



# Determination

Application for authorisation AA1000419

lodged by

Council Solutions & Ors

in respect of

joint procurement, negotiation and contracting for  
waste processing and disposal services

Date: 23 November 2018

Authorisation number: AA1000419

Commissioners: Sims  
Keogh  
Rickard  
Cifuentes  
Court  
Featherston

# Summary

**The ACCC grants authorisation to Council Solutions, Adelaide City Council and the Cities of Charles Sturt, Marion and Port Adelaide Enfield (the Participating Councils) to jointly procure waste processing and disposal services.**

**The ACCC grants authorisation until 30 June 2031.**

Council Solutions and the Participating Councils (together, the Applicants) are seeking authorisation to conduct a joint procurement process to appoint suppliers to the Participating Councils for the receiving and processing of waste service streams comprising:

- receiving and processing of recyclables
- receiving and processing of organics, and
- receiving and processing or disposal of residual waste

(together, Processing Services).

In the context of procuring these services, these councils may be considered to be each other's competitors. Therefore, by conducting their procurement jointly rather than individually, they risk breaching competition laws. Accordingly, the Applicants have sought authorisation from the ACCC, which would give them legal protection to conduct joint procurement. The ACCC can grant authorisation if it is satisfied that the likely public benefits outweigh the likely public detriments.

The Participating Councils consider that the proposed joint procurement will provide value for money, improve waste management and reduce waste, to achieve environmental and economic benefits for their communities. The ACCC considers that the Participating Councils are well informed and well placed to make the assessment as to whether a joint procurement process is likely to provide this outcome. It is in their interest to ensure that this is the case and they are accountable to their ratepayers for doing so.

Based on the information before it, the ACCC considers that the Participating Councils jointly procuring Processing Services will contribute to the achievement of these aims and is likely to result in lower prices and/or improved quality of waste management services for their ratepayers. The ACCC is satisfied that these likely benefits to the public will outweigh the detriments to the public from the joint procurement. Accordingly, the ACCC grants authorisation until 30 June 2031. This allows for the tender process, existing contracts to conclude and, where applicable, new infrastructure to be commissioned, and proposed contract lengths of up to 10 years.

It is common practice throughout Australia for local councils to collaborate to procure waste services to reduce transaction costs, pool resources and expertise, achieve economies of scale and improve their purchasing power. The ACCC has authorised around 30 such arrangements, concluding they were likely to result in a net public benefit through improved service quality at lower cost. The joint procurement process for which the Applicants have sought authorisation is similar to a number that the ACCC has authorised.

In 2016, the ACCC denied authorisation for Council Solutions and five Adelaide Councils (the four councils participating in the current process plus Tea Tree Gully) to jointly procure kerbside waste collection services, receival and processing services and waste disposal services via a single Request For Proposal process. Under the Request for Proposal, each council would have individually decided which supplier to appoint for each service stream, meaning there was the potential for a large number of possible service stream and supplier combinations.

The ACCC was concerned that the size and scope of the 2016 proposal, covering multiple waste service streams, and the uncertainty about the possible outcomes arising from the Request for Proposal process, would reduce or eliminate transaction cost savings and may mean that some businesses were unable to participate.

In this 2018 application, Council Solutions has sought to address the issues associated with the 2016 application by:

- running separate tender processes for three service streams, which are the subject of three separate applications for authorisation; kerbside waste collection services, Processing Services (this application) and ancillary services
- issuing more tightly prescribed and separate Requests for Tenders for each service stream, instead of a single Request for Proposal covering all service streams and all councils, and
- prescribing the number of suppliers that will be appointed: one or two suppliers for the receival and processing of each of recyclables and organics and a single supplier for processing and disposal of residual waste.

The ACCC released a final determination authorising the kerbside collection joint procurement proposal on 12 October 2018. Concurrent with the release of this Processing Services determination, the ACCC has released a determination authorising the ancillary services joint procurement arrangements.

The ACCC acknowledges the many submissions from industry participants, both concerned about, and supporting, the proposed arrangements. The Applicants and other interested parties have given the ACCC an extensive amount of information, on a public and confidential basis.

A number of these submissions have expressed strong views about how the Participating Councils should structure their procurement arrangements and, in effect, called on the ACCC to play the role of arbiter about how the waste services industry in South Australia should be structured. However, the ACCC's role is limited to determining whether to grant authorisation (and on what terms). This involves assessing whether the likely public benefits of the joint procurement process for which the Applicants have sought authorisation outweigh the likely public detriments. Beyond that, it is not the ACCC's role to determine how the Participating Councils, or suppliers of waste services, should operate. In this respect, as noted, the Participating Councils are ultimately accountable to their ratepayers and communities.

The ACCC considers that the current application addresses the concerns identified in 2016 as they relate to joint procurement of Processing Services, primarily by simplifying the process and providing greater certainty for tenderers about the services the Participating Councils are seeking to procure through each tender process and how their bids will be assessed.

The ACCC considers that the joint procurement process is likely to result in a public benefit through stimulation of competition to provide Processing Services to the Participating Councils.

The ACCC considers that the proposed joint tender is likely to increase the purchasing power of the Participating Councils in contracting for the supply of Processing Services. This increased purchasing power is likely to be reflected in negotiated terms and conditions of agreements, resulting in lower prices and/or better quality of waste management services delivery to the Participating Councils ratepayers.

In particular, the joint procurement process is likely to offer potential suppliers some transaction cost savings and other efficiencies that could be passed on in lower costs and improved services. Further, guaranteed contracts covering greater volumes of waste than any of the Participating Councils could offer individually are likely to provide greater incentives for suppliers to compete for the tenders, notwithstanding that the tender opportunities may not be commercially attractive to every current or potential service provider.

Some interested parties have raised concerns that combining the Processing Services needs of the Participating Councils will limit competition and exclude some potential suppliers who would be likely to compete to supply these services if each Council tendered separately.

The ACCC's inquiries do not support this competition concern. With respect to receiving and processing of recyclables and organics, there are three suppliers currently servicing councils in Adelaide (three recyclables suppliers and three, different, organics suppliers) and the ACCC considers that each would be able to supply the Participating Councils, particularly as the Participating Councils will appoint two suppliers for each stream if tender responses support this being a more efficient and competitive way to structure the contract. With respect to receiving and processing or disposal of residual waste (landfill), the ACCC considers that there are numerous suppliers capable of supplying the Participating Councils.

In this respect, the ACCC notes that the concerns expressed by interested parties about the proposed joint procurement lessening competition are not that the joint tender will confer market power on the Participating Councils and therefore allow them to depress prices below competitive levels. Rather, some parties are concerned that, despite their good intentions, the Participating Councils are mistaken in their belief that joint procurement will result in better outcomes for their ratepayers and, as a result, the joint procurement process will have the unintended consequence of limiting the field of potential bidders and raising prices.

The Participating Councils have the experience and expertise to assess what type of Processing Services arrangements are likely to deliver them the best outcomes for their communities. Further, authorisation does not require the Participating Councils to enter into contracts: it provides legal protection to undertake joint procurement. The ACCC considers that once the Participating Councils have tested the market through jointly calling for tenders, if they find that the proposed joint procurement process is not going to deliver better outcomes in terms of prices and quality of service for their ratepayers, they would be unlikely to proceed with joint contracts. Accordingly, the ACCC considers that the concern that the proposed joint procurement could result in higher prices is unlikely to be realised.

The ACCC also considers that the proposed conduct is likely to generate public benefits in the form of transaction cost savings compared with each Participating Council conducting its own procurement process.

The ACCC also considers that the proposed conduct is likely to generate public benefits through improvements in:

- efficiency in managing the Processing Services contracts, and
- efficiency in the supply of Processing Services.

The ACCC considers that the joint procurement is unlikely to result in a public detriment by reducing competition to supply Processing Services to the Participating Councils and other councils in Adelaide in the longer term. For example, the ACCC has considered concerns that unsuccessful tenderers would permanently leave the market, leaving a more concentrated and less competitive set of firms to compete for future contracts. However, the ACCC considers this concern is unlikely to be realised. There are current service providers who do not have contracts with the Participating Councils, and there will continue to be other opportunities for those suppliers who do not win the contracts with the Participating Councils to remain active in waste processing in South Australia.

The ACCC considers that the public benefits of the joint procurement are likely to outweigh any public detriment arising.

The ACCC has decided to grant authorisation until 30 June 2031.

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## The application for authorisation

1. On 4 May 2018 Council Solutions Regional Authority (Council Solutions), on behalf of itself, the Corporation of the City of Adelaide and the Cities of Charles Sturt, Marion and Port Adelaide Enfield (the **Participating Councils**) (together, the **Applicants**) lodged application for authorisation AA1000419 with the Australian Competition and Consumer Commission (**ACCC**). Council Solutions, on behalf of itself and the Participating Councils, is seeking authorisation to jointly procure certain waste-processing services, until 30 June 2031.<sup>1</sup> The application for authorisation was made under subsection 88(1) of the *Competition and Consumer Act 2010* (the **Act**).
2. Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the Act. Applicants seek authorisation where they wish to engage in conduct which is at risk of breaching the Act but nonetheless consider it is not harmful to competition and/or there is an offsetting public benefit from the conduct.<sup>2</sup>
3. On 14 September 2018, the ACCC issued a draft determination proposing to grant authorisation until 30 June 2031. At the time of releasing the draft determination, the ACCC also granted interim authorisation for Council Solutions and the Participating Councils to enable them to commence the tender and contract negotiation process, but not to enter into or give effect to any waste processing services contracts.

## The proposed conduct

4. Council Solutions and the Participating Councils seek authorisation for:
  - Council Solutions, on behalf of the Participating Councils, to
    - i. conduct a collaborative competitive tender process for waste services, comprising the:
      1. receiving and processing of recyclables
      2. receiving and processing of organics and
      3. receiving and processing or disposal of residual waste(together, Processing Services).<sup>3</sup>
  - Council Solutions to evaluate the responses in collaboration with the Participating Councils and to negotiate on behalf of the Participating Councils the contractual framework

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<sup>1</sup> Council Solutions submission in support of application for authorisation, dated 2 May 2018, p. 1, available: [ACCC Public Register](#).

<sup>2</sup> Detailed information about the authorisation process is available in the ACCC's Authorisation Guidelines at [www.accc.gov.au/publications/authorisation-guidelines-2013](http://www.accc.gov.au/publications/authorisation-guidelines-2013).

<sup>3</sup> Council Solutions submission in support of application for authorisation, dated 2 May 2018, p. 7, available: [ACCC Public Register](#).

- the Participating Councils to individually enter into separate contracts for each of the Processing Services, each on a joint and not several basis, with the successful supplier/s and
  - ongoing administration and management of the resultant contracts to be undertaken jointly by Council Solutions and the Participating Councils.<sup>4</sup>
5. Recyclable waste, or 'recyclables', includes paper and cardboard, glass, plastics, aluminium and steel. Recyclables processing involves the receipt, screening and sorting for 'recovery' of recyclables from waste materials collected either through the 3-bin kerbside collection system from residential premises or from bulk bins. They are delivered to 'resource-recovery infrastructure', typically a Materials Recovery Facility (MRF). The MRF operator may use or sell the material.<sup>5</sup>
  6. Organics comprises garden organics, food organics, timber and other organics, mainly derived from industries such as food processing.<sup>6</sup>
  7. The main type of organic waste found in the household/municipal sector is garden organics. However, all Greater Adelaide Region Councils (other than the City of Onkaparinga) allow food organics into the organics (or 'green') bin where provided and this is a growing component of municipal organic waste. Small amounts of timber and other organics may also be present.<sup>7</sup>
  8. Council Solutions explains that organics processing involves the receipt and beneficial processing of organics. Basic steps include screening and removal of contaminants, aerobic or anaerobic biological processing and manufacture of end products, such as organic fertilisers, soil conditioners and mulches. These end products are then sold to the public or may be bought back by the Participating Councils.<sup>8</sup>
  9. Residual waste should, in theory, consist only of that waste, such as soft plastic, clothing, textiles, nappies and polystyrene, which cannot be treated through resource recovery or reprocessing infrastructure. However, it may also include recyclables and organics where source separation is not followed or available, or contamination is too high to allow for the established processing method. Residual waste may come from the 3-Bin System, Bulk Bins, Hard Waste, Street Litter Bins, contaminated recyclables, contaminated organics or direct disposal by residents.
  10. Council Solutions explains that residual processing involves the receipt of residual waste; sorting for resource recovery where possible; and disposal of the remaining material into landfill.<sup>9</sup>

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<sup>4</sup> Council Solutions submission in support of application for authorisation, dated 2 May 2018, p. 1, available: [ACCC Public Register](#).

<sup>5</sup> Council Solutions submission in support of application for authorisation, dated 2 May 2018, p. 8, available: [ACCC Public Register](#).

<sup>6</sup> Council Solutions submission in support of application for authorisation, dated 2 May 2018, pp. 8-9, available: [ACCC Public Register](#).

<sup>7</sup> Council Solutions submission in support of application for authorisation, dated 2 May 2018, p. 9, available: [ACCC Public Register](#).

<sup>8</sup> Council Solutions submission in support of the application for authorisation, dated 4 May 2018, p 9, available [ACCC Public Register](#).

<sup>9</sup> Council Solutions submission in support of application for authorisation, dated 2 May 2018, p. 9, available: [ACCC Public Register](#).



11. Not all Participating Councils will obtain all their waste-processing services through the Proposed Conduct. Each Participating Council's requirements are as follows:

**Table 1: Participating Councils' requirements**

Processing Service Streams			
Council	Recyclables Processing	Organics Processing	Residual Processing
City of Adelaide	YES	YES	YES
City of Charles Sturt	YES	YES	YES
City of Marion	YES	YES	NO <sup>#</sup>
City of Port Adelaide Enfield	YES	YES*	YES*

<sup>#</sup> The City of Marion does not require Residual Processing as this is provided by SRWRA.  
<sup>\*</sup> These services will not be required by the City of Port Adelaide Enfield until existing arrangements have ended in 2024 at which time the City of Port Adelaide Enfield will confirm its requirements.

12. For the recyclables and organics streams, the Participating Councils may appoint up to two suppliers for each stream.
13. The Participating Councils will appoint one supplier for residual waste processing and disposal.
14. Council Solutions explains that it will seek prices from potential suppliers for each stream to receive the materials from one of two 'centroids' (centre points of circles drawn up based on the locations of particular current resource-recovery infrastructure in Adelaide). Council Solutions states that 'by nominating two centroid locations, greater equity is provided by reducing the advantage or disadvantage to any potential supplier by virtue of the location of their processing facility relative to the collection contractor's depots and the Participating Councils.'<sup>10</sup>
15. Where Council Solutions may appoint two suppliers for a stream, it states that the potential suppliers will provide a price in their tender based on set brackets of tonnes (for example, 25,000 to 40,000 tonnes). In the event that two suppliers are appointed, each supplier will be awarded receipt from one centroid only and the services for discrete Participating Councils.<sup>11</sup>
16. The Applicants seek authorisation until 30 June 2031. This period comprises:
- publication of the Request for Tender (RFT) for the processing service streams in 2018

<sup>10</sup> Council Solutions submission in support of application for authorisation, dated 2 May 2018, p. 10, available: [ACCC Public Register](#).

<sup>11</sup> Council Solutions submission in support of application for authorisation, dated 2 May 2018, pp.10-11, available: [ACCC Public Register](#).

- a tender open period of six to eight weeks (the tender is currently open with a closing date of 12 December 2018)
- a tender evaluation period that allows for contracts to be awarded in 2019
- nine to 12 months to allow for existing contracts to conclude and, where applicable, new infrastructure to be commissioned
- contract commencement from May 2020, with a rolling start across the Participating Councils as current contractual arrangements conclude, with all contracts commenced by May 2021 (subject to Port Adelaide Enfield’s confirmation of their later participation – see Table 1 above), and
- a proposed maximum 10-year contract operating term (initial term and extension options).<sup>12</sup>

17. Table 2 details proposed terms for each waste stream and Councils Solutions’ reasoning:

**Table 2: Proposed contract lengths<sup>13</sup>**

Service Stream	Initial Term	Extension Option	Reasoning
Recyclables Processing	3 years	2 x 3 years, plus 1 additional year	There is currently instability in the recyclables commodity markets that makes the returns on the sale of recovered material by the processors unpredictable. Accordingly, a shorter initial term is planned, supported by extension options which provides greater flexibility, along with appropriate risk sharing mechanisms (e.g. rise and fall).
Organics Processing	7 years	3 years	The Organics Processing market is very stable in South Australia, with three well established processors providing this service and a stable market for the sale of the processed material.
Residual Processing	4 years	2 x 3 years	Disposal of waste processes are rapidly evolving and moving away from simply ‘burying in a hole’. There are emerging and new technology options and a shorter first term provides greater flexibility.

### Proposed tender process

18. The Applicants state that Council Solutions will undertake a competitive RFT process, open to all suitably qualified suppliers. Council Solutions have made the tender documents available on the SA Tenders & Contracts website.<sup>14</sup>

<sup>12</sup> Council Solutions submission in support of application for authorisation, dated 2 May 2018, pp. 13-14, available: [ACCC Public Register](#).

<sup>13</sup> Council Solutions submission in support of application for authorisation, dated 2 May 2018, p.14, available: [ACCC Public Register](#).

<sup>14</sup> Council Solutions submission in support of application for authorisation, dated 2 May 2018, p.10, available: [ACCC Public Register](#).

19. Council Solutions' responsibilities including designing and implementing the procurement process and negotiating contracts. An evaluation team comprising Council Solutions, a Waste Service Management Project team consisting of a representative from each participating council and expert advisors will evaluate tender responses.<sup>15</sup>
20. Council Solutions recovers its costs for running the tender process from the Participating Councils. It is not applying a percentage levy to the contracts.<sup>16</sup>

### **Ongoing administration of contracts<sup>17</sup>**

21. As part of ongoing contract management and administration, Council Solutions and representatives from each Participating Council will participate in joint decisions, activities (including the sharing of information) and discussions concerning, for example, contamination management and assessment of supplier performance.
22. Council Solutions will perform a central contract management role, being primarily responsible for and taking the lead on:
  - reviewing and verifying data
  - measurement and monitoring of Key Performance Indicators
  - pricing reviews, and
  - exercising contract options.
23. Each of the Participating Councils will retain some contract management responsibility, such as internal reporting and providing the customer interface to their communities.

### **The rationale for the Proposed Conduct**

24. The Applicants submit that the Proposed Conduct, which forms part of what it terms the Waste Service Management Project, seeks to establish strategic partnerships that provide the best possible benefits and services to the Participating Councils' communities. They submit that these partnerships will provide value for money, improve waste management and deliver waste reduction outcomes and environmental sustainability across multiple municipalities, to achieve environmental and economic benefits for their communities.<sup>18</sup>

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<sup>15</sup> Council Solutions submission in support of application for authorisation, dated 2 May 2018, p.10, available: [ACCC Public Register](#).

<sup>16</sup> Council Solutions AA1000419 and AA1000420 response to submissions from interested parties 12 July 2018, p.15, available: [ACCC Public Register](#).

<sup>17</sup> Council Solutions submission in support of application for authorisation, dated 2 May 2018, p.11, available: [ACCC Public Register](#).

<sup>18</sup> Council Solutions submission in support of application for authorisation, dated 2 May 2018, pp.12-13, available: [ACCC Public Register](#).

## The Applicants

### Council Solutions

25. 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.<sup>19</sup>
26. Council Solutions' primary purpose is to improve the financial sustainability of its constituent councils through collaborative strategic procurement, contract negotiation and management.<sup>20</sup> During 2016/17 more than \$63.5 million of Council expenditure was undertaken utilising Council Solutions' collaborative contract arrangements.<sup>21</sup>
27. Council Solutions is owned by the constituent councils and governed by a Board of Management, formed by the Chief Executive Officers of each of the six constituent councils and an Independent Chair.<sup>22</sup>

### Participating Councils

28. The Participating Councils and Council Solutions are an unincorporated joint venture with the purpose of undertaking the Proposed Conduct.<sup>23</sup>
29. The Participating Councils are:
  - the Corporation of Adelaide City Council and the Cities of 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.<sup>24</sup>
30. 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.<sup>25</sup>
31. The sizes of the Participating Councils are outlined in Table 3.

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<sup>19</sup> The Cities of Onkaparinga, Salisbury and Tea Tree Gully are non-participating councils for the purpose of the proposed joint procurement process for which authorisation is sought.

<sup>20</sup> The governing charter as gazetted 20 December 2012.

<sup>21</sup> Council Solutions submission in support of application for authorisation, dated 2 May 2018, p.4, available: [ACCC Public Register](#).

<sup>22</sup> Council Solutions submission in support of application for authorisation, dated 2 May 2018, p.4, available: [ACCC Public Register](#).

<sup>23</sup> Council Solutions submission in support of application for authorisation, dated 2 May 2018, p.4, available: [ACCC Public Register](#).

<sup>24</sup> Council Solutions submission in support of application for authorisation, dated 2 May 2018, pp. 4-5, available: [ACCC Public Register](#).

<sup>25</sup> Council Solutions submission in support of application for authorisation, dated 2 May 2018, p. 7, available: [ACCC Public Register](#).

**Table 3: The Participating Councils: population, properties and area<sup>26</sup>**

Council	Population	Rateable Properties	Land Area
City of Adelaide	23,396	22,435	15.6
City of Charles Sturt	114,688	55,175	54.8
City of Marion	90,602	41,376	55.6
City of Port Adelaide Enfield	123,947	61,026	91.8
<b>TOTAL</b>	<b>352,633</b>	<b>180,012</b>	<b>217.8</b>
<b>All Greater Adelaide Region Councils</b>	<b>1,429,122</b>	<b>686,236</b>	<b>10,882.50</b>

32. The Participating Councils are situated within the Adelaide metropolitan area. A map showing the location of each of the Participating Councils is provided below.

**Map 1: Location of the Participating Councils within the Metropolitan Adelaide area<sup>27</sup>**



<sup>26</sup> Council Solutions submission in support of application for authorisation AA1000414, dated 14 March 2018, p.5, available: [ACCC Public Register](#).

<sup>27</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.6, available: [ACCC Public Register](#).

33. The Participating Councils' current Processing Service providers are as follows:

**Table 4: Participating Councils' current contractors<sup>28</sup>**

Participating Council	Recyclables receipt and processing	Organics receipt and processing	Waste disposal
<b>Adelaide</b>	SKM Recycling	Jeffries	Cleanaway
<b>Charles Sturt</b>	Visy	Jeffries	Cleanaway
<b>Marion</b>	Contractor: Solo Sub-contractor: Visy	Contractor: Solo Sub-contractor: Peats	SRWRA Marion not participating in proposed joint tender for waste disposal
<b>Port Adelaide Enfield</b>	Contractor: Cleanaway Sub-contractor: Visy	IWS Port Adelaide continuing with this existing arrangement, which expires in 2024	IWS Port Adelaide continuing with this existing arrangement, which expires in 2024

## Previous application for authorisation

34. In December 2016, the ACCC issued a determination denying authorisation to Council Solutions and a group of five metropolitan councils in SA, which had applied to jointly procure waste management services.<sup>29</sup>
35. Council Solutions, on behalf of Adelaide City Council, Charles Sturt, Marion, Tea Tree Gully, and Port Adelaide Enfield, sought authorisation for 17 years (with a proposed maximum contract term of 10 years) to jointly procure the supply of:
- waste collection services
  - the receiving and processing of recyclables
  - the receiving and processing of organics, and
  - waste disposal services.
36. Council Solutions proposed to run a joint process to procure all these waste management services streams at once, via a single Request for Proposal process.

<sup>28</sup> Council Solutions response to information request dated 24 August 2018, p.1-2, available: [ACCC Public Register](#).

<sup>29</sup> Determination, Application for authorisation A91520, 20 December 2016, available: [ACCC Public Register](#).

37. Under the Request for Proposal process, tenderers would not have been required to tender to service all councils or all these waste management service streams. Each council would have individually decided which supplier to appoint for each service stream, meaning there was the potential for a large number of possible service streams and supplier combinations. The effect of this arrangement would have been that unless a provider wanted to limit itself to one option, it would have been required to prepare a proposal that covered multiple permutations and combinations of waste streams, in case only part of the proposal was successful.
38. The ACCC concluded that the proposed conduct was likely to result in some public benefits in the form of:
- small improvements in efficiency related to community education
  - small improvements in efficiency in the supply of recyclables and organics processing, and
  - small improvements in environmental outcomes.
39. The ACCC considered that the conduct was likely to result in some public detriment 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, and
  - reducing competition for the supply of waste services to non-participating councils.
40. On balance the ACCC was not satisfied that the net public benefit test was met.
41. Council Solutions has sought to address the ACCC's concerns with the 2016 application in the following ways:
- Council Solutions has split the conduct into three separate tenders for different service streams: waste collection services, Processing Services and ancillary services. The current application relates to Processing Services only. As discussed below, separate applications have been lodged covering the collection and ancillary service streams.
  - Council Solutions proposes to issue a more tightly prescribed RFT for each service stream, instead of a Request for Proposal.
  - Council Solutions proposes to appoint a set number of suppliers to the Participating Councils (see paragraphs 12 and 13 above).
  - Council Solutions seeks authorisation until 30 June 2031, with a proposed maximum contract term of 10 years.
42. The application also covers four, instead of five, councils (the City of Tea Tree Gully is no longer participating).

## Related applications

43. Council Solutions has lodged two other applications for authorisation for itself and the Participating Councils, in respect of the following service streams:
  - **Council Solutions & Ors (collections), AA1000414, lodged 14 March 2018:** joint procurement of the collection of domestic waste, recyclables and organics through the use of the 3-bin system, including the supply and maintenance of mobile garbage bins.
  - **Council Solutions & Ors (ancillary), AA1000420, lodged 4 May 2018:** joint procurement for the collection of ancillary waste services, comprising the multi-unit collection of Bulk Bins and processing or disposal of the waste (including the supply and maintenance of the bins), kerbside collection and processing or disposal of Hard Waste and collection of park and footpath litter and/or recycling bins and disposal or processing of the waste.
44. The ACCC released a determination granting authorisation for application AA1000414 (kerbside collections) on 12 October 2018.<sup>30</sup>
45. Concurrent with the release of this Processing Services determination, the ACCC has released a determination granting authorisation to application AA1000420 (ancillary services).
46. The applications, public submissions received and determinations are available on the ACCC's Public Register: [collections](#) and [ancillary](#).
47. The ACCC notes that some potential suppliers offer services across more than one of the service streams covered by the three applications. As the three applications concern separate service streams, and separate areas of competition, the ACCC has assessed each application separately. However, in undertaking its assessment, the ACCC has had regard to the possibility that one supplier may be awarded contracts across multiple service streams.

## Other authorisations

48. It is common practice throughout Australia for groups of local councils to collaborate to jointly procure waste services.<sup>31</sup> The objective of such collaboration is to reduce transaction costs, pool resources and expertise and achieve economies of scale.
49. The ACCC has authorised around 30 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. Many of these have involved the procurement of waste-processing services.<sup>32</sup>

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<sup>30</sup> Available: [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister)

<sup>31</sup> SA examples include procurements related to Barossa Regional Procurement Group, Adelaide Hills Region Waste Management Authority, Northern Adelaide Waste Management Authority and East Waste.

<sup>32</sup> See at [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister): for example, AA1000422 Metropolitan Waste and Resource Recovery Group; A91596 and A91597 Loddon Mallee Waste and Resource Recovery Group; A91585 North East Waste and Resource Recovery Group; A91518 Southern Metropolitan Regional Council; A91483 Maitland City



50. The joint procurement process that the Applicants have proposed in their current application for authorisation is similar to a number of those which the ACCC has previously authorised.

## Consultation

51. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process.
52. The ACCC invited submissions from a range of market participants, including waste and recycling service providers, industry agencies, government agencies/bodies, neighbouring councils and parties who provided a submission in response to the 2016 application.<sup>33</sup>
53. The ACCC received submissions from 34 parties.<sup>34</sup>
54. The submissions in support of the application submit that the Proposed Conduct will result in cost savings for the Participating Councils through increased service efficiencies and the administration of a single joint tender process; and promote competition for the supply of waste services, providing better value for money for ratepayers.
55. The submissions opposed to the application submit that:
- Administrative cost savings are unlikely to be realised because all four councils will need to remain heavily involved in the tender process and the ongoing management of waste services in their respective council areas.
  - A tender process of the proposed size will exclude or deter a number of suppliers, particularly small businesses, from tendering.
  - Awarding contracts of the proposed size to a small number of suppliers could result in fewer waste services providers in Adelaide, which would impact competition in the long term.
56. Two associations that count current processors for the Participating Councils among their members have expressed concerns to the ACCC. These are:
- The Waste & Recycling Association of SA (**WRASA**). WRASA lists organics processor Peats as one of its members. Peats is the subcontractor to another WRASA member, Solo Resource Recovery, for organics processing at City of Marion. Peats advised that it supported WRASA's submission.
  - The Waste & Recycling Industry Association of SA (**WRISA**). WRISA member Cleanaway is the contractor for waste disposal at the cities of Adelaide and Charles Sturt and the head contractor for recyclables

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Council and others; A91431 Cities of Wanneroo, Joondalup and others; and A91408 Clarence City Council and others.

<sup>33</sup> A list of the parties consulted and the public submissions received is available from the ACCC public register: [www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register](http://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register) and [here](#).

<sup>34</sup> A number of parties provided more than one submission.

processing at Port Adelaide Enfield, with Visy as the subcontractor. Cleanaway advised that it supported WRISA's submission.

57. In addition, the ACCC directly contacted and held discussions with parties including other councils in, and outside, South Australia and service suppliers about all three applications for authorisation. These discussions were initiated by the ACCC to inform the ACCC's understanding of the waste management industry and provide context to the Proposed Conduct. This included obtaining information about the outcomes of joint procurement processes the ACCC has previously authorised, included obtaining commercially sensitive information from some parties who have not identified themselves as having an interest in the current applications. Accordingly, records of these conversations have not been placed on the ACCC's public register.
58. The submissions by Council Solutions, Participating Councils and interested parties, and the information obtained through the ACCC's market inquiries, are considered as part of the ACCC's assessment of the application for authorisation below.
59. Public submissions received and other information which relates to the application for authorisation may be obtained from the [ACCC's Public Register](#).

## ACCC assessment

60. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
61. The Applicants have sought authorisation for the Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsections 90(7) and 90(8) of the Act, the ACCC must not make a determination granting authorisation in relation to conduct unless it is satisfied in all the circumstances that the conduct would result or be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the conduct.<sup>35</sup>

## Relevant areas of competition

62. The ACCC does not consider it necessary to precisely define the relevant areas of competition in assessing the Proposed Conduct.
63. For the purposes of best assessing the Proposed Conduct, the ACCC has focused on the following areas of competition:
  - the supply of processing services for recyclables in metropolitan Adelaide, including receiving and processing of paper, cardboard, glass, plastic aluminium and steel from municipal and non-municipal sources
  - 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, and
  - the supply of waste disposal services in metropolitan Adelaide including residual kerbside waste, bulk bin waste, 'hard waste' (bulky domestic waste), waste from parks and public area collections, contaminated recyclables, contaminated organics, waste delivered by residents under bulk drop off arrangements, commercial-and-industrial waste and construction-and-demolition waste.

## Future with and without

64. To assist in its assessment of the Proposed Conduct against the authorisation test, 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.
65. The ACCC notes that there are a range of possible options the Participating Councils could explore if they did not jointly tender as proposed. These options include each Council procuring waste processing services individually, or seeking to partner with other councils, as the City of Marion has done in the past.
66. While these are possibilities, the ACCC considers that the most appropriate comparison to the Proposed Conduct is each council individually procuring

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<sup>35</sup> As the Applicants have sought authorisation for conduct which may include cartel conduct, section 90(8) requires the ACCC to be satisfied under the net public benefit test in section 90(7)(b) when making its determination.

services for the receipt and processing of recyclables, receipt and processing of organics and waste disposal services.

67. Where the Participating Councils individually procure these services, the timing of each procurement 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, to decide how few or how many service streams to include in a procurement process, and whether to use a request for tender or request for proposal.

## Public benefit

68. The Act does not define what constitutes a public benefit and the ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (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.<sup>36</sup>

69. The ACCC notes the aims of the Participating Councils to provide value for money, improve waste management and reduce waste, and to achieve environmental and economic benefits for their communities. The Participating Councils consider that the proposed joint procurement is their best means of achieving these aims. The ACCC considers that the Participating Councils are well informed and well placed to make this assessment. It is in the interest of the Participating Councils to ensure that this is the case and they are accountable to their ratepayers for doing so.
70. A number of submissions have raised concerns about the Proposed Conduct and questioned whether these benefits will be realised.
71. Having regard to the submissions of the Applicants and interested parties and information available to the ACCC, the ACCC has considered five claimed public benefits of the Proposed Conduct:
- stimulation of competition
  - transaction cost savings
  - improved efficiencies through combined contract management
  - improved efficiency in the supply of waste processing and disposal services, and
  - improved environmental outcomes.
72. More generally, the ACCC notes that a number of submissions have expressed strong views about how the Participating Councils should structure their procurement arrangements and, in effect, called on the ACCC to play the role of arbiter of how the waste services industry in South Australia should be structured.

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<sup>36</sup> *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.

This included submissions raising concerns about specific clauses of the tender documents released by Council Solutions.<sup>37</sup>

73. In particular, some interested parties submitted that the tender documents have been written in a manner that reduces contract risk for the Participating Councils and places additional risk on suppliers. Examples cited in these submissions include contract extensions being at the Participating Councils' discretion, and long lead times between submitting tender prices and contracts commencing.<sup>38</sup>
74. However, the ACCC's role is limited to determining whether to grant authorisation (and on what terms). This involves assessing whether the likely public benefits of the Proposed Conduct for which Council Solutions has sought authorisation outweigh the likely public detriments. Beyond that, it is not the ACCC's role to determine how the Participating Councils, or suppliers of waste services, should operate or how they should structure their contracts. In this respect, as noted, the Participating Councils are ultimately accountable to their ratepayers and communities.
75. The ACCC's assessment of the likely public benefits from the Proposed Conduct follows.

### **Stimulation of competition**

76. Council Solutions states that the aim of the proposed joint procurement is to provide the best possible benefits and service to the Participating Councils' ratepayers, through acquiring value for money waste management services.<sup>39</sup>
77. Council Solutions submits that there are some fundamental tenets of collaborative procurement or 'bulk buying' that guide buyers to join together where possible. Aggregating service volumes and providing assurance of business over time via multi-year contracts drives lower costs and optimal value for money. Such opportunities are highly desirable to suppliers and attract significant competition.<sup>40</sup> There is clear evidence from the experience of other councils that collaboration can drive savings through improved purchasing power.<sup>41</sup>
78. Council Solutions argues that the opportunity presented by the Participating Councils under the Proposed Conduct will encourage all potential suppliers capable of providing any or all of the processing service streams to compete and submit tenders.<sup>42</sup> The feedback provided by potential suppliers across the processing service streams to Council Solutions during consultation with market participants indicated that the contract opportunities presented by the Proposed Conduct are attractive. The collaborative approach of the Participating Councils

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<sup>37</sup> Pursuant to the interim authorisation granted by the ACCC on 14 September 2018, the tender process for waste processing services, as well as the tender processes for kerbside collection services and ancillary waste services, are currently open with the tender documents having been released in late September.

<sup>38</sup> Waste & Recycling Association of SA Inc submission, pre decision conference record, p.5 & 6, Waste & Recycling Association of SA Inc submission, dated 3 October 2018, p.2, Polytrade Recycling submission, dated 5 October 2018, p.1, available: [ACCC Public Register](#).

<sup>39</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.13, available: [ACCC Public Register](#).

<sup>40</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.30, available: [ACCC Public Register](#).

<sup>41</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.31, available: [ACCC Public Register](#).

<sup>42</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.32, available: [ACCC Public Register](#).

utilising a single RFT across all three processing service streams with standardised specifications, reduces the tendering workload for the potential suppliers and further encourages competition.<sup>43</sup>

79. In this respect, Council Solutions states that each of the Participating Councils has chosen to procure waste processing services collectively in the expectation of extracting a better deal in doing so.<sup>44</sup>
80. The Participating Councils each provided submissions in support of the Proposed Conduct, stating that it supports best value procurement of waste management services aimed at achieving the best outcomes for their communities. The City of Charles Sturt and the City of Marion submit that joint procurement will improve their purchasing power.<sup>45</sup>
81. The City of Charles Sturt also submits that they have already achieved significant cost savings through collaborative procurements provided by Council Solutions on behalf of groups of councils, including arrangements for bituminous road works, cleaning contracts and temporary labour hire.<sup>46</sup>
82. WRISA submits that the proposed joint tender will skew bargaining power in favour of the Participating Councils through lessening of competition while establishing a contract that does not benefit the public and create forces that have been proven elsewhere to generate higher prices and reduce service quality and lower landfill diversion rates.<sup>47</sup>
83. WRISA submits that a tender of the size proposed will significantly limit future competition and exclude market players who would likely bid for processing services from Participating Councils if offered through individual tenders. WRISA submits that, given these contracts are highly capital intensive and require significant upfront investment, the business risk alone will further exclude potential contractors from the process.<sup>48</sup>
84. The Australian Small Business and Family Enterprise Ombudsman and the Small Business Commissioner of South Australia submit that the tendering process, scope of proposed contracts, capital required by the successful tenderer, including required bank guarantees, and the risks imposed on tenderers (and the successful tenderer) will preclude small businesses from tendering, thereby lessening competition.<sup>49</sup>
85. WRISA further submits that claims regarding improved purchasing power are overstated as economies of scale with respect to recycling and organics are already realised by large councils.<sup>50</sup>

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<sup>43</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.36, available: [ACCC Public Register](#).

<sup>44</sup> Council Solutions submission, dated 12 July 2018, p. 24, available: [ACCC Public Register](#).

<sup>45</sup> City of Charles Sturt submission, dated 4 June 2018, p 1, and City of Marion submission, dated 4 June, p 2, available: [ACCC Public Register](#).

<sup>46</sup> The City of Charles Sturt submission, dated 29 October September 2018, p.2, available: [ACCC Public Register](#).

<sup>47</sup> Waste & Recycling Association of SA Inc submission, dated 18 June 2018, p. 30, available: [ACCC Public Register](#).

<sup>48</sup> Waste & Recycling Industry Association of South Australia submission, dated 15 June 2018, p. 2, available: [ACCC Public Register](#).

<sup>49</sup> Australian Small Business and Family Enterprise Ombudsman submission, dated 12 September 2018, p.1, and Small Business Commissioner of South Australia submission, dated 1 November 2018, p.3, available: [ACCC Public Register](#).

<sup>50</sup> Waste & Recycling Industry Association of South Australia submission, dated 15 June 2018, p. 3, available: [ACCC Public Register](#).

86. WRISA states that its members are more likely to tender if the work is not jointly tendered. WRISA submits that, while a supplier may be capable of supplying an individual council, it may not be in a position to supply all the Participating Councils. WRISA submits that the greatest stimulation of a market occurs when there is a dynamic market with a consistent pipeline of opportunities available to all or most contractors.<sup>51</sup>
87. The National Waste Recycling Industry Council (NWRIC) similarly submits that public benefit is maximised when market opportunities occur frequently and are spread evenly over time, rather than aggregated into a single contract as proposed by Council Solutions.<sup>52</sup>
88. WRASA also submits that the terms of the tender documents released by Council Solutions, will require tenderers to factor in proportionally higher risk premiums, discouraging tender bids and/or leading to higher prices. For example:
- tender prices will need to be held for 270 days before a decision about which tenderer(s) to appoint will be made, rather than industry standard practice of having to hold prices for 180 days, and
  - required bank guarantees are to be advised meaning tenderers will not know what bank guarantees will be required at the time of tendering.<sup>53</sup>
89. WRASA further submits that depending on the outcome of the ancillary service stream tender process, processors of kerbside waste may also need to accept waste collected by ancillary service stream collectors. Waste from different sources incur different costs to process but there is no capacity in the tender documents to price the processing of waste from different services streams separately. WRASA submits that this will likely lead to higher prices for all waste processed.<sup>54</sup>
90. In response, Council Solutions submits that there are no small businesses providing recyclables, organics or residual waste processing or disposal to the Participating Councils or any of the Greater Adelaide Region Councils.<sup>55</sup>
91. Council Solutions submits that all potential suppliers will be able to compete to supply processing services. Potential suppliers can tender for one service stream or more than one service stream. Potential suppliers can also submit different prices for different volumes (bands) of waste and two suppliers will be appointed for the processing of recyclables and the processing of organics if tender responses reflect that this is the most efficient way to structure the arrangements.<sup>56</sup>
92. Council Solutions also submits that historically, bank guarantees required for processing service stream suppliers have been minimal, or have not been

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<sup>51</sup> Waste & Recycling Industry Association of South Australia submission, dated 15 June 2018, p. 7, available: [ACCC Public Register](#).

<sup>52</sup> National Waste Recycling Industry Council submission, dated 5 October 2018, p.1, available: [ACCC Public Register](#).

<sup>53</sup> Waste & Recycling Association of SA Inc submission, pre decision conference record, p.5, available: [ACCC Public Register](#).

<sup>54</sup> Waste & Recycling Association of SA Inc submission, pre decision conference record, p.4, available: [ACCC Public Register](#).

<sup>55</sup> Council Solutions submission, dated 12 July 2018, p. 11, available: [ACCC Public Register](#).

<sup>56</sup> Council Solutions submission, pre decision conference record, p.8, available: [ACCC Public Register](#).

required at all, and this is likely to continue to be the case under the Proposed Conduct. Required bank guarantees are listed in the tender documents as to be advised because the level of risk, and therefore the required bank guarantees, will be assessed based on tender responses.<sup>57</sup>

93. The ACCC notes the Participating Councils' aim in establishing the proposed joint procurement process. That is, to provide value for money, improve waste management and deliver waste-reduction outcomes and environmental sustainability across their municipalities and to achieve environmental and economic benefits for their communities. The Participating Councils consider that aggregating their service volumes is likely to be desirable to potential suppliers and attract significant competition.
94. However, in the context of procuring processing and disposal services, the Participating Councils may be considered to be each other's competitors. Therefore, absent authorisation, by conducting their procurement jointly rather than individually, they risk breaching competition laws. Broadly, the competition laws the Participating Councils would be at risk of breaching, as they relate to the Proposed Conduct, are designed to prevent consumer harm arising from buyers gaining market power to depress prices below efficient levels, which could lead to inefficiently low levels of supply, firms exiting the market and ultimately a more concentrated market, leading to higher prices in the long run.
95. However, the concerns expressed by interested parties about the Proposed Conduct lessening competition in this case are not that the joint tender will confer market power on the Participating Councils and therefore allow them to depress prices below competitive levels. Rather, some parties are concerned that, despite their good intentions, the Participating Councils are mistaken in their belief that joint procurement will result in better outcomes for their ratepayers and, as a result of this mistake, the joint procurement process will have the unintended consequence of limiting the field of potential bidders and raising prices. That is, the Participating Councils are inadvertently conferring market power to a small group of larger suppliers who will exploit that market power to the disadvantage of the Participating Councils and their ratepayers.
96. The ACCC considers that this is unlikely to be the case. The ACCC considers that the proposed joint tender is likely to increase the purchasing power of the Participating Councils in contracting for the supply of Processing Services. All else being equal, this increased purchasing power is likely to be reflected in the negotiated terms and conditions of service agreements, resulting in lower prices and/or better quality of waste management services delivery to the Participating Councils' ratepayers.
97. As discussed below, the ACCC also considers that the Proposed Conduct is likely to offer suppliers the opportunity of transaction cost savings and other efficiencies compared with tendering for and supplying these services to the Participating Councils individually. Further, the ACCC considers that the Proposed Conduct, by offering a guaranteed contract for a greater volumes of tonnes than any of the Participating Councils could offer individually, is likely to provide a greater incentive for the suppliers who typically win these contracts to compete for these contracts, while recognising that the tender opportunities may not be commercially attractive to every current or potential service provider.

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<sup>57</sup> Council Solutions submission, pre decision conference record, p.8, available: [ACCC Public Register](#).



98. Accordingly, the ACCC considers that the Proposed Conduct is likely to result in a public benefit by stimulating competition to provide the Processing Services to the Participating Council, resulting in lower prices and/or better quality of waste management services delivery to the Participating Councils ratepayers.
99. The ACCC notes the concerns raised by some interested parties that the size of the proposed contracts may preclude some potential suppliers from bidding. This is considered in the ACCC's assessment about the impact on competition of the proposed joint tender as it relates to each of the processing service streams (recyclables, organics and residual waste), discussed directly below, and in the ACCC's assessment about the longer-term impact on competition for the supply of waste processing services, discussed in the ACCC's assessment of the potential public detriments of the Proposed Conduct.
100. With respect to concerns about some of the contract terms proposed by Council Solutions, as noted, it is not the ACCC's role to determine how the Participating Councils, or suppliers of waste services, should operate or how they should structure their contracts. In particular, whether, as some interested parties have suggested, the Participating Councils seek to acquire waste processing services on terms that reduce contract risk for them and, potentially incur higher costs (prices) in doing so, is a matter for the Participating Councils to decide

*Recyclables receipt and processing*

101. Council Solutions submits that there are currently at least three potential suppliers who have the capacity to provide recyclables processing to the Participating Councils: the Northern Adelaide Waste Management Authority (NAWMA), SKM Recycling and Visy.<sup>58</sup>
102. WRISA states that their members are more likely to tender if the work is not jointly tendered. WRISA submits that while a supplier may be capable of supplying an individual council, it may not be in a position to supply all the Participating Councils.<sup>59</sup>
103. WRASA submits that the proposed joint tender may actually result in less competition as recycling companies are extremely hesitant to enter long term arrangements at present due to changes to China's recycling policy (the China national sword policy), or if they do contract their terms are unfavourable for Councils. These unfavourable contract terms will not only include higher gate fee charges, but additionally transfer the risk of market volatility onto the Councils.<sup>60</sup>
104. NAWMA submits that recyclables processing, when compared to the waste and organics streams, may require the most significant capital investment, yet the capital and risk must be amortised over the shortest term (three years).<sup>61</sup>
105. In response, Council Solutions submits that the proposed contract structure, with a shorter initial term, supported by extension options, has been specifically

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<sup>58</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.33, available: [ACCC Public Register](#).

<sup>59</sup> Waste & Recycling Industry Association of South Australia submission, dated 15 June 2018, p. 7, available: [ACCC Public Register](#).

<sup>60</sup> Waste & Recycling Association of SA Inc submission, dated 18 June 2018, pp. 5 and -7, available: [ACCC Public Register](#).

<sup>61</sup> Northern Adelaide Waste Management Authority submission, dated 25 September 2018, p.1, available: [ACCC Public Register](#).

designed to address this risk.<sup>62</sup> Council Solutions also submits that the initial term will be able to be negotiated with the successful tenderer(s). If a large capital investment is required, a longer term can be negotiated. However, the inherent volatility in the recyclables market at the moment is unrelated to the proposed joint procurement process.<sup>63</sup>

106. NAWMA also submits that it supports the flexibility to appoint two suppliers for the recyclables stream, but questions whether this erodes the efficiencies and cost advantages purported by Council Solutions.<sup>64</sup>
107. The ACCC notes the three potential suppliers identified by Council Solutions. The ACCC is not aware of any other suppliers currently supplying recyclables receipt and processing services to councils in Adelaide. While some of the identified suppliers, and other suppliers, also provide services to the commercial and industrial and construction and demolition sectors, the nature of the recyclable materials received from these sectors, and the facilities required to process them, differ from those for the receipt and processing of municipal recyclables. The ACCC understands that Adelaide's three largest recyclables processors are largely configured to handle municipal recyclables.<sup>65</sup>
108. The ACCC considers that each of these suppliers would be capable of supplying services to the Participating Councils, particularly as Council Solutions may appoint up to two suppliers for the processing of recyclables. In this respect, as noted, potential suppliers will be asked to submit tender prices to receive and process materials in specific tonnage bands. Efficiencies in aggregating volumes would be expected to be reflected in the prices tendered for each tonnage band. Similarly, any preference to receive smaller volumes than the aggregate volumes of the Participating Councils are also able to be reflected in the prices tendered by potential suppliers for each tonnage band.
109. Accordingly, the Participating Councils will choose to appoint either a single supplier, or two suppliers, based on whether having one or two suppliers will achieve the best (most competitive) outcome for their ratepayers.
110. With respect to whether the proposed joint tender may attract other potential suppliers, as discussed at paragraphs 169 to 172, while not sufficient in and of itself to attract a new processing facility to Adelaide, aggregating the volumes of the Participating Councils is more likely to assist in encouraging a new processing facility to Adelaide than each council tendering individually. Aggregating volumes may also encourage greater investment in or use of better technologies at existing facilities.
111. However, the ACCC notes that, given the volume necessary to sustain a facility processing municipal recyclables, relative to the total amount of household recyclables generated in Adelaide, there is some question whether an additional supplier would be sustainable in any event.
112. An alternative approach for a potential new entrant would be to transport recyclables interstate for processing, as does occur in some cases, unless or until

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<sup>62</sup> Council Solutions submission, dated 12 July 2018, p. 9, available: [ACCC Public Register](#).

<sup>63</sup> Council Solutions submission, pre decision conference record, p.8, available: [ACCC Public Register](#).

<sup>64</sup> Northern Adelaide Waste Management Authority submission, dated 25 September 2018, p.1, available: [ACCC Public Register](#).

<sup>65</sup> See, for example, [www.nawma.sa.gov.au/material/](http://www.nawma.sa.gov.au/material/)

such time as the supplier has sufficient volume to sustain a processing facility in the state where the recyclables are received. For a potential new entrant adopting this approach, smaller, more frequent opportunities to win contracts for recyclables processing services may be more likely to encourage expansion into Adelaide. Although, the ACCC notes that under the Proposed Conduct, a new entrant adopting this strategy would still be able to win a proportion of the Participating Councils work if they were able to make the best offer for a proportion of the Participating Councils total volume.

113. With respect to the uncertainty created by the China national sword policy, the ACCC considers that the proposed contract structure, with a short initial term, three years, and extension options, but with flexibility to negotiate an alternative initial term with the successful tenderer(s), and the ability to appoint one or two suppliers, strikes a balance in dealing with this issue.

#### *Organics receipt and processing*

114. Council Solutions submits that there are currently at least three potential suppliers in the market who have the capacity to provide Organics Processing to the Participating Councils, Jefferies, Peats and IWS. In addition, Council Solutions submits that DeLorean Energy has announced that a new bioenergy plant will be established in northern Adelaide and will accept organics for processing, offering an alternative processing solution and a new market entrant.<sup>66</sup>
115. WRASA submits that the size of the proposed contract will favour large companies that can afford the bank guarantees and capital requirements, which WRASA estimates at over \$1 million.<sup>67</sup>
116. SA Composters similarly submits that large tenders are out of the reach of small and medium size businesses and that the bank guarantee and capital requirement necessary to service the Participating Councils through a joint contract mean SA Composters will be unable to tender.<sup>68</sup>
117. In response, Council Solutions submits that there are no small businesses providing organics processing to the Participating Councils or any of the Greater Adelaide Region Councils.<sup>69</sup>
118. The ACCC notes the three potential suppliers identified by Council Solutions. The ACCC considers that these three suppliers would be capable of supplying services to the Participating Councils. Further, as with recyclables processing, the ACCC notes that Council Solutions may spread the total tonnage required to be processed between two suppliers if the tenders they submit support this being a more efficient and competitive way to structure the contract.
119. With respect to whether the proposed joint tender may attract other potential suppliers, as discussed at paragraphs 169 to 172, while not sufficient in and of itself to attract a new processing facility to Adelaide, aggregating the volumes of the Participating Councils is more likely to assist in encouraging a new processing facility to Adelaide than each council tendering individually.

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<sup>66</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.34, available: [ACCC Public Register](#).

<sup>67</sup> Waste & Recycling Association of SA Inc submission, dated 18 June 2018, p. 5, available: [ACCC Public Register](#).

<sup>68</sup> SA Composters submission, dated 24 July 2018, p. 1 and submission dated 11 October 2018, p.1, available [ACCC Public Register](#).

<sup>69</sup> Council Solutions submission, dated 12 July 2018, p. 11, available: [ACCC Public Register](#).

## *Waste disposal*

120. Council Solutions submits that in the Greater Adelaide Region there was over 700,000 tonnes of Residual Waste sent to landfill in 2015-16. Council Solutions states that the Participating Councils have a combined volume of just over 53,400 tonnes per annum, representing approximately 7.5 per cent of the Residual Waste tonnes available.<sup>70</sup>
121. Council Solutions submits that there are currently at least seven potential suppliers in the market who have the capacity to provide residual processing to the Participating Councils, including several landfills owned and operated by Regional Subsidiaries. These are all traditional landfill sites with various pre-burial resource recovery systems.<sup>71</sup>
122. Council Solutions states that, in addition, through consultation with the market, it is aware of another potential supplier, Adelaide Resource Recovery, intending to establish reprocessing infrastructure in the form of an energy-from-waste anaerobic digestion facility in northern Adelaide. Council Solutions states that this is subject to receiving enough tonnes to feed the facility, which will accept both organics and residual waste.<sup>72</sup>
123. Council Solutions submits that the introduction of new technology requires availability and security of feedstock volumes to ensure viability. Whilst the Participating Councils' aggregated tonnes may not be sufficient to entirely underpin the establishment of new reprocessing infrastructure, the feedback provided by potential suppliers to Council Solutions during the consultation with the market indicated that the contract opportunity presented by the Proposed Conduct is attractive as it provides a pipeline of significant volumes over an extended period.<sup>73</sup>
124. WRASA submits that new entry and innovation is largely driven by small-to-medium, manageable and lower-risk contracts. WRASA submits that the reality is no further competition other than current suppliers in the market will submit tenders, which demonstrates its point that a joint tender is not required to attract new entrants to the market.<sup>74</sup>
125. In response, Council Solutions submits that WRASA's submission implies that competition has a singular dimension. That of the number of parties tendering. Council Solutions contends that competition has additional dimensions, such as the quantity of supply on offer, and in this instance the joint tender process will trigger the quantity of supply aspect of competition between existing market participants.<sup>75</sup>
126. In this respect, Council Solutions submits that combining the wastes from the three Participating Councils will present the market with a more attractive parcel of guaranteed waste supply than would be the case with the councils tendering for

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<sup>70</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.20, available: [ACCC Public Register](#).

<sup>71</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.35, available: [ACCC Public Register](#).

<sup>72</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.35, available: [ACCC Public Register](#).

<sup>73</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.35, available: [ACCC Public Register](#).

<sup>74</sup> Waste & Recycling Association of SA Inc submission, dated 18 June 2018, p. 6, available: [ACCC Public Register](#).

<sup>75</sup> Council Solutions submission, dated 27 July 2018, p 8, available: [ACCC Public Register](#).

disposal services separately and at different times. On this basis, it is reasonable to expect that existing disposal service providers, and any new entrants that may wish to consider entering the market, will compete more vigorously for the waste on offer, thereby increasing competition.<sup>76</sup>

127. As discussed at paragraph 96, the ACCC considers that the proposed joint tender is likely to increase the purchasing power of the Participating Councils, resulting in lower prices and/or better quality of waste management services delivery to the Participating Councils ratepayers. Offering a guaranteed contract for a greater volume of tonnes than any of the Participating Councils could offer individually is likely to provide a greater incentive for the suppliers who typically win these contracts to compete to supply the Participating Councils.

## Transaction cost savings

128. Council Solutions submits that tendering processes for councils are detailed and involve considerable time, effort and resources for councils and tenderers.<sup>77</sup> Each council tender process would ordinarily have its own service specification, contract conditions, evaluation criteria, and information to be submitted by suppliers. Council Solutions submits that where multiple councils approach the market separately over a short period of time, the time and effort from the supply market to review and analyse the differences and customise and complete separate tender submissions is compounded.<sup>78</sup>
129. Council Solutions submits that the proposed joint tender will significantly reduce this replication of work for the Participating Councils. Instead of the four Participating Councils each developing their own sets of tender documents, Council Solutions will create one set. Whilst some of the documents, for example the specification, will need to be separate for each processing service stream (recyclables, organics and residual waste), a number will be used in the RFT for all three processing service streams, reducing replication further. While the Participating Councils will contribute to and endorse these documents, the centralisation of the development and drafting will reduce the time and resources to be contributed by the Participating Councils.<sup>79</sup>
130. Council Solutions submits that similarly, in a collaborative procurement process, there is a reduction in time, cost and resources for the potential suppliers in responding to one tender with consistent return schedules. Under the joint procurement process, a potential supplier will only need to complete the tender return schedules once and only for the processing service streams they elect to tender for, reducing the replication further. Additionally, as pricing will be requested in pre-set tonnage brackets, potential suppliers will not need to prepare individual pricing for each Participating Council, further streamlining the effort required.<sup>80</sup>

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<sup>76</sup> Council Solutions submission, dated 27 July 2018, p 8, available: [ACCC Public Register](#).

<sup>77</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.22, available: [ACCC Public Register](#).

<sup>78</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.23, available: [ACCC Public Register](#).

<sup>79</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.23, available: [ACCC Public Register](#).

<sup>80</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.24, available: [ACCC Public Register](#).

131. Council Solutions also states that technical, legal and probity advice requirements will be sourced and managed through Council Solutions, with the costs shared by the Participating Councils. Without the Proposed Conduct, each Participating Council would be required to engage and pay for their own technical, legal and probity advice, and the advice required would likely be similar for each Participating Council.<sup>81</sup>
132. For potential tenderers, Council Solutions submits that in preparing tender responses they will need to calculate aspects of pricing/costing that may differ between the Participating Councils, however, the 16 other tender return schedules will only need to be completed once rather than four times.<sup>82</sup>
133. Business SA submits that the joint tender process should result in transaction cost savings by reducing the replication of work required by the Participating Councils and allowing them to jointly obtain technical, legal and probity advice.<sup>83</sup>
134. WRASA and Jeffries submit that the Proposed Conduct will not result in tender process cost savings because the involvement of Council Solutions adds an extra layer of bureaucracy.<sup>84</sup>
135. WRASA and WRISA submit that each step of the tender process, from tender specification to contract award, will still need to be reviewed and agreed by each council through their independent internal review processes. WRASA therefore considers that, because individual councils are required to negotiate and agree with other councils and Council Solutions, the work involved is greater and more complex than current practice, thereby increasing coordination costs.<sup>85</sup>
136. WRASA submits that for potential suppliers a joint tender process only saves approximately 5% of tender preparation time, as approximately 95% of the time invested is on operational research, costings and pricing.<sup>86</sup>
137. WRISA submits that the work involved in considering tenders will not change and is simply being transferred from the Participating Councils to Council Solutions.<sup>87</sup>
138. Adelaide City Council the Cities of Marion and Port Adelaide Enfield each submit that Council Solutions has streamlined the tendering process and removed administrative duplication, freeing Council resources for other important operational functions.<sup>88</sup> The City of Charles Sturt similarly submits that collaborative approach adopted by the Participating Councils has streamlined the tendering process and removed process duplication costs, resulting in direct savings for the Participating Councils.<sup>89</sup>

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<sup>81</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.25, available: [ACCC Public Register](#).

<sup>82</sup> Council Solutions submission, dated 12 July 2018, p. 7, available: [ACCC Public Register](#).

<sup>83</sup> Business SA submission, dated June 2018, p. 5, available: [ACCC Public Register](#).

<sup>84</sup> Waste & Recycling Association of SA Inc submission, dated 18 June 2018, p. 2, Jefferies Group submission, dated 14 June 2018, p. 1, available: [ACCC Public Register](#).

<sup>85</sup> Waste & Recycling Association of SA Inc submission, dated 18 June 2018, p. 2, Waste & Recycling Industry Association of South Australia submission, dated 15 June 2018, p. 6, available: [ACCC Public Register](#).

<sup>86</sup> Waste & Recycling Association of SA Inc submission, dated 18 June 2018, p. 31, available: [ACCC Public Register](#).

<sup>87</sup> Waste & Recycling Industry Association of South Australia submission, dated 15 June 2018, p. 5, available: [ACCC Public Register](#).

<sup>88</sup> City of Marion submission, dated 12 October 2018, p.1, Adelaide City Council submission dated 15 October 2018, p.1, City of Port Adelaide Enfield submission dated 18 October 2018, p.1: available: [ACCC Public Register](#).

<sup>89</sup> The City of Charles Sturt submission, dated 29 October September 2018, p.2, available: [ACCC Public Register](#).

139. The City of Marion and the City of Charles Sturt both individually submit that that they have achieved significant cost savings through other collaborative procurements provided by Council Solutions on behalf of groups of councils, including arrangements for bituminous road works, legal services and temporary labour hire.<sup>90</sup> The City of Charles Sturt also submits that transaction cost savings have already been realised through the current tender process.<sup>91</sup>
140. The ACCC has received information in the course of this review and in previous reviews, from waste-services procurers and providers in and outside SA, supporting the view that transaction cost savings can result from collaborative procurement by councils: by facilitating the reduction of unnecessary duplication of costs incurred by councils and/or suppliers to conduct or participate in individual tender processes.
141. 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 tender documentation preparation, briefing sessions for prospective tenderers and contract preparation. The greater involvement of Council Solutions in the coordination and management of the tender process increases the potential for the realisation of such cost savings.
142. Similarly, a single tender process is likely to reduce duplication of work required by tenderers.
143. The ACCC considers that transaction cost savings from reducing duplication are likely to be partially offset by the cost required to coordinate internally within the group of Councils. The Participating Councils will be responsible for endorsing the procurement process and will have representatives on the evaluation panel responsible for evaluating tenders received. This will involve coordination to determine the characteristics, objectives and preferences of each Council.
144. However, overall, the ACCC considers that, relative to each Participating Council separately conducting its own procurement process, the Proposed Conduct is likely to result in a public benefit in the form of transaction cost savings, principally for councils but also for suppliers.

### **Improved efficiencies through combined contract management**

145. Council Solutions submits that contract management tasks include:
- benefits realisation reporting, data analysis and feedback and identification of changes that can improve efficiencies – to be undertaken by Council Solutions
  - compliance with contractual requirements such as safety inductions, license and accreditation updates, insurance certificates and any other objective compliance measure – to be undertaken by Council Solutions with Participating Councils contributing as required
  - conformance, ensuring that both parties adhere to their requirements under the contract including monitoring KPIs, data review and

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<sup>90</sup> City of Marion submission, dated 12 October 2018, p.2, available: [ACCC Public Register](#), The City of Charles Sturt submission, dated 29 October 2018, p.2-3, available: [ACCC Public Register](#).

certification, pricing reviews and document management – to be undertaken by Council Solutions, and

- ensuring that services are delivered, which is limited in a processing services stream contract and includes the initial customer interface – to be undertaken by the Participating Councils with support from Council Solutions.<sup>92</sup>

146. Council Solutions submits that with designated contract management provided by it across the four councils, duplicated effort associated with these tasks will be removed and a dedicated focus will be applied in extracting maximum value and performance from the contract.<sup>93</sup>
147. In particular, Council Solutions submits that good data, consistent across the four councils, will assist in policy and strategy development, monitoring and evaluation of service delivery and investment decisions.<sup>94</sup>
148. WRASA submits that past experience shows that individual Councils do not shed staff or reduce administration costs when they participate in a joint tender process. Administration is simply duplicated and the individual council staff spend further time managing the joint tender administration. In short, another layer of administration is added to the detriment of ratepayers.<sup>95</sup>
149. WRASA further submits that contract management tasks Council Solutions will be responsible for, as summarised at paragraph 145 above, only account for around 5% of the total time invested in contract management.<sup>96</sup>
150. WRISA submits that once the contract is awarded administration will fall back to the Participating Councils and the role of Council Solutions would add further complexity and may increase the administrative burden.<sup>97</sup>
151. Peats and WRASA submit that the tender documents released by Council Solutions illustrate that the involvement of Council Solutions will add another layer of costs to contract management.<sup>98</sup> WRASA submits that the tender documents contemplate that successful tenderers across all three streams, and Council representatives, will be bought together for meetings in relation to delivery of service, meaning up to 10 representatives will attend such meetings, which will make coordination difficult and increase contract management costs.<sup>99</sup>
152. In response Council Solutions submits that the Participating Councils are in the best position to identify costs and benefits attributed to using Council Solutions and have unanimously rejected the assertion that Council Solutions adds a layer

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<sup>92</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.26, available: [ACCC Public Register](#).

<sup>93</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.26, available: [ACCC Public Register](#).

<sup>94</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.27, available: [ACCC Public Register](#).

<sup>95</sup> Waste & Recycling Association of SA Inc submission, dated 18 June 2018, p. 31, available: [ACCC Public Register](#).

<sup>96</sup> Waste & Recycling Association of SA Inc submission, dated 18 June 2018, p. 14, available: [ACCC Public Register](#).

<sup>97</sup> Waste & Recycling Industry Association of South Australia submission, dated 15 June 2018, p. 3, available: [ACCC Public Register](#).

<sup>98</sup> Peats submission, pre decision conference record, p.7, WRASA submission, pre decision conference record, p.5, available: [ACCC Public Register](#).

<sup>99</sup> WRASA submission, pre decision conference record, p.5, available: [ACCC Public Register](#).



of bureaucracy and have acknowledged the savings derived from various Council Solution collaborative procurements.<sup>100</sup>

153. The ACCC notes that most of the day-to-day operation contract management would be undertaken by each Participating Council, although in the case of Processing Service contracts this primarily involves customer interface which is more limited than in relation to collections contracts.
154. The ACCC considers that there is some potential for cost savings to be realised through Council Solutions undertaking some contract management tasks in relation to issues common to the four councils. In particular, the Proposed Conduct is likely to reduce or remove some duplication by Participating Councils of contract management tasks such as ensuring compliance and conformance with contractual requirements.
155. Overall, the ACCC considers that there is likely to be some public benefit resulting from likely efficiencies from combined contract management.
156. The ACCC considers that centrally coordinated data analysis and review also has the potential to assist in policy and strategy development and monitoring and evaluation of service delivery to the extent that the issues around operational delivery being analysed are common across the four councils. However, based on the information provided, the extent of the commonality across the four councils, and accordingly the utility of aggregated data, is unclear. Therefore, based on the information before it, the ACCC is not in a position to conclude that it is likely that this data sharing will result in a material public benefit.

## **Improved efficiencies in the supply of waste processing and disposal services**

157. Council Solutions submits under the Proposed Conduct, the combined volume of the Participating Councils in each processing service stream will provide a platform for the Participating Councils to seek to unlock additional service improvements and cost savings from potential suppliers. These service improvements can establish a new 'benchmark' and lift the service standards and outcomes across all councils.<sup>101</sup>
158. Council Solutions states that the proposed joint tender could incentivise capital investment from a new entrant or an existing supplier because the surety of a strong and significant future cash flow could provide the certainty for capital investments that may not otherwise be viable.<sup>102</sup>
159. Council Solutions submits that the volumes represented by the Participating Councils are substantial, with both the recyclables processing tonnes, at 30,200, and organics processing tonnes, starting at 31,500 and potentially increasing to 47,700, represent a significant percentage of the nominated average processing capacity for the infrastructure currently in use. The Proposed Conduct will provide potential suppliers with access to a significant pipeline of aggregated volumes underpinned by a contract commitment of up to 10 years. This represents an opportunity to maximise as far as possible the efficient use of expensive

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<sup>100</sup> Council Solutions submission, dated 12 September 2018, p.4, available [ACCC Public Register](#).

<sup>101</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.31, available: [ACCC Public Register](#).

<sup>102</sup> Council Solutions submission, dated 12 July 2018, p.19, available [ACCC Public Register](#).

infrastructure.<sup>103</sup> Council Solutions argues that this also provides a level of support for infrastructure investment that would not be provided if the Participating Councils went to the market separately.<sup>104</sup>

160. In respect of residual waste processing, Council Solutions submits that the reprocessing infrastructure required to provide a beneficial processing solution, prior to the disposal of the un-recoverable waste to landfill, is similarly a high capital cost, between \$30 million and \$100 million, and requires a greater level of feedstock to realise its average processing capacity of 100,000 tonnes per annum. As such, Council Solutions states that it is unlikely a purpose-built facility will be proposed as a response to Participating Councils procurement process. However, Council Solutions submits that a potential supplier may consider the Participating Councils' residual waste of 28,300 tonnes per annum, and potentially increasing to 53,400 tonnes per annum, to be an opportunity to build their in-feed supply and improve the economics of their operation. This would provide a public benefit to existing customers as efficiencies increase and operating costs reduce, and a gate price for the Participating Councils that supports the use of alternative technology.<sup>105</sup>
161. The LGASA and City of Charles Sturt submit that collective procurement processes may help to provide the critical mass necessary to secure investment in new technology and infrastructure.<sup>106</sup>
162. The EPA SA similarly submits that the proposed joint tender has the potential to result in better management of collected waste streams driven by secure contracts of larger volumes that should support greater investment in processing recyclables, organics and residual waste and supporting innovation within the resource recovery sector through economies of scale.<sup>107</sup>
163. WRASA submits that the geographic location of the Participating Councils has forced Council Solutions to provide a convoluted qualification around two receipt points (centroids) which means tendering facilities cannot be certain of the tonnes to be received and must provide a collection of prices for all possible combinations of potential Councils.<sup>108</sup>
164. WRASA submits that further complexity arises because, with respect to ancillary services (bulk bins, hard waste and street litter), Council Solutions can elect to use the successful collections contractor to supply processing and disposal services or use the suppliers appointed to process/dispose of recyclables, organics and residual waste. This means that tenders for the supply of processing services will have to tender on the basis of both scenarios.<sup>109</sup>
165. In response, Council Solutions states that the tender documents will clearly set out the tonnage of each waste stream generated by each Participating Council

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<sup>103</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.32, available: [ACCC Public Register](#).

<sup>104</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.39, available: [ACCC Public Register](#).

<sup>105</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.32, available: [ACCC Public Register](#).

<sup>106</sup> Local Government Association of South Australia submission dated 6 June 2018, p. 3, City of Charles Sturt submission, dated 4 June 2018, p. 2, available: [ACCC Public Register](#).

<sup>107</sup> Environmental Protection Authority South Australia submission, dated 22 June 2018, p. 1, available [ACCC Public Register](#).

<sup>108</sup> Waste & Recycling Association of SA Inc submission, dated 18 June 2018, p. 12, available: [ACCC Public Register](#).

<sup>109</sup> Waste & Recycling Association of SA Inc submission, dated 18 June 2018, p. 13, available: [ACCC Public Register](#).

and invite tenderers to submit tender prices to receive and process wastes in specific tonnage bands from their nominated facility location.<sup>110</sup>

166. Further, Council Solutions submits that the proposed joint tenders have been structured in this way for two reasons. First, to maximise competition for the supply of ancillary processing services by allowing suppliers who do not have processing capabilities to compete for this work. Second, the processing contracts will be substantial contracts, likely secured on favourable terms, which could then also be applied to waste collected under the ancillary collection contracts.<sup>111</sup>
167. In respect of recyclables processing, WRASA submits that the proposed joint tender commits all the Participating Councils for three years initially in an environment where factors are changing dramatically each week and no resolution to the industry crisis arising from the China national sword policy has been found.<sup>112</sup> WRASA submits that the proposed contract is both too long to deal with this issue and not long enough to incentivise new investment.<sup>113</sup>
168. In response, Council Solutions submits that it is cognisant of the risk arising from the China national sword policy and has proposed an initial term of three years to mitigate this risk for both the councils and potential suppliers.<sup>114</sup> Further, the proposed term has been determined in consultation with relevant processing companies and takes into account the agreed undesirability of fixing a long-term contract in the current circumstances.<sup>115</sup> Council Solutions also states that the initial term will be able to be negotiated with the successful tenderer(s).<sup>116</sup>
169. The ACCC recognises that the aggregation of recyclables or organics volumes can improve efficiency by helping the successful supplier or suppliers of these services to achieve or maintain efficient scale. Aggregation can facilitate lower average costs and reduce the risk associated with investment in new processing technology or facilities.
170. In this case, based on the information available to the ACCC, the estimated volume of recyclables from the Participating Councils, around 30,000 tonnes, represents a significant proportion of the tonnes required to sustain a medium sized facility in Adelaide. The successful supplier or suppliers of recycling services to the Participating Councils would also be likely to have access to other municipal volumes if it has, or can win, contracts to supply councils that do not participate in the Council Solutions arrangement. The ACCC considers that the aggregation of Participating Council recyclable volumes under the Proposed Conduct is likely to result in some public benefits in the form of improved efficiencies in the receipt and processing of recyclables.
171. Similarly, in relation to organics, based on information available to the ACCC, the estimated volume of the Participating Councils, 31,500 to 47,700 tonnes, represents a significant proportion of the estimated tonnes required to sustain a medium sized facility in Adelaide. Again, the successful supplier or suppliers of organic services to the Participating Councils would also be likely to have access other municipal volumes if it has contracts to supply councils that do not

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<sup>110</sup> Council Solutions submission, dated 12 July 2018, p.21, available [ACCC Public Register](#).

<sup>111</sup> Council Solutions submission, dated 27 July 2018, p. 17, available: [ACCC Public Register](#).

<sup>112</sup> Waste & Recycling Association of SA Inc submission, dated 18 June 2018, p.1, available: [ACCC Public Register](#).

<sup>113</sup> Waste & Recycling Association of SA Inc submission, dated 18 June 2018, p.8, available: [ACCC Public Register](#).

<sup>114</sup> Council Solutions submission, dated 12 July 2018, p.33, available: [ACCC Public Register](#).

<sup>115</sup> Council Solutions submission, dated 27 July 2018, p. 11, available: [ACCC Public Register](#).

<sup>116</sup> Council Solutions submission, pre decision conference record, p.8, available: [ACCC Public Register](#).

participate in the Council Solutions arrangement, and potentially access to non-municipal volumes of organics. The ACCC considers that the aggregation of Participating Council organic volumes under the Proposed Conduct is likely to result in some public benefits in the form of small improved efficiencies in the receipt and processing of organics.

172. In relation to waste disposal, as noted by Council Solutions, the Participating Councils estimated volumes are unlikely to be sufficient to incentivise investment in a new or existing facility. These volumes may support improved efficiencies in the operation of a new facility. However, the ACCC does not presently have sufficient information to conclude that this is likely to be the case.
173. The ACCC notes the concerns raised by WRASA about the length of the proposed contract for processing of recyclables. That is, that the proposed three year initial contract is both too long to mitigate risk associated with the China national sword policy and not long enough to incentivise new investment. The ACCC considers that the proposed contract structure, with a short initial term of three years, but with flexibility to negotiate an alternative initial term with the successful tenderer(s), and extension options, strikes a balance in dealing with these competing issues.
174. Similarly, in relation to uncertainty about actual volumes that service providers will be required to process, the ACCC considers that inviting tenderers to submit tender prices to receive and process wastes in specific tonnage bands deals with this issue.

## **Improved environmental outcomes**

175. Council Solutions notes that where contamination is managed, diversion will be increased and there will be less waste going to landfill. Council Solutions submits that the Participating Councils will combine their educational materials which will make messaging more consistent, strategic and affordable through sharing the preparation, delivery and costs. Council Solutions submits that consistent education, reinforcement and working with all stakeholders will result in less waste created and less waste going to landfill, improving environmental outcomes, which will be of a benefit to the whole of South Australia.<sup>117</sup>
176. Council Solutions also submits that as there will be one waste collection services contractor providing services for all four Participating Councils, initiatives that target known sources of high contamination, at neighbourhood, street or household level, will be more effective and based on a consistent data framework.<sup>118</sup>
177. The EPA SA submits that the Proposed Conduct has the potential to result in improved resource recovery by better informing ratepayers through combined education and better targeted and managed communication strategies.<sup>119</sup>
178. WRASA submits that councils nationwide can and do already share educational resources without the need for a joint tender and that there is no evidence that the

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<sup>117</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.29, available: [ACCC Public Register](#).

<sup>118</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.28, available: [ACCC Public Register](#).

<sup>119</sup> Environmental Protection Authority South Australia submission, dated 22 June 2018, p. 1, available: [ACCC Public Register](#).

Participating Councils jointly tendering is likely to produce better environmental outcomes, especially as multiple processing facilities are likely to be used.<sup>120</sup>

179. WRISA and AORA submit that individual councils are able to best tailor education programs to the unique requirements of their municipality.<sup>121</sup> The Australian Organics Recycling Association (AORA) submits that it is concerned that education programs and contamination management practices will be generalised across the Participating Councils, leading to higher contamination rates. In particular:
- The more people involved in managing and responding to these issues, the less responsive to the specific circumstances across the councils they will be.
  - Interactions with the kerbside collections provider are also better managed council by council.<sup>122</sup>
180. AORA also submits that the Participating Councils cover different areas of Adelaide with different issues and materials which will be more difficult to manage through a single education program.<sup>123</sup>
181. Peats submits that different council areas have different contamination rates. Under the joint tender, tenderers will need to price based on a worst-case scenario with respect to contamination levels which will mean that Participating Councils with lower contamination rates will be penalised.<sup>124</sup>
182. In response, Adelaide City Council and the Cities of Marion and Port Adelaide Enfield submit that the Proposed Conduct will allow collaboration in community education resourcing through sharing costs, delivering a consistent message and targeting identified common issues.<sup>125</sup> The Cities of Marion and Port Adelaide Enfield further submit that the Participating Councils combined volumes and common objective will bring about improved environmental outcomes, increasing diversion from landfill to resource recovery and/or waste to energy.<sup>126</sup>
183. Council Solutions submits that education programs and contamination minimisation strategies will continue to be established and managed by key council personnel and the contractor. Council Solutions will help facilitate a coordinated approach to education and contamination minimisation strategies and solicit input from expert advisers for sharing across all Participating Councils.<sup>127</sup>
184. Council Solutions also submits that Participating Councils will continue to provide their technical expertise in contamination minimisation and this will also be shared

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<sup>120</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p.4, available: [ACCC Public Register](#).

<sup>121</sup> Waste & Recycling Industry Association of South Australia submission, dated 15 June 2018, p. 6, Australian Organics Recycling Association submission, dated 16 August 2018, p. 2, available: [ACCC Public Register](#).

<sup>122</sup> Australian Organics Recycling Association submission, pre decision conference record, p.6, available: [ACCC Public Register](#).

<sup>123</sup> Australian Organics Recycling Association submission, dated 16 August 2018, p. 2, available: [ACCC Public Register](#).

<sup>124</sup> Peats submission, pre decision conference record, p.7, available: [ACCC Public Register](#).

<sup>125</sup> Adelaide City Council submission, dated 15 October 2018, p.2, City of Marion submission dated 12 October 2018, p.1, City of Port Adelaide Enfield submission, dated 18 October 2018, p.2, available: [ACCC Public Register](#).

<sup>126</sup> City of Marion submission dated 12 October 2018, p.1, City of Port Adelaide Enfield submission, dated 18 October 2018, p.2, available: [ACCC Public Register](#).

<sup>127</sup> Council Solutions submission, dated 12 September 2018, p.2, available: [ACCC Public Register](#).

between the Participating Councils along with external technical advisers coordinated by Council Solutions as Chair of the Contract Performance Management Committee that will require the participation of the processing contractor(s) and collection contractor.<sup>128</sup>

185. In its determinations about Council Solutions kerbside collections and ancillary services applications for authorisation (AA1000414 and AA1000420), the ACCC considered that a combined education program is likely to facilitate improvements in both design and delivery of community education programs across the Participating Councils, resulting in a public benefit in the form of landfill diversion. However, having regard to the Participating Councils' ability to undertake their own education programs, the ACCC concluded that a combined education program would result in a small public benefit in the form of improved environmental outcomes.
186. The ACCC considers that the proposed joint tender for waste processing services may support the adoption of combined education programs and associated improvements in environmental outcomes across the Participating Councils.
187. However, unlike collection services, waste processing does not involve any direct interface with the community. Accordingly, the ACCC considers that likely improvements in environmental outcomes resulting from the adoption of coordinated education programs is primarily supported by the Participating Councils' proposed joint procurement of kerbside and ancillary collection services.

### **ACCC conclusion on public benefits**

188. The ACCC considers that the joint procurement process is likely to result in a public benefit by stimulating additional competition to provide waste processing services to the Participating Councils.
189. The ACCC also considers that the Proposed Conduct is likely to generate public benefits in the form of transaction cost savings compared with each participating council conducting its own procurement process.
190. The ACCC further considers that the Proposed Conduct is likely to generate public benefits through improvements in:
  - efficiency in managing waste processing services contracts, and
  - efficiency in the receipt and processing of recyclables and organics.

### **Public detriment**

191. The Act does not define what constitutes a public detriment and the ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as :

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>129</sup>

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<sup>128</sup> Council Solutions submission, dated 12 July 2018, p.4, available: [ACCC Public Register](#).

<sup>129</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

192. Some interested parties have raised concerns that the Proposed Conduct will lessen competition by deterring or preventing some suppliers from tendering or bidding competitively.
193. However, the ACCC considers that this is unlikely in practice. As discussed at paragraphs 93 to 98, rather than lessening competition, the ACCC considers that the net effect of the Proposed Conduct is likely to be to stimulate greater competition by leading to more tender participants than would otherwise be the case and/or tender participants bidding more keenly.
194. Generally, competition authorities may be concerned about joint purchasing if the buying group's size in the market would give it market power and an ability to depress prices below the competitive or efficient level. However, in this case this concern does not appear likely to arise; the four councils account for a minority of waste collection contracts in Adelaide. Those who oppose authorisation have put forward different concerns about possible public detriment. In particular, some interested parties have also submitted that:
- The Proposed Conduct will result in a longer-term reduction in competition for the supply of recyclables and organics waste processing services to the Participating Councils and non-participating councils.
  - The Proposed Conduct may result in recyclables being processed outside of SA, which may impact the operation of the SA beverage container deposit scheme.
195. The ACCC's assessment of these potential public detriments follows.

### **Longer-term reduction in competition for the supply of recyclables and organics waste processing services to the Participating Councils and non-participating councils**

196. WRASA, WRISA and Jefferies submit that if the Council Solutions application is approved and awarded to one contractor as intended, approximately 75% of councils in Adelaide will be closed to tenders for 8 to 10 years, due to existing contracts in place with NAWMA (three councils) and East Waste (seven councils).<sup>130</sup>
197. WRISA also argues that the winning tenderer would have an almost unassailable lead in capturing market share.<sup>131</sup>
198. Similarly, Business SA submits that the unsuccessful tenderer(s) will be unable to bid for close to one third of the Greater Adelaide Region's recyclable tonnes for up to 10 years.<sup>132</sup>
199. The ACCC has considered whether the Proposed Conduct may reduce the number of suppliers of Processing Services in Adelaide in the longer term.

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<sup>130</sup> Waste & Recycling Association of SA Inc submission, dated 18 June 2018, p. 27, Waste & Recycling Industry Association of South Australia submission, dated 15 June 2018, p. 4, Jefferies Group submission, dated 14 June 2018, p. 1, available: [ACCC Public Register](#).

<sup>131</sup> Waste & Recycling Industry Association of South Australia submission, dated 15 June 2018, p. 7, available: [ACCC Public Register](#).

<sup>132</sup> Business SA submission, dated June 2018, p. 8, available: [ACCC Public Register](#).

200. This may be because:

- new suppliers are more likely to enter the market if there are more frequent, incremental (essentially smaller-scale) opportunities to do so than afforded by the Proposed Conduct, and
- potential suppliers that do not win the joint work of the four Participating Councils exit the market

leaving a more concentrated and less competitive set of firms to compete for future contracts.

201. However, the ACCC considers these outcomes are unlikely to be realised.

202. As discussed above, in relation to the processing of recyclables and organics, there are only currently a small number of suppliers providing services to municipal councils. This, at least in part, reflects the tonnages necessary to economically operate a processing facility.

203. Particularly in relation to recyclables, the facilities are usually configured for the receipt of municipal recyclables. The ACCC understands that, in relation to organics, there is more commonality between waste generated by household and commercial and industrial customers and therefore greater capacity for the processing facility to be configured to accept both.

204. As noted above in relation to both recyclables and organics processing, there is some question whether an additional supplier would be sustainable.

205. WRASA, WRISA and Jefferies submit that, due to existing long term contracts entered into by other groups of councils, there are only limited council contracts that are currently contestable.

206. The ACCC considers that all the Adelaide councils are likely to be contestable over the longer term (some are more imminently and / or readily contestable than others). That is, it is open to any of these councils to explore the full range of options for the provision of processing services, including open tender for the provision of these services. In this respect, the four councils represent a significant part of, but ultimately only a subset of, opportunities in the wider area of competition.

207. Further, while existing arrangements other councils have in place is relevant context to the ACCC's assessment of the impact on competition of the Proposed Conduct, the ACCC must assess the impact on competition of the four Participating Councils collectively acquiring processing services. In this respect, the Participating Councils represent around a quarter of rateable properties in the Greater Adelaide Region.

208. Having regard to

- the small number of existing suppliers providing recyclables and organics processing to Adelaide Councils (three in each service stream)
- the volume of waste captured by the proposed joint tender and the volume of waste from other sources and



- the fact that Council Solutions will be likely to appoint two suppliers for each service stream if the tenders suppliers submit support this being a more efficient and competitive way to structure the contract

the ACCC considers that firms that do not win the work of the Participating Councils will likely remain active in the provision of waste processing services in Adelaide, rather than exiting the market.

209. With respect to potential new entrants, the impact on competition of the Proposed Conduct is less clear. For a supplier looking to establish a processing facility in Adelaide, the volume offered by the Participating Councils is likely to make doing so a more viable proposition than if each Participating Council tendered separately. For a potential supplier seeking to grow incrementally, and transport waste out of state for processing, smaller, more frequent opportunities to tender may be more attractive.
210. On balance, the ACCC is satisfied that the Proposed Conduct is unlikely to significantly impact competition for the supply of waste processing services to the Participating Councils and non-participating councils in the longer term.
211. The ACCC notes that the Participating Councils intend to evaluate tender responses for the provision of kerbside collection services and ancillary waste services at the same time as they evaluate responses to the waste processing services RFT.
212. WRASA submits that the three tenders have been released on the same day, close on the same day and encourage submissions that incorporate all three streams.<sup>133</sup> The Australian Small Business and Family Enterprise Ombudsman submits that clearly the tender processes have been coordinated to facilitate tendering across waste streams.<sup>134</sup>
213. The Australian Small Business and Family Enterprise Ombudsman and the Small Business Commissioner of South Australia submit that having regard to the common tender structure across the three services streams the processing services tender can not be considered in isolation from the kerbside collections and ancillary services tenders.<sup>135</sup>
214. SA Composters notes that alternative tenders across all streams will be considered and that all or most services are likely to be awarded to a larger company.<sup>136</sup> Polytrade Recycling similarly submits that structuring the tenders in this way will favour a small number of larger companies, lessening competition for the supply of these services.<sup>137</sup>

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<sup>133</sup> Waste & Recycling Association of SA Inc submission, dated 3 October 2018, p.3, available: [ACCC Public Register](#).

<sup>134</sup> Australian Small Business and Family Enterprise Ombudsman submission, dated 12 September 2018, p.1, available: [ACCC Public Register](#).

<sup>135</sup> Australian Small Business and Family Enterprise Ombudsman submission, dated 12 September 2018, p.1, and Small Business Commissioner of South Australia submission, dated 1 November 2018, p.1, available: [ACCC Public Register](#).

<sup>136</sup> SA Composters submission, dated 11 October 2018, p.1, available [ACCC Public Register](#).

<sup>137</sup> Polytrade Recycling submission, dated 5 October 2018, p.1, available: [ACCC Public Register](#).

215. Council Solutions submits that while each tender will have a different service scope, its own evaluation criteria and will be assessed separately, running them concurrently allows tenderers to assess the whole opportunity.<sup>138</sup>
216. The ACCC has considered the possibility that the Participating Councils may appoint a single supplier to provide services across multiple service streams. In this respect, the ACCC notes that it is not uncommon for councils to tender for the provision of services across multiple services streams at the same time, either through a single tender process covering multiple service streams, or separate tender processes run concurrently. Further, running the three RFT processes at different times would not preclude a supplier ultimately being awarded contracts for more than one service stream.
217. As noted above, the ACCC does not consider that the Participating Councils collectively acquiring Processing Services will significantly impact competition for the supply of waste processing services to the Participating Councils and non-participating councils in the longer term. Whether or not the appointed Processing Services provider(s) are also the successful tenderer for other waste streams offered by the Participating Councils does not materially affect this assessment. The ACCC considers that if a single supplier was appointed across multiple waste streams, it would remain the case that suppliers of Processing Services who did not win the work of the Participating Councils would have sufficient other work and future opportunities to fall back on to remain viable.
218. For these reasons, the ACCC considers that the Participating Councils jointly procuring Processing Services for up to 10 years is unlikely to result in public detriment from reducing competition for the supply of waste processing services to the Participating Councils or other councils in Adelaide in the longer term.

### **Operation of the SA beverage container deposit scheme**

219. Scout Recycling Centres South Australia (Scouts Recycling Centres) submits that if a contract for receipt and processing of recyclables is awarded to a supplier that does not have an MRF in SA this may have an adverse impact on SA's container deposit scheme.<sup>139</sup>
220. Under SA's container deposit scheme beverage containers (cans and bottles) can be returned by the public to collection depots in exchange for a 10 cent refund. The collection depots then deliver the containers to 'super collectors' acting on behalf of the beverage manufacturers for reimbursement of the refund and a handling fee. The handling fee is the income source for the collection depots.
221. Scout Recycling Centres, which is owned by The Scout Association of Australia (SA Branch), operates collection depots in SA. Scouts Recycling Centres submits that last financial year they earned \$2.1 million as a result of operating these collection depots.
222. Scouts Recycling Centres submits that if the recyclables contract was awarded to a processor that does not have a MRF in SA, the beverage containers the processor received would be sent interstate for processing and thereby, the

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<sup>138</sup> Council Solutions submission in relation to application for authorisation AA1000414, dated 12 September 2018, p.7, available: [ACCC Public Register](#).

<sup>139</sup> Scouts Recycling Centres South Australia submission, dated 8 August 2018, p. 1, available: [ACCC Public Register](#).

containers would be lost to SA. Scouts Recycling Centres states that the loss of these containers would be a loss of income for collection depots.

223. Scouts Recycling Centres also submits that this could potentially undermine the container deposit scheme, forcing out of business the 124 collection depots in SA, including small family run collection depots and collection depots operated by the not for profit sector such as the Surf Lifesaving Association, Guide Dogs and Salvation Army which rely on revenue derived from the operation of collection depots.<sup>140</sup>
224. The ACCC considers that the SA's container deposit scheme plays an important role in reducing beverage container litter and promoting the recovery and recycling of beverage containers in South Australia and thereby generates a public benefit.<sup>141</sup> However, which processor is responsible for recycling the beverage containers is not material to the realisation of this public benefit.
225. The ACCC notes that the three potential suppliers identified by Council Solutions currently supplying recyclables receipt and processing facilities to Adelaide councils each have, or are in the process of building, MRFs in Adelaide. As discussed at paragraph 170, the volume of recyclables generated by the Participating Councils is unlikely to be sufficient, in and of itself, to attract a new processing facility to Adelaide. However, as noted at paragraph 112, an alternative approach for a potential new entrant with an MRF in another state would be to transport recyclables interstate for processing unless or until such time as the supplier had sufficient volume, for examples through winning other contracts, to sustain a processing facility in Adelaide. This would result in some beverage containers captured by the SA container deposit scheme being lost to SA.
226. The ACCC also notes that it would be open to the Participating Councils, if tendering individually for the supply of recyclables receipt and processing services, to appoint suppliers who transported recyclables interstate for processing. Given the volumes necessary to attract a new processing facility to Adelaide, the ACCC considers that it is more likely that the Participating Councils tendering individually would successfully attract operators who would transport the recyclables interstate for processing than would the joint tender.
227. In any event, the ACCC understands that containers collected from households through kerbside collection is not the primary source of containers received by collection depots. The value of the containers (the 10 cent refund) means that the containers are typically delivered directly to collection depots by the public rather than disposed of in kerbside recycling bins for the council appointed waste collector to collect and deliver to a recyclables processing facility.
228. Accordingly, the ACCC does not consider that the beverage containers collected from kerbside collection for the Participating Councils being transported interstate would be likely to undermine the operation of the SA container deposit scheme. Nor would it undermine the environmental benefits of the scheme (reducing beverage container litter and promoting the recovery and recycling of beverage containers). Once collected, where the containers are processed does not impact the realisation of these public benefits.

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<sup>140</sup> Scouts Recycling Centres South Australia submission, dated 8 August 2018, p. 1, available: [ACCC Public Register](#).

<sup>141</sup> ACCC Determination, authorisation AA1000415, Recyclers of South Australia Inc, 29 August 2018, p. 18.

229. Any diversion of containers interstate for processing would potentially impact the revenue available to collection depots in South Australia as submitted by Scouts Recycling Centres. However, for the reasons discussed above, the ACCC does not consider that beverage containers covered by the scheme are more likely to be processed outside of SA if the Participating Councils jointly tender for recyclables receipt and processing services than if they tendered separately for these services.
230. Accordingly, the ACCC considers that the Proposed Conduct is unlikely to result in a public detriment in the form of undermining the operation of the SA container deposit scheme.

### **ACCC conclusion on public detriments**

231. The ACCC considers that the Proposed Conduct is unlikely to result in significant public detriment from reducing competition for the supply of Processing Services to the Participating Councils or other councils in Adelaide or undermining the operation of the SA container deposit scheme.

### **Balance of public benefit and detriment**

232. In general, the ACCC may grant authorisation if 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, including any lessening of competition.
233. The ACCC considers that the joint procurement process is likely to result in a public benefit by stimulating additional competition to provide waste processing services to the Participating Councils. The ACCC considers that the proposed joint tender is likely to increase the purchasing power of the Participating Councils in contracting for the supply of Processing Services. This increased purchasing power is likely to be reflected in negotiated terms and conditions of agreements, resulting in lower prices and/or better quality of waste management services delivery to the Participating Councils' ratepayers.
234. In particular, the Proposed Conduct is likely to offer potential suppliers some transaction cost savings and other efficiencies that could be passed on in lower costs and improved services. Further, guaranteed contracts covering greater volumes of waste than any of the Participating Councils could offer individually are likely to provide greater incentives for suppliers to compete for the tenders, notwithstanding that the tender opportunities may not be commercially attractive to every current or potential service provider.
235. The ACCC also considers that the proposed conduct is likely to generate public benefits in the form of transaction cost savings compared with each participating council conducting its own procurement process.
236. The ACCC further considers that the proposed conduct is likely to generate public benefits through improvements in efficiency in the receipt and processing of recyclables and organics.
237. The ACCC considers that the Proposed Conduct is unlikely to result in significant public detriment from reducing competition for the supply of Processing Services to the Participating Councils or other councils in Adelaide in the longer term.

There are current service providers who do not have contracts with the Participating Councils, and there will continue to be other opportunities for those suppliers who do not win the contracts with the Participating Councils to remain active in waste processing in South Australia.

238. The ACCC also considers that the Proposed Conduct is unlikely to result in public detriment because it is unlikely to undermine the operation of the SA container deposit scheme or undermine the environmental benefits of the scheme.
239. Therefore, for the reasons outlined in this determination, the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit that would outweigh the likely public detriment, including the detriment constituted by any lessening of competition that would be likely to result.
240. Accordingly, the ACCC proposes to grant authorisation.

## Length of authorisation

241. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>142</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
242. In this instance, the Applicants seek authorisation for around 13 years (until 30 June 2031) to allow for the tender process, existing contracts to conclude and, where applicable, new infrastructure to be commissioned, contract commencement in May 2020, with a rolling start as existing contracts expire, and a contract length of up to 10 years.<sup>143</sup>
243. The Small Business Commissioner of South Australia submits that given the significance of the ACCC's decision in relation to each of Council Solutions' three applications for authorisation and the impact they will have on small business, should authorisation be granted it should be granted for five years to allow for an earlier review of whether the Proposed Conduct has resulted in a net public benefit.<sup>144</sup>
244. As noted in Table 2, Council Solutions has proposed various lengths for initial contract terms and extension options. These are related to the natures of the different streams. In each case the total of proposed initial terms and extensions totals 10 years.
245. Having regard to the ACCC's conclusions about the public benefits and public detriments likely to result from the Proposed Conduct, and the terms of the contracts the Applicants propose to enter into, the ACCC grants authorisation until 30 June 2031.

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<sup>142</sup> Subsection 91(1).

<sup>143</sup> Council Solutions submission in support of application for authorisation, dated 4 May 2018, p. 14, available: [ACCC Public Register](#).

<sup>144</sup> Small Business Commissioner of South Australia submission, dated 1 November 2018, p.4, available: [ACCC Public Register](#).

# Determination

## The application

246. On 4 May 2018, Council Solutions Regional Authority (Council Solutions), on behalf of itself, the Corporation of the City of Adelaide and the Cities of Charles Sturt, Marion and Port Adelaide Enfield (the **Participating Councils**) (together, the **Applicants**) lodged application for authorisation AA1000419 with the ACCC. The application was made under subsection 88(1) of the Act.

247. The Applicants seek authorisation for:

- Council Solutions, on behalf of the Participating Councils, to
  - i. conduct a collaborative competitive tender process for waste services, comprising the:
    1. receiving and processing of recyclables
    2. receiving and processing of organics and
    3. receiving and processing or disposal of residual waste(together, Processing Services).<sup>145</sup>
- Council Solutions to evaluate the responses in collaboration with the Participating Councils and to negotiate on behalf of the Participating Councils the contractual framework
- the Participating Councils to individually enter into separate contracts for each of the Processing Services, each on a joint and not several basis, with the successful supplier/s, and
- ongoing administration and management of the resultant contracts to be undertaken jointly by Council Solutions and the Participating Councils.<sup>146</sup>

## The net public benefit test

248. For the reasons outlined in this determination, the ACCC is satisfied, pursuant to subsections 90(7) and 90(8) of the Act, that in all the circumstances the Proposed Conduct for which authorisation is sought would result or be likely to result in a public benefit that would outweigh any detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.<sup>147</sup>

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<sup>145</sup> Council Solutions submission in support of application for authorisation, dated 2 May 2018, p. 7, available: [ACCC Public Register](#).

<sup>146</sup> Council Solutions submission in support of application for authorisation, dated 2 May 2018, p. 1, available: [ACCC Public Register](#).

<sup>147</sup> As the Applicants have sought authorisation for conduct which may include cartel conduct, section 90(8) requires the ACCC to be satisfied under the net public benefit test in section 90(7)(b) when making its determination.

## **Conduct which the ACCC authorises**

249. The ACCC grants authorisation AA1000419 to the Applicants for the conduct outlined at paragraph 247 of this Determination, which may contain a cartel provision within the meaning of Division 1 of Part IV of the Act or may substantially lessen competition within the meaning of section 45 of the Act.
250. The ACCC has decided to grant authorisation until 30 June 2031.

## **Date authorisation comes into effect**

251. This determination is made on 23 November 2018. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 15 December 2018.

## **Interim authorisation**

252. On 14 September 2018, interim authorisation was granted under subsection 91(2) of the Act.<sup>148</sup> Interim authorisation will remain in place until the date the ACCC's determination comes into effect or until the ACCC decides to revoke interim authorisation.

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<sup>148</sup> See the ACCC's draft determination dated 14 September 2018.