will not result in efficiencies or may even result in inefficiencies. Specifically:

- J.J. Richards & Sons submits that the establishment of working groups from various councils will add significantly to the cost of administering the contracts. For example, it is likely that meetings would need to be convened between the various participating councils to establish common ground prior to meetings with a contractor.⁷⁹
- Professor Barry Burgan, representing Economic Research Consultants, in a submission provided by WRASA, submits:
 - the monitoring and control costs of a much bigger contract will be higher, over the whole life of the contract, because of the big differences between the councils (density, distances, industrial structure, socio-demographics) and also because of the risks involved in a large contract
 - such a large and diverse tender will require significant controls to be implemented to manage agency costs
 - monitoring and control costs under the proposed conduct will be higher over the whole life of the contract, because of the complexities involved with the differences between the councils (density, distances, industrial structure, socio-demographics)⁸⁰
- WRASA submits that the use of procurement staff as part of the contract management process would complicate and stifle the process.⁸¹
- An interested party has submitted, on a confidential basis, the proposed conduct is unlikely to result in improved educational programs due to the geographic spread of the participating councils. Additionally, as the councils have differing bin lid colours, this will mean that brochures and flyers will require different print runs. The interested party also submitted that councils are already able to share information on educational strategies.

ACCC view

122. The ACCC notes that, while Council Solutions will have a role in the ongoing contract management, day-to-day operational contract management would be undertaken by each participating council. Any efficiency benefit would therefore be based on broader contract management issues common to each council's individual contractual arrangement.

⁷⁹ J.J. Richards, Submission, 10 March 2016, page 2.

⁸⁰ Burgan, Barry 'A Cost Benefit Assessment of the Council Solutions Proposal for single tendering of multiple councils in Adelaide' 11 March 2016, pages 5-6 and 8.

⁸¹ WRASA, Submission, 16 September 2016, page 41.

123. The ACCC accepts that the proposed conduct is likely to result in increased information sharing and collaboration between participating councils and Council Solutions, and that this in turn may enhance the Applicants' ability to negotiate with service providers during the life of their contracts.
124. However, compared to the future without, where each council would manage its contract independently, in the future with the proposed conduct each council would be likely to incur additional coordination and administration costs through the establishment and implementation of the Contract Working Group, and the need to coordinate responses to broader contract management issues with up to six parties (five councils plus Council Solutions). The ACCC considers that this increased cost of coordination is likely to offset any benefits gained through collaboration and coordination.
125. In relation to the potential for improved efficiency through the joint delivery of community education programs, the ACCC accepts that the proposed conduct would be likely to allow the participating councils to improve efficiency in the development and implementation of community education programs. This would result from the aggregation of education program requirements and resources, together with the coordinating role to be played by Council Solutions, which is likely to facilitate improvements in both the design and delivery of community education programs across participating councils. However, the ACCC notes that the participating councils can and do undertake their own community education programs. Therefore, while the ACCC accepts this public benefit, it considers that any efficiencies that would be likely to be gained when compared to the future where each council undertakes its own community engagement programs are likely to be small.
126. Overall, the ACCC considers that:
- No public benefit is likely in respect of better contract management as increased costs of coordination are likely to offset any efficiencies in coordination.
 - Some small public benefits are likely to result from efficiencies in delivering community education programs.

Facilitating improved efficiency in the supply of waste services

127. The ACCC has considered the potential for the proposed conduct to result in public benefits by facilitating suppliers' realisation of efficiency improvements through aggregating waste volumes and collection points under a single tender process, for example by:
- making it easier for suppliers to achieve a minimum efficient scale of operation and/or access available scale economies; and/or
 - reducing uncertainty and risk associated with investment in upgraded or new facilities and technologies.
128. The ACCC has separately considered the likely efficiencies for each waste stream.

Municipal waste collection

Applicants' submissions

129. The Applicants submit that a successful supplier will have a greater area to service and a greater number of residences, resulting in efficiencies and economies of scale in the delivery of the services.
130. The Applicants submit that where the participating councils share common boundaries there are geographical synergies, and even where there is no common boundary, the close proximity of all the participating councils provides the potential to share trucks and employees across the council areas to cover for truck breakdowns.⁸² Council Solutions engaged an independent industry expert in late 2014 / early 2015 to assess the joint procurement opportunities for municipal kerbside collections. The report highlighted a number of areas where service efficiencies could be gained that would lead to a reduction in cost, including the ability to cross boundaries, 'nearest vehicle' response to missed bins and consolidation of the fleet in waste collection.⁸³
131. The Applicants submit that the common boundaries are 10.4%. When the larger coastal areas of the Cities of Port Adelaide Enfield, Charles Sturt and Marion are also taken into consideration (i.e. boundaries that cannot be geographically shared), the common boundaries increase to 13.17%. However, Council Solutions does not view the percentage of common boundaries as being particularly relevant to the assessment of whether there will be greater economies of scale and efficiency. Even where the participating councils do not share common boundaries, there are geographic efficiencies in their relative cluster. Through the RFP, respondents will be able to present the amalgamation that provides the best value and efficiency.⁸⁴
132. The Applicants cite the joint procurement by Maitland City Council & Ors (A91483)⁸⁵ as providing a number of examples of how economies of scale in waste collection (and supply of mobile garbage bins) might be realised. In that case:
- the successful supplier proposed to use one spare vehicle to service all three councils in case of breakdown or grounding for service, which was a saving of two trucks compared to the scenario where the councils procured their waste collection services individually
 - the contract allows for trucks to cross council borders when needed to complete routes or missed bins, saving both the need for additional trucks to meet this requirement and emissions by requiring trucks to be dispatched from the depot
 - the three councils also agreed to have uniform logos on all bins, allowing the manufacturer to produce all the bins in one run and the contractor to

⁸² Council Solutions, Supporting submission, 30 November 2016, page 11.

⁸³ Council Solutions, Submission, 30 June 2016, page 11.

⁸⁴ Council Solutions, Submission, 30 June 2016, page 13.

⁸⁵ <http://registers.acc.gov.au/content/index.phtml/itemId/1185314/fromItemId/278039>

stockpile the bins in one area, meaning that when bins need to be replaced, the contractor can do so in one run without concerns about mix ups.⁸⁶

133. The Applicants consider there is a real chance that these types of outcomes will also occur under the proposed conduct.
134. The Applicants also identify waste collection from higher density multi-unit dwellings (MUDs) as an area where improvements could be achieved under the proposed conduct. Higher density multi-unit dwellings require larger bulk bins that are collected by rear lift trucks instead of side lift trucks (used for the kerbside, three bin collections).⁸⁷
135. The Applicants submit:
 - when taken in isolation, each participating council that operates services to MUDs is only servicing a small number making the service relatively inefficient as there are insufficient services within each participating council area individually to create whole runs for collection vehicles. This inefficiency makes the service relatively expensive to provide on a unit basis compared with kerbside services.
 - by working in partnership with other participating councils, it will be possible for services to be undertaken on a more efficient basis by creating whole runs filled for each collection vehicle. It has already been seen on an individual council level that increasing the number of MUDs serviced decreases the unit cost which can be expected to continue where there is collaboration.
 - the two primary participating councils requiring this service, Adelaide City Council and the City of Charles Sturt, are also geographically aligned, which feeds into the expected efficiencies.
 - medium to high density residential development is increasing and it can be expected the number of MUDs being serviced will also increase. Some MUDs are currently being serviced by kerbside bins as it is currently not viable for the council to provide a bulk bin service due to the high cost. As the number of MUDs increases across the participating councils and the cost of bulk bin services decreases, participating councils may look to negotiate with their residents a change in service provision to provide a more efficient service.⁸⁸

Interested parties' submissions

136. Interested parties generally disputed the Applicants' claim that the proposed conduct would result in efficiencies in waste collection. Specifically:
 - SAWIN submits that:⁸⁹

⁸⁶ Council Solutions, Submission, 14 November 2016, page 3.

⁸⁷ Council Solutions, Submission, 23 November 2016, page 2.

⁸⁸ Council Solutions, Submission, 23 November 2016, pages 2-3.

⁸⁹ SAWIN, Submission, 8 January 2016, pages 2 and 6.

- tenders and costing can only be done on a site-by-site basis, following a standard tendering process and that changing this process to involve more councils can be onerous
- transport is a significant component of the cost of providing waste collection services and it can be expected that the higher costs of servicing some areas will have to be factored into the prices offered to the group of participating councils
- there will be not be any improvement in economic efficiency as a result of the proposed conduct, but rather the opposite.
- WRASA submits that:⁹⁰
 - the optimal contract size for waste collection is about 20,000 to 50,000 households with a three bin service and that fixed costs are covered at 20,000 households
 - beyond 20,000 households all costs are direct variable costs which rise proportionately as the distance travelled rises with the key cost saver being distance to the disposal point.
 - the participating councils share just 6.62% of their boundaries, which means there are fewer opportunities for economies of scale compared with current arrangements.
 - councils are invoiced large amounts for disposal and processing of waste and so trucks cannot be used to collect from bins from more than one council in one load as waste liabilities for each council would be unable to be quantified
 - the geographic spread of the participating councils provides low potential for reducing transport to disposal costs and, crucially, it permanently disturbs the potential for effective state planning of waste infrastructure and the ability for neighbouring councils to cluster for transport efficiency and public benefit
 - a report from Professor Brian Dollery analysing the impact of council mergers in Queensland and New South Wales on waste services over the long term, which concludes that ‘no economies of scale were observed for either roads or domestic waste collection and removal expenditure’.⁹¹

⁹⁰ See WRASA, Submission, 11 April 2016, pages 5 and 9 and WRASA, Submission, 21 March 2016, page 18.

⁹¹ See Dollery, Brian *‘Do mergers make for better councils? The evidence is against ‘bigger is better’ for local government’*, 5 April 2016, and WRASA, Submission, 16 September 2016, page 28.

- J.J. Richards & Sons submits that each of the participating councils is of sufficient size in its own right to achieve economies of scale for collection services.⁹²
- Hatch Waste and Recycling notes that the participating councils have differing topographies and distances to travel to respective disposal sites, which means that pricing uniformity across the participating councils is unrealistic.⁹³

ACCC view

137. The ACCC notes WRASA's submission that the optimal size of a municipal waste collection service is between 20,000 and 50,000 households. The table below provided by Council Solutions sets out the number of premises entitled to receive a municipal waste collection service in each participating council.⁹⁴

Participating council	Population		Service-entitled premises	Rateable properties	
	People	% of all Metro. councils	Premises	Properties	% of all Metro. councils
Corporation of the City of Adelaide	22,690	1.8%	10,917	22,735	3.88%
City of Charles Sturt	112,714	8.94%	54,289	54,067	9.23%
City of Marion	88,292	7.00%	40,986	41,011	7.00%
City of Tea Tree Gully	98,575	7.82%	38,492	39,393	6.73%
City of Port Adelaide Enfield	122,205	9.69%	58,298	59,579	10.18%
Subtotal (Participating councils)	444,476	35.25%	202,982	216,785	37.03%
Total (Adelaide Metro councils)	1,261,033	-		585,473	-

138. The ACCC observes that four of the five participating councils individually have more than 20,000 service entitled premises and three have less than 50,000 service entitled premises.

139. The ACCC also notes that waste collection services are not confined to kerbside bin collections, but include bulk bin collection from businesses and higher density multi-unit dwellings, hard waste collection from households and park and footpath collection.

⁹² J.J. Richards, Submission, 10 March 2016, page 3.

⁹³ Hatch Waste and Recycling, Submission, 26 February 2016, page 1.

⁹⁴ Council Solutions, Supporting Submission, 30 November 2015, page 20.

140. In the submissions and information provided by the Applicants and interested parties there are a range of views put forward as to the optimal number of dwellings for efficient waste collection. The Applicants submit that with the proposed conduct a successful supplier would have a greater number of residences without artificial council boundaries, resulting in improved efficiencies and economies of scale. Industry representatives, however, submit that four out of the five councils are already of an optimal size for waste collection and that increasing serviceable residences beyond 50,000 will add to complexity and not improve efficiencies.
141. The ACCC recognises that the proposed conduct provides an opportunity for all types of waste collection services to reduce costs by reconfiguring operations across adjacent participating councils. In particular, compared to the situation where the participating councils conduct individual tenders, the ACCC considers that the proposed conduct is likely to enable waste collectors servicing the participating councils to reduce costs by:
- helping them to achieve or maintain efficient scale to the extent that an individual council is not fully able to do so in the future without the proposed conduct
 - providing opportunity for the design of more efficient collection routes across participating councils
 - reducing the number of spare trucks needed to cover repairs and breakdowns across participating councils.
142. However, the ACCC considers that the opportunity for such cost savings is likely to be confined to participating councils that are geographically proximate and therefore would not extend to the City of Marion, since it is located about 12-15 km to the south of the closest participating councils (being Adelaide City Council and the City of Charles Sturt). Also, such cost savings depend upon participating councils being prepared to share services across council boundaries, which may involve complexities in identifying costs relevant to their respective ratepayers.
143. Therefore, while the ACCC recognises the potential for aggregation of the participating councils to result in improved efficiencies in the supply of waste collection services, it considers that such benefits would be unlikely in this case for the group of councils and services concerned. This is particularly so given the geographic spread of the councils, the small degree of shared boundaries and the evidence presented as to the optimal size for efficient waste collection services. Accordingly, on balance, the ACCC is not persuaded that the proposed conduct is likely to result in a net public benefit in the form of improved efficiencies for the supply of waste collection services.

Recyclables receipt and processing

Applicants' submissions

144. The Applicants submit the receiving and processing of recyclables requires a single or multiple Material Recovery Facilities (MRFs) to receive, screen and sort recyclables according to material. The MRF operator then on-sells each type of recyclable and those that cannot be sold are disposed to landfill. Traditionally councils have paid for the receiving and sorting of recyclables, however recent

market trends have led to some local governments entering into arrangements where they receive payment for their recyclables.⁹⁵

145. The Applicants submit that kerbside collected recyclables in metropolitan Adelaide are currently processed by SKM, Visy or the NAWMA facility.⁹⁶
146. The Applicants submit that the aggregated recyclables volume of the participating councils was 33,580 tonnes in the 2013-14 financial year, representing 13 per cent of recyclables from all Adelaide metropolitan councils and 1.3 per cent of recyclables from all Adelaide metropolitan sources.⁹⁷

Participating council	Recyclables- Estimated quantity ⁹⁸	
	Tonnes	% of all Metro sectors
Corporation of the City of Adelaide	1,849	0.07%
City of Charles Sturt	10,276	0.40%
City of Marion	7,918	0.31%
City of Tea Tree Gully	8,468	0.33%
City of Port Adelaide Enfield	5,068	0.20%
Subtotal (Participating councils)	33,580	1.30%
Total (Adelaide Metro councils)	258,087	
All Metro. sectors	2,591,000	

147. The Applicants submit that the proposed conduct may lead to lower gate fees (being the fees charged to receive recyclables) through economies of scale and that the processing of combined volumes would result in efficiencies and economies of scale in the delivery of processing services, lowering the cost per tonne.⁹⁹
148. They also note that while there are several relatively small MRFs in Adelaide currently, joint procurement by the participating councils has the potential to encourage investment to build or upgrade to modern MRF infrastructure.¹⁰⁰

⁹⁵ Council Solutions, Supporting submission, 30 November 2015, page 7.

⁹⁶ Council Solutions, Supporting submission, 30 November 2015, page 16.

⁹⁷ Council Solutions, Further submission, 14 November 2016, page 7.

⁹⁸ See Council Solutions, Supporting submission, 30 November 2015, page 20: 'All metropolitan sources' includes Municipal, Commercial & Industrial and Construction & Demolition. Recyclables excludes Fly Ash and Clay, Fines, Rubble & Soil.

⁹⁹ Council Solutions, Supporting submission, 30 November 2015, page 11.

¹⁰⁰ Council Solutions, Supporting submission, 30 November 2015, page 13.

149. The Applicants therefore consider there is a real chance that the proposed conduct would achieve economies of scale, delivering economic and environmental benefits back to the participating councils for the benefit of their ratepayers.

Interested parties' submissions

150. WRASA submits that the recyclables market is at its worst in decades and that it is a poor time for councils to contract for lengthy periods as processors will be offering low returns. Locking in long term arrangements at low returns would provide no incentive for investment in new infrastructure as has been seen with SKM's decision to transport half of Adelaide's material to contractors in Melbourne for processing, rather than setting up local infrastructure to process those volumes locally.¹⁰¹
151. SAWIN submits that if all recyclable volumes for the participating councils were to be awarded to SKM (which does not have local receiving and processing facilities) there is a risk that Visy would have insufficient volumes to maintain its facility or at least maintain its current offering. If this occurs, there would be only one competitor in the recyclables market, with no investment in infrastructure locally.¹⁰²

ACCC view

152. The ACCC recognises that the aggregation of recyclables volumes can, in certain circumstances, improve efficiency by helping the successful supplier or suppliers of recycling services to achieve or maintain efficient scale. Aggregation can facilitate lower average costs and reduce the risk associated with investment in new recyclables processing technology or facilities.
153. The ACCC accepts that the ongoing viable operation of a MRF depends on conditions in the end markets for the various recyclables. On this point, the ACCC notes the submissions by WRASA and SAWIN that the recycling sector is currently in a downward trend because of the low cost of commodities such as glass, which is currently limiting incentives for investment in upgrading existing or developing new recycling facilities in Adelaide.
154. In this case, based on the information available to the ACCC, the estimated volume of recyclables from the participating councils ranges from 30,000-40,000 tonnes which represents a significant proportion tonnes required to sustain a medium sized facility in Adelaide. However, the successful supplier or suppliers of recycling services to the participating councils would also be likely to have access to substantial non-municipal volumes of recyclables as well as other municipal volumes if it has contracts to supply councils that do not participate in the Council Solutions arrangement. The extent of public benefit therefore reflects the extent to which these alternative sources of recyclables are less preferred, more difficult or more costly to access compared to the participating council volumes. Accordingly, the ACCC concludes that the aggregation of participating council recyclable volumes under the proposed conduct is likely to result in some minimal public

¹⁰¹ WRASA, Submission, 13 March 2016, page 36.

¹⁰² SAWIN, Submission, 8 January 2016, page 3.

benefits in the form of improved efficiencies in the receipt and processing of recyclables.

Organics receipt and processing

Applicants' submissions

155. The Applicants submit kerbside collected organics are delivered to a transfer or receiving facility where they are sorted to remove contaminants and composted to produce an end product (such as renewable energy, organic fertilisers, soil conditioners and mulches). Organics processors then market and sell their own end products.
156. The Applicants submit that kerbside collected organics in metropolitan Adelaide are currently processed by Peats Soil & Garden Supplies, Jeffries or Integrated Waste Services.
157. The Applicants submit that the proposed conduct combines the organic waste volume of four of the five participating councils.¹⁰³ This totalled 37,628 tonnes in the 2013-14 financial year, representing 29.8 per cent of organic waste from all Adelaide metropolitan councils and 3.8 per cent of organic waste from all Adelaide metropolitan sectors.¹⁰⁴

Participating council	Organics- Estimated quantity	
	Tonnes	% of all Metro sectors
Corporation of the City of Adelaide	474	0.05%
City of Charles Sturt	15,444	1.55%
City of Marion	11,474	1.15%
City of Tea Tree Gully	10,236	1.03%
Subtotal (Participating councils)	37,628	3.8%
Total (Adelaide Metro councils)	126,121	
All Metro. sectors	997,000	

158. The Applicants submit that the processing of combined volumes of organics will result in efficiencies and economies of scale in provision of processing services, lowering the cost per tonne.

¹⁰³ City of Adelaide Port Enfield does not intend to initially procure organics processing services under the proposed conduct.

¹⁰⁴ Council Solutions, Further submission, 14 November 2016, page 7.

159. They also submit that the proposed conduct may provide an opportunity to support industry development through investment in processing infrastructure.¹⁰⁵
160. The Applicants note the introduction of Veolia's mechanical biological treatment (MBT) facility at Woodlawn (servicing waste from the Sydney region) as an example of innovation in organics processing. The introduction of the MBT plant was facilitated by the amalgamation of the South Sydney Regional Organisation of Councils.¹⁰⁶

Interested parties' submissions

161. WRASA submits that Adelaide's organics processing companies are among Australia's most innovative and successful drivers of increased waste diversion. WRASA notes however that at least one such company is at high risk of downscaling or closing. WRASA also submits that the City of Marion was one of the first councils nationally to implement organics collections and innovation can only be implemented through lower risk contracts.¹⁰⁷
162. WRASA submits that the example cited by the Applicants in support of the proposed conduct (determination A91483 for joint tendering for organics collection and processing in Maitland)¹⁰⁸ actually contradicts the Applicants' assertion that larger tenders attract new entrants. WRASA submits that the Maitland organics tender initially attracted only two non-conforming tenders. Contractors then recommended separate tenders that did not lean towards 'whole of group' solutions or requirements for contractors to partner and commit to a risky long term arrangement with another party. The councils re-tendered for organics processing and received six conforming tenders with the successful tenderer not one of the initial two. Councils have re-tendered for organics collection only separately and had four tenderers attend the briefing as opposed to zero tenders submitted previously.¹⁰⁹
163. SAWIN states it is possible that the concentration of tonnes into one facility could incentivise investment in that facility, but there is a real question whether this benefit outweighs the risk to competition in this space if there is an award of all tonnes to one competitor. SAWIN further states that a lack of available volumes remaining in the organics market would also be likely to act as a deterrent to investment by other potential entrants.¹¹⁰

ACCC view

164. The ACCC recognises that the aggregation of organics volumes can, in certain circumstances, improve efficiency by helping the successful supplier or suppliers of organic services to achieve or maintain efficient scale. Aggregation can facilitate lower average costs and reduce the risk associated with investment in new organics processing technology or facilities.

¹⁰⁵ Council Solutions, Supporting submission, 30 November 2015, pages 11-13.

¹⁰⁶ Council Solutions, Submission, 14 November 2016, page 3; Annexure A.

¹⁰⁷ WRASA, Submission, 21 March 2016, page 38.

¹⁰⁸ <http://registers.acc.gov.au/content/index.phtml/itemId/1185314/fromItemId/278039>

¹⁰⁹ WRASA, Submission, 21 March 2016, page 23; WRASA Submission, 11 April 2016, page 12.

¹¹⁰ SAWIN, Submission, 8 January 2016, page 3.

165. In this case, based on information available to the ACCC, the estimated volume of organics from the participating councils in this service stream is around 37,000 tonnes which represents a significant proportion of the estimated tonnes required to sustain a medium sized facility in Adelaide. However, the successful supplier or suppliers of organic services to the participating councils would also be likely to have access to substantial non-municipal volumes of organics as well as other municipal volumes if it has contracts to supply councils that do not participate in the Council Solutions arrangement. The extent of public benefit therefore reflects the extent to which these alternative sources of organics are less preferred, more difficult or more costly to access compared to the participating council volumes. Accordingly, while the aggregation of the participating councils' organics volumes has the potential to improve efficiency, the ACCC considers the size of any public benefit from facilitating improved efficiency in the supply of recyclables processing is likely to be minimal.
166. Accordingly, the ACCC concludes that the aggregation of participating council organics volumes under the proposed conduct is likely to result in some minimal public benefit in the form of improved efficiencies in the receipt and processing of organics.

Waste disposal

Applicants' submissions

167. The Applicants submit that landfill locations available for municipal residual waste in metropolitan Adelaide also service the Commercial and Industrial and Construction and Demolition sectors.
168. The Applicants submit that the proposed conduct combines the residual waste volume of three of the five participating councils.¹¹¹ Based on the information provided by Council Solutions, this totalled 46,123 tonnes in the 2013-14 financial year, representing 17.6 per cent of residual waste from all Adelaide metropolitan councils and 5 per cent of residual waste from all Adelaide metropolitan sectors.¹¹²

¹¹¹ City of Marion will continue to use the landfill operated by its regional subsidiary, the Southern Region Waste Resource Authority (SRWRA). City of Adelaide Port Enfield currently uses Integrated Waste Services.

¹¹² Council Solutions, Further submission dated 14 November 2016, page 7.

Participating council	Residual waste - Estimated quantity	
	Tonnes	% of all Metro sectors
Corporation of the City of Adelaide	4,253	0.47%
City of Charles Sturt	23,396	2.56%
City of Tea Tree Gully	18,474	2.02%
Subtotal (Participating councils)	46,123	5%
Total (Adelaide Metro councils)	262,228	
All Metro. sectors	914,000	

169. The Applicants submit that their combined volume of material may provide the guaranteed volume for an operator to offer an innovative, environmentally positive and commercially beneficial solution that utilises Alternative Waste Technology (AWT) or waste to energy.¹¹³
170. The Applicants provided documents indicating that the South Australian Government is taking steps to increase diversion of waste away from landfill in coming years. One of the priorities for action in the Government's South Australian Waste Strategy 2015-2020 (SA Waste Strategy 2015-2020) is to achieve 70% diversion of waste away from landfill by 2020 in metropolitan Adelaide.¹¹⁴ This document also identifies as a priority 'supporting long term waste infrastructure planning and develop[ing] innovative funding mechanisms to help stimulate investment in waste infrastructure, including energy from waste'.¹¹⁵
171. The Applicants also note that the South Australian Government has announced that as part of its State Budget 2016/17, the Solid Waste Levy (SWL) payable by municipal councils will be increased from \$62 per tonne on 1 July 2016 to \$76 on 1 September 2016, \$87 in 2017-18, \$100 in 2018-19 and \$103 in 2019-20.¹¹⁶
172. The Applicants submit that the Southern Sydney Regional Organisation of Councils has demonstrated how economies of scale can drive investment in infrastructure. Through its procurement,¹¹⁷ representing 120,000 tonnes per

¹¹³ Council Solutions, Supporting submission, 30 November 2015, page 12.

¹¹⁴ South Australia's Waste Strategy 2015-2020, Office of Green Industries SA, 2015, page 32.

¹¹⁵ South Australia's Waste Strategy 2015-2020, Office of Green Industries SA, 2015, page 36.

¹¹⁶ <http://www.premier.sa.gov.au/index.php/tom-koutsantonis-news-releases/792-state-budget-2016-17-solid-waste-reform-to-grow-jobs-and-increase-recycling>

¹¹⁷ See A91143 & A91167 Southern Sydney Regional Organisation of Councils (SSROC), 22 October 2009.

annum over 10 years, Veolia Environment Services has been able to build a Mechanical Biological Treatment (MBT) facility to service the Sydney market.¹¹⁸

173. The Northern Sydney Regional Organisation of Councils (NSROC) then leveraged off the establishment of the MBT facility to drive further infrastructure investment. Through its procurement¹¹⁹ NSROC also entered into a 10 year contract with Veolia which will see 280,000 tonnes of waste diverted from landfill and converted into compost and fuel using MBT technology.
174. The Applicants consider that economies of scale under the proposed conduct are likely to leverage similar spending in infrastructure in the South Australian market.¹²⁰
175. The Applicants also cite a report by the Australian Council of Recycling into the economic effects of the South Australian solid waste levy, which outlines that MBT is on the threshold of being viable at \$100 per tonne and energy from waste at \$133 per tonne.¹²¹

Interested parties' submissions

176. There are currently six landfill locations for municipal residual waste in metropolitan Adelaide.¹²²
177. WRASA agrees that aggregated tonnes can underpin a new facility but considers that best results are achieved by separating any individual service for their own tender process; identifying councils that cluster; minimising administrative layers between councils; and involving all councils impacted by the AWT decision.¹²³
178. WRASA states that Phoenix Energy's waste to energy proposal in Kwinana, Western Australia is based on securing 260,000 tonnes per annum and they seek terms of 20 years plus to allow economical recovery of capital. WRASA submits that:
 - the introduction of waste to energy infrastructure requires state government support and funding, and state LGA support
 - a waste to energy facility would require more volume than the three participating councils could supply to be financially viable
 - restricting waste disposal contracts to ten years 'makes it impossible for a new alternate waste facility provider to, for example, provide the most economical price to councils and the ratepayers.'¹²⁴

¹¹⁸ <http://www.resourcerecovery.biz/news/veolia-breaks-soil-woodlawn-mbt>

¹¹⁹ See A91401 Northern Sydney Regional Organisation of Councils (NSROC), 16 December 2013.

¹²⁰ Council Solutions, Submission, 14 November 2016, page 4.

¹²¹ Deloitte Access Economics, July 2015, available at <http://www.acor.org.au/publications-policies--submissions.html>

¹²² WRASA, Adelaide Market Review, March 2016, page 6.

¹²³ Submission by WRASA, Submission, 21 March 2016, page 20.

¹²⁴ WRASA, Submission, 28 September 2016, section 3.3.2.

179. SAWIN submits that its group members are accustomed to evaluating the potential viability of waste to energy in the markets in which they operate, and SAWIN's assessment is that it is very unlikely that Council Solutions' proposal would encourage or incentivise investment in waste to energy technology in Adelaide. SAWIN did not provide further evidence in support of this proposition.¹²⁵
180. Phoenix Energy¹²⁶ submits that:
- the minimum volume required to establish a waste to energy facility in Adelaide is 150,000 tonnes per annum
 - typically a single council will not have sufficient waste to justify a waste to energy infrastructure development project. Hence, it is common for councils to collaborate (as they have done for years in relation to procurement of value-for-money waste services).
 - in general, councils typically control over 50 per cent of the waste suitable for processing through a waste to energy plant. The remaining volumes under non-municipal control have higher risk of contaminants and other non-acceptable waste.
 - municipal sources are more likely to be able to guarantee a minimum volume of waste, significantly longer tenures and more consistent waste compositions, which are more attractive to project financiers
 - councils are seen by financiers as a better credit risk than private waste haulers and contract for long tenures. Private haulers can generally only contract for up to a maximum of five years, which is insufficient to underpin a bankable waste to energy project.¹²⁷
181. WRASA and the Hon. Christopher Pyne MP submit that elements of the South Australian Government draft Waste and Resource Infrastructure Plan may be compromised as the proposed conduct has the potential to lead to an inefficient geographic spread of waste management services.¹²⁸
182. The Office of Green Industries noted that, without being provided with detailed specifications of the proposed procurement, it is not in a position to assess if the proposed joint procurement would compromise the waste and resource recovery infrastructure plan or not.¹²⁹

¹²⁵ SAWIN, Submission, 8 January 2016, page 2.

¹²⁶ Phoenix Energy is currently developing Australia's first large scale waste to energy facility in Kwinana, Western Australia. This project is underpinned by 20 year waste supply agreements with both the Rivers Region Council (representing six local government authorities) and the City of Kwinana. Under these agreements, the local government authorities will supply residential (post-recycling) waste to the plant, which is designed to receive and process up to 400,000 tonnes of residual waste per annum. Further information is available at: <http://www.phoenixenergy.com.au/wp-content/uploads/2016/06/BGC-Contracting-chosen-for-Kwinana-Waste-to-Energy-30062016-.pdf>

¹²⁷ Phoenix Energy, Submission, 7 November 2016, page 1.

¹²⁸ WRASA, Submission, 25 October 2016, pages 7-9; the Hon. Christopher Pyne MP, Submission, 31 October 2016, page 1.

¹²⁹ Office of Green Industries South Australia, Submission, 21 November 2016, page 2.

ACCC view

183. The ACCC considers that in both the future with and the future without the proposed conduct, the South Australian Government is likely to prioritise greater diversion of waste away from landfill in metropolitan Adelaide, including by significantly raising levies paid by municipal councils to access waste disposal services. In both futures, councils are likely to face strong incentives to consider alternatives to landfill. In particular, the ACCC considers that the budgeted changes to levies paid by councils for waste disposal increase the cost of landfill disposal to a level where AWT and waste to energy technology are likely to start becoming a viable alternative to the landfill options employed by councils currently.
184. The ACCC understands that the minimum amount of residual waste required to sustain a viable waste to energy facility in Adelaide is about 150,000 tonnes per year.¹³⁰
185. The ACCC notes that initially only three of the five participating councils are seeking to procure waste disposal services as part of the Council Solutions arrangement, and their 46,000 tonnes of residual waste per annum represents around one-third of the minimum volume required to sustain a facility of this type in Adelaide.¹³¹ Therefore, while the proposed conduct may reduce some uncertainty and risk for a new entrant, it is unlikely that a waste to energy supplier would invest in infrastructure on the basis of the Council Solutions tender alone.
186. The ACCC notes there are currently two other groupings of councils in metropolitan Adelaide (East Waste and Northern Adelaide Waste Management Authority (NAWMA)) which, in recent years, have each individually produced around 50,000 tonnes of residual waste per year.¹³² It is possible that by bringing together the residual waste volume of the three participating councils, a waste to energy supplier would be able to negotiate with three parties (Council Solutions, East Waste and NAWMA) rather than six parties in order to secure the minimum amount of residual waste required to sustain a waste to energy facility.
187. In this regard, the ACCC notes the submission by Phoenix Energy that municipal sources of waste are more likely to be able to guarantee a minimum volume of waste, significantly longer tenures and more consistent waste compositions, which are more attractive to financiers of a waste to energy project.
188. However, the ACCC also notes WRASA's observation that the development of a waste to energy plant is likely to be important infrastructure for the state which may require government input.
189. Overall, while the ACCC recognises the aggregation of waste volumes between councils may assist in lowering the risk of investment in technologies (such as

¹³⁰ Phoenix Energy, Submission, 7 November 2016, page 1.

¹³¹ Council Solutions, Further Information Requested And Response To Late Submissions, 14 November 2016, page 7.

¹³² http://www.eastwaste.com.au/files/FINAL_Annual%20Report_AF_for%20release.pdf page 20 and <http://www.nawma.sa.gov.au/about/publications/2014-172015%20Annual%20Report.pdf> page 9.

waste to energy), the ACCC considers that there is significant uncertainty about whether the proposed conduct would be likely to facilitate investment that would not otherwise occur in the future without the proposed conduct. The ACCC is therefore not satisfied that the proposed conduct is likely to result in public benefit in the form of improvements in the efficient supply of waste disposal services.

Stimulation of competition

Applicants' submissions

190. The Applicants submit that:

- participating councils are committed to delivering best value to their ratepayers, and that value is not limited to the concept of cost, but also includes quality of services, innovation, support to local industry and achieving council's environmental goals
- the best way to carefully balance these considerations to produce the optimal result is through robust, transparent, competitive procurement processes
- in collaborating, the participating councils can more fully realise best value as there is a reduction in costs that each participating council bears for the process, there can be streamlining of specifications and mutual learning, and the greater opportunity can increase competition in the marketplace.¹³³

191. The Applicants submit that the potential to win a larger, regional contract is likely to stimulate competition between suppliers and operators vying for the combined volume of services for each service stream compared to each participating council individually negotiating the services for smaller volumes.¹³⁴

192. The Applicants submit that, to the extent a common provider for a service stream is selected, the proposed conduct may result in public benefits by providing an improved incentive for new market entrants or existing waste providers to expand their current operations.

193. They note that the combined size of the participating councils (35.3% of the population and 37% of the rateable properties) may encourage new entrants to the waste collection market, thereby increasing competition.

194. According to Council Solutions, there is interest from new market entrants, particularly in some of the areas where innovation is anticipated, such as waste to energy.

195. Council Solutions submits that the public benefit claimed is not solely based on a new entrant to the market, but also in the incentives for expansion and infrastructure investment the combined volume may provide.

¹³³ Council Solutions, Submission, 30 June 2016, page 22.

¹³⁴ Council Solutions, Supporting submission, 30 November 2015, page 11.

196. Council Solutions considers that the size of the contract will not prevent market participants from tendering, and believes that the opportunity to secure volume, combined with the reduction in the physical number of complete tender packages to respond to, will provide a greater opportunity to respond.
197. The Applicants also submit that suppliers will be free to compete for contracts with other Adelaide metropolitan councils and the operators will be able to offer services to customers other than the participating councils, including industry clients and other South Australian councils.

Interested parties' submissions

198. Several interested parties submit that:

- the relevant Adelaide waste services markets are already highly competitive without the proposed conduct¹³⁵
- waste services suppliers already vie for every opportunity in Adelaide and most national and several multi-national companies already actively participate in Adelaide waste services markets
- larger tenders (i.e. involving more than one council) typically do not receive as many responses. For example, smaller operators cannot afford the cost of a larger bank guarantee or will not be granted a guarantee of that size by their bank.
- the fact that Council Solutions are bringing together these five councils and all four service streams weighs heavily in favour of multi-nationals (even though the contracts are separable)¹³⁶.

199. WRASA submits that currently South Australia has:

- Australia's highest rate of waste diversion
- the highest quality public waste services in Australia, with the highest distribution of the three-bin kerbside collection system, hard waste, e-waste and programs such as the Container Deposit system
- the lowest rates for waste services in Australia due to the prevalence of councils with households in the range of 30-50,000 households.¹³⁷

200. SAWIN submits that currently:

- each tender by each council is 'hotly contested' and competition in each service stream is strong

¹³⁵ See for example Anonymous, Submission, 22 February 2016, page 2; Blue Bins Pty Ltd, Submission, 26 February 2016, page 1; Just Co Services, Submission, 26 February 2016; Mastec Australia Pty Ltd, Submission, 26 February 2016; Signal Waste, Submission, 26 February 2016.

¹³⁶ See for example WRASA, Submission, 16 September 2016, page 4.

- it is not the case that service providers do not respond to tender opportunities as they arise due to a perceived 'administrative burden' of answering five individual tenders
- the status quo, which leverages the combined forces of competitive pressure and the opportunity to win volumes on a regular basis, already incentivises investment and innovation.¹³⁸

201. SAWIN submits that Council Solutions list three international waste service providers they hope to entice to enter the Adelaide market. However, SAWIN submits that Remondis, Veolia and J.J. Richards already operate in the market, but they have not been successful in past municipal tenders.¹³⁹
202. An interested party who wishes to remain anonymous states that it would not be able to compete with larger rivals, and would be forced into a sub-contractor role along with other small businesses. Administrative costs will rise as a result of the second layer of management required to manage the sub-contracts.¹⁴⁰

ACCC view

203. The ACCC notes the importance of waste management for local councils in South Australia as highlighted in a 2014 Report for the South Australian Local Government Association '*Transitioning the roles of local government in Waste Management*':

*Waste management consistently ranks at a very high level in the importance attributed to Council services by communities ... It is also one of the largest components of a Council's operating budget (8.5% of total Local Government operating expenditure in 2011/12). The effective and efficient management of waste services is therefore very important to Local Government.*¹⁴¹

204. The ACCC also notes the direct involvement of participating council Chief Executive Officers in the proposed conduct and considers that the Applicants have a strong incentive to use the proposed conduct to explore opportunities to achieve better waste service outcomes for their constituents (not only in terms of price) by aggregating participating councils' waste service requirements.
205. The ACCC notes that the proposed conduct is likely to result in a larger number of collection points and larger volumes of recyclables, organics and residual waste being offered for tender in a single process, compared to the future without the proposed conduct.
206. The ACCC considers that a larger contract (in terms of scale and value) under the proposed conduct has the potential to stimulate competition in the supply of waste

¹³⁸ SAWIN, Submission, 8 January 2016, page 4.

¹³⁹ WRASA, Submission, 11 March 2016, page 1.

¹⁴⁰ Anonymous, Submission, 22 February 2016, page 2. See also Business SA, Submission, 11 March 2016.

¹⁴¹ SA Local Government Association, '*Transitioning the roles of Local Government in Waste Management*', August 2014, page 25.

disposal services by attracting bidders (including potentially new suppliers) and helping to make previously uneconomic technologies and services viable.

207. However, previous tenders for waste collection, recyclables and organics appear to have been the subject of a high degree of competition and that a number of multinational companies are already present or interested in the relevant markets. The ACCC also notes that any benefit in the form of attracting bidders to the tender is likely to be offset by the detriment caused by parties being deterred or prevented from tendering (see detriments section from paragraph 232).
208. In these circumstances, based on the information available, the ACCC is not persuaded that the aggregation of volumes and contracts would be likely to result in a public benefit in the form of stimulation of competition.

Improved environmental outcomes

Applicants' submissions

209. The Applicants submit that improved environmental outcomes are a key driver for the proposed conduct. Waste management within South Australia has been the subject of a number of governmental policies and strategic plans. These have resulted in two key strategic targets for local governments:
- reduce waste to landfill by 35% by 2020 with a milestone of 25% by 2014
 - metropolitan municipal solid waste diversion rate of 70% by 2015.¹⁴²
210. In July 2016, the South Australian State Government announced an increase of the SWL as part of its State Budget for 2016/17. The levy will increase in stages over the coming years (\$62 per tonne in July 2016; \$76 in September 2016; \$87 in 2017/18; \$100 in 2018/19 and \$103 in 2019/20).¹⁴³
211. The Applicants submit that the proposed joint tendering arrangements will deliver environmental benefits from the increased efficient diversion of waste from landfill, with the harmful effects of reliance on landfill being long established and accepted. The Applicants submit that reliance on landfill has harmful effects and risks associated with:
- groundwater pollution from leachate¹⁴⁴
 - odour emission
 - vermin, birds and other disease vectors
 - storage and handling of dangerous substances
 - fire risk

¹⁴² Council Solutions, Supporting submission, 30 November 2015, page 4.

¹⁴³ Council Solutions, Submission, 14 November 2016, page 6.

¹⁴⁴ Leachate can be defined as a liquid that passes through a landfill and has extracted dissolved and suspended matter from it.

- landfill gas including anaerobic decomposition of organic material producing greenhouse gases contributing to climate change.¹⁴⁵
212. The Applicants submit that the proposed conduct would allow for a unified strategy and education program which would maximise landfill diversion rates in the shortest time. Consistent messaging throughout the participating councils' communities would create more certainty as to which receptacle is appropriate for each waste type, especially for visitors and new residents, improving the likelihood the waste would be diverted from landfill.¹⁴⁶
213. The Applicants submit that the combined waste volumes together with a longer term contract may provide the guaranteed volume for an operator to offer an innovative, environmentally positive and commercially beneficial solution that utilises AWT or waste to energy.¹⁴⁷
214. The Applicants further submit that even if AWT or waste to energy is not utilised, the proposed conduct may result in increased investment in organics processing infrastructure, allowing for both lower emissions during the processing as well as higher quality end product that can decrease future water consumption in agricultural settings.¹⁴⁸
215. Council Solutions also notes that the Environmental Protection Authority of South Australia has recognised the need to modernise existing infrastructure. Without modernisation, there may be implications for recovery rates, efficiency and the volume of contaminated material being returned to landfill.
216. Council Solutions submits that a barrier for operators is the significant cost to upgrade processing equipment to improve quality and diversify the end product. The proposed conduct would contribute to achieving targets as the combined waste volumes of the participating councils may result in an operator investing in recyclables processing infrastructure. Any upgrade or new investment would use newer and more efficient technology that will improve environmental outcomes by reducing landfill and improving diversion ratios.¹⁴⁹
217. The Applicants note that in 2009, all Australian governments committed to the National Waste Policy: Less Waste, More Resources (National Waste Policy), which sets out Australia's waste management and resource recovery direction to 2020.¹⁵⁰ In particular, the National Waste Policy sets out the roles and responsibilities for each level of government against 16 waste strategies and provides a framework for jurisdictions to work together to deliver effective and efficient approaches to national waste issues.

¹⁴⁵ Council Solutions, Supporting submission, 30 November 2015, pages 11-12.

¹⁴⁶ Council Solutions, Supporting submission, 30 November 2015, page 12.

¹⁴⁷ Council Solutions, Supporting submission, 30 November 2015, page 12.

¹⁴⁸ Council Solutions, Supporting submission, 30 November 2015, page 12.

¹⁴⁹ See Council Solutions, Supporting submission, 30 November 2015, page 12.

Interested parties' submissions

218. As discussed above, SAWIN submits that it is unlikely that Council Solutions' proposal would encourage or incentivise investment in waste to energy technology, particularly within the timeframes under consideration.
219. SAWIN also submits that granting authorisation would result in its members having to travel up to 42 kilometres, which is on average a further 21 kilometres, which will have the effect of increasing harmful air emissions from the vehicles used to transport waste.¹⁵¹
220. Professor Burgan, representing Economic Research Consultants, in a submission provided by WRASA, has submitted that the diversion of waste away from landfill is best facilitated by the range of policies currently in place.¹⁵² Further, Professor Burgan and a number of other stakeholders have submitted that where larger contracts are involved, waste diversion is poorer, such as in Queensland and Western Australia. WRASA submits that, as highlighted by the industry consultant, Australian data shows that longer and larger contracts limits the introduction of innovative new practices due to the higher risk and reduced opportunities.¹⁵³
221. Phoenix Energy, a provider of waste to energy services, states that:
- waste to energy competes with landfill
 - once offsets associated with avoided fugitive landfill gas emissions and recovered recyclable metals are taken into consideration, net greenhouse gas emissions of waste to energy compared with landfill are typically considerably below zero (i.e. a significant reduction in greenhouse gas emissions)
 - in terms of carbon intensity, waste to energy from municipal solid waste is similar to that of a gas fired power station
 - the atmospheric emissions from waste to energy are controlled to very low levels, typically based on benchmark standards operating across continental Europe and the United Kingdom
 - nuisance emissions such as noise and odour are managed by the full enclosure of waste handling and noisy equipment items, and the extraction of combustion air from the waste storage area.
222. The Office of Green Industries South Australia submits:
- while South Australia has achieved significant landfill diversion outcomes during the past decade, residual waste is inevitable and the need to support new technologies and processes to manage residual waste streams effectively has long been recognised.

¹⁵¹ SAWIN, Submission, 11 March 2016, page 4.

¹⁵² Burgan, Barry 'A Cost Benefit Assessment of the Council Solutions Proposal for single tendering of multiple councils in Adelaide' 11 March 2016, page 7.

¹⁵³ WRASA, Submission, 19 August 2016, paragraph 6.

- collaborative procurement of waste services could encourage innovative resource recovery technologies and processes that produce higher value adding products consistent with waste management hierarchy
- waste to energy can play an important role in contributing to greenhouse gas emissions reduction in different ways including:
 - treating biodegradable waste by anaerobic digestion will avoid the production of greenhouse gases that this waste would emit in a landfill site, which predominantly comprises methane and carbon dioxide, with methane being a powerful greenhouse gas with a global warming potential 21 times the effect of the same amount of carbon dioxide.
 - utilising biogas to produce electricity or as a vehicle fuel will substitute more traditional solid or liquid fossil fuels, further contributing to the reduction of greenhouse gas emissions.
 - high efficiency combustion or Advanced Thermal Treatment of residual waste can reduce consumption of fossil fuels, by utilising power for electricity and heat (or cooling).¹⁵⁴

223. Senator Williams has noted that councils are already able to share resources on environmental initiatives.¹⁵⁵

ACCC view

224. The ACCC recognises that, to the extent the proposed conduct facilitates diversion of residual waste from landfill, it has the potential to result in improved environmental outcomes by reducing the harmful effects associated with landfills.

225. As indicated earlier, the ACCC considers that each participating council already has significant incentives to reduce the volume of waste going to landfill and these incentives will increase as the SWL rises over coming years, both with and without the proposed conduct. It is therefore not clear that the proposed conduct would alter these incentives.

226. However, as discussed earlier, the ACCC accepts that the proposed conduct is likely to result in some small public benefit in the form of improvements in the development and implementation of community education. This benefit has been discussed at paragraph 125 above.

227. The ACCC considers that by enabling a larger scale education program which facilitates innovation in the design of education programs to improve their effectiveness, the proposed conduct is likely to improve household waste separation practices and therefore increase the recovery of recyclable and organic material. This is likely to result in an environmental benefit in the form of landfill diversion.

¹⁵⁴ Office of Green Industries South Australia, Submission, 21 November 2016.

¹⁵⁵ Senator John Williams, Submission, 24 February 2016.

228. However, the ACCC notes that the participating councils can and do undertake their own community education programs, and so any environmental benefit from improved education is likely to be small. Therefore, the ACCC considers that the proposed conduct is likely to result in a small public benefit in the form of improved environmental outcomes.
229. The ACCC notes the potential for the proposed conduct to facilitate improved environmental outcomes, such as a waste to energy solution, through efficiencies or innovation in each service stream. The ACCC has already considered these issues above in respect of each service stream and concluded that there is likely to be some minimal benefit in respect of improved efficiencies in processing of recyclables and organics, and no likely benefit in respect of waste collection and waste disposal.

ACCC conclusion on public benefits

230. The ACCC considers that the proposed conduct is likely to result in some public benefits in the form of:
- small improvements in efficient community education
 - small improvements in efficiency in the supply of recyclables and organics processing
 - small improvements in environmental outcomes.

Public detriments

231. Having regard to information including the submissions of the Applicants and interested parties, the ACCC has considered whether the proposed conduct is likely to result in the following public detriments:

- deterring or preventing some potential suppliers from tendering, or from submitting competitive bids
- reducing competition for the supply of waste services to participating councils in the longer term
- reducing competition for the supply of waste services to non-participating councils

Deterring or preventing some suppliers from participating in the tender process or submitting competitive bids

Applicants' submissions

232. The Applicants submit that the tender process will:

- be public and conducted according to local government procurement standards
- allow for the maximum number of suppliers and operators to compete to provide the services
- involve a probity advisor advising on all probity matters for the duration of the tender process.

233. The Applicants also submit that the:

- joint tender is not limited to suppliers who can service all participating councils. It will allow for suppliers to provide services to individual participating councils or groups of participating councils. It will also allow suppliers to tender for separate service streams.
- opportunity for suppliers to secure higher volumes, combined with the reduction in the number of complete tender packages to respond to, will provide a greater opportunity to respond.¹⁵⁶

234. The Applicants submit that the size and complexity of the collective tender will not effectively exclude a significant number of small businesses from competing, because:

- to the extent that interested parties currently tender for work from participating councils, they will continue to have the opportunity to do so

¹⁵⁶ See Council Solutions, Submission, 30 June 2016, page 11.

- the RFP will provide a greater opportunity for all market participants to be involved because they can propose their own solutions to the participating councils' requirements without needing to meet a prescriptive service specification that they may not have the capacity to undertake
- providers may identify opportunities to collaborate with other market participants to provide a holistic solution
- sub-contracting arrangements will continue to be available to service providers as a way of participating in the market
- submissions from interested parties relating to greater capital costs and bank guarantee requirements are unfounded, because:
 - the streamlining of services may reduce market participants' capital costs
 - while bank guarantees are for commercial negotiation, it is not the intention to require more collectively than the sum that each participating council would require individually
 - if a small business responded for a service stream, or specialist requirement, as they might currently do, then the requirements are unlikely to be different from what is currently required.
- small businesses that have lodged submissions generally specialise in particular waste collection services, such as hard waste or park and footpath collection, or supply and maintenance of MGBs. It is likely that these elements will each be separable portions of the RFP, or may be the subject of a separate tender process for the specialised requirement, providing the business with the same opportunity to participate as they had historically. Where they currently provide these services through sub-contract arrangements, that is also a possible outcome
- the businesses which regularly tender directly for local government requirements are not small businesses.¹⁵⁷

235. The Applicants consider that individual tenders, in the future without the conduct, would involve the following:

- higher transaction costs and higher contract rates, which may be passed on to ratepayers through higher rates or reduction in other services
- fewer suppliers and operators tendering due to the additional administrative burden of five individual tenders and contracts for each service stream.

Interested parties' submissions

236. Several interested parties have raised a concern that the complexity of the arrangement (resulting from the number of participating councils and waste

¹⁵⁷ Council Solutions, Submission, 30 June 2016, pages 4-6.

streams and the use of an RFP process) is likely to deter some suppliers from participating in the tender process.

237. J.J. Richards submits:

- The scale of the works and the complexity of the joint tender process will potentially result in fewer tenders being submitted, notwithstanding the ability to tender for separable portions for each local government area. Some companies that participate in waste collection tenders for smaller contracts may not participate in larger processes. Some companies may be prevented from participating in the tender process at all. Based on the many tenders throughout Australia each year, the number of tender responses received by a council for a waste collection service does not correlate to the size of the group.¹⁵⁸
- For those waste service suppliers that do participate in the tender, tender bids will have to be prepared as though for individual councils or groups which will add significant cost to participate in the tender process and which will be reflected in tender prices submitted.

238. Two interested parties confidentially advised the ACCC that they may not participate in the Council Solutions tender. Their concerns raised related to the complexity of the process, the need to build in contingencies, time pressure burden on the tendering team, the risk that councils ultimately decide not to award a tender through the process, and the increase of such joint procurement processes around the country.

239. Several interested parties specifically raised concerns about the ability of small businesses to participate in the tender process. The Australian Small Business and Family Enterprise Ombudsman, raised concerns about the ability of small businesses to participate in the tender process for services such as hard waste collection and park and footpath collection.¹⁵⁹

240. The Hon. Christopher Pyne MP submits that the proposed conduct would irreparably damage the waste and recycling industry in South Australia, and would create an anti-competitive environment in which small businesses could not bid for government waste contracts.¹⁶⁰

241. Some interested parties consider that Council Solutions should have regard to the South Australian Industry Participation Policy to ensure that small and medium businesses are given fair and reasonable opportunities to tender for projects.¹⁶¹

242. Some stakeholders submit that Council Solutions' application did not provide a detailed cost benefit analysis or address the potential impact on jobs, employment, and small businesses.¹⁶²

¹⁵⁸ J.J. Richards, Submission, 10 March 2016, pages 2-3.

¹⁵⁹ ASBFEO, Submission, 21 October 2016, page 1.

¹⁶⁰ The Hon. Christopher Pyne MP, Submission, 29 April 2016, page 1.

¹⁶¹ See for example SA Small Business Commissioner, Submission, 1 March 2016, page 4, SA Small Business Commissioner, Submission, 18 July 2016, pages 2-3; Business SA, Submission, 11 March 2016.

243. Some interested parties raised a concern that larger contracts involving multiple councils increase the level of bank or capital guarantee required by the service provider. Some interested parties submit that small businesses will be prevented from tendering because an increased guarantee is likely to be required.¹⁶³
244. SAWIN submits that the size of the bank guarantees that are required to be provided at the commencement of these contracts will be beyond the reach of a number of current market participants. SAWIN also submits that it is often a condition of these contracts that a successful contractor purchase waste disposal vehicles that are co-branded with the council and contractor's name. SAWIN understands that the cost of these vehicles is upwards of \$400,000 and the larger the area being tendered, the larger the fleet required. In addition to the cost of the fleet, the capital required to cover the collection and maintenance of such vehicles itself is beyond the capacity of most businesses in the market. Multinational corporations are in a position to absorb the running of a larger fleet of vehicles in this way and sustain the operation of larger fleets for the timeframe proposed. SAWIN submits this would effectively force smaller companies out of the bidding process or force them to bid for sub-contractor roles to the extent the larger players wish to subcontract any of the services. If any of these services were to be sub-contracted, it would increase the cost of these services to the end user.¹⁶⁴
245. WRASA submits that many small Australian owned businesses will not have the resources and time to dedicate to completing a tender of this scale without negatively impacting the operations and service to their existing customers.¹⁶⁵ WRASA submits that a large scale tender is biased and designed to suit large multinational organisations. Additionally, due to the size of the collective tender, WRASA submits the contracts will be beyond the financial scope of most small businesses and the unprecedented capital costs would see multimillion dollar bank guarantees and only one or two tenderers. WRASA concludes all of this will result in higher prices and less competition for the public.¹⁶⁶
246. WRASA also submits that it will be a very complex and unprecedented tendering and contract management process, with 31 different council combinations and 15 different service combinations.¹⁶⁷
247. WRASA submits that the RFP process for numerous councils and a broad range of services is unproven as a method for securing a contract with the required specification in Australia in the waste industry. WRASA further submits that the diversity of submissions that will be received by Council Solutions and the

¹⁶² See for example WRASA, Submission, 16 September 2016, page 7 and SA Small Business Commissioner, Submission, 18 July 2016, pages 2-6.

¹⁶³ Blue Bins Pty Ltd, Submission, 26 February 2016, page 1; Just Co Services, Submission, 26 February 2016; Mastec Australia Pty Ltd, Submission, 26 February 2016; Oz Bin Cleaning (South Australia), Submission, 26 February 2016; WRASA, Submission, 16 September 2016, page 16.

¹⁶⁴ SAWIN, Submission, 11 March 2016, page 5.

¹⁶⁵ WRASA, Submission, 11 March 2016, page 2.

¹⁶⁶ WRASA, Submission, 21 March 2016, page 3.

¹⁶⁷ WRASA, Submission, 21 March 2016, page 25.

respective councils will result in a higher risk to individual councils and their ratepayers as part of the tender evaluation process.¹⁶⁸

248. WRASA accepts that small businesses will have the opportunity to participate through sub-contractor arrangements or by directly tendering if there are separable portions of the tender for hard waste and park and footpath collections. However, WRASA notes that whilst all tenderers will have the same opportunity to participate under the proposed conduct, contracts of this nature are usually won by a larger contractor.¹⁶⁹
249. Interested parties are also concerned that the proposed conduct increases the risk for suppliers in tendering because:
- the time between submitting a tender and the commencement of the contract is two years (as opposed to the typical one year period in other council waste tendering arrangements), which means that expenditure items priced in the tender will need to include a price premium for the risk of price increases¹⁷⁰
 - the long length of the waste collection contract introduces a substantial risk in the cost of purchasing new vehicles during the contract term. It is argued that it would be impossible to accurately predict operating costs over the term of the contract, and the risk of inflation will need to be priced into the tender bid.
 - larger waste collection contracts involve operational risk, due to a lack of accountability in large teams of drivers.

ACCC view

250. While the ACCC accepts that the participating councils have incentives to ensure broad participation in the RFP, based on submissions received from waste services providers, many of whom have extensive experience in the industry in preparing tenders for councils, the ACCC accepts that the proposed conduct and the RFP arrangements would result in a significantly more complex process for waste service tendering in the relevant markets.
251. The ACCC notes that there is significant uncertainty about the extent to which the arrangements would attract tenders from waste services providers that would not otherwise participate in tenders to supply the participating councils in the likely future without the proposed conduct. This, combined with the likelihood that some potential tenderers will not participate in the RFP due to its increased scope and complexity and the greater costs involved, leads the ACCC to conclude that there is a real chance that the proposed conduct will lead to fewer participants in the tender process than would be the case without the proposed conduct.
252. The ACCC considers that fewer participants in the tender process would reduce the competitive tension between tenderers and therefore be likely to result in public detriment.

¹⁶⁸ WRASA, Submission, 16 September 2016, page 9.

¹⁶⁹ WRASA, Submission, 16 September 2016.

¹⁷⁰ WRASA, Submission, 16 September 2016, page 19.

253. The ACCC also considers that there is a real chance that participants in the RFP will submit tenders that are less competitive than would be the case in the likely future without the proposed conduct. The ACCC accepts that the large number of potential supply combinations, and the likely increased time between tendering and contracting, are likely to lead to at least some tenderers submitting sub-optimal pricing options because of the uncertainty and risk involved.
254. In relation to interested party concerns about the participation of small businesses in the tender process, the ACCC considers that to the extent that small businesses currently tender directly with the participating councils, they would be likely to be able to participate in the RFP under the proposed conduct. However, the ACCC also accepts that under the proposed conduct, arrangements may be more complex for some small businesses, for example by creating a real or perceived need for some small business service providers to partner with other service providers to submit tenders that are considered capable of winning business through the RFP.
255. Accordingly, the ACCC concludes that the proposed conduct is likely to result in some public detriment constituted by a lessening of competition by deterring or preventing some suppliers from participating in the tender process or submitting competitive bids.

Long term reduction in competition for the supply of waste services to participating councils

256. The ACCC recognises the possibility that the proposed conduct may reduce the number of parties supplying waste services to the participating councils, including the possibility of a single tenderer being appointed to supply all services.
257. The potential consequences of this on competition are twofold. One is on competition to supply waste services to the participating councils in the longer term. The other is on competition to supply waste services to non-participating councils both in the near and longer term.
258. This section considers the potential consequences of competition in the supply of waste services to the participating councils.

Applicants' submissions

259. The Applicants submit that the objective of the proposed conduct is to achieve more efficient and more competitive outcomes.
260. The Applicants submit that the structure of the tender is such that more than one supplier may be successful in each of the four service streams. The participating councils retain the right to accept or reject tenders. If the individual terms offered to a participating council are more favourable than those offered on a collective basis, the participating council can choose to accept the individual proposal.
261. The Applicants submit that:
- investigations of the market indicate there does not currently appear to be an existing single provider in the market which has the capacity, experience and/or expertise to deliver the service requirements of all four

service streams to one participating council without significant sub-contracting arrangements

- it is unlikely that such subcontractor arrangements would be as commercially attractive to participating councils as entering into contracts directly with the subcontractor for those service streams. Therefore it is extremely unlikely that a single provider would be awarded a contract for all five participating councils across all four service streams
- Council Solutions is aware of existing relationships between providers across some service streams, which warrants a combined approach
- some market participants may look at establishing joint ventures or other consortia to respond to the RFP which may include otherwise unachievable levels of service provision or innovation
- the benefits of a multiple or sole provider arrangements will depend on the responses received and will be determined by the RFP evaluation. However, in evaluating responses, the Applicants submit that:
 - due regard will be given to the resulting structure of the market should the amalgamated response be awarded;
 - the entire merits of an amalgamated response will be considered, with no 'bonus' weighting given for simply including more than one service stream.
- the future without the proposed conduct may still result in a single supplier providing the services to all the participating councils through separate tender processes, all of which are medium or large businesses.¹⁷¹

Interested parties' submissions

262. Some interested parties have raised a concern that the proposed conduct may result in the appointment of a single service provider for all service streams for all participating councils.
263. SAWIN submits that the three main players in organics processing (Jeffries, Peats Soils and IWS) currently compete for council tenders. This leads to strong competition in pricing. If the organics of all of the participating councils were awarded to one organics service provider for a long term, this would do significant damage to the ability of the other competitors to offer this service and/or to invest in the necessary technology required to provide it (especially given that organics is a high fixed-costs business). The combined tonnes offered, along with the proposed length of the contracts to be awarded, means that unsuccessful facilities are unlikely to be able to 'ride out' the term of the contracts awarded. Further, the lack of available volumes remaining in the organics market would also be likely to act as a deterrent to investment by other potential entrants. Collectively this means that, especially in time, less competitive pressure can be expected to be

¹⁷¹ See Council Solutions, Submission, 30 June 2016, pages 3, 4 and 27.

exerted on the successful facility, causing a substantial lessening of competition.¹⁷²

264. Similarly, with recyclables receipt and processing, SAWIN submits that there are three facilities for the receipt and processing of recyclables, being NAWMA (which is currently available to its constituent councils), SKM and Visy. SAWIN submits that if the volumes for the participating councils were awarded to SKM (which does not have local receipt and processing facilities) there is a risk that Visy would have insufficient volumes to maintain its facility in Adelaide. If Visy was unable to sustain its operations in a meaningful way on remaining volumes, the result would be that there would be only one competitor in the recyclables market.¹⁷³
265. SAWIN submits that the proposed conduct will cause small to medium sized companies to exit the market, and the net effect will be a lessening of competition because there will be fewer businesses operating in the market. SAWIN submits that larger participants in the market do not sub-contract to specialist providers in the way that small and medium sized participants do, which will mean that specialist providers will be pushed out of the market or will only be able to compete for the much reduced market share which will not be able to support and sustain all of the participants currently providing these services in the market.¹⁷⁴
266. WRASA submits that of 16 recent waste applications considered by the ACCC, 15 have seen one of the larger companies successful rather than more than one business being successful.¹⁷⁵ WRASA submits that the fact that Council Solutions are bringing together, separable or not, these five councils and all four services weighs heavily in favour of multinationals and to the detriment of the public and councils. WRASA submits that a reduced term or separable services will still favour one or two large multinationals.¹⁷⁶
267. J.J. Richards submits that a reduction in the total number of contracts available and a reduction in the variation of start dates and contract terms will lead to a reduced number of skilled, experienced service providers over time leading to reduced competition and increased costs. Granting authorisation will be to the detriment of long term, sustainable competition and the positive impact this has on long term pricing, service quality, innovation and environmental outcomes. J.J. Richards acknowledges that individual councils could offer contracts for 14 years without the proposed conduct, but submits that more numerous contracts and varying completion dates would mean opportunities to tender would be far more frequent and this would incentivise service providers to maintain an interest and the necessary skills to remain in the market.¹⁷⁷
268. Deputy Prime Minister, the Hon. Barnaby Joyce MP, submits that the proposed conduct has the potential to significantly reduce competition, and that many small to medium sized businesses that currently provide Adelaide ratepayers with high

¹⁷² SAWIN, Submission, 8 January 2016, page 3.

¹⁷³ SAWIN, Submission, 8 January 2016, page 3.

¹⁷⁴ SAWIN, Submission, 11 March 2016 page 6.

¹⁷⁵ WRASA, Submission, 19 August 2016, page 3.

¹⁷⁶ WRASA, Submission, 11 April 2016, page 8.

¹⁷⁷ J.J. Richards, Submission, 10 March 2016, page 3.

quality waste management services at competitive prices might potentially be locked out.¹⁷⁸

269. Senator the Hon. Matthew Canavan, the Minister for Resources and Northern Australia submits that concentration of available contracts in a city the size of Adelaide can have a significant impact on jobs and local industry sustainability.¹⁷⁹

ACCC view

270. The ACCC notes that six parties currently provide various waste services to the participating councils. Specifically:

- two firms (Solo and Transpacific Cleanaway) currently supply all kerbside waste collection services as well as a substantial share of bulk bin and hard waste collection services
- three firms (Solo, Jeffries and Integrated Waste Services), currently supply organics processing services
- three firms (Solo, Visy and Transpacific Cleanaway) currently supply recyclables processing services
- three firms (Transpacific Cleanaway, Integrated Waste Services and SRWRA) currently supply waste disposal services.

Table: current providers of waste services to the participating councils

Participating council	Kerbside Waste collection	Recyclables receipt and processing	Organics receipt and processing	Waste disposal
City of Adelaide	Solo	Visy	Jeffries	Transpacific Cleanaway
City of Charles Sturt	Solo	Visy	Jeffries	Transpacific Cleanaway
City of Marion	Solo	Solo	Solo	SRWRA
City of Tea Tree Gully	Solo	Visy	Jeffries	Integrated Waste Services
City of Port Adelaide Enfield	Transpacific Cleanaway	Transpacific Cleanaway	Integrated Waste Services	Integrated Waste Services

271. While the participating councils have both financial and statutory obligations to provide cost-effective waste services to ratepayers, the ACCC considers that the proposed conduct has the potential to result in the awarding of a contract or contracts which substantially reduce the overall number of suppliers of waste services to the participating councils. This could occur within service streams where there are currently multiple providers or across councils where there are, in some cases, different providers of services to different participating councils.

¹⁷⁸ The Hon. Barnaby Joyce MP, Submission, 11 November 2016, page 1.

¹⁷⁹ Senator the Hon. Matthew Canavan, Submission, 26 October 2016, page 1.

Indeed, at its most extreme, the proposed conduct allows for one provider to be selected as the prime contractor for all service streams across all councils.

272. The ACCC is of the view that, compared to the likely counterfactual, the proposed conduct would be likely to:

- reduce the ability of existing providers to innovate and continually improve their offers to supply waste services over time through successive and frequent opportunities
- make entry into the supply of waste services in metropolitan Adelaide less likely by making entry on an incremental basis more difficult.

273. The ACCC accepts that the RFP is intended to generate competition ‘for the market’ in respect of the waste service requirements for the participating councils. However, the ACCC is concerned that if the proposed conduct results in fewer waste service providers in metropolitan Adelaide, competition for provision of these services to the participating councils will be lessened in the longer term as existing suppliers are likely to be in a stronger position to compete in subsequent tender processes.

274. Overall, the ACCC considers that there is a real chance that the proposed conduct will result in fewer providers of waste services providers in metropolitan Adelaide and that this is likely to constitute some public detriment in the form of reduced competition in the longer term.

Reduction in competition for the supply of waste services to non-participating councils

Applicants’ submissions

275. The Applicants submit that suppliers will be free to compete for contracts with other consortia of Adelaide metropolitan councils and will be able to offer services to customers other than the participating councils, including industry clients and other South Australian councils.¹⁸⁰

Interested parties’ submissions

276. WRASA submits that the grouping of participating councils reduces the ability of other Adelaide councils to cluster and jointly tender effectively for a regional AWT facility or waste collection services.¹⁸¹

277. J.J. Richards submits that granting authorisation will be to the detriment of surrounding areas. There will be a substantial reduction in opportunities for unsuccessful bidders which will lead to less competition and higher prices over time.¹⁸²

¹⁸⁰ Council Solutions, Supporting submission, 30 November 2015, page 17.

¹⁸¹ WRASA, Submission, 11 April 2016, page 9; WRASA, Submission, 21 March 2016, page 28.

¹⁸² J.J. Richards, Submission, 10 March 2016, pages 2 and 4.

278. A non-participating council in the Adelaide metropolitan area has submitted that there may be a positive effect for it if the Council Solutions arrangement attracts new technology (such as waste to energy or facilities for recycling of soft plastics) to which the council could contribute volumes of residual waste.

ACCC view

279. The ACCC considers that a large scale joint procurement arrangement for municipal waste services has the potential to adversely impact competition for the supply of waste services to non-participating councils if it:

- does not leave room for non-participating councils to develop or continue alternative collaborative waste procurement arrangements which offer competitive rivalry or at least the opportunity for mutual learning
- is so large that supply of some or all waste services to non-participating councils is necessarily at sub-optimal scale; or
- reduces suppliers' incentive to participate or make competitive offers in future tender processes run by non-participating Adelaide councils.

280. The ACCC considers that the proposed conduct is likely to leave room for the formation or continuation of multiple other collective procurement arrangements in metropolitan Adelaide that are capable of realising a similar range of benefits as the Council Solutions arrangement, subject to legal constraints. The conduct for which authorisation is sought does not allow Council Solutions to include additional councils. Further, the proposed arrangement is not so large that it materially impacts non-participating councils' ability to access efficient scale in service provision. While some of the smaller councils may not be in a position to offer waste collection contracts that achieve the minimum efficient scale (i.e. fewer than 20,000 to 50,000 households or collection points), this is also the case in the future without the proposed conduct.

281. However, for the reasons set out at paragraphs 270 to 274, the ACCC considers that the proposed conduct is likely to result in fewer waste service providers in metropolitan Adelaide and is likely to advantage existing suppliers in future municipal waste tender processes in Adelaide. The ACCC considers that this is likely reduce competition for the provision of waste services to other councils in Adelaide that do not participate in the Council Solutions arrangement.

282. Overall, the ACCC considers that there is a real chance that the proposed conduct will result in some public detriment in the form of reduced competition in the supply of waste services to councils in Adelaide that do not participate in the Council Solutions arrangement.

ACCC conclusion on public detriments

283. The ACCC considers the proposed conduct is likely to result in some public detriments constituted by a lessening of competition through:

- deterring or preventing some potential suppliers from tendering, or from submitting competitive bids
- reducing competition for the supply of waste services to participating councils in the longer term

- reducing competition for the supply of waste services to non-participating councils

Balance of public benefit and detriment

284. The ACCC must not grant authorisation unless it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment constituted by any lessening of competition.

285. The ACCC considers that the proposed conduct is likely to result in some public benefits in the form of:

- small improvements in efficient community education
- small improvements in efficiency in the supply of recyclables and organics processing
- small improvements in environmental outcomes.

286. The ACCC considers the proposed conduct is likely to result in public detriment constituted by lessening of competition through:

- deterring or preventing some potential suppliers from tendering, or from submitting competitive bids
- reducing competition for the supply of waste services to participating councils in the longer term
- reducing competition for the supply of waste services to non-participating councils

287. The ACCC has carefully reviewed and considered the large number of submissions from the Applicants and interested parties in this matter. On balance, for the reasons outlined in this determination, the ACCC is not satisfied that in all the circumstances, the likely public benefits outweigh the likely detriments to the public constituted by the lessening of competition arising from the proposed conduct.

288. Accordingly, the ACCC has decided to **deny** authorisation to application A91520.

Determination

The application

289. On 30 November 2015 Council Solutions lodged application for authorisation A91520 with the ACCC. Application A91520 was made using Form B Schedule 1, of the Competition and Consumer Regulations 2010. The application was made under subsection 88 (1 and 1A) of the Act for:

- Council Solutions, on behalf of the participating councils, to conduct collaborative competitive tender processes for services within the service streams
- Council Solutions and the participating councils to evaluate the responses in collaboration
- Council Solutions to negotiate the contractual framework on behalf of the participating councils
- the participating councils to individually enter into separate contracts on identical or near identical terms with each supplier/operator (the contracts for all services within the service streams will be on the same general terms and conditions); and
- certain decisions regarding the ongoing administration and management of the resultant contracts to be made jointly by Council Solutions and/or the individual participating councils.

290. The Applicants originally sought authorisation for contracts with suppliers with operating terms of up to 14 years, but later amended this to a maximum of 10 years.

291. The Applicants seek authorisation of the conduct as it may contain a cartel provision and may have the effect of substantially lessening competition within the meaning of section 45 of the Act.

Net public benefit test

292. For the reasons outlined in this determination, the ACCC is not satisfied, pursuant to sections 90(5A), 90(5B), 90(6) and 90(7) of the Act, that in all the circumstances the conduct for which authorisation is sought is likely to result in a public benefit that would outweigh any likely detriment to the public constituted by any lessening of competition arising from the conduct.

293. The ACCC has therefore decided to **deny** authorisation to application A91520.

294. This determination is made on 20 December 2016. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 11 January 2017.

Revocation of interim authorisation

295. At the time of lodging the application for authorisation, the Applicants sought interim authorisation to begin engaging in the proposed conduct. On 11 February, 2016, the ACCC granted interim authorisation pursuant to s91(2) of the Act to engage in the proposed conduct noting that the Applicants would not enter into contracts for any service streams pursuant to the proposed conduct before the ACCC issued a final determination (**the interim authorisation**).
296. The interim authorisation was granted until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.
297. Given the ACCC determination to deny authorisation, the ACCC considers it appropriate to revoke the interim authorisation pursuant to s91(2AB) of the Act effective 11 January 2017.

Attachment A — Summary of relevant statutory tests

Subsections 90(5A) and 90(5B) provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(5A) 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 were made or given effect to, or in the case of subsection 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

Subsections 90(6) and 90(7) state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(6) 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 and the provision was given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.