

**ADELAIDE HILLS COUNCIL MEETING  
Tuesday 22 April 2013 (typo) - 2014  
AGENDA BUSINESS ITEM**

**Item:** 18.2

**Originating Officer:** Marc Salver, Director Strategy & Development

**Responsible Director:** Marc Salver, Director Strategy & Development

**Subject:** Adelaide Hills Region Waste Management Authority update and consideration of Options

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**Adelaide Hills Region Waste Management Authority update and consideration of Options - Exclusion of the Public**

**Moved Cr  
S/- Cr**

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public, except:

- CEO, Andrew Aitken
- Director Strategy & Development, Marc Salver
- Director Corporate Services, Tim Piper
- Director Community & Customer Service, David Waters
- Manager Governance & Risk, Lachlan Miller
- Minute Secretary, Pam Williams

be excluded from attendance at the meeting for Agenda Item 17.2 Adelaide Hills Region Waste Management Authority (AHRWMA) update and consideration of Options.

The Council is satisfied that, pursuant to sections 90(3)(b), (d) and (i), the information to be received, discussed or considered in relation to the Agenda Item is:

(b) information the disclosure of which —

- (i) could reasonably be expected to confer a commercial advantage on a person with whom the Authority is conducting, or proposing to conduct, business, or to prejudice the commercial position of the Authority; and
- (ii) would, on balance, be contrary to the public interest;

(d) commercial information of a confidential nature (not being a trade secret) the disclosure of which—

- (i) could reasonably be expected to prejudice the commercial position of the person who supplied the information, or to confer a commercial advantage on a third party; and
- (ii) would, on balance, be contrary to the public interest;

(i) Information relating to actual litigation, or litigation that the council or council committee believes on reasonable grounds will take place, involving the council or an employee of the council; -

because the Council is to consider an offer from a competitor with regard to where to take its waste stream, and to consider the long term implications and options in relation to the Regional Waste Management Authority of which it is a member, and due to the fact that the competitor has initiated legal proceedings against the aforementioned Authority.

In addition the disclosure of this information would, on balance, be contrary to the public interest. The public interest in public access to the meeting has been balanced against the public interest in the continued non-disclosure of the information. The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because consideration of the item in a public forum would disclose the details of the commercial offer and legal action which may prejudice the Regional Waste Management Authority's case.

## **Adelaide Hills Region Waste Management Authority update and consideration of Options – Confidential Item**

### **SUMMARY**

This report assesses two options for disposal of Council's waste stream, namely the offer from Southern Waste ResourceCo (SWR) who currently operate from the Hartley Landfill site in Callington, or to continue with the Adelaide Hills Region Waste Management Authority (the Authority) of which Council is a member, and who operate a landfill from the Brinkley site in Murray Bridge.

The Board of the Authority have recently requested that each member Council assess their options with regard to where to dispose of their waste streams and advise the Board accordingly so that the future options for the Authority can be clarified as part of their forward business planning and Long Term Financial Plan. After an extensive analysis of both options as presented, staff are recommending that the Adelaide Hills Council advise the Board of the Authority that it commits to continue to take its waste streams to the Authority's landfill for the next 10 years in support of the Long Term Financial Plan, and its beneficial outcomes to Member Councils, unless circumstances arise requiring a review of this position. Further, that the Council advise Southern Waste ResourceCo that it has considered its offer but resolved to remain with the Authority.

### **RECOMMENDATION**

- 1. That the Council advise the Board of the Adelaide Hills Region Waste Management Authority that it commits to continue to take its waste streams to the Authority's landfill for the next 10 years in support of the Long Term Financial Plan and its beneficial outcomes to Member Councils, unless circumstances arise requiring a review of this position.**
- 2. That the Council advise Southern Waste ResourceCo that it has considered its offer, and its options for disposal of its waste streams, and has resolved to continue to dispose of its waste via the Adelaide Hills Region Waste Management Authority's operated landfill site.**

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## **1. GOVERNANCE**

### **➤ Strategic Management Plan / Council Policy**

Goal 2: Sustainable Natural and Built Environs

Goal 4: A Recognised Leading Performer

Key Issues – 2.3: Waste Management

4.1 Leadership

4.1.4: Meet legislative, regulatory and good governance responsibilities & obligations

### **➤ Legal Implications**

The Adelaide Hills Regional Waste Management Authority ("the Authority") is a Regional Subsidiary established pursuant Section 43 (and Schedule 2 and Parts 2 and 3) of the Local Government Act, 1999. Further, Southern Waste ResourceCo (SWR) has lodged a claim against the Authority and issued a Notice pursuant to Rule 33 of the Supreme Court against the Authority for which legal advice has been obtained. In short, the Authority denies the allegations made by SWR in relation to their acquisition of the Hartley landfill site from the Authority.

➤ **Risk Management Implications**

There is a financial risk to Council both in terms of the legal costs for the claim initiated against the Authority by SWR. There is a further financial risk and liabilities to all the member Councils in the event the Authority is closed down, which is detailed later in this report. Note that the allegations against the Authority by SWR are strongly refuted and are considered to have no basis. Lastly, there is also a risk that the Authority's current lease over the Brinkley Landfill site owned by the Rural City of Murray Bridge, is not renewed. However such a risk is considered low for reasons outlined in this report.

➤ **Financial and Resource Implications**

There is a financial risk to Council both in terms of the legal costs for the claim initiated against the Authority by SWR. There is a further financial risk and liabilities to all the member Councils in the event the Authority is closed down, which is detailed later in this report.

➤ **Customer Service and Community/Cultural Implications**

Maintaining an efficient and effective waste management service is an essential function of the Council. The Authority has assisted the Council in delivering such a service for over 20 years, and has resulted in significant reduction in waste to landfill and the roll out of a sustainable waste management program.

➤ **Environmental Implications**

Any closure of the Brinkley landfill site will require compliance with the relevant Environmental Protection Authority's (EPA) requirements in this regard in order to minimise any adverse impacts on the environment.

➤ **Community Engagement/Consultation**

No consultation is required in this instance.

## **2. BACKGROUND**

Adelaide Hills Regional Waste Management Authority (AHRWMA) is a regional subsidiary established in accordance with Section 43 of the Local Government Act, 1999. The Authority is a collaboration of the Adelaide Hills Council, the District Council Mount Barker(DCMB), The Rural City of Murray Bridge (RCMB), and Alexandrina Council.

The Authority provides the following services to the member Councils:

- Provides in-house specialised advice (Regional Waste Coordinator) to Councils
- Manages and operates a landfill site for the disposal of member Council waste
- Undertakes education and promotion activities to promote responsible waste management in the community
- Undertakes resource recovery initiatives and programs (e.g. cardboard recycling, and commercial and demolition (C&D) waste processing)

- Operates and manages landfill facility as a commercial operation and pays dividends to constituent Councils, and
- Provides other services to Councils e.g. preparation of tenders for kerbside collection services.

The Authority also manages and operates the Adelaide Hills Council's Waste Transfer Station at the Heathfield Depot which includes a resource recovery operation by Finding Workable Solutions (FWS).

Since 1991, the Authority operated the Hartley Landfill Site near Callington. On 13 February 2013, Southern Waste ResourceCo (SWR) took possession of this site, and the Authority's EPA licence was transferred to SWR along with all future liabilities. Further, on the same day, the Authority's landfill operations moved to the Brinkley Landfill site at Murray Bridge under a lease arrangement with the RCMB.

#### Takeover of the Hartley Landfill site by SWR

The Authority's lease over Hartley landfill site was to expire in November 2011. As part of a longer term strategy, the Authority put an offer to purchase Hartley from landowners in 2011 which was subsequently rejected. The Authority then pursued renewal of 10 year lease with the landowners, the Harveys, but these negotiations became acrimonious and it was considered that there must be a third party involved. As a backup plan the Authority approached Murray Bridge Council to operate from their Brinkley landfill site which they were considering closing. SWR then came forward and undertook an aggressive takeover of the Hartley site from the Authority resulting in negotiations in 2012. Finally, in December 2012, a settlement offer from SWR was reached which included \$990,000 once off payment to the Authority and SWR taking on all the post closure liabilities for the Harley site.

#### Claim by SWR against the Authority

On 16 July 2013 a letter was received from Botten Levinson, solicitors for SWR, making claims in relation to the Hartley site and allegations of misrepresentations in relation to future waste contracts.

On 7 August 2013 SWR submitted an offer to the District Council of Mount Barker seeking to secure their waste tonnes at the Hartley Landfill in return for a discounted rate per tonne over a 5 year period.

Subsequently on 20 September 2013 SWR submitted a revised offer through the Authority seeking to secure Member Council tonnes to the Hartley Landfill in return for an improved discounted rate per tonne and over a longer period of time of 7 years with an option to extend by a further 3 years. A similar offer was made to the Adelaide Hills Council by way of a letter dated 21 October 2013 (refer to **Appendix 1**). The offer is as follows:

- Disposal rate of \$34.70 per tonne plus the applicable EPA levy.
- Agreement term is 21/10/13 — 30/6/2020 (7 years) with an option to extend by a further 3 years.
- Disposal rate adjustment calculated each year and to be based on CPI (All Groups Adelaide) for the previous 12 months.
- Pricing exclusive of all government taxes and levies.

Council sent an interim response to SWR on 11 December 2013 (refer to **Appendix 2**) seeking an extension of time to consider the offer. By comparison the current disposal rate for member Councils at the Brinkley landfill site is \$38.64 per tonne.

The SWR offer was considered by the Authority's Board on 21 November 2013 (refer to **Appendix 4** for a copy of the report) where it in essence resolved to

consider the financial and non-financial implications of the Authority continuing with its current adopted Business and Long Term Financial Plans as compared to it becoming a landfill client. Further, the Board resolved to advise its member councils of the aforementioned implications of the SWR offer on the Authority and recommended that the member Councils commit their waste streams to the Authority and that this arrangement only be reviewed if unforeseen issues with the Authority's operations and financial position arise.

An updated Notice of Claim was received by the Authority from Botten Levinson (the lawyers acting on behalf of SWR) on 12 December 2013 (refer to **Appendix 5**). The claims as represented by SWR total an estimated of \$6.8 million. The claims formulated by SWR are strongly refuted and further investigation of their claims has confirmed that they have no basis (refer to the letter from the Authority's lawyers (Wallmans) contained in **Appendix 7**).

In light of the updated notice of Claim from SWR dated 12 December 2013, the Authority's Board reconsidered the financial and non-financial implications of the SWR offer at its meeting of 20 February 2014 (refer to **Appendix 8** for a copy of the report) and resolved:

*"That:*

- (1) The Board reaffirms its recommendations from its 21 November 2013 Agenda Item 5.6 with consideration to the subsequent Rule 33 Notice issued by Southern Waste ResourceCo. Namely:*
- (2) That a cover letter be drafted for Member Council Chief Executive Officer's notifying them of the Authority's recommendation. The letter will emphasise that whilst the Authority has made a recommendation each individual Member council needs to independently consider their position and determine whether they wish to commit to the current business plan model where the Authority operates its own landfill, or adopt a model where the Member Councils each become customers of another landfill operator."*

In accord with the above resolution, Council received a letter from the Chairman of the Board on 20 March 2014 (refer to **Appendix 3** for a copy) seeking Council's response as to whether or not it will take its waste streams to the Authority's Brinkley Landfill site, or SWR's Hartley Landfill site. This is the purpose of this report.

### **3. ANALYSIS**

The Authority's adopted Business and Long Term Financial Plan includes the investment in, and operation of, the Brinkley Landfill. The Authority's Budget and Long Term Financial Plan as adopted at June 2013 assumed the commitment of Member Council tonnes and allowed for a 55% loss of Commercial tonnes due to competition from the SWR Hartley landfill. The Authority's first quarter financial results showed a significant reduction in commercial tonnes of approximately 90%. In addition waste tonnes from Alexandrina Council had not been sent to the Brinkley Landfill until last month. The securing of Member Council tonnes has been identified as a significant issue by both the Authority's Management and Operations Committee and Audit Committee.

Whilst at Hartley, the Authority's landfill operation received approximately 48,000 council and commercial tonnes per annum. It should be noted that the breakeven point for a landfill operation is around 20,000 tonnes per annum. Increased processing cost implications would occur if the annual tonnes received by a landfill

site exceed 70,000. In recent times, Adelaide Hills Council contributed 8,490 tonnes per annum or 18% of the total waste stream, or 30% of all the Councils waste stream. The table below details the waste stream contribution between the respective Councils and compares the current tonnes received at Brinkley site versus to tonnes previously received at the Hartley Landfill site.

Waste Tonne Source	Projected 13/14 Tonnes - Based on first 3 months	Previous Annual Tonnes
DCMB	7500	7900
AHC - Rural	2855	2890
AHC - Metro	6200	5600
AC	0	3200
RCMB	4800	4780
Non Member Local Govt	6500	6030
Commercial	2500	17700
<b>Total All Tonnes</b>	<b>30355</b>	<b>48100</b>

The waste landfill disposal offer received from Southern Waste ResourceCo in October 2013 was as follows:

- A Disposal rate of \$34.70 per tonne plus the applicable EPA levy.
- Agreement term is 7 years with an option to extend by a further 3 years.
- Disposal rate adjustment calculated each year and to be based on CPI (All Groups Adelaide) for the previous 12 months.
- Pricing exclusive of all government taxes and levies.

By comparison the current disposal rate for member Councils at the Brinkley landfill site is \$38.64 per tonne. To enable a direct financial analysis, the SWR discounted rate of \$34.70 per tonne was entered into the Authority's Long Term Financial Plan (LTFP) with different tonnage scenarios to show the effect on Net Profit, Cash Flow, Net Equity and the level of financial risk. This analysis was presented to the Board's meeting on 21 November 2013 (refer to **Appendix 4**) provided the following:

1. An analysis of both the financial and non-financial benefits using the SWR proposal.
2. To enable a direct financial analysis the SWR discounted rate of \$34.70 per tonne has been entered into the Authority's LTFP with different tonnage scenarios to show the effect on Net Profit, Cash Flow, Net Equity and the level of financial risk.
3. In addition a low cost model has been developed. The low cost model was produced to show that there is scope to further reduce the cost per tonne to Member Councils by reducing the service levels provided to core base services if desired. However, it was concluded that this is not the preferred model.

4. Ignoring the non-financial benefits of the Authority the LTFP still indicates that the Authority is viable and will return good value for Member Councils provided that they commit their waste tonnes to the Brinkley Landfill site.
5. The SWR proposal offers the potential of lower short term risks and includes a very attractive cost per tonne for waste disposal. In addition the location of the Hartley Landfill is more central to all Member Councils. However this would come at the loss of the services offered by the Authority including the in-house waste and recycling expertise and project management services, reduced benefit for transfer station management services and long term uncertainty in the future waste market.
6. The continued Authority business model offers long term certainty for the member Councils, including control of waste streams and resource recovery efforts to meet environmental and social expectations. It also achieves a level of economies of scale that enables other value adding services to continue to be performed and pursued for Member Councils. However short term risk is high whilst there is an attempt to win commercial waste streams in a limited market. This requires the long term commitment of Member Councils. In addition the Brinkley Landfill is not as centrally located and as such some Member Councils have increased transport costs.
7. SWR have indicated their intention to pursue some form of damages claim and to attempt to relinquish their landfill liability obligations at Hartley should Member Councils not commit their waste streams to their Hartley Landfill site. It is not clear whether SWR would not pursue the same path if Member Council tonnes were committed to the Hartley Landfill.
8. The financial analysis provided doesn't take into account the wrap up costs of the Authority's landfill operations should a decision be made to close down the Authority and its landfill operation.

The three scenarios presented in the above analysis, namely a worst case, likely case and best case, were developed in order to determine the impact of the SWR offer on the Authority – refer to the financial analysis in **Appendix 4**. The scenarios have also factored in the additional transport costs to each member Council for transporting waste to Brinkley as opposed to the Hartley Landfill site. In the worst case scenario, without the waste tonnes from Alexandrina Council, the Authority would run at a loss in the first instance of around \$191,626 (excluding the additional transport costs). Adelaide Hills Council's portion of this amounts to \$67,069 (excl. transport costs). It is noted, however, that Alexandrina Council has recently recommitted to bringing its waste stream to the Brinkley Landfill site. The likely scenario with Alexandrina's waste stream reflects that the Authority could achieve an annual surplus of around \$118,723 per annum (excluding transport costs) of which the AHC portion would be \$41,553. In the best case scenario with all commercial and member Council tonnes coming to the Authority, an annual surplus of around \$917,509 could be achieved with AHC portion being \$321,128.

As can be seen from the above analysis, the long term viability of the Authority depends on the commitment of Member Council tonnes, as equity owners in an Authority, to bring their waste streams to the Authority's landfill site. In such an adopted business model, the member Councils would be able to reap the benefits of doing so which includes the receipt of equity payments proportional to the amount of waste which they have contributed to the total waste stream.

The non-financial impacts and benefits of the SWR offer have also been assessed via a SWOT analysis as is reflected in the attachments to **Appendix 4**. In short, the



Authority offers a number of such benefits to member Councils which they would not enjoy if they were simply clients of another landfill operator such as SWR.

#### Wrap up costs for the Authority

In the event that member Councils choose to take their waste streams elsewhere, it is estimated that there may be a shortfall in cash requirements of just over \$955,000 for a period of approximately one year. This would be shared amongst Member Councils according to their equity distribution. This would equate to a requirement of approximately \$300,000 from Adelaide Hills Council.

This is made up of:

- Bringing forward capping works of about \$300,000
- However to close the cell earlier would require additional works to reshape and fill voids plus the need for a construction project manager (approx. \$250,000).
- future monitoring & maintenance costs (\$30,000 pa)
- write-off of remaining asset space Cell 6a (approx. \$700,000)
- Staff redundancies up to \$200,000
- Specialist management services to manage the wrap up, i.e. arrange for sale of assets, legal issues, accounting services etc. (\$150,000)
- Sale of assets at a reduce value totalling approximately \$850,000

The shortfall at the end of the wrap up would need to be covered by Member Councils. All Member Councils need to be committed either to the current business plan model or to a landfill client model (i.e. taking their waste streams to another landfill site). If one Member Council withdraws its waste tonnes, the Authority's LTFF is no longer as viable when compared to the rate offered by SWR.

It is noted that if the Councils were to pursue the SWR offer, then it would involve a significant change to the Authority's long term Business Plan and future existence. It is clear that the Authority's long term viability and sustainability depends on the member Councils waste streams coming to its Brinkley landfill operation.

## **4. OPTIONS**

Taking into consideration all of the above points, it is considered that the Council has one of two options, namely:

1. Continue with the Authority's current business plan model by committing to take its waste stream there; or
2. Take its waste stream to SWR or another landfill operator.

The following analysis has been undertaken in relation to each of the above options:

<b>Option 1 – Continue with the Authority</b>	
<b>Pros</b>	<b>Cons</b>
<ul style="list-style-type: none"> <li>• Councils in control of their destiny for waste management services &amp; disposal rates (strategic planning, vision, LTFF);</li> </ul>	<ul style="list-style-type: none"> <li>• Competition from SWR for commercial tonnes, albeit this has been forced into the LTFF</li> </ul>

<ul style="list-style-type: none"> <li>• Ability to pursue commercial waste streams to generate income for Councils;</li> <li>• Receive equity payments (LTFP indicates potential \$917,509 pa over 10 years – of which AHC would receive \$321,128 pa). Increase in commercial tonnes would increase equity payments;</li> <li>• Continued operation of Heathfield WTS &amp; access to in-house waste management advice</li> </ul>	
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The major risks of pursuing this option relate to the financial and other liabilities on Councils if Authority is not well managed into the future or is closed down. However, given the current 20 year track record, the Authority has performed well and delivered consistent dividends to member Council. An additional risk would be if RCMB did not renew the Authority's lease for the Brinkley site, but this risk is considered low as the relationship is a mutually beneficial one with both parties being winners in this instance.

<b>Option 2 – Use SWR or another Operator's Landfill Services</b>	
<b>Pros</b>	<b>Cons</b>
<ul style="list-style-type: none"> <li>• Councils enter into 7 + 3 year contract at competitive fixed rates with no liabilities;</li> <li>• No staff or asset management risks &amp; liabilities</li> </ul>	<ul style="list-style-type: none"> <li>• Be at mercy of SWR or other commercial operator;</li> <li>• No long term certainty/destiny/vision;</li> <li>• No equity in business &amp; no gains from waste management initiatives;</li> <li>• No ability to pursue strategic initiatives &amp; gain from these;</li> <li>• Post Brinkley site closure liabilities (approx. \$300k), future monitoring &amp; maintenance costs (\$30k pa), redundancy payments to staff (approx. \$150k), write-off of remaining asset space Cell 6a (approx. \$700k), disposal of assets (heavy vehicle fleet &amp; structures) at a reduced value</li> </ul>

The main risks with this option are:

- SWR ceases its operations or its contracts are not honoured; and/or
- Council needing to find an alternate landfill site after 10 years if SWR ceases operation.

### **In conclusion**

The Authority has been well managed and operated successfully for over 20 years and has generated equity income for constituent Councils. It has also enabled the Authority to pursue other residual waste streams and commercial clients for the benefit of member Councils. Continuing with the Authority allows Councils to control their destiny from a waste management point of view, and enables them to pursue strategic waste management initiatives to their advantage. However, the long term viability of the Authority is dependent on commitment of waste streams from all the constituent Councils. It is noted that both RCMB and Alexandrina Council have recently determined to commit their waste streams to the Authority, and Mount Barker Council will be considering its position in this regard shortly.

In consideration of all the information provided, staff are recommending that the Council advise the Board of the Adelaide Hills Region Waste Management Authority that it commits to continue to take its waste streams to the Authority's landfill for the next 10 years in support of the Long Term Financial Plan and its beneficial outcomes to Member Councils, unless circumstances arise requiring a review of this position. Further, that the Council advise Southern Waste ResourceCo that it has considered its offer, and its options for disposal of its waste streams, and has resolved to continue to dispose of its waste via the Adelaide Hills Region Waste Management Authority's operated landfill site.

## **5. APPENDICES**

- (1) Southern Waste ResourceCo Offer dated 21 October 2013
- (2) Council's Interim Response to SWR dated 11 December 2013
- (3) Letter from AHRWMA Board Chairman received 20 March 2014
- (4) AHRWMA Board Meeting Report of 21 November 2013 on SWR Offer
- (5) Botten Levinson Letter regarding Rule 33 Notice dated 12 December 2013 to the AHRWMA Board
- (6) SWR Statement of Claim (12 December 2013)
- (7) Wallmans Letter of Advice dated 19 December 2013
- (8) AHRWMA Board Meeting Report of 20 February 2014 on SWR Offer – Confirmation/Review of previous report

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# **Appendix 1**

*Southern Waste ResourceCo Offer dated 21  
October 2013*

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21<sup>st</sup> October 2013

Andrew Aitken  
CEO  
Adelaide Hills Council  
PO Box 44  
WOODSIDE 5244

**SCANNED**

24 OCT 2013

**ADELAIDE HILLS COUNCIL  
RECEIVED**

**RE: HARTLEY LANDFILL**

24 OCT 2013

Dear Andrew,

I refer to our previous communications about possible waste disposal services for your Council.

I note that we have not previously set out a proposal for a rate or terms for disposal for your Council at Hartley (beyond the \$37/t rate in the Deed entered into with AHRWMA). Despite the absence of such a proposal you advised in your letter of 24 April 2013 that your Council had been "working closely with the Authority to finalise and review the long term financial plan for the operation of the Brinkley site..." and that "...in accordance with the analysis of the Long Term Financial Plan, our Council will continue to utilise this landfill site into the future".

Notwithstanding your letter of 24 April, I write to make an offer that has also been made recently by us to the Adelaide Hills Regional Waste Management Authority (AHRWMA).

I understand that the AHRWMA does not control the waste of each member Council and that each Council is free and able to make its own decision about where waste is disposed and on what terms. Accordingly we are making this offer to your Council in its own right (even though an offer in essentially the same terms has also been made to the AHRWM).

Our offer -

- **Disposal rate of \$34.70/tonne + applicable EPA levy.**
- Agreement term is 21/10/13 – 30/6/2020 (**7 years**) with an option to extend by a **further 3 years**.
- Disposal rate adjustment calculated each year and to be based on CPI (All Groups Adelaide) for the previous 12 months.
- Pricing exclusive of all government taxes and levies.

This offer will be subject to our usual terms and conditions as attached. This offer will remain open for 30 days from the date of this letter.

Now that you have a disposal rate from us, we hope that you will actually be in a position to make a proper analysis of the relative costs of disposal at Hartley and Brinkley. We believe that this offer has several benefits to your Council. Firstly, the rate offered is very competitive, being lower even than the rate you were previously offered by the AHRWMA when it operated the Hartley site. Secondly, you will no longer have to pay for the extra transport costs associated with sending waste past the Hartley site all the way out to Brinkley (which is likely to cost you at least \$8/t).



Lastly, the Council will not need to pay or provision for (in its own right or by subsidising the AHRWMA) the short and long term waste management costs associated with the day to day management of waste at Brinkley or the capping and post closure management of that site.

In addition to the offer regarding waste disposal at Hartley (above), we would also like to work with the Authority on a variety of other waste streams where ResourceCo and Southern Waste ResourceCo have demonstrated capability and expertise; including but not limited to:

- a) Sludges and muds;
- b) Bio-solids;
- c) Contaminated soils and waste;
- d) Various recycling and resource recovery opportunities.

I look forward to a response from you at your earliest convenience. If your position remains as stated in your letter of 24 April then I would be grateful for prompt advice to that effect.

We are nonetheless hopeful about the re-engagement of our two organisations in working toward mutually beneficial commercial, environmental and regulatory outcomes.

Kind Regards,

A handwritten signature in black ink, appearing to read 'S. Brown', with a stylized flourish at the end.

**Simon Brown**  
**Managing Director**  
**ResourceCo**  
(Incorporating Southern Waste ResourceCo)

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## **Appendix 2**

*Council's Interim Response to SWR dated 11  
December 2013*

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Direct line: 8408 0438  
File Ref: OC13/8149 05.64.13 IC13/15855 / OC13/7290



11 December 2013

Mr Simon Brown  
Managing Director  
Southern Waste ResourceCo Pty Ltd  
PO Box 542  
ENFIELD PLAZA SA 5085

28 Onkaparinga Valley Road  
PO Box 44  
Woodside SA 5244

T: (08) 8408 0400  
F: (08) 8389 7440  
E: [mail@ahc.sa.gov.au](mailto:mail@ahc.sa.gov.au)  
W: [www.ahc.sa.gov.au](http://www.ahc.sa.gov.au)

Dear Simon

**Waste Disposal Offer - Hartley Landfill Site**

I refer to my letter dated 5 November 2013 in relation to consideration of the offer from Southern Waste ResourceCo regarding the Hartley landfill site. I note that there was a meeting between you, Andrew Stuart from the District Council of Mt Barker and Michael Lorenz on 4 December 2013.

It is noted that this meeting has resulted in a need for further consideration of your offer and further discussions with the Authority's constituent Councils. As such, we will not be able to report back to you as intended before Christmas. We are seeking an extension of time for consideration of your offer until February 2014. Please advise if this is acceptable.

If you have any further queries, please contact me or Marc Salver, Director Strategy & Development, on 8408 0522.

Yours sincerely

**Andrew Aitken**  
**Chief Executive Officer**



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## **Appendix 3**

*Letter from AHRWMA Board Chairman received 20  
March 2014*

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# AHRWMA

“Sustainable Waste Management Through Shared Services”

Andrew Aitken  
Chief Executive Officer  
Adelaide Hills Council  
PO Box 44  
Woodside SA 5244

Dear Andrew,

Late last year the Board of the Adelaide Hills Region Waste Management Authority ("the Authority") conducted a financial and non-financial analysis of the Authority continuing with its current adopted Business and Long Term Financial Plans ("LTFP").

The analysis was undertaken given the existence of several offers put forward by Southern Waste ResourceCo ("SWR") for the acceptance of waste from the Member Councils at the Hartley landfill.

I **attach** for your information a copy of the confidential report prepared at this time which was reaffirmed by the Board at its Meeting on 20 February 2014. The report was reaffirmed to take into account SWR subsequently issuing a notice of their intention to make a claim followed by their actual claim.

Having considered the financial and non-financial aspects of the SWR offer, the Board considers that subject to the observations contained in the report, it is in the best interests of the Member Councils to continue with the current business model (which includes the operation of the landfill).

The confidential report also contains an analysis of the financial and non-financial benefits based on the SWR proposal.

Whilst the attached report contains the Board's recommendations to its Member Councils in regards to future directions, it is up to each Member Council individually to make its own independent assessment as to whether they wish to commit to:

- (1) the Authority's current business plan model; or
- (2) a landfill client model where the Councils become clients of another landfill operator.



# AHRWMA

“Sustainable Waste Management Through Shared Services”

## ***Claims by SWR***

The attached report refers to the risks that SWR may pursue claims in relation to the Hartley site and allegations of misrepresentations in relation to future waste contracts. The claim as currently formulated by SWR is strongly refuted.

Since this time SWR has subsequently issued a Rule 33 Notice (as a precursor to the commencement of legal proceedings) and indicated that it intended to make a claim regardless of whether or not the Member Councils accepted its offer to dispose of waste at the Hartley landfill.

On 20 February 2014 SWR issued their Statement of Claim (**attached**). The claim against the Authority relates to SWR's acquisition of the right to operate the Authority's old landfill site at Hartley and is now focussed on SWR's ability to get the Member Councils as a customer at Hartley and the capacity on Hartley site. Significantly, the Statement of Claim does not incorporate the claims (contained in the original Rule 33 Notice) concerning deficiencies in the construction of cells, the leachate collection system and groundwater monitoring.

Further updates on the SWR Claim will be provided as information comes to hand.

## ***Instructions***

I look forward to your response, and in the meantime if you require any further information or have any questions, please do not hesitate to contact me.

Yours Sincerely

Councillor Barry Laubsch

CHAIRPERSON AHRWMA

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## **Appendix 4**

*AHRWMA Board Meeting Report of 21 November  
2013 on SWR Offer*

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ITEM NO. 5.6  
TO: ADELAIDE HILLS REGION WASTE MANAGEMENT AUTHORITY  
FROM: EXECUTIVE OFFICER  
SUBJECT: SWR PROPOSAL

**GROUNDNS FOR CONFIDENTIALITY**

Section 90(3) (b) & (d) of the *Local Government Act, 1999*:

- (b) information the disclosure of which —
- (i) could reasonably be expected to confer a commercial advantage on a person with whom the Authority is conducting, or proposing to conduct, business, or to prejudice the commercial position of the Authority; and
  - (ii) would, on balance, be contrary to the public interest;
- (d) commercial information of a confidential nature (not being a trade secret) the disclosure of which—
- (i) could reasonably be expected to prejudice the commercial position of the person who supplied the information, or to confer a commercial advantage on a third party; and
  - (ii) would, on balance, be contrary to the public interest;

\*\*\*\*\*

**PURPOSE**

For the Board to reassess commitment to its adopted business model in the context of the Southern Waste ResourceCo (SWR) proposal and for a decision and commitment to be made as to the preferred future direction.

**KEY ISSUES**

- SWR have made the threat of a potential claim against the Authority concerning the Hartley Landfill agreement
- A SWR proposal has been received which if pursued is a significant change to the Authority's Business Plan
- The Authority's Business and Long Term Financial Plan includes the operation of a landfill which requires commitment of Member Councils and their tonnes to enable long term planning and benefits to occur.
- The Authority needs to be able to demonstrate that it offers value on both a financial and non-financial basis for its Member Councils. In demonstrating this there is an underlying assumption of commitment of Member Councils to the Business Plan.

**RECOMMENDATION**

That:-

- (1) The Board consider the financial and non-financial analysis of the Authority continuing with its current adopted Business and Long Term Financial Plans compared to becoming a landfill client and commits to the preferred future direction.
- (2)(a) The Board advise the member councils that after analysis of the financial and non-financial impacts on the Authority of the SWR offer, it recommends that they commit to sending their waste streams to the Authority's Brinkley operation for at least the next seven years and respond to SWR accordingly.
- (b) That this arrangement only be reviewed if unforeseen issues with the Authority's operations and financial position arise.
- (c) That the Executive Officer prepare a standard report in this regard for consideration by the member Councils.
- (3) Southern Waste Resource Co be informed of the Authority's direction.
- (4) In accordance with Section 91 (7) & (9) of the *Local Government Act 1999* and on the grounds that Item No. 5.1 listed on the Agenda for the meeting of the Adelaide Hills Region Waste Management Authority held on 16 December 2010 was received, discussed and considered in confidence pursuant to Section 90(3) (b) & (d) of the *Local Government Act, 1999*, this meeting of the Committee, do order that:
  - (a) the resolution, the report, the discussion and any other associated information submitted to this meeting and the minutes of this meeting in relation to the matter remain confidential and not available for public inspection until 20 November 2014;
  - (b) the confidentiality of the matter be reviewed in November 2014;
  - (c) the Executive Officer be delegated the authority to review and revoke all or part of the order herein and directed to present a report containing the Item for which the confidentiality order has been revoked.

## **REPORT**

### **Background**

1. Following commitment from Member Councils the Authority executed an agreement with SWR and relocated its landfill operations from Hartley to Brinkley on 13 February 2013. On the same day SWR took possession of the Hartley Landfill and the Authority's EPA licence was transferred to them along with all future liabilities.
2. On 16 July 2013 a letter was received from Botten Levinson, solicitors for SWR, making claims in relation to the Hartley site and allegations of misrepresentations in relation to future waste contracts. The claims as represented by SWR total an estimated loss of \$6 million.
3. The claims as currently formulated by SWR are strongly refuted. Further investigation of their claims has confirmed that they have no basis.
4. On 7 August 2013 SWR submitted an offer to the District Council of Mount Barker seeking to secure their waste tonnes at the Hartley Landfill in return for a discounted rate per tonne over a 5 year period.
5. Subsequently on 20 September 2013 SWR submitted a revised offer through the Authority seeking to secure Member Council tonnes at the Hartley Landfill in return for an improved discounted rate per tonne and over a longer period of time of 7 years with an option to extend by a further 3 years.
6. The Authority's adopted Business and Long Term Financial Plan includes the investment in, and operation of, the Brinkley Landfill.
7. The Authority's Budget and Long Term Financial Plan as adopted at June 2013 assumed the commitment of Member Council tonnes and allowed for a 55% loss of Commercial tonnes due to competition from the Hartley landfill.
8. The Authority's first quarter financial results show a significant reduction in commercial tonnes of approximately 90%. In addition waste tonnes from Alexandrina Council have not been sent to the Brinkley Landfill.

### **Discussion**

9. The Long Term Financial Plan (LTFP) has been amended to take into account the significant change to projected commercial waste tonnes and several scenarios have been run to give an indication of financial risk.
10. A core underlying assumption contained within the LTFP is the commitment of Member Council tonnes as equity owners in an Authority that they agreed to form and have adopted a business model which includes the operation of a landfill for their residual waste streams.
11. Whilst some Member Councils are considering the recent proposals from SWR it is affecting the Authority's ability to undertake long term planning and commitments as included in its LTFP.
12. The securing of Member Council tonnes has been identified as a significant issue by both the Management and Operations Committee and Audit Committee. As a result

both committees have asked for a legal and probity review to occur of ways to secure Member Council tonnes and for potential agreements to be drafted.

13. Preliminary legal advice states:

“Whilst it is possible for contracts to secure long-term commitments in a variety of circumstances, the constituent councils entering into contracts with the Authority may not be the most appropriate way in which to address this issue. There are significant legal risks which may arise from an approach involving the constituent councils entering into long-term contracts with the Authority. These risks should be carefully evaluated before a contracting strategy is adopted.

A better approach may be to secure longer term commitment through the provisions of the Authority's Charter and the funding commitments of constituent councils.”

Analysis

14. An analysis of both the financial and non-financial benefits has been undertaken using the SWR proposal. (**Attached** –Direct Cost per Tonne Analysis for Disposal of Waste to Landfill Taking into Account Transport Cost Differences, and **Attached** SWOT analysis of Non-Financial Aspects)
15. To enable a direct financial analysis the SWR discounted rate of \$34.70 per tonne has been entered into the Authority's LTFP with different tonnage scenarios to show the effect on Net Profit, Cash Flow, Net Equity and the level of financial risk.
16. In addition a low cost model has been developed. The low cost model has been produced to show that there is scope to further reduce the cost per tonne to Member Councils by reducing the service levels provided to core base services if desired.
17. Ignoring the non-financial benefits of the Authority the LTFP still indicates that the Authority is viable and will return good value for Member Councils provided that they are committed with their waste tonnes.
18. The SWR proposal offers the potential of lower short term risks and includes a very attractive cost per tonne for waste disposal. In addition the location of the Hartley Landfill is more central to all Member Councils. However this would come at the loss of in house waste and recycling expertise and project management services, reduced benefit for transfer station management services and long term uncertainty in the future waste market.
19. The continued Authority business model offers long term certainty, control of waste streams and resource recovery efforts to meet environmental and social expectations. It also achieves a level of economies of scale that enables other value adding services to continue to be performed and pursued for Member Councils. However short term risk is high whilst there is an attempt to win waste streams in a limited market. This requires the long term commitment of Member Councils. In addition the Brinkley Landfill is not as centrally located and as such some Member Councils have increased transport costs.
20. SWR have indicated their intention to pursue some form of damages claim and to attempt to relinquish their landfill liability obligations at Hartley should Member Councils not commit their waste streams to their Hartley Landfill site. It is not clear whether SWR



would not pursue the same path if Member Council tonnes were committed to the Hartley Landfill.

21. The financial analysis provided doesn't take into account the wrap up costs of the Authority's landfill operations. Liabilities include a capping cost for Cell 6a of approximately \$300k, future monitoring and maintenance costs of approximately \$30k per annum, redundancies of staff of approximately \$150k. In addition the remaining asset space of Cell 6a would be written off at about \$700k. A payment may be required from Member Councils in accordance with their equity shares to fund the closure and wrap up costs depending on the timing of the decision and amounts received for saleable asset items.

### Conclusion

22. A recent series of proposals from Southern Waste ResourceCo has highlighted that whilst it is good practice to reassess the benefits of the Authority's adopted business model on a regular basis that Member Councils need to understand that the model is one that requires long term commitment to achieve the benefits.
23. All Member Councils need to be committed either to the current business plan model or to a landfill client model. If one Member Council withdraws its waste tonnes the Authority's LTFP is no longer viable when compared the rate offered by SWR. It can't be one or the other whenever it suits. The Authority's business model requires a long term commitment.

\*\*\*\*\*

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## Direct Cost per Tonne Analysis for Disposal of Waste to Landfill Taking Into Account Transport Cost Differences

All Scenarios below use the SWR rate of \$34.70 per tonne in the Authority's LTFF to show the effect on Net Equity and Cashflow

The Change in Equity figures below have been calculated over a 10 year period and divided by 10 to provide an annual average change

The Transport Cost Change (Brinkley vs Hartley) has been calculated over a 10 year period and divided by 10 to provide an annual average change

The same CPI rates have been used to for annual adjustments to the rate per tonne and transport costs

Loan Finance costs have not been included in the model

Waste Tonne Source	Projected 13/14 Tonnes - Based on first 3 months	Previous Annual Tonnes
DCMB	7500	7900
AHC - Rural	2855	2890
AHC - Metro	6200	5600
AC	0	3200
RCMB	4800	4780
Non Member Local Govt	6500	6030
Commercial	2500	17700
Total All Tonnes	<b>30355</b>	<b>48100</b>

Worst Case - Assumes Alexandrina tonnes come (3,200t) and no additional other tonnes- have reduced contract labour (\$80k), repairs/machinery (\$20k), diesel (\$30k)														
Member Council	Average Annual Equity Change Over 10 Years	Average Annual Transport Cost Change Over 10 Years	Net Annual Difference	Fin Yr End (cumulative totals)	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
AC	(\$22,995)	(\$14,608)	(\$37,603)	Net Profit	(\$316,749)	(\$491,149)	(\$443,392)	(\$483,211)	(\$354,606)	(\$231,915)	(\$70,795)	(\$46,923)	\$115,075	\$90,657
AHC	(\$67,069)	(\$33,890)	(\$100,959)	Cash at End of Period	(\$50,039)	\$48,843	(\$512,737)	(\$225,156)	(\$1,305,728)	(\$1,203,483)	(\$793,241)	(\$327,533)	\$346,329	\$33,681
DCMB	(\$61,320)	(\$41,994)	(\$103,314)	Equity	\$2,530,890	\$2,039,740	\$1,596,348	\$1,113,137	\$758,530	\$526,615	\$455,820	\$408,897	\$523,972	\$614,628
RCMB	(\$40,242)	\$47,046	\$6,804											
ALL Councils	(\$191,626)	(\$43,446)	(\$235,072)											

Likely Case (Conservative) - Assumes AC at 3,200t, commercial up by 3500t and other local govt up 1000t - have reduced contract labour (\$80k), repairs/machinery (\$20k), diesel (\$30k)														
Member Council	Average Annual Equity Change Over 10 Years	Average Annual Transport Cost Change Over 10 Years	Net Annual Difference	Fin Yr End (cumulative totals)	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
AC	\$14,247	(\$14,608)	(\$361)	Net Profit	(\$53,017)	(\$213,100)	(\$150,180)	(\$174,236)	(\$29,176)	\$110,653	\$289,486	\$331,941	\$513,082	\$508,758
AHC	\$41,553	(\$33,890)	\$7,663	Cash at End of Period	\$213,693	\$590,624	\$322,257	\$918,812	\$163,670	\$608,482	\$1,379,006	\$2,223,579	\$3,295,448	\$3,400,901
DCMB	\$37,991	(\$41,994)	(\$4,003)	Equity	\$2,794,622	\$2,581,521	\$2,431,341	\$2,257,105	\$2,227,928	\$2,338,580	\$2,628,067	\$2,960,008	\$3,473,090	\$3,981,848
RCMB	\$24,932	\$47,046	\$71,977											
ALL Councils	\$118,723	(\$43,446)	\$75,276											

Best Case -All Tonnes to Brinkley														
Member Council	Average Annual Equity Change Over 10 Years	Average Annual Transport Cost Change Over 10 Years	Net Annual Difference	Fin Yr End (cumulative totals)	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
AC	\$110,101	(\$14,608)	\$95,493	Net Profit	\$617,508	\$489,102	\$593,156	\$612,268	\$802,249	\$988,732	\$1,216,208	\$1,309,282	\$1,552,060	\$1,612,036
AHC	\$321,128	(\$33,890)	\$287,238	Cash at End of Period	\$884,218	\$1,963,351	\$2,438,320	\$3,821,380	\$3,897,662	\$5,220,554	\$6,917,800	\$8,739,714	\$10,850,561	\$12,059,292
DCMB	\$293,603	(\$41,994)	\$251,609	Equity	\$3,465,147	\$3,954,248	\$4,547,404	\$5,159,672	\$5,961,921	\$6,950,653	\$8,166,861	\$9,476,143	\$11,028,203	\$12,640,239
RCMB	\$192,677	\$47,046	\$239,723											
ALL Councils	\$917,509	(\$43,446)	\$874,063											

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## Direct Cost per Tonne Analysis for Disposal of Waste to Landfill Taking Into Account Transport Cost Differences - Low Cost Model \*\*\*

All Scenarios below use the SWR rate of \$34.70 per tonne in the Authority's LTFF to show the effect on Net Equity and Cahflow

The Change in Equity figures below have been calculated over a 10 year period and divided by 10 to provide an annual average change

The Transport Cost Change (Brinkley vs Hartley) has been calculated over a 10 year period and divided by 10 to provide an annual average change

The same CPI rates have been used to for annual adjustments to the rate per tonne and transport costs

Loan Finance costs have not been included in the model

Waste Tonne Source	Projected 13/14 Tonnes - Based on first 3 months	Previous Annual Tonnes
DCMB	7500	7900
AHC - Rural	2855	2890
AHC - Metro	6200	5600
AC	0	3200
RCMB	4800	4780
Non Member Local Govt	6500	6030
Commercial	2500	17700
Total All Tonnes	<b>30355</b>	<b>48100</b>

\*\*\* This low cost model has been produced to show that there is scope to further reduce the cost per tonne to Member Councils by reducing the service levels provided to core base services if desired

Low Cost Model reduces labour by 2 FTE's, reduces executive officer hours, removes operations manager role which currently covers all Authority activity areas - landfill operations and transfer stations would still each have a supervisor role. Resource recovery efforts would be minimised. Economies of scale benefits would reduce slightly for Transfer Station operations. Project management services previously provided to Member Councils would not be possible. Ability to explore opportunities for future savings or revenue streams reduced. Authority's staffing resource structure not as robust - may be periods of time where it will be difficult to service all requirements due to staff shortages from natural attrition.

Worst Case - Assumes Alexandrina tonnes come (3,200t) and no additional other tonnes- have reduced contract labour (\$80k), repairs/machinery (\$20k), diesel (\$30k), EPA levy adjusted to reflect actual tonnes

Reduce Labour further (\$40k) and Management/Supervision by (\$200k) from Jul 2015

Member Council	Average Annual Equity Change Over 10 Years	Average Annual Transport Cost Change Over 10 Years	Net Annual Difference
AC	\$5,276	(\$14,608)	(\$9,332)
AHC	\$15,387	(\$33,890)	(\$18,503)
DCMB	\$14,068	(\$41,994)	(\$27,926)
RCMB	\$9,232	\$47,046	\$56,278
ALL Councils	\$43,964	(\$43,446)	\$517

Fin Yr End (cumulative totals)	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Net Profit	(\$316,749)	(\$251,939)	(\$197,372)	(\$230,261)	(\$94,536)	\$35,485	\$204,125	\$235,737	\$405,695	\$389,467
Cash at End of Period	(\$50,039)	\$288,053	(\$27,507)	\$513,024	(\$307,478)	\$62,167	\$747,329	\$1,495,697	\$2,460,179	\$2,446,341
Equity	\$2,530,890	\$2,278,950	\$2,081,578	\$1,851,317	\$1,756,780	\$1,792,265	\$1,996,390	\$2,232,127	\$2,637,822	\$3,027,288

Likely Case (Conservative) - Assumes AC at 3,200t, commercial up by 3500t and other local govt up 1000t - have reduced contract labour (\$80k), repairs/machinery (\$20k), diesel (\$30k), EPA levy adjusted to reflect actual tonnes

Reduce Labour further (\$40k) and Management/Supervision by (\$200k) from Jul 2015

Member Council	Average Annual Equity Change Over 10 Years	Average Annual Transport Cost Change Over 10 Years	Net Annual Difference
AC	\$43,199	(\$14,608)	\$28,591
AHC	\$125,996	(\$33,890)	\$92,106
DCMB	\$115,196	(\$41,994)	\$73,202
RCMB	\$75,598	\$47,046	\$122,643
ALL Councils	\$359,989	(\$43,446)	\$316,542

Fin Yr End (cumulative totals)	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Net Profit	(\$53,017)	\$26,110	\$95,840	\$78,714	\$230,894	\$378,053	\$564,406	\$614,601	\$803,702	\$807,568
Cash at End of Period	\$213,693	\$829,834	\$807,487	\$1,656,992	\$1,161,920	\$1,874,132	\$2,919,576	\$4,046,809	\$5,409,298	\$5,813,561
Equity	\$2,794,622	\$2,820,731	\$2,916,571	\$2,995,285	\$3,226,178	\$3,604,230	\$4,168,637	\$4,783,238	\$5,586,940	\$6,394,508

Best Case -All Tonnes to Brinkley, EPA levy adjusted to reflect actual tonnes

Reduce Labour (\$120k) and Management/Supervision by (\$200k) from Jul 2015

Member Council	Average Annual Equity Change Over 10 Years	Average Annual Transport Cost Change Over 10 Years	Net Annual Difference
AC	\$149,332	(\$14,608)	\$134,724
AHC	\$435,551	(\$33,890)	\$401,660
DCMB	\$398,218	(\$41,994)	\$356,224
RCMB	\$261,330	\$47,046	\$308,376
ALL Councils	\$1,244,430	(\$43,446)	\$1,200,984

Fin Yr End (cumulative totals)	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Net Profit	\$617,508	\$811,112	\$924,956	\$953,918	\$1,154,029	\$1,350,962	\$1,589,188	\$1,693,342	\$1,947,530	\$2,019,266
Cash at End of Period	\$884,218	\$2,285,361	\$3,092,130	\$4,816,840	\$5,244,902	\$6,930,024	\$9,000,250	\$11,206,224	\$13,712,541	\$15,328,502
Equity	\$3,465,147	\$4,276,258	\$5,201,214	\$6,155,132	\$7,309,161	\$8,660,123	\$10,249,311	\$11,942,653	\$13,890,183	\$15,909,449

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# SWOT ANALYSIS – Non Financial Aspects

## SWR Proposal

(CONFIDENTIAL)

**S**

### Strengths

- Lower short term risk.
- SWR very good at C&D resource recovery.
- Attractive cost per tonne disposal rate
- Can offer other complimentary services.
- Location of landfill more central to all Member Councils
- Marketing

**W**

### Weaknesses

- In house waste and recycling expertise lost.
- Reduced benefit for Transfer Station management services.
- Long term uncertainty.
- Less emphasis on long term planning and regional approach
- Operating cost is main driver – may lead to poor site performance and increased complaints
- Trust

**O**

### Opportunities

- Contaminated wastes
- Sludges/Muds
- Bio solids
- C&D resource recovery
- Strategic alliances, partnerships may exist for some of the above opportunities

**T**

### Threats

- Threat of claim by SWR may still exist
- SWR could dissolve business if it suits
- Transfer Station management services may not be possible in the future
- Wrap up costs could exceed available funds requiring Member Councils to make payment

# SWOT ANALYSIS – Non Financial Aspects

## Continued Authority Business Model

(CONFIDENTIAL)

**S**

### Strengths

- Long term certainty
- Control over waste stream and resource recovery efforts to meet environmental and social expectations
- Value adding for Member Councils through shared services model and economies of scale
- Access to in house expertise
- Wholistic independent advice for Member Councils taking into account benefits for individual Councils and Authority as a whole
- Running a compliant landfill

**O**

### Opportunities

- Bio solids (CWMS – Community Wastewater Management Scheme)
- C&D resource recovery – crusher due to arrive shortly for use at Brinkley, Heathfield, Goolwa and other projects
- Cardboard and plastics baling and resource recovery
- Alternative technologies for waste treatment
- Expanded hooklift operations
- Brinkley landfill location may enable expansion to surrounding councils in future

**W**

### Weaknesses

- Member Council commitment to long term business plan
- Authority held to higher standards by regulatory bodies
- Brinkley landfill not as central

**T**

### Threats

- Threat of claim by SWR
- Member Council(s) withdrawing tonnes
- Competition from Hartley landfill in a market where only one operator is viable – could make Authority model unviable
- May struggle to maintain in house expertise in the future

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## **Appendix 5**

*Botten Levinson Letter regarding Rule 33 Notice  
dated 12 December 2013 to the AHRWMA  
Board*

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Our ref: JAL/213168

12 December 2013

Mr Scott Lumsden  
Wallmans Lawyers  
GPO Box 1018  
ADELAIDE SA 5001

By email: [scott.lumsden@wallmans.com.au](mailto:scott.lumsden@wallmans.com.au)

Dear Scott

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

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

**Offer to settle**

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

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

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

**Details of claim 1**

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

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

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

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

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

#### **Details of Claim 2**

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

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

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

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

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



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

1.17 \$10,000 to establish vegetation screening;

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

Yours faithfully



**James Levinson**  
**BOTTEN LEVINSON**  
Mob: 0407 050 080  
Email: [jal@bllawyers.com.au](mailto:jal@bllawyers.com.au)

Enc. Draft statement of claim.

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# **Appendix 6**

*SWR Statement of Claim (12 December 2013)*

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**FDN**

**IN THE SUPRMEME COURT OF SOUTH AUSTRALIA**

**No.     of 2013**

**BETWEEN**

**SOUTHERN WASTE RESOURCECO PTY LTD ACN 151 241 093**  
Plaintiff

**AND**

**ADELAIDE HILLS REGION WASTE MANAGEMENT AUTHORITY**  
Defendant

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**STATEMENT OF CLAIM**

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Filed on behalf of the plaintiff, Southern Waste  
ResourceCo Pty Ltd ACN 151 241 093  
By

Botten Levinson Lawyers  
140 South Terrace  
ADELAIDE SA 5000

Telephone: 8212 9777  
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L1234  
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Settled by:

Michael Burnett

Date and time of filing or transmission:

12 December 2013

**STATEMENT OF CLAIM**

Part 1:

The causes of action, the basis of them and the material facts are:

**A: Parties**

1. The Plaintiff, Southern Waste ResourceCo Pty Ltd (**SWR**):
  - 1.1. is and was at all material times a company duly incorporated under the *Corporations Act 2001 (Cth)*;
  - 1.2. is the joint venture company for the joint venture between ResourceCo Pty Ltd and Lucas Earthmovers Pty Ltd;
  - 1.3. carries on inter alia the business of disposal and management of waste and the operation of waste disposal sites;
  - 1.4. has and at all material times had Mr Simon Brown as its managing director.
2. The defendant the Adelaide Hills Waste Management Authority (**the Authority**):
  - 2.1. Was established as a regional subsidiary pursuant to section 43 of the Local Government Act 1999;
  - 2.2. Is a regional subsidiary of the District Council of Mt Barker, the Rural City of Murray Bridge, the Adelaide Hills Council and the Alexandria Council (**the member Councils**);
  - 2.3. Is a body corporate;
  - 2.4. Is able to be sued in its corporate name;
  - 2.5. Engaged in trade and commerce within the meaning of section 18(1) of the Australian Consumer Law, as contained in schedule 2 to the Competition and Consumer Law 2010 (Cth) (**the Australian Consumer Law**);

- 2.6. Has and had at all material times Mr Michael Lorenz as its executive officer;
- 2.7. Has and had at all material times, Mr Marc Salver as one of its board members.
- 3. At all material times, Mr Lorenz was an employee and agent of the Authority and Mr Salver was an agent of the Authority and both acted within the scope of their actual or apparent authority in their dealings with SWR as described in this statement of claim.
- 4. By reason of the matters referred to in paragraph 3 above, the conduct of Mr Lorenz and Mr Salver described in this statement of claim is deemed to be conduct engaged in by the Authority pursuant to section 84(2) of the Competition and Consumer Act 2010.
- 5. At all material times, Robin Angas Harvey, Christine Mary Harvey and Ian Brownhill Harvey (**the Harveys**) were and are the owners of the whole of the land comprised in Certificate of Title Register Book Volume 5500 Folio 360 situate at Hartley in the State of South Australia (**the Land**).

**B: Background facts**

- 6. From about November 1991 to 13 February 2013, the Authority operated a bulk waste disposal facility on the Land pursuant to:
  - 6.1. Licence number EPA24 issued under the Environment Protection Act 1993 and varied from time to time (**the EPA Licence**);
  - 6.2. A development approval granted by the South Australian Planning Commission and affirmed by the Planning Appeal Tribunal (**the Development Approval**) which limited the waste that could be disposed on the Land to the waste collected by Councils in accordance with the Management Plan (**the LEMP**) approved by the then Waste Management Commission as varied from time to time;

- 6.3. A Licence dated 27 November 1991 granted to the Authority by the then owner of the Land, Herbert Colin Livingston Harvey (**the Licence**).
7. The Licence contained a right of renewal for a 10 years commencing on 27 November 2001 and expiring on 26 November 2011 and a further right of renewal commencing on 27 November 2011.
8. The Authority exercised the first right of renewal in 2001 but a dispute arose between the Harveys and the Authority concerning the right of the Authority to exercise a further right of renewal in August 2011, which right of renewal would have commenced on 27 November 2011 (**the Dispute**).
9. Pending resolution of the Dispute, the Authority remained in possession of the Land and continued to operate a bulk waste disposal facility on the Land.
10. As at November 2011, the Harveys were of the view that:
- 10.1. The purported exercise of the right of renewal by the Authority for a further 10 year period commencing 27 November 2011 was invalid and of no affect;
- 10.2. The Authority had no right to continue to occupy the Land and operate a bulk waste disposal there.
11. On 13 August 2012, the Harveys and SWR entered into an agreement in writing entitled the Landfill Deed (**the Landfill Deed**) whereby subject to the Authority vacating the Land:
- 11.1. the Harveys agreed to grant SWR a licence to occupy and use the Land for the purpose of a bulk waste disposal and backfill together with all other activities and land uses incidental thereto for a period of 20 years commencing on the first day of the next month following the vacation by the Authority (**the commencement date**);
- 11.2. SWR agreed to make payments to the Harveys for that licence of \$100,000 per annum from the commencement date to the

date upon which it received all approvals and licences to operate a bulk waste disposal facility on the Land and thereafter an amount equal to 16 per cent of the gross rubbish income derived by SWR from the Land each financial year or \$100,000, whichever is the greater.

12. From on or about 15 August 2012, the Harveys and the Authority together with SWR commenced negotiations as to settling the Dispute and negotiating the terms upon which the Authority might cease to occupy the Land.
13. On 11 February 2013, the Harveys, the Authority and SWR entered into a Deed (**the Deed**) in which the terms of the resolution of the Dispute were recorded.

### **Particulars**

SWR will refer to the Deed for its full terms and effects.

14. It was a term of the Deed that:
  - 14.1. The Authority would give free and unencumbered vacant possession of the Land to the Harveys and SWR by 5pm on 13 February 2013;
  - 14.2. The Authority would cease operating its bulk waste facility on the Land by 5pm on 13 February 2013;
  - 14.3. SWR would agree to pay to the Authority the sum of \$990,000 (inclusive of GST) on settlement, namely 5pm on 13 February 2013(**settlement**),
  - 14.4. SWR would from settlement take vacant possession of the Land;
  - 14.5. SWR would from 5pm on 13 February 2013 assume full responsibility and liability for the Environmental Performance (as defined) including:
    - 14.5.1. The responsibility for covering and final capping of waste, management of landfill gas and post closure

management of the Land relating to waste deposited by the Authority prior to settlement;

14.5.2. Responsibility and liability for or arising from the lawful and proper Environmental Performance by the Authority prior to settlement (but not including any negligent acts or omissions by the Authority in relation to its Environmental Performance);

14.6. SWR agreed to release and discharge the Authority from all claims arising out of or in connection with the lawful and proper Environmental Performance by the Authority (but not including any negligent acts or omissions by the Authority in relation to Environmental Performance);

14.7. SWR agreed to indemnify and keep indemnified the Authority from all claims arising from the lawful and proper Environmental Performance by the Authority (but not including any negligent acts or omissions by the Authority in relation to its Environmental Performance).

14.8. The Authority warranted that except for certain alleged breaches in Schedule C of the Deed it had at all times complied with the EPA Licence and indemnified SWR against any loss or damage arising from a breach of such warranty.

15. On 11 February 2013, SWR and the Authority entered into a further Deed (**the Further Deed**) in which SWR agreed that on and from the date of the transfer of the EPA Licence from the Authority to SWR, SWR agreed to assume liability for the purposes of section 103E of the Environment Protection Act 1993 for the waste deposited by the Authority within the confines of the landfill cells on the Land.

16. The bulk waste disposal facility conducted by the Authority on the Land comprised a number of cells in which waste was deposited.

17. As at November 2012, the cells numbered 1-5 had been filled and the Authority was using cell numbered 6.



18. Since the date of settlement, SWR has undertaken negotiations with each of the member Councils as to the disposal of waste at the Land and each of the member Councils has advised SWR that they would not dispose their waste at the Land.

**C: Claim for misleading and deceptive conduct**

19. On 14 September 2012, a meeting occurred at the offices of Wallmans lawyers between representatives of SWR and representatives of the Authority to discuss a possible resolution of the Dispute. Those in attendance at that meeting were:
  - 19.1. Mr Michael Lorenz, Mr Simon Grenfell and Mr Rob Coleman on behalf of the Authority together with its lawyer, Mr Scott Lumsden;
  - 19.2. Mr Simon Brown, Mr David Lucas and Mr Chris Pucknell on behalf of SWR together with its lawyers, Mr James Levinson and Mr William Rudd.
20. During the course of the meeting, SWR discussed its plans for the Land. The substance of the conversation was:
  - 20.1. A statement by Mr Brown that the Land was a long term plan and that they were keen to take on waste from the Authority but also take other market opportunities with the Council waste as a basis;
  - 20.2. A statement by Mr Brown that SWR preferred to keep the same customer group.
21. By letter dated 25 September 2012 the Authority by its lawyers provided certain information about the Land and the conduct on the Land of the landfill. The letter included
  - 21.1. a statement of the remaining air space in cells 5A and B (60,000m<sup>3</sup>), 6 (200,000m<sup>3</sup>), 7A and B (398,000m<sup>3</sup> but only 60% excavated);

- 21.2. a statement that the written down asset value of cell 6 as at 1 July 2012 was \$1.2m; and
  - 21.3. the details (weight in tonnes) of the waste stream accepted by the Authority at the Land from 1992.
22. On 23 October 2012, Mr Brown and Mr Lucas on behalf of SWR and Mr Lorenz on behalf of the Authority met at the Land to discuss the site and how it had been operated by the Authority.
23. During the course of that meeting, the parties discussed the access by SWR to the member Councils (of the Authority). The substance of the conversation was:
- 23.1. A question by Mr Brown on behalf of SWR as to access by SWR to the member Councils;
  - 23.2. A statement by Mr Lorenz on behalf of the Authority that SWR would be able to get access to the member Councils;
  - 23.3. A statement by Mr Lorenz that he (meaning the Authority) did not control the waste and that all member Councils are free to do what they like with the waste;
  - 23.4. A statement by Mr Lorenz that the Authority was setting up a new cell at Brinkley.
24. On 5 November 2012, a further meeting occurred at the offices of Wallmans Lawyers between representatives of SWR and representatives of the Authority to discuss a possible resolution of the Dispute. Those in attendance at that meeting were:
- 24.1. Mr Lorenz, Mr Mark Salver and Mr Rob Coleman on behalf of the Authority together with their lawyers, Mr Brian Hayes QC and Mr Scott Lumsden;
  - 24.2. Mr Brown and Mr Chris Pucknell on behalf of SWR together with their lawyer, Mr James Levinson.

25. During the course of that meeting, the parties discussed the access by SWR to the member Councils (of the Authority). The substance of the conversation was:
  - 25.1. A statement by Mr Hayes QC on behalf of the Authority that because of the Brinkley site, the Authority did not need the Land;
  - 25.2. A statement by Mr Brown on behalf of SWR that it would take SWR a few years to build up the business;
  - 25.3. A statement by Mr Lorenz on behalf of the Authority that the Authority could not make member Councils to take waste to SWR;
  - 25.4. A statement by Mr Hayes QC on behalf of the Authority that SWR could deal with the member Councils direct.
26. On 12 November 2012, a further meeting occurred at the offices of Wallmans lawyers between representatives of SWR and representatives of the Authority to discuss a possible resolution of the Dispute. Those in attendance at that meeting were:
  - 26.1. Mr Lorenz, Mr Salver and Mr Coleman on behalf of the Authority together with its lawyer Mr Scott Lumsden;
  - 26.2. Mr Lucas, Mr Brown and Mr Chris Pucknell together with SWRs lawyer Mr James Levinson.
27. During the course of the meeting in the context of a discussion about offers of compensation which would be paid by SWR to the Authority, there was also a discussion about access by SWR to member Councils. The substance of the conversation was:
  - 27.1. A statement by Mr Levinson on behalf of SWR that SWR would pay the Authority the sum of \$700,000 plus access for SWR to member Councils and that SWR would honour the current rate (for waste disposal at Hartley) of the Authority;
  - 27.2. A rejection by the Authority of that offer by Mr Salver and the making of a counter offer of \$900.000;

- 27.3. A statement by Mr Brown that he accepted that offer (on behalf of SWR) based on SWR getting in front of all the councils to introduce themselves;
- 27.4. A statement by Mr Lorenz on behalf of the Authority giving the names of the contact person in each member Council.
- 28. By email dated 22 January 2013, the Authority through its lawyers advised SWR through its lawyers that the available cell space in cell 6 for further disposal of waste was 11,000 cubic metres immediately and an additional 134,000 cubic metres following the construction of cell 7.
- 29. In order to induce SWR to enter into the Deed and the Further Deed, the Authority warranted and represented that:
  - 29.1. It, the Authority, had no pre-existing contract, arrangement or understanding with the member Councils, which would prohibit or hinder or render less likely the member Councils from using the Land or entering into a contract with SWR in relation to waste disposal;
  - 29.2. It would not impair or hinder or interfere in any way with attempts that might be made by SWR to obtain the waste disposal business of the member Councils;
  - 29.3. It would not induce or seek to induce the member Councils to use the site at Brinkley rather than the Land;
  - 29.4. It did not know of any matter that would mean that it was likely or possible that member Councils would not utilise the services of SWR and would dispose of waste at a site other than the Land;
  - 29.5. It would not seek to obtain for itself the custom of the member Councils in relation to their disposal of waste;
  - 29.6. It was possible that the member Councils would enter into a contract with SWR for the disposal of waste at the Land on usual commercial terms.

- 29.7. Cell 6 had 11,000 cubic metres of immediately available space and cell 6 would have an additional 134,000 cubic metres available upon the construction of cell 7 with a value of \$1.2m.
30. The warranties and representations referred to in paragraphs 29.1 to 29.6 above were implied and were implied from:
  - 30.1. the statements contained in paragraphs 20, 23, 25 and 27 above
  - 30.2. the fact that up to the date of settlement, the member Councils had used the Land for the disposal of waste;
  - 30.3. the fact that from settlement, SWR was to be the operator of the waste disposal business conducted on the Land;
  - 30.4. the fact that the planning approval as evidenced by the decision of the Planning Appeals Tribunal for use of the Land as a waste disposal site was limited to waste supplied by Councils;
  - 30.5. the fact that without the custom of the member Councils, SWR could not operate the waste disposal business situate on the Land profitably;
  - 30.6. the fact that without the custom of the member Councils, the business to be conducted by SWRC on the Land was of little or no value.
31. The warranty and representation referred to in paragraph 29.7 was
  - 31.1. express and contained in the email from the Authority's lawyers to SWR's lawyers dated 22 January 2013; and
  - 31.2. implied from the written down asset value of the cell represented in the letter referred to in paragraph 21.2.
32. The Authority knew or ought reasonably to have known that it would be material to the assessment of SWR as to whether to enter into the Deed and Further Deed:
  - 32.1. To have knowledge of any contract, arrangement or understanding entered into between the Authority and the

member Councils for using the land at Brinkley for the waste disposal rather than using the Land;

- 32.2. To have knowledge of any negotiations or alternatively any discussions between the Authority and member Councils for using the land at Brinkley for the waste disposal rather than using the Land;
  - 32.3. To have knowledge that it was intention of the Authority to seek to induce or encourage member Councils to cease using the Land for waste disposal and instead use the site at Brinkley
  - 32.4. To have knowledge of the fact that it was likely that the member Councils would enter into a contract with the Authority for the disposal of waste at Brinkley;
  - 32.5. To have knowledge of the fact that it was unlikely that member Councils would enter into a contract with SWR whereby they would agree to dispose the waste at the Land.
33. By reason of the matters pleaded in paragraphs 29 to 31 above, the Authority was under a duty to disclose to SWR and it was misleading and deceptive not to disclose the following matters to SWR prior to it entering the Deed and the Further Deed:
- 33.1. It, the Authority, had entered into a contract, arrangement or understanding with the member Councils for using the land at Brinkley for the waste disposal rather than using the Land;
  - 33.2. It, the Authority, had entered into negotiations or alternatively had held discussions with member Councils for using the land at Brinkley for the waste disposal rather than using the Land;
  - 33.3. It was intention of the Authority to seek to induce or encourage member Councils to cease using the Land for waste disposal and instead use the site at Brinkley
  - 33.4. It was likely that the member Councils would enter into a contract with the Authority for the disposal of waste at Brinkley;

- 33.5. It was unlikely that member Councils would enter into a contract with SWR whereby they would agree to dispose the waste at the Land.
34. In reliance upon the warranties and representations referred to in paragraph 29 above and by reason of the failure to be advised of the matters set out in paragraph 33 above, SWR:
- 34.1. Entered into the Deed;
  - 34.2. Pursuant to the terms of the Deed, paid to the Authority the sum of \$990,000 and assumed control of the Land for the purpose of the waste disposal business;
  - 34.3. Commenced operating its business on the Land;
  - 34.4. Assumed certain environmental liabilities pursuant to the terms of the Deed;
  - 34.5. Entered into the Further Deed.
35. By making each of the warranties and representations, and failing to advise of the matters referred to in paragraph 33 above, the Authority, in trade or commerce, engaged in conduct that was misleading or deceptive or was likely to mislead to deceive in that:
- 35.1. It had a contract, arrangement or understanding with the member Councils at the time of time that the representations and warranties were made and at the time of the entering into the Deed and Further Deed, particulars of which are unknown to SWR until after disclosure, which had the effect of prohibiting or hindering or rendering less likely the member Councils from using the Land or entering into a contract with SWR in relation to waste disposal;
  - 35.2. It impaired and/or hindered and/or interfered with attempts that might be made by SWR to obtain the waste disposal business of the member Councils in that it made proposals to member Councils to use the facility at Brinkley rather than using the Land

and SWR for its waste disposal, details of which proposals are not known to SWR until after disclosure,

- 35.3. It induced and/or sought to induce the member Councils to use the site at Brinkley rather than the Land, details of which proposals are not known to SWR until after disclosure,;
- 35.4. It knew from the matters referred to in paragraphs 33.1 and 33.2 that the member Councils had made a decision and/or were contemplating not utilising the services of SWR and not disposing of their waste at the Land but had decided or alternatively were considering disposing of the waste at Brinkley;
- 35.5. It had or alternatively was intending to obtain for itself the custom of the member Councils in relation to their disposal of waste;
- 35.6. It was not likely that the member Councils would enter into a contract with SWR for the disposal of waste at the Land;
- 35.7. Cell 6 did not have an immediately available capacity of 11,000 cubic metres and would not have a further 134,000 cubic metres available upon the construction of cell 7, but had substantially less immediately available and future capacity, details of which SWR will provide upon the obtaining of an expert's report.
- 35.8. Cells 5A and B and Cell 6 have been over filled requiring the removal of waste and the rectification of those cells and their capping and additional expense in the construction of cell 7 details of which SWR will provide upon the obtaining of an expert's report;
36. Insofar as the warranties and representations were of a future matter within the meaning of section 4 of the Australian Consumer Law, such warranties and representations were misleading because the Authority did not have reasonable grounds for making the representation.



37. In the circumstances, the Authority has engaged in conduct that is misleading and deceptive contrary to the provisions of section 18 of the Australian Consumer Law.
38. Further, SWR is entitled pursuant to section 236 of the Australian Consumer Law to recover the loss and damage from the Authority as a result of the above contraventions of the Australian Consumer Law by the Authority or alternatively is entitled to an order under section 87 of the Competition and Consumer Act 2010.
39. Further or in the alternative;
  - 39.1. SWR entered into the Deed and Further Deed as a result of the warranties and representations referred to in paragraph 29 above;
  - 39.2. the Authority made the warranties and representations;
  - 39.3. the warranties and representations were false and misleading for the reasons set out in paragraph 35 above;
  - 39.4. the Authority was a contracting party to the Deed and the Further Deed.
40. In the circumstances SWR will rely upon the provisions of section 7 of the Misrepresentation Act (SA) entitling it to the relief claimed against the Authority.
41. As a result of the misleading and deceptive conduct and the misrepresentations referred to above, SWR has suffered loss and damage in that:
  - 41.1. It has paid the sum of \$990,000 to the Authority pursuant to the terms of the Deed;
  - 41.2. It has expended the sum of \$249,626.85 on capital invested in the business by SWR to date which expenditure is now worthless in that the business is not profitable;
  - 41.3. It has a liability or a future liability to the Harveys in the sum of \$1,263,751.01 which represents the net present value of the

amount of royalties that it owes to the Harveys pursuant to the terms of Landfill Deed or in the alternative it has lost the profits of the facility with a net present value of \$1.33m;

41.4. It has incurred losses in carrying on the waste disposal business on the Land to date in the sum of \$14,413;

41.5. Under the terms of the Deed and the Further Deed, it has:

41.5.1. assumed liability for and

41.5.2. released and discharged the Authority from

41.5.3. given an indemnity to the Authority in respect of all claims arising out of the lawful and proper Environmental Performance by the Authority in relation to its operation of a bulk waste facility on the Land and has thereby incurred a liability which, but for the terms of the Deed and Further Deed it would not otherwise have had for

(a) the capping of cells 1 to 4 in the sum of \$500,000'

(b) the capping of cell 5 in the sum of \$744,000;

(c) the capping of cell 6 in the sum of \$779,000;

(d) post closure remedial work in the sum of \$800,400.

41.6. It has lost the capacity of cell 6 to a value of at least \$1,102,000;

**D. Claim for breach of Development Approval, EPA licence and warranties**

42. The Authority has warranted to SWR under the Deed that it has complied with the EPA licence and issued an indemnity for the loss and damage arising from a breach of that warranty.

43. The EPA Licence has not been complied with as expressly warranted under the Deed in that

43.1. a leachate collection system has not been established as required by the EPA Licence, details of which SWR will provide upon the obtaining of an expert's report.

- 43.2. Cells 5A, 5B and 6 have not been constructed in accordance with approved specifications under the EPA Licence, details of which SWR will provide upon the obtaining of an expert's report.
44. SWR has incurred loss and damage from the breach of the warranty including -
  - 44.1.1. the cost to rectify the improperly constructed cells 5A, B and 6 and the additional cost of constructing cell 7 due to the improper construction and overfilling of cell 6 of \$935,720;
  - 44.1.2. the cost of constructing a leachate collection system for cell 6 of \$300,000;
45. The Authority has breached the Development Approval by breaching condition 1 of that Approval requiring adherence to the requirements of the LEMP contrary to section 32 and 44 of the Development Act in particular the Authority -
  - 45.1. Failed to install or replace a litter tent on the Land;
  - 45.2. Failed to erect a 1.8m high wire mesh fence around the perimeter of the site;
  - 45.3. Failed to establish vegetation screening; and
  - 45.4. Failed to properly monitor and manage groundwater quality.
46. In the circumstances SWR will rely upon the provisions of section 85 of the Development Act entitling it to the relief claimed.
47. As a result of the breaches of the Development Approval SWR has suffered loss of -
  - 47.1. \$15,000 to install or replace a litter tent on the Land;
  - 47.2. \$50,000 to erect a 1.8m high wire mesh fence around the perimeter of the site;
  - 47.3. \$10,000 to establish vegetation screening; and
  - 47.4. \$25,000 to monitor and manage groundwater quality.

## Part 2:

The remedies sought are:

1. A declaration that the Authority has contravened section 18 of the Australian Consumer Law.
2. An award of damages pursuant to Section 236 of the Australian Consumer Law.
3. Such other relief pursuant to section 87 of the Competition and Consumer Act 2010 as the Court deems fit.
4. Damages pursuant to section 7 of the Misrepresentation Act.
5. Damages pursuant to section 85 of the Development Act.
6. Damages for loss of use of monies.
7. Costs.
8. Such further or other order as the Court deems fit.

## Certificate :

This pleading is put forward in accordance with the instructions of the Plaintiffs, and it complies with the Supreme Court Civil Rules 2006.

.....

**James Levinson**

Botten Levinson  
Solicitors for the Plaintiff

Date:

(See Practice Direction 3.11)

**If this document is filed electronically, the initials and name(s) of the issuing Solicitor or Party/Parties should be typed in, in lieu of a signature.**

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## **Appendix 7**

*Wallmans Letter of Advice dated 19 December  
2013*

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**WALLMANS**  
LAWYERS

Our Ref: SLL:szp:113663

19 December 2013

Mr Michael Lorenz  
Adelaide Hills Region Waste Management Authority  
c/- 21 Rundle Street  
KENT TOWN SA 5067

**VIA EMAIL: m.lorenz@ahrwma.com**

**Expert advice,  
human approach.**

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ABN 98 802 494 422

Dear Michael

**SOUTHERN WASTE RESOURCECO PTY LIMITED ("SWR")**

***Rule 33 Notice***

I refer to the Rule 33 Notice and draft Statement of Claim served on the Authority on 12 December.

Rule 33 of the Supreme Court Rules requires a claimant to make an offer of settlement at least 21 days before commencing an action. It is then necessary for the defendant to respond in writing to the Notice within 14 days of receipt by:

- accepting the plaintiff's offer;
- making a counter-offer; or
- stating that liability is denied and the grounds on which it is denied.

The Rule 33 process is relevant to the way in which the Court may exercise its discretion in awarding the costs in a matter. The Rules require that the Court must consider whether the parties have complied with their obligations under this Rule and the terms of any offer or counter-offer.

It is a requirement of a Rule 33 Notice that sufficient details be provided of the claim together with sufficient supporting material. As such, I propose responding to Botten Levinson on the basis that the Notice that has been served is defective for want of particularity and until such time as particulars are provided, we are not required to respond to this document.

**Enclosed** to this letter is a copy of my proposed draft letter of response.

***Local Government Association Mutual Liability Scheme***

As discussed, I have spoken to the Scheme Administrator, Robyn Daly, and notified her of the threatened claim by SWR.

I **enclose** for your information a copy of the letter (without enclosures) that I have forwarded to the Scheme providing background details in relation to this dispute.

It will now be a matter for the Scheme to determine whether this is a matter for which the Scheme will provide indemnity.

### ***The Draft Claim***

The draft Statement of Claim that has been served in this matter is an extrapolation of the matters raised in the letters of demand issued by Botten Levinson in July 2013.

Whilst it will be necessary to obtain further instructions and information, particularly in relation to the cell capacity and compliance issues, I provide you with my preliminary observations in relation to the claims made.

The Claim contains the following broad categories of complaint:

- ***Contracting with the Member Councils***

At paragraph 29 it is asserted that the Authority made a number of warranties and representations to the effect that:

- they had no pre-existing contract, arrangement or understanding with Member Councils which would prohibit or hinder or render less likely the Member Councils from using the land or entering into a contract with SWR;
- it would not impair or hinder or interfere in any way with attempts that might be made by SWR to obtain the waste disposal business of the Member Councils;
- it would not induce or seek to induce the Member Councils to use the site at Brinkley rather than the land;
- it did not know of any matter that would mean that it was likely or possible that Member Councils would not utilise the services of SWR;
- it would not seek to obtain for itself the custom of the Member Councils;
- it was possible that the Member Councils would enter into a contract with SWR for the disposal of waste at the land on usual commercial terms.

The warranties and representations are said to be implied from various statements that were made by you as follows:

- that SWR would be able to get access to the Member Councils;
- that the Authority did not control the waste and that all Members Councils are free to do what they like with the waste;
- that the Authority was setting up a new cell at Brinkley;
- that the Authority could not make Member Councils take waste to SWR; and
- the statement by Mr Hayes QC on behalf of the Authority that SWR could deal with the Member Councils direct.

The statements made that the Authority was setting up a new cell at Brinkley and that they could deal with Member Councils direct are correct.

The balance of the asserted statements do not properly reflect what occurred. In response to a question by SWR as to whether the councils would enter into an

arrangement with SWR, it was stated by you that this was a question for Member Councils and not the Authority. I note your instructions that the assertions that statements were made to the effect that the Authority would not approach member Councils to dump at Brinkley and would not seek to obtain their waste are vigorously denied.

Even if it was the case that the balance of the asserted statements were made, they do not in my view give rise (by implication) to the asserted warranties and representations. It is significant that there are no assertions that express representations were made.

More importantly, the pleadings overlook relevant matters, including:

- the fact that SWR was provided with a copy of the Charter of the Authority during the course of negotiations;
- SWR made an application to vary the Development Approval pre-settlement so that it could accept third party waste;
- the correspondence from Botten Levinson dated 13 November 2012 which was issued as the final letter of offer only made reference to the councils' waste stream in the following respects:

"SWRC remains committed to engaging with the Constituent Councils to explore opportunities to provide services addressing the ongoing waste requirements".

There was no reference in this correspondence to any of the representations identified in the pleading.

Given the seriousness of the allegations being made, I will prepare a detailed chronology of the history of negotiations and relevant documents, as there are a number of other matters which will be relevant in responding to this aspect of the claim.

As discussed, could you please collate any notes/records of discussions held by yourself, Simon Grenfell, Marc Salver and Rob Coleman.

- ***Representation as to Cell Capacity***

SWR complains that it was incorrect to state that "Cell 6 had 11,000m<sup>3</sup> of immediately available space and Cell 6 would have an additional 134,000m<sup>3</sup> available upon the construction of Cell 7 with a value of \$1.2 million".

We have not been provided with any expert report to support the contention that this cell space is not available.

In response to the asserted representations as to capacities, we note the following:

- initial estimates were provided in September 2012;
- the settlement was not concluded until 13 February 2013 and during this period it was made clear to SWR that space was running out and that SWR would need to commence construction of Cell 7 as soon as possible;
- during this period SWR inspected the site many times leading up to settlement;



- by email dated 5 February 2013 SWR was advised that its proposed warranty as to capacities was not acceptable in the following terms:

"we consider that it is too difficult with the available information to give a meaningful warranty as to capacity given differing assumptions, capping and compaction methods may impact on the capacity and therefore propose that this clause be deleted";

- the proposed clause was then deleted;
- the uncertainty in relation to the available capacity was further reinforced by clause 4.4 of the Deed which notes that:

"nothing provided for in this Deed creates an obligation on the Authority to increase the immediately available cell space at the site in the event that the available cell space at the site is filled prior to settlement."

- ***Compliance Representations***

There are a number of complaints made as follows:

- ***Leachate Collection System***

It is asserted that the EPA licence has not been complied with in that "a leachate collection system has not been established as required by the EPA licence".

SWR claims \$300,000 for constructing a leachate collection system.

It is not clear what provision of which licence is being referred to and the precise nature of the complaint.

Licence condition 18 of the licence dated January 2007 (expiring January 2012) provides that the licensee must prior to preparing and constructing a cell for the purposes of waste disposal at the premises, provide to the Authority for assessment, detailed design drawings and work specifications of the cell, which must include leachate drainage, collection and disposal. Please advise as to what, if any, documentation exists in relation to this issue and what approvals were obtained from the EPA.

An important issue that will need to be considered is which EPA licence is of application. There was a new licence introduced as at 7 February 2012 however arguably this licence is not of application given that during this period the Authority had already been served with a Notice of Termination and therefore was in a holding over period.

The 2012 licence is relevant in that in addition to condition 18, it is also necessary for the licensee not to dispose of leachate at the premises unless in a lined evaporation pond approved by the Authority. This was not a requirement of the previous licence that expired in January 2012, however I note that the practice since this time was to remove leachate from the site by using a mobile tanker.

- ***Cells 5A, 5B and 6 have not been constructed in accordance with approved specifications under the EPA licence.***

We are not in receipt of any expert report to substantiate this assertion.

Previously it has been asserted by SWR that Cell 6 is overfilled and does not sit on the clay liner. It was asserted that there was 22,000m<sup>3</sup> of waste located off the clay liner to the landfill. It was also asserted that the slope was too steep and that it was at 2.5 to 1 instead of 2 to 1. I understand from your review of the materials that you do not consider that there is any basis to these assertions.

- *Failure to Install or Replace a Litter Tent on the Land*

SWR claims \$15,000 to install a litter tent on site.

Schedule A of the Deed of Settlement made it clear that the fixed assets that were to remain on the site did not include the litter tent. The provision of a replacement litter tent is not the responsibility of the Authority.

- *Failed to Erect a 1.8 Metre High Wire Mesh Fence around the Perimeter of the Site*

SWR claims \$50,000 to install a fence around the landfill.

Clause 5.5 of the Landfill Management Plan required the establishment of a 1.8 metre high vermin/litter fence. I note that approximately 50% of this fence is in place, and that the balance was not installed due to potential conflicts with the construction of Cells 6 and 7. SWR was aware of the extent of fencing. Furthermore, the Deed excludes this breach from the operation of the warranties in the Deed.

- *Vegetation Screening*

SWR claims \$10,000 in relation to vegetation screening.

Clause 5.1 of the LMP required vegetation/screening zones to be established and maintained, including by the prompt replacement of trees not in good health. We note that the assertion of inadequate screening is disputed. Furthermore this alleged breach is excluded from the warranties provided by the Authority.

- *Failure to Properly Monitor and Manage Groundwater Quality*

SWR claims \$25,000 for groundwater monitoring fees incurred on site.

No particulars are provided of the asserted breach.

By letter dated May 2013 the EPA advised that it had completed a review of historical groundwater monitoring data and as a result had determined that further assessments were required to determine whether the current groundwater monitoring locations adequately characterised the potential risk to human health and environment. It was acknowledged by the EPA that the current concentrations did not exceed the guideline values but indicated a potential increase in trend.

The fact that the EPA has directed SWR as a new licence holder to conduct this further testing is an obligation that arises simply by reason of the fact that SWR is now the licence holder.

In any event, I note that Michael Cobb of WaterSearch had reviewed the groundwater monitoring and in his report dated 30 October 2013 concluded that the graphs were actually showing a downward trend. Furthermore he

considered that the location of the 3 monitoring wells were adequate to characterise any impact that the landfilling operations may have on the local groundwater resources.

### Summary

The draft proceedings that have been issued do not contain any further details or supporting material to that provided in the initial letter of demand issued in July.

I remain of the view that the recent correspondence and Rule 33 Notice is strategic and has been designed to increase the pressure on the Authority and the councils to resolve this matter.

This is not to say that SWR will not proceed to the next step of issuing proceedings, however given the initial demand in July, I am somewhat surprised that they have not obtained or provided to us evidence in support of its claim.

At present, in the absence of the Authority or the councils wishing to enter into a commercial arrangement with SWR, I consider that we should proceed with our request as per the attached draft letter. If and when a valid Rule 33 Notice is served, we can then respond to the merits of the claim.

Yours faithfully  
WALLMANS LAWYERS

  
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Partner  
Direct Line: 08 8235 3038  
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## **Appendix 8**

*AHRWMA Board Meeting Report of 20 February  
2014 on SWR Offer – Confirmation/Review  
of previous report*

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**ITEM NO. 5.5**

**TO: ADELAIDE HILLS REGION WASTE MANAGEMENT AUTHORITY**

**FROM: EXECUTIVE OFFICER**

**SUBJECT: SWR PROPOSAL – Confirmation/Review of previous report**

**GROUND FOR CONFIDENTIALITY**

**Section 90(3) (b) & (d) of the *Local Government Act, 1999*:**

- (b) information the disclosure of which —**
  - (i) could reasonably be expected to confer a commercial advantage on a person with whom the Authority is conducting, or proposing to conduct, business, or to prejudice the commercial position of the Authority; and**
  - (ii) would, on balance, be contrary to the public interest;**
- (d) commercial information of a confidential nature (not being a trade secret) the disclosure of which—**
  - (i) could reasonably be expected to prejudice the commercial position of the person who supplied the information, or to confer a commercial advantage on a third party; and**
  - (ii) would, on balance, be contrary to the public interest;**

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**PURPOSE**

For the Board to assess and review and, if considered appropriate, reconfirm its recommendations from Item 5.6 on 21 November 2013 in light of the subsequently issued Rule 33 Notice by Southern Waste ResourceCo (SWR) on 12 December 2013.

**KEY ISSUES**

- On 21 November 2013 the Board considered confidential item 5.6 SWR Proposal.
- Subsequent to the November Board Meeting on 12 December 2013 SWR issued a Rule 33 Notice stating their intention to make a claim against the Authority concerning the Hartley Landfill and outlining their draft claim.
- Whilst the Board can indicate its recommendations to Councils in regard to future directions it is up to each Member Council individually to make its own independent assessment as to whether they wish to commit to:
  - (1) the Authority's current business plan model; or
  - (2) a landfill client model where the Councils become clients of another landfill operator.

**RECOMMENDATION**

That:-

- (1) The Board reaffirms its recommendations from its 21 November 2013 Agenda Item 5.6 with consideration to the subsequent Rule 33 Notice issued by Southern Waste ResourceCo.
- (2) That a cover letter be drafted for Member Council CEO's notifying them of the Authority's recommendation. The letter will emphasise that whilst the Authority has made a recommendation each individual Member Council needs to independently consider their position and determine whether they wish to commit to the current business plan model where the Authority operates its own landfill, or adopt a model where the Member Councils each become customers of another landfill operator.
- (3) In accordance with Section 91 (7) & (9) of the *Local Government Act 1999* and on the grounds that Item No. 5.1 listed on the Agenda for the meeting of the Adelaide Hills Region Waste Management Authority held on 20 February 2014 was received, discussed and considered in confidence pursuant to Section 90(3) (b) & (d) of the *Local Government Act, 1999*, this meeting of the Committee, do order that:
  - (a) the resolution, the report, the discussion and any other associated information submitted to this meeting and the minutes of this meeting in relation to the matter remain confidential and not available for public inspection until 20 February 2015;
  - (b) the confidentiality of the matter be reviewed in February 2015;
  - (c) the Executive Officer be delegated the authority to review and revoke all or part of the order herein and directed to present a report containing the Item for which the confidentiality order has been revoked.

## **REPORT**

### **Background**

1. On 21 November 2013 the Authority considered a financial and non-financial analysis of continuing with its current adopted Business and Long Term Financial Plans in the light of several offers put forward by Southern Waste ResourceCo. (Confidential Report Attached - **Attachment 1**)
2. The report also identified the risk that SWR may pursue claims in relation to the Hartley site and allegations of misrepresentations in relation to future waste contracts. The claims as currently formulated by SWR are strongly refuted.
3. On 12 December 2013 SWR subsequently issued a Rule 33 notice (**Attachment 2**) and draft claim (**Attachment 3**) and have indicated that they intend to make a claim regardless of Member Councils accepting their previous Hartley Landfill waste disposal offer or not. Those documents were provided to Board Members and Member Council CEO's.

### **Discussion & Analysis**

4. On 19 December 2013 the Executive Officer sent an email to Board Members and Member Council CEO's providing a legal overview of the Rule 33 notice and draft claim (**Attachment 4**). On 6 February 2014 a further brief update was provided.
5. To date SWR has not, to the knowledge of the Authority, lodged a claim.
6. Given that SWR issued their Rule 33 notice subsequent to the Board's Recommendations on 21 November 2013 it would be prudent for the Board to review and reaffirm its recommendation prior to seeking Member Council positions.

### **Conclusion**

7. It will be a matter for each Member Council to independently consider their position in relation to supporting the Authority's recommendation and to notify the Authority accordingly.

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**6. Adelaide Hills Region Waste Management Authority update and consideration of Options – Period of Confidentiality**

**Moved Cr**

**S/- Cr**

**That having considered Agenda Item 17.2 in confidence under section 90(2) and (3)(a) of the Local Government Act 1999, the Council, pursuant to section 91(7) of that Act orders that the documents, reports and minutes pertaining to this matter, including discussions and considerations, be retained in confidence until the legal action has been concluded, but no longer than 12 months, pursuant to section 91(9).**