A waste disposal facility, or landfill, located at Hartley in South Australia was owned by the Harvey family (the Harveys). Prior to 13 February 2013, the Hartley landfill was operated by the defendant, the Adelaide Hills Region Waste Management Authority (the Authority), a regional subsidiary established under s 43 of the Local Government Act 1999 (SA) by four councils: the District Council of Mount Barker (DCMB), the Rural City of Murray Bridge (RCMB), the Adelaide Hills Council (AHC) and the Alexandrina Council (AC) (collectively, the constituent councils). The constituent councils disposed of the kerbside waste that they collected from their council areas at the Hartley landfill.

The Authority operated the Hartley landfill pursuant to a licence agreement with the Harveys which was originally entered into in 1991 for an initial period of 10 years, with two rights of renewal for a period of 10 years each. In 2011 the Authority sought to exercise the second right of renewal. The Harveys claimed that the Authority’s purported exercise of this right was void. In particular, the Harveys claimed that the Authority had committed breaches of the licence.

The Harveys and the Authority attempted to negotiate the dispute. Whilst the dispute was ongoing, the Harveys spoke to representatives of the plaintiff, Southern Waste ResourceCo
Pty Ltd (SWR), a body corporate whose principal business was in the treatment, recycling and disposal of waste. In August 2012, SWR and the Harveys executed two deeds, a Landfill Deed and a Litigation Management and Funding Deed. The former deed granted SWR a licence to operate the Hartley landfill subject to the Authority vacating the land, whilst the latter provided for the subjugation of the Harveys’ rights and interests in the dispute with the Authority to SWR. Thus, from August 2012, SWR assumed responsibility for negotiations with the Authority.

Negotiations between SWR and the Authority were conducted in the course of meetings on 14 September 2012, 5 November 2012 and 12 November 2012, an onsite meeting at Hartley on 23 October 2012, and by way of correspondence, primarily between solicitors for SWR, and the Authority. Throughout its negotiations with SWR, the Authority continued to occupy and operate the Hartley landfill.

As a consequence of its dispute with SWR and the Harveys, the possibility arose that the Authority would lose access to the Hartley landfill, which threatened the security of the waste disposal service that the Authority provided to the constituent councils. As a consequence, the Authority determined to re-establish a landfill site at Brinkley in Murray Bridge as a back-up in the event that the negotiations over the Hartley site resulted in the Authority having to vacate that landfill. By February 2013 the Brinkley landfill was available to receive waste.

An agreement between SWR and the Authority was eventually reached and reduced to two deeds, both executed on 11 February 2013. The effect of the two deeds was, inter alia, that the Authority would vacate the Hartley landfill on 13 February 2013, and in return SWR would pay the Authority the sum of $990,000 and assume responsibility for operating the Hartley landfill, including responsibility for all past, present and future environmental liabilities.

During negotiations SWR was told that the Authority did not control where the constituent councils disposed of their waste and that it was for the councils to determine where they disposed of their waste. SWR was also told that it could approach the constituent councils in an effort to contract with them for the disposal of their waste streams at Hartley. Securing the disposal of a sufficient quantity of the constituent councils' waste was important to SWR's assessment of the opportunity that the Hartley landfill provided. SWR considered that the location of the landfill would likely result in at least AHC and DCMB disposing of their waste at Hartley. Immediately upon settlement AHC and RCMB ceased disposing of their waste at Hartley. In July 2013 DCMB also ceased disposing of its waste at Hartley and in April 2014 AC followed suit.

SWR instituted these proceedings claiming that the Authority had engaged in misleading or deceptive conduct during the course of its negotiations with SWR contrary to s 18 of the Australian Consumer Law. The first aspect of SWR’s primary case was that the Authority informed SWR that it did not control where the constituent councils chose to dispose of their waste and that SWR was free to approach the constituent councils, knowing that SWR’s interest in operating the Hartley landfill was linked to SWR securing the constituent councils’ waste streams. Thus, it was contended, the Authority implicitly represented that the constituent councils were not bound in any way to dispose of their waste with the Authority and that the Authority would not interfere with any attempt made by SWR to attract the constituent councils’ custom. The second aspect of SWR’s primary case was one of the non-disclosure of information that the Authority knew or ought to have known would be material to SWR’s assessment of whether to enter into the deeds on 11 February 2013 in circumstances giving rise to a duty on the part of the Authority to make such disclosure. A further and discrete aspect of SWR’s case concerns representations specifically made in relation to the remaining available airspace in cell 6 at the Hartley landfill. In particular, SWR pleads that the Authority made erroneous representations and warranties regarding the write down asset value of cell 6, and its immediately available and future capacity by representing and warranting that it had an immediately available capacity of 11,000 m3 and would have a further 134,000 m3 available upon construction of cell 7, when in fact it had substantially less immediately available and future capacity.
In relation to its primary claim, SWR pleads that it was misled or deceived by the Authority and its officers into thinking that it would be able to negotiate with the constituent councils to attract their waste to Hartley, when, it is claimed, the Authority had a pre-existing contract, arrangement or understanding with the constituent councils to the effect that the councils were committed to disposing of their waste at the Authority’s landfill facility at Brinkley. Had SWR known that the constituent councils would always be committed to disposing of their waste with the Authority, it would not have entered into the two deeds on 11 February 2013. With regard to the representations made in relation to cell 6, SWR pleads that it was misled or deceived by the Authority in relation to the immediately available and future capacity of cell 6 as well as its write down asset value and contended that it would not have paid what it did in compensation had it known the true position. SWR seeks to recover the losses it claims to have suffered as a result of the Authority’s alleged misleading and deceptive conduct. In the alternative, SWR contends that the same representations and warranties pleaded in support of its misleading or deceptive conduct claim constitute a contravention of s 7 of the Misrepresentation Act 1972 (SA) entitling SWR to damages.

The Authority defended the claim on the basis that there was no misleading or deceptive conduct on its part, and that there was no contravention of s 7 of the Misrepresentation Act 1972 (SA). In particular, the Authority denied making the representations and warranties pleaded, and denied that SWR was entitled to the relief it seeks, instead claiming that SWR failed to put offers to the Authority and the constituent councils which the councils considered outweighed the benefits of continuing to dispose of their waste streams with the Authority. Furthermore, the Authority submits that the proceedings were instituted for an ulterior or collateral purpose or because SWR has been delinquent and acted unreasonably in the conduct of the proceedings.

Held, dismissing the claim:

1. The defendant did not engage in misleading or deceptive conduct contrary to s 18 of the Australian Consumer Law, as a law of the Commonwealth and as a law of this State.

2. The defendant did not contravene s 7 of the Misrepresentation Act 1972 (SA).

3. The proceedings were not an abuse of process.

Acts Interpretation Act 1901 (Cth) s 17; Acts Interpretation Act 1915 (SA); Competition and Consumer Act 2010 (Cth) ss 2, 4, 5, 6, 18, 84, 87, 130, 131, 139, 236; Environment Protection Act 1993 (SA) ss 37, 49, 103; Fair Trading Act 1987 (SA) ss 13, 14, 22; Government Business (Competition) Act 1996 (SA) s 16; Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA); Local Government Act 1999 (SA) ss 4, 43, 48, 49, 91, 99, 109; Local Government (Procedures at Meetings) Regulations 2000 (SA); Misrepresentation Act 1972 (SA) s 7; Supreme Court Civil Rules 2006 (SA) r 100; Trade Practices Act 1984 (Cth) ss 18, 52, referred to.

SOUTHERN WASTE RESOURCESCO PTY LTD v ADELAIDE HILLS REGION WASTE MANAGEMENT AUTHORITY [NO 3] [2019] SASC 192

Civil

HINTON J:

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1 Note: References to pages of the transcript have been included in parentheses in the body of the text.
Introduction

The plaintiff, Southern Waste ResourceCo Pty Ltd (SWR or Southern Waste ResourceCo), instituted these proceedings to recover losses it claims to have suffered as a result of misleading and deceptive conduct engaged in by the defendant, the Adelaide Hills Region Waste Management Authority (the Authority or AHRWMA). The conduct allegedly occurred in the course of negotiations that resulted in the execution of two deeds that saw the Authority vacate a waste landfill situated at Hartley in the Adelaide Hills (the Hartley landfill or Hartley) and SWR assume responsibility for the operation of that landfill and all related environmental liabilities.

Under the deeds, in exchange for the Authority agreeing to vacate the Hartley landfill by 5 pm on 13 February 2013, SWR agreed to take vacant possession of the site, to pay the Authority the sum of $990,000 (inclusive of GST), and, in effect, to assume all responsibility for all environmental obligations and liabilities arising from the site, past, present and future. Statements made by officers of the Authority allowed SWR to believe that it would have a genuine opportunity to persuade the councils that had established the Authority to continue to dispose of the household waste they collected to the Hartley landfill when, it is alleged, there in fact existed an arrangement or agreement that the councils would take their waste to the Authority’s facility at Brinkley near Murray Bridge.

As a result of the alleged misleading and deceptive conduct SWR claims to have suffered loss being the difference between what it paid and the true value of what it obtained.

In my view, I would dismiss the claim. My reasons follow.

A. A brief overview

The Authority was established by four councils for the purpose of providing waste management services to those councils and the people who lived and worked within the collective area of those councils. The four councils were the Adelaide Hills Council (AHC), the District Council of Mount Barker (DCMB), the Rural City of Murray Bridge (RCMB) and the Alexandrina Council (AC) (collectively the member councils or the constituent councils).

Since 1991 the Authority operated the Hartley landfill pursuant to a licence granted to it by the then landowner, Herbert Harvey. The licence agreement was for an initial period of 10 years commencing November 1991, with a right to renew in 10 years and a second right to renew after a further 10 years. The constituent councils disposed of the kerbside waste they collected from their council areas at the Hartley landfill.
In 2001 the Authority renewed the licence. In 2011 the Authority sought to do so a second time. By this time Mr Harvey had died leaving the Hartley site to his three sons — Ian, Robin and Darrell. Darrell subsequently died leaving his interest in the Hartley site to his wife, Christine. Hereafter, where I refer to the Harveys, unless otherwise indicated, I should be taken as referring to Robin, Ian and Christine Harvey.

A dispute arose between the Harveys and the Authority which, the Harveys contended, had the consequence that the purported exercise of the 2011 right of renewal was void. More particularly, the right of renewal was conditional on the continuing compliance of all conditions of the licence pursuant to which the site had been occupied including the applicable licence issued under the Environment Protection Act 1993 (SA) (the EPA Act). The Harveys claimed that breaches of the licence had been and were being committed.

The Authority is a regional subsidiary established under s 43 of the Local Government Act 1999 (SA) (the LGA). Under the Authority’s Charter (the Charter) its functions included to facilitate and coordinate waste management including collection, treatment, disposal and recycling within the collective area of the constituent councils and to provide and operate a place or places for the treatment, recycling and disposal of waste collected. The Authority enjoyed legal personality independent of the constituent councils and the constituent councils, despite establishing the Authority, were not constrained to conduct functions delegated to the Authority by or through the Authority.

Throughout much of 2011 and the first half of 2012 the Authority and the Harveys attempted to negotiate the settlement of the dispute amongst themselves. In time lawyers became involved. One aspect of the dispute was the adequacy of the royalty the Authority paid to the Harveys. During the course of the dispute the Harveys spoke to representatives from SWR. In August 2012 SWR and the Harveys executed two deeds, a Landfill Deed and a Litigation Management and Funding Deed. The former granted to SWR a licence to operate the Hartley landfill for a term of 20 years with a right of renewal for a further 10 years, subject to the Authority vacating the land, in return for the payment of a royalty. The latter provided for the subjugation of the Harveys’ rights and interests in the dispute with the Authority to SWR with SWR undertaking to use its best endeavours to have the Authority vacate the site including, if necessary, litigating. Accordingly, from August 2012 SWR assumed all responsibility for negotiations with the Authority.

Throughout the negotiation of the dispute with the Harveys, and subsequently with SWR, the Authority continued to occupy and operate the Hartley landfill.

The negotiations between SWR and the Authority were conducted in the course of meetings on 14 September 2012, 5 November 2012 and 12 November 2012, an onsite meeting at the Hartley landfill on 23 October 2012, and by way
of correspondence, primarily between solicitors. Eventually, a compromise was reached. That compromise was reduced to two deeds, a Deed of Settlement and a s 103E Deed, both executed on 11 February 2013. The essence of those deeds was that the Authority vacated Hartley on 13 February 2013 in return for the payment of $990,000 (inclusive of GST) and SWR assuming responsibility for the operation of the landfill from that date, including assuming responsibility for all environmental liabilities, past and future.

The dispute with the Harveys and the associated possibility that the Authority would lose access to the Hartley landfill threatened the security of the waste disposal service provided by the Authority to the constituent councils. This caused the Authority to consider alternate possibilities. One such possibility was a landfill at Brinkley, a short distance from Murray Bridge, owned by RCMB and not then in use. The Authority determined to re-establish the Brinkley site during the negotiations over the Hartley site as a back-up in the event that the dispute resulted in the Authority leaving Hartley.

In the absence of the two larger constituent councils (AHC and DCMB) disposing of their waste at Hartley, Hartley ceased to be a viable landfill. SWR found itself in possession of a liability. In taking on the Hartley landfill SWR always thought it would be able to negotiate with the constituent councils on a commercial basis to attract their waste to Hartley. At the risk of oversimplification, SWR claims that it was misled or deceived by the Authority and its officers into thinking that such commercial deals could be done when the true position was that the constituent councils were always committed to disposing of their waste with the Authority. Had SWR known the true position, it would not have gone through with the execution of the Deed of Settlement and the s 103E Deed.

The Authority contends that there has been no misleading or deceptive conduct. Rather, it contends that SWR has failed to put offers to the Authority and the constituent councils which the councils considered outweighed the benefits of continuing to dispose of their waste streams with the Authority.

B. The players

It is convenient to identify in one place the people involved in, or referred to, in this case. The following people are those who gave evidence:

- Andrew Aitken, Chief Executive Officer Adelaide Hills Council and former Board member AHRWMA;
- Simon Brown, Southern Waste ResourceCo Managing Director;
- Robert Coleman, AHRWMA Site Manager;

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1 Environment Protection Act 1993 (SA), s 103E.
• James Fairweather, Southern Waste ResourceCo Sales and Marketing Director up until June 2014;
• Simon Grenfell, General Manager of Engineering and Environment Alexandrina Council and AHRWMA Board member;
• John Heard, former Chairman of the Executive Committee of the ResourceCo Group;
• Stuart Hollingworth, ResourceCo Pty Ltd Chief Financial Officer;
• Brett Jarvis, Southern Waste ResourceCo Site Manager;
• James Levinson, Partner of Botten Levinson Lawyers;
• Michael Lorenz, Executive Officer AHRWMA;
• David Lucas, Southern Waste ResourceCo Director/Lucas Earthmovers;
• Andrew Manning, Group Environment Manager Southern Waste ResourceCo;
• Christopher Pucknell, Southern Waste ResourceCo Chief Financial Officer until January 2015;
• Marc Salver, Director for Strategy and Development Adelaide Hills Council and AHRWMA Board member; and
• Andrew Stuart, Chief Executive Officer District Council of Mount Barker.

The following people did not give evidence, but are referred to in the evidence:

• Ian Bailey, Board member AHRWMA and Councillor Adelaide Hills Council;
• Peter Bond, former Chief Executive Officer Rural City of Murray Bridge and Board member AHRWMA;
• Anthony Brazzale, Sales Manager Southern Waste ResourceCo;
• Peter Dinning, Chief Executive Officer Alexandrina Council;
• Bob England, Board member AHRWMA and Councillor Rural City of Murray Bridge;
• Peter Fisher, lawyer for AHRWMA;
• Richard Fricker, Clay and Mineral Sales Director;
• Erin Gillespie, staff member District Council of Mount Baker and AHRWMA;
• Tim Hancock, Director of Engineering Adelaide Hills Council;
• Christine Harvey, site owner, widow of late Darrell Harvey;
Darrell Harvey, brother of Ian and Robin, husband of Christine;
Herbert Harvey, father of Robin, Darrell and Ian;
Ian Harvey, site owner;
Robin Harvey, site owner;
Brian Hayes QC, counsel for the Authority;
Peter Hein, surveyor Allsurv;
Trevor Hockley, TJH Management Services (consultant to Rural City of Murray Bridge and AHRWMA);
Norm Key, staff member District Council of Mount Barker and Board member AHRWMA;
Jason Kerr, Fleurieu Regional Waste Authority Operational Manager;
Barry Laubsch, former Chairperson AHRWMA and Councillor Rural City of Murray Bridge;
Ben Lucas, Chief Executive Officer Lucas Earthmovers;
Scott Lumsden, Partner of Wallmans Lawyers;
Leah Maxwell, Board member AHRWMA and Waste Strategy Coordinator, AHRWMA;
David McMahon, Director ResourceCo Holdings;
Alan Oliver, Board member AHRWMA and Councillor Alexandrina Council;
Peter Peppin, former Board member AHRWMA and Chief Executive Officer Adelaide Hills Council;
David Peters, General Manager Corporate Services District Council of Mount Barker and Board member AHRWMA;
Tim Piper, Director of Finance Adelaide Hills Council and Board member AHRWMA;
Robert Prime, KPMG;
Clinton Ramm, Knight Frank real estate agent;
Michael Roder SC, counsel for Southern Waste ResourceCo;
Bill Rudd, Botten Levinson Lawyers;
James Sexton, RE/MAX Hills and Country, real estate agent;
Lyn Stokes, Chairperson AHRWMA and Councillor District Council of Mount Barker;
Marina Wagner, Manager and Executive Officer Fleurieu Regional Waste Authority;
• Madeleine Walker, Board member AHRWMA and Councillor Alexandrina Council;
• Sarah Welsh, AHRWMA and TJH Management Services; and
• Simon Westwood, Board member AHRWMA, and Councillor District Council of Mount Barker.

It is also convenient to note that at all material times the Authority has been represented by Wallmans Lawyers (Wallmans) and SWR and the Harveys by Botten Levinson, Lawyers (Botten Levinson).

C. SWR, ResourceCo and the waste industry

SWR was incorporated on 1 June 2011. As at 3 March 2016 the company had four directors — Benjamin Lucas, David Lucas (father of Benjamin Lucas), Simon Brown and Benjamin Sawley. Mr Sawley became a director in March 2015 after the retirement of Christopher Pucknell who had been a director since 2011. Thus at the material time the directors of SWR were Mr Brown, Mr Pucknell, Mr David Lucas and his son, Mr Benjamin Lucas. Further, Mr Brown was the Managing Director of SWR, Mr Benjamin Lucas the company secretary, and Mr Pucknell, until his retirement in 2015, the Chief Financial Officer. Mr Benjamin Lucas played no meaningful part in the negotiations leading up to SWR’s acquisition of the Hartley landfill. That decision was ultimately made by Mr Brown in consultation with Mr David Lucas. Mr Pucknell, whilst a director, in truth fulfilled the role of advisor. Mr Brown had primary carriage of the negotiations resulting in SWR’s acquisition of Hartley. Hereafter wherever I refer to Mr Lucas I should be taken as referring to Mr David Lucas unless I state otherwise.

As at 3 March 2016 all shares in SWR were held by two other corporate entities — Lucas Waste Management Pty Ltd and ResourceCo Holdings Pty Ltd. SWR was, in effect, a joint venture company brought into existence when ResourceCo bought a 50% share of the landfill assets at McLaren Vale owned by the Lucas’ companies. The Lucas’ companies and Mr David Lucas had experience in the operation of landfills, including the construction of cells for the receipt and disposal of waste on such sites. ResourceCo, on the other hand, had a sales and marketing team and expertise in recycling and the processing of waste.
SWR has operated since 1 August 2011. In his statement Mr Brown advised that SWR’s principal business was the treatment, recycling or disposal of various forms of waste. In his oral evidence Mr Brown described the waste industry, which he had been involved in for 23 years, as a mature industry and a logistics industry. The latter description reflected the fact that the industry revolved around the collection, transportation and disposal of waste. Mr Brown added that the industry was extremely competitive and was a high-barrier-to-entry industry because the cost involved in providing services at any step — collection, transportation, processing and disposal — were significant; trucks, transfer stations, processing equipment and landfills were required.

ResourceCo and SWR were involved in the waste industry at the transfer station stage in the process (upstream of collection). ResourceCo and SWR operated transfer stations which they called receivable facilities, one of which was located at Lonsdale. Transfer stations allowed for smaller waste loads to be aggregated close to the collection point before being transported by larger trucks to landfill or processing facilities thereby reducing cost. Mr Brown said that the industry was that competitive that the location of transfer stations was strategically important in that the closer they were to the point of collection the lower transportation costs became.

In more recent times landfill levies had given impetus to the development of the recycling industry. It was in the area of recycling that ResourceCo’s business had grown. I understood Mr Brown to be saying that one reason for the formation of SWR was to take advantage of the growth in the recycling industry. In short, SWR would extract from waste resources that could be on-sold. In this connection SWR operates a number of sites in metropolitan Adelaide, sites at McLaren Vale and, since February 2013, the Hartley landfill.

As mentioned, government imposed levies on the disposal of waste to landfill served as an incentive for the development of the recycling industry upstream from collection. In South Australia two levies applied to the disposal of waste to landfill — a metropolitan levy of $57 a tonne and a country levy calculated as 50% of the metropolitan levy. The levy was collected by landfill operators and payable to the Environment Protection Authority (the EPA). Mr Brown said that the industry was actively lobbying for the levy to be increased to provide greater incentive to the recycling industry to expand and develop. Mr Brown provided an example of how ResourceCo had developed a process whereby the combustible component of waste was processed and sold as a fuel to the cement and power industries. A by-product of this process was the creation of what is known as trommel fines, a type of soil.
In all, he estimated the facility recycled about 96 per cent of waste and sent the balance to landfill. (561)

Mr Brown informed the Court that after working closely with regulators, trommel fines had been approved for use as daily cover at SWR’s landfills at Hartley and McLaren Vale. (562) Daily cover is a layer of soil that is placed over the top of waste deposited in a landfill at the end of each day to prevent the waste blowing off site and as a means of controlling vermin and odour. With respect to the use of trommel fines, the question that was yet to be determined was whether their use as daily cover was subject to the levy. (562) If trommel fines turned out to be leviable that would affect the cost-effectiveness of their use as cover. (563) Consequently, pending the EPA’s decision, trommel fines were only used by SWR as cover at McLaren Vale but were stockpiled at Hartley for future use. (563)

Mr Brown gave evidence that from his experience the typical metropolitan rate per tonne for the disposal of waste to landfill during 2011-2012 was around $80. Without the levy that would equate to $50-$55 per tonne. He further explained that competition was tight within the industry due to an oversupply of facilities vying for business. That created downward pressure on price. Whilst levies had gone up the cost to the consumer of disposing of waste to landfill had plateaued. The consequence was that to operate a profitable business owners were compelled to reduce costs. In this regard the ResourceCo model, which involved disposing to landfill only what was needed in preference for recycling, was advantageous. (564)

The cost to dispose of waste to landfill is generally published on the internet by landfill operators. Despite that, larger customers will not pay the published rate. Generally, landfill operators will enter into long-term relationships with large customers, being those customers with large volumes of waste to dispose of such as councils. A long-term relationship would involve a price for disposal over a period exceeding 10 years. In this connection Mr Brown said that he worked closely with his sales and marketing staff. (565)

The benefit of a long-term deal was that it provided certainty in relation to the future of the landfill asset and certainty in relation to the cost structure involved in running the asset. From a customer’s point of view, the longer the term of the contract, the better the price they would receive. (566)

Mr Brown said that the location of landfills is what drives a landfill operator’s customer base. Location dictated a landfill’s usage. If a landfill was in the right location and strongly patronised, it allowed for potential to build a manufacturing plant. (567) He said location was all about transport costs. (568)

Whether a customer was in a position to negotiate rates with a landfill operator depended, amongst other things, upon the waste tonnage that they would dispose of to the landfill. Normally, a discounted rate would be set on the basis of
the guaranteed receipt of a minimum tonnage of waste. Mr Brown said that negotiations could commence if the customer was in a position to dispose of 5,000 tonnes of waste a year. If such customer was prepared to lock their waste in for five years, you would be able to have a sensible discussion about a long-term fixed rate subject to the Consumer Price Index (CPI). (568) The rate would be fixed dependent upon volume, transport, location and the nature of the waste. (569)

Mr Brown advised that in the waste industry waste is divided into categories. Those categories include construction and demolition waste and municipal waste. Construction and demolition waste comprised the largest sector nationally. It consisted primarily of concrete, asphalt and brick which could be processed into alternate quarry products. The majority of waste from building demolition would now be recycled. There was also a commercial and industrial waste sector which was growing. (569) Commercial and industrial waste included cardboard, paper, plastic, carpet and textiles. (570)

Mr Brown said that household or municipal waste was decreasing due to the greater emphasis upon recycling. With the reduction in the amount of municipal waste to landfill comes increased competition. Currently, councils are investigating methods of separating the organic fraction of municipal waste from the inorganic. Once the organic is taken out, the balance is recyclable. Once waste is recyclable it can be processed and commodified. The result is a reduction of cost and the reduction of waste disposed to landfill. (570-571) For the metropolitan areas the amount of waste disposed of to landfill was decreasing. Outside the metropolitan areas the amount of waste disposed of to landfill had probably stagnated. (571)

A further category of waste was soil or fuel. SWR and ResourceCo did a lot of soil management, soil treatment and soil disposal in Adelaide, Melbourne and Sydney. The market was evolving rapidly. (571) Some soil may be contaminated and require treatment before being disposed of or used at another site. Contaminated soils are separated from clean soils. Clean soil may be redirected to a different use almost immediately. (572) Re-use of contaminated soil depended upon the extent of contamination, the nature of the contaminant, and the cost of treatment. To manage the disposal of contaminated waste could prove expensive. (573)

Mr Brown turned to the issue of transport costs. Whether or not waste would be taken from the metropolitan area to Hartley as opposed to SWR’s site at McLaren Vale depended upon which site it was more cost effective to transport the waste to. In transporting waste to Hartley the cost and time taken for a truck to travel to the site had to be taken into account. Further, a truck travelling up the freeway would burn a lot more diesel than one that was not travelling uphill. Fuel usage and travel time impacted upon the transport cost per
tonne. (575). Mr Brown said that it was the practice to calculate a transport cost per kilometre per tonne. He said: (575)

... that’s how you’ve got to break the cost of these projects down. I mean you win and lose these projects on the back of exactly that. So we’re pricing the northern connector at the moment and one of our sites is bidding against Penrice’s material at Angaston and our site is probably 10 ks closer and you know that can save a dollar a tonne which is what wins and loses these projects.

Prior to coming into contact with the Harveys, SWR was not looking to establish a site in the Mount Lofty Ranges/Adelaide Hills. SWR was focused on other opportunities closer to the metropolitan area.

Lastly, the operator of a landfill requires development approval from the relevant local authority, a licence from the EPA, and, unless the operator owns the relevant land, permission from the landowner before they can operate a landfill.

D. The Authority

The Authority is a regional subsidiary established under s 43 of the LGA. It is not in dispute that the Authority was properly established nor that it is a body corporate enjoying legal personality. More particularly, under Sch 2 Pt 2 clause 18 of the LGA, the Authority is a body corporate, has the name assigned to it by its Charter, has the powers, functions and duties specified in its Charter, and holds property on behalf of the constituent councils.

Clause 1.4 of the Authority’s Charter set out objects and purposes of the Authority. It provided:

1.4 Object and Purposes

The Authority is established for the following objects and purposes:

1.4.1 to facilitate and co-ordinate waste management including collection, treatment, disposal and recycling within the Region;
1.4.2 to develop and implement policies designed to improve waste management and recycling programmes and practices within the Region;
1.4.3 to regularly review the Region’s waste management and recycling practices and policies;
1.4.4 to provide and operate a place or places for the treatment, recycling and disposal of waste collected by or in the areas of the Constituent Councils;

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14 Ex P1: 4 at cl 1.2.
15 Ex P1: 4 at cl 1.1.
16 Under Sch 1 Pt 2 cl 19 of the Local Government Act 1999 (SA) a charter must be prepared for a regional subsidiary by the constituent councils. The content of a charter must address those matters set out in Sch 2 Pt 2 cl 19(2) of the Act.
17 See also Ex P1: 4 at cl 1.7.
1.4.5 to develop further co-operation between the Constituent Councils in the collection, treatment, recycling and disposal of waste for which the Constituent Councils are or may become responsible;

1.4.6 to minimise the volume of waste collected in the areas of the Constituent Councils which is required to be disposed of by landfill;

1.4.7 to educate and motivate the community to achieve the practical reduction of waste through reuse and recycling initiatives;

1.4.8 to be financially self sufficient,

and in doing so will give due weight to economic, social and environmental considerations.

The “Region” is defined in the Charter as the collective areas of the constituent councils.\(^\text{18}\)

In order to fulfil its objects and purposes the Charter conferred the following powers upon the Authority:

1.5 Powers

The powers, functions and duties of the Authority are to be exercised in the performance of the Authority’s objects and purposes. The Authority shall have those powers, functions and duties delegated to it by the Constituent Councils from time to time which include but are not limited to the following:

1.5.1 to acquire, deal with and dispose of real and personal property (wherever situated) and rights in relation to real and personal property provided that it shall be a condition precedent that any such transaction may not incur a singular or a total liability of $250 000 or more without the prior approval of all of the Constituent Councils;

1.5.2 to sue and be sued in its corporate name provided that any litigation is subject to an immediate urgent report to the Constituent Councils by the Executive Officer;

1.5.3 subject to Clauses 1.5.1, 1.5.12 and 1.6 of this Charter to enter into any kind of contract or arrangement;

1.5.4 to borrow funds and incur expenditure in accordance with Clauses 1.5.1, 1.5.2 and 1.6 of this Charter;

1.5.5 to establish a reserve fund or funds clearly identified for the upkeep and/or replacement of fixed assets of the Authority or for meeting any deferred liability of the Authority;

1.5.6 to invest any surplus funds of the Authority in any investment authorised by the Trustee Act 1936, or with the Local Government Finance Authority provided that:

1.5.6.1 in exercising this power of investment the Authority must exercise the care, diligence and skill that a prudent person of business would exercise in managing the affairs of other persons; and

1.5.6.2 the Authority must avoid investments that are speculative or hazardous in nature;

\(^{18}\) Ex P1: 4 at cl 1.1.
1.5.7 to distribute profit to the Constituent Councils and where this power of
distribution is exercised to do so on a proportionate basis in accordance
with the Schedule of Constituent Council’s Interests in Net Assets as
provided at Clause 7.2 of this Charter;

1.5.8 to enter into agreements with the Constituent Councils for the purpose of
operating and managing sites for the treatment, recycling and disposal of
waste;

1.5.9 to raise finance for all purposes relating to the collection, treatment,
recycling and disposal of waste;

1.5.10 to determine the types of refuse and waste which will be received and the
method of collection, treatment, recycling and disposal of the waste;

1.5.11 to enter into any kind of contract or arrangement to undertake projects and
to undertake all manner of things relating to and incidental to the
collection, treatment, recycling and disposal of waste, provided that any
project with a value of $500 000 or more requires the prior approval of all
the Constituent Councils;

1.5.12 to commit the Authority to undertake a project in conjunction with any
other Council or government agency and in doing so to participate in the
formation of a trust, partnership or joint venture with the other body to give
effect to the project provided that any project with a value of $500 000 or
more requires the prior approval of all of the Constituent Councils;

1.5.13 to employ, engage, remunerate, remove, suspend or dismiss the Executive
Officer of the Authority;

1.5.14 to open and operate bank accounts;

1.5.15 to make submissions for and accept grants, subsidies and contributions to
further its objects and purposes and to invest any funds of the Authority in
any securities in which a Council may lawfully invest;

1.5.16 to charge whatever fees the Authority considers appropriate for services
rendered to any person, body or Council (other than a Constituent Council)
provided that such fees charged by the Authority shall be sufficient to
cover the cost to the Authority of providing the service;

1.5.17 to charge the Constituent Councils fees for services that cover the cost to
the Authority of providing the services;

1.5.18 to do anything else necessary or convenient for, or incidental to, the
exercise, performance or discharge of its powers, functions or duties.

For reasons that will become apparent, it is appropriate to highlight clauses
1.5.16 and 1.5.17 and the vesting of a discretion to charge fees above cost for
services rendered save in relation to constituent councils who are to be charged
fees that cover the cost to the Authority of providing the service.

Further, notwithstanding the powers conferred in the Authority, and its
purposes and functions, under s 43(4) of the LGA the establishment of the
Authority did not derogate from the power of a constituent council to act in a
matter. This was re-affirmed in clause 8.6.1 of the Charter which stated:
8.6.1 The establishment of the Authority does not derogate from the power of any of the Constituent Councils to act independently in relation to a matter within the jurisdiction of the Authority.

The governance of the Authority was the subject of clauses 2 and 3 of the Charter. Clause 2.1 provided that the Authority was a corporate body governed by a Board which had the responsibility of managing “the business and other affairs of the Authority ensuring that the Authority acts in accordance with this Charter”. Under clause 2.2 all meetings of the Authority were to be meetings of the Board, and under clause 2.3 the Board was empowered to make decisions in accordance with the powers and functions of the Authority established in the Charter and set out above.

Clause 3.2 dealt with the membership of the Board. The Board consisted of eight members, two appointed by each of the constituent councils, one being an elected member of the particular constituent council and the other being an employee of that council. Clause 3.2 also provided for the appointment of a deputy Board member who may act in place of a Board member appointed by a constituent council if that member was unable for any reason to attend a Board meeting.

Clause 3.2.5 of the Charter required that there be a Chairperson and deputy Chairperson of the Board. Those positions were to be elected by a ballot of the whole Board but must be drawn from those Board members who were also elected members of the constituent councils. The Chairperson was required to preside at all meetings of the Board and, in his or her absence, the deputy Chairperson acted in the office of the Chairperson. If neither were able to attend a Board meeting, the Board would elect an acting Chairperson from amongst those Board members present who were elected members of the constituent councils. The Chairperson and deputy Chairperson held their offices for 12 months, vacating them at the annual general meeting. Each was eligible for reappointment.

The term of office of each Board member was to be determined by the constituent council responsible for the Board member’s appointment. At the conclusion of that term of office a Board member was eligible for reappointment.

Clause 3.3.2 of the Charter dealt with the issue of when the office of a Board member became vacant. If such office did become vacant within the

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19 Ex P1: 4 at cl 3.2.7.
20 Ex P1: 4 at cl 3.2.7.
21 Ex P1: 4 at cl 3.2.6. As to the annual general meeting, see Ex P1: 4 at cl 3.7.
22 Ex P1: 4 at cl 3.3.1.
23 Ex P1: 4 at cl 3.3.1.
meaning of clause 3.3.2, the constituent council that appointed the Board member was responsible for appointing a replacement Board member.\textsuperscript{24}

The proceedings of the Board were dealt with in detail in clause 3.4 of the Charter in addition to Pt 2 of the \textit{Local Government (Procedures at Meetings) Regulations 2000} (SA). That is to say, the regulations applied to the proceedings of the Board save to the extent that they were modified by clause 3.4.\textsuperscript{25}

Under clause 3.4.2, subject to the special provisions of clause 3.4, no meeting of the Board could commence until such time as a quorum of members was present and no meeting could continue if a quorum of members was not present. A quorum was comprised of one half of the members in office, ignoring any fraction, plus one.\textsuperscript{26} Under clause 3.4.3 attendance at a meeting could be effected electronically.

Meetings of the Board were required to be open to the public unless the Board resolved to consider a matter in confidence in accordance with the provisions of Ch 6 Pt 3 of the LGA.\textsuperscript{27} If a resolution was passed that a matter be considered in confidence, a note to that effect had to be made in the minutes of the fact of the resolution and of the grounds on which it was made.\textsuperscript{28} If a matter was considered in confidence the Board could subsequently resolve to keep minutes and/or documents considered during that part of the meeting kept confidential under s 91 of the LGA.\textsuperscript{29}

All matters for decision at a Board meeting were to be decided by a simple majority of the members present and entitled to vote on the matter.\textsuperscript{30} All members, including the Chairperson, were entitled only to a deliberative vote.\textsuperscript{31} In the case of an equality of votes, the Chairperson did not possess a casting vote and the matter was deemed to have lapsed.\textsuperscript{32}

Clause 3.4.4 dealt with resolutions in writing made in the absence of a meeting. It provided:

\textit{3.4.4} A proposed resolution in writing and given to all Board Members in accordance with proceedings determined by the Board will be a valid decision of the Board where a majority of Board Members vote in favour of the resolution by signing and returning the resolution to the Executive Officer or otherwise giving written notice of their consent and setting out the terms of the resolution to the Executive Officer. The resolution shall thereupon be as valid and effectual as if it had been passed at a meeting of the Board duly convened and held.

\textsuperscript{24} Ex P1: 4 at cl 3.3.4.
\textsuperscript{25} Ex P1: 4 at cl 3.4.1.
\textsuperscript{26} Ex P1: 4 at cl 3.4.2.
\textsuperscript{27} Ex P1: 4 at cl 3.4.5.
\textsuperscript{28} Ex P1: 4 at cl 3.4.5.
\textsuperscript{29} Ex P1: 4 at cl 3.4.6.
\textsuperscript{30} Ex P1: 4 at cl 3.4.7.
\textsuperscript{31} Ex P1: 4 at cl 3.4.7.
\textsuperscript{32} Ex P1: 4 at cl 3.4.8.
As will be seen, it was pursuant to the power contained in clause 3.4.4 that the Board entertained a resolution in writing facilitating the execution of the Deed of Settlement and s 103E Deed.

The frequency of meetings of the Board was a matter for the Board save that the Charter required there be at least one ordinary meeting in every four months.\textsuperscript{33} Special meetings of the Board could be convened at any time at the request of the Chairperson or upon the written request of at least three members of the Board.\textsuperscript{34} A notice of all meetings of the Board was to be given in accordance with the requirements applicable to a council under the LGA.\textsuperscript{35}

Under clause 3.4.12 the Executive Officer of the Authority was required to cause minutes to be kept of the proceedings of every meeting of the Board and to ensure that the minutes were presented at the next ordinary meeting of the Board for confirmation and adoption. If the Executive Officer was excluded from attendance at a meeting, the presiding member was required to cause the minutes to be kept.\textsuperscript{36}

The functions of the Board were set out in clause 3.1. It provided:

\textbf{3.1 Functions of the Board}

3.1.1 The formulation of strategic and business plans in accordance with Clause 5 of this Charter and the development of strategies aimed at improving the business of the Authority.

3.1.2 To provide policy direction to the Authority.

3.1.3 Monitoring, overseeing and measuring the performance of the Executive Officer of the Authority.

3.1.4 Subject to this Charter ensuring that the business of the Authority is undertaken in an open and transparent manner.

3.1.5 Ensuring that ethical behaviour and integrity is established and maintained by the Authority and its Board Members in all activities undertaken by the Authority.

3.1.6 Assisting in the development of strategic and business plans.

3.1.7 Exercising the care, diligence and skill that a prudent person of business would exercise in managing the affairs of other persons.

3.1.8 Developing and giving effect to policies that reflect the Authority’s responsibilities under the National Competition Policy (if applicable) and the Trade Practices Act.

3.1.9 Ensuring that the Authority functions in accordance with its objects and purposes and within its approved budget.

\textsuperscript{33} Ex P1: 4 at cl 3.4.9.
\textsuperscript{34} Ex P1: 4 at cl 3.4.10.
\textsuperscript{35} Ex P1: 4 at cl 3.4.11. See also \textit{Local Government Act 1999} (SA), s 83.
\textsuperscript{36} Ex P1: 4 at cl 3.4.12.
Again, for reasons that will become apparent later in this judgment, and bearing in mind the obligation imposed by clause 3.1.8, under clause 1.3 of the Charter it was declared that the Authority not undertake any commercial activities that constituted a significant business activity of the Authority to which the principles of competitive neutrality must be applied. That declaration purportedly relieved the Authority of having to comply with the requirements of Sch 2 clause 32 of the LGA. The principles of competitive neutrality to which clause 1.3 and Sch 2 clause 32 of the LGA refer are those published under s 16 of the Government Business Enterprises (Competition) Act 1996 (SA). The principles are intended to neutralise the competitive advantage that a government agency or a local government agency engaged in significant business activities may have over private business operating in the same market by virtue of the fact of the agency being controlled by government or local government. Clause 1.3 was, in effect, a declaration that the business activity engaged in by the Authority was not of a level of significance that the Authority had a competitive advantage over private business operating in the same market by virtue of the Authority being controlled by government or local government. It will be necessary to return to the application of the principles of competitive neutrality and competition policy later in these reasons.

Under clause 3.5 the Charter picked up and applied to Board members all provisions governing the propriety of conduct of members of a council and public officers under the law of this State and the provisions of the LGA regarding conflicts of interest. Further clause 3.5 commanded that at all times Board members “act in accordance with their duties of confidence and confidentiality and individual fiduciary duties, including honesty and the exercise of reasonable care and diligence with respect to the performance and discharge of official functions and duties as required by” Pt 4 Div 1 Ch 5 of the LGA and Sch 2 Pt 2 clause 23 of the LGA.

In order to carry out its functions the Board was empowered by clause 6 of the Charter to appoint an Executive Officer and other staff on terms and conditions to be determined by the Board. Under clause 6.1.2 the Board was required to delegate responsibility for the day-to-day management of the Authority to the Executive Officer. Further, pursuant to clause 6.1.3 the responsibilities of the Executive Officer were listed as follows:

6.1.3 The Executive Officer will be responsible to the Board:

6.1.3.1 for the implementation of its [the Board’s] decisions in a timely and efficient manner;

6.1.3.2 to carry out such duties as the Board may direct;

6.1.3.3 attending at all meetings of the Board unless excluded by resolution of the Board;

37 Government Business Enterprises (Competition) Act 1996 (SA), s 16(1).
38 Ex P1: 4 at cl 6.1.1.
6.1.3.4 providing information to assist the Board to assess the Authority’s performance against its Strategic and Business Plans;

6.1.3.5 appointing, managing, suspending and dismissing all other employees of the Authority;

6.1.3.6 determining the conditions of employment of all other employees of the Authority; within budgetary constraints set by the Board;

6.1.3.7 providing advice and reports to the Board on the exercise and performance of its powers and functions under this Charter or any Act;

6.1.3.8 ensuring that the assets and resources of the Authority are properly managed and maintained;

6.1.3.9 ensuring that records required under the Act or any other legislation are properly kept and maintained;

6.1.3.10 exercising, performing or discharging other powers, functions or duties conferred on the Executive Officer by or under the Act or any other Act or this Charter, and performing other functions lawfully directed by the Board;

6.1.3.11 achieving financial and other outcomes in accordance with adopted plans and budgets of the Authority; and

6.1.3.12 for the efficient and effective management of the operations and affairs of the Authority.

Provision was also made in clause 6 for the appointment of a suitable person to deputise for the Executive Officer in the event that he or she was absent for any period exceeding three weeks. Further, the Executive Officer was empowered to delegate or sub-delegate to an employee of the Authority or a committee comprising employees of the Authority, any power or function vested in the Executive Officer. Where such power or function was delegated to an employee, that employee was responsible to the Executive Officer for the efficient and effective exercise or performance of that power or function. A written record of all delegations and sub-delegations was required to be kept at all times by the Executive Officer.

Here reference should also be made to clause 1.8 of the Charter. It provided:

1.8 **Delegation by the Authority**

The Board may by resolution delegate to the Executive Officer or to any officer of the Authority any of its powers, functions and duties under this Charter but may not delegate:

1.8.1 the power to impose charges;

1.8.2 the power to enter into transactions in excess of $50 000;

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39 Ex P1: 4 at cl 6.1.4.
40 Ex P1: 4 at cl 6.1.5.
41 Ex P1: 4 at cl 6.1.6.
42 Ex P1: 4 at cl 6.1.7.
1.8.3 the power to borrow money or obtain any other form of financial accommodation;
1.8.4 the power to approve expenditure of money on the works, services or operations of the Authority not set out in a budget approved by the Authority or where required by this Charter approved by the Constituent Councils;
1.8.5 the power to approve the reimbursement of expenses or payment of allowances to Members of the Board of Management;
1.8.6 the power to adopt budgets;
1.8.7 the power to adopt or revise financial estimates and reports; and
1.8.8 the power to make any application or recommendation to the Minister.

A delegation is revocable at will and does not prevent the Board from acting in a matter.

Clause 3.6 also empowered the Board to establish committees for the purposes of assisting it in the performance of its functions. A committee was required by clause 3.6.2 to operate in accordance with the general procedure applicable to the Board unless such procedure was varied by the Board in establishing the committee. As will be seen, the Authority had at least two committees, the Audit Committee and the Maintenance and Operations, or M & O Committee.

Under clause 6.2.2 the Charter empowered the Board to engage professional consultants, or authorise the Executive Officer to engage professional consultants, to provide services to the Authority as may be necessary for the proper execution of its decisions, the efficient and effective management of its operations and affairs, and for the purpose of giving effect to the general management objectives and principles of personnel management prescribed by the Charter.

Clause 6.3 provided for the establishment of a common seal of the Authority to be affixed to documents executed by the Authority. Where the common seal was used it had to be attested by the Chairperson and the Executive Officer of the Authority. Under clause 6.3.2 the common seal could not be affixed to a document except to give effect to a resolution of the Board. Further, the Executive Officer was required to maintain a register recording the resolutions of the Board giving authority to use the common seal and the details of the documents to which the common seal was affixed with the particulars of the persons who attested the fixing of the seal and the date thereof. Importantly, delegations made to the Executive Officer under clause 1.8, being effected by resolution, would be required under clause 6.3 to bear the common seal of the Authority.
With respect to the operations of the Authority, clause 5.1 required that the Authority prepare and adopt a 10-year Strategic Plan for the conduct of its business identifying its objectives during that period and the principle activities that it intended to undertake to achieve those objectives. The Strategic Plan was to be submitted to the constituent councils for their approval and reviewed once in every four years in consultation with the constituent councils. In addition, under clause 5.2 the Authority was required to prepare a three-year business plan linking core business activities to strategic, operational and organisational requirements with supporting financial projections, in consultation with the constituent councils. The business plans were to be submitted to the constituent councils for their approval. The contents of a business plan are as prescribed by Sch 2 Pt 2 clause 24 of the LGA.

In terms of reporting to the constituent councils, clause 5.3 commanded the Authority to report by 30 September of each financial year on the work and operations of the Authority detailing achievement of the aims and objectives of its business plan and incorporating the financial statements of the Authority and any other information or reports as required by the constituent councils. In addition, on or before the second Friday in September of each year, the Board was required to present to the constituent councils a balance sheet and full financial report in relation to the previous financial year.

It is unnecessary to deal with the Authority’s power to borrow and spend. However, something must be said regarding the financing of the Authority and its budgeting practices. Those considerations were the subject of clause 4 of the Charter. In particular clause 4.1 required that the Authority prepare and, after 31 May each year, adopt an annual budget for the forthcoming financial year in accordance with the LGA. The content of an annual budget was to accord with Sch 2 Pt 2 clause 25 of the LGA. Within five business days of an annual budget being adopted it is to be provided to the Chief Executive of each constituent council. Reports summarising the financial position and performance of the Authority were to be prepared and presented to the Board at every ordinary Board meeting. Further, the Board was required to reconsider the budget at least three times a year at intervals of not less than three months between 30 September and 31 May.

Clauses 4.2, 4.3 and 4.4 deal with financial contributions, administration contributions and operating contributions. Under clause 4.2 the Board’s annual

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43 Ex P1: 4 at cl 5.1.2-5.1.3.
44 Ex P1: 4 at cl 5.2.3.
45 Ex P1: 4 at cl 5 and the note thereto.
46 Ex P1: 4 at cl 5.3.2.
47 See Ex P1: 4 at cl 1.6.
48 See Ex P1: 4 at cl 4 and the note to cl 4.
49 Ex P1: 4 at cl 4.1.2.
50 Ex P1: 4 at cl 4.1.3.
51 Ex P1: 4 at cl 4.1.4.
budget was to include the funds required to enable the Authority to operate and
fulfil its objects and purposes. Under clause 4.3 each of the constituent councils
was required to contribute equally to the administration costs required by the
Authority as set out in the budget. Those costs were to be paid in advance by
monthly instalments. Provision was also made for emergency contributions.
Clause 4.4 set out operating contributions consisting of fees, charges, imposts,
levies and prices payable by the constituent councils for the collection, receipt or
purchase of waste by the Authority. In this regard the contribution that the
constituent councils made was determined proportionate to that council’s current
annual asset percentage as at the date that the income requirement contained
within the budget was approved by the Board. Importantly, clauses 4.2.1 and
4.3.1 indicated that the approved Board budget must be submitted in turn to the
constituent councils for approval in relation to the financial and administrative
contributions to be made.

It is unnecessary to deal with the clauses of the Charter addressing the
banking of the Authority or its maintenance of a schedule of assets, save to the
extent that the latter was required to be prepared every financial year.

Under clause 7 the Board was required to maintain a record known as the
“Schedule of Constituent Councils Interest in Net Assets”. That Schedule
reflected the proportionate contribution each constituent council had made to the
growth of the net assets of the Authority having regard to the proportion of
contributions to the Authority’s assets in proportion to each constituent council’s
asset percentage and subscriptions. Thus a council’s interest in net assets was
linked to the extent to which the constituent council contributed to the
Authority’s profits. That is to say, being a customer of the Authority contributed
to a constituent council’s interest in the Authority’s net assets.

Clause 7 further provided that the Schedule, once updated at the end of each
succeeding financial year, would reflect the proportionate contribution of each
constituent council since the commencement of the Authority, and, once
accepted by the Board, would be evidence of the agreed proportion of a
constituent council’s interest in the net asset percentage as at 30 June in the
relevant year. Under clause 7.2.2 the constituent councils agreed to be bound by
the annual decision of the Board as to the net asset percentage.

Clause 8 of the Charter dealt with miscellaneous matters including the
alteration of the Charter, the withdrawal or addition of a constituent council, the
winding up of the Authority, insurance and superannuation requirements, the
review of the Charter and disputes between constituent councils. It is
unnecessary to go through each clause in detail. For reasons that will become
clear it is important, however, to observe:

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52 Ex P1: 4 at cl 4.4.2.
53 Ex P1: 4 at cl 7.2.1.
• Under clause 8.2.3 in the event of a constituent council withdrawing from the Authority that council was entitled at the discretion of the Board to be paid not more than 20% of its interest in the net asset percentage of the Authority as determined and agreed in accordance with clause 7.2.2. The withdrawing council was entitled to receive that sum in quarterly instalments to be paid over a period of two years with a first instalment being due on the first day of January following the actual date of withdrawal.

• Under clause 8.2.5 the withdrawal of any constituent council did not extinguish the liability of that council for the payment of its contribution towards any actual or contingent deficiency in the net assets of the Authority at the end of a financial year in which such withdrawal occurred.

• Equally, under clause 8.2.6 the withdrawal of a constituent council did not extinguish the liability of that council to contribute to any loss or liability incurred by the Authority at any time before or after such withdrawal in respect of an act or omission by the Authority prior to such withdrawal.

• Under clause 8.7.1 the Charter was to be reviewed by the constituent councils acting in concurrence at least once in every three years.

• Under clause 8.8.1 the constituent councils agreed to work together in good faith to resolve any matter requiring their direction or resolution.

• Lastly, the constituent councils may direct and control the Authority under clause 8.6.2, but before doing so must all first agree on the action to be taken. Under clause 8.6.3 any direction given under clause 8.6.2 must be in writing.

E. SWR’s claim

SWR’s primary claim is one seeking damages under s 236 of the Australian Consumer Law, as contained in Sch 2 of the Competition and Consumer Act 2010 (Cth) (CACA), in consequence of it sustaining loss and damage because the Authority engaged in misleading and deceptive conduct contrary to s 18 of the Australian Consumer Law.

In its Second Statement of Claim SWR pleaded that it was induced to enter into the Deed of Settlement and the s 103 Deed by the Authority as a consequence of the Authority warranting and representing that:54

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54 Second Statement of Claim at [29].
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 [Hartley] or from 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 [at Hartley] 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.

SWR further pleaded that the warranties and representations referred to in paragraphs 29.1-29.6 were implied at meetings that occurred between SWR and the Authority, these being the three meetings at Wallmans on 14 September, 5 November and 12 November 2012 and another meeting onsite at Hartley on 23 October 2012. Further, SWR also pleaded the warranties and representations were implied from:

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 profitably operate the waste disposal business situate on the Land;

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.

The warranties and representations referred to in paragraph 29.7 of the Second Statement of Claim were pleaded by SWR as contained in an email from the Authority’s lawyers, Wallmans, to SWR’s lawyers, Botten Levinson, dated

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55 Second Statement of Claim at [30].
22 January 2013 in addition to being implied from the written-down asset value of cell 6 as set out in a letter from Wallmans to Botten Levinson dated 25 September 2012.

SWR further pleads that the Authority knew or ought reasonably to have known that the following information was material to SWR’s decision to enter into the Deed of Settlement and the s 103E Deed:56

32.1. … 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 [Hartley];

32.2. … 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. … knowledge that it was the then 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. … 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. … knowledge of the fact that it was unlikely that member Councils would enter into a contract with SWR whereby they would agree to dispose of the waste at the Land.

SWR pleads that knowing the above, and in the light of the warranties and representations made, the Authority misled and deceived SWR inducing it to enter in the Deed of Settlement and the s 103E Deed by not disclosing that:57

33.1. It, the Authority, had entered into a contract, arrangement or understanding with the member Councils for using the land at Brinkley for waste disposal rather than using the Land [Hartley];

…

33.2. It, the Authority, had entered into negotiations or alternatively had held discussions with the member Councils for using the land at Brinkley for waste disposal rather than using the Land;

…

33.3. It was [the] 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;

56 Second Statement of Claim at [32].
57 Second Statement of Claim at [33].
33.5. It was unlikely that the member Councils would enter into a contract with SWR whereby they would agree to dispose the waste at the Land.

From the above it is immediately apparent that SWR’s case of misleading and deceptive conduct has two aspects, one founded on actual warranties and representations made and the other on the non-disclosure of facts where the circumstances gave rise to a duty on the Authority’s part to make disclosure.

SWR claims that as a consequence of the Authority’s misleading and deceptive conduct it suffered loss and damage in that: 58

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 $264,976.85 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 [the] Landfill Deed or in the alternative it has lost the profits of the facility with a net present value of $3.77m;

41.4. It has incurred losses in carrying on the waste disposal business on the Land to December 2013 in the sum of $63,057;

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; and

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. lost the capacity of cell 6 to a value of at least $1,008,000.

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58 Second Statement of Claim at [41].
Accordingly, SWR seeks an award of damages under s 236 of the
Australian Consumer Law (Cth).

In the alternative to its primary claim SWR pleads that:

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.

This alternative claim is advanced on the basis that the same warranties and representations as pleaded in support of the misleading and deceptive conduct claim constitute a contravention of s 7 of the Misrepresentation Act 1972 (SA) entitling SWR to damages. My understanding of the way in which SWR presented its case is that I need only consider the alternative basis if the primary basis fails.

For its part the Authority denies that it made the warranties or representations pleaded by SWR, denies that it was under any duty to make disclosure and denies that SWR was induced to enter into the Deed of Settlement and s 103E Deed. The Authority’s defence raises the following issues:

• Is the Authority a trading corporation to which s 18 of the Australian Consumer Law (Cth) applies?

• Was the Authority engaged in trade and commerce within the meaning of s 18(1) of the Australian Consumer Law (Cth)?

• What is the effect of clauses 22, 23 and 24 of the Deed of Settlement which purport to exclude reliance on representations?

• What knowledge did SWR have of Brinkley as an alternate site to receive the member councils’ waste?

• What were SWR’s intentions in relation to Hartley, and how dependent was it on the member councils’ waste streams? Did SWR represent to the Authority that its intended business at Hartley was not dependent on and did not rely upon the waste streams of the member councils?

• What was the effect of clause 9 of the Deed of Settlement?

59 Second Statement of Claim at [39].
• Was there a contract, arrangement or understanding between the Authority and the member councils concerning the member councils’ waste going to Brinkley?

• Was there any duty or obligation on the Authority to make disclosure of the matters alleged?

• Did SWR represent to the Authority that SWR’s business at Hartley was not dependent on the receipt of the waste of the member councils, and if so, what effect does such representation have on its claim?

• What knowledge did SWR have of the following matters, and if so, what effect does that knowledge have on its claim(s):
  o the terms of the Charter;
  o the provisions of the LGA in relation to regional subsidiaries;
  o the operations of the Authority including its business plans, shared services model and annual reports;
  o the intentions of the member councils and the Authority in relation to the disposal of waste;
  o the move of the Authority and its operations to Brinkley, and the competition by the Authority for the waste of the member councils;
  o the matters likely to be taken into account by the member councils in relation to the deposit of their waste streams, and the failure on the part of SWR to take steps to protect against competition from the Authority;
  o the extent to which the Authority gave notice to SWR of its intentions about seeking to obtain the waste of the member councils and the use of Brinkley;
  o SWR’s failure to make enquiries of the Authority in relation to the inclusion of clause 9 of the Deed of Settlement, details of its operations at Brinkley, and details of its discussions about the waste of the member councils;
  o That it was ultimately a decision of each member council as to whether they would deposit their waste at Hartley or Brinkley;
  o That SWR had made proposals to the Harveys prior to any expectation of Council waste;
Whether SWR suffered any loss and damage as a consequence of the conduct of the Authority;

Whether any loss or damage arose from the negligent failure of SWR to protect its own interests;

Whether any loss or damage was suffered partly as a result of the failure of SWR to take reasonable care and the amount of damages should be reduced accordingly;

Relevant to costs, whether the claim is an abuse of process because it is being pursued for an ulterior motive.

I deal with each of these issues below to the extent necessary.
II

Preliminary Matters

A. Pleading issues

a. Introduction

In counsel for the Authority’s final address he submitted that SWR had neither pleaded nor proved that the Authority was a trading corporation and corporation to which s 18 of the Australian Consumer Law as a law of the Commonwealth (ACL Cth) applied. In response, counsel for SWR submitted that it was unnecessary to plead or prove that the Authority was a trading corporation under s 18 of the Australian Consumer Law as a law of this State (ACL SA), and, in any event, whether the Authority was a trading corporation amounted to a special defence within the meaning of rule 100 of the Supreme Court Civil Rules 2006 (SA) (SCCR), with the onus being on the Authority to plead the same. In reply the Authority submitted that SWR did not plead a case of misleading and deceptive conduct committed contrary to the ACL SA and should be bound by the case it did plead (i.e. one contrary to s 18 ACL Cth). Further, the Authority disputed the assertion that the fact of whether it was a trading corporation amounted to a special defence as whether the Authority was a person caught by s 18 ACL Cth was a material fact to proven by SWR as part of establishing liability.

The Authority added that even if SWR applied to amend its Second Statement of Claim to include a claim contrary to s 18 ACL SA, the amendment would be futile because the Authority was the State within the meaning of s 22 of the Fair Trading Act 1987 (SA) (FTA) and was not carrying on business in the sense required by that section. This was not an invitation by the Authority for the Court to consider an alternate case. The Authority’s primary position was that if amendment were sought, it had not had the opportunity to consider and respond to a case instituted under the ACL SA.  

The significance of these issues to this case arose after the parties had closed their respective cases and then only peripherally in the course of submissions. Neither party applied for permission to amend its pleadings and/or to re-open its case. After I reserved my decision my chambers again raised the issues with the parties in an email sent on 28 August 2019. That email said:

In reply to the defendant’s submission that the plaintiff had failed to plead and prove that the defendant was a trading corporation, the plaintiff submitted that under the Australian Consumer Law (SA) no need arose to do so.

The defendant has also submitted that it is an emanation of the State and for all intents and purposes should be treated as the State. If that submission is accepted, about which the plaintiff has made no submission, does s 22 of the Fair Trading Act 1987 (SA) become engaged? And if so, what are the ramifications of its engagement?

60 Defendant’s Reply Submissions at [191].
On 3 September 2019 a second email was sent to the parties. Among other things it stated:

It appears that there is a disconnect between the plaintiff’s case as pleaded and as put in address with respect to the applicable body of law. The position appears to be:

1. The defence contends that the Second Statement of Claim pleads a case contrary to the ACL as a law of the Commonwealth.
2. The plaintiff does not appear to dispute [1].
3. Under the ACL as a law of the Commonwealth the plaintiff must establish, relevantly, that the defendant is a trading corporation.
4. In address the plaintiff dealt with [3] by submitting that the claim should be treated as one brought under the ACL as a law of the State and, therefore, implicitly eschewed any case under the ACL as a law of the Commonwealth and the need to plead and prove that the defendant was a trading corporation.
5. The defendant contends that the plaintiff should be bound by the case it pleaded on the law.

If this is right, the following questions are:

1. Should the plaintiff apply to amend its Second Statement of Claim to plead a case against the ACL as a law of the State?
2. If not, does the Court proceed to determine which body of law, the ACL as a law of the Commonwealth or as a law of the State, is invoked by the Statement of Claim, and then determine the case applying the body of law invoked by the Statement of Claim, including determining potentially whether the defendant is a trading corporation, or, engaged in misleading and deceptive conduct in the course of a business on the evidence as is?
3. If the Court is to proceed as set out in 2, what prejudice, if any, is occasioned either party?
4. If the plaintiff does apply to amend the Second Statement of Claim:
   a. what prejudice is occasioned the defendant?
   b. if the plaintiff is permitted to amend its Statement of Claim and the Court proceeds to determine the case in accordance with 4(i) above, is any additional prejudice occasioned the defendant?
   c. if the application is granted, does the Court proceed to determine the matter as a claim under the ACL as a law of the State including accounting for the possible application of s 22 of the Fair Trading Act 1987 on the evidence as is?
5. Alternately, should the Court proceed to determine the claim on the basis that the ACL is invoked both as a law of the State and as a law of the Commonwealth on the basis of the evidence as is?
6. If the Court is to proceed according to [5], what prejudice, if any, would be occasioned either party?
7. As to the question of prejudice generally, was the question of the defendant’s status as a trading corporation raised prior to the defendant’s address? If not, was there any obligation on the defendant to raise it earlier?
Again, neither party applied for permission to amend its pleadings and/or to re-open its case. SWR pointed to s 19 FTA, about which more is said below, as justifying the manner in which it had pleaded its case and as rendering unnecessary any amendment. It maintained that the question of whether the Authority was a trading corporation or the Crown in right of the State were special defences. For the Authority’s part, s 19 FTA did not provide the antidote, the case pleaded and run was one contrary to s 18 ACL Cth and to that case SWR should be held. Further, whether the Authority was a trading corporation was not a special defence and for the Court to now consider the case as one pleaded as against both the ACL Cth and the ACL SA would result in irremediable prejudice to the Authority.

b. **The Australian Consumer Law**

The Australian Consumer Law came into operation on 1 January 2011. It is to be found in Sch 2 CACA. Part XI CACA creates the ACL Cth whilst Pt XIAA allows for the Australian Consumer Law to be picked up by a State or Territory and applied as a law of such State or Territory. That has occurred in each of the States and in the Northern Territory and the Australian Capital Territory.61 Thus, whilst there are nine Australian Consumer Laws in force in Australia, by virtue of each picking up the text contained in Sch 2 CACA and all regulations made under s 139G CACA, there largely exists a uniform consumer law, as was self-evidently the intention.

In this State ss 13 and 14 FTA provide:

13—Australian Consumer Law text

The Australian Consumer Law text consists of—

(a) Schedule 2 of the Competition and Consumer Act 2010 of the Commonwealth; and

(b) the regulations under section 139G of that Act.

14—Application of Australian Consumer Law

(1) The Australian Consumer Law text, as in force from time to time—

(a) applies as a law of this jurisdiction; and

(b) as so applying may be referred to as the Australian Consumer Law (SA); and

(c) as so applying is a part of this Act.

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61 See Fair Trading Act 1987 (NSW), ss 27 and 28; Australian Consumer Law and Fair Trading Act 2012 (Vic), ss 7 and 8; Fair Trading Act 1989 (Qld), ss 15 and 16; Fair Trading Act 2010 (WA), ss 18 and 19; Fair Trading Act 1987 (SA), ss 13 and 14; Australian Consumer Law (Tasmania) Act 2010 (Tas), ss 5 and 6; Consumer Affairs and Fair Trading Act 1990 (NT), ss 26 and 27; Fair Trading (Australian Consumer Law) Act 1992 (ACT), ss 6 and 7.
Section 14 FTA picks up the *Australian Consumer Law* text, consisting of Sch 2 CACA and all regulations made under s 139G CACA, and applies it as a law of this State as a part of the FTA subject to ss 15, 16 and 17 of the FTA. It is important to note that s 14 FTA does not pick up the text of the CACA and apply it as a law of the State.

Section 15 FTA deals with future amendments made by the Commonwealth to the *Australian Consumer Law* text. It is not presently relevant. Section 16 FTA addresses the meaning to be attributed the words “court” and “regulator” as they appear in the ACL SA. Section 17 FTA picks up the *Acts Interpretation Act 1901* (Cth) as a law of this State but only to the extent that it is to be applied to the ACL SA. Section 17 also dis-applies the *Acts Interpretation Act 1915* (SA) to the ACL SA (but not to the FTA).

Section 1 of Sch 2 CACA provides:

This Schedule applies to the extent provided by:

(a) Part XI of the Competition and Consumer Act; or

(b) an application law.

In Pt XI CACA s 131(1) provides that Sch 2 applies as a law of the Commonwealth to the conduct of corporations, and, in relation to a contravention of Chs 2, 3 or 4 of Sch 2, by corporations. Sections 5 and 6 CACA extend the application of Sch 2 as a law of the Commonwealth. They are not picked up and applied as part of the ACL SA. Further, and in any event, the Authority is not a person falling within either s 5 or s 6 CACA.

Corporation is defined in s 130 of Pt XI CACA as having the same meaning as in s 4(1) CACA. Section 4(1) CACA defines a corporation as meaning a body corporate that:

(a) is a foreign corporation;

(b) is a trading corporation formed within the limits of Australia or is a financial corporation so formed;

(c) is incorporated in a Territory; or

(d) is the holding company of a body corporate of a kind referred to in paragraph (a), (b) or (c).

Thus, if the *Australian Consumer Law* text is picked up without modification, it will apply to corporations as defined in s 4(1) only. Sections 5 and 6 CACA extend the application of the *Australian Consumer Law* text as a law of the Commonwealth, but those sections themselves form no part of the text that was picked up by the FTA.
The benefit to the nation in the States and Territories picking up the Australian Consumer Law text lies not only in the harmonisation of the law it achieves, but in the increased coverage of that body of law that comes as a consequence of the capacity of the States and Territories to make laws applying to a broader range of persons than the Commonwealth. Consequently, whilst this State has picked up the Australian Consumer Law text and applied it as a law of the State, it has done so subject to modification as to the persons to whom the ACL SA applies. In this regard, s 18 FTA provides:

18—Application of Australian Consumer Law

(1) The Australian Consumer Law (SA) applies to and in relation to—

(a) persons carrying on business within this jurisdiction; or

(b) bodies corporate incorporated or registered under the law of this jurisdiction; or

(c) persons ordinarily resident in this jurisdiction; or

(d) persons otherwise connected with this jurisdiction.

(2) Subject to subsection (1), the Australian Consumer Law (SA) extends to conduct, and other acts, matters and things, occurring or existing outside or partly outside this jurisdiction (whether within or outside Australia).

Section 2B CACA makes plain that the ACL Cth does not apply to the Crown in the right of a State. The application of the ACL SA to the Crown in right of this State and of participating jurisdictions is dealt with expressly in ss 22 and 23 FTA. Those sections provide:

22—Application law of this jurisdiction

The application law of this jurisdiction binds (so far as the legislative power of Parliament permits) the Crown in right of this jurisdiction and of each other jurisdiction, so far as the Crown carries on a business, either directly or by an authority of the jurisdiction concerned.

23—Application law of other jurisdictions

(1) The application law of each participating jurisdiction other than this jurisdiction binds the Crown in right of this jurisdiction, so far as the Crown carries on a business, either directly or by an authority of this jurisdiction.

(2) If, because of this Part, a provision of the law of another participating jurisdiction binds the Crown in right of this jurisdiction, the Crown in that right is subject to that provision despite any prerogative right or privilege.

Thus, accepting that the Authority is not a person to whom s 5 or s 6 CACA apply, s 18 ACL Cth will only apply to the Authority if it is not the Crown in the right of the State, and, it is a trading corporation within the meaning of s 4(1) CACA. Further, s 18 ACL SA will only apply to the Authority if it is one of the persons or bodies referred to in s 18 FTA, or, if it is the Crown in right of this State, it carries on business directly or is an authority by which the Crown carries on business.
c. **SWR’s pleaded case**

The first reference made in the Second Statement of Claim to the *Australian Consumer Law* is in paragraph 2 where SWR pleads:

2. The defendant the Adelaide Hills Region 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 Alexandrina 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 or 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.

Four observations may be made. First, paragraphs 2.1, 2.2 and 2.3, in combination, identify the Authority as a body corporate incorporated under the law of South Australia. Second, the description of the defendant is consistent with an allegation that the defendant is a body corporate to whom s 18(1)(b) of the FTA applies and with an allegation of the defendant being a corporation within the meaning of Sch 2, albeit without nominating any more specifically the nature of the corporation. Third, paragraph 2.5 does two things; it alleges that the Authority engaged in trade or commerce within the meaning of s 18(1) of the *Australian Consumer Law*, and, for the purposes of the document it defines the Australian Consumer Law as the law contained in Sch 2 to the *Competition and Consumer Act 2010* (Cth). Fourth, nothing in paragraph 2 purports to identify the basis for the plaintiff’s cause of action.

It is to be noted that the Authority did not admit that it was a body corporate, effectively putting SWR to proof as to the basis upon which SWR asserts that the Authority is caught by s 18(1) of the *Australian Consumer Law*.

In paragraph 4 of the Second Statement of Claim, SWR purports to invoke the aid of s 84(2) CACA to establish that the conduct of officers of the Authority as pleaded, if proven, shall be deemed to be conduct engaged in by the Authority. In paragraphs 36 and 37, SWR refers to the circumstances as pleaded as refuting

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62 Second Statement of Claim at [2].

63 Third Defence at [2].
any suggestion that the defendant had reasonable grounds for any warranty or representation as to a future matter “within the meaning of section 4 of the Australian Consumer Law” and to the conduct as pleaded amounting to misleading and deceptive conduct “contrary to the provisions of section 18 of the Australian Consumer Law”. It is in paragraph 37 that the basis for the cause of action is stated.

In paragraph 38, SWR pleads that “pursuant to section 236 of the Australian Consumer Law” it is entitled to recover the loss and damage from the Authority as a result of the contraventions pleaded or alternately to an order under s 87 CACA. A further reference is made to each of s 87 CACA and s 236 of the Australian Consumer Law in those paragraphs of the Second Statement of Claim specifying the remedies which SWR seeks.64

At this juncture reference should be made to s 19 FTA. It provides:

19—References to Australian Consumer Law
(1) A reference in any instrument to the Australian Consumer Law is a reference to the Australian Consumer Law of any or all of the participating jurisdictions.
(2) Subsection (1) has effect except so far as the contrary intention appears in the instrument or the context of the reference otherwise requires.

An instrument is defined in s 3(1) FTA as including any pleading.

No doubt s 19 reflects the understanding that there was intended to be a harmonised consumer law applying throughout the country.65 Overlapping inconsistent regulation of trade practices was replaced by a regime of overlapping and consistent consumer protection laws. Consequently, in theory, it would not matter which of the Australian Consumer Laws of the Federation was contravened; they were all the same and in combination captured everyone. At one level that is the position here. The basis for the cause of action is s 18 of the Australian Consumer Law which is the same irrespective of whether the contravention alleged is against either the ACL Cth or ACL SA. However, despite the best intentions, complexity arises because, as I have endeavoured to explain, the ACL Cth and the ACL SA do not overlap entirely as to the persons to whom each law applies.

Relying on s 19 FTA, SWR contends that the Second Statement of Claim should be construed as invoking both the ACL Cth and the ACL SA.

The Authority acknowledges the operative effect of s 19(1) FTA, but contends that the Second Statement of Claim contains a contrary intent, one requiring that the references to the Australian Consumer Law contained in the Second Statement of Claim be construed as meaning the ACL Cth exclusively,

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64 Second Statement of Claim at Pt 2 [2]-[3].
65 South Australia, Parliamentary Debates, Legislative Council, 29 September 2010 at pp 996-998.
or, that the references to the *Australian Consumer Law* understood in their context, require that they be construed as meaning the ACL Cth exclusively. In this regard the Authority latches onto the drafter’s definition of *Australian Consumer Law* as contained in paragraph 2.5 of the Second Statement of Claim as indicative of an intention on the part of the drafter to invoke the ACL Cth. The contention is that if the drafter had intended to engage the ACL SA, he or she would have defined the *Australian Consumer Law* as the ACL SA or by reference to the FTA, and if it had been intended to invoke both the ACL Cth and ACL SA, the drafter would have referred to the *Australian Consumer Law* without any reference to the CACA.

One consequence of Sch 2 CACA and the regulations made under s 139G CACA being picked up by s 14 FTA and applied as a law of this State is that both the ACL Cth and the ACL SA may be accurately described as contained in Sch 2 CACA, as SWR did in paragraph 2.5 of the Second Statement of Claim. Thus, the first reference to the *Australian Consumer Law* in paragraph 2.5 of the Second Statement of Claim, viewed in isolation, is equivocal as to whether the ACL SA or the ACL Cth is invoked. Equally, the references to the *Australian Consumer Law* in paragraphs 36, 37 and 38 to ss 4, 18 and 236 of the *Australian Consumer Law* are equivocal; those sections are all contained in Sch 2.

In my view paragraphs 2.5, 36, 37 and 38 betray no contrary indication suggesting that the Second Statement of Claim should not be treated as pleading a case against both the ACL Cth and the ACL SA.

The references to ss 84 and 87 CACA are of a different nature. Sections 84 and 87 CACA are not picked up by s 14 FTA and do not apply of their own force to a claim under the ACL SA. Section 84 may be invoked in proof of a claim made under the ACL Cth. Whilst s 87 has no application to either the ACL Cth or the ACL SA, its inclusion, taken with the reference to s 84, suggests that the drafter considered the claim one brought pursuant to the law of the Commonwealth. As a contextual indicator the references to ss 84 and 87 provide strong support for the conclusion that, in a document otherwise equivocal, the drafter had in contemplation a cause of action contrary to the ACL Cth.

Before proceeding much further, the question of whether it was incumbent upon the Authority to plead as a special defence that it was not a trading corporation and was the Crown should be considered. It is well to commence by recalling the overarching purpose of pleadings. To that end in *Banque Commerciale SA (In liq) v Akhil Holdings Ltd* Mason CJ and Gaudron J said:66

> The function of pleadings is to state with sufficient clarity the case that must be met: *Gould and Birbeck and Bacon v Mount Oxide Mines Ltd. (In liq.)*, per Isaacs and Rich JJ. In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision. The rule that, in general, relief is confined

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to that available on the pleadings secures a party’s right to this basic requirement of procedural fairness. Accordingly, the circumstances in which a case may be decided on a basis different from that disclosed by the pleadings are limited to those in which the parties have deliberately chosen some different basis for the determination of their respective rights and liabilities. See, e.g., Browne v. Dunn; Mount Oxide Mines.

[footnotes omitted]

Consistent with these observations, rule 98(2)(d) of the SCCR requires that a pleading must plead such facts and matters as give fair notice of the party’s case at trial.

Turning to rules 100(1) and (3) SCCR, they provide:

(1) A defence—
   (a) must raise any preliminary issue; and
   (b) must indicate which (if any) allegations in the plaintiff’s statement of claim the defendant admits or does not propose to challenge at the trial; and
   (c) must specifically raise any special defence on which the defendant relies; and
   (d) must state the basis of each special defence on which the defence relies (including reference to any statutory provision on which the defendant relies); and
   (e) must contain a short statement of the material facts and matters on which each special defence is based.

....

(3) A special defence is a defence other than a denial of facts and matters alleged by the plaintiff, or a denial that facts and matters alleged by the plaintiff give rise to a cause of action.

Examples—

1. An assertion that the plaintiff is estopped from maintaining the claim.
2. An assertion that the plaintiff’s claim is statute barred.

The definition of a special defence as contained in rule 100(3) SCCR and the examples provided suggest that a special defence is in the nature of a justification or excuse for the conduct subject of the claim, or the claim is one that is barred or precluded in law. A special defence will defeat liability despite the plaintiff being able to prove the cause of action. Further, a special defence is one in relation to which the defendant bears the persuasive onus. If this is correct, a defence that challenges proof of the elements of a cause of action is not a special defence.

As to the onus of proof, in Vines v Djordjevitch a unanimous High Court said: 67

67 (1955) 91 CLR 512 at 519-520.
... All the cases say, that if there be an exception in the enacting clause, it must be negatived: but if there be a separate proviso, it need not”—per Abbott J. in *Steel v. Smith*. The distinction has perhaps come to be applied in a less technical manner, and now depends not so much upon form as upon substantial considerations. In the end, of course, it is a matter of the intention that ought, in the case of a particular enactment, to be ascribed to the legislature and therefore the manner in which the legislature has expressed its will must remain of importance. But whether the form is that of a proviso or of an exception, the intrinsic character of the provision that the proviso makes and its real effect cannot be put out of consideration in determining where the burden of proof lies. When an enactment is stating the grounds of some liability that it is imposing or the conditions giving rise to some right that it is creating, it is possible that in defining the elements forming the title to the right or the basis of the liability the provision may rely upon qualifications exceptions or provisos and it may employ negative as well as positive expressions. Yet it may be sufficiently clear that the whole amounts to a statement of the complete factual situation which must be found to exist before anybody obtains a right or incurs a liability under the provision. In other words it may embody the principle which the legislature seeks to apply generally. On the other hand it may be the purpose of the enactment to lay down some principle of liability which it means to apply generally and then to provide for some special grounds of excuse, justification or exculpation depending upon new or additional facts. In the same way where conditions of general application giving rise to a right are laid down, additional facts of a special nature may be made a ground for defeating or excluding the right. For such a purpose the use of a proviso is natural. But in whatever form the enactment is cast, if it expresses an exculpation, justification, excuse, ground of defeasance or exclusion which assumes the existence of the general or primary grounds from which the liability or right arises but denies the right or liability in a particular case by reason of additional or special facts, then it is evident that such an enactment supplies considerations of substance for placing the burden of proof on the party seeking to rely upon the additional or special matter: see *Morgan v. Babcock & Wilcox Ltd.; Pye v. Metropolitan Coal Co. Ltd.; Darling Island Stevedoring & Lighterage Co. Ltd. v. Jacobsen; Barritt v. Baker; Dowling v. Bowie*.

[footnotes omitted]

The norm of conduct that s 18 ACL Cth creates applies to a person in trade or commerce. Whilst the expression denotes persons generally and as such, *prima facie*, includes an individual, a corporation and a body politic, such meaning must give way to any contrary indication. As a law of the Commonwealth ss 2B, 5, 6 and 131 CACA provide contrary indications. As a law of the Commonwealth s 18 ACL does not apply to persons generally; the word “person” in s 18 of the ACL Cth must be read in conformity with ss 2B, 5, 6 and 131 CACA. Put slightly differently, the norm of conduct that s 18 ACL Cth creates applies to a particular class of person being exclusive of those not caught by ss 2B, 5, 6 and 131. Those that do not fall within the class are not required to conform to the norm. This analysis suggests that whether a person falls within the class caught by s 18 ACL Cth is not a matter of “exculpation, justification, excuse, ground of defeasance or exclusion which assumes the existence of the general or primary grounds from which the liability or right arises but denies the

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68 *Acts Interpretation Act 1901* (Cth), s 2C.
right or liability in a particular case by reason of additional or special facts”.

Rather, it is a fact determinative of liability which lies upon the plaintiff to prove.

In my view, proof of the fact that a person falls within the class of persons to whom s 18 ACL Cth applies is material to proof of any contravention of s 18 ACL Cth and should be pleaded by a plaintiff. The corollary of this is that the fact that a person does not fall within the class of persons to whom s 18 ACL Cth applies is not a special defence within the meaning of rule 100 SCCR.

Applying the same analytical approach to the FTA I arrive at no different conclusion. Section 18 ACL SA does not, as a law of the State, apply generally to individuals, corporations and bodies politic. The word “person” as contained in s 18 ACL SA is to be construed consistent with ss 18 and 21, 22 and 23 FTA. It is for any plaintiff to plead and prove that the defendant is an entity within falling within ss 18, 21, 22 and 23 FTA to whom s 18 ACL SA applies.

But that is not be the end of the matter; the fact is that the Second Statement of Claim does plead that the Authority fell within the class of persons to whom the ACL Cth and ACL SA both apply insofar as it identified the Authority as a body corporate. Admittedly, the pleading could have been more fulsome, nevertheless it is not inconsistent with a claim that the Authority is a trading corporation and/or a body corporate incorporated under the law of this State. It seems to me that if a plaintiff pleads a capacity that it contends renders the defendant liable to a norm of conduct and pleads that the defendant has contravened the norm of conduct, the general rules of pleading would require that the defendant plead any answer it may have as to why it does not possess the capacity claimed and is thus not subject to the relevant norm. Otherwise, irrespective of any question of special defences, the statement of claim and defence will fail to achieve their purposes. Accepting this, in my view, once SWR pleaded that the Authority was an entity to which the norm contained in s 18 of the Australian Consumer Law applied, it was for the Authority to plead an answer sufficient to put SWR on notice of its case. In other words, if the Authority wished to contend that it was not a corporation to which s 18 ACL Cth applied, the general rules of pleading required that it plead as much. And if the Authority wished to contend that it was the State and as such not amenable to either the ACL Cth or the ACL SA, then the general rules of pleading required that it plead as much.

Returning to the Second Statement of Claim, does the context in which the references to the Australian Consumer Law appear indicate that those references are to be understood as referring to the ACL Cth exclusively? The question is finely balanced and not without difficulty. I bear in mind the policy manifest in s 19 FTA. That policy, in no small part, is intended to overcome arguments such

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69 Vines v Djordjevitch (1955) 91 CLR 512 at 519.
70 Fair Trading Act 1987 (SA), s 17(1); Acts Interpretation Act 1901 (Cth), s 2C.
71 Fair Trading Act 1987 (SA), s 18(1)(b).
as the present — if all Australian Consumer Laws are applicable to a given case then it may be accepted that at least one captures the defendant and thus the defendant will not evade liability by being able to exploit jurisdictional differences arising from constitutional constraints. But for the references to ss 84 and 87 CACA the Second Statement of Claim pleads a case amenable to the benefits of s 19 FTA and what may be described as the national consumer law scheme. In the end I conclude that the reasonable legal practitioner would not consider the drafter to have pleaded a case contrary to the ACL Cth exclusively. The Authority does not rely upon any implication to be drawn from ss 84 and 87, suggesting such implication to be weak at best. More importantly, the reference to ss 84 and 87 do not cause me to think that the drafter has eschewed the benefit of the national consumer law scheme and the material facts comprising the claim, as pleaded, are entirely consistent with the pleading being against the Australian Consumer Law within the meaning of s 19(1) FTA.

d. Should the Second Statement of Claim be amended?

If I am wrong, should the Second Statement of Claim be amended to make plain that the claim of misleading and deceptive conduct is pursued under both the ACL Cth and the ACL SA? The postulated amendment would be to exclude the references to ss 84 and 87 having the consequence that, applying s 19 FTA, the claim is to be understood, relevantly, as one against both the ACL Cth and the ACL SA (the only contextual indication to the contrary being removed).

In Macks v Viscariello the Full Court observed:72

Rule 57 of the Supreme Court Civil Rules 2006 (SA) provides that the court may at any stage of proceedings order the amendment of any document. The amendment may be made on the court’s own initiative or on an application by a party and an amendment or an order for amendment may be made on such conditions as the court considers appropriate.

The observations of Bowen LJ in Cropper v Smith are most frequently cited in respect of the court’s power to allow amendments to a party’s pleadings:

[T]he objects of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases … I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party … as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right.

[footnote omitted]

As I have said, despite twice having the opportunity, SWR has not applied to amend the Second Statement of Claim, but that is largely because SWR believes that it can take advantage of s 19 FTA. Such amendment in no way prejudices SWR. But what about the Authority? Before answering that question I

72 (2017) 130 SASR 1 at [105]-[106].
observe that the amendment would result in the case going forward on the basis that it was truly contested; i.e. that the Authority was a body corporate to which s 18 of the Australian Consumer Law applied. It seems to me that to make the amendment does not prejudice the Authority. Omitting reference to ss 84 and 87 is of no moment. The suggestion that the Authority has been denied the opportunity to contend that it is the Crown is without merit. If this were a case that the Authority wished to run, why did it not plead such case in response to what it understood to be a case against the ACL Cth? To amend the Second Statement of Claim in the manner I have foreshadowed would, in my view, reflect the basis upon which the forensic contest was truly fought. I add, I would similarly amend the Third Defence so that contributory negligence under the Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) be pleaded in paragraph 44A in the alternative to s137B CACA. That amendment reflects the Second Statement of Claim, and, as I have said, the true basis upon which the dispute was contested.

e. Is the Authority a trading corporation?

As mentioned in address SWR eschewed any case based on the Authority being a trading corporation within the meaning of the ACL Cth. Consistent with this, in its written submissions SWR made no submission nor referred to any evidence in support of a case that depended in part on proof that the Authority was a trading corporation. Accordingly, to the extent that the Second Statement of Claim purports to plead a case under the ACL Cth, I dismiss the claim.

B. The standard of proof

In Maxcon Constructions Pty Ltd v Vadasz (No 2) I said:73

The Briginshaw considerations may be distilled from the judgments of Latham CJ, Rich, Starke and Dixon JJ and, in particular, Dixon J in Briginshaw v Briginshaw. At their heart is the requirement that in determining whether evidence adduced proves a fact to the civil standard, the trier of fact should take into account the significance and consequences of the finding of fact that they are urged to make in determining whether they are persuaded of the existence of that fact to that standard. In the joint reasons in Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd Mason CJ, Brennan, Deane and Gaudron JJ provided a working summary of the Briginshaw considerations. They said:

The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary “where so serious a matter as fraud is to be found”. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting the conventional perception that members of our society do not ordinarily engage in

73 (2017) 127 SASR 193 at [250]-[253]. This case went on appeal to the High Court but not on the question of the application of the Briginshaw v Briginshaw (1938) 60 CLR 336 principles.
fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct. As Dixon J commented in *Briginshaw v Briginshaw*:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved ...

(Footnotes omitted).

This reflects the reality that persuasion of the existence of a fact to a particular standard requires “actual persuasion of its occurrence or existence before it can be found” and that such state of mind is not one “attained or established independently of the nature and consequences of the fact or facts to be proved”. The requirement that proof be clear, cogent or strict — expressions taken from the authorities applying the *Briginshaw* considerations — is an expression of the quality of the evidence necessary to move a mind to a state of actual persuasion of a fact where the finding of fact is one to which serious consequences attach. Accepting this, the *Briginshaw* considerations amount, in effect, to directions to be given in a civil trial to the trier of fact as to matters relevant to the weighing of evidence adduced in support of a proposition to be proved to the civil standard. So understood the content of the directions will vary depending upon the nature of the issue in dispute. Further, the directions not amounting to a rule of law, the failure to administer them will not necessarily result in a judgment being set aside. Further again, the necessity of giving such directions evaporates where the relevant factor may be considered obvious to the trier of fact.

*Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* is an example of a case where the forensic contest was of a nature that rendered a direction drawing the *Briginshaw* considerations to the attention of the trier of fact unnecessary and inappropriate. In that case Mason CJ, Brennan, Deane and Gaudron JJ said:

When an issue falls for determination on the balance of probabilities and the determination depends on a choice between competing and mutually inconsistent allegations of fraudulent conduct, generalisations about the need for clear and cogent proof are likely to be at best unhelpful and at worst misleading. If such generalisations were to affect the proof required of the party bearing the onus of proving the issue, the issue would be determined not on the balance of probabilities but by an unbalanced standard. The most that can validly be said in such a case is that the trial judge should be conscious of the gravity of the allegations made on both sides when reaching his or her conclusion. Ultimately, however, it remains incumbent upon the trial judge to determine the issue by reference to the balance of probabilities.

Nonetheless, if the resolution of a factual question involves an issue of importance and gravity, “due regard must be had to its important and grave nature”.

[footnotes omitted]

Neither party suggested that the *Briginshaw v Briginshaw*\(^{74}\) (*Briginshaw*) considerations should invariably be brought to bear in a case of misleading and deceptive conduct. That perhaps reflects the fact that s 18 of the *Australian Consumer Law* does not require proof of any intention to deceive or mislead. In this case, however, SWR asserted that the Authority knew upon agreement being reached at the third Wallmans meeting that SWR thought it was getting the

\(^{74}\) (1938) 60 CLR 336.
constituent councils’ waste streams and had lured SWR into paying compensation of $990,000 and taking on all environmental liabilities by letting SWR believe that it would get those waste streams knowing that it was unlikely that it would. The allegations border on fraud. Those allegations cause me to remind myself of the Briginshaw considerations. Where I have determined what was said and not said in the second and third Wallmans meetings, in particular, I have borne in mind the Briginshaw considerations. More generally, I have borne in mind the seriousness of the allegations. I have also been mindful of McLelland CJ’s advice in Watson v Foxman:75

… Where the conduct is the speaking of words in the course of a conversation, it is necessary that the words spoken be proved with a degree of precision sufficient to enable the court to be reasonably satisfied that they were in fact misleading in the proved circumstances. In many cases (but not all) the question whether spoken words were misleading may depend upon what, if examined at the time, may have been seen to be relatively subtle nuances flowing from the use of one word, phrase or grammatical construction rather than another, or the presence or absence of some qualifying word or phrase, or condition. Furthermore, human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.

I remind myself, having regard to the considerations to which I have referred, that the standard of proof is nonetheless the balance of probabilities.

C. The view

The Court went on a view to Brinkley. The purpose of the view was primarily to assist in understanding the evidence Mr Brown gave of his attendance at Brinkley.76 I have used the observations I made on the view as directed by counsel and recorded in the transcript of the view for no other purpose.

76 Scott v Shire of Namurkah (1954) 91 CLR 300 at 313 (Dixon CJ, Webb, Kitto and Taylor JJ); Glenmont Investments Pty Ltd v O’Loughlin (No 2) (2000) 79 SASR 185 at [308] (the Court).
III
Misleading and deceptive conduct — the applicable principles

A. Introduction

Section 18(1) ACL SA provides:

A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

To succeed SWR must establish, first, that the Authority engaged in conduct, second, in trade or commerce, and third, that was misleading or deceptive or was likely to mislead or deceive. With the exception of the reference in s 18 to “a person”, where s 52 of the Trade Practices Act 1974 (Cth) (TPA) referred to “a corporation”, s 18 is no different to s 52. Consequently, decisions dealing with the interpretation and application of s 52 may be plundered in the construction and application of s 18.

I take each element of s 18 in turn.

B. Conduct

In Google Inc v Australian Competition and Consumer Commission, in reference to s 52, TPA Hayne J stated:77

The generality with which s 52 was expressed should not obscure one fundamental point. The section prohibited engaging in conduct that is misleading or deceptive or is likely to mislead or deceive. It is, therefore, always necessary to begin consideration of the application of the section by identifying the conduct that is said to meet the statutory description “misleading or deceptive or … likely to mislead or deceive”. The first question for consideration is always: “What did the alleged contravener do (or not do)”? It is only after identifying the conduct that is impugned that one can go on to consider separately whether that conduct is misleading or deceptive or likely to be so.

In some s 52 cases, in identifying conduct that is said to be misleading or deceptive or likely to be so, it may be necessary to recognise that the Act amplified (s 4(2)(a)) the way in which a reference to “engaging in conduct” should be read. No question of that kind arose in this appeal and the extended definition may be put aside.

[emphasis in original]

SWR’s primary case has two aspects. First, there is that aspect that relies upon actual conduct comprised of the alleged representations and warranties made during the meetings on 14 September, 5 November and 12 November 2012, and during the site meeting on 23 October 2012, set out in paragraphs 20, 23, 25 and 27 of the Second Statement of Claim taken with the facts set out in paragraphs 30.2-30.6 of the Second Statement of Claim. Stripped to its minimum this case is as follows: representatives of the Authority informed Mr Brown and others from SWR that the Authority did not control where the constituent councils chose to dispose of their waste and that SWR was free to treat with the

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77 (2013) 249 CLR 435 at [89]-[90].
constituent councils, knowing that SWR’s interest in operating the Hartley landfill was linked to SWR securing the constituent councils’ waste streams, thereby implicitly representing that the constituent councils were not bound in any way, either directly or indirectly, to dispose of their waste with the Authority and that the Authority would not interfere with any attempt made by SWR to attract the constituent councils’ custom. In relation to this case, the conduct that SWR relies upon consists of the representations and warranties set out in 20.1, 20.2, 23.1–23.4, 25.1–25.4 and 27.1–27.4 of the Second Statement of Claim taken with the facts pleaded at 30.2–30.6.

The second aspect of SWR’s primary case is described in the Second Statement of Claim as one of the non-disclosure of information that the Authority knew or ought to have known would be material to SWR’s assessment of whether to enter into the Deed of Settlement and s 103E Deed in circumstances giving rise to a duty on the part of the Authority to make such disclosure.78 With respect to this aspect the conduct may be viewed as one of silence amounting to misleading and deceptive conduct, or, one of an implied representation amounting to misleading and deceptive conduct, the implication being that the Authority’s silence allowed SWR to think that the representations and warranties made were not qualified in any respect. On either approach, the duty to disclose is pleaded as arising from the same material facts that underpin the first aspect of SWR’s case.79 This aspect of SWR’s case does not engage the “amplified” meaning of conduct contained in s 2(2) ACL SA. Section 2(2) states that a reference to engaging in conduct, such as in s 18, is a reference to doing or refusing to do any act. Section 2(2)(c) states that a reference to refusing to do an act includes a reference to refraining (otherwise than inadvertently) from doing an act or making it known that that act will not be done. This is not a case of refusing or refraining.

There is a further discrete component of SWR’s case, one that concerns representations specifically made about the available airspace in cell 6. That case as pleaded relies upon representations and warranties made in a letter dated 25 September 2012,80 and an email dated 22 January 2013.81

Returning to the second aspect of SWR’s primary case, SWR pleads the failure to disclose certain facts where the circumstances gave rise to a duty to make such disclosure.

C. In trade or commerce

Proof of the conduct pleaded achieved, the next question is whether that conduct occurred in trade or commerce. In Re Ku-ring-gai Co-operative Building Society (No 12) Ltd Bowen CJ referred to the concepts of trade and commerce in
the course of analysing s 47(1) TPA which prohibited the practice of exclusive dealing in trade or commerce. His Honour observed:

The terms “trade” and “commerce” are ordinary terms which describe all the mutual communings, the negotiations verbal and by correspondence, the bargain, the transport and the delivery which comprise commercial arrangements W & A McArthur Ltd v State of Queensland (1920) 28 CLR 530 at 547. The word “trade” is used with its accepted English meaning: traffic by way of sale of exchange or commercial dealing: Commissioner of Taxation v Kirk (1900) AC 588 at 592 per Lord Davey; W & A McArthur Ltd v State of Queensland, supra at 548. The commercial character of trade was mentioned more recently by Lord Reid in Ransom v Higgs [1974] 3 All ER 949 at 955. His Lordship there said: “As an ordinary word in the English language ‘trade’ has or has had a variety of meanings or shades of meaning. Leaving aside obsolete [sic] or rare usage it is sometimes used to denote any mercantile operation but is commonly used to denote operations of a commercial character by which the trader provides to customers for reward some kind of goods or services.” Moreover, the word covers intangibles, such as banking transactions, as well as the movement of goods and person for historically its use has been founded upon the elements of use, regularity and course of conduct: Bank of New South Wales v Commonwealth (1948) 76 CLR at 381.

In the same case Deane J stated: In Concrete Constructions (NSW) Pty Ltd v Nelson (Nelson) the plaintiff fell to the bottom of an air-conditioning shaft while he was attempting to remove a grate positioned at the entry point of the shaft. The plaintiff had been told by his foreman that the grate was secured by three bolts on each side and that it was safe to remove those bolts in the manner explained by the foreman. The plaintiff instituted proceedings in the Federal Court seeking damages from his employer on the basis that he sustained injury as a consequence of his fall which was caused by the foreman’s misleading or deceptive advice. The plaintiff alleged that he fell after the grate gave way, the grate not being secured as the foreman had said or at all.

In the Federal Court the matter proceeded by way of a preliminary question being, on the assumption that the allegations were accepted and that the

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82 (1978) 22 ALR 621.
foreman’s actions could be attributed to his employer, did the foreman’s conduct constitute a contravention of s 52 TPA? More particularly, was the foreman’s conduct “in trade or commerce” within the meaning of s 52(1) TPA?

In the High Court Mason CJ, Deane, Dawson and Gaudron JJ considered the words “trade” and “commerce” terms of common knowledge of the widest import, just as in the case of s 51(i) of the Constitution. That said, the authorities dealing with the interpretation of s 51(i) were of no assistance in construing s 52(1) TPA because the grant of plenary legislative power with respect to trade or commerce was something different to conduct in trade or commerce. The joint reasons considered:

The phrase “in trade or commerce” in s. 52 has a restrictive operation. It qualifies the prohibition against engaging in conduct of the specified kind. As a matter of language, a prohibition against engaging in conduct “in trade or commerce” can be construed as encompassing conduct in the course of the myriad of activities which are not, of their nature, of a trading or commercial character but which are undertaken in the course of, or as incidental to, the carrying on of an overall trading or commercial business. If the words “in trade or commerce” in s. 52 are construed in that sense, the provisions of the section would extend, for example, to a case where the misleading or deceptive conduct was a failure by a driver to give the correct hand signal when driving a truck in the course of a corporation’s haulage business. It would also extend to a case, such as the present, where the alleged misleading or deceptive conduct consisted of the giving of inaccurate information by one employee to another in the course of carrying on the building activities of a commercial builder. Alternatively, the reference to conduct “in trade or commerce” in s. 52 can be construed as referring only to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character. So construed, to borrow and adapt words used by Dixon J. in a different context in Bank of N.S.W. v. The Commonwealth, the words “in trade or commerce” refer to “the central conception” of trade or commerce and not to the “immense field of activities” in which corporations may engage in the course of, or for the purposes of, carrying on some overall trading or commercial business.

Mason CJ, Deane, Dawson and Gaudron JJ considered the second construction the correct construction, holding that s 52 was not intended to extend to all conduct that a corporation might engage in as part of its trading or commercial business. Their Honours said:

What the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character. Such conduct includes, of course, promotional activities in relation to, or for the purposes of, the supply of goods or services to actual or potential consumers, be they identified persons or merely an unidentifiable section of the public. In some areas, the dividing line between what is and

86 Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594 at 602.
87 Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594 at 602.
88 Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594 at 602-603.
89 Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594 at 604.
what is not conduct “in trade or commerce” may be less clear and may require the identification of what imports a trading or commercial character to an activity which is not, without more, of that character. The point can be illustrated by reference to the examples mentioned above. The driving of a truck for the delivery of goods to a consumer and the construction of a building for another pursuant to a building contract are, no doubt, trade or commerce in so far as the relationship between supplier and actual or potential customer or between builder and building owner is concerned. That being so, to drive a truck with a competitor's name upon it in order to mislead the customer or to conceal a defect in a building for the purpose of deceiving the building owner may well constitute misleading or deceptive conduct “in trade or commerce” for the purposes of s. 52. On the other hand, the mere driving of a truck or construction of a building is not, without more, trade or commerce and to engage in conduct in the course of those activities which is divorced from any relevant actual or potential trading or commercial relationship or dealing will not, of itself, constitute conduct “in trade or commerce” for the purposes of that section. That being so, the giving of a misleading handsignal by the driver of one of its trucks is not, in the relevant sense, conduct by a corporation “in trade or commerce”. Nor, without more, is a misleading statement by one of a building company’s own employees to another employee in the course of their ordinary activities. The position might well be different if the misleading statement was made in the course of, or for the purposes of, some trading or commercial dealing between the corporation and the particular employee.

Applying these principles to the facts in Nelson, their Honours held that the foreman did not, in trade or commerce, engage in misleading and deceptive conduct. The foreman’s conduct formed part of the ordinary activities associated with the construction of a building. 90

Toohey J agreed that the preposition “in” contained in s 52(1) TPA operated to limit the ambit of the section to a class of activity less than that to which a law made under s 51(i) of the Constitution may apply. 91 Toohey J ventured that the preposition achieved the same as if the section read that the conduct occur “as part of trade or commerce”. 92 Importantly, earlier in his reasons Toohey J observed:

The present appeal proceeded on the assumption, tacit if not express, that the conduct said to have been misleading or deceptive must have been conduct in the trade or commerce of the appellant. No doubt, in most cases the focus will be on the nature of the defendant’s business but the section is not so limited. It does not, in terms, refer to the trade or commerce of the particular corporation. It seems unlikely, given the nature of the activities with which Pt V, Div. 1 of the Act is concerned, that it should be necessary to consider closely the character of a corporation’s business and in particular to determine whether or not the conduct relied upon by an applicant or plaintiff can fairly be said to be in the trade or commerce of that corporation. Notions of ultra vires can hardly have a part to play in this area of the law. The position of the expression “in trade or commerce” in s. 52(1), and indeed in other sections in Pt V, Div. 1, suggests that it is trade or commerce in general terms with which the statute is concerned.

90 Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594 at 604-605.
91 Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594 at 614.
92 Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594 at 614.
93 Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594 at 613.
In *Houghton v Arms* a unanimous High Court embraced the construction of the expression, “in trade or commerce”, contained in the joint reasons in *Nelson* in addition to the observation made by Toohey J quoted above, as applicable to the construction of the Victorian equivalent of s 52(1) TPA and s 18 ACL SA.\(^{94}\)

Whilst all bargains struck for consideration may be considered acts of trade or commerce, they are not necessarily acts undertaken in trade or commerce. To amount to conduct in trade or commerce such acts must be an aspect or element of activities or transactions that bear a trading or commercial character. The task is to identify the trading or commercial activity of which the impugned act of trade or commerce is an aspect or element bearing in mind that the trading or commercial activity need not be that of the person whose conduct is said to be misleading or deceptive.

**D. That was misleading and deceptive or likely to mislead and deceive**

If the pleaded conduct is proven, and it is also proven to have occurred in trade or commerce, the next question is whether the conduct may be characterised as misleading and deceptive or likely to mislead or deceive.

Conduct will be misleading or deceptive if it induces or is capable of inducing error or leads into error.\(^{95}\) In *Taco Co of Australia Inc v Taco Bell Pty Ltd* Deane and Fitzgerald JJ said that “no conduct can mislead or deceive unless the representee labours under some erroneous assumption”.\(^{96}\) That said, the words “or is likely to mislead or deceive” make clear it is unnecessary to prove that the conduct actually deceived or actually misled anyone.\(^{97}\)

Whether conduct may be characterised as misleading or deceptive, or likely to mislead or deceive, is a question of fact to be determined having regard to “a notional cause and effect relationship between the conduct and the state of mind of the relevant person or class of persons”.\(^{98}\) The inquiry is objective,\(^{99}\) undertaken having regard to the actual or possible consequences of the conduct.\(^{100}\) Analysing the conduct of a defendant in relation to a particular plaintiff requires that consideration be given to the character of the particular conduct of the

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\(^{95}\) *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198 (Gibbs CJ); *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at [39] (French CJ, Crennan, Bell and Keane JJ); *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564 at [63] (French J); *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [111] (McHugh J).

\(^{96}\) (1982) 42 ALR 177 at 200.

\(^{97}\) *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198 (Gibbs CJ).

\(^{98}\) *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [25] (French CJ); see also *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [37] (Gleeson CJ, Hayne and Heydon JJ).

\(^{99}\) *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198-199 (Gibbs CJ).

\(^{100}\) *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 228 (Stephen J).
defendant in relation to that plaintiff, “bearing in mind what matters of fact each
knew about the other as a result of the nature of their dealings and the
conversations between them, or which each may be taken to have known”. In
Butcher v Lachlan Elder Realty Pty Ltd McHugh J said:

The question whether conduct is misleading or deceptive or is likely to mislead or
deceive is a question of fact. In determining whether a contravention of s 52 has occurred,
the task of the court is to examine the relevant course of conduct as a whole. It is
determined by reference to the alleged conduct in the light of the relevant surrounding
facts and circumstances. It is an objective question that the court must determine for
itself. It invites error to look at isolated parts of the corporation’s conduct. The effect of
any relevant statements or actions or any silence or inaction occurring in the context of a
single course of conduct must be deduced from the whole course of conduct. Thus, where
the alleged contravention of s 52 relates primarily to a document, the effect of the
document must be examined in the context of the evidence as a whole. The court is not
confined to examining the document in isolation. It must have regard to all the conduct of
the corporation in relation to the document including the preparation and distribution of
the document and any statement, action, silence or inaction in connection with the
document.

[footnotes omitted]

For conduct to be misleading or deceptive is it not necessary that it convey
an express or implied representation. It is enough that the conduct lead a person
into error or is likely to lead a person into error.

Where the conduct consists of a combination of representations and non-
disclosure it may be approached as a case of implied representation in that the
implication is that the representation made was complete and wholly correct (a
positive case in the sense that it was what was said in all the circumstances that
was misleading and deceptive), or, as one where the defendant’s silence is
misleading and deceptive (a negative case in the sense that it was what was not
said that was misleading and deceptive). The approach adopted influences the
analysis.

In a case of implied representation the question is whether what was said or
done, in all the relevant circumstances, conveyed something more so as to lead
into error or be likely to do so. Importantly, the starting point is that the
ordinary meaning of a representation is the meaning conveyed. Of course, the

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101 Butcher v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 592 at [37] (Gleeson CJ, Hayne and
Heydon JJ).
102 (2004) 218 CLR 592 at [109]; see also Campbell v Backoffice Investments Pty Ltd (2009) 238
CLR 304 at [102] (Gummow, Hayne, Heydon and Kiefel JJ).
103 Butcher v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 592 at [32] (Gleeson CJ, Hayne and
Heydon JJ); Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd (2010)
104 Johnson Tiles Pty Ltd v Esso Australia Ltd (2000) 104 FCR 564 at [63] (French J, Beaumont and
Finkelstein JJ agreeing); Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance
105 Allianz Australia Insurance Ltd v Haddad [2015] NSWCA 186 at [42] (the Court).
106 Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191 at 198 (Gibbs CJ).
ordinary meaning will give way to evidence demonstrating that the
representation was to be understood as having a special meaning. 107

In a case of misleading or deceptive conduct by silence, the question is
whether, in the light of all relevant circumstances including acts, omissions,
statements and silence, conduct has occurred that did or was likely to mislead or
deceive. 108

It is to be borne in mind that “the misleading and deceptive quality of
remaining silent inheres in the non-disclosure of information; not in any refusal
to provide it”. 109 I admit to some difficulty with this not being a case of refraining
engaging s 2(2) ACL SA and requiring proof of intent, but neither party
suggested otherwise.

In Software Integrators Pty Ltd v Roadrunner Couriers Pty Ltd Doyle CJ
observed: 110

There can no longer be any doubt that silence can constitute misleading and deceptive
conduct within the meaning of s 52 of the Trade Practices Act. However, silence or
nondisclosure, without more, will not amount to misleading and deceptive conduct.
Silence and nondisclosure, by themselves, are not misleading and deceptive conduct for
at least two reasons.

For one thing, mere silence or nondisclosure cannot cause a person to be misled or
deceived. For an applicant to establish that a contravention of s 52 has occurred, it is not
sufficient to show that it was laboring under an erroneous belief. The applicant must
prove its belief was caused by the defendant's conduct. That requisite causal nexus is
necessarily absent in cases of mere silence or nondisclosure.

The second reason is closely allied to the first. In cases of silence the defendant’s conduct
must fall within the purview of “engaging in conduct” which is the essential threshold
hurdle to be cleared for any s 52 action. As that expression is defined to include refusing
to do an act “otherwise than inadvertently” (s 4(2)(a)) it has been interpreted as including
an omission to disclose information only where that omission is deliberate: see Spedley

It is also pertinent to bear in mind the comments of Gleeson CJ in Lam v Ausintel
Investments Australia Pty Ltd (1990) 97 FLR 458 at 475:

“When parties are dealing at arm's length in a commercial situation in which they have
conflicting interests it will often be the case that one party will be aware of information
which, if known to the other would or might cause the other party to take a different
negotiating stance. This does not impose an obligation on the first party to bring to the
attention of the other party, and failure to do so would not, without more, ordinarily be
regarded as dishonesty or sharp practice.”

108 Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31 at 40 (Gummow J, Black CJ and Cooper J
agreeing); Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd (2010)
241 CLR 357 at [18] (French CJ and Kiefel J).
109 CCP Australian Airships v Primus Telecommunications Pty Ltd [2004] VSCA 232 at [34] (Nettle
JA).
With respect to silence as misleading and deceptive conduct, in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* French CJ and Kiefel J said: 111

The circumstances in which silence or non-disclosure of information can be misleading or deceptive are various. …

The 1992 decision of the Full Court of the Federal Court in *Demagogue Pty Ltd v Ramensky* represented what has been described accurately as “an emphatic acknowledgment … of the unique nature of the statutory prohibition”. The Full Court upheld the decision of the primary judge that a vendor of land had created a clear but erroneous impression in the purchasers that there was nothing unusual concerning access to the land and, in particular, had been silent as to the necessity of a grant of a licence by a statutory authority to enable such access.

Gummow J, who wrote the leading judgment and with whom Black CJ and Cooper J agreed, said:

“it should be no inhibition to giving effect to what, on its proper construction, is provided for in the legislation, that the result may be to achieve consequences and administer remedies which differ from those otherwise obtaining under the general law.”

Silence, as Black CJ said in his concurring judgment, was to be assessed as a circumstance like any other:

“the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive.”

Gummow J referred to the limitation that “unless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed, it is difficult to see how mere silence could support the inference that the fact does not exist”.

[footnotes omitted]

French CJ and Kiefel J added that the language of reasonable expectation is not statutory. 112 Consideration of whether the circumstances gave rise to a reasonable expectation in a plaintiff that the defendant would disclose a relevant fact was an aid to characterising non-disclosure as misleading or deceptive. 113 Their Honours explained: 114

To invoke the existence of a reasonable expectation that if a fact exists it will be disclosed is to do no more than direct attention to the effect or likely effect of non-disclosure unmediated by antecedent erroneous assumptions or beliefs or high moral expectations held by one person of another which exceed the requirements of the general law and the prohibition imposed by the statute. In that connection, Robson A-JA in the Court of Appeal spoke of s 52 as making parties “strictly responsible to ensure they did not

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111 (2010) 241 CLR 357 at [16]-[18].
mislead or deceive their customer or trading partners”. Such language, while no doubt intended to distinguish the necessary elements of misleading or deceptive conduct from those of torts such as deceit, negligence and passing off, may take on a life of its own. It may lead to the imposition of a requirement to volunteer information which travels beyond the statutory duty “to act in a way which does not mislead or deceive”. Cicero, in his famous essay *On Duties*, seems to have contemplated such a standard when he wrote:

“Holding things back does not always amount to concealment; but it does when you want people, for your own profit, to be kept in the dark about something which you know and would be useful for them to know.”

It would no doubt be regarded as an unrealistic expectation, inconsistent with the protection of that “superior smartness in dealing” of which Barton J wrote in *W Scott, Fell & Co Ltd v Lloyd*, that people who hold things back for their own profit are to be regarded as engaging in misleading or deceptive conduct. As Burchett J observed in *Poseidon Ltd v Adelaide Petroleum NL*, s 52 does not strike at the traditional secretiveness and obliquity of the bargaining process. But his Honour went on to remark that the bargaining process is not to be seen as a licence to deceive, and gave the example of a bargainer who had no intention of contracting on the terms discussed and whose silence was to achieve some undisclosed and ulterior purpose harmful to a competitor.

However, as a general proposition, s 52 does not require a party to commercial negotiations to volunteer information which will be of assistance to the decision-making of the other party. A fortiori it does not impose on a party an obligation to volunteer information in order to avoid the consequences of the careless disregard, for its own interests, of another party of equal bargaining power and competence. Yet that appears to have been, in practical effect, the character of the obligation said to have rested upon Miller in this case.

[footnotes omitted] [emphasis in original]

As a judge of the Federal Court, French CJ had previously commented that, bearing in mind that s 52 TPA does not impose a duty to volunteer information, “unless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed, it is difficult to see how mere silence could support the inference that that fact does not exist”.115 Nonetheless, in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* French CJ and Kiefel J advised:116

Reasonable expectation analysis is unnecessary in the case of a false representation where the undisclosed fact is the falsity of the representation. A party to precontractual negotiations who provides to another party a document containing a false representation which is not disclaimed will, in all probability, have engaged in misleading or deceptive conduct. When a document contains a statement that is true, non-disclosure of an important qualifying fact will be misleading or deceptive if the recipient would be misled, absent such disclosure, into believing that the statement was complete. In some cases it might not be necessary to invoke non-disclosure at all where a statement which is literally true, but incomplete in some material respect, conveys a false representation that it is complete.

115 *Kimberley NZI Finance Ltd v Torero Pty Ltd* (1989) ATPR (Digest) 46-054 at 53,195.

116 (2010) 241 CLR 357 at [23].
It is also wrong to approach a case of misleading and deceptive conduct by silence or non-disclosure by asking whether there exists a duty to disclose.\(^{(117)}\) The existence of a duty is not required by s 18 ACL SA. The characterisation question is whether in the light of all relevant circumstances constituted by acts or omissions, statements or silence, the defendant has engaged in conduct in trade or commerce that is misleading or deceptive or likely to mislead or deceive.\(^{(118)}\)

Helpfully, in *Fraser v NRMA Holdings Ltd* the Full Court of the Federal Court said:\(^{(119)}\)

Where the contravention of s 52 alleged involves a failure to make a full and fair disclosure of information, the applicant carries the onus of establishing how or in what manner that which was said involved error or how that which was left unsaid had the potential to mislead or deceive. Errors and omissions to have that potential must be relevant to the topic about which it is said that the respondents’ conduct is likely to mislead or deceive. The need for an applicant to establish materiality is of particular importance in a case like the present one where the proposal is complex, and involves difficult questions of commercial judgment and matters of degree and conjecture as to the future about which there is room for a range of honestly and reasonably held opinions.

That said, materiality alone may not be sufficient to characterise non-disclosure as misleading and deceptive.

Whilst s 18 ACL SA does not strike at the “traditional secretiveness and obliquity of the bargaining process” the bargaining process provides no licence to deceive.\(^{(120)}\) Further, a person does not avoid liability because the plaintiff could have discovered the misleading and deceptive conduct by undertaking reasonable inquiries.

In *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* Gibbs CJ said that the “heavy burdens which the section [s 52 TPA] creates cannot have been intended to be imposed for the benefit of persons who fail to take reasonable care of their own interests”.\(^{(122)}\)

In *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* the joint reasons explained:\(^{(123)}\)

Whether speaking of representations to the public at large or in negotiations between parties of equal bargaining power and competence, the quoted observations in *Puxu* and *Miller* go to the characterisation of conduct as misleading or deceptive. Conduct is misleading or deceptive, or likely to mislead or deceive, if it has a tendency to lead into

\(^{(117)}\) *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 40 (Gummow J).

\(^{(118)}\) *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 41 (Gummow J).

\(^{(119)}\) (1995) 55 FCR 452 at 467-468 (the Court).

\(^{(120)}\) *Poseidon Ltd v Adelaide Petroleum NL* (1991) 105 ALR 25 at 26 (Burchett J).


\(^{(123)}\) (2013) 250 CLR 640 at [39], see also [49].
error. That is to say there must be a sufficient causal link between the conduct and error on the part of persons exposed to it. It is in that sense that it can be said that the prohibitions in ss 52 and 18 were not enacted for the benefit of people who failed to take reasonable care of their own interests.

[footnote omitted]

And in Johnson Tiles Pty Ltd v Esso Australia Pty Ltd French J, as he then was, with whom Beaumont and Finkelstein JJ agreed, said: 124

.It does require a capacity to mislead or deceive attributable to the conduct in question. There must be a logical causal connection between the conduct and some hypothesised error. But not every case involving a logical connection between conduct and alleged error will result in the conduct being regarded as misleading or deceptive for the purposes of s 52. There is an evaluative judgment involved. As the Full Court said in SAP Australia Pty Ltd v Sapient Australia Pty Ltd (1999) 169 ALR 1 at 14:

“The characterisation of conduct as ‘misleading or deceptive or likely to mislead or deceive’ involves a judgment of a notional cause and effect relationship between the conduct and the putative consumer’s state of mind. Implicit in that judgment is a selection process which can reject some causal connections, which, although theoretically open, are too tenuous or impose responsibility otherwise than in accordance with the policy of the legislation.”

By way of example, it might be said that, strictly speaking, a causal connection exists between conduct and error where the error is based upon erroneous assumption derived from but not logically justified by the conduct. The conduct will not ordinarily be treated on that account, as misleading or deceptive in such a case.

Conduct that causes confusion or wonderment will not necessarily be misleading or deceptive. 125

The context in which conduct falls to be characterised will include relevant disclaimers or explanations. In Campbell v Backoffice Investments Pty Ltd French CJ said: 126

A person accused of engaging in misleading or deceptive conduct may claim that its effects were negated by a contemporaneous disclaimer by that person, or a subsequent disclaimer of reliance by the person allegedly affected by the conduct. The contemporaneous disclaimer by the person engaging in the impugned conduct is likely to go to the characterisation of the conduct. A subsequent declaration of non-reliance by a person said to have been affected by the conduct is more likely to be relevant to the question of causation.

The first situation was discussed in Yorke v Lucas. Speaking of an example in which a corporation merely passes on false information provided by another, Mason A-CJ, Wilson, Deane and Dawson JJ said:

“If the circumstances are such as to make it apparent that the corporation is not the source of the information and that it expressly or impliedly disclaims any belief in its

124 (2000) 104 FCR 564 at [64]-[65].
126 (2009) 238 CLR 304 at [29]-[31].
truth or falsity, merely passing it on for what it is worth, we very much doubt that the corporation can properly be said to be itself engaging in conduct that is misleading or deceptive.”

Commenting on this passage, the majority in *Butcher v Lachlan Elder Realty Pty Ltd* said:

“In applying those principles, it is important that the agent’s conduct be viewed as a whole. It is not right to characterise the problem as one of analysing the effect of its ‘conduct’ divorced from ‘disclaimers’ about that ‘conduct’ and divorced from other circumstances which might qualify its character.”

Where the impugned conduct comprises allegedly misleading pre-contractual representations, a contractual disclaimer of reliance will ordinarily be considered in relation to the question of causation. For if a person expressly declares in a contractual document that he or she did not rely upon pre-contractual representations, that declaration may, according to the circumstances, be evidence of non-reliance and of the want of a causal link between the impugned conduct and the loss or damage flowing from entry into the contract. In many cases, such a provision will not be taken to evidence a break in the causal link between misleading or deceptive conduct and loss. The person making the declaration may nevertheless be found to have been actuated by the misrepresentations into entering the contract. The question is not one of law, but of fact.

[footnotes omitted]

Thus a disclaimer clause cannot of itself provide an immunity from the obligation imposed by s 18 ACL SA but may erase the misleading and deceptive character of conduct where it can be said to modify the characterisation of the impugned conduct.  

Two final issues; first a plaintiff need not prove that a defendant engaged in misleading and deceptive conduct or conduct likely to mislead or deceive intending to mislead or deceive.  

Second, with respect to representations as to future matters, which form a part of SWR’s case, s 4 ACL SA is engaged. Section 4(1) provides:

(1) If:
   (a) a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act); and
   (b) the person does not have reasonable grounds for making the representation; the representation is taken, for the purposes of this Schedule, to be misleading.

Section 4(2) effectively burdens the defendant with having to prove that he or she had reasonable grounds for making the representation. It states:

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173 Bowler v Hilda Pty Ltd (1998) 80 FCR 191 at 207 (Heerey J); Benlist Pty Ltd v Olivetti (1990) ATPR 41-043 at 51,590 (Burchett J).


175 Second Statement of Claim at [29.2], [29.3] and [29.5].
(2) For the purposes of applying subsection (1) in relation to a proceeding concerning a representation made with respect to a future matter by:

(a) a party to the proceeding; or
(b) any other person;

the party or other person is taken not to have had reasonable grounds for making the representation, unless evidence is adduced to the contrary.

Of course, the burden remains on the plaintiff to satisfy the Court that the representation was made. However, upon the Court being satisfied that the representation was made, the presumption is enlivened and the burden shifts to the defendant to establish that he or she had reasonable grounds for making the representation. Section 4(3) is also relevant here. It provides:

(3) To avoid doubt, subsection (2) does not:

(a) have the effect that, merely because such evidence to the contrary is adduced, the person who made the representation is taken to have had reasonable grounds for making the representation; or
(b) have the effect of placing on any person an onus of proving that the person who made the representation had reasonable grounds for making the representation.

Lastly, s 4(4) states that s 4(1), in deeming a representation as to future matters to be misleading if the defendant does not have reasonable grounds therefor, “does not imply that a representation that a person makes with respect to any future matter is not misleading merely because the person has reasonable grounds for making the representation”. Simply put, the statement may be misleading even if the maker had reasonable grounds for making it.

The predecessor to s 4 ACL SA was s 51A TPA. The cases have held s 4 of the Australian Consumer Law to be expressed in similar terms to s 51A(2) and to bear a relationship to its predecessor, and that the import of s 51A “more or less” covers the same ground as s 4, although this is not to detract from the fact that s 4 does not operate in quite the same way as its predecessor. For present purposes, it is unnecessary to elaborate on this further.

As with the TPA, “future matter” is not defined in the ACL SA. In Samsung Electronics Australia Pty Ltd v LG Electronics Australia Pty Ltd Nicholas J considered that a representation with respect to any future matter for the purposes of s 4, and, before it, s 51A “is a representation which expressly or by implication makes a prediction, forecast or projection, or otherwise conveys

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130 No TasWind Farm Group Inc v Hydro-Electric Corporation (No 2) [2014] FCA 348 at [43] (Kerr J).
133 GlaxoSmithKline Australia Pty Ltd v Reckitt Benckiser (Australia) Pty Ltd (No 2) [2018] FCA 1 at [137] (Foster J).
something about what may (or may not) happen in the future”.\footnote{[2015] FCA 227 at [84].} In \textit{Sykes v Reserve Bank of Australia} Heerey J considered s 51A TPA and said:\footnote{(1998) 88 FCR 511 at 514-515.}

In \textit{Ting v Blanche} (1993) 118 ALR 543, Hill J said (at 552-553):

“It will be readily apparent that a representation as to future conduct or a future event will generally imply (and sometimes explicitly state) that the maker of the representation was of a particular state of mind as to the future conduct or event as at the time the representation was made. A representation that a particular occupancy rate for a hotel might in the future be achieved, or, as alleged here, that a particular rent for nominated premises could be achieved in a future letting, impliedly involves a representation that the maker of the representation believed that the occupancy rate or rental could be achieved. It would be no less a representation as to the future by virtue of this implication. If the actual term of the representation is that the maker of the representation is of the view at the time that the occupancy rate or rental nominated could be achieved in the future, does that express statement turn a representation as to the future into a representation as to existing fact?

... Whatever may be the case where there is an express representation as to the maker’s state of mind concerning a future matter, it is not, in my opinion, correct to treat a representation as to an event or conduct in the future, be that in the form of a prediction or otherwise, as not being a representation with respect to a future matter merely because it implies a representation as to the maker’s present state of mind. The language of s 51A is very wide and the words ‘with respect to’ are, like the words ‘in respect of’ discussed by Dickson J, delivering the judgment of the Supreme Court of Canada in \textit{Nowegijick v The Queen} (1983) 144 DLR (3d) 193 at 200 (a discussion cited with approval by Toohey J) in \textit{Smith v Commissioner of Taxation (Cth)} (1987) 164 CLR 513 at 533; 74 ALR 411 at 424):

‘... words of the widest possible scope. They import such meanings as “in relation to, with reference to” or “in connection with”. The phrase “in respect of” is probably the widest of any expression intended to convey some connection between related subject-matters.’

... In determining whether a person had reasonable grounds for making a prediction as to a future matter, it is necessary to judge the matter as at the date of representation, although this does not preclude examining evidence of later events that may throw light upon the overall probabilities.\footnote{City of Botany Bay Council v Jazabas Pty Ltd [2001] NSWCA 94 at [83] (Mason P, with whom Beazley JA agreed).} Further, as Sheppard and Neaves JJ held in \textit{Cummings v Lewis}, evidence of reasonable grounds may be established by evidence other than that of the person who is alleged to have made the representation as to a future matter:\footnote{(1993) 41 FCR 559 at 566.}

… as in so many other areas, a court may find the overall probabilities to which the circumstances of a given case give rise, the background to it and the conduct of parties prior to conversations taking place as providing better guides to whether or not they had
particular states of mind or whether particular factors existed which would establish evidence of something such as reasonable grounds.
IV

The evidence to 13 February 2013

In this part of my reasons I deal with the evidence relating to SWR’s claims with the exception of that relevant to the discrete claim concerning the representations made as to the unfilled space in cell 6. I deal with that aspect of SWR’s claim elsewhere in these reasons.

A. The Future Directions Study, Mr Lorenz’s employment, the 2007 council resolutions and the Authority’s 10-year Strategic Plan

a. The Future Directions Study

Sometime in 2006 TJH Management Services Pty Ltd was commissioned to undertake a scoping study assessing the sustainability of the Authority and the Hartley landfill (the Future Directions Study or the Study). The executive summary to the Study stated:

The Adelaide Hills Region Waste Management Authority (Authority) is not sustainable at the current rates charged to Member Councils.

Without written agreements being entered into with the Councils of Adelaide Hills, Alexandrina and Mount Barker to guarantee that the existing waste streams will be delivered to Hartley to June 2010 or June 2015 then the Board should seriously consider the future of Hartley. It is extremely difficult to operate sustainably and thereby to guarantee the viability of the landfill operation if Councils can divert their waste to alternative facilities without notice.

If agreements are put in place with Member Councils the Authority can confidently plan to operate sustainably within the agreed timeframes. This will require a price increase of $9.60 per tonne for the June 2010 option 2 or $4.60 per tonne for option 3 to June 2015. If the decision is to close the landfill in June 2007 then Member Councils will need to contribute $1.28 million to fund closure and post closure management. …

A review of alternative landfilling options has shown that there is no clear alternative that would confidently predict future disposal costs for Member Councils that are significantly less than the projected sustainable Hartley landfill rates.

The Study Team has formed the view that option 3 is the best way forward for the Authority and provides the most cost effective and sustainable solution for Member Councils.

…

If Member Councils commit their waste streams to the Authority and the Board implements the recommendations of this report then Hartley provides a competitive landfill gate rate for the disposal of the residual waste stream from its Member Councils that is predictable well into the future.

…
A 10 year strategic plan and 3 year business plan that has been approved by Member Councils will set the framework for the Board to monitor performance and progress towards achieving the key objectives identified in these plans.

At the time of the report RCMB was not depositing waste at Hartley. The Study observed that the “effectiveness of a landfill operation increases as the quantity of waste deposited increases”. The viability of Hartley was determined to depend upon maintaining current levels of waste receipts if not increasing those levels. Critical was the commitment of AHC and DCMB to dispose of the entirety of their waste streams at Hartley.

The Study considered five possible future options for the Authority. Option three, which provided for the maximum utilisation of Hartley and which was recommended by the Study, was as follows:

1. That the Authority, pursuant to clause 1.5.8 of the revised charter, enter into binding agreements with the Member Councils of Adelaide Hills, Alexandrina and Mount Barker to deliver their domestic waste streams collected by the Councils … to the Hartley landfill until June 2015.

2. That, on the basis that agreements are negotiated with Member Councils, the Authority advises Member Councils that the Hartley landfill gate rate for the financial year 2007/2008 be increased by $4.60 per tonne for the June 2015 option 3 plus EPA levy applying for the 2007/2008 financial year plus GST.

Option three also required Hartley to compete “in the market for waste against other existing and proposed landfills in the Southern Region, Fleurieu Peninsula, Murray Bridge, and Metropolitan area”. The study described the option as the “most cost effective and sustainable outcome for Member Councils”.

On 21 December 2006 the Authority’s Board considered a draft of the Future Directions Study and endorsed option three. Further, the Board resolved to seek feedback and a response from each of the constituent councils on the Study. An allied resolution was passed obliging the Chair to write to all constituent councils formally providing them with a copy of the Study and highlighting the key conclusions being the clear need for change to place the Authority on a sustainable footing and the options for reform contained in the report.
b. The 2007 council resolutions

i. District Council of Mount Barker

In accordance with the resolutions of the Authority’s Board, Ms Stokes sent a draft copy of the Future Directions Study report to Mr Stuart at DCMB under cover of a letter dated 9 January 2007. After advising that the Authority “is not sustainable at the current rates charged to Member Councils”, Ms Stokes informed Mr Stuart that the Study had been considered by the Board at its meeting on 21 December 2006 where it agreed that the Authority would endorse option three and the two key recommendations quoted above. Ms Stokes stated that the Study evidenced that the increased gate price was a very competitive price when compared to the alternatives. She also said that the Authority would put in place management improvements, including the preparation of a strategic plan and a business plan coupled with processes allowing for the review of achievement against performance. This would have implications for all the constituent councils, Ms Stokes wrote, including impacting upon the level of administration and operating contributions. Ms Stokes stated that the proposed initiatives would directly benefit the constituent councils, including providing long-term certainty for waste disposal and reduced risk exposure. These advantages were to be contrasted with the position that would exist if the constituent councils did not adopt the proposed initiatives; i.e. the councils would be “price takers” and be subject to commercial landfill market volatility and price increases. Ms Stokes closed her letter by advising that the Authority was “seeking agreement in principle” from DCMB “to committing as a minimum that the existing waste streams will be delivered to [the] Hartley Landfill to June 2015 and to the recommended gate rate increases for the 2007/08 financial year”. In accordance with the resolution of the Authority’s Board, Ms Stokes requested that DCMB respond by 7 February 2007.

On 5 February 2007, DCMB met. In anticipation of this meeting, Mr Stuart arranged for the preparation of a report on the Future Directions Study to which a copy of Ms Stokes’ letter of 9 January 2007 was attached. The report was prepared by Mr Clancey who, in referring to the Study, observed that the constituent councils had not yet committed their waste to Hartley. In his view, membership of the Authority exposed DCMB to a significant risk, which could be ameliorated by all the constituent councils supporting the proposed course of action. He noted that:

At this stage the AHRWMA is only seeking agreement in principle. Assuming this is forthcoming from the constituent councils the AHRWMA would then need to prepare formal documentation and supporting information for consideration by the constituent councils. This would be the subject of a further report to Council.

147 Ex P79.
148 Ex P79.
149 Ex P79.
150 Ex P79.
151 Ex P79.
Mr Clancey further recommended that DCMB support the gate price increase proposed by the Authority.

DCMB resolved that:

1. The proposed further changes to the Charter of the Adelaide Hills Region Waste Management Authority are supported;

2. The District Council of Mount Barker is prepared to agree in principle to commit as a minimum to the existing waste streams collected by Council being delivered to the Hartley Landfill until June 2015; and

3. The recommended gate rate price increases for the 2007/08 financial year are supported.

On 8 February 2007 Mr Stuart wrote to Ms Stokes to advise the Authority of its resolutions.

In cross-examination Mr Stuart said that the only agreement regarding DCMB’s waste stream that he was aware of was the “in-principle agreement” given by way of the council resolution in 2007. He could not recall there being another agreement. (2791)

ii. Alexandrina Council

AC was also provided with a copy of the draft Future Directions Study which it considered at a council meetings on 15 January 2007 and 5 February 2007. Among other things, the minutes of the 15 January 2007 meeting record:

The recommended way forward as proposed by the consultants and endorsed by the Board being that Adelaide Hills Council, Alexandrina Council and District Council of Mount Barker enter into written agreements with the Authority to guarantee that as a minimum the existing waste streams will be delivered to Hartley Landfill to June 2015 and the Authority will have in place a strategic plan and a business plan and ensure that the business will be professionally managed with regular review of achievement against performance expectations regarding matters such as statutory compliance, risk management …

In relation to the Authority’s request for the commitment of AC’s waste to June 2015, the minutes of the 15 January 2007 meeting record that AC was of the view that as it would be able to maintain its existing disposal arrangements for that period, the Authority’s request presented as a reasonable option for AC, even if it meant that it would result in an additional cost of $4.60 per tonne from 1 July 2007. On 5 February 2007 the following resolution was passed:

… that Council support Option 3 in the Hartley Landfill Future Directions Strategy to commit Alexandrina Council to deliver the current waste stream to the Hartley Landfill
until 2015 on the basis that AHRWMA undertake a risk management review, a compliance audit and develop a business plan with management improvements for the operation.

On 15 February 2007 AC wrote to Ms Stokes to advise the Authority of its resolution. 156

In his evidence, Mr Grenfell said he was unaware of AC’s 2007 resolution until 2017. (3394) Further, he was not aware of any discussion about the existence of the resolution within AC. (3395) The minutes of the 15 January 2007 council meeting suggest the recommended way forward was for the constituent councils to enter into written agreements with the Authority to guarantee their waste streams. 157 Mr Grenfell said he had never seen a written agreement between AC and the Authority that obligated the council to take its waste to Hartley, nor had he been told about the existence of such an agreement. (3395) In his capacity as a member of the Authority’s Board, Mr Grenfell had never seen such an agreement. (3396)

Despite the absence of a formal agreement or contract, Mr Grenfell agreed that a core underlying assumption of the Authority’s long-term financial plan was that the constituent councils would continue to dispose of their waste streams at Hartley. (3649) That assumption also underpinned budgets and business plans prepared by the Authority. (3649-3650) In all his time as a member of the Authority’s Board the Authority operated on the basis of the core underlying assumption. (3649)

iii. Adelaide Hills Council

In accordance with the resolutions of the Authority’s Board, AHC also received a copy of the draft Future Directions Study report which it considered at a council meeting on 6 February 2007. Mr Lacy, Director Engineering at AHC, prepared a report for AHC which provided a summary of the draft Future Directions Study. 158 In his report Mr Lacy said: 159

Council is the second largest user of the Hartley facility, behind Mount Barker Council. If operated and managed professionally, the Hartley landfill could offer up to 23 years future service life, with Member Councils being in control of the major strategic, operational and financial decisions affecting the site. In simple terms, being in control (or at least in partnership with others) of our own destiny.

The option to close the Hartley site and transfer all waste streams to other regional landfills is not supported, the main reasons being that this option increases Adelaide Hills Council’s dependence, and therefore risk, of the commercial and operational vagaries of other commercial landfill operations. It is possible under this scenario that prices may

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156 Ex D110.
157 Ex D111.
158 Ex D120.
159 Ex D120.
increase more rapidly than under the Authority-managed option. The inherent commercial risk seems to preclude this option.

Mr Lacy was supportive of AHC agreeing in-principle to the recommendations of the Future Directions Study, but for there to be more than in-principle support he advised that the following three issues would need to be addressed: 160

- Joint commitment by all Member Councils – it would be incumbent that all Member Councils committed to support the Hartley landfill to the same extent – ie that they all committed existing waste streams and for the same period of time (this affects Mt Barker and AHC most, as they are the two largest users of the landfill, and to Alexandrina Council to a lesser extent)

- Nature of the contractual commitments – whilst at present the form of commitments is simply an indicative in-principle support for the Authority’s approach, the nature, form and commercial terms of any specific agreement would need to be agreed before council should proceed further

- Commitment to management & operational improvements – the Authority will need to demonstrate a clear strategy and implementation plan to ensure that the required management and operational changes are effected and that the required operating performance is maintained for the life of the project. This will need to include interim management arrangements whilst permanent arrangements are put in place.

At its 6 February 2007 meeting AHC resolved: 161

That Council advises the Adelaide Hills Regional Waste Management Authority that it agrees in principle with the Authority’s recommendations generally in terms set out below:

a) Adelaide Hills Council is prepared to commit existing 2006 waste tonnages for the Hartley landfill for a period of up to 9 years (ie to June 2015), subject to similar agreements by other Member Councils;

b) Council agrees in principle to increasing gate prices for 2007/08 by $4.20 (and any additional EPA levies) to achieve sustainable financial position;

c) Council supports proposed improvements in the Authority’s operational, financial and management functions in relation to landfill operations, governance and financial reporting to ensure that the Authority operates at or near best practice;

d) Council’s agreement in-principle is given on the understanding that:

i. similar agreements are reached between the Authority and other Member Councils;

ii. the form and content of any proposed contractual agreements be agreed between the Authority and all Member Councils; and

160 Ex D120.
161 Ex D121.
iii. clear strategy and implementation plans be established and endorsed by both the Authority Board and Member Councils to ensure the proposed management and operational improvements are delivered, and that a rigorous review/audit process be established to demonstrate best practice management of the Hartley facility.

On 12 February 2007 AHC wrote to Ms Stokes advising the Authority of the Council’s resolutions.\(^{162}\)

In his evidence, Mr Aitken said that he was unaware of the existence of Mr Lacy’s letter of 12 February 2007 or the resolution of 6 February 2007 until 2017. (3724) Mr Aitken said he had never seen any written agreement between the AHC and the Authority under which AHC was obligated to send its waste to Hartley. (3725) Further, he had never been told by anyone about the existence of any such written agreement. (3725-3726) He was not aware at any time of any agreement between any of the other constituent councils and the Authority under which the council was legally obligated to dispose of its waste at Hartley. (3726) He characterised the relationship between AHC and the Authority as “an ongoing relationship rather than a contractual relationship; it’s a relationship based on the fact that it’s a subsidiary, council”. (3950)

Like Mr Grenfell, Mr Aitken agreed that a core underlying assumption of previous long-term financial plans of the Authority was that the constituent councils would continue to dispose of their waste streams at Hartley. (3817) Mr Aitken made plain that the assumptions underpinning the long-term financial plan were “based on the known circumstances at the time”. (3817) The same assumption underpinned annual budgets and strategic plans prepared by the Authority. (3817-3818) He added: (3818)

Q In each of the matters I have described, whilst you were a board member the core underlying assumption contained remained that which is expressed in para.10.

A Yes, there’s really no other way to describe a long-term financial plan until such time circumstances or assumptions change. That long-term financial plan is current but circumstances do change from time to time and that’s when long-term financial plans are reviewed.

Q That, of course, requires an identification of the change in circumstances as a starting point; do you agree.

A Yes, if there’s a change in circumstance or a potential change in circumstance, yes.

Q That needs to be identified.

A Yes.

Q Second, there needs to be active consideration to the extent to which, if at all, the change in circumstances warrants a change in the planning.

\(^{162}\) Ex D119.
Mr Aitken did not consider AHC’s relationship with the Authority as contractual but rather “a relationship based on the fact that it’s a subsidiary”. (3950)

Mr Salver did not see the council resolution or letter until 2017. (4041-4042) He could not recall attending the meeting of the council on 6 February 2007. At that stage he had no role in waste management. He never discussed the resolution with any of the officers or councillors of AHC prior to 2017. Nor did he discuss the existence of the resolution with anyone at AHC. (4042) Like Mr Aitken, Mr Salver said that he had never seen any written agreement between AHC and the Authority pursuant to which AHC was legally obligated to send its waste to Hartley. (4042-4043) Mr Salver confirmed that extensive searches had been undertaken at the council for such an agreement to no avail. (4043)

Mr Salver agreed that the Authority’s long-term financial plan was based on certain assumptions about the way in which the Authority expected to operate. (4117) He agreed that if the constituent councils chose to dispose of their waste with anyone other than the Authority, the Authority’s long-term financial plan would change significantly. (4085) He said: (4227)

A Yes, in this instance, there are no contracts involved so.

Q Well, there is the long-term commitment, the core underlying assumption between the member councils and the authority, that as equity owners they would provide their waste to the authority on an ongoing basis, isn’t there.

A That’s what the authority was established for.

Q And that simply hasn’t changed during your time on the board, has it.

A At the end of the day, as I recall stating earlier, the authority was established to run a landfill on behalf of the four local governments but they do not determine or it’s up to the councils to determine where they send their waste.

Q Certainly but year on year, with each budget, with each annual report, with each long-term financial plan, there is a core underlying assumption regarding the commitment of waste to the authority, isn’t there.

A In the authority’s budget perhaps but it’s not a core underlying assumption for the council.

Q It’s one with which you agreed.

A It’s one that in terms of the assessment that was before us at the time, I had provided an opinion on, yes.
iv. Rural City of Murray Bridge

The draft Future Direction Study and option three were considered by RCMB at a council meeting on 12 February 2007.\textsuperscript{163} The minutes reveal that RCMB was in the process of preparing its own report on the same issues as covered in the Future Directions Study but including the desirability of RCMB remaining a member of the Authority. The Council resolved:\textsuperscript{164}

1. That item number 60.2 on the agenda of Council [AHRWMA Future Directions Study] dated 12 February, 2007 be received.

2. That Council endorse the ‘Hartley Landfill Future Directions Study’ draft 13/11/2006 16:09 as attached

3. That Council advise the Adelaide Hills Region Waste Management Authority in writing of Councils endorsement of said document

4. That Council notes that it will receive a sustainability analysis document for the Brinkley Landfill during 2007 and that a decision as to Councils future direction in terms of continued membership of the AHRWMA can be made at that time.

By email dated 13 February 2007 the Authority was advised of RCMB’s resolution.\textsuperscript{165}

c. Mr Lorenz’s appointment by the Authority

As part of the review of the Authority in 2006/2007, Mr Lorenz was appointed Executive Officer. He commenced work in that position on 26 April 2007.\textsuperscript{166} The terms of Mr Lorenz’s employment are set out in exhibit D87. Mr Lorenz described the contract as a “standard Mount Barker contract for consultants”. (4610) He agreed that his appointment was part of a “shift in the approach taken by the authority to its activities”. (4530) The contract specified that the position required “commitment to 0.6 EFT with the potential to increase to 0.8 EFT in certain circumstances as required”.\textsuperscript{167}

Annexed to the contract was a job description. Among other things, and consistent with the Charter,\textsuperscript{168} it stated that the Executive Officer was responsible for the day-to-day management of the Authority, the efficient and effective management of the operations and affairs of the Authority and developing and maintaining appropriate relationships with all constituent councils and key stakeholders.\textsuperscript{169}

\textsuperscript{163} Ex D15: 560.
\textsuperscript{164} Ex D15: 260 at p 4275.
\textsuperscript{165} Ex D15: 561.
\textsuperscript{166} Ex D87.
\textsuperscript{167} Ex D87.
\textsuperscript{168} Ex D87; Ex P1: 4.
\textsuperscript{169} Ex D87.
It was put to Mr Lorenz that when he commenced his duties he worked closely with council officers who also held Board positions. Mr Lorenz disagreed. He said that initially his focus was on operational matters. (4614) When it was suggested that it was not possible for him to fulfil the role in 2007/2008 without gaining a detailed understanding of what the constituent councils were doing with their waste, Mr Lorenz explained: (4615)

No, I didn't have a detailed understanding of what they were doing with their waste. We had developed, or the 10-year strategic plan had been primarily developed which looked at what the Authority would be doing over the next 10 years, but yes, that would become important to understand what the needs of the councils were in the future, but it wasn't a focus for me in that early period.

Prior to Mr Lorenz’s engagement, the Authority managed the Hartley site through the Management Committee. It did not have the benefit of an Executive Officer or anyone with experience in operating a landfill. Once Mr Lorenz cemented his position with the Authority, the necessity of having separate management and operations committees no longer existed. They were combined to form the Management and Operations Committee. (4622)

Mr Lorenz gave evidence that he did not have regard to the Future Directions Study in 2007 or 2008. He confirmed that he had only seen the document when he noticed it in Mr Hockley’s office after these proceedings were instituted. He said that he examined it briefly as he assumed whatever was contained in the Study was reflected in the 10-year Strategic Plan. (4486-4487)

d. The report of the Authority’s Chair to the 2007 annual general meeting

On 22 May 2007 Mr Clancey of DCMB sent an email to Mr Lorenz providing him with an update as to the events that had occurred in relation to the Authority over the past year, including the obtaining of the Future Directions Study. (170) Mr Clancey asked Mr Lorenz to assist Ms Stokes, the Chair of the Authority, in preparing the Chairperson’s report for the annual general meeting. Mr Lorenz subsequently prepared the Chairperson’s report which he sent to Ms Stokes under cover of an email dated 17 June 2007. (171) The report commenced by making reference to the Future Directions Study, stating that “[t]he study has led to the Commitment of all Member Councils to current waste streams being deposited at Hartley until June 2015”. (172) As to the outcomes of the study the report provided: (173)

One of the outcomes of the Future directions study has been the engagement of TJH Management Services to prepare a new Strategic plan and Business Plan. Following a workshop with Board Members in May 2007 these documents are now nearing completion. A draft Strategic Plan and Business Plan will be presented to the Board early in the 07/08 financial year.

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170 Ex D137.
171 Ex D137.
172 Ex D137.
173 Ex D137.
Mr Lorenz gave evidence that it never occurred to him that the commitment referred to in the Chair’s report meant there was any agreement or contract in place. He said that he only understood it to mean that the constituent councils were supportive and committed to the model provided by the Authority. (4627)

Despite the reference to the Future Directions Study in his report, Mr Lorenz maintained that he did not access the Future Directions Study in 2007. He did have the new 10-year Strategic Plan. Mr Lorenz was asked: (4629-4632)

Q … the only means by which it was possible to undertake financial planning over a 10-year period was with the benefit of the future directions study and the commitment embodied within it regarding member council waste.

A No.

Q You understood that clearly from what you drafted for Ms Stokes in June 2007.

A No.

Q Looking at Exhibit 137 now produced to you, you’ve seen this previously.

A Yes.

Q This starts as an email chain on 22 May 2007 from Mr Clancy.

A Yes.

Q And you’ve seen yesterday the skeleton that Mr Clancy provided to you in that email.

A Yes.

Q And yesterday you saw also the extent to which the draft that you sent to Ms Stokes on 17 June 2007 contained information additional to that which Mr Clancy set out in his email.

A Yes.

Q That additional information includes the correct title of the Hartley landfill future directions study.

A Yes.

Q That information also includes that the study led to the commitment of all member councils to current waste streams being deposited at Hartley until June ‘15.

A Yes.

Q You wrote those words.

A I wrote those words based on information that was provided to me.

Q You provided those words to Ms Stokes.
A I did.

Q And you also wrote the words ‘This is of fundamental importance to the success of the authority.’

A Again that was provided to me.

Q You wrote those words.

A From information provided to me.

Q You read what you wrote.

A I read - yeah, I read what I wrote but I didn’t have the actual document that it was referring to, I only knew that there was a new 10-year strategic plan which was a stand-alone document which was what I was briefed with in terms to execute over the next 10 years.

Q You understood what you read and wrote.

A Well, I didn’t have the future directions study. I don’t believe it was relevant to the 10-year strategic plan other than yeah, there had been some analysis done in the past but the 10-year strategic plan was a stand-alone document.

Q May I suggest, Mr Lorenz, that you are not being truthful and what you are doing with your answers is trying as best you can to distance yourself from a document which you now regard as unhelpful to your case.

A No. No, I disagree.

Q Please come back to the executive summary. You agree, don’t you, that the 2007/2008 year focuses on establishing the long-term operational model for Hartley.

A This document was already drafted and prepared prior to my arrival, yes.

Q It was your job to implement it.

A It was my job to have the board to adopt that plan.

Q And were the board to adopt that plan, it was your job on a day-to-day basis to manage and implement it.

A Yeah, for the future, the 10-year strategic plan and the future business plans, it was my role to carry out those.

Q Integral to the model was member council waste going to Hartley.

A As I said, those words I didn’t write, they were already drafted.

Q You understood those words when you read them.

A No, my understanding of those words was that the member councils, should they be supportive and provide their tonnes to the landfill into the future, it would
provide the benefits. I did not understand it to mean that there was any contract or agreement in place as there was no contract or agreement in place.

Q Well can I invite you to leave to one side a contract or agreement and just address the words that you wrote which were -

A As I said, I didn’t write the words.

e. The 10-year Strategic Plan and the constituent councils’ waste strategies

As mentioned earlier, the Authority prepared a 10-year Strategic Plan for the period 2007 to 2017 which was based on the Future Directions Study. The foreword recorded:

The Adelaide Hills Region Waste Management Authority (the Authority) was formed in the early 90’s as a Regional Subsidiary under the Local Government Act 1934. Its primary function was to operate the newly approved Hartley Landfill.

The Authority’s charter has recently been amended as required by the transitional arrangements contained in the new Local Government Act 1999 and clause 5.1 requires the Authority:

- prepare and adopt a ten year Strategic Plan for the conduct of its business which will identify its objectives over the period of the Plan and the principal activities that the Authority intends to undertake to achieve its objectives;

- in consultation with the Constituent Councils review the Strategic Plan at any time but subject to a comprehensive review being undertaken at least once in every four years; and

- submit the Strategic Plan to the Constituent Councils for their approval.

Management of the Authority has been mainly by Member Council officers and the operation of the Hartley landfill conducted by Monarto Quarries in accordance with an Operational Agreement between the Mt Barker Council and the Authority. With the increasing complexity of managing an organization and the higher environmental standards for landfill operation, the Board of the Authority recently commissioned a review into all aspects of the Hartley operation. This report, titled “Hartley Landfill – Future Directions Study”, was completed in February 2007 and key recommendations contained in this report adopted by Member Councils by April/2007.

The foreword also recorded that Mr Lorenz was involved in the development of the Strategic Plan. The vision for the Authority as set out in the Strategic Plan was one of “[s]ustainable waste management through shared services for the communities of Adelaide Hills, Alexandrina, Mr Barker and Murray Bridge”. In order to achieve that vision the plan stated that “all stakeholders must have ownership and commitment to this 10-year Strategic Plan” and that “[t]he implementation of the plan will require goodwill and

174 Ex P77.
175 Ex P77.
176 Ex P77.
cooperation across the four Member Councils to achieve the … key objectives”. 177

219 Mr Lorenz gave the following evidence: (4638-4639)

Q … When first you joined [the Authority] Murray Bridge was using Brinkley

A That’s correct.

Q From October 2007 as I understand your evidence all four councils were using Hartley.

A Yes, Alexandrina to a lesser extent, yes.

Q Be that as it may, all four councils were using Hartley.

A All four councils were sending some of their waste to Hartley, yes.

Q In order for there to be confident future financial planning assumptions had to be made about income, do you agree.

A For forward planning, yes, there were assumptions relating to the tonnes and therefore the projections into the future.

Q And the core underlying assumption regarding member council waste was that the member councils would continue to maintain the levels at which they were dumping their tonnes with Hartley.

A Yep, that was an understanding for the projections into the future to be viable. It assumed that the member councils tonnes were coming and the quantities that there were whatever they were at the time and if things changed in the future then that would need to be readdressed.

Q Yes, but without a commitment that the councils would act in that way by maintaining their tonnes at Hartley one couldn’t be confident about the financial planning for the future.

A One couldn’t be 100% confident. You would have to do a review if things changed down the track, if a member council, another member council started bringing more waste or less waste that would need to be taken into account to then reproject.

220 Throughout 2009 to 2012 Mr Lorenz operated on the understanding that each of the constituent councils remained supportive of the Authority’s model. (4641) Accordingly, all documents he prepared containing projections reflected this.

221 Mr Stuart’s attention was drawn to the financial statements contained in the Authority’s 10-year Strategic Plan. 178 He agreed that the statements assumed that the waste tonnages of the constituent councils would continue to be deposited at Hartley. (2811)

177 Ex P77.
178 Ex P77.
In 2009, DCMB prepared and adopted a New Waste Management Strategy 2009-2014. In its Strategy DCMB declared that its strategic direction in waste management was considered consistent with the 10-year Strategic Plan of the Authority and the State Waste Strategy and its vision was “[t]o provide services, facilities and programs that help the community to manage its waste streams in a sustainable manner and an efficient kerbside collection service that continues to increase the level of resource recovery”. More particularly, the DCMB Strategy referred to a key component of the State Waste Strategy as emphasising the establishment of regional waste management groups to promote regional responses to waste management. With respect to the Authority the DCMB Strategy stated:

… The Authority reinvigorated itself in 2006/07, commencing with a review of its charter and a future directions study which included securing agreements with member Council’s [sic] for existing annual tonnages of waste to be maintained until 2015 to ensure the viability of the facility. The Authority has developed a 10 Year Strategic Plan 2007 - 2017 and business plan until 2010. With the Authority playing more of an active role, there are many opportunities for the Authority to provide additional services for member Councils. Additional resources are now available through the Authority including an Executive Officer and Environment Officer to assist with achieving the outcomes of the strategic plan.

…

Council’s waste management strategy will ensure consistency with Councils new strategic plan which is currently in development, the State Waste Strategy and the Adelaide Hills Region Waste Management Authority 10 Year Strategic Plan.

In terms of landfill, the objectives of DCMB were stated as follows:

1. To continue to be a member Council in the Adelaide Hills Region Waste Management Authority (AHRWMA).

2. To contribute to the effective management & operation of the Hartley Landfill through the Board membership and committees of the AHRWMA.

3. As per the written agreement with the Authority, Council has guaranteed as a minimum that the existing waste streams will be delivered to Hartley Landfill to June 2015.

A paper in relation to the Strategy had previously been prepared for the Council’s consideration, which recommended that DCMB adopt the Waste Management Strategy 2009-2014 for implementation. At a council meeting on
15 June 2009 DCMB resolved to adopt the DCMB Waste Management Strategy 2009-2014. In cross-examination Mr Stuart was taken to the landfill objectives set out in the DCMB 2009-2014 Strategy as quoted above. He said: (2763-2764)

Q And we’ve seen the objectives which are the three of them there on p.16 [of Exhibit D2: 17].
A Yes.
Q That was accurate at the time of this strategy report.
A Yes.
Q And we see the strategies, they’re numbered 1, 2, 3 and 4 please read those.
A I beg your pardon, well I read the strategies first and I’ll just review - just allow me to read objectives and strategies. Well I take exception to 3, that’s a point of something that I need to declare about a written agreement with the authority.
Q What do you mean by you take exception.
A It says there ‘As per the written agreement with the authority council has guaranteed as a minimum the existing waste streams will be delivered to Hartley landfill to 2015. I can’t recall a written agreement.
Q I see. Was there a commitment that that be done regardless whether it was in writing.
A I don’t recall a commitment, no.
Q Do you remember any discussion about the idea that the council would guarantee or offer existing waste streams to the Hartley landfill at any time.
A Well as you asked me to cast my mind back to 2008 or thereabouts I don’t recall it then.
Q Of course if there’d been a 10-year plan adopted in around 2005 which utilised the waste streams from the member councils over that 10-year period, that would be a commitment wouldn’t it.
A It’s a commitment, it’s a commitment a form of commitment, yes.
Q And if that was in writing then their [sic] might be a written agreement, would you agree.
A That’s possible, yes.
Q As you sit there today you don’t remember.
A A written agreement, no I don’t.
Q  But you’re not saying there wasn’t one.
A  No, that’s correct.
Q  And you haven’t looked have you.
A  No.
Q  And the probabilities are that you reviewed this in ‘09 and saw no error with respect to the report generally.
A  That’s correct.

Subsequently, cross-examination turned to the policy framework of the DCMB 2009-2014 Strategy: (2791-2792)

Q  We see don’t we at p.7 of the document or p.368 of the book that there was a reference to the authority having reinvigorated itself in 2006, 2007.
A  Yes.
Q  That included a review of its charter.
A  Yes.
Q  It also included a future directions study.
A  Yes.
Q  And it included securing agreements with member councils for existing annual tonnages of waste to be maintained until 2015.
A  Yes, I read that.
Q  It seems doesn’t it likely that between the time of your council meeting in 2007 when in principle agreement was sought, agreements were finally entered into by the time of this strategy report in 2009.
A  Well, the agreement that I’m aware of is the one that you referred to by way of council resolution, the in-principle agreement. I can’t recall another agreement.
Q  Please have a look at p.16 of the document or p.377 of the book at p.16 of the document under ‘Objectives’ item 3 there is a reference to the written agreement with the authority and the council having guaranteed as a minimum.
A  Yes, I see that.
Q  That suggests that there was an agreement entered into doesn’t it.
A  It does, it certainly does, but - yes, that’s right.
Q  And in the course of preparing for this case and refreshing your memory, you haven’t looked for this agreement have you.
A  No, I have not.
Q: You haven’t looked at this strategy document.
A: No, I did not.
Q: You didn’t look at the 10 year strategic plan from the authority either did you.
A: No.

Mr Stuart explained that in adopting the 10-year Strategic Plan, the council had “by extension” committed to the Plan. (2814)

Between 2007 and 2009 DCMB continued to deposit at Hartley. (2820) Further, DCMB continued to deposit at Hartley in the same way from 2009 to 2011. (2821-2823) Mr Stuart explained: (2829-2830)

Q: It had already made a commitment to the 10-year strategic plan of the authority, hadn’t it.
A: It adopted the 10-year strategic strategy, yes.
Q: And in particular it committed to the financial arrangements which underpinned that 10-year strategic plan, didn’t it.
A: If I could respond by saying that as a strategic plan in a local government context is an agreement to a set of policies, practices, strategies. In terms of specifics to do with financial plans, pricing, there is no commitment by virtue of that plan – it’s simply a framework in that sense.
Q: Your own strategy document for 2009/2014 described a commitment to providing the existing waste streams to the Hartley landfill until June 2015, didn’t it.
A: As a strategy, yes.
Q: Well, with respect, as something which it had agreed to do.
A: The council adopted the strategic plan.

In further questioning Mr Stuart said a strategic plan was “for planning, obviously … [i]t’s to provide confidence public confidence in the council’s ability to dispose of its waste”. (2831)

In relation to the three objectives of the DCMB in terms of landfilling outlined earlier in these reasons, Mr Stuart agreed that that was the Strategy for the forthcoming 10 years. (2830) More broadly, the purpose of the DCMB 2009-2014 Strategy was to provide public confidence in the council’s ability to dispose of its waste. (2831) Mr Stuart was asked: (2832)

Q: To your knowledge has there ever been a similar agenda item and papers which went before your council after the adoption of the 2009 strategy which revoked or altered in any way the arrangements described in your council’s strategy until, let’s say, December 2012.
I can recall a request by the authority to adopt its business plan or a request by the authority to have councils commit to waste streams, or recently, and I think that was about 2012. I can recall our council not considering the matter, the rationale being that by virtue of it being a member of the subsidiary it had already made that commitment to the subsidiary. …

Mr Stuart agreed that by the time of January 2013 there had been no council agenda item or resolution to revisit DCMB’s 2009 resolution. (2882) The arrangement between DCMB and the Authority regarding the deposit of waste had not changed. (2882-2883) He referred to DCMB’s 2007 in-principle agreement and the DCMB 2009-2014 Strategy as being “underpinning documents” given that DCMB was a member of the Authority and an owner in the business. (2883-2884)

In terms of the political dimension to the in-principle 2007 agreement and the DCMB 2009-2014 Strategy and other decisions, Mr Stuart said: (2920-2923)

Q  What I’m putting to you is that there was a particularly important political dimension in circumstances where in principle in 2007 and then without any reservation in 2009 your council had committed its waste stream to the authority and on that basis it had continued to provide waste to the authority for every year following.

A  And the question?

Q  The political issue was therefore very important, because of that commitment.

A  The prospect of the political dimension to sending it elsewhere was a very relevant one because the council was a member of the authority, it was a member of a subsidiary. It had committed to becoming a member of the subsidiary and it had been a member of that subsidiary for a long, long time. Relationships had been built and formed with that subsidiary membership. To contemplate a new relationship would have meant that quite rightly I would have expected the council to have had to have been satisfied with the new relationship and leaving an old relationship, potentially.

Q  It wasn’t simply relationship created by the charter, it was also the fact of the commitment of your council’s waste stream that meant that it would be particularly important for you to be able to explain a change in approach.

A  That - well see, I don’t think that occupied my mind - would have occupied - well, it’s hard to say, because you’re talking about a hypothetical situation and I saw moreover the political dimension raising heads by virtue of being a longstanding member of the authority, forming relationships with those people who are co-owners in a business and the prospect of breaking that relationship, or modifying it severely and explaining that process and dealing with that, as well as forming a relationship with a new entity. That’s what occupied my mind and still does.

Q  One of the first - and I suggest obvious questions - were you to decide to withdraw your waste from the authority would be ’But you’ve made a commitment, you did so in principle in 2007, you did so unequivocally in 2009, you’ve done so in the
years since and we’ve made our budget forecasts, our long-term forecasts on the assumption that we would have your waste stream’. Do you agree that that would be an obvious question.

A     One of many.

Q     You would need to have a good answer in order to respond to that obvious question, wouldn’t you.

A     I would have needed a response. It would have been a matter of judgment, whether it would have been good or bad or indifferent. Yes, you are quite right, there would have been a need for an answer.

Q     So far as your counsel was concerned you forecast the potential for a need to explain very clearly what the changed direction was.

A     Again, this is quite hypothetical, but it’s - you know, you’re talking about a process that is not unfamiliar for me. You are talking about almost a sense of advising council on opportunities, different ideas and you go through a process, so you do need answers, you need to do research and you do need to provide those explanations. In terms of any one matter that you are raising, any one particular matter, it would be one of many many considerations, one for which I never assembled all the complete picture, I never got to that point, so it’s difficult for me to focus in on one small element of a large canvas that you need to present to council.

HIS HONOUR

Q     Mr Stuart, when you were talking about the political dimension, do I understand you to mean the fact that you must always factor into what you do on behalf of the council and in it reporting to council, that the members of the council ultimately are answerable to the ratepayers and it’s the influence of the ratepayers.

A     Absolutely, I mean, more than ever our councils are subject to public scrutiny and in many ways the normal decision-making process is influenced by factors to do with public opinion; public opinion is a very powerful factor and sometimes it may be that sound process is lost amongst public opinion, so it’s a very real consideration, it’s one that I deal with every day.

Mr Stuart agreed that the in-principle agreement in 2007, the approval of the DCMB 2009-2014 Strategy, and the approval and acceptance of budget papers and the long-term financial plans reflected DCMB’s commitment to the Authority by virtue of the Charter and DCMB’s waste was committed on a similar basis. (2946) Accordingly, in the absence of anything happening to the contrary, after a short delay, DCMB’s waste was destined for Brinkley. (2947)

AHC published a Waste Management Strategy for 2011-2015.\(^{185}\) The executive summary of the Strategy provided:\(^{186}\)

\(^{185}\) Ex D2: 37.

\(^{186}\) Ex D2: 37 at p 590.
This strategy seeks to support the objectives of Council’s strategic plan and those within zero Waste SA’s State Waste Strategy. Local government is obliged to support state waste management objectives and by adopting this strategy, Council will confirm its commitment to these environmentally sustainable principles and will implement another mechanism whereby to support its own objectives.

Council’s position will be further enhanced by strengthening its relationship and involvement with the Adelaide Hills Region Waste Management Authority (AHRWMA) and with regional initiatives. …

The background section of the Strategy makes reference to AHC’s relationship and involvement with the Authority, including that involvement with the Authority brought the benefits of a regional approach to waste management endeavours the most obvious being “the operation of a regional landfill where the waste disposal needs of member Councils are met, but through the increased economies of scale, cost savings are also achieved”. The AHC strategy further observed that the Authority was “undergoing a strategic planning process in order to identify additional regional opportunities which will also benefit Council into the future”. The Strategy also noted that the activities of the Authority influenced the Council’s waste management direction from a regional and shared services perspective. The Strategy stated:

### 3.3.2 Adelaide Hills Region Waste Management Authority (AHRWMA)

By virtue of being a member of the AHRWMA, Council is supporting sustainable waste management through the provision of shared services made available in the Adelaide Hills, Alexandrina, Mount Barker and Murray Bridge Councils.

The charter of the Authority establishes the regional subsidiary as the coordinating waste management body on behalf of its member Councils. It is independently resourced and working to evaluate all waste services throughout the region and is identifying areas where value can be added by applying a resource sharing model.

Broadly this includes the operation of a shared landfill at Hartley where waste from member Council’s [sic] is disposed of at a competitive member’s price. By gaining economies of scale through a regional service the landfill is operating efficiently and costs can be minimised in order to benefit member Councils.

Later in the Strategy, under the heading, “AHC Existing Waste Management Contracts, Services and Facilities”, reference is made to AHC’s membership of the Authority but, in contrast to the reference to the council’s relationship with All-Bulk Waste, the relationship is not described as a contractual one.

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187 Ex D2: 37 at p 593.
188 Ex D2: 37 at p 593.
189 Ex D2: 37 at p 598.
190 Ex D2: 17 at p 603.
As mentioned, Mr Grenfell conceded that this Strategy assumed the constituent councils would continue to dispose of their waste streams at Hartley.

Mr Lorenz agreed that Hartley presented as a shared service to the constituent councils which, if utilised, provided certain economies of scales. He agreed that the words “shared services” would not tell one very much about the long list of services that are embraced within that concept. (4644) Mr Lorenz explained that the concept of shared services related to where the Authority could identify a benefit by combining particular activities of constituent councils. (4645) Mr Lorenz agreed with the comment that for so long as Hartley appeared to provide benefits for the constituent councils there was no reason to question the understanding that there would be an ongoing commitment. This was on the proviso that the Hartley model was demonstrated as being the best outcome for each of the constituent councils. He agreed that there was no legal imperative obliging the constituent councils to use Hartley. (4646) He gave the following evidence: (4647)

Q ... You see if you were not able to draw on that understanding amongst the member councils as represented on the board about a commitment of their waste tonnes, then there would be what I suggest is undesirable uncertainty about the basis for future financial planning.

A Yes, I didn’t have any commitment from the member councils that I was aware of that required them to continue bringing their waste to the Hartley landfill. It was a concern for me in terms of looking at future projections, so long as I knew, so long as we provided the best outcome through that service, then logically the member councils would continue to support that. If that changed they would let me know and we would make amendments and adjustments accordingly.

f. Consideration

I find that the Future Directions Study did not result in the Authority entering into contractual agreements with the constituent councils pursuant to which the councils committed to the disposal of their waste streams at Hartley. None of Mr Stuart, Mr Aitken, Mr Grenfell and Mr Salver had ever seen or heard of a contract between their respective councils and the Authority governing the disposal of the council’s waste stream. No contract has been tendered in evidence. SWR has made no submission to the contrary.Whilst Mr Stuart was right to concede that the DCMB New Waste Management Strategy 2009-2014 suggests such contracts exist, I find to the contrary.

That is not the end of the matter. SWR’s case does not depend upon the existence of a binding contract, it extends to the existence of an arrangement or understanding. In this regard SWR pleaded a relationship or bond between the Authority and each of the constituent councils falling short of a contract, one unenforceable by legal proceedings but which nonetheless gives rise to an obligation which in the popular or ordinary sense may be described as an arrangement or understanding.
In *Newton v Federal Commissioner of Taxation* the Privy Council commented that “the word “arrangement” is apt to describe something less than a binding contract or agreement, something in the nature of an understanding between two or more persons—a plan arranged between them which may not be enforceable at law”.  

In *British Basic Slag Ltd v Registrar of Restrictive Trading Agreements* Diplock LJ considered what amounted to an arrangement within the meaning of s 6 of the *Restrictive Trade Practices Act 1956* (UK) 4 & 5 Eliz 2, c 68. He said:

… it is sufficient to constitute an arrangement between A and B, if (1) A makes a representation as to his future conduct with the expectation and intention that such conduct on his part will operate as an inducement to B to act in a particular way, (2) such representation is communicated to B, who has knowledge that A so expected and intended, and (3) such representation or A’s conduct in fulfilment of it operates as an inducement whether among other inducements or not, to B to act in that particular way.

In *Federal Commissioner of Taxation v Lutovi Investments Pty Ltd* the High Court considered the meaning of an “arrangement” in the context of s 260 of the *Income Tax Assessment Act 1936* (Cth). Gibbs and Mason JJ, with Murphy J agreeing, said:

In the context of s. 260 an arrangement is something less than a binding contract or agreement, something in the nature of an understanding which may not be enforceable at law (*Newton v. Federal Commissioner of Taxation*). … It is, however, necessary that an arrangement should be consensual, and that there should be some adoption of it. But in our view it is not essential that the parties are committed to it or are bound to support it. An arrangement may be informal as well as unenforceable and the parties may be free to withdraw from it or to act inconsistently with it, notwithstanding their adoption of it.

In *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd*, a case involving price fixing under the TPA, Gray J said:

The word “arrangement” is less clearly understood, and more susceptible of elasticity as to its meaning. In general, it appears to connote a consensual dealing lacking some of the essential elements that would otherwise make it a contract. For instance, a dealing that would otherwise be a contract may be described as an “arrangement” if the parties to it intended not to create a legally binding relationship, but only to give expression to their intentions as to the obligations that each felt morally bound to adhere to in relation to what was to pass between them, or to be carried out by them. Of course, an arrangement might be a broader concept than this, because it is a term the boundaries of which have not been fixed in the traditional understanding of lawyers. The *Oxford English Dictionary* gives as the apparently appropriate meaning of the word “arrangement” “a settlement of mutual relations or claims between parties; an adjustment of disputed or debatable matters; a settlement by agreement”, or alternatively, “disposition of measures for the accomplishment of a purpose; preparations for successful performance”. The ordinary

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191 (1958) 98 CLR 1 at 7.
193 *British Basic Slag Ltd v Registrar of Restrictive Trading Agreements* [1963] 1 WLR 727 at 747.
194 (1978) 140 CLR 434.
195 *Federal Commissioner of Taxation v Lutovi Investments Pty Ltd* (1978) 140 CLR 434 at 444.
understanding of what amounts to an “arrangement” makes it difficult to envisage that an arrangement could come about without express negotiations between the parties, although there have been suggestions that an arrangement can be tacit. See Federal Commissioner of Taxation v Cooper Brookes (Wollongong) Pty Ltd (1979) 10 ATR 128 at 146 per Fisher J, with whom Brennan and Deane JJ agreed, referred to by Franki J in Trade Practices Commission v TNT Management Pty Ltd (1985) 6 FCR 1 at 24 in the context of s 45(2) of the Trade Practices Act. At the very least, there must be some express communication between the parties, although what is said may not amount to offer and acceptance for the purposes of the law of contract. The need for express communication is also suggested by the use of the verb “make” in conjunction with both “contract” and “arrangement” in s 45(2)(a) of the Trade Practices Act. It is hard to see how two parties could “make” an “arrangement” without doing so expressly, at least as to the substance of the arrangement, even if the acceptance by one party of what the other has communicated is implicit in some act, rather than expressed in words.

The word “understanding” is obviously intended to connote a less precise dealing than either a contract or arrangement. This is so because of the meaning of the word “understanding” itself, and because, in the terms of s 45(2)(a), the parties to it may “arrive at” it instead of making it. Once again, the Oxford English Dictionary supplies an appropriate definition: “a mutual arrangement or agreement of an informal but more or less explicit nature.” It is the informal and less explicit nature of an understanding that led Smithers J to describe the concept of an understanding as “broad and flexible” in L Grollo & Company Pty Ltd v Nu-Statt Decorating Pty Ltd (1978) 34 FLR 81 at 89.

The concepts of an agreement, an arrangement and an understanding may be said to occupy a spectrum with an understanding being, arguably, the least formal. All may be said to involve forms of commitment operating for so long as they subsist. Critical to any agreement, arrangement or understanding is the existence of a meeting of the minds as to the content of the agreement, arrangement or understanding, which leads the parties or one of them to adopt a course of conduct consistent with the agreement, arrangement or understanding, for so long as the agreement, arrangement or understanding subsists. Whilst an agreement or arrangement may be said to involve some form of positive communication and an understanding may be tacit, in each instance the parties nonetheless consensually arrive at a consensus as to some action or conduct. One consequence of informality is that an arrangement or understanding may be fleeting.

In Australian Competition and Consumer Commission v CC (NSW) Pty Ltd Lindgren J considered what amounted to an arrangement or understanding for the purposes of the prohibitions on price fixing contained in ss 45 and 45A TPA, as distinct from an expectation.197 After reviewing the authorities Lindgren J observed:198

The cases require that at least one party “assume an obligation” or give an “assurance” or “undertaking” that it will act in a certain way. A mere expectation that as a matter of fact a party will act in a certain way is not enough, even if it has been engendered by that

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party. In the present case, for example, each individual who attended the Meeting may have expected that as a matter of fact the others would return to their respective offices by car, or, to express the matter differently, each may have been expected by the others to act in that way. Each may even have “aroused” that expectation by things he said at the Meeting. But these factual expectations do not found an “understanding” in the sense in which the word is used in ss 45 and 45A. …

[emphasis in original]

It seems to me that an agreement, arrangement or understanding, whilst it subsists, comes with restrictions that lend to each the character of a commitment with attendant obligations. An expectation does not.

It is unnecessary in this case to go further and consider such things as whether an arrangement contemplates the existence of mutual obligations. I am not concerned here with the construction of a statute, but the characterisation of a relationship.

At its 5 February 2007 council meeting, DCMB resolved to “agree in principle” to commit to disposing of the existing waste stream collected by the council at Hartley until June 2015. At its 5 February 2007 council meeting AC resolved to deliver the current waste stream to Hartley on the basis that the Authority “undertake a risk management review, a compliance audit and develop a business plan with management improvements for operation”.\footnote{Ex D110.} At its 6 February 2007 council meeting AHC agreed “in principle” with the Authority’s recommendations including that AHC dispose of its waste stream at Hartley for up to nine years “subject to similar agreements [being entered] by other Member Councils” with the form and content of any proposed agreement to be agreed.\footnote{Ex D121.} On 12 February 2007 RCMB resolved to endorse the Future Directions Study but RCMB’s continued membership of the Authority was to be considered when RCMB’s sustainability analysis became available. There is no evidence that any of the constituent councils returned to consider the question of an agreement with the Authority and the terms and conditions of such agreement. Quite clearly, the February 2007 council meetings did not result in the expression by any council of an unequivocal commitment to dispose of its waste stream at Hartley.

In my view the commitments to which Ms Stokes referred in her report to the Authority’s 2007 Annual General Meeting,\footnote{Ex D137.} as drafted by Mr Lorenz, was that given in the February 2007 council meetings to which I have referred.

For three of the constituent councils, the in-principle commitment sought by the Authority meant no change to what was already occurring. It was only RCMB that was asked to consider changing its current practice, and even then that was not required by option three. Thus, for DCMB, AHC and AC the in-principle commitment sought was likely not to have been a decision of any great
moment. I suspect that the more significant decision surrounded the increase in price. Ms Stokes advised DCMB that it was a competitive price.

There is no evidence that a truly competitive waste disposal market existed in 2007 or that landfills other than Brinkley posed as a competitor to Hartley for DCMB’s, AHC’s and AC’s waste streams. One reason for the establishment of the Authority was to allow for the closure of smaller landfills and the consolidation and regionalisation of waste disposal services.

Still, each of the four constituent councils disposed of its waste stream at Hartley from 2007 until the Authority left the Hartley landfill. And, clearly, the Authority was able to rely upon them doing so in the projections it included in budgets, plans and strategies prepared during that period. But is the conduct of the constituent councils the product of an arrangement or understanding with the Authority, or, the product of an absence of competition and choice? Is it the product of a meeting of minds, or simply the acceptance of a service unilaterally considered suitable?

The DCMB and AHC waste strategies do not take matters very far. They certainly are indicative of an attitude on the part of the respective councils toward the Authority and the service it provided. And that attitude may be regarded as resulting in a form of commitment made, but it lacks mutuality. The strategies would certainly give rise to an expectation in the Authority.

However one labels the relationship between the Authority and each one of the constituent councils, I find that none of the councils purported to bind themselves in the sense of creating legal relations, to the disposal of their waste streams with the Authority. The support given for the future direction of the Authority must be considered in the context in which it was sought and the environment in which it was foreseen the Authority would operate. It must be remembered that the Authority did not exist for its own ends, but to serve the ends of the constituent councils. Further, the constituent councils were not obliged under the Charter to accept the services provided by the Authority. The extent of the commitments obtained in 2007 was to the direction the Authority indicated it intended to take. In the case of each constituent council it was a commitment to a model intended to service and satisfy the needs of the councils without guaranteeing that it would, and, no contracts being entered, without any guarantee that the councils would remain customers if the model did not, or, for that matter, even if it did.

Tacitly, the constituent councils remained committed to the model, hence they continued to dispose of their waste at Hartley and, in some instances, developed their own complementary strategies in parallel. This tacit ongoing commitment of the constituent councils to the model meant that the Authority could and did plan on the constituent council tonnages coming to Hartley. It may

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202 RCMB was disposing of its waste at Hartley by the time Mr Lorenz was employed.
be inferred that from 2007 the model adequately served the needs of the constituent councils without the need for any contractual agreement to be entered.

256 But the model was fragile in two respects. First, any and all of the constituent councils could abandon it at any time. Second, until the arrival of SWR, it appears to have operated with a false sense of security in that there does not appear to have been any real competition in terms of the provision of waste services, particularly those relating to landfilling.

257 I find that between August 2012 and February 2013 there was an understanding of the kind I have endeavoured to describe between the Authority and each of the constituent councils.

258 At another level, the Charter was itself a form of an agreement, arrangement or understanding, one that reflected that the constituent councils may engage with the Authority to differing extents, and possibly not at all. In the case of each council the extent that it utilised the Authority’s landfilling service was reflected in the equity that the particular council held in the Authority. Thus, commitment by the constituent councils to the Authority was addressed indirectly by the Charter in the calculation of equity. The penalty for not committing was that the recalcitrant council would hold less equity and be entitled to a smaller share in any possible dividend. Such councils would still be liable for its share of the administrative contribution but would contribute less to the operating contribution and would also be less exposed to liabilities. The point is that the Charter itself acknowledged that any commitment was one of imperfect obligation and provided for appropriate adjustments should a council prefer to contract with an alternate service provider.
B. The Authority and Hartley (1991-2011)

As mentioned, the Authority operated a landfill at Hartley from November 1991 under a licence granted to it by the then owner of the site, Herbert Harvey (the 1991 licence). As also mentioned, the 1991 licence contained a right of renewal for a period of 10 years from 27 November 2001 and a further right of renewal from 27 November 2011. Clause 4.1 of the licence recorded that in consideration for the licence being granted and by way of compensation for the damage occasioned to the site, the Authority would pay $0.80 per tonne of waste brought onto and deposited on the land in the first year, increasing to $1.00 per in the second year. The amount payable was to be assessed monthly and to be paid on the 10th day of the following month (the royalty). On the second and subsequent anniversaries of the commencement of royalty payments, the rate payable was to be adjusted in accordance with the CPI published for the quarter ending immediately prior to the date of the anniversary.

Clause 7 of the 1991 licence conditioned the right of renewal on the Authority’s compliance with, amongst other things, all statutes, ordinances, proclamations, orders or regulations, present or future, affecting or relating to the use of the site, and with all requirements that may be made by any governmental, municipal, civic or other authority, including planning and the Landfill Management Plan (the 1991 LEMP) annexed to the 1991 licence.

Planning approval obtained for the site’s use as a landfill included a condition that the site “not be used or operated as a public depot and no waste shall be deposited in it other than by the District Councils of Stirling, Mount Barker and Onkaparinga, or by any other council which becomes a member of the controlling authority formed by those councils for the purpose of operating and managing the depot hereby approved, or by any contractor acting on behalf of any such council”.

The 1991 LEMP annexed to the 1991 licence contains a convenient explanation of the layout and intended operation of the Hartley landfill:

6.1 Landfilling Method

The general method of filling the site will be by dividing the site into 16 individual cells each approximately 100 m × 100 m. Figure 3 shows the suggested cell arrangement for the landfill site with a cell sequence starting from the higher elevated areas and working towards the lower parts thereby avoiding the horizontal infiltration of surface run-off.

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203 Ex P1: 13. See also Ex P1: 2 (Certificate of Title, Volume 5500 Folio 460).
204 Ex P1: 13 at cl 3. See also Second Statement of Claim at [7]; admitted in Third Defence at [5].
205 Ex P1: 13 at cl 4.2. If the royalty was left unpaid, it attracted interest at a rate of 2% per month thereafter.
206 Ex P1: 13 at cl 4.3.
207 Ex P1: 12 at pp 234-235. See also Ex P7: 201.
208 Ex D1: 10 at cl 6.1-6.2.
water into existing landfill cells. Each cell will be initially excavated 2.0 m and then be filled using approximately 2.0 m lifts until the final landform is reached. Details of this operation are shown on Figure 4. Two to four lifts will be required to achieve the final landform at a maximum of 6 m above the current floor level. The process of restoring the site to rural use will take place progressively on a cell to cell basis, i.e. immediately after the completion of a cell, depending on seasonal factors, the cell will be revegetated. Figures 5 to 8 show operational stages of the landfill site.

Before commencing the filling operation each cell must be prepared as follows:

- extending the site access road to the cell;
- excavating the whole of the cell to a level approximately 2.0 m below the existing quarry floor;
- stockpiling the excavated material in the vicinity of the cell for later use as cover or stormwater diversion bund material;
- placing a mound of excavated material approximately 1.5 m high on the borders of the cell;
- establishing a leachate control and collection system at the bottom of the cell (refer Section 9)

The method of filling is modified from that previously proposed because of the need to line the entire base of each cell. It is now proposed that each wholly excavated 100 m × 100 m cell will be filled in four sections, each approximately 25 m wide × 100 m long. Filling will start at the most elevated section and finish at the lowest section (refer Figure 10). Each individual lift will be commenced at the most elevated part of the current cell which will ensure that surface water inside the cell will always drain away from the watering face (refer Figure 11).

On completion of each cell, final cover will be placed to obtain the final landform shown on Figure 9. The crests of the hill immediately to the south and east of the quarry are at a level of approximately 80 m AHD. A similar level will be provided to the top of the filled landform, which will have a domed brow similar in form to the surrounding landscape with slopes of 2-6%. The slopes ranging from 2%-6% will facilitate runoff and reduce infiltration and consequent leachate generation. The landscaping operations are detailed in the Appendix.

6.2 Stormwater Management

Passage of runoff from the surrounding landfill area to excavated cells/adjacent areas will be avoided by:

(i) providing earth bunds around cells to divert runoff away from excavated cells during filling

(ii) grading trenches and area fill operations so that surface run-off is directed away from the working face to a sump where it can be pumped out and, if necessary, treated, before disposal in the retention basin under (iii) (refer Figure 10)

(iii) collection of all other site runoff in the detention basin. This is runoff from completed, revegetated areas and from areas not yet used for landfill; the basin will trap eroded soil. It will be sized to cope with a 5 year Annual Recurrence Interval storm event. Figure 3 shows the location of the basin. The basin will be constructed while excavating clay material for the liner in cell No. 1 and/or cell No. 2. Collected water will be chemically analysed and treated, if necessary, before releasing it into adjacent watercourses.
The 1991 LEMP also provided for composting post closure, litter, dust, odour, weed and pest control, noise, firefighting, and the security of the site. In addition, the 1991 LEMP contained comprehensive conditions dealing with the necessary monitoring of aspects of the landfill, including the level of fill, stormwater collection, gas and odour, as well as leachate collection and the testing of groundwater.

Leachate is water that has percolated through the waste deposited in a cell becoming contaminated as it does so. There is an obvious need to control leachate particularly to ensure that it does enter ground water. As to leachate the 1991 LEMP provided:

9.1 Leachate Collection System

As a result of proceedings to date a leachate collection system will be installed in each cell.

In concept the establishment of the collection system will consist of:

- excavation of each cell to provide a 2% base slope towards one corner allowing leachate collection in that corner. Advantage will be taken of the natural topography where possible; otherwise this will be achieved by varying the excavation depths in individual cells;
- placement of a clay layer suitable for the purpose of reducing the lateral and vertical seepage of leachate at the bottom and 1 m up the walls of each cell. The clay shall be compacted to a specified density and sufficient in-situ permeability tests shall then be carried out in order to ensure a consistent quality of the lining material;
- provision of 100 mm and 150 mm PVC pipes for reducing surface travel distance of any generated leachate (refer Figure 13);
- provision of a 150 mm layer of gravel or coarse sand over the compacted clay surface to act as a preferred drainage path, to protect the clay during landfill operations and to stabilise the moisture content of the compacted clay layer;
- additional rubble material may be required to provide all weather vehicular access to the floor of the landfill cell;
- if drastic changes in the clay moisture content are observed (e.g. by extensive surface cracking) then appropriate measures will be taken to ensure that the integrity of the clay layer as a lining material is maintained;
- construction of a sump and, after filling, subsequent manhole access in the lowest corner of the cell to allow for collection and subsequent treatment and monitoring of any leachate generated.

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209 Ex D1: 10 at cl 6.3-6.9.
210 Ex D1: 10 at cl 8.
211 Ex D1: 10 at cl 9.1.
The 1991 LEMP also dealt with post-closure monitoring over a period of at least 20 years following completion of waste landfilling operations.\textsuperscript{212} Post-closure monitoring of leachate and gas emissions is particularly important.

In 1995 the EPA Act came into operation. The transitional provisions provided for the granting of a licence under the EPA Act in respect of an activity to which the EPA Act applied and which was lawfully carried on immediately before the commencement of the EPA Act.\textsuperscript{213} Under Part 6 of the EPA Act, a person must not undertake a “prescribed activity of environmental significance” except as authorised by an environmental authorisation in the form of an EPA licence.\textsuperscript{214} The operation of a landfill for waste disposal falls within the definition of a “prescribed activity of environmental significance”.\textsuperscript{215} It is also relevant to the present case to observe that under s 35 of the EPA Act a person may not carry out works for the construction of a structure for use for a prescribed activity of environmental significance without an environmental authorisation in the form of a works approval. Relevantly, a person may not undertake construction of a cell within a landfill site without EPA approval.

It is also relevant to the present case to note that a person may acquire an EPA licence to operate a landfill by way of an application under s 37 of the EPA Act. Alternatively, an environmental authorisation may be obtained by way of transfer of an existing licence under s 49 of the EPA Act.

The Authority operated the Hartley landfill pursuant to an EPA licence granted for a period of five years commencing on 1 February 2012.\textsuperscript{216} Amongst other things, that licence required that the Authority submit a written Landfill Environment Management Plan for the Hartley landfill no later than 30 April 2013.\textsuperscript{217} In the interim, the applicable LEMP was developed in 2008 (\textbf{2008 LEMP})\textsuperscript{218} and replaced the 1991 LEMP as updated in 2003. The LEMPs guide the operation of the landfill.

The 2008 LEMP provides a convenient history of the operation of the Hartley site to 2008:\textsuperscript{219}

3.2 Waste Disposal

The 1991 development approval allows for disposal of solid waste that originates from Council waste collection activities from the Constituent Councils of the AHRWMA (Adelaide Hills Council, Mt Barker Council, Murray Bridge Council and Alexandrina Council). As outlined in the 2003 LEMP, the waste is restricted to:

\textsuperscript{212} Ex D1: 10 at cl 10.
\textsuperscript{213} Environment Protection Act 1993 (SA), Sch 2, cl 5(1) (as in force in 1995).
\textsuperscript{214} Environment Protection Act 1993 (SA), s 36(1).
\textsuperscript{215} Environment Protection Act 1993 (SA), Sch 1, cl 3(1).
\textsuperscript{216} Ex P3: 57.
\textsuperscript{217} Ex P3: 57 at p 689.
\textsuperscript{218} Ex D2: 16.
\textsuperscript{219} Ex D2: 16 at pp 257-258.
Council collected domestic soft waste;

- Domestic hard wastes collected at Council transfer stations;
- Garden and Council waste collected at Council transfer stations; and
- Commercial waste, which is defined as waste material generated by establishments such as office buildings, stores, markets, theatres, hotels and warehouses.

The landfill Licence provides criteria for the receipt, storage, disposal and record keeping for waste soil.

The landfill Licence states that wastes deemed un-acceptable for receipt and/or disposal at the site include:

- any Listed Waste in Schedule 1 Part B of the Environmental Protection Act 1993 [sic] (refer Appendix B); and
- whole automotive tyres.

The EPA Landfill Guidelines prohibit co-disposal of any of the following with the solid waste:

- the two-unacceptable waste types listed above;
- bulk liquids and semi-solid sludges;
- automobiles, white goods and other large metallic objects, explosives: or
- dead animals from commercial activities including poultry, slaughter house, fish hatchery or cannery waste and by-products.

Waste that is currently being disposed at the landfill is originating from the Adelaide Hills Council, District Council of Mt Barker and parts of the Alexandrina Council. Temporarily the Rural Council of Murray bridge [sic] is using Hartley while Brinkley Landfill is closed. These councils operate kerbside pick-up and transfer stations. Waste is transported to Hartley in trucks by operators authorised by the AHRWMA. The general public are not allowed access to the Landfill for waste disposal.

Waste disposal records from the AHRWMA indicate the following waste was received at the Hartley landfill:

- 18,616 tonnes for 11 months in the financial year 2000/2001;
- 21,759 tonnes in financial year 2001/2002;
- 25,455 tonnes in financial year 2003/2004
- 20,793 tonnes in financial year 2004/2005
- 20,935 tonnes in financial year 2006/2007

This LEMP has been prepared on the basis of an assumed future waste disposal rate of about 20,000 tonnes per year being equivalent to between about 25,000 to 30,000 cubic metres of consumed air space, including cover material. The anticipated life of the facility depends on the available airspace for waste disposal. This depends on the depth of excavation as part of cell preparation, the finished landform and the airspace required for the leachate containment system and final cover. Details of the extent of excavation and the
final surface as part of this LEMP are described in Sections 7 and 12. The anticipated operation of the facility under the current AHRWMA waste management plan is until 2015. The plan for the facility beyond 2015 will be reconsidered at that time.

As at 2008, waste had been placed in cells 1, 2 and 3 along the southern boundary of the landfill and in cells 4, 5A and 5B immediately to the north. Cells 1, 2 and 3 had been capped; cells 6A and 7A were next to be constructed. This did not occur as anticipated. Rather, cells 6A and 6B were constructed simultaneously as cell 6 and, as at February 2013, work on cell 7 had commenced.

Returning to the 1991 licence, the Authority exercised the first right of renewal in 2001. In 2011 it sought to exercise the second right of renewal. A dispute arose between the Authority and the Harveys regarding the purported exercise of the second right to renew. That dispute is dealt with below. It was not resolved until 11 February 2013. In the meantime the Authority continued to operate Hartley. In the 2011/12 financial year, the Authority paid $71,500 in royalties (up from $64,800 in 2010/11), for approximately 45,000 tonnes of waste deposited. By the 2012/13 financial year, the Authority was paying royalties of $1.62 per tonne. The requirement that the Authority comply with planning approval and the 2008 LEMP remained.

C. The Harveys and the Authority in dispute

a. The dispute over the 2011 right of renewal

As mentioned, the Authority sought in 2011 to exercise the second right of renewal under the 1991 licence. By this time, Herbert Harvey had died leaving the land on which the Hartley landfill was situated to his children.

The Harveys claimed that the Authority had breached the terms of the 1991 licence including the applicable EPA licence. As a consequence, the Harveys considered that the Authority was not entitled to a renewal of the licence agreement. The Authority, on the other hand, claimed that there had been no breach of either the EPA licence or the 1991 licence and that it was entitled to a renewal. Pending the resolution of the dispute, the Authority remained in possession of Hartley and continued to operate the site as a bulk waste disposal facility. The history of the dispute is set out in what follows.

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220 Ex D2: 16 at pp 261, 266.
221 Second Statement of Claim at [8]; admitted in Third Defence at [5].
222 Ex P4: 99 at p 1108; Ex D4: 116 at p 1285.
223 Ex P4: 99 at p 1108.
224 Second Statement of Claim at [8]; admitted in Third Defence at [5].
225 Second Statement of Claim at [10]; Third Defence at [6]; admitted in Second Reply at [1].
226 Second of Claim at [10]; Third Defence at [6]; admitted in Reply at [1].
227 Second Statement of Claim at [9]; admitted in Third Defence at [5].
In his statement Mr Lorenz tells of the desire on the part of the Authority to achieve greater security of tenure at the Hartley landfill.\textsuperscript{228} The concern was that the licence did not provide sufficient security given the long-term nature of the landfill business and the waste disposal needs of the constituent councils. Consequently, the Harvey family was approached with proposals that the Authority enter into a long-term lease or alternatively purchase the site.\textsuperscript{229} In the discussions that followed it was made known to the Authority that the Harvey family was not in favour of selling the Hartley site to the Authority\textsuperscript{230} but was interested in an arrangement that maintained an ongoing royalty payment. It appears that prior to June 2011 neither party was legally represented in the negotiations, although the Authority had engaged the assistance of Knight Frank. In a letter dated 6 June 2011 addressed to Mr Robin Harvey, Knight Frank advised that as the Hartley site was not for sale, the Authority would seek to take up the option to extend the licence pursuant to which it would occupy the site for a further 10 years.\textsuperscript{231} The same letter made plain that the extension of the licence was viewed by the Authority as a short-term fix for a long-term problem, being security of tenure.

On 23 August 2011 Mr Lorenz wrote to Mr Robin Harvey enclosing a Notice of Exercise of Right to extend the term of the licence.\textsuperscript{232} In his letter, Mr Lorenz took the opportunity to advise that whilst the extension was for another 10 years, the Authority was interested in continuing discussions about an alternative method of land tenure acceptable to both parties.

On 22 November 2011 Botten Levinson wrote to Mr Lorenz.\textsuperscript{233} Botten Levinson advised that it was acting for the Harveys. Referring to Mr Lorenz’s letter of 23 August 2011 and the Notice enclosed, Botten Levinson observed that the right of extension under the licence agreement was subject to the Authority not being in breach of the licence. The letter then proceeded to advise that the Harveys did not propose to grant the extension sought because the Authority was in breach of the licence. The letter detailed 11 alleged breaches. The letter concluded with the statement that the Harveys wished to discuss with the Authority the winding up of its operations on the Hartley landfill.

Subsequent to receiving the letter of 22 November 2011, Mr Lorenz sought and obtained an assurance from Botten Levinson that the Harveys would take no action to prevent the Authority operating Hartley until after 13 January 2012. Mr Lorenz then advised the Authority’s Board members that he had obtained that assurance.\textsuperscript{234} Further, he advised that the Authority would work through
strategies and options in the event that the Harveys actually wanted the Authority to leave.

278 On 28 November 2011 the M & O Committee met to discuss the dispute with the Harveys. Mr Fisher, a solicitor with Norman Waterhouse Lawyers, was present. Mr Fisher advised the Committee that he had spoken to the Harveys’ legal advisor, Mr Rudd from Botten Levinson, on the previous Friday afternoon. At that meeting, Mr Fisher had been advised that the Harveys wanted the Authority off the land because they had another operator interested in taking over the site. Mr Fisher nominated two possible operators — ResourceCo and Adelaide Resource Recovery.

279 It is plain from Mr Salver’s notes of the meeting that the M & O Committee had turned its mind to the possibility of moving its operations to Brinkley in the event that it could no longer receive waste at Hartley as of 13 January 2012. Mr Lorenz advised at the meeting that six months was needed to set up a waste facility at Brinkley. It was determined that Mr Lorenz would seek further details of the purported breaches of the licence alleged by the Harveys, so that the Authority could review the same and respond. Mr Salver recorded:

Issues & Actions going forward

- An option is to relocate the operation to Brinkley at an estimated start-up cost of $400,000 (with 3 months required to get a cell constructed).
- Michael and Peter to set up the Lawyers/QC for initiating a Court injunction.
- Michael to set up a meeting with the EPA to discuss the issues raised earlier.
- Michael to estimate the capital costs invested into the site and the potential losses if we were kicked off the site, in order to lodge a claim of losses in the event the Harveys close the gates on 13 January.

[Redacted]
- Michael to prepare a briefing note to the Board ASAP in order to update them on what is happening.

280 On 29 November 2011 Mr Lorenz sent an email to the Authority’s Board. He advised that initial indications were that the Harveys actually wanted the Authority to stay but wished to negotiate a new agreement. He advised that the plan going forward was to seek confirmation of the Harveys’ actual intentions and to obtain legal advice regarding the merits of the matter in the event that the Harveys did in fact want the Authority to leave the site. Mr Lorenz noted that it was possible “that there may be a third party involved talking with the Harveys which we will also seek to confirm”. He concluded his email by advising that the Authority’s Board intended to meet with the EPA to fast track the establishment of a new cell at Brinkley in case it was required as a fall back.

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235 Ex P3: 43. See also Ex D131.
236 Ex P3: 43 at p 661.
237 Ex P3: 44.
238 Ex P3: 44 at p 662.
Over the following days the Authority obtained information which revealed that ResourceCo had become involved with the Harveys, that the Harveys were affronted by any suggestion that the Authority would compulsorily acquire the Hartley site, that as the site was considered a family generational holding, the Harveys intended to keep it in the family, and that there remained hope to negotiate an agreed outcome. Whilst lawyers were instructed and fall back positions were to be considered, the aim was to achieve a commercial outcome acceptable to both parties.

By email dated 2 December 2011 Mr Lorenz advised the Authority’s Board that the Authority had received advice from Wallmans to negotiate the dispute with the Harveys or, alternatively, to proceed to mediation. Mr Lorenz also advised that the intention was to act on that advice and to make contact with the Harveys. The Authority would seek an extension of the Harveys’ undertaking not to prevent the Authority receiving waste at Hartley, in order that there be adequate time in which to resolve the dispute. In addition, Wallmans would write to the Harveys seeking clarification of the actual alleged breaches of the licence. The letter was considered necessary because the alleged breaches were linked to the 1991 LEMP which, as indicated above, had been superseded. Mr Lorenz also advised that the Authority was preparing for the worst, including documenting a damages claim and working with the EPA to establish Brinkley as an alternative site if required.

On 7 December 2011 Mr Lorenz sent an email to Mr Stuart. Amongst other things, Mr Lorenz advised that he had learnt that the Harveys had been meeting with Mr Brown, that ResourceCo had offered a royalty of $12 per tonne and that it had been suggested to the Harveys that ResourceCo would receive the same waste tonnage into Hartley. Mr Lorenz had also learnt that the Harveys were prepared to consider two landfill operators on the site (ResourceCo and the Authority) and that they would offer a long-term lease for that purpose, although the arrangement would be on the basis of a $12 per tonne royalty payment. Mr Lorenz advised that the Harveys had agreed to take no action until the end of February, to allow negotiations to continue.

On 9 December 2011 Mr Lorenz, Mr Salver and Mr Peppin met. Mr Salver made notes of what was said during the meeting as was his usual practice. Mr Salver explained in his statement that he and Mr Peppin, and subsequently he and Mr Aitken, would meet with Mr Lorenz on a regular basis to discuss Authority business and to provide support to Mr Lorenz given his limited resources. At the meeting it was suggested that the Authority offer the Harveys...
an increased royalty of around $3 per tonne, approximately a 100% uplift on what was currently being paid.243

By 10 December 2011 the Authority had learnt that the EPA was generally supportive of the reopening of the Brinkley landfill, provided that a new cell was constructed in accordance with EPA approved guidelines.244

On 10 December 2011 Mr Lorenz sent a fulsome email to the Authority’s Board.245 In that email, Mr Lorenz advised that the Authority had approached the Harveys through a third party and had learnt that the Harveys were not happy with the terms and conditions of the existing licence agreement and wanted to negotiate an outcome more favourable. Further, the Harveys had agreed through their solicitors not to take any legal action until the end of February 2012 to allow negotiations to continue. In his email, Mr Lorenz advised the Board that he understood the Harveys had been approached by ResourceCo with a view to ResourceCo operating the Hartley landfill. He understood ResourceCo had offered a royalty of $12 per tonne, which was the position that the Harveys were now taking with the Authority. Currently, he said, the Authority paid $1.59 per tonne. He also confirmed that the Harveys were prepared to offer two landfill operators on the site and that they were prepared to have a long-term lease on the basis of receiving $12 per tonne in royalties. Mr Lorenz went on to state that there was a large gap between the Harveys’ position and that of the Authority. He remarked that the Authority only ever considered the existing licence to be a short-term option. He advised of discussions he had had with the EPA and that Brinkley was an acceptable backup if negotiations failed. He further remarked that if the Authority were to move to Brinkley, it would need to obtain approval from RCMB and a new cell would have to be constructed. Estimates in this regard, he advised, were “well advanced” and “looking positive”. He added, “[w]e will have to also consider increased transport costs and what contractual arrangements are in place with individual Member Councils to properly assess all backup options”.246

On 20 January 2012 Mr Lorenz once again updated the Authority’s Board on the licence dispute with the Harveys.247 In the intervening period Mr Lorenz and the Chairperson of the Authority had met with the Harveys. He reported that the Harveys essentially confirmed what the Authority had learnt through a third party, as previously reported on 10 December 2011. The Harveys’ position was that they sensed the Authority was doing well and as such they should be entitled to a higher royalty per tonne. A royalty of $12 per tonne was again raised. It was also confirmed that the Harveys wished to establish a second landfill operator on the site. The Harveys were said to be of the view that the current licence given to

243 Ex P3: 49.
244 Ex P3: 50.
245 Ex P3: 51. See also Ex D131.
246 Ex P3: 51 at p 674.
247 Ex P3: 54.
the Authority did not prevent this from occurring. It was confirmed that the other proposed operator was ResourceCo. It was suggested that ResourceCo would operate a contaminated soil landfill and a construction and demolition resource recovery operation with a landfill to dispose of the residual waste. Lastly, the Harveys were prepared to look at a long-term lease.

In his report of 20 January 2012, Mr Lorenz advised that the $12 per tonne figure seemed to be firm in the Harveys’ thinking. The Harveys were of the view that the annual increase to their royalty did not match real market value; as much was conceded. However, payment had been made in accordance with what was agreed. Mr Lorenz considered the $12 per tonne royalty inflated, possibly to make up for that which the Harveys considered they had long been entitled. He calculated that to pay the royalty requested would amount to 25% of the Authority’s gross income. He observed that the two-operator option would result in undesirable competition between ResourceCo and the Authority. He referred to the desirability of any new long-term lease as being one that gave total control of the land and any activities that took place on it to the Authority, so as to prevent another operator being established and to avoid the landowner frustrating any new activity proposed. He brought his update to a conclusion advising that it had been requested of the Harveys that they put their position formally in writing to the Authority, so that a formal response could be articulated.

On 25 January 2012 Mr Lorenz, Mr Salver and Mr Peppin had one of their regular meetings. Mr Lorenz updated his colleagues regarding the dispute with the Harveys. Mr Salver’s notes record Mr Lorenz as expecting a push by the Harveys for a royalty of $12 per tonne. The Authority was awaiting a formal letter from the Harveys. Mr Lorenz was also waiting for a formal response from Mr Bond regarding RCMB’s attitude to the Authority using Brinkley. Mr Salver states, “[t]his would be the Authority’s fall-back position in the event the negotiations with the Harveys are not successful.” Mr Lorenz advised that he had received a positive response to a briefing given to RCMB on the issue of the Authority using Brinkley.

On 3 February 2012 Mr Lorenz, Mr Salver and Mr Peppin met again. Mr Salver made a note of the meeting. He recorded that RCMB had agreed in principle to allow the Authority to operate from Brinkley. In fact RCMB considered the reactivation of Brinkley to be advantageous in that it would mean that the $3-5 million cost of closure of the site would no longer be incurred. The Authority could acquire the site and factor the cost of closure into its long-term financial plan.

\[\text{Ex P3: 56.}\]
\[\text{Ex P3: 56 at p 683.}\]
\[\text{Ex P3: 58.}\]
On 8 February 2012 the Authority received the Harveys’ written proposal.\textsuperscript{251} That proposal stated:\textsuperscript{252}

Proposed considerations for AHWMA renewal of licence for landfill at Hartley:

- Long term lease
- Royalties paid per tonnage to reflect commercial value (to be negotiated)
- Market price paid per tonne to be reviewed on a regular basis (to be negotiated)
- Agreement to be reviewed on a regular basis (to be negotiated)
- CPI increase of royalties
- Notified breaches to be resolved and landfill to be operated in accordance with licence agreements
- A second operator to conduct another landfill on the property

On 10 February 2012 Mr Salver, Mr Lorenz and Mr Peppin had another of their regular meetings. Once again Mr Salver made a note of what was discussed at the meeting.\textsuperscript{253} Mr Salver records discussion of an opportunity to tender for the waste of three Riverland councils totalling 20,000 tonnes. It was thought that 20,000 tonnes from the Riverland would make Brinkley viable without receiving any of the tonnage then being disposed of at Hartley. Brinkley had a capacity to take over 40,000 tonnes of waste per annum. The Harveys’ proposal was discussed. The meeting was concerned that the Harveys wanted a second landfill operator on the site. The meeting considered that to be untenable and suggested that Mr Lorenz draft a letter setting out the Authority’s position. It was also suggested that the M & O Committee convene to consider:\textsuperscript{254}

a) The Harvey claim;

b) The legal position;

c) Available options;

d) Planning considerations;

e) Financial considerations; and

f) Recommended strategies going forward

Mr Salver, Mr Peppin and Mr Lorenz met once again on 24 February 2012.\textsuperscript{255} Councillor Bailey, an Authority’s Board member, also attended. Mr Salver took notes. Those notes record that Mr Lorenz reported that he estimated that the Brinkley landfill would cost $2 per tonne more to operate than the Hartley landfill. This included the cost of cell construction. Considering that

\begin{itemize}
\item Ex P3: 59.
\item Ex P3: 59 at p 715.
\item Ex P3: 60.
\item Ex P3: 60 at p 717.
\item Ex P3: 62.
\end{itemize}
the Authority currently paid $1.59 per tonne to the Harveys, which it would cease paying if it moved to Brinkley, the difference if the Authority did move was only 0.41 cents per tonne. Mr Lorenz was undertaking an analysis of various scenarios so that the Authority could ascertain its negotiation threshold in relation to the payment of any increased royalty to the Harveys. The meeting considered that he should undertake an analysis of costs associated with moving if the royalty payable to the Harveys was $3, $4 and $12 per tonne. The meeting also noted that the Harveys had been asked to extend the current lease until the end of March 2012 to enable negotiations to continue. It was suggested that Mr Lorenz meet with the EPA to determine who would be responsible for site remediation and capping, in the event that the Authority was prevented from accessing Hartley.

On 29 February 2012 Mr Brown received an email from Mr Prime of KPMG. Mr Prime reported that he had spoken to Mr Robin Harvey that morning. He had learnt that the Harveys had not progressed very far with the Authority in terms of resolving their dispute. Although there had been some discussion regarding price going forward, nothing had been agreed. The Harveys had granted an extension of the existing licence until end of March 2012 to allow the parties to consider their respective positions. The email went on to advise that Mr Rudd of Botten Levinson was putting together the Harveys’ case on the alleged EPA licence breaches, to be raised with the Authority by the end of March. Mr Prime reported that the Harveys were still keen to have ResourceCo as a potential operator of the landfill subject to the resolution of ongoing negotiations with the Authority. He suggested that Mr Brown and Mr Lucas meet with the Harveys and Mr Rudd in the near future to discuss events.

At a meeting on 8 March 2012 the Authority’s Board resolved to negotiate with the Harveys to convert the existing Hartley licence to a 20-year lease with the option to extend for two 10-year periods. The Authority was also to negotiate a royalty of $3 per tonne and a base rent of $15,000 per annum. In addition, the Authority would seek the registration of the lease on all titles and that it have exclusive use of the property. Further, if the Harveys ever intended to sell the property, the Authority sought the first right of refusal to purchase. The Authority was also prepared to agree to an annual rent review in line with the CPI for both the base rent and the royalty payable. In addition, it was resolved that an offer to purchase the Hartley site should be made for $2.8 million. In parallel to these negotiations, the Authority resolved to commence to re-establish the Brinkley landfill, subject to approval by RCMB and securing a suitable tenure arrangement with the RCMB.

On 15 March 2012 Mr Lorenz wrote to the Harveys advising them of the Authority’s offer. In his letter, Mr Lorenz did not include the offer to purchase

256 Ex D131 at [24].
257 Ex D3: 63.
258 Ex P3: 68.
the Hartley site, merely the terms of a proposed lease as set out in the Board’s minutes of its meeting on 8 March 2012. On 27 March 2012 the Authority was asked to send its best offer to the Harveys’ solicitor, Mr Rudd, via their solicitor.\(^{259}\) The Authority was also advised that the Harveys remained uninterested in selling the site.

On 29 March 2012 Mr Lumsden, acting on the instructions of the Authority, sent an email to Mr Rudd. The purpose of the email was to secure an assurance from the Harveys that they would take no action to prevent the Authority from operating the Hartley landfill until after the end of May 2012. The following day, Mr Rudd responded, confirming that his instructions from the Harveys were that they would allow the Authority to remain on the site until the end of May 2012.\(^{260}\)

Mr Salver, Mr Peppin and Mr Lorenz met on 13 April 2012.\(^{261}\) The Authority was now in the process of undertaking cell design work for Brinkley. Mr Lorenz was due to meet Mr Bond on 2 May 2012 to progress negotiations with RCMB over Brinkley. Thereafter, he was expected to make a presentation to RCMB elected members regarding the Authority’s proposal to operate Brinkley.

In his statement Mr Salver said that he was mindful of the cost to the Authority of engaging experts to prepare cell design plans, but in view of the Harveys’ attitude, considered that the Authority had no other option.\(^{262}\) He makes the point that the uncertainty as to the Authority’s future at Hartley spelt uncertainty for AHC.

Mr Salver, Mr Peppin and Mr Lorenz met again on 11 May 2012.\(^{263}\) Mr Lorenz reported that the Authority’s lawyers were preparing to apply for an injunction in the event that the Harveys shut the Authority out of Hartley. Further, Ian Harvey had been in touch and asked that the Authority’s lawyers contact his lawyers. Mr Lorenz was scheduled to make his presentation to RCMB on 28 May 2012. Ms Stokes, the Authority Chairperson, was also to attend.

The dispute between the Authority and the Harveys had not resolved by 31 May 2012. On that date, Mr Rudd emailed Mr Lumsden to advise that he anticipated obtaining final instructions from his clients within a week.\(^{264}\) He also confirmed that, in the meantime, the Harveys would not take steps to prevent the Authority from continuing to operate the landfill, without giving 14 days’ written notice.

\(^{259}\) Ex P3: 71.
\(^{260}\) Ex P3: 73.
\(^{261}\) Ex P3: 75.
\(^{262}\) Ex D13: 483.
\(^{263}\) Ex P4: 84.
Mr Salver and Mr Lorenz met on 19 July 2012. It appears that Mr Peppin was not in attendance on this occasion. Mr Lorenz provided Mr Salver with an update on negotiations with the Harveys. The Authority via its lawyers had written to the Harveys’ lawyers giving them 21 days to advise of the terms of any licence renewal, failing which the Authority would institute proceedings.

On 25 July 2012 Botten Levinson wrote to Wallmans. That letter advised:

Further to my emailed communication to you dated 31 May 2012, I am now instructed to reiterate my clients’ previous assertions that your client is not entitled to an extension of the Licence Agreement for a further 10 years until 26 November 2021 or at all, and accordingly my client will not grant any extension.

My clients will not take steps to prevent the Authority from continuing to operate the landfill for a further month, that is until after close of business on Monday 27 August 2012, to allow your client sufficient time to make an application to the Court to preserve its rights.

In the event that your client were to seek an interim injunction then my clients are likely to consent to such an order on your client giving the usual undertakings as to damages.

Alternatively, if you prefer to vacate the site rather than litigate the matter, then my clients would be prepared to discuss a timeframe and terms on which such a transition could be effected.

On 27 July 2012 Mr Lorenz sent an email to members of the M & O Committee. The email makes clear that Mr Lorenz was at this time unsure of the Harveys’ intentions and whether there was an option that allowed it to stay at Hartley.

Mr Salver, Mr Piper and Mr Lorenz met on 1 August 2012. Mr Lorenz updated Mr Salver and Mr Piper telling them about the Botten Levinson letter of 25 July 2012. The M & O Committee was to be briefed by the Authority’s lawyers at a meeting later the same week. Mr Salver, Mr Piper and Mr Lorenz considered that a period of four years to vacate Hartley would be desirable, but suspected that any withdrawal would have to occur over a period more like six months. Meanwhile, at Brinkley, construction of cell 6 was nearing completion.

Mr Salver’s notes reflect an understanding that the Authority was negotiating with the Harveys. Any claim for compensation would be made against the Harveys. Any extension of time in which to vacate Hartley was to be obtained from the Harveys. The point is that, for some time, the Authority had planned to move its business without any regard to a competitor setting up at Hartley. Whilst the Authority knew of the possibility that ResourceCo may be in negotiation with the Harveys, all indications in the evidence to this point in time

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265 Ex D12: 484.
266 Ex P4: 92.
267 Ex P4: 93.
268 Ex P4: 94.
were not about competition but continuation at a fresh site of the same service. Thus, for the Authority, it was not a matter of planning to deal with SWR at ResourceCo.

On 3 August 2012, Mr Lumsden, who had spoken to Mr Rudd, advised Mr Lorenz that the Harveys were not opposed to the dispute being referred to mediation after proceedings were commenced. Mr Lumsden advised that Mr Rudd had indicated that the Harveys wanted the Authority to vacate the premises, so that they could bring a second operator on to the site at a commercial rate. The commercial rate translated to a royalty of around $8 per tonne. Mr Lumsden brought his email to a close by asking Mr Lorenz to begin to collate information for the purposes of engaging in a mediation.

Mr Lorenz forwarded Mr Lumsden’s email of 3 August 2012 to Mr Salver that day. Three days later, Mr Salver responded. He suggested some members of the M & O Committee be made available during any mediation to provide technical advice to the lawyers. He added:

On another note, I suggest we do the numbers to see how much more we could offer to pay in royalties and whether or not this would be even close to the $8 per tonne they reckon they can get from another operator. Personally I cannot see how another operator dumping similar material into the landfill without a captive market (e.g. the 4 member Councils of the Authority) could make this work at $8 per tonne. Let us know.

Mr Lorenz emailed Mr Salver on 15 August 2012 in response to Mr Salver’s email of 6 August 2012. He referred to his having done a financial analysis which he attached. He also said he had “spoken with our lawyer and QC in preparation for an initial meeting between them and the Harvey’s lawyer and QC today ahead of a mediation session” and referred to wanting to notify the M & O Committee.

Pausing momentarily; it is plain that the Authority was of the opinion that the “initial meeting” was between the Authority’s lawyers on the one hand and the Harveys’ lawyers on the other. Mr Salver’s comment in his email of 6 August 2012 was made in ignorance of SWR’s plans. From his and the Authority’s viewpoint, whatever plans SWR and the Harveys had for Hartley were being hatched independent of the Authority and anything it may do. As early as May 2012 SWR first broached the terms of the Landfill Deed with the Harveys. At no point in the period to 15 August 2012 did SWR see fit to approach the Authority or the constituent councils.

Proceedings were not instituted and the matter did not proceed to mediation. Rather arrangements were made for the respective parties’ legal

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269 Ex P4: 95.
270 Ex P4: 99.
271 Ex P4: 99 at p 1106.
272 Ex P4: 99.
advisors to meet to discuss the dispute at Murray Chambers on 15 August 2012.\textsuperscript{273}

\textbf{b. Consideration}

By August 2012 the dispute between the Authority and the Harveys was about to enter its second year if it was not already in its second year. None of the Harveys were called to give evidence. The documentary evidence suggests the Harveys felt that the royalty they received was too little. Accepting this, as I do, it is likely that after the best part of a year of being engaged in negotiations their patience with the Authority was wearing thin. Another year had passed and the Harveys were yet to receive what they considered they were entitled to. From the Authority’s stand point, the dispute with the Harveys exposed the risk to its operations as a landfill operator arising from the nature of the tenure it enjoyed at Hartley. It is understandable that the Authority would begin planning for the possibility that it would be shut out of Hartley. The outcome of the negotiations with the Harveys could not be predicted, extension after extension having been granted, but the Authority remained in residence at Hartley at risk of eviction, possibly in the very short term. Negotiations with the Harveys did not concern alternative options for the receipt and disposal of the constituent councils’ waste streams. The Authority was duty bound to ensure that the constituent councils’ waste disposal needs were met and guaranteed as far as possible. It is in that context that work began on re-establishing Brinkley as a landfill to be operated by the Authority.

\textbf{D. The re-establishment of Brinkley}

As mentioned, the possibility that the Harveys would not renew the Authority’s licence to operate the Hartley landfill meant that an alternative had to be found. The evidence suggests that the Authority first commenced the search for an alternative in the final quarter of 2011 and in particular after receiving Botten Levinson’s letter of 22 November 2011.\textsuperscript{274}

In an email dated 25 November 2011 Mr Lorenz advised the Authority’s Board that the Authority was “currently working through strategies and options in the event that the Harveys actually want us to leave”.\textsuperscript{275} Notes taken by Mr Salver at an M & O Committee meeting on 28 November 2011, referred to earlier in these reasons, show that the Committee had begun to turn its mind to the re-establishment of Brinkley.\textsuperscript{276} As noted earlier, those notes also record that Mr Lorenz was given the task of approaching the EPA to ascertain its view regarding site remediation, presumably at Hartley, and relocation of operations to Brinkley in the event that the Authority had to move from Hartley on 13 January 2012 (the Harveys having assured the Authority that they would not take any

\begin{itemize}
  \item \textsuperscript{273} Ex P4: 99.
  \item \textsuperscript{274} Ex P3: 41.
  \item \textsuperscript{275} Ex P3: 42.
  \item \textsuperscript{276} Ex P3: 43. See also Ex P3: 42.
\end{itemize}
steps to prevent the Authority operating Hartley prior to 13 January 2012). The same minutes record Mr Lorenz expressing the opinion that Brinkley needed a six-month lead time if a waste disposal facility was to be established. Further, the estimated start-up cost for relocating to Brinkley was $400,000. It is plain from Mr Salver’s notes that the Authority was considering Brinkley as an alternative and that its intention at this time were to continue to work with the Harveys to arrive at a negotiated outcome to the dispute.

315 Mr Lorenz emailed the Authority’s Board on 29 November 2011.277 In this email, he advised the Board that indications were that the Harveys did not want the Authority to leave the site, but that it was possible that a third party had become involved in the matter. In the final paragraph of the email, Mr Lorenz advised the Board that the Authority was soon to meet with the EPA to confirm what would be involved in fast tracking the establishment of a new cell at the Brinkley landfill “if required as a fall back”.278

316 The documentary evidence makes plain that the re-establishment of Brinkley was prompted by the Harveys’ engagement of Botten Levinson and the articulation of the Harveys’ complaints regarding the Authority’s alleged breaches of licence. Put slightly differently, until the Botten Levinson letter of 22 November 2011, negotiations had been conducted on a comparatively relaxed basis. Things changed, however, with the Botten Levinson letter and the ultimatum that it delivered. That is not to be critical of either Botten Levinson or the Harveys.

317 It was not disputed that if the Harveys carried out their threat and prevented the Authority from operating the Hartley landfill, waste could not be disposed of by the constituent councils to that landfill.279 At that time, the only entity in possession of a licence allowing it to operate the Hartley landfill was the Authority. To shut the gate meant that the landfill would lay dormant until such time as another operator obtained the necessary licences and approvals to operate the landfill or until the dispute with the Authority resolved. In the meantime, the constituent councils would have to find a repository for their waste. In this regard it is important to note that the Authority was established for the purpose of providing for the treatment, recycling and disposal of waste collected by or in the areas of the constituent councils.280 As I have said, in my view this obligation demanded the Authority search for an alternative.

318 Throughout December 2011, Mr Lorenz set about determining what was required if Brinkley were to be re-established as a landfill operated by the Authority.281 This involved consulting with RCMB and the EPA.282

277 Ex P3: 44.
278 Ex P3: 44.
279 Plaintiff’s Closing Submissions at [556].
280 Ex P1: 4 at cl 1.4.4.
281 See Ex P3: 47; Ex P3: 50; Ex P3: 51.
As mentioned earlier in these reasons, on 20 January 2012, Mr Lorenz sent an email to the Board members of the Authority. The purpose of the email was to update the Board on the dispute with the Harveys. In his email, Mr Lorenz advised that he was “costing alternatives including the Brinkley landfill” in the event that the negotiations fell over. He advised that he had planned a briefing with RCMB concerning Brinkley as an option.\textsuperscript{283}

On the same day, Mr Lorenz sent a draft briefing to be presented to RCMB to Mr Bond.\textsuperscript{284} In that email, Mr Lorenz noted that in the event that the Authority cannot negotiate a secure form of tenure, it would need to look at establishing an alternative landfill for member councils. He states that one such option could be the Brinkley landfill which would be viable option on a cost per tonne basis if the Authority brought the current waste streams across from Hartley. He also noted that this would involve significant unbudgeted capital investments by the Authority which would need to be approved by individual member councils.

On 8 March 2012 at the meeting of the Board of the Authority referred to earlier, the Authority considered a confidential report prepared by Mr Lorenz. Under the heading “Move to Brinkley”, Mr Lorenz wrote:\textsuperscript{285}

i. $2 per tonne more to operate (ignoring current Harvey royalty payment of $1.59 per tonne)

ii. $7 per tonne extra transport cost for AHC, DCMB, AC

iii. Brinkley tonnage would be at 40,000 (we would lose 5,000 tonnes of commercial waste)

iv. There would be better potential to increase our current waste catchment area. Rural councils to the east of Murray Bridge are currently assessing future options for the disposal of 20 to 30,000 tonnes of waste as their existing landfills near closure.

v. Operational costs would reduce by about 20% as resources could be shared between Brinkley Transfer Station and the Landfill operations.

The report went on to note that even if the Authority secured all of the constituent councils’ waste streams, the Brinkley landfill was estimated to make a modest profit of $76,000. The Authority resolved to commence activities to re-establish the Brinkley landfill subject to approval by RCMB.

On 13 July 2012 the EPA granted the Authority approval to commence construction of cell 6 at Brinkley.\textsuperscript{286} Mr Lorenz advised Mr Piper and Mr Salver on 30 August 2012 that the setting up of Brinkley was on schedule and that the

\begin{footnotes}
\item[282] See Ex P3: 50; Ex P3: 51; Ex P3: 53; Ex P3: 55.
\item[283] Ex P3: 54.
\item[284] Ex P3: 55.
\item[285] Ex P3: 66 at p 748.
\item[286] Ex D146 at [222]; Ex P3: 57.
\end{footnotes}
new cell will be ready to receive waste "within the next week or two". By 25 October 2012, construction on the new cell at Brinkley was complete.

I agree with the defendant’s submission that there was nothing sinister in the Authority taking the steps that it did to re-establish the Brinkley landfill. The Hartley licence had expired and the Authority continued to occupy the site at the discretion of the Harveys. Implicit in the act of engaging lawyers and instructing those lawyers to send the letter of 22 November 2011, was the fact that the Harveys were serious in their allegations and the action they indicated that they were prepared to take. The operation at Hartley was at risk and the Authority, acting prudently, could not be dismissive of that risk.

It is also apparent from the documentary evidence that in the last quarter of 2011 the Authority was attempting to understand what was motivating the Harveys. Understanding the Harveys’ motivation would provide a basis upon which meaningful negotiation could take place. The negotiations and the Authority’s assessment of risk were further complicated when the Authority learnt that ResourceCo, an entity capable of operating a landfill and a participant in the broader waste industry, was involved. In this context, it seems to me that the Authority was acting entirely responsibly in considering all alternatives for the disposal of the constituent councils’ waste and, in doing so, the re-establishment of the Brinkley landfill.

E. SWR becomes involved in the Authority’s dispute with the Harveys

a. Mr Brown

In late 2011 Mr Brown became aware from discussions with Mr Lucas that the Harveys were looking to refuse to renew the Authority’s licence to operate the landfill and were interested in SWR taking over responsibility for the operation. Mr Brown also became aware that the Authority operated the landfill under a licence agreement in exchange for the payment of a royalty to the Harveys.

In time Mr Brown and Mr Lucas met with Ian and Robin Harvey. The purpose of the meeting was to discuss what the Harvey family wanted and whether the site was of potential interest to SWR.

At this time SWR was not looking to acquire the site or any business in the immediate area. Nonetheless, Mr Brown thought that the site could be a good fit for SWR in that it provided an eastern location with a large local government

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287 Ex P4: 107 at p 1127.
288 Ex P5: 125.
289 Ex P23 at [25].
290 Ex P23 at [24].
291 Ex P23 at [26].
292 Ex P23 at [27].
domestic waste customer base and a foundation to attract the business of commercial waste operators in the region.

In the course of the meeting with the Harveys Mr Brown learnt of the royalty that was being paid by the Authority and that the Harveys considered the amount unfair. Further, he learnt of negotiations on foot with the Authority in which the Harveys were hoping to obtain a better deal. Further again, there was mention of dissatisfaction with the Authority’s operation of the landfill. In his oral evidence, Mr Brown said that he was not concerned with this. He was interested in how the licence arrangement worked. That said, he did consider that the royalty that the Authority was paying the Harveys under the licence was uncommercial. The Harveys put to Mr Lucas and Mr Brown that the Harveys were looking to find a competent site operator and to secure a better return for the use of the land.

Mr Brown and Mr Lucas discussed the opportunity. Mr Brown knew that it was difficult to establish new landfill sites. He considered the Hartley site a good opportunity. Mr Lucas and Mr Brown agreed to progress negotiations with the Harveys.

In around April 2012 SWR commenced negotiating the terms of an agreement with the Harvey family. Negotiations took several months. In the course of those negotiations SWR met with the accountants, KPMG, to discuss the royalty rate and to see if an arrangement could be structured that would be agreeable to both SWR and the Harveys. It was in the course of these negotiations that the Harveys asked SWR to take over the conduct of their dispute with the Authority. At that time both the Harveys and SWR had independently engaged Botten Levinson to act for them. Mr Brown was aware that Botten Levinson had written to Wallmans on 25 July 2012 refuting the Authority’s claim to be entitled to renew the licence and advising that the Harveys would not take steps to prevent the Authority operating the landfill until after close of business on 27 August 2012. In the interim, it was expected that the Authority would either institute legal proceedings to preserve its rights or vacate the site. The letter concluded with an indication that if the Authority was prepared to vacate the site then the Harveys were prepared to discuss a timeframe and terms on which that could be effected.

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293 Ex P23 at [28].
294 Ex P23 at [28].
295 Ex P23 at [29].
296 Ex P23 at [30].
297 Ex P23 at [33].
298 Ex P4: 92.
In his statement Mr Brown said that at this point in time, about August 2012, he was aware that the Authority was considering moving its operations to Brinkley.299

Mr Brown gave evidence that SWR had formed the view that an appropriate royalty to be paid in return for operating Hartley was $8,000 per month or approximately $100,000 per year. (582-583) That figure was based on the tonnage disposed of at Hartley and the long-term liability300 with which the Harvey’s would be left. (583) It approximated the arrangement that SWR had entered into with another family that owned the land on which SWR ran its McLaren Vale operation. (584)

In his evidence Mr Brown said that from SWR’s perspective, the Harveys’ concern was that they were not receiving an appropriate royalty. (586) Consequently, SWR agreed, in effect, to pay the Harvey’s an appropriate royalty immediately, to assume responsibility for the dispute, and, if the outcome of the dispute were favourable to SWR, to negotiate a long-term royalty payment with the Harveys. (586)

Mr Brown said that through the discussions with the Harveys SWR learnt that approximately 40,000 tonnes of commercial waste was being received by the Hartley landfill annually and that the two largest members of the Authority, in terms of waste disposal, were AHC and DCMB. (586) Mr Brown understood that RCMB was the third largest producer of waste disposed of at Hartley and that AC was a small supplier of waste. (586-587) He said SWR “started to get an understanding of how the authority worked” which was very important to SWR. (587) Mr Brown accepted that there was a risk that RCMB would take its waste to Brinkley. (2181, 2201) He thought that it was “clear” and “practical” for RCMB to do so. (2184)

Mr Brown said SWR had some experience with “the makeup of these authorities” through SWR’s involvement with the Onkaparinga Council, amongst other councils. (587) He considered authorities like the Authority to be “very rare” because the market could manage the procurement, processing and disposal of waste in a more cost-effective manner. (587) He understood the constituent councils had each contracted separately for the collection of their kerbside waste and had implemented different kerbside requirements in terms of bin types used. (589) I understood Mr Brown to be saying that the constituent councils’ waste strategies presented possible commercial opportunities for operators such as SWR and ResourceCo.

299 Ex P23 at [34].
300 Mr Brown explained that the long-term liability consisted of the obligation to manage the landfill for 25 years after it was capped and closed in accordance with the requirements of the EPA. The cost of doing so was calculated at $3 to $5 per tonne of waste deposited. (583)
As mentioned above, negotiations between SWR and the Harveys culminated in the execution of a Landfill Deed and a Litigation Management and Funding Deed on 13 August 2012. I deal with the content of those deeds below.

The execution of the Litigation Management and Funding Deed and the Landfill Deed marked the endpoint of SWR’s negotiations with the Harveys and the commencement of its dealings with the Authority. Similarly, the Authority’s negotiations with the Harveys ended and its involvement with SWR commenced.

b. Mr Lucas

The Harveys contacted Benjamin Lucas via email on 15 June 2005. In consequence of that email, Mr Lucas organised to meet Ian Harvey. During the course of their meeting Mr Harvey told Mr Lucas that he was aware that Mr Lucas had been involved in operating a landfill owned by another family and wanted to know how Mr Lucas had managed the relationship. He advised Mr Lucas that his family owned a landfill in the Adelaide Hills occupied by the Authority. He advised Mr Lucas that the Harvey family and the Authority had a licence agreement that involved the payment of a royalty. He said that he felt as though the Authority was taking advantage of the Harvey family and expressed dissatisfaction with the amount paid in royalties. Mr Lucas indicated that he thought the Harveys were being taken advantage of and stated that if the Authority were to leave the site in the future he would be interested in talking about taking over the site.

Late in 2011 Ian Harvey contacted Mr Lucas yet again. He advised Mr Lucas that the Authority’s licence was due for renewal. He also advised that the Harvey family was being pressured by Mr Lorenz to renew the licence but that the Authority would not agree to an increase in royalty. Mr Lucas said that Ian Harvey expressed dissatisfaction on behalf of the Harvey family with the way in which the Authority had managed the site and with the late payment of royalties. He was told that the Harvey family was inclined to refuse to renew the licence and was interested in talking to another operator, such as SWR, about taking over the site.

Following on from this conversation Mr Lucas spoke to Mr Brown. They agreed that SWR would be interested in taking over the operation of the Hartley landfill if the opportunity became available. A short time later Mr Brown and Mr Lucas met with Ian Harvey in order to “get a better idea of what the Harvey
family wanted”. At that meeting, Mr Brown, Mr Lucas and Mr Harvey discussed the Harveys’ concerns about the operation of the site, the royalty payment system and the way in which the Lucas’ companies had managed the McLaren Vale landfill.

In his statement Mr Lucas said:

Following the meeting, I formed the view that [the] Hartley landfill could be a good fit for SWR’s business in that it would provide an eastern location, a large local government domestic waste customer base (the member Councils of the Authority) and the opportunity from that local government customer foundation to build further business with commercial waste operators in the region.

Mr Lucas understood Mr Brown to be of the same view. Consequently, they agreed to continue negotiations with the Harvey family.

From around April 2012 SWR negotiated the terms of an agreement with the Harvey family over several months. Mr Brown was responsible for negotiating the details of the agreement with the Harveys. Mr Brown and Mr Lucas would “occasionally” discuss the ongoing negotiations. By this time the Harveys had engaged the law firm Botten Levinson to act for them in the dispute with the Authority. SWR was also represented by Botten Levinson and continued to be represented by that firm in negotiating the exit of the Authority from the site.

c. The Litigation Management and Funding Deed and the Landfill Deed

As mentioned the arrangements between SWR and the Harveys were reduced to a Litigation Management and Funding Deed and a Landfill Deed, both of which were executed on 13 August 2012.

The Landfill Deed contained the following recitals:

A. The Harveys own sections 299, 301 and 302 in the Hundred of Freeling, comprised in Certificate of Title Volume 5500 Folio 460 (“the Land”).

B. Since November 1991 the Adelaide Hills Region Waste Management Authority (“the Regional Authority”) has used the Land for the purposes of bulk waste disposal and backfill pursuant to agreements which are annexed to this Deed as Annexure 1 (“the Licence Agreement”).

C. The Licence Agreement commenced in 1991 for a term of 10 years with two rights of renewal each for periods of 10 years.

E. The Harveys are dissatisfied with the performance of the Regional Authority and have advised the Regional Authority that they do not propose to renew the Licence Agreement.

F. The Harveys contend that the Regional Authority is not entitled to renew the Licence Agreement.

G. The Regional Authority asserts its right to renewal of the Licence Agreement.

H. SWR wishes to secure an entitlement to use the Land for the purpose of bulk disposal.

I. Subject to the Regional Authority vacating the Land as a result of the resolution or determination of the dispute with the Harveys as defined in clause 4 below SWR will commence using the Land for that purpose on the terms and conditions set out in this Deed.

The obligations of the parties under the Landfill Deed were set out in clause 5. Relevantly, it provided:

**OBLIGATIONS OF THE PARTIES**

5. Subject to the Regional Authority vacating the Land as a result of the resolution of the dispute by agreement or final determination:

5.1 the Harveys hereby agree to grant to SWR and SWR agrees to accept a licence to occupy and use the Land for the purposes of bulk waste disposal and backfill together with all other activities and land uses (including alteration of the surface of the Land and construction of buildings) incidental thereto for a term of 20 years commencing on the first day of the next month following the vacation of the Land by the Regional Authority;

5.2 the Harveys agree that on the written request of SWR made not less than 6 months before the expiration of the term referred to in clause 5.1 and provided that there shall not at the time of such request be any existing breach or non-observance of any of the terms or conditions of this Deed on SWR’s part to be performed or observed they will grant to SWR an extension of the term of this licence for a further 10 years on the same terms and conditions as herein contained save for the exclusion of this clause;

5.3 SWR will make payments to the Harveys at the rate of one hundred thousand dollars ($100,000) per annum by equal monthly instalments from the commencement date specified in clause 5.1 until it commences using the Land in accordance with clause 5.5 hereof;

5.4 SWR will use its best endeavours to secure at its expense as soon as possible following the commencement date specified in clause 5.1 any necessary consents, approvals, licences and other permissions referred to in clause 5.5 hereof;

5.5 subject to securing all consents, approval, licences and other permissions necessary to operate a bulk waste disposal facility on the Land (including
any development approval under the Development Act 1993 and a licence under the Environment Protection Act 1993), SWR will:

5.5.1 commence using the land only for the receipt of waste materials for disposal on the Land by landfill in return for the payment by parties disposing of such waste material of a disposal fee per weight of waste material which fee shall include the levy imposed by the Environment Protection Authority pursuant to section 113 of the Environment Protection Act 1993 together with GST and any other tax or levy payable by SWR in respect of the said waste material;

5.5.2 make payment to the Harveys of amounts equal to:

5.5.2.1 16 percent of gross rubbish income derived by SWR from the Land each financial year; or

5.5.2.2 the amount per annum referred to in clause 5.3 (“the base rate”),

whichever amount is greater;

The balance of the sub-clauses and clauses contained in the Landfill Deed may be passed over as not presently relevant, with the exception of clause 21 which dealt with the termination of the deed. That clause provided that either the Harveys or SWR could, by written notice, terminate the deed if the Authority had not vacated the land within a period of two years after the date of the deed.

Turning to the Litigation Management and Funding Deed, recitals A-G were the same as in the Landfill Deed. The final two recitals in the Litigation Management and Funding Deed stated:317

H. SWR has secured an entitlement to use the Land for the purpose of bulk waste disposal in the event that the Regional Authority vacates the Land as a result of the resolution or final determination of the dispute between the Regional Authority and the Harveys on the terms and conditions set out in a separate deed, a copy of which is annexed to this deed and marked “Annexure B”.

I. As a result of its interest in the dispute, SWR has agreed to fully fund the conduct and determination of the dispute between the Harveys and the Regional Authority on the terms set out below.

The obligations of the Harveys were set out in clause 5 of the deed. Those obligations included:

5. The Harveys agree:

5.1 that SWR will have full conduct of the dispute and the sole responsibility and authority to give all instructions to the solicitors in relation to the dispute;318

317 Ex D4: 98 at pp 1095-1096.
318 Under cl 4 of the deed “the solicitors” were defined to mean the firm of Botten Levinson or such
5.2 that the solicitors may provide to SWR documents and information which would otherwise be confidential to or subject to the legal professional or common interest privilege of the Harveys for purposes related to the conduct of the dispute and no waiver of privilege or confidentiality is thereby intended or occasioned;

5.3 to do all things reasonably required by SWR for the conduct of the dispute including without limiting the generality of the foregoing, providing documents, giving statements (and in doing so give full and frank disclosure of all matters material to the dispute), declarations, affidavits and the like, attending conferences with solicitors and counsel, giving evidence and executing documents;

…

5.5 not to communicate in any manner whatsoever with the Regional Authority or with any of its constituent councils, with any servant, agent or representative of them or to enter into any arrangement with them without the prior written consent of SWR in relation to the dispute or any aspect of it; and

…

Clause 5.6 required the Harveys to keep the terms of the deed confidential save where disclosure was required by law, with the consent of SWR or to legal, financial or other professional advisers.

Clause 6 contained the obligations with which the deed burdened SWR.

6. SWR agrees:

6.1 to use its reasonable endeavours to establish that the Regional Authority is not entitled to renew the Licence Agreement for a further 10 years from 27 November 2011 or at all;

6.2 subject to clauses 6.8 and 7 hereof, to fund the conduct of the dispute including but without limiting the generality of the foregoing, making payment of all solicitors’ and barristers’ fees and disbursements reasonably incurred in the conduct of the dispute, and making payment of any court fees, witness expenses and transcript and all other expenses incurred in the conduct of the dispute and any GST payable in respect of the supply of such goods or services;

6.3 to conduct the dispute and any related litigation in accordance with the obligations of a litigant and to render all reasonable assistance to the Harveys to ensure that they are able to comply with any such obligations;

6.4 to indemnify the Harveys in respect to any orders of a court requiring the Harveys to pay the costs of the Regional Authority in respect to the dispute;

other solicitors as are appointed from time to time with SWR’s approval to have the conduct of the dispute.
6.5 to indemnify the Harveys against any and all claims by the Regional Authority against them for damages in respect of the dispute and against all costs, losses, liabilities and expenses arising out of any court orders or judgments in connection with the dispute;

... 

353 The balance of the deed is not presently relevant.

354 From the above, it is plain that under the Litigation Management and Funding Deed SWR had absolute control over the dispute on behalf of the Harveys. Further, SWR was obliged to apply its resources to securing the departure of the Authority from the Hartley site. SWR was not only obligated to the Harveys to secure such an outcome, both stood to benefit in that thereafter under the Landfill Deed SWR could operate the Hartley landfill and the Harveys would receive an increased royalty.

355 Consistent with the terms of the Litigation and Management Deed, SWR assumed conduct of the dispute on behalf of the Harveys.

356 Mr Levinson was cross-examined on the content of the Litigation Management and Funding Deed. He agreed that by the Deed SWR agreed to fund the conduct and termination of the dispute between the Harveys and the Authority about the Authority’s entitlement to renew the licence. (209) Mr Levinson agreed that the Harveys were in a licence dispute with the Authority about the Authority’s entitlement to renew the licence. (210) Mr Levinson agreed that he knew the Authority wished to renew the licence to exploit as sets on which it had expended capital and that the Authority denied breaching its licence. (210)

357 Mr Levinson was taken to the Landfill Deed. He accepted that as at August 2012, the Harveys agreed to grant SWR a licence to use the Hartley landfill for a period of 20 years under the Landfill Deed subject to the Authority vacating the Hartley landfill as part of the resolution of the dispute between the Harveys and the Authority. (213) Upon the Authority vacating the land, SWR was obliged under clause 5.3 of the Landfill Deed to make payments to the Harveys in the amount of $100,000 per annum until it commenced using the land in accordance with clause 5.5 whereupon, subject to securing all consents, approvals, licences and other permissions, SWR would operate the site as a landfill and make payments to the Harveys equal to 16% of gross rubbish income derived each financial year or $100,000 whichever was the greater. Read together, clauses 5.3 and 5.5 contemplated a situation where SWR was not able to operate the landfill and yet would be required to pay $100,000 per annum. In such circumstances, the Authority would have left the site without transferring its EPA licence to operate the landfill to SWR. Until SWR obtained all necessary approvals it would not have been able to receive waste. Mr Levinson agreed this was so. (214) He also agreed that the commitment made by SWR to the Harveys, in clauses 5.3 and 5.5, was not dependent upon SWR securing the constituent councils’ waste streams. (215)
To this point in time (August 2012), Mr Levinson was not involved in advising the Harveys and/or SWR on their strategy regarding the acquisition of the landfill. (215) Mr Rudd had had initial carriage of the file. (215)

In re-examination, Mr Levinson made clear that Botten Levinson was jointly retained by SWR and the Harveys on or around 14 August 2012. (322)

d. **Consideration**

It is significant that SWR committed itself to operating the Hartley landfill upon the Authority’s departure without any guarantee as to the tonnages of waste that might be received. There is no evidence that any officer of SWR turned his or her mind to the risk that the departure of the Authority may result in the departure of customers, in particular the constituent councils. I have no doubt that Mr Brown’s appraisal of the opportunity presented reflected his assessment of the location of the Hartley landfill as proximate to the constituent councils his appreciation of the likelihood that transport costs would see the constituent councils, or the larger constituent councils, continue to dispose of their waste at Hartley. As he made plain on numerous occasions in his evidence, location is key in the waste disposal industry. Mr Lucas’ assessment of the opportunity was linked to the known customer base. I infer that SWR considered that if it were successful in ousting the Authority, it could operate the Hartley landfill profitably on the basis that it would continue to receive the same or a sufficient portion of the tonnage that the Authority was then understood to be disposing of to the landfill. In arriving at this conclusion I note Mr Brown’s evidence that the Harveys told him of the tonnages received at Hartley. His understanding of the gate price that could be charged for the receipt of those tonnages and the transport cost associated with taking that amount of waste to landfill was all the information he required to assess the opportunity along with the life expectancy of the landfill.

I also infer that the potential profitability of the landfill was such that SWR considered the opportunity too good to pass up (SWR not being in the market for a landfill until approached by the Harveys), one which justified taking over the negotiation of the Harveys’ dispute with the Authority, funding litigation if necessary and paying up to $200,000 to the Harveys before the first customer arrived (i.e. assuming the Authority left the site and it took two years for SWR to get all necessary approvals and have a cell ready to take the waste). Accepting this, the motivation to remove the Authority must have been significant.

One final observation; SWR executed the Litigation Management and Funding Deed and the Landfill Deed on the understanding that if the Authority left Hartley, the waste did not go with it. That is to say, SWR must have considered that the Authority did not control where the constituent councils’ waste went or, if it did, then confronted by being shut out of Hartley, it would nonetheless send the waste to Hartley. However, Mr Brown always expected to lose RCMB’s waste and, possibly, AC’s to Brinkley. Whoever controlled the
waste, one thing is clear from SWR’s point of view; SWR considered that the question of where the waste ended up would be determined by the gate price and transport cost. In relation to the latter, SWR considered that Hartley enjoyed a competitive advantage over any alternative in relation to AHC’s and DCMB’s waste streams due to its proximity to those council districts.

F. The negotiations between SWR and the Authority

a. The meeting at Murray Chambers on 15 August 2012

Mr Levinson attended a meeting at Murray Chambers on 15 August 2012 on behalf of SWR and the Harveys. He was accompanied by Mr Rudd, a solicitor in the employ of Botten Levinson, and Mr Roder SC of counsel. Mr Lumsden from Wallmans attended for the Authority with Mr Hayes QC of counsel. Mr Levinson had only assumed responsibility for the file the previous day. Prior to that, since September 2011, Mr Rudd had had the care and conduct of the Harvey and SWR matters. (113)

i. An overview

Mr Levinson made notes of what was said during the meeting. His notes were admitted in evidence. As is to be expected, the notes are neither a verbatim record of everything said in the meeting nor a comprehensive record of all issues raised. No-one else who attended the meeting at Murray Chambers gave evidence.

Mr Levinson’s notes suggest that early in the meeting Mr Hayes asked what it was that the lawyers were meant to accomplish. Mr Roder’s response was to the effect that the Harvey family wanted the Authority to cease operating the site. That prompted a question from Mr Hayes as to whether or not the site was to be given to someone else at a higher rate. Mr Roder responded saying the operation of the site was to be taken over by SWR. Mr Hayes asked whether the Harvey family would accept a higher rate from the Authority as the Authority had made substantial investment in the site and would like to stay. Mr Roder’s reply was that there would need to be a completely different proposal put if the Authority were to attempt to match the rate offered by SWR. He added the observation that the royalty paid by the Authority was close to unconscionable.

Mr Levinson’s notes suggest that Mr Roder first introduced the topic of the Authority possibly acquiring the land during the meeting. It prompted the question from Mr Hayes as to whether the Harveys were interested in selling the land. Mr Roder indicated that it could not be ruled out “[f]or the right price”. Despite this, he said that his instructions were that the Harveys wanted the

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319 Ex P14 at [5]. See also Ex D16.
320 Ex D16.
321 Ex D16.
Authority off the land. He indicated that the Harveys would consider any request for compensation.

The next notation featured in Mr Levinson’s notes is, “[a]ccept that you did not know about Southern Waste Resourceco”. Self-evidently, this is a reference to the Authority being advised for the first time that the Harveys had actually reached an agreement with SWR for SWR to take over the operation of the Hartley landfill. There is nothing in the notes to indicate that the content of the Landfill Deed and the Litigation Management and Funding Deed was discussed. However, in his report back to Mr Lorenz on the evening of 15 August 2012 Mr Lumsden clearly had some appreciation of the content of the contractual relationship between the Harveys and SWR.

The conversation appears to have turned to the possibility of mediation. Mr Roder commented that he did not think there was much point. The question was asked as to who would attend mediation prompting Mr Lumsden to nominate a number of the Authority’s Board members. Mr Levinson then records the question being raised as to whether or not those representatives would need to go back to their councils. His notes record Mr Hayes as saying that the representatives were a “fairly coherent group so [we’ll] get a fairly consistent approach”. Mr Levinson also notes a comment made by Mr Lumsden in the following terms, “get a range of delegated authorities - a very commercial and businesslike outfit”.

Mr Roder is recorded to have then said words to the effect that the Harvey family was concerned that the Authority was on their land when it should not be and that the Authority’s occupation was costing the Harvey’s money in terms of the return that alternatives could provide. Mr Roder said that if the Authority were to stay the Harveys would require undertakings as to damages to be given. He also commented that the Harveys did not want to draw the matter out. That appears to have prompted an observation from Mr Hayes to the effect that the Harveys had reached an agreement with SWR subject to the Harveys being able to deliver the site. Mr Hayes then referred to a comment made by those representing the Harveys that SWR are much more commercial and that the Harveys were not interested in selling the land as they preferred the income that it derived. Mr Hayes is reported to have said that in the circumstances the Authority needed to know what it needed to offer to match SWR or whether it was a case of the Harveys simply not liking the Authority and wanting it to leave the site. Mr Levinson records that at this stage Mr Rudd said words to the effect that the Harveys have instructed that “the Authority has to go”.

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322 Ex D16.
323 Ex P4: 101.
324 Ex D16.
325 Ex D16.
326 Ex D16.
Mr Lumsden enquired as to the timing of the deal that had been reached by the Harveys and SWR. He was advised that it was uncertain and that the Harveys were still open to discussing the terms on which the Authority might leave the Hartley site. Mr Hayes clarified that the Harveys were not interested in discussing a way forward which enabled the Authority to stay, but rather wished to negotiate how the Authority might leave the land and any compensation that might to be paid in recognition of the investment the Authority had made. Mr Roder commented that SWR and the Harveys would rather talk about cells, staff and an orderly departure than litigate. Mr Hayes referred to each of those matters as things that would be dealt with if litigation eventuated. Mr Roder did not think that was necessarily the case.

At this point in the meeting someone referred to the fact that SWR may offer services to the councils. Mr Levinson’s notes do not attribute the comment to any particular person. In terms of the investment made by the Authority in relation to which it might seek compensation, Mr Lumsden advised that cell 6 had been constructed some 18 months earlier at a cost of $1.6 million and had five years left to run. Cell 7 was under construction with some $200,000 having been spent on a clay lining.

Mr Levinson’s notes then record an interchange between Mr Lumsden and Mr Roder regarding the nature of the alleged breaches committed by the Authority.

Next Mr Levinson notes that Mr Hayes observed that the Harveys and SWR had reached a position where they were not going to be persuaded by anything said by the Authority. Accordingly, the question was how long did the Authority have to leave the site. Mr Lumsden commented that there should be an orderly transition, one in relation to which the Authority managed to get value out of the site. That prompted Mr Roder to comment that the Authority had already gained value out of the site in that it had had possession of the site for a very small percentage of the commercial rate charged to those who disposed of waste to the landfill. Notwithstanding, Mr Roder acknowledged that the Authority had a half-built cell and that, for the purposes of arriving at a resolution, there was room to discuss compensation, but compensation would not involve the Authority staying on the site for years. He added that it was possible that a new operator might see value in taking over the operation of the cell. Further, there might also be room to discuss a new operator taking on the employees currently working for the Authority at the site.

Mr Roder commented that his client was not looking to be belligerent but that if the matter could not be resolved they would proceed to lock out the Authority or litigate. Mr Levinson’s notes record that at this point Mr Hayes asked the question “Resourcoco?” What either of Mr Levinson or Mr Hayes
meant is not known. It appears that the discussion then moved to the question of how to progress negotiations. Mr Hayes commented that now that the Harveys’ position was known he and Mr Lumsden would need to get instructions on whether the Authority wanted to stay or was prepared to litigate. Mr Roder is recorded as saying that the issue needed to be brought to a head and that an undertaking as to damages would have significant consequences. In making that comment it seems Mr Roder had in mind that the Harveys lock the gates to Hartley or the Authority would get an injunction prohibiting them from doing so.

Mr Lumsden returned the discussion to the question of an orderly transition. He raised the question of a withdrawal over time. Mr Roder repeated that it would not be years.

There is a further reference in the notes to compensation regarding cells. Then the following note is made of a comment attributed to Mr Levinson; “disposal of waste stream - subject to new operator’s views on it”. No detail is given as to the context in which that statement or indeed question was made or asked. No answer is recorded, rather the meeting comes to an end with Mr Hayes and Mr Lumsden having to obtain instructions and get back to the other side within 10 days.

Mr Levinson was cross-examined on his attendance at the 15 August 2012 meeting. He characterised the nature of this meeting as an ordinary commercial meeting that occurred in the context of the dispute that had taken place over the Authority’s entitlement under the 1991 licence as renewed.

As at the time of the meeting Mr Levinson was aware that SWR had taken over the dispute from the Harveys. In his view when he attended the meeting he was acting in the capacity as solicitor to both the Harveys and SWR. However, whether he informed those present at the meeting as to the capacity in which he attended he could not recall, though he appeared to imply that he had been given no real opportunity to do so. He did not think that any of the attendees at the meeting announced who they were acting for. No mention was made of the fact that Botten Levinson was acting for both SWR and the Harveys.

Mr Levinson recalled that there was possibly a statement by Mr Roder about SWR taking over the site or some arrangement with SWR. With respect to Mr Hayes’ enquiry as to whether the Harvey family might accept a higher rate, he agreed that implicit in the exchange between Mr Roder and Mr Hayes was the fact that ResourceCo or SWR had agreed to pay a higher rate to the Harveys than that which the Authority was paying.

Early on the evening of 15 August 2012 Mr Lumsden sent an email to Mr Lorenz, reporting back on the meeting held earlier that day at Murray 329

Ex D16.
He commenced by reporting that during the course of the meeting it was revealed that the Harveys had entered into an agreement with SWR conditional on a number of factors which Mr Lumsden presumed included obtaining regulatory approvals and vacant possession. He then said:

The Harveys’ representatives advised that their clients were not prepared to:

- negotiate a revised licence rate;
- negotiate the sale of the site to the Authority; or
- enter into any other long-term arrangement.

In addition to financial considerations, we were advised that the Harveys do not want to continue with the Authority in relation to a commercial arrangement on their site.

The Harveys are prepared to allow sufficient time for an orderly departure by the Authority from the site. We discussed the infrastructure that had been developed on the site by the Authority at great expense. The Harveys’ representatives advised that their clients would not consent to the Authority remaining on the site until the existing capacity had been utilised, however indicated that their clients may be prepared to provide some negotiation in relation to the unutilised aspects of Cells 6 and 7.

The Harveys now wish to progress this matter as, on their case, they are currently being deprived of the significantly higher payments that they will receive from Southern Waste Resource Co.

The Harveys have requested advice as to whether the Authority wishes to negotiate in relation to an orderly transition/compensation scenario. …

Mr Lumsden goes on to refer to future discussions having to address the question of whether the Authority could continue to receive waste at Hartley pending approvals being obtained by the new operator and the necessity of agreeing an arrangement regarding future capping requirements. Mr Lumsden advised Mr Lorenz that neither of those topics were raised during the course of the meeting at Murray Chambers.

If negotiations did not proceed as Mr Lumsden had outlined, he advised Mr Lorenz that the Harveys wished the matter brought to a head.

Mr Lumsden brought his email to a close referring to the fact that in view of the Harveys’ attitude it would now be appropriate for the counsel to review the merits of the Authority’s case taking on board what had transpired during the course of the meeting. Mr Lumsden advised that the Authority will need to inform the Harveys within the next seven to 10 days as to whether it wished to negotiate or litigate.
I note that in his email Mr Lumsden does not refer to SWR as being involved in the meeting at all or to Mr Levinson, Mr Rudd and Mr Roder as representing SWR.

The following day, 16 August 2012, Mr Lorenz reported back to the members of the Authority’s M & O Committee, being Mr Bond, Mr Salver, Mr Grenfell and Mr Key.  

ii. Consideration

Neither party submitted that I should not rely upon Mr Levinson’s notes. In doing so I bear in mind the obvious limitations, being that they were not a complete record of all topics raised nor a comprehensive record of what was said. I rely upon the notes for a general understanding of the discussion of the issues noted as raised at the meeting at Murray Chambers. I find that Mr Levinson’s notes record the substance of comments made and opinions expressed in relation to the issues noted as raised in the course of the meeting.

It seems to me that the precariousness of the Authority’s tenure at Hartley was made abundantly clear; it would be leaving Hartley and within a shorter timeframe than it preferred. In this regard, those present and acting for SWR were clearly acting consistent with the objective of the Litigation Management and Funding Deed. They adopted what may be described as an aggressive or bullish position in relation to the Authority’s continued occupation of Hartley. I mean no criticism of Mr Roder, Mr Rudd and Mr Levinson in this regard. My point is that the Authority was placed under pressure and intentionally so. Not only would it be leaving Hartley sooner than hoped, but there being no discussion of any EPA licence transfer and Brinkley not yet being ready, an alternative disposal site for the constituent councils’ waste needed to be found.

I find that none of Mr Roder, Mr Rudd or Mr Levinson made plain that they were acting on behalf of both SWR and the Harveys. I do not think much can be made of the non-disclosure of SWR’s true involvement or of the fact that Mr Roder, Mr Rudd or Mr Levinson were acting for both SWR and the Authority. The tenor of Mr Levinson’s notes suggest that Mr Hayes and Mr Lumsden did not know that they were speaking to SWR’s legal representatives. Mr Lumsden’s email reporting back to Mr Lorenz also indicates that he did not know that he was speaking to SWR’s lawyers. Mr Levinson’s notes of things said by Mr Roder and himself do not suggest that it was made plain the capacity in which they attended. I do not think this was part of any deliberate plan on the part of SWR. I draw no adverse conclusion. There is, however, one consequence. At this stage the Authority still thinks it is negotiating with the Harveys. The future negotiations contemplated involved the terms of the Authority’s departure and no more. The added complexity of

332 Ex D16.
333 Ex P4: 101.
negotiating with SWR had not, obviously, commenced. Whatever intentions SWR and the Harveys had for Hartley upon the departure of the Authority were not known to the Authority at this time.

I do not overlook the fact that neither Mr Hayes nor Mr Lumsden gave evidence, however on anyone’s case the content of the discussion did not move beyond the Authority leaving the site and a preparedness on the part of the Harveys to discuss compensation. No mention was made of how ongoing environmental liabilities would be discharged. The true complexity of the Authority leaving the site was yet to be grappled with.

Whilst the topic of the constituent councils’ waste steams was raised, it appears to have assumed no significance to those acting for the Harveys and SWR. The Authority is told that future disposal will be “subject to [the] new operator’s views”. Whatever the precise enquiry and whatever the precise response, what is plain is that SWR’s operation of Hartley was not linked to the constituent councils’ continued disposal of their waste streams at Hartley. That is the impression with which Mr Hayes and Mr Lumsden would likely have been left. I have no doubt that the true position was that the disposal of the constituent councils’ waste streams at Hartley was pivotal to SWR’s plans. Equally I have no doubt that confidence in location and that transport cost and gate price were the drivers of any decision as to where waste would be deposited, would more likely than not have resulted in SWR being of the opinion that the future disposal of the constituent councils’ waste streams presented as a non-issue in the action to be taken to remove the Authority from Hartley. I do not overlook the fact that by this time Mr Brown knew that the Authority was considering moving its operations to Brinkley, but as I have said, he was confident in the transport cost advantage of Hartley. (910)

I return to the pressure placed on the Authority. SWR must not only have been confident in securing the constituent councils’ waste streams, but also of obtaining the necessary approvals to operate Hartley. Potentially, SWR would have been liable to pay a royalty without any income being earned by Hartley, pending the grant of approvals. I have no doubt that SWR would have taken steps to minimise any period of inaction at Hartley, but it highlights the risk SWR was prepared to take for the sake of removing the Authority.

b. Mr Levinson’s email of 13 September 2012

On 13 September 2012 Mr Levinson sent an email to Mr Brown and Mr Pucknell. Mr Rudd was copied into the email. The email featured prominently in the cross-examination of most of SWR’s witnesses. I set it out in full here.

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334 Ex D16.
335 Ex D16.
336 Ex D16.
Dear Simon and Chris,

We have done some digging in the various documents published on the AHRWMA and related council web sites to try to get a sense of the volumes of waste and price/cost charged which might be relevant to the extent of your generosity in any deal potentially struck over Hartley.

This is obviously not a complete picture - there are plenty of gaps. The bits of the jigsaw we can find are-

1. Adelaide Hills Council (AHC) sent 8508 tonnes out of a total waste to landfill of 9811 to Hartley in 2009/2010 and estimated 8773 out of a total of 10174 for 2010/11;

2. AHC total cost of waste management for 2010/11 was $3m and disposal costs were estimated at $600,000, with kerbside collection (including bins) $1.97m.

3. “The majority of AHC’s waste is disposed at Hartley …”

4. AHC uses East Waste as its contractor. It is the only Council in AHRWMA doing so and it is a “shareholder” in East Waste. 2 years notice is needed to terminate.

5. Murray Bridge uses SITA. Contract likely to go until April 2015. Also uses SOLO for recycling. 6 year contract expires April 2015 but have a 3 year extension option.

6. DC Mt Barker use SITA with 7 year contract expiring March 2015 with a 3 year renewal option.

7. Alexandrina Council uses a regional subsidiary (Fleurieu Regional WA).

8. Mt Barker Council (DCMB) sends all of its waste to Hartley. The volumes were about 7900 tonnes in 07/08 and 7500 in 08/09.

9. Net profit of AHRWMA in 2010/11 was $183,168 “after depreciation”;

10. Income to AHRWMA in 10/11 for “user charges” was $2,392,508, up on FY10 ($1,968,008) and FY09 ($1,902,702) which might be partly explained by the fact that Brinkley was opened during that FY11 period.

11. Expenses (“Materials, contracts and other expenses”) were $2,077,596 in FY11, $1,429,829 in FY10 $1,334,240 in FY09.

12. AHRWMA rates its non-current assets (“Infrastructure, Property, Plant & Equipment) at $4,030,155 in FY11, $3,576,782 in FY10 and $1,105,930 in FY09.

13. They compact to 0.9 tonnes/cubic metre.

14. Total cost to build cell 6 was $1.4m “conservatively used in forward projections for depreciation and amortization …” but this cost is to be “confirmed by independent costs estimators …”

15. The AHRWMA also provides “project management services to member councils on a fee for service basis.

16. Their budget for 2011/12 provisions $981,000 for Hartley “land rehabilitation”, $1,042,000 for capping cells 1-5, $770,000 for capping cell 6.
17. Budgeted receipts for 2011/12 are $3,425,000 and payments to suppliers and employees are $2,559,000.

Sources of these bits of the jigsaw are the AHC Waste Management Strategy 2011-2015, DCMB Waste Management Strategy 2009, AHRWMA annual reports 2010 and 2011 and the Annual Business Plan and Budget 2012-2013.

I will copy the full documents for you.

The EPA would only give us the total levy for the State and wouldn’t give a breakdown for Hartley (or other sites). We can try and get it by FOI but have not gone that far yet.

Regards

James Levinson

This email provides some objective insight into the thinking of SWR, accepting that Mr Levinson undertook the research evident in the email on instructions from SWR. That is to say, SWR had entered into the Litigation and Management Funding Deed and the Landfill Deed without undertaking anything in the way of a due diligence inquiry. I have formed the view that this was not because SWR management was inept. Rather, Mr Lucas and, in particular, Mr Brown, had extensive knowledge and experience of the waste industry in this State. That knowledge and experience gave the two men confidence in their assessment of the opportunity presented to SWR by the Harveys. Consistent with this, there is no evidence of any financial modelling being done by SWR. Again, I am left with the impression that it was considered unnecessary. Mr Lucas and Mr Brown knew the industry and the drivers associated with evaluating the likely success of a landfill. I infer that information provided by the Harveys as to the tonnages disposed of at Hartley, when coupled with Mr Lucas’ and Mr Brown’s knowledge of Hartley’s location proximate to AHC and DCMB, in particular, and their knowledge of the locations of alternate landfills and the waste industry more generally, was all Mr Lucas and Mr Brown considered they needed in order to evaluate the opportunity presented.

Clearly, SWR was considering compensating the Authority. The purpose of providing the information was not to assess the opportunity presented, but to provide a basis upon which SWR could determine its negotiation threshold on the issue of compensation payable to the Authority. As much is stated by Mr Levinson in opening his email. Paragraphs 1-10 concentrate on the ability of the site to generate income. To my mind that information would have only supported Mr Lucas’ and Mr Brown’s assessment of the opportunity that Hartley presented. Paragraphs 11-16 focus on liabilities. I doubt that this information would have come as any surprise to Mr Brown and Mr Lucas.

Paragraph 10 of the email is significant. It suggests that Brinkley being opened in 2010/11 financial year had an effect upon user numbers. Whether Brinkley was open does not matter. What is important is that Mr Levinson operated on the basis that his reference to Brinkley would be understood by
Mr Pucknell, Mr Brown and Mr Rudd, and considered Brinkley’s operation had possibly affected the Authority’s income. This is consistent with Mr Brown’s evidence of his having had discussions about Brinkley with Mr Levinson and Mr Pucknell. (910-911)

c. The first meeting at Wallmans (14 September 2012)

Neither party disputes that a meeting was held on 14 September 2012 at the offices of Wallmans nor that Mr Brown, Mr Lucas, Mr Pucknell, Mr Rudd, Mr Lorenz, Mr Coleman, Mr Grenfell, Mr Lumsden and Mr Levinson were in attendance at the meeting. With the exception of Mr Lumsden all attendees at this meeting gave evidence of the matters discussed.

i. Mr Levinson

Mr Levinson made notes during the course of the meeting. (235-236) Those notes were tendered in evidence.337

Mr Levinson’s notes record Mr Brown as stating that the Hartley site was “a good fit for our business”. Mr Brown also said that there are “2 ways we can go”, that SWR would “[l]ike to continue [to] accept waste from [the] market plus residuals” and that SWR was in the business of constructing cells, indicating, in effect, that SWR could set up on its own at the site, or the “smart way would be to have [a] take over arrangement”.338 Mr Levinson noted that Mr Brown added that SWR was “keen to contract to take w[aste] from [the] Auth[ority]” and to develop other market opportunities in the region.339 Mr Levinson noted that Mr Brown sought to “[h]ammer home” that SWR was not in the business of litigating, that SWR did not bring the dispute to the table and that the Harveys had approached SWR.340

From Mr Levinson’s notes it appears that at this point in the meeting Mr Lucas announced that SWR was happy to negotiate with the Authority. Mr Lumsden then referred to the fact that cell 7 was partly constructed, prompting Mr Brown to state that if a negotiated settlement could not be reached the EPA would nonetheless require management of the existing cells and, even if SWR built cells alongside those that the Authority had constructed, there would remain the need for the old cells to be monitored and managed. This being so, Mr Brown went on to state that it would be cleanest for SWR “to take those liabilities on”.341

Next Mr Levinson’s notes record Mr Lorenz commenting that future liabilities regarding past operation of the Hartley landfill would be the Authority’s concern and the Authority would be particularly concerned if new

337 Ex D16. Whilst the notes are dated 14 September 2010 in the course of giving oral evidence Mr Levinson explained that the correct date is 14 September 2012. (235)
338 Ex D16.
339 Ex D16; Ex P14 at [28].
340 Ex D16.
341 Ex D16; Ex P14 at [30].
waste was brought onto the site. It appears that Mr Lumsden then raised the question of what material SWR contemplated bringing onto the site. Mr Brown indicated that the waste that to be disposed of by SWR would be similar to the waste disposed by the Authority, but that, SWR would operate under its own licence, the conditions of which it would negotiate with the EPA. 342

Mr Lumsden is then said to have queried when SWR thought it would be in a position to accept waste at Hartley. Mr Levinson replied saying that SWR would be flexible with timing if it were to take over the site. That appears to have prompted Mr Brown to state that SWR would prefer to have an arrangement to keep the same customer group and that the best outcome would be an alignment that works for SWR, the Authority and the Harveys including long-term supply contracts for the constituent councils so that SWR could integrate its growth into the site.

Mr Levinson then records that Mr Lumsden said that the Authority would need to look at a clean break and put a proposal to SWR regarding compensation for the existing infrastructure and the cost of leaving. It appears that the discussion then revolved around information to be provided by the Authority to SWR so that SWR could prepare a proposal for the consideration of the Authority. That proposal would include a rate per tonne for the constituent councils to continue to dump their waste at Hartley. The meeting ended with Mr Levinson undertaking to write to Mr Lumsden setting out the information that SWR required.

Exhibit D16 includes Mr Rudd’s notes made on 14 September 2012. Mr Rudd’s notes record Mr Brown as saying “we most interested in commercial aligning” and “but view as significant site for existing activities anyway”. 343

Mr Levinson said that, his notes aside, he did not have a detailed recollection of what was said at the 14 September 2012 meeting. (240) Mr Levinson conceded that where in his notes he recorded that Mr Brown had said that the site was part of a “long term play” that reference was made in relation to SWR’s intentions. (242) Mr Levinson agreed that when Mr Brown said there were “2 ways we can go” he was referring to SWR constructing its own cells or taking over the licence to Hartley and the cells already constructed. (243) With respect to the first option (SWR constructing its own cells), bearing in mind that the necessary regulatory approvals had to be obtained, it was an option that could take some time to come to fruition. Mr Levinson was of the opinion that it could be as quick as five or six months, although he conceded that it could also take at least 12 months. The process could involve obtaining a separate licence by way of splitting the existing licence, that way one could work within the context of the existing planning approval. (243) Of course, the cell would then have to be constructed but it was not necessary that it be constructed

342 Ex D16; Ex P14 at [33].
343 Ex D16.
in its entirety; construction could be staggered. (244) In short, there are a number of ways in which the necessary approvals could be obtained, some of which would necessitate the cooperation of the existing licensee. If a new licence were sought, the process itself was not difficult, but the delay in designing the cell and in construction, particularly on a greenfield site, could see the time taken before waste was received expand. (244) Whatever time it would take in relation to the Hartley landfill, if the Authority had left the landfill and SWR taken over without the EPA licence being transferred, SWR would have been liable to pay the royalty as set out in the Landfill Deed despite receiving no waste. In the light of this, Mr Levinson agreed that there was “certainly a value”, from SWR’s point of view, in the Authority transferring the licence and cells to it. (245) Under such option, SWR could generate an income immediately upon takeover which would fund its liabilities.

In cross-examination Mr Levinson said he could not recall the discussion of the “two active operator scenario” but conceded he could not say it was not discussed. (248) He was then cross-examined about comments attributed to Mr Brown in the course of the meeting. (260) More particularly, he was asked about his note that Mr Brown had said that SWR “view site strategic for us anyway”. Mr Levinson was asked what was meant by the word “anyway”. (260) Mr Levinson could recall that Mr Brown referred to the Hartley site as having a long-term value but could cast no further light on the meaning of the comment. (261)

In the course of being cross-examined, Mr Levinson was asked about his position of conflict. On the one hand, he was representing the Harveys who wanted the dispute with the Authority resolved as quickly as possible. On the other, he was representing SWR who did not want the site without securing the constituent councils’ waste streams. Mr Levinson agreed that there would be no conflict, however, if SWR wanted the site for its strategic value irrespective of whether the constituent councils disposed of their waste at Hartley. (262-263)

Mr Levinson denied being told at the meeting (or at the meetings subsequent to this) that if the constituent councils continued to deposit their waste at Hartley then the business of Authority would collapse. He said the viability of the Authority was never discussed. (1050)

ii. Mr Brown

Mr Brown did not take notes at the 14 September 2012 meeting. From his memory he said words to the effect that SWR wanted to take over the site in the long-term, that SWR was keen to take on waste from the Authority as well as to develop other market opportunities in the region, and that SWR would prefer to keep the same customer group.344 The meeting ended with SWR indicating that

344 Ex P23 at [37].
further detail was required from the Authority about the site before SWR could make an offer in settlement of the dispute with the Harveys.\footnote{Ex P23 at [38].}

Mr Brown’s evidence on the question of what was said during the meeting at Wallmans on 14 September 2012 was not given with any precision. By that I mean that he did not give evidence of who said what at the meeting and in what order. His evidence was largely a description of the attitude SWR had in going into the meeting and, he said, conveyed at the meeting. As to the former, Mr Brown said that SWR wanted to take over the operation of Hartley and work with the Authority and constituent councils to keep the site operating.\footnote{Ex P22 at [21.1].} In terms of keeping the site operating, he said that SWR approached the negotiations “with a commercial hat on”.\footnote{Ex P22 at [21.2].} The Hartley landfill was an isolated asset whose commercial viability depended upon the continued receipt of 40,000 tonnes of waste.\footnote{Ex P22 at [21.3].} He described the facility without the waste streams as a “stranded asset that’s basically a liability”. Mr Brown said that Hartley was purchased to make a return and in order that it do so it needed to attract the majority of the Authority’s waste.\footnote{Ex P23 at [38].}

In cross-examination, Mr Brown denied saying that if SWR could not secure the council waste streams, the site would still be a “significant site” for their existing activities.\footnote{Ex P22 at [21.1].} He also denied saying that Harley was a “long-term play” for SWR, but accepted that SWR was looking at “other opportunities” at the facility.\footnote{Ex P22 at [21.2].} Mr Brown denied that SWR was looking to have the licence amended to enable the deposit of asbestos and contaminated waste.\footnote{Ex P22 at [21.3].} While there were discussions with the Authority about a side-by-side operation, he said SWR was not open to that option.\footnote{Ex P23 at [38].}

\textit{iii. Mr Lucas}

Mr Lucas attended the 14 September 2012 meeting at Wallmans. He did not take notes at the meeting. In his statement he said he recalled that the Authority’s lawyer said words to the effect that “the Authority is open to a commercial resolution and wants to know what SWR proposes”.\footnote{Ex P23 at [38].} Mr Lucas stated that he said something along the lines of SWR having become involved because the Harveys had approached it and was aware that Mr Lucas had managed a landfill site as a tenant with a farmer in the past and enjoyed a good relationship.\footnote{Ex P22 at [21.2].} Mr Lucas also said that the Harveys were not happy with the way Mr Lorenz had managed the site and, in particular, that payments were late and the site was untidy.\footnote{Ex P22 at [21.3].}

Mr Lucas recalled that Mr Brown said words to the effect that “SWR are only here because the Harveys want us involved. We want to develop the site,
keep the existing Council clients and build other market opportunities”.

Discussion at the meeting then turned to the following topics:

22.1 The fact that the Authority had partly built cell 7 and wanted to use it or be compensated;

22.2 Who would be liable for and what EPA requirements would apply for the waste already on site compared to any new waste we brought in;

22.3 The timing of SWR starting and the Authority leaving;

22.4 The stockpile of rock and limestone on site; whether we could operate the site together or with the Authority having a clean break;

22.5 Whether there were funds set aside for post closure and rehabilitation.

Mr Lucas said the meeting concluded with the Authority inviting SWR to put a proposal to it relating to the Authority leaving the site and SWR paying compensation. There was then some discussion as to the information SWR would require in order to put that proposal.

Mr Lucas was cross-examined about the 14 September 2012 meeting. He had no independent recollection of who attended the meeting. He knew that there were three meetings but he could not remember the dates of any of them. (498) He admitted that his statement had been prepared by his lawyer and that his lawyer had listed the persons who were present at the meeting on 14 September 2012. He then acceded to the proposition that the statement was prepared from his own knowledge only subsequently to state that the paragraph relating to the persons in attendance at the meeting was drawn from Mr Levinson’s knowledge. (499)

Mr Lucas conceded that he did not have a good memory of the meeting. (514) He agreed that potentially there were inaccuracies in his statement. In response to the question of what issues were discussed, Mr Lucas referred to the issue of the Harveys and that they had called SWR and wanted SWR to act on their behalf. That was essentially all he remembered. It was put to him that Mr Brown had said SWR was interested in commercial alignment with the Authority. He remembered that being said. He said he also remembered Mr Brown saying that if commercial alignment could not occur SWR nonetheless viewed the site as significant for its existing activities. (515) He could not recall Mr Brown mentioning the site being useful for the purposes of contaminated waste. He had no recollection of any discussion of Hartley being used for contaminated waste. He recalled Mr Brown saying that it was the strategic location of Hartley that rendered it significant to SWR’s existing activities. (515) In this connection, Mr Brown also mentioned that the site had a fair catchment

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349 Ex P22 at [21.4].
350 Ex P22 at [22].
351 Ex P22 at [23].
area bearing in mind that Mount Barker was developing, industry in the area was growing, population in the area was growing and there was no other landfill site proximate to Hartley. (516)

Mr Lucas could not remember there being any discussion at the meeting as to whether SWR and the Authority could operate Hartley together. Despite having the opportunity to refresh his memory from his statement, he could not say what the discussion regarding the joint operation of the site involved. (517)

iv. Mr Pucknell

Mr Pucknell’s recollection was that during the course of the meeting SWR requested certain information from the Authority. The purpose of the request was to place SWR in a position where it could make an offer to the Authority. In fact it was Mr Pucknell who said during the course of the meeting that SWR needed the material and it was Mr Pucknell who said that SWR would write setting out what it wanted. Mr Pucknell said that Mr Levinson’s letter of 14 September 2012 (see below) contained the information that he required.

It was put to Mr Pucknell that the Harveys contemplated SWR and the Authority both operating on the site. He said he could not comment on that. He did recall a second operator on site being discussed at one stage but not in the context of the Harveys requesting as much. There was discussion at one point, he said, that the Authority would cease to receive waste and commence rehabilitating the landfill whilst a second operation would open up on the site. (1232) It appears from Mr Pucknell’s evidence that SWR’s attitude was that there would only ever be one landfill operator on the site. He agreed that potentially SWR would look to set up a resource recovery operation on the site. (1233)

It was put to Mr Pucknell that Mr Brown said that either SWR would start its own cell or it could take over the existing cells. Mr Pucknell said he could not remember what Mr Brown had said that at the meeting. (1237) Mr Pucknell’s evidence generally was that he could not recall what Mr Brown, or anyone else for that matter, said in the meeting. He did agree that it was preferable for SWR to take over operation of the site given the lengthy delays in obtaining approvals for the construction of a new cell. (1238) Mr Pucknell agreed that the Hartley site potentially had value irrespective of obtaining the constituent councils’ waste streams. (1238)

He commented that the Harvey agreement was structured in a way that if SWR were unable to consummate a deal then the agreement with the Harveys folded after a period of time. (1239)
Mr Pucknell could not recall any discussion of the Authority continuing to conduct a landfill side-by-side with SWR with the Authority receiving the constituent councils’ waste. (1240)

v. Mr Lorenz

Mr Lorenz did not recall taking notes at this meeting. Nor did he have a precise recollection of what was said. However, on 28 September 2012, precisely two weeks after the meeting, Mr Lorenz circulated a summary of the discussion that occurred at the meeting to members of the Authority’s Board. That summary was tendered in evidence.\(^\text{354}\)

The summary notes that from the Authority’s perspective the purpose of the meeting was to obtain a better understanding of SWR’s proposed use of the site in order for the Authority to consider its position “in relation to a negotiated settlement, our liability requirements in relation to the Hartley site and our other options”.\(^\text{355}\) The meeting was also of assistance in terms of the Authority obtaining some understanding as to the parameters within which SWR was prepared to negotiate.

Next the summary advises that the following was raised at the meeting:\(^\text{356}\)

- SRW would like to use the landfill constructed by the Authority to dispose of their residual waste from their operations and other waste.
- It is proposed that similar material will be deposited at the landfill, however it became clear that there is also an intention to receive contaminated soils.
- They are prepared to allow time for an orderly transition, and may be prepared to allow for an extended period (there was the suggestion of say 12 months), however this was on the basis that the Authority worked in “commercial alignment” with SRW, it became clearer later that by this they meant that the Authority still continued to deposit waste at the Hartley Landfill into the future as a customer of SRW. It should be noted that the Authority does not own or determine where Member Council waste goes. This is entirely up to Member Councils based on where they believe the greatest overall benefit will be obtained.
- They would like an assignment of the Authority’s EPA licence, so that they can use the existing infrastructure and not have to go through the process of obtaining a new licence.
- The nature of any resolution would very much depend on the model of ongoing operation. If it is the case that the Authority continues as a customer of the landfill, it is likely that SRW will be more flexible in relation to a compensation claim, however (although no price was mentioned) it is likely that the costs for dumping the material will increase. They have suggested a contract term for receiving the Authority’s waste of 5 years.
- SRW indicated that if it is the case that the Authority does not use the landfill, the likely compensation to be received from SRW is likely to be significantly less.

\(^{354}\) Ex D4: 115.

\(^{355}\) Ex D4: 115 at p 1250.

\(^{356}\) Ex D4: 115 at pp 1250-1251.
• It appears that SRW is not currently aware of the Brinkley site and the Authority’s plans in relation to the usage of this site. Consideration needs to be given as to when and if this information is brought to the attention of SRW. Brinkley Cell 6a is within a few weeks of completion and will be ready for use as soon as EPA approval of the construction quality assurance report is granted.

• SRW indicated that their preference is that the Authority stay as a customer at Hartley but if this didn’t occur that their interest in the site was of a longer term strategic nature particularly the ability to use the site for contaminated waste.

• There was discussion as to the various heads of damage that we would need to explore, including compensation for:
  - cell construction on site;
  - current available capacity which has been constructed;
  - potential capacity by reason of planning approval;
  - cost of removal of plant and equipment;
  - cost of removal of product from the site;
  - responsibility for capping and monitoring the site.

• If agreement can be reached they are prepared to allow some time for an orderly transition but not an extended period of time.

• The sense from the meeting was that if the Authority was to have an ongoing commercial arrangement with SRW, then there was greater potential for flexibility in relation to settlement scenarios than if the Authority was to leave the site.

• SRW said that they would need some base information in regards to the current Hartley Landfill operations and future liabilities and that they would send a request for information.

In his statement Mr Lorenz recounted that at the commencement of the meeting Mr Brown said words to the effect that “there were 2 options, namely we can start our own cells or we can take over the existing operation”.357

According to Mr Lorenz, Mr Brown had also clarified SWR’s position in this meeting. Mr Brown stated that SWR’s preference was to not litigate, and that it was keen to take on the waste from the Authority and develop other market opportunities. Mr Brown said words to the effect that Hartley “was a long term play for the group”.358 Mr Lorenz also recalled Mr Brown further clarifying that it was SWR’s preference that the Authority stay as a customer at Hartley. However, if this did not occur their interest in the site was of a “longer term strategic nature”, particularly the ability to use the site for contaminated waste.359 Mr Lorenz assumed that this strategy may have involved the acceptance of contaminated waste but he could not recall this being expressly stated at the meeting.

357 Ex D146 at [117].
358 Ex D146 at [119].
359 Ex D146 at [119].
The discussion at the meeting then turned to what would occur in the event that the EPA licence was not transferred. Mr Lorenz recalled Mr Brown saying words to the effect, “we would construct our own cells” to which Mr Lorenz responded, “it would not be possible for you to deposit waste in the Authority’s landfill cells without the Authority’s approval”. Mr Lorenz further recalled stating that without this consent there would potentially be disputes as to who would be responsible for contamination liabilities at the site. According to Mr Lorenz, Mr Brown’s response was that an arrangement to keep the same customer group was preferred. Mr Lumsden added that if the Authority were to leave it would require compensation.

Mr Lorenz stated that the outcome of the meeting was that SWR was to give consideration to a settlement proposal to present to the Authority. It was stated on behalf of SWR, although by whom Mr Lorenz could not recall, that a letter would be sent seeking further information in relation to Hartley.

vi. Mr Grenfell

Mr Grenfell made notes at the meeting which make only brief reference to matters raised at the meeting including “[i]ntentions for the site”, “[t]ake over existing cells / or work together [to] take waste from Authority”, “[t]imeframes”, “compensation”, “[h]ow built; lined; airspace available”, “[s]ame material as existing”, “[t]ransfer licence”, “[m]aintain same customers” and “[c]ommercial alignment”.

In his statement Mr Grenfell stated that Mr Brown said words to the following effect at the meeting:

24.1. “SWR wanted to take over the existing cells”;

24.2. “SWR wanted to work together to take waste from the Authority”;

24.3. “SWR said that the material it would be looking to deposit on the site would be similar to that currently being deposited and that SWR would look at options for licence conditions”;

24.4. “SWR would be looking to transfer the licence and would prefer to keep the same customers and work together with the Authority in some form of commercial alignment”;

24.5. “SWR was prepared to be flexible in the timing for taking over the site”.

Mr Lumsden responded by stating that the Authority would require compensation. A representative of SWR then advised that a request would be

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360 Ex D146 at [120].
361 Ex D12: 487 at p 3526.
362 Ex D112 at [24].
made for the provision of some information from the Authority in order that SWR may prepare a proposal.\textsuperscript{363}

In cross-examination Mr Grenfell agreed that at one point what was being proposed was either SWR could take over the separation at Hartley or that it would work with the Authority at Hartley. In this regard what was being put could be considered “a potential competitive position or a potential non-competitive position whereby there was [sic] working together to take on the waste that was already going to Hartley”. (3452)

Mr Grenfell agreed that there was discussion at the meeting about the cells, including their lifespan. (3452) He recalled it being said that cell 6 had approximately 18 months remaining. He assumed that it was Mr Lorenz who had said this, but was not certain. Cross-examination then turned to the meaning of the phrase “[s]ame material as existing” which appeared in Mr Grenfell’s notes. The following exchange occurred: (3453-3454)

\begin{enumerate}
\item Q Do you agree you made a note about that during the course of a discussion during which Southern Waste Resource Co said or one of the members of the Southern Waste Resource Co team says that it was their intention to take the same waste material as was currently being taken at Hartley.
\item A Similar to before, I would be working it out that is what they said. I can’t recall that but similar to what I’ve said about the cell space, I would assume that’s what they said from that note.
\item Q There is a reference to a transfer of the licence.
\item A Correct.
\item Q And in connection with that maintaining the same customers.
\item A Correct.
\item Q That included, I’d suggest, the member councils.
\item A Correct.
\item Q You understood from what was said at meeting that if there was a transfer of the licence to Southern Waste Resource Co it was Southern Waste Resource Co’s intention to maintain the same customers.
\item A Yes.
\item Q An alternative which did not involve a commercial competition was a commercial alignment.
\item A Yes.
\end{enumerate}

\textsuperscript{363} Ex D112 at [25].
Discussion at the meeting regarding compensation then ensued. Mr Grenfell agreed that Mr Brown had said words to the effect that “[t]he site is a good fit for Southern Waste Resource Co. Southern Waste Resource Co wants to take over the site as a long-term operator”. (3454) However, Mr Grenfell could not recall whether Mr Brown had said words to the effect that SWR wanted to maintain its customer base or that SWR was keen to take waste from the Authority. He further could not recall if Mr Brown had mentioned that SWR was not there to litigate but “rather it was at the table because the Harveys asked Southern Waste Resource Co to be there”. (3454)

Mr Grenfell agreed that there had been discussion at the meeting to the effect that if no negotiation occurred, attention would need to be given to the EPA’s requirement that there be management of the cells over time. (3454) It was also mentioned at the meeting that even if SWR came onto the site and built alongside existing cells, management of the old cells would still be required. According to Mr Grenfell, Mr Brown probably went on to say words to the effect that if no commercial alignment could be reached the cleanest approach would be for SWR to take over the old cells. (3455)

Mr Grenfell recalled Mr Lorenz stating that future liabilities would still be a concern for the Authority, especially if new waste was brought onto the site. The concern was that the Authority would have a long-term potential liability if SWR took over the site. (3455)

vii. Mr Coleman

Mr Coleman attended the meeting at Wallmans with Mr Lumsden, Mr Lorenz and Mr Grenfell on behalf of the Authority. In his statement, he said the Harvey/SWR interests were represented by Mr Brown, Mr Lucas, Mr Pucknell, Mr Levinson and Mr Rudd.

Mr Coleman did not take notes at the meeting. From his recollection words to the following effect were said:364

81.1. “SWR wanted to take over the site”;

81.2. “SWR could construct its own cells or take over the Authority’s cells”;

81.3. “reference was made to the fact that the EPA would require management of the cells already in place”;

364 Ex D92 at [81].
81.4. “the material to be brought onto the site would be a similar type of waste to that which was currently being dumped but that SWR would look at options for additional types of waste”;

81.5. “SWR would be flexible with the timing”;

81.6. “SWR preferred to keep the same customer group”;

81.7. “SWR wanted to develop other market opportunities in the region”.

Mr Coleman recalled Mr Lorenz raising the issue of the Authority’s liability in the future and the impact upon that liability of new waste being comingled with that deposited by the Authority. He could also recall Mr Lumsden raising the question of compensation if the Authority was to leave the site.

In oral evidence Mr Coleman stated that he attended the 14 September 2012 meeting upon Mr Lorenz’s request. He was there simply “to listen to what was going on” given that his role was more to do with the operational side of things. Earlier in examination-in-chief Mr Coleman said that because it appeared that the Authority would have to move it was important that he have input into any questions raised regarding timing.

SWR’s position at the meeting was that it was not there to litigate. SWR was at the table because the Harveys had asked it to be there. The meeting was more about “what the Harveys wanted”.

Mr Coleman recalled Mr Brown speaking first at the meeting, saying words to the effect of “[t]he site is a good fit for Southern Waste ResourceCo and Southern Waste ResourceCo wants to take over the site as a long-term operator”. Mr Brown went on to say that SWR wanted to continue to accept waste from the existing market and residuals and that SWR had two ways in which it could proceed; one being to construct its own cells and the other to have a takeover arrangement.

Mr Coleman’s recollection was that Mr Brown stated that SWR was keen to take on waste from the constituent councils, but later conceded that he could not remember Mr Brown’s exact words. Mr Coleman also recalled Mr Brown mentioning at the meeting the issue of developing other market opportunities in the region.

Mr Coleman thought that Mr Lumsden said that cell 7 was being partly constructed. He then clarified that he was not certain about this stating, “[n]ot 100% sure but I think cell 7 was mentioned, I’m not sure by who”. When asked whether he could recall Mr Brown saying words to the effect, “if we can’t negotiate the EPA would require management of the cells that are already there”,
Mr Coleman stated that he thought it was Mr Lorenz, but conceded that his memory might have failed him. (3239)

Mr Coleman agreed that Mr Brown had said that if SWR operated alongside the Authority there would still be a need for management of the old cells. (3239) Mr Coleman further agreed that it might have been Mr Brown who said words to the effect that, “it would be cleanest for Southern Waste ResourceCo to take over the facilities”, and agreed that Mr Lorenz stated any future liabilities would be the Authority’s concern, especially if new waste were received. (3239)

Mr Coleman could not recall if Mr Lumsden asked what material SWR intended to bring on the site, but he remembered Mr Brown saying that “[t]he material will be similar to that already on site and Southern Waste ResourceCo will work with the EPA to look at options for licence conditions”. (3240)

Mr Coleman said that someone at the meeting, although who exactly he was not sure, had asked about the proposed timing of SWR commencing to receive waste at the site. (3240) Mr Levinson’s response to this query had been that SWR would be flexible with the timing if it were to take over the site. (3241) Mr Coleman agreed that Mr Brown had said that SWR would prefer to have an arrangement to keep the same customer group. (3241) The following exchange then occurred: (3241-3242)

Q  And he [Mr Brown] also said, I suggest, that Southern Waste ResourceCo was very commercial, the best outcome is an alignment that works for Southern Waste ResourceCo, the Authority and the Harveys, including long-term supply contracts for the councils so that Southern Waste ResourceCo can integrate growth into the site.

A  I don’t remember that statement, no.

Q  Is it fair to say that it might well have been said even though it’s now lost to your memory.

A  It’s quite possible, I don’t remember it though.

Q  It was pretty clear though that Mr Brown was interested in the member council waste, wasn’t he.

A  It was quite clear through all the meetings that Mr Brown wanted to get in front of the councils and discuss that, yes.

Q  Well it wasn’t just about that, he wanted to receive the waste at the Hartley site, didn’t he.

A  Yes, and it was also said that we had no control over where the councils take their waste.

Q  … Do you agree also that Mr Brown said on various occasions that Southern Waste ResourceCo was looking into long-term supply contracts for the councils.

A  Yes.
Q Now do you recall Mr Lumsden saying words to this effect that ‘We would need to look at a clean break and put a proposal for the existing infrastructure and the costs of the Authority leaving Hartley’.

A The costs were discussed, like as an issue for the Authority.

Q Is it fair to say that you don’t really remember Mr Lumsden saying words to that effect.

A No. No, I don’t.

Mr Coleman recalled there being mention of the need for the Authority to provide further detail to SWR in order for SWR to prepare a proposal. However, when it was put to him, Mr Coleman could not recall if it was Mr Pucknell who stated that SWR would need further information before formulating a proposal. (3243) Mr Coleman also could not recall it being mentioned at the meeting that the proposal would include a rate per tonne for the councils to continue dumping at the Hartley site in future. (3243)

When it was put to Mr Coleman as to whether he could recall Mr Levinson stating that he would write to Mr Lumsden setting out the information required for SWR to make an offer, he said that discussion regarding the fact that there would be further correspondence occurred toward the end of the meeting. Mr Coleman then qualified that this may have been said during one of the other meetings he attended. (3243)

viii. Mr Levinson’s letter of 14 September 2012

After the meeting of 14 September 2012 and on the same day Mr Levinson wrote to Mr Lumsden.367 In that letter he confirmed that SWR was prepared to make a proposal that “might deal with such matters as the purchase of or compensation for infrastructure, plant and equipment, employees, post closure management and rehabilitation obligations etc but only if the constituent Councils are prepared to enter into a long term (at least 5 years) agreement to supply the waste to the site”.368 In the next paragraph of his letter Mr Levinson announced that he had been instructed to extend the deadline by which time the Authority was to make its position clear from 21 September 2012 to 28 September 2012. That gave the parties “two weeks to reach any agreement, or at least to be seriously engaged in negotiations in relation to a settlement along the above lines”.369 Thereafter Mr Levinson itemised the information he required in order for SWR to formulate a proposal for consideration by the Authority. Item 1 was the current disposal terms that applied to each council disposing waste at Hartley and the terms for any other customer of the facility. This was important to the valuation of the opportunity by SWR. (709) Item 4 was the remaining airspace in the current cells, whilst item 16 was the “details of the waste stream
previously accepted at the site including the quantity, nature and location of any contaminated soil”.

In the closing paragraphs of his letter Mr Levinson sought permission on behalf of his client to inspect the Hartley landfill and to speak to any of the engineers or other consultants involved in the design, construction or operation of the cells contained on the site and the gas capture system. Mr Levinson closed his letter stating:

I would be grateful for your prompt attention to this request. I note your indication that much of this information could be provided within one week. I reiterate that if no agreement is reached involving the long term supply of waste by the constituent Councils, or if serious negotiations are not in train towards that end by 28 September then our clients intend to proceed to take the necessary steps to prevent the Authority from continuing to operate the landfill. I note that this position has been made clear to your client on several prior occasions and the deadline has previously been extended. My clients are anxious to bring this matter to a resolution as quickly as possible.

Mr Levinson’s letter of 14 September 2012 was sent on Mr Brown’s instructions. He read the letter at the time it was drafted. He considered the condition stated in the letter (i.e. that the constituent councils enter into a long-term agreement to supply waste to the site) an important aspect of the proposal at this point in time and throughout the negotiations up to and including the execution of the Deed of Settlement. That was because Mr Brown considered that without revenue from the councils’ waste streams the purchase and takeover of the liability and post-closure obligations were not commercially worthwhile or viable. He was of the view that SWR needed the revenue from those waste streams at the very least to cover the cost and exposure to liabilities present and future whilst the business developed and grew. He added that the council waste streams were also critical because of the location of the Hartley landfill. Bearing in mind travel time and associated costs, it was unlikely that alternate sources of waste of sufficient tonnage could be secured given that there was little major industry in the region and the cost of transporting the waste from further afield would be prohibitive.

In cross-examination, Mr Brown acknowledged that the request for the Authority to leave Hartley was a threat. He explained that the letter was sent in the context of the deterioration of the relationship between the Harveys and Mr Lorenz. However, he made it plain that he did not view this as “shutting the gate” on the Authority.

Mr Brown maintained that at this stage of negotiations, he did not see the Authority as the individual councils. He believed the Authority was a “very
separate entity to the individual councils”. (710) He gave the following evidence: (710-711)

Q    Why was it so important to kick them off so quickly.
A    As I’ve said, we took this issue over from the Harveys, the relationship had diminished, there was a lot of ill-feeling between the Harveys and Michael Lorenz, as mentioned he wanted to compulsorily acquire their land. So we actually saw ourselves as the intermediary group to try and resolve this issue.

Q    And you thought that would be facilitated by putting a two week deadline on shutting the gate on the authority.
A    So the authority, we weren’t shutting the gate at all, from our perspective we were going to take over the operation of the facility for the Harveys and allow the individual councils to continue to take their waste there. There was -

Q    You were threatening in this letter, weren’t you, to stop the authority continuing to operate the landfill.
A    Yes, as I said we didn’t see the authority as the individual councils, we believed that the authority was a group. While you say there was shareholdings between those entities we believed it was a very separate entity to the individual councils.

Q    But just focussing on the threat to stop the authority continuing to operate the landfill, that’s what it states. Now the effect of that would be that council waste couldn’t be deposited at Hartley.
A    No, absolutely not.

Q    How would that occur after 28 September if you shut the gate on the authority.
A    The authority is an entity in essence that’s running a compactor and a weighbridge. We were very keen to allow the individual councils to continue to deposit their waste there and we stated that all the way through.

Q    Yes, but practically that wouldn’t occur for years.
A    No, that would occur straightaway.
Q    But you didn’t have a licence.

…

A    We were of the view that we could take over their licence. Our environmental people had spoken to the EPA and the EPA often do that.

Mr Pucknell was taken to the same ultimatum. He conceded that he may have had some input into the drafting of that paragraph. He could not specifically recall it. It was put to him that SWR was continually threatening the Authority in the course of negotiations with a prospect of closing the landfill. His response was: (1225)

A    I wouldn’t say continual threats but we needed to have their attention.
Q  Attention to the degree of shutting the gates on the Authority at the site.

A  Or threatening to.

Mr Pucknell conceded that if SWR carried through on the threat and the Authority was shut out of Hartley, it would have the consequence that they could not use Hartley. (1225)

ix. **Consideration**

Pausing here; I accept that Mr Brown approached the first meeting at Wallmans with a commercial hat on. I also accept that he understood the viability of Hartley to be linked to securing a sufficient proportion of the constituent council wastes’ streams. I am not persuaded that he elevated securing the council waste streams to having a priority status for SWR above all else during the course of the meeting, but the evidence of Mr Lorenz, Mr Grenfell and Mr Coleman suggests that they understood Mr Brown’s plans for SWR at Hartley to include receiving the constituent councils’ waste streams. Each of Mr Lorenz, Mr Grenfell and Mr Coleman gave evidence that Mr Brown said words to the effect that SWR wanted to keep the existing customer base. I so find.

I am satisfied that during the course of the meeting Mr Brown did refer to Hartley as being a “long term play” for SWR, that he laid out two broad options for the resolution of the dispute and that the possibility of their being two operators on the Hartley site was raised. As to the two options, one was a takeover and the other involved SWR constructing new cells. I think it more likely than not that Mr Brown referred to SWR as intending to grow the Hartley business and develop opportunities and that it is also more likely than not that he referred to the possibility of commercial alignment with the Authority. Accepting these things, the question arises, did SWR walk into the first meeting at Wallmans with the intention of taking over Hartley irrespective of whether it secured the constituent councils’ waste streams? In my view the answer on the balance of probabilities is no. In my view, Mr Brown and Mr Lucas gave little consideration to the possibility of not securing the constituent councils’ waste streams prior to the meeting. That is not because they had other plans for Hartley. Rather, my impression from all the evidence was that at this stage of negotiations, they considered that the reasons that led the existing customers to dispose of their waste at Hartley would remain. Cost was the primary driver. SWR had control over the gate price and location ensured a travel cost advantage. It was knowing these things and having some idea of the tonnage disposed of at Hartley (as provided by the Harveys) that caused Mr Brown and Mr Lucas to see Hartley as an opportunity. That in my view was their essential thinking when they met with the Authority’s representative for the first time at Wallmans. It is in this context that I am persuaded that it is more likely than not that Mr Brown said that Hartley presented as a “long term play” for SWR. I have no doubt that he planned to grow the business and exploit other opportunities as
they might arise, but I am persuaded that his immediate plan was to takeover a landfill and retain its existing customer base.

Mr Levinson’s notes record:\textsuperscript{375}

SB - very commercial - best outcome is an alignment that works for both + for H.
Supply contracts - long term
[Integrate our growth into the site
View site strategic for us anyway.

Mr Rudd’s notes state:\textsuperscript{376}

We most interested in commercial alignment
but view as significant site for existing activities anyway.

In his report Mr Lorenz said:\textsuperscript{377}

SRW indicated that their preference is that the Authority stay as a customer at Hartley but if this didn’t occur that their interest in the site was of a longer term strategic nature particularly the ability to use the site for contaminated waste.

No less than three attendees at the meeting recorded Mr Brown as saying that the site had strategic value for SWR. I find that he made such statement. I do not think anything turns on whether Mr Brown said that the site had strategic or significant value “anyway”, as if meaning irrespective of whether the constituent councils disposed of their waste at Hartley. I am satisfied that whilst the Authority representatives would have left the meeting thinking that SWR wanted the constituent councils’ waste streams, it is likely they would not have formed the impression that SWR considered the waste streams critical to its plans.

Mr Brown’s reference to the site as being a “long term play” and as being strategic or significant to SWR’s existing activities would have contributed to an impression, and was likely intended to give the impression, that SWR was committed to taking over Hartley. A preparedness to litigate and time limits within which to act would have reinforced the impression of commitment and conviction. It was all part of SWR’s approach to the negotiation.

This was a hostile takeover by SWR. Mr Lorenz quickly came to realise the threat to the Authority model as is clear from the content of his report to the Authority’s Board.\textsuperscript{378} Whatever the breadth of Mr Brown’s notion of commercial alignment, I have no doubt it included the constituent councils disposing of their waste streams at Hartley. That is not to find that Mr Brown truly understood the nature of the relationship between the Authority and the constituent councils at this time. I do not think he did, nor do I think that he was concerned to

\begin{flushright}
\textsuperscript{375}  Ex D16.
\textsuperscript{376}  Ex D16.
\textsuperscript{377}  Ex D4: 115 at p 1251.
\textsuperscript{378}  Ex D4: 115.
\end{flushright}
understand the relationship. His confidence, as I have explained it above, rendered such detail irrelevant. As far as he was concerned costs drivers would see the tonnages largely remain at Hartley upon SWR taking over.

From the Authority’s point of view, the first meeting at Wallmans was the first time it was exposed to SWR and the first time it had to deal with SWR as part of negotiating the dispute with the Harveys. Of course, SWR was not merely the Harveys’ agent. SWR had its own interest in the negotiation. A seachange had occurred in the negotiations, one, the ramifications of which, the Authority had not had the opportunity to contemplate, and one which introduced added complexity. Whatever SWR would offer as the negotiations progressed, at the conclusion of the first meeting at Wallmans the Authority would not have considered SWR’s future at Hartley to be inextricably linked with securing the constituent councils’ waste streams.

It is to be remembered that it is at the first meeting at Wallmans that the Authority hears for the first time that SWR is prepared to accept the constituent councils’ waste at Hartley. Before this meeting the position had not been made clear; at the Murray Chambers meeting it was said that the new operator may offer some services to the constituent councils.

In his report to the members of the Authority’s Board Mr Lorenz states that it did not appear that SWR was aware of Brinkley. Of course, the reality was that SWR did know that steps were being taken to re-establish Brinkley. But even so, at the conclusion of the first Wallmans meeting, I am persuaded Mr Lorenz knew that the future for the Authority, if it were to continue in operation, was a competitive one where to date it had largely enjoyed a monopoly. In my view, Mr Brown was equally aware of this, there is no other reason why he would have expected RCMB’s waste to go to Brinkley in the short term and possibly longer. Accepting the costs advantages to RCMB of disposing of its waste at Brinkley and that consequently it was logical for RCMB’s waste to go to Brinkley, meant accepting that Hartley could not compete with those costs advantages in the short term. In the longer term, Mr Brown thought that Hartley might regain RCMB’s waste stream because the tonnages disposed of at Brinkley might be insufficient to meet the cost of operating the landfill including the long-term environmental liabilities, or, the gate price would rise to a level to meet those costs where it was cheaper to return to Hartley. Again, such opinion is in reality one as to the nature of the market and the ability to compete in the market.

Returning to the first Wallmans meeting, at the conclusion of the meeting it was reasonable for the Authority to think that the constituent councils’ waste streams were not critical to SWR’s plans for Hartley, although SWR wanted those streams. Further, that whatever those plans were, SWR was ready to take over the operation of the site at short notice. That is, SWR was prepared to takeover the site irrespective of whether it had secured the constituent councils’ waste streams, reinforcing the impression that the streams were not critical.
Further again, that whatever those plans were, SWR was ready to assume responsibility for the Authority’s long-term environmental liabilities on the site and compensate the Authority for the capital investment it had made in the site. The Authority representatives would also have understood SWR to have no interest in the consequences for the Authority of SWR taking over Hartley or the future of the Authority without Hartley, save to the extent that the Authority might agree to Mr Brown’s idea of “commercial alignment”, which when raised quite obviously meant that the Authority would be a customer at Hartley. Lastly, by SWR not referring to Brinkley, the Authority representatives would have been left with impression, as Mr Lorenz was, that SWR did not know of Brinkley.

If it was not appreciated at the close of the meeting of 14 September 2012 that SWR wished to retain the constituent councils’ waste streams, it was made plain in Botten Levinson’s letter of later that same day. It is important to note that it is an offer to purchase or compensate for infrastructure that is conditioned on the constituent councils being prepared to enter into long-term agreements for the supply of their waste to Hartley. A further observation to be made is the use of the style, constituent councils. Clearly, Botten Levinson had had regard to the Charter. Equally clearly, Botten Levinson knew that the waste streams belonged to the constituent councils. Lastly, Botten Levinson’s letter of 14 September 2012 letter marks the very first time that the prospect of SWR entering into long-term contracts with the constituent councils is raised.

In the absence of evidence from the Harveys, I do not accept that they were exclusively the source of pressure to bring the dispute to a conclusion within the tight timeframes continually set by SWR. As I have said, it is likely that the Harveys were frustrated and growing impatient, but I am firmly of the view that the negotiations were driven by SWR. The Litigation Management and Funding Deed gave SWR the freedom to proceed as it saw fit. It was SWR who would fund any settlement. In this regard I accept Mr Pucknell’s candour. Again, all part of SWR’s approach to the negotiation.

Mr Cox’s cross-examination of Mr Brown on the threat contained in the Botten Levinson letter of 14 September 2012 is revealing in a number of respects. First, I reject Mr Brown’s suggestion that he saw SWR as an intermediary. The Litigation Management and Funding Deed and the unfolding of the negotiations viewed as a whole makes plain that in no way did SWR act as an intermediary. Mr Brown well knew that SWR had total control over the negotiations with the Authority to the exclusion of the Harveys. After the execution of the Landfill Deed and the Litigation Management and Funding Deed, in a practical sense, the Harveys were no longer involved in a dispute with the Authority. Second, Mr Brown expressed himself in terms of SWR having decided that it was going to take over the operation of Hartley. Consistent with the inference arising from the Landfill Deed and the Litigation Management and

379 Ex P4: 112.
Funding Deed the only question was how to achieve the objective. Third, I very much doubt that Mr Brown believed that SWR could, without the Authority’s cooperation, have so quickly assumed operating Hartley. I consider his evidence disingenuous in this regard. In my view SWR wanted the Authority under pressure. Fourth, SWR understood the Authority and the constituent councils to be distinct entities. Despite this, SWR did not approach any of the constituent councils in an effort to secure waste streams.

Of course, the Authority was not to know whether the threat was empty.

d. The negotiations continue

i. The negotiations continue via correspondence

On 25 September 2012 Mr Lumsden wrote to Mr Rudd in response to Mr Levinson’s letter of 14 September 2012. Amongst other things Mr Lumsden’s letter advised:

1. The current disposal terms that apply to each council disposing of waste at the facility and the terms for any other customers of the facility

There are no specific terms other than that they are member councils of the Adelaide Hills Region Waste Management Authority and are governed by its Charter (Attachment Q1). There is no contractual arrangement requiring that they bring their waste to the Hartley landfill.

Member Councils pay a reduced fee which is determined each year when the budget is developed. Currently the rate is $37.70 per tonne exclusive of the EPA levy and GST.

The letter also advised that cell 6 had approximately 200,000 m$^3$ in remaining airspace, that post-closure provision for cells 1-4 and cell 6 had been made in the amounts of $500,000 and $779,000 respectively, that contaminated soil was not received at Hartley, and that in the 2010/11 and 2011/12 financial years Hartley received 38,519 and 42,206 tonnes respectively (60% of which was domestic waste and 40% commercial and industrial).

Mr Levinson was cross-examined on the Wallmans’ letter of 25 September 2012. Mr Levinson said that accompanying the letter was two lever arch files containing the documents referred to in it. (217) The letter mentioned the Charter. Mr Levinson was already aware of the Charter but could not recall if he discussed it with his client. (217) He believed that he forwarded all the information provided by Wallmans with the 25 September 2012 letter to SWR. (218) He could not recall what advice he gave SWR with respect to the content of the material. (218)

Mr Brown said that he read Mr Lumsden’s letter of 25 September 2012 after it was received by Botten Levinson. He noted in particular the absence of

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380 Ex P4: 114.
381 Ex P4: 114 at p 1142.
any contractual arrangement requiring the constituent councils to dispose of their waste to the Hartley landfill, the available cell space at Hartley and the nature and volumes of waste received in the financial years 2010/11 and 2011/12.\textsuperscript{382} Armed with this information and from his knowledge of other landfill sites and the waste industry more generally, Mr Brown formed the belief that Hartley had value if the historic waste disposal quantities of 30,000-40,000 tonnes per year could be maintained. On the basis of tonnage of that size the site could be operated at a cost of $12-$15 per tonne and generate profits of around $800,000-$900,000 per year charging a gate price of $35-$38 per tonne.\textsuperscript{383} On this basis he instructed Botten Levinson to write the letter of 4 October 2012, to which reference is made below.\textsuperscript{384}

In cross-examination, when asked if cell airspace was important to him Mr Brown said it was valuable, but his focus was on the volume of waste received. (591) SWR took the cell space figures at face value. Waste stream was the most important thing to assessing the opportunity that the landfill provided. (591) Depending on how efficient the landfill was operated, at $37.50 per tonne SWR thought it could make $15-20 a tonne and pay the Harveys a royalty of $100,000 per annum. (592) The opportunity would also allow them to make $700,000 to $900,000 and “build a base”. (592)

Mr Pucknell was taken to the Wallmans’ letter of 25 September 2012.\textsuperscript{385} He said he remembered the letter very well. It was accompanied by the two volumes of material. (1218) His attention was drawn to the reference in the letter to the constituent councils paying a reduced fee. He said he understood that the constituent councils were earning a return above cost from other customers. Further, the Authority was charging other customers a different rate to that it charged the constituent councils. (1219) He understood that as a consequence non-constituent member customers were subsidising the constituent councils. Referring back to the Wallmans’ letter, Mr Pucknell said the rate per tonne the constituent councils were charged ($37.70) was low. He considered it roughly 10% over cost. That was based on his understanding that SWR was capable of running the Hartley landfill at around $34 a tonne. (1220)

On 27 September 2012 Mr Pucknell sent an email to Mr Brown, Mr Levinson and Mr Rudd.\textsuperscript{386} In that email he provided an analysis of the cost per tonne to dispose of waste at Hartley based on figures taken from the Authority’s financial statements. Mr Pucknell considered costs to “be sitting around the $47 per tonne” mark and a “sustainable long term rate” to be $55 per tonne.

Having digested the information provided in and with the Wallman’s letter of 25 September 2012, Botten Levinson wrote to Wallmans on 4 October 2012

\textsuperscript{382} Ex P23 at [41]-[44].
\textsuperscript{383} Ex P23 at [45].
\textsuperscript{384} Ex P23 at [46].
\textsuperscript{385} Ex P4: 114.
\textsuperscript{386} Ex D12: 501.
on Mr Brown’s instructions.\textsuperscript{387} (593) The 4 October 2012 letter proposed that the Authority’s dispute with the Harveys be resolved on one of two possible bases being:\textsuperscript{388}

Option 1

1. The Authority will -
   1.1 Cease depositing waste at the site within 30 days;
   1.2 Cap and close the cells within 180 days;
   1.3 Comply with all of its post closure obligations as directed by the EPA for all waste deposited on site until the cessation of dumping in 1.1 above;

2. Southern Waste ResourceCo will commence operating on the land in a separate location (upon obtaining a new EPA licence).

Option 2

3. The Authority will -
   3.1 Cease operating the site within 60 days;
   3.2 Execute all necessary documents and take all steps necessary to transfer the EPA licence to Southern Waste ResourceCo within 60 days;
   3.3 Use its best endeavours to procure agreements from all of the member Councils of the Authority with Southern Waste ResourceCo to the continued disposal of their waste at the site for 4 years plus an option to renew for a further 5 years at the current rate to June 2013 and then at arms-length market rates;

4. Southern Waste ResourceCo will -
   4.1 Take over operation and control of the site upon cessation by the Authority in 3.1 above;
   4.2 Take over all responsibility for compliance with the EPA licence from the date of transfer of the licence
   4.3 Pay $300,000 to the Authority within 7 days of transfer of the EPA licence to Southern Waste ResourceCo;
   4.4 Pay $500,000 to the Authority upon execution of the last of the agreements mentioned at 3.3;
   4.5 Pay the value determined by an independent valuer for all mobile plant within 7 days of the valuation or the date of commencing operation at the site (whichever is the latter);
   4.6 Pay the value determined by an independent valuer for all fixed assets (roads, water supply tanks & pump, water tanker unit, perimeter fencing, litter fencing, weighbridge receiving system, UPS, PC & software, digital image CCTV system and cameras) within 7 days of the valuation or the date of commencing operation at the site (whichever is the latter);

\textsuperscript{387} Ex P5: 117.
\textsuperscript{388} Ex P5: 117 at pp 1309-1310.
4.7 Pay the book value (approximately $1.2m) for the existing cell space depending on an independent audit of the design and construction of the cells and the remaining cell capacity within 7 days of the completion of the audit.

4.8 Deduct the value of the cell capping and closure estimate of $2.8m from the total of the amounts above.

Botten Levinson’s letter also referred to interim measures including that SWR wished to have a landfill manager on site as soon as possible and that, in the absence of agreement, SWR would accept waste from the constituent councils at market rates. The letter concluded stating that SWR wanted to continue to expedite the resolution of the dispute and so the offers made were open for acceptance until close of business on 18 October 2012.

Mr Levinson was cross-examined regarding the content of the Botten Levinson letter of 4 October 2012. He confirmed that the first of the two options involved the Authority operating alongside SWR on the Hartley landfill site pursuant to separate EPA licences. He clarified that the Authority’s operations would be limited to managing the environmental liability associated with the existing cells and not involve the receipt of additional waste. (247-248)

Mr Levinson was cross-examined about option 2 as contained in the letter of 4 October 2012 and the condition expressed therein (that it was subject to the constituent councils entering into agreements with SWR for the continued disposal of their waste at Hartley). He agreed that SWR subsequently abandoned the idea that any deal with the Authority be conditioned upon member councils agreeing to deposit their waste at Hartley. Hence that condition was not featured in future correspondence. (249)

In his evidence Mr Brown said that at the time that the 4 October 2012 letter was sent his thinking regarding the importance of securing the member council waste streams remained the same. (593)

On 9 October 2012 Wallmans wrote to Botten Levinson in response to the letter of 4 October.389 Clarification was sought regarding the rate SWR would charge councils as from 1 July 2013 for the four-year period referred to in option 2 and whether SWR proposed to compensate the Authority for a pile of crushed rock at the Hartley site. Wallmans also advised that the Authority’s Board would not meet until the following week to discuss the options proposed.

The following day Botten Levinson replied to Wallmans’ letter of 9 October 2012.390 The letter was sent on the instructions of Mr Brown. (593) Botten Levinson’s letter advised that SWR was prepared to lock in a waste to landfill rate with the member councils of $37.70 per tonne plus EPA levy and any other statutory fees and charges to 30 June 2013, and thereafter, for the following four years, at $53 per tonne plus CPI (calculated from 1 July 2013)

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389 Ex P5: 118.
390 Ex P5: 119.
plus the EPA levy and any other relevant statutory fees and charges. Mr Brown considered the rates offered very competitive. (594) They also allowed for SWR to realise a return from the asset. Mr Brown explained that the rates were struck having regard to the long-term liability of the site. (594) He said: (594)

A We looked at this obviously commercially, we needed to get a return out of the asset and that was the rate that we struck in regards to the long-term liability of the site that we were also taking on.

Q At the time of these letters, were you speaking to anyone within Southern Waste ResourceCo about the prospect of taking over the Hartley site.

A Yes.

Q To whom were you speaking.

A I was speaking to obviously my ResourceCo board, I was speaking to David Lucas, Ben Lucas, we were having lots of discussions with it on this opportunity.

Q Were you having any discussions with Mr Pucknell.

A Yes.

Q In what way were these discussions proceeding, was it in face, was it by telephone, by email, can you explain.

A A lot of it in face, face to face discussions.

Q Had you instructed anyone to draw up feasibility studies or financial modelling in relation to this opportunity at this stage in October 2012.

A We understand this sector very well and understand the costs involved in constructing cells and dozing waste into the ground, and recycling what you can out of the material. It wasn’t a big task for us to work out the opportunity and the value that we could create out of this facility.

Q How did you undertake that exercise personally.

A 40,000 tonnes of waste you know, we believe we could probably make as I said, 15 or $20 a tonne out of it net.

For Mr Brown it was a simple calculation drawing on his experience in the industry. (595)

On 12 October 2012 Mr Lorenz sent an email to the members of the Authority’s Board.391 The Botten Levinson letters of 4 and 10 October 2012 were attached to the email. Mr Lorenz advised the Board members that he was in the process of putting together an evaluation of the proposal to be considered at a special meeting of the Board. He commented, “[i]t doesn’t appear to be very

391 Ex P5: 120.
attractive on the face of it and would suggest that they are not aware of our preparations for Brinkley”. 392

By letter dated 18 October 2012 Wallmans advised that the Authority’s Board had met on 17 October 2012 to discuss the proposals put by SWR in the 4 October 2012 Botten Levinson letter. 393 The letter advised that the next step was for the Authority to consult the constituent councils before a response could be provided. The letter proposed that a response be provided by 30 October 2012 and asked Botten Levinson to ascertain SWR’s attitude toward such timeline.

ii. Consideration

Paragraph 1 of Mr Lumsden’s letter of 25 September 2012 is important. Legally it is correct. Quite properly, it referred SWR to the Charter in order to understand the nature of the relationship between the Authority and the constituent councils.

Option 2 in the Botten Levinson letter of 4 October 2012 reflects an understanding of the relationship between the Authority and the constituent councils insofar as it obliges the Authority to “use its best endeavours” to procure agreements. Interestingly, option 1 is not dependent on the constituent councils disposing of their waste at Hartley. It betrays a preparedness to establish, in effect, a greenfield landfill at Hartley. Had option 1 been agreed, SWR’s obligation to the Harveys under the Landfill Deed would have been triggered notwithstanding delay in obtaining a licence from the EPA and in constructing a cell. The delay could have been years. (214, 231, 243, 512 and 1238) Of course, option 1, had it been accepted, would also see SWR not pay any compensation and not assume responsibility for the Authority’s environmental liabilities at Hartley. When one turns to option 2 and contrasts it to option 1, quite clearly compensation and the assumption of liability for existing environmental liabilities turned on SWR securing the constituent councils’ waste streams. That is to say, whilst option 1 indicated that SWR was prepared to settle without securing the constituent councils’ waste streams, at this stage, compensation and indemnification would only be provided if it did so.

I appreciate that Mr Brown gave evidence to the effect that option 1 was never really an option for SWR. I assume it went forward, nonetheless, as part of SWR’s approach to the negotiation, intending to convey a preparedness to takeover the site in the short-term hence time pressure was maintained. From the Authority’s point of view, the approach would have left it thinking that securing the constituent councils’ waste streams was not a deal breaker.

A comment should be made regarding the gate prices of $37.70 per tonne to 30 June 2013 and thereafter $53 per tonne increasing annually by CPI. The 10 October 2012 letter is the first time that SWR put in writing proposed gate

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392 Ex P5: 120 at p 1314.
393 Ex P5: 123.
prices. The sizable increase as of 1 July 2013 would render any of the constituent councils wary of what to expect from SWR in future. I suspect Mr Lorenz considered the increased rate indicative of SWR not being aware of Brinkley because it tended to erode any cash advantage Hartley had over Brinkley.

**e. The 23 October 2012 site meeting at Hartley**

It is not disputed that on 23 October 2012, at the instigation of SWR, Mr Brown, Mr Lucas and Mr Lorenz met at Hartley. In arranging the meeting Mr Levinson described the purpose as “to assess the site to see how (a) your client’s operations might be terminated and ResourceCo’s operations commence in the event that a more amicable arrangement fails; or (b) an agreed arrangement might be facilitated”.

**i. Mr Brown**

Mr Brown attended the site visit on 23 October 2012 as he was keen to understand what had been constructed at Hartley, what infrastructure was in place and how much cell space was potentially available. Upon attendance, he did not think that the site was particularly tidy and well maintained. He could see that there was space available in cell 6 but he could not tell how much. Cell 6 was being utilised at that time.

Mr Brown said that discussions during the course of the site visit were focused on how the site had been constructed and operated by the Authority. In his statement he said:

52. At this time and throughout the period of negotiations, I considered that the access to the waste of the member Councils was critical to the decision of SWR whether or not to take over the operation of the Hartley Landfill. I held the view that if there was [not] to be such access, then the operation was not viable. For this reason, during the site meeting on 23 October 2012, I questioned Mr Lorenz on several occasions about access to the member Councils. I do not recall my precise words, but I asked him to the effect “can we get in front of these councils to do a deal?” I wanted to know whether SWR would have an opportunity to put a commercial offer to the Councils for their waste.

53. Mr Lorenz said words to the effect:

“SWR will be able to get access to the Councils”.

He further said words to the effect:

“Neither I nor the Authority control the waste and all Councils are free to do what they like with their waste. The Councils can make their own decisions about doing a deal with SWR if they wanted”.

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394 Ex D15: 569.
395 Ex P23 at [50].
396 Ex P23 at [51].
397 Ex P23 at [52]-[56].
54. Mr Lorenz raised the topic of the Brinkley site during that meeting. He said words to the effect that:

“The Authority is going to Brinkley and I am moving all of our equipment there”.

55. Mr Lorenz did not say anything more about Brinkley or the financial modelling or assumptions by the Authority or whether the Authority had held discussions with its member Councils relating to that move. He did not say that the authority was intending to obtain the waste from the member Councils.

56. Mr Lorenz’s comments about Brinkley did not include any reference to the Councils moving their waste from Hartley to Brinkley after he and the Authority moved or what effect the establishment of the Brinkley site would have on the operation of the Hartley site.

In examination-in-chief Mr Brown said: (597-598)

Q Did you ask Mr Lorenz any questions about that topic [the relationship between the Authority and the constituent councils].

A Yes.

Q Can you recall now, if not the precise words, the effect of your questions to Mr Lorenz.

A Who controls the waste, and how does the authority work. It was made very clear to me that the authority didn’t control the waste.

Q When you say ‘made very clear to me’ are you referring to anything Mr Lorenz said.

A Yes.

Q Can you remember his exact words on the topic or at least the effect of what he said.

A We spoke about it often at the meetings, that we don’t control the waste, meaning the authority. The individual councils can do their own commercial deals. That was my whole focus in regards to the commercial opportunity that we had at the facility. I was also interested to understand what the relationship was like. He mentioned at that meeting that he wasn’t happy with his situation at the authority.

Q What did he say.

A Exactly that, he’s not paid appropriately, he’s not happy with the workings of the authority and the complexity of the arrangement, I took it to understand the interface between the councils and the authority.

Q Did you ask him any questions about how you might negotiate with the councils.

A Not really. I just wanted to be clear that we had those opportunities and that we could do commercial deals with the individual councils.

Q Did he say anything about whether you could get in front of the councils for that purpose.
A  Yes.

Q  What did he say.

A  He said - I’m not sure if it was at this meeting but he definitely said that he would get us in front of the appropriate people at the individual councils and he did so.

During the course of the meeting Mr Brown and Mr Lorenz discussed Brinkley: (598)

Q  Do you recall anything being said about the Brinkley site during that site meeting.

A  Yes, so he was obviously upset with the breakdown in the relationship with the Harveys, I think it was all very personal. The Brinkley sites at Murray Bridge, it’s a landfill that was closed a number of years prior.

Q  I’ll stop you there. What understanding did you have about Brinkley by the time of this site meeting on 23 October 2012.

A  That the authority being the landfill operator was going to move there and open up the Brinkley landfill.

Q  From where did you get that understanding.

A  From Michael Lorenz.

Q  Did he say anything on the topic of whether the four councils would move to Brinkley.

A  We talked about it and he clearly stated that he didn’t control that decision. It was controlled by the individual councils.

Q  Did he say that there was any decision that had been reached that the councils would move to Brinkley.

A  No.

And: (599-601)

Q  Did he [Mr Lorenz] say anything on the topic of whether there was to be … competition between your company on the one hand and the authority on the other about the member council waste streams.

A  He actually said that - and we actually pushed this. We didn’t see ourselves as a competitor to the authority at all, we thought we could add value to their entity but also to their member councils. We talked about it at a few meetings, and he said that he agreed.

Q  Agreed with what.

A  That we shouldn’t compete with each other, and I took that to think that they were going to Brinkley to continue to keep their staff employed. We actually offered at that meeting to take on their staff.
Q  This is at the site meeting.

A  The landfill staff, because we saw that as a potential win-win situation. So there was no discussion at all up until the sale of this asset, that we were a competitor.

Q  If the four councils didn’t move their waste to Brinkley what did you think the Authority was going to do at Brinkley with its equipment and staff.

A  We thought it was sound for Murray Bridge to take their waste into that cell. It’s on their doorstep, the authority does other things.

Q  What other things did you have in mind.

A  The authority runs transfer stations, community centres, you know, there’s still a need and a purpose for the authority. It wasn’t our business to understand the nature of what they were going to do at Brinkley. What our business was to understand was the fact that the authority was not going to compete with us to go and do commercial sound deals to keep this entity alive. There’s no need in a small regional area to be running two small facilities like that. It’s just a recipe for disaster and that’s why we were so focused on getting in front of the councils.

Q  Did he say anything at the site meeting or subsequently to the effect that if the authority didn’t garner the four member councils waste streams, then the authority might collapse.

A  Absolutely not.

Q  Did he say anything to the effect that it was important for the authority to keep those four member council waste streams.

A  No.

Then in cross-examination Mr Brown gave the following evidence: (900-904)

Q  He [Mr Lorenz] said you could speak to the member councils but it was up to the member councils to determine how their waste is dealt with.

A  Yes.

Q  And that was all that was said on the topic of the member council waste.

A  I can’t recall precisely what was said but we had a good open discussion about it.

Q  He never said that individual councils can do their own commercial deals.

A  Yes.

Q  He never said at that meeting that he would get you in front of the appropriate people at the individual councils.

HIS HONOUR: Hold on, hold on. Your last proposition he said yes to.

HIS HONOUR
Q  Do you mean yes, he did say it.
A  Yes, he did say that, sorry.

XXN
Q  He never said at that meeting that it would get you in front of the appropriate people at the individual councils.
A  That was said at the later meeting.
Q  There was no discussion of the four councils moving to Brinkley at this meeting on 23 October.
A  No.
Q  He never said the decision of the four councils moving to Brinkley was controlled by the individual councils.
A  No.
Q  He never said at that meeting that he agreed that Southern Waste wasn’t a competitor to the authority.
A  I can’t recall talking about that at all, to be honest.
Q  He never said the authority and Southern Waste should not compete with each other.
A  He never said -
Q  At that meeting, that the authority and Southern Waste should not compete with each other.
A  I can’t recall that.
Q  In fact, there wasn’t a single word spoken of potential competition between the authority and Southern Waste at that meeting.
A  I can’t recall, sorry.
Q  Well, you have made various references to it in your evidence so that’s why I am putting these propositions to you. I suggest that all your evidence on that topic about statements at this meeting was false. Are you telling his Honour you just can’t recall now.
A  I have said many times, at that meeting, we drove around the site, we inspected the site, we had a very open discussion about the workings of the authority and the relationships between the authority and the individual councils and we definitely talked about that the authority didn’t control the individual councils and that they were, in essence, able to contract their own services and disposal -
Q  Right, just coming back to my question, I suggest there was not a single word spoken of potential competition between the authority and Southern Waste at that meeting.
I don’t understand your question, sorry.

You have made various - I can go through them if you would like. You have made various references to Mr Lorenz at that meeting, you talking about competition between the authority and Southern Waste and I suggest to you that there was not a single word spoken at that meeting by either of you about competition or potential competition between the authority and Southern Waste.

We definitely spoke to Michael that we didn’t see ourselves as a competitor and that we thought the best way forward was for us to work together with the authority. If you’re suggesting that we didn’t speak about that, we definitely did.

Just hold on, the suggestion is at the site meeting on 23 October 2012 -

Yes.

- that topic wasn’t discussed, right.

Yes.

Just specifically at that site meeting.

Yes.

Not more generally.

Yes, it was discussed.

Nor did he tell you to go and do deals with the individual councils.

No.

Well, meaning do you agree that he didn’t tell you that specifically.

If we’re talking about that day, no, we didn’t talk about that on that day.

He never said anything about member councils controlling their own waste procurement.

Yes, he did.

He never said anything about not interfering with any discussion between you and the member councils.

No, he didn’t.

He never said anything about you having the opportunity to individually deal on a commercial basis with each of the member councils.

Yes, he did.
Q  You have just made all this up, haven’t you.
A   No, I haven’t.
Q  None of that is mentioned in your witness statement, is it, you agree with that, your summary from paras.50-56.
A   I think I have clearly pointed that out.
Q  Is what was said at the meeting, does it go any further than what you have set out in paras.50-56 or is really that all that was said. The only conversation you refer to is in paras.53 and 54 and 52. So apart from what’s in 52, 53 and 54, was anything else said.

HIS HONOUR:  About what? Because, clearly, something else had to be said.

XXN
Q  On the topic of member council waste, was anything else said apart from what’s in 52, 53 and 54.
A   I can’t recall word for word.
Q  You have given evidence that there was a conversation where you said “Who are we dealing with here, Michael? Can we do a deal with these individual councils?’ and you said Mr Lorenz said ‘Yes, you can’, do you recall giving that evidence.
A   Yes.
Q  I suggest to you that there never was such a conversation at that meeting on 23 October.
A   What paragraph is that?
Q  It’s just your evidence, it’s not in your statement, it’s in your evidence.
A   Could you say that again, sorry?
Q  You said that there was a conversation where you said ‘Who are we dealing with here, Michael? Can we do a deal with these individual councils?’ and Mr Lorenz said ‘Yes, you can’.
A   Absolutely we talked about that.

...  

Q  You have also given evidence that you were told by Mr Lorenz - this is your evidence - ‘We were told that the authority was not reliant on individual councils funding via waste disposal’.
A   Yes.
Q  Mr Lorenz never said that at the meeting on 23 October, did he.
A   Yes, he did.
Q He didn’t say it at any meeting.
A Yes, he did.
Q You said he said it at meetings in September and November 2012 as well.
A Yes.
Q That’s false as well, isn’t it.
A No.
Q Why didn’t you mention that in your statement.
A I think I have.
Q Can you point to where in your statement you talk about being told by Mr Lorenz on multiple occasions at this meeting and also in September and November that the authority wasn’t reliant on individual councils funding via waste disposal.
A 53.
Q 53. So you think that - you took that comment by Mr Lorenz to mean the authority wasn’t reliant on individual councils funding via waste disposal.
A As I’ve said, we talked about it in detail and that was the reason we agreed to move forward with this purchase.

Mr Brown said that had SWR been told at that time that the constituent councils planned to take their waste to Brinkley, SWR would have walked away from any further involvement in the Harvey/Authority dispute “in a heartbeat”. (598) Mr Brown explained that without revenue streams from the constituent councils, the Hartley site was a “liability”. (598) Mr Brown acknowledged that SWR would have been left having to honour the deal with the Harveys, but it would not have purchased Hartley. (599)

It was suggested to Mr Brown in cross-examination that the purpose of the 23 October 2012 meeting was to review the site. Mr Brown said that the real purpose was to “have a chat to Michael Lorenz about the workings of the authority and the relationships between the authority and the councils”. (898) He denied that discussions at that meeting had turned to details of the site and how it had been constructed.

ii. Mr Lucas

Mr Lucas attended the site meeting at Hartley on 23 October 2012. Most of the discussion during the meeting focused on site details, and how the site was to be constructed and operated by the Authority.398 During the course of discussions with Mr Lorenz, Mr Brown asked on several occasions about access to the constituent councils. Mr Lucas recalled Mr Brown saying words to the effect,

398 Ex P22 at [25].
“can we get in front of these councils to do a deal?”.

Mr Lucas recalled Mr Lorenz saying that the councils could make their own decisions about doing a deal with SWR if they wanted to. He recalled Mr Lorenz saying that the Authority was moving to Brinkley. According to Mr Lucas, at no point during the site visit did Mr Lorenz say anything more about Brinkley, about waste being diverted from Hartley to Brinkley or about the effect that the establishment of Brinkley would have on the operation at Hartley.

Mr Lucas was cross-examined about the 23 October 2012 site meeting. He agreed that Mr Lorenz said that the Authority “is going to Brinkley and I’m moving all of our equipment there”. At that time, Mr Lucas did not know about the cell that was being constructed at Brinkley. He said he did not know what they were doing at Brinkley. He did not ask.

Mr Lucas said that he did not learn about the Authority’s Brinkley operations until SWR was engaged in negotiations with the Authority and the Harveys. He could not say what discussions he had with Mr Pucknell and Mr Brown about Brinkley in August/September 2012. He said he was not aware that the Authority had been looking to re-establish Brinkley since March 2012. He agreed with the proposition that in 2012 SWR was interested in expanding the types of waste that could be received at Hartley beyond those that which the Authority had deposited, including trommel fines.

He repeated that he was effectively a silent partner and he trusted Mr Brown and his judgment.

iii. Mr Lorenz

Mr Lorenz recalled attending the 23 October 2012 site meeting on behalf of the Authority. However, he did not take notes of what was said. From his recollection, it lasted approximately 20 minutes. In his statement Mr Lorenz said:

132. … We drove around the site in their car. We drove up to the top of the landfill and looked over cell 6 and then [went] back down to the office.

133. There was a discussion about the site layout and I identified aspects of the site.

134. They asked what the Authority was like to work for. I explained that for the Authority position I allocated 3 days per week, however a lot more time than that was required which prevented me from working with my other clients which in some instances paid at a higher rate.
135. As for paragraph 52 of Mr Brown’s statement, I do not recall the precise words spoken, however I do recall him saying words to the effect that “he would like to get access to the member councils to discuss what SWR could offer them in relation to receiving waste at Hartley”.

136. In response I said words to the effect that “he could speak to the member councils but that it is up to the member councils to determine how their waste is dealt with”.

Mr Lorenz could not recall informing Mr Brown and Mr Lucas that the Authority was moving to Brinkley.

In his oral evidence Mr Lorenz denied telling Mr Brown that he would put SWR in front of the individual councils for the purposes of doing a deal about securing waste at Hartley. (4478) Further, he denied that he and Mr Brown had agreed that SWR and the Authority should not compete with each other. (4478)

In cross-examination, Mr Lorenz agreed that Mr Brown referred to “wanting to get in front of the member councils to put options to them”. (4704) Mr Lorenz recalled Mr Brown referring to this at various meetings and agreed that it was obvious that Mr Brown was keenly interested in the securing the Authority’s waste. (4704-4705) He recalled informing Mr Brown that the Authority did not control the waste and that it was up to the individual councils to determine what happened to their waste. (4705) Although he could not recall the precise words he used, Mr Lorenz remembered saying words to the effect that “[t]he councils were free to make their own decisions about waste”. (4705) However, in examination-in-chief Mr Lorenz had denied saying to Mr Brown that “[y]ou can go do individual deals with the councils to secure their waste”. (4477-4478)

iv. Consideration

There appears no dispute, and I find, that during the 23 October 2012 site meeting Mr Brown made plain, if it was not already plain to Mr Lorenz, SWR’s interest in gaining access to the constituent councils for the purpose of doing a deal. I am not prepared to find that Mr Lorenz said that he would put SWR in front of the constituent councils. Such statement does not appear in Mr Brown’s statement404 and is not supported by Mr Lucas. Further, in cross-examination Mr Brown said that that statement was made at a later meeting. (901)

There is also no dispute, and I find, that Mr Lorenz told Mr Brown that the Authority did not control where the constituent councils disposed of their waste and that it was for the councils to determine where they would dispose of their waste.

I understood the effect of Mr Lorenz’s evidence to be that he did not discount the possibility that he said that the Authority was moving to Brinkley during the course of the 23 October 2012 site meeting. Mr Brown is supported by

404 Ex P23.
Mr Lucas in his claim that Mr Lorenz did say the Authority was moving to Brinkley. I find that Mr Lorenz did make such statement.

Mr Lucas denied knowing that the Authority was in the process of constructing a cell at Brinkley. (542) I think that unlikely. As Mr Brown conceded, SWR recognised at this time that RCMB would likely dispose of its waste at Brinkley. Clearly, whatever the Authority was doing at Brinkley, SWR knew that at least it involved the capability of accepting RCMB’s waste. (2217)

I find that there was no discussion during the 23 October 2012 site meeting about the constituent councils moving their waste streams to Brinkley.

I am unable to find that during the 23 October 2012 site meeting there was discussion about SWR and the Authority on the topic of being in competition or being competitors. I found Mr Brown’s evidence on this issue very unsatisfactory. Initially, he said that “we actually pushed this” and that Mr Lorenz agreed with him when he said that SWR did not see itself as a competitor of the Authority, that it could value add to the Authority and that the two entities should not compete. Mr Brown then said that he could not recall talking about SWR not being a competitor of the Authority at all, and could not recall Mr Lorenz saying that SWR and the Authority should not compete during the site meeting. It was put to him in strong terms that competition was not discussed and he said he could not recall. He was then reminded of the earlier evidence he had given as to what was said during the 23 October 2012 site meeting, prompting him to change his evidence and to state that SWR did say that it did not see itself as a competitor to the Authority and that SWR thought the best way forward was for the two entities to work together.

I appreciate that Mr Brown spent considerable time in the witness box and I appreciate that he was closely questioned about things that were said and done some time ago. However, those matters only make it more difficult to rely upon his evidence as to what was said during the 23 October 2012 site visit absent support to be found elsewhere in the evidence.

There is also a troubling inconsistency in his evidence. On the one hand, he says SWR did not see the Authority as a competitor — “we actually pushed this”. (599) On the other, SWR considered that there was no need for two landfills in the region — it was a “recipe for disaster”. (600) Disaster was the consequence of competition. In truth what Mr Brown meant was that SWR wanted the Authority as a customer, not a competitor, and as a customer the Authority would have a different role in the industry. I have no doubt this became SWR’s view but I am not persuaded that it was expressed during the site meeting. I consider his evidence on this issue an example of aggregation, conflation and reconstruction.

I also found Mr Brown’s evidence on the issue of whether Mr Lorenz said during the site meeting that the Authority was not reliant on the individual
council’s funding via waste disposal, unsatisfactory. Initially, he said that Mr Lorenz did not say anything to the effect that it was important for the Authority to keep the four constituent councils’ waste streams. He then said in cross-examination that Mr Lorenz did say that the Authority was not reliant on the individual council’s funding via waste streams. He claimed that he had previously said as much in his statement and pointed to paragraph 53. Mr Brown said that he and Mr Lorenz talked about the topic in detail and “that was the reason we agreed to move forward with this purchase”. (904) Mr Lorenz denied saying any such thing and implicitly denied the conversation. It is a topic of conversation which, if it did occur, I would have expected Mr Lucas to be a keen observer of, if not a participant in, and yet he has no recollection of the discussion. I reject Mr Brown’s evidence on this issue as again lacking in reliability. Did he lie? My impression was that he did.

f. The second meeting at Wallmans (5 November 2012)

On 5 November 2012 representatives of SWR and of the Authority met at Wallmans a second time. Mr Brown, Mr Pucknell and Mr Levinson attended on behalf of SWR. Mr Lumsden, Mr Hayes, Mr Salver, Mr Lorenz and Mr Coleman attended on behalf of the Authority.

i. Mr Brown

In his statement Mr Brown stated that he could not recall the precise words used by the various persons present in the course of contributing to the discussion. He did recall, however, Mr Hayes saying words to the effect of “the Authority accepts that it will exit the site and will move to Brinkley, although it could not move immediately”.405 In response Mr Brown said words to the effect of “the Harveys want us [SWR] to take over operation and the Authority to leave”.406 He further said words to the effect that the easiest way for that to occur was for SWR to take over post-closure liability and operate the facility with the councils continuing to dispose of their waste at Hartley. Mr Brown said that SWR was prepared to discuss a commercial basis for that occurring.

Mr Brown recalled Mr Hayes responding along the lines of the Authority having “no problem” with that proposal save that the Authority needed to be compensated for the cells it had built.407 That caused Mr Brown to say something to the effect of “we are offering $800,000 for the cells without getting into a detailed valuation ... SWR is very clear that we can take over the liability and compensate the Authority for its expenditure to date”.408 Mr Brown suggested that Mr Hayes then referred to it just being a matter of negotiating a timetable for the Authority’s exit. Mr Lorenz said words to the effect that it would take two to three months before the Authority could leave. Mr Brown then remarked that the

405 Ex P23 at [58.1].
406 Ex P23 at [58.2].
407 Ex P23 at [58.3].
408 Ex P23 at [58.4].
ability of the councils to continue to dispose of their waste at Hartley was an important part of SWR’s offer. This prompted Mr Hayes to say words to the effect that “[t]he move to Brinkley means that the Authority doesn’t need the Hartley site” and Mr Brown to comment that SWR was happy to take “our own risk on waste streams and price the plant and equipment, but the asset value we would offer would be very different without the Council waste as it would take us several years to build up our business”. Thereupon Mr Lorenz advised that the Authority could not make the councils take their waste to Hartley. Mr Hayes said that the Authority wanted to resolve the matter and suggested that any deal include a timeframe of two to three months, so that the Authority could exit Hartley, SWR could take over the licence and SWR could compensate the Authority for the investment it had made in Hartley.

In response, Mr Brown recalled saying words to the effect that SWR wanted to resolve the matter quickly and that we “could lock ourselves away in a room and just sort out a commercial deal”. At this point in the meeting, Mr Salver said words to the effect that the Authority could not control the council waste streams at Hartley and that any deal had to be about compensation and not a rate for councils to continue disposing of waste at Hartley. Mr Hayes advised that SWR was free to approach the councils directly to attempt to win their business. Mr Brown recalled saying that SWR’s disposal offer of $53 a tonne was “just a number” which could be revisited. Mr Brown said that he could see many logistical benefits to the constituent councils remaining at Hartley and did not want to make waves or inconvenience those councils.

Mr Brown said that Mr Lorenz then outlined the process for a decision to be made by the Authority. He referred in that outline to the Authority’s Board as needing to make a decision that each council would then have to ratify which may take four months. At some point toward the conclusion of the meeting, Mr Salver commented that the Authority just wanted the best outcome for the councils.

It was agreed that a further meeting would be held on 12 November 2012 at Wallmans to finalise the details of the compensation to be paid to the Authority, as well as other details of the deal.

In his oral evidence Mr Brown recalled the issue of compensation for the Authority being discussed. He said SWR understood that they would compensate the Authority for taking over the operation of the Hartley landfill on the understanding that SWR could do commercial deals with the constituent councils. The amount to be paid in compensation focussed on the value of the licence to operate the landfill which was agreed to be about $1 million.

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409 Ex P23 at [58.8].
410 Ex P23 at [58.11].
411 Ex P23 at [58.14].
secured the constituent councils’ waste, or at least AHC’s and DCMB’s waste, the deal was beneficial.

Mr Brown was asked whether he said anything at this meeting highlighting the importance to SWR of securing the constituent councils’ waste streams. (602) He said he did, but did not give evidence of what exactly he or others said in this regard. His evidence was that “[w]e said” that it was fundamental for SWR, if it were to enter any agreement with the Authority, to have the constituent councils’ dispose of their waste at Hartley. Mr Brown said that SWR was told that the Authority would introduce SWR to the individual council representatives who were responsible for making those decisions and that the Authority would not interfere with that process (602). Mr Brown’s evidence was that had he known that he would not have the opportunity to persuade the constituent councils, it was likely that he and Mr Lucas would not have “settled the transaction at all”. (602) He summarised his position as follows: (603)

If we knew at any point throughout the negotiation that the authority and the councils were all going to stay together as one, we would have walked away because we just - we can’t get the opportunity to commercially compete for that waste volume.

The Authority asked for time to arrange its exit from the Hartley site. (603) Mr Brown could not remember who raised the issue but suggested it was likely to be Mr Lorenz. He did recall that the question of the rate that would be charged to councils choosing to dispose of their waste at Hartley once SWR took over the operation was raised. He could not recall exactly what he said but by the end of the meeting the basis of an agreement had been reached. (604)

Mr Brown was asked if the topic of the price paid per tonne by the constituent councils to dispose of waste at Hartley was based on financial modelling accounting for operational costs at both Hartley and Brinkley was raised. Mr Brown said it was, but such discussion was limited to the operations at Hartley — it did not concern Brinkley. (725) He said: (726)

They were telling us that this was the rate that the member councils were depositing their waste in the Hartley facility and for us to continue that tenure we obviously had to match or better that rate and that’s what we went about to do, and obviously also improve the royalty structure to the Harveys at the same time. I’ve never had … anyone talk to us about that rate, incorporate rating costs at Brinkley, it doesn’t make any sense. Why would you talk to a deposit rate at a facility and say that it’s a construction cost at another facility that it incorporates as well?

Mr Brown could not recall Mr Hayes opening the meeting with a statement to the effect that the Authority’s preference was to continue to receive the council waste for two to four years to fill the unused cells and withdraw. (912-913) He could not recall if it was the Authority’s preference to move to Brinkley. (914) Mr Brown was asked whether he appreciated that the Authority’s move to Brinkley might involve the council waste streams moving to Brinkley. In
response, he said that he knew that the Authority was moving there, but thought that SWR could do commercial deals with individual councils. (915)

**ii. Mr Levinson**

Mr Levinson took notes during the course of the 5 November 2012 meeting. The outline of the meeting provided in Mr Levinson’s statement is similar to the outline in Mr Brown’s statement. Mr Levinson recalls that Mr Lorenz said words to the effect that “the Authority can’t make the councils bring waste to you”. Similarly, he recalls Mr Salver saying “the council waste stream won’t be a part of the deal if we have an alternate site, it will just be a question of compensation”.

In cross-examination Mr Levinson agreed that the Authority’s preference was to have two to four years to fill the unused cells that it had constructed or partially constructed at Hartley and thereafter to withdraw. (251) Mr Levinson agreed that the Authority’s preferred position was one that allowed for SWR to construct its own cell on the Hartley site and operate side-by-side. (252-253) It was in that context that Mr Hayes referred to the Authority having a site at Brinkley. (253) Mr Levinson agreed that what was being discussed was that the Authority would continue to receive waste and fill the cells that it had invested in, pay an increased royalty and complete all work to cap the remaining cells. (253) If that were to occur there would be no basis for the Authority to seek compensation. SWR could commence operation at the site but the Authority would not leave. It was in response to that proposal put by Mr Hayes that Mr Brown said that SWR would prefer to take over responsibility for Hartley. (253) Mr Levinson agreed that when Mr Brown referred to the risk of closing the gate, he was threatening to close the gate on the Authority but not necessarily the constituent councils. (254) Mr Levinson could not recall the position ever being put during negotiations that the councils would be excluded from disposing of waste to the Hartley landfill. The threat was that the Authority would be excluded from operating the site. (255)

Mr Levinson was cross-examined about the reference in his notes to Mr Hayes as saying, “Brinkley site means don’t need this site”. (265) Mr Levinson accepted the note meant that the Authority did not need the Hartley site because it had Brinkley. The implication is that the Authority continued to need a landfill and had a landfill. Mr Levinson said that he did not have a “particular understanding about what the authority needed in that sense”. (265) Mr Levinson was taken to Mr Salver’s statement that the council waste stream would not be part of the deal as the Authority had an alternative site and thus any deal would just be a question of compensation. (266) He was asked whether he understood that statement to mean that there was no commitment on the part of the Authority about the council waste streams. Mr Levinson agreed that this

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412 Ex P14 at [56].
413 Ex P14 at [62].
414 Ex D131 at [62].
statement was made in the context of discussion about the alternative site (at Brinkley). He understood that Mr Salver was indicating that the councils had a choice as to whether or not to take their waste to Hartley or Brinkley, although he did not state it in such bold terms. (266)

Mr Levinson said: (1023)

Q  You knew that the loss of member council waste streams to the authority’s operations at Brinkley was a risk for Southern Waste Resources.
A  Yes, I - yes.
Q  In fact it was clear to you, wasn't it, by 5 November that the member councils would have a choice whether or not to use Hartley or Brinkley; that's 5 November 2012.
A  That was my belief, yes.

iii. Mr Pucknell

In his statement Mr Pucknell stated that he could not recall all the matters that were discussed at the meeting but recalled discussion about the council waste streams. He recalled someone from the Authority saying words to the effect that “you can approach the Councils direct to discuss their future waste stream”.415 He recalled Mr Lorenz saying words to the effect, “the Authority did not control the waste and the Councils could decide where they were to take their waste”.416

Mr Pucknell acknowledged that he had a poor recollection of the matters discussed at the meeting. (1246) He could not recall with any precision what was said about a side-by-side operation at Hartley. (1244) Mr Pucknell could not remember Mr Brown making a “threat” of legal action to the Authority but conceded that it may have happened. (1244-1245).

iv. Mr Lorenz

At the time of the 5 November 2012 meeting Mr Lorenz thought that the best course of action for the Authority was to leave the Hartley site.417 While he did not keep any notes of the meeting, Mr Lorenz recalled discussion between Mr Hayes and Mr Brown about the expected timing of the Authority’s exit. Mr Lorenz recalled Mr Hayes saying that the Authority would like “a period of 3 to 4 years within which to exit the site to enable the Authority to utilise the existing cells and leave the site in an orderly fashion and on this basis would not pursue damages” and that “SWR could then operate subject to its own licence elsewhere on the site”.418 Mr Brown found that proposal to be unacceptable and

415 Ex P34 at [37].
416 Ex P34 at [37].
417 Ex D146 at [140].
418 Ex D146 at [141]-[142].
said that he wanted the Authority off the site as soon as possible. Mr Brown said words to the effect that “the worst result would be that the Authority would not get access to its cells and SWR would get its own licence”. Mr Hayes indicated that in that case the Authority would need to be compensated.

Discussion then turned to the topics of how quickly the Authority could leave the site and the council waste streams. Mr Lorenz recalled Mr Brown stating that the council waste streams were important to SWR. In response Mr Lorenz said that the Authority could not direct the councils to take their waste to Hartley. Mr Lorenz recalled Mr Salver saying words to the effect that “[a]ny deal is just about compensation and not a rate for councils to continue dumping”. Mr Lorenz advised that the Authority’s Board would need to make a decision about compensation and the terms of its exit from Hartley and each council would need to ratify the decision which could take four months. The attendees agreed to meet again on 12 November 2012 to further discuss settlement.

In cross-examination, Mr Lorenz agreed that at the time of the meeting the Authority was looking to pursue the option of leaving Hartley and negotiating a compensation package. (4707) Mr Lorenz agreed that, during the meeting, Mr Brown said that SWR was prepared to take on the post-closure risk and liabilities of the site and that the Harveys wanted the Authority off the site as soon as possible. (4707-4708) Mr Lorenz denied that there was discussion of the tonnage rate at Hartley being negotiable. (4709) Although he initially agreed that Mr Brown said words to the effect that it was crucial to the deal for SWR to secure council waste streams, (4708) he denied that it was made plain to him that without the council waste streams, SWR would be in a “financial predicament”. (4709) He further denied being told that the importance of securing the waste streams derived from SWR’s requirement to pay the Harveys. (4710)

Mr Lorenz was cross-examined on what was said by Mr Salver at the meeting. He agreed that while he could not recall the precise words, the general effect of what he said was that the deal “wasn’t about councils continuing to dump at Hartley” but rather compensating the Authority for moving to Brinkley. (4902-4903)

v. Mr Salver

Mr Salver made notes of the 5 November 2012 meeting at Wallmans. These notes were tendered. Mr Salver noted that Mr Brown told the meeting that “crucial to the deal is that they have an ongoing waste stream from the Authority” and that “they need the waste stream as they have to compensate the Harvey’s [sic] as soon as they take over the site”. Mr Salver further noted that

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419 Ex D146 at [146].
420 Ex D146 at [154].
421 Ex D5: 137.
422 Ex D5: 137 at p 1523.
SWR “would like to get on [sic] front of the individual councils to make an offer to take our waste streams essentially as a competitor”.  

According to Mr Salver, the following matters were raised at the meeting:

49.1. Brian Hayes QC said words to the effect that “the Authority will agree to leave the site and negotiate an orderly exit and wants to discuss how and when this will occur”;

49.2. Brian Hayes QC said words to the effect that “there were 2 landfill cells which could still be utilised because of remaining air space and that the Authority has obligations under the EPA licence for closure of the site and as such the Authority would like to negotiate the timing of its exit so that the remaining air space could be used and cell closure could occur”.

49.3. Brian Hayes QC said words to the effect that “the Authority had another site at Brinkley and that the Authority would offer to pay an increased royalty of $3.00 per tonne and would require a 30 year access to the site to monitor the site in accordance with the EPA”.

49.4. Brian Hayes QC said words to the effect that “the Authority would require 2 to 4 years for this process and that there would then not be a compensation claim”.

49.5. Simon Brown said words to the effect that “SWR was prepared to take on the risk and liability of post site closure, that SWR would like to get access to the site promptly but critical to the deal is that SWR have an ongoing waste stream from the Authority”.

49.6. A response was then provided on behalf of the Authority … to the effect that it made no sense to dump waste at Hartley at a rate of $53.00 per tonne premium when the Authority has an alternate site.

49.7. Simon Brown then said words to the effect that “the tonnage rate they advised was negotiable but they need the waste stream as they have to compensate the Harveys as soon as they take over the site”.

Mr Salver maintained that the discussions at the meeting were limited to the SWR taking over the site, SWR assuming liability of the site, SWR compensating the Authority, the timing of the Authority’s exit from Hartley and the council waste streams. Regarding the council waste streams, Mr Salver recalled Mr Hayes, Mr Brown and Mr Levinson stating the following:

- Mr Brown: “The ability of the council[s] to continue to dispose of their waste at Hartley is an important part of our [SWR’s] offer”;

- Mr Hayes: “The move to Brinkley means that the Authority does not need the Hartley site”;

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423 Ex D5: 137 at p 1523.
424 Ex D131 at [49].
425 Ex D131 at [50.3].
• Mr Lorenz: “We [the Authority] can’t make the councils take their waste to Hartley”;

• Mr Salver: “We can’t control the council waste stream at Hartley if the Authority has an alternative site. Any deal is just about compensation and not any rate for councils to continue dumping”;

• Mr Hayes: “You are free to approach the councils direct to attempt to win their business”;

• Mr Brown: “Our disposal offer of $53 per tonne is just a number. We can revisit it”;

• Mr Salver: “The Authority just wants the best outcome for the councils”.

Mr Salver said in his statement that “[t]here had been no offer made [by the Authority] or consideration [given by the Authority] as to what was going to happen in the future regarding Council waste streams”.

On 6 November 2012 Mr Salver wrote to Andrew Aitken, Tim Piper and Tim Hancock to advise of the outcome. In that email, Mr Salver stated:

We pointed out that it makes no sense to dump waste at the Hartley if member Councils have to pay a higher dumping rate of $53 per tonne (which ResourceCo was seeking) when we have an alternate site with much lower dumping rates ($38 per tonne). This to my mind became the game changer as they immediately advised that the tonnage rate was negotiable and pressed the issue that they need our waste stream as they have to compensate the Harvey’s as soon as they take over the site. Without the waste coming into Hartley, they would be in a financial predicament.

Mr Salver concluded his email by stating:

In short, it was considered that we have the upper hand at present and should be able to leverage a suitable outcome for the Authority and its members.

When asked about this meeting, Mr Salver said that SWR did not reveal its plans for the Hartley site other than that it wanted to use it as a landfill. He denied telling Mr Brown that he did not see SWR as a competitor, and denied saying words to the effect that if the $37 per tonne royalty payment was honoured it would be “business as usual” at Hartley. This phrase was attributed to either Mr Salver or Mr Lorenz in Mr Brown’s evidence. Mr Salver could not recall Mr Lorenz saying words to that effect.
In the course of being cross-examined, Mr Salver was taken to his 6 November 2012 email. He was asked what he meant when he said that the Authority have “the upper hand”. Mr Salver clarified that as the Authority had secured the Brinkley site, it had the “bargaining power to get a good outcome for the authority and its members”. (4023) Mr Salver was also cross-examined on what was meant by the term “game changer” in his email. He explained: (4206)

The meeting had actually started out with the ResourceCo representatives being quite aggressive in their stance and to my mind, during the discussions when the Brinkley site was mentioned and the gentleman then left the room and came back, there was a complete different mood change, and the use of that term ‘game changer’ was because of that. There had been a complete change in mood and approach to us as the other party and they were far more amenable and to my mind, this was because they would want that opportunity to come to us at a later stage.

Mr Salver conceded that it was clear from the “flow of the negotiations” that SWR would be in a financial predicament if it did not secure the council waste streams at Hartley. Mr Salver accepted that their financial predicament would become more acute with the taking on of the post-site closure risk and liability at Hartley. Further, he conceded that the agreement to take over this liability occurred in circumstances where SWR had emphasised that it was crucial to secure the waste streams going forward. (4208)

vi. Mr Coleman

Mr Coleman did not keep any notes of the meeting. From his memory he recalled the following being discussed:

88.1. Simon Brown said words to the effect that “SWR wanted to take over the Hartley landfill and it was necessary for the Authority to leave”;

88.2. Mr Hayes QC said words to the effect that “if the Authority were to depart the site it required compensation”;

88.3. Mr Brown said words to the effect that “SWR was keen to take waste from the member councils”;

88.4. Mr Hayes QC said words to the effect that “the move to Brinkley meant that the Authority did not need the Hartley site”;

88.5. Mr Lorenz said words to the effect that “the Authority can’t make the councils bring waste to Hartley”;

88.6. Mr Salver said words to the effect that “the council waste stream won’t be part of the deal if we have an alternate site, it will be a question of compensation”; and

88.7. Mr Hayes QC said words to the effect that “we can approach\textsuperscript{430} the councils direct to attempt to win their business”.

\textsuperscript{430} In his oral evidence Mr Coleman conceded that paragraph 88.7 of his statement should read “you can approach” rather than “we can approach”. (3131)
Mr Coleman gave limited oral evidence regarding this meeting. Mr Coleman said he was asked to attend the meeting by Mr Lorenz as it looked as though the Authority would move to Brinkley. Mr Lorenz wanted Mr Coleman’s input on operational matters at Hartley. (3130)

Mr Coleman recalled Mr Hayes saying that the Authority no longer required Hartley because it was establishing a site at Brinkley. (3131) To this end, Mr Coleman recalled telling the SWR representatives that the equipment was not for sale as the Authority would require it at the Brinkley site. (3131)

vii. Consideration

Based on the correspondence between Mr Levinson’s notes and Mr Salver’s notes, I find that the meeting opened with Mr Hayes putting a proposal that allowed for the Authority to remain at Hartley for as long as it took to fill and cap cells 6 and 7 and then have access in order that it might meet its environmental management obligations. I find that the discussion changed tack when Mr Brown indicated that SWR preferred to take the entire operation over including responsibility for existing and future environmental liabilities. I am satisfied that in the course of outlining the Authority’s position Mr Hayes said that the Authority had Brinkley and would move to Brinkley but could not simply walk away from its obligations in relation to the Hartley landfill. Mr Coleman was not challenged on his evidence, and I find, that Mr Hayes said that the Authority did not need Hartley as it had Brinkley.

Again, the correspondence between the notes of Mr Levinson and Mr Salver satisfies me that Mr Hayes said that if the Authority’s proposal was accepted there would be no claim for compensation. Once Mr Brown made clear SWR’s preference, I find the discussion turned in the main to the question of compensation payable to the Authority.

I accept the evidence of Mr Pucknell and Mr Levinson that they understood with the disclosure of Brinkley that the constituent councils would have a choice of landfills. I think the same reality was plain to Mr Brown, hence I find, based on Mr Levinson’s and Mr Salver’s evidence, that he immediately stated that the $53 per tonne rate offer was negotiable. Mr Brown recognised that upon taking over Hartley, SWR would be competing for the constituent councils’ waste streams with the Authority.

I also accept that SWR made it known that the constituent councils’ waste streams were important to its plans. It is not disputed, and I find, that Mr Lorenz said words to the effect that the Authority did not control the decision as to where the constituent councils dispose of their waste and that Mr Hayes said that it was open to SWR to approach the councils in an attempt to secure agreements that the waste come to Hartley. Further, I find that Mr Salver said words to the effect that any settlement could not include the constituent councils’ waste streams. Accepting this, on the basis of Mr Levinson’s notes, I accept that Mr Brown
made clear that the consequence was that less would be paid in the way of compensation. Mr Levinson, Mr Salver and Mr Lorenz all gave evidence, and I accept, that discussion then ensued regarding the process that would be undertaken by the Authority if agreements were reached.

There is no evidence of any of the Authority representatives making any comment as to the likelihood or otherwise that the constituent councils would dispose of their waste at either Hartley or Brinkley. There is also no evidence of any of the Authority representatives articulating the Authority’s intentions at Brinkley. As I have said, however, I am satisfied that each of Mr Brown, Mr Pucknell and Mr Levinson understood that if SWR took over the Hartley operation and the Authority moved to Brinkley, the constituent councils would be presented with a choice. In other words, SWR and the Authority would be competitors. I reject the suggestion made by Mr Brown that in this meeting Mr Lorenz said that the Authority and SWR were not competitors. No-one in attendance at the meeting other than Mr Brown suggested that the issue of competition was expressly raised.

Standing back, it is apparent that the Authority approached the meeting hoping that it would be able to operate at Hartley for some time. If this did occur then the Authority would operate two landfills, a possibility that was anticipated when first it was decided to commission Brinkley.

It is also apparent that SWR considered the constituent councils’ waste streams important, but not critical. SWR made clear that it was prepared to takeover Hartley without any deal with the constituent councils being in place, an eventuality that would, however, affect what SWR was prepared to pay in compensation as it would take some time to grow the business. There is no evidence that anyone from SWR said during the meeting that if SWR did not secure the constituent councils’ waste streams SWR would be in a financial predicament. The closest thing they said to this was, as Mr Salver noted, that the waste streams were needed because upon taking over the operation the Harveys had to be paid.

I reject Mr Brown’s evidence that SWR was told that the Authority would not interfere with SWR meeting and making offers to the constituent councils. No-one else who attended the meeting and gave evidence has suggested that this was said. I find that it was not said. Nonetheless, as Mr Brown said and as Mr Levinson noted, SWR was content to proceed without securing the constituent councils’ business and would grow the business notwithstanding its obligation to the Harveys.
g. **The negotiations continue**

i. **The negotiations continue via correspondence**

After the meeting of 5 November 2012 Mr Levinson sent an email to Mr Lumsden. He commenced the email confirming the next meeting on 12 November 2012 at which negotiations would continue. He then expressed his understanding that the negotiations would proceed on the basis that the Authority would transfer its licence for the Hartley site to SWR and that SWR would take on all responsibility and liability for that site thereafter. Further, the Authority would exit the site soon and SWR would compensate the Authority for the cells that had been constructed but would not be used by the Authority. Mr Levinson then stated:

Further to our meeting today and for the purposes of our meeting on Monday, could you please advise me –

1. What are the assets that your client would wish to see included in any discussion on “compensation”? I gather that some plant and equipment would be used at Brinkley and I’m not clear what cells etc your client sees as being included in the offer;

2. I note that your client undertook an independent valuation in the 2010/11 year of the capping and post closure costs (see its 2010/11 Annual Report). Could you please provide a copy of that valuation;

3. To the extent that it is not covered already, please provide details of the way in which the capping and post closure costs are calculated in paragraph 6 of your letter to me of 25 September;

4. Your letter to me of 25 September notes (at paragraph 8) the construction costs of Cells 6 and 7. Can you please provide the details of the construction costs of these cells (and any other assets that your client seeks compensation for);

5. Marc Salver mentioned today that the price per tonne paid by member Councils was based on financial modelling taking into account the costs of construction, operation and capping as well as post closure management – I would be grateful if you could provide that modelling.

In cross-examination, it was put to Mr Levinson that his summary of the position that the negotiations had reached did not include any reference to SWR’s commitment being conditioned on securing the constituent councils’ waste streams. Mr Levinson agreed that, at the time of writing the email on 5 November 2012, the council waste streams were not “tied into the deal”. He understood that the constituent councils would make up their own minds about where they disposed of their waste and that the Authority did not dictate what the councils would do.
On 7 November 2012 Mr Pucknell sent an email to Mr Brown and Mr Lucas which followed up from the meeting on 5 November.\(^{433}\) In his email, Mr Pucknell set out his thoughts regarding the dollar value and cost of factors relevant to assessing the compensation sought by the Authority. He committed those thoughts to writing for the benefit of a future meeting between himself, Mr Brown and Mr Lucas. Under the heading, “Other issues”, Mr Pucknell stated, “Brinkley option has transport disadvantage of $15 / tonne. For waste ex Adelaide side. Not all waste impacted but suspect lions share of council tonnes would be disadvantaged”.\(^{434}\) Mr Pucknell also observed, “[L]andfill without council volume has less value need to model 10k tonne scenario and minimum royalty. May not work if retain existing cost structure”.\(^{435}\) Notwithstanding that Mr Pucknell’s email contained an estimate of the value of Hartley on the basis that the constituent councils took their waste elsewhere, Mr Brown said that such an outcome was never an option. (606) He said: (605-606)

Q … Did you agree with that approach [Mr Pucknell valuing constituent council contracts at $500,000\(^{436}\)] to doing contracts with the councils.

A I agree with what he was trying to flag to us.

Q What did you understand that he was trying to flag to you.

A Just the conservative view of his understanding of what we were embarking on.

Q He then refers to ‘All of that leading to a net payment of up to $700,000 with council volume or $200,000 without’.

A Yes.

Q Did you ever consider this deal without council volume.

A No.

Q He refers then to the Brinkley option and a transport disadvantage of $15 per tonne. What did you understand he was referring to there.

A That was where my real focus was in regards to this transaction. So our position of our landfill is strategic, extremely strategic to Mount Barker, because it’s on their doorstep, and Adelaide Hills, because they’re further back towards the city. The Murray Bridge sites are a lot further away. Transport is what wins or loses these opportunities. So we saw that as the real strategic advantage to do individual commercial deals with councils.

Q Did you agree with his estimate of $15 per tonne being the transport disadvantage between Hartley and Brinkley.

\(^{433}\) Ex P5: 139.
\(^{434}\) Ex P5: 139 at p 1527.
\(^{435}\) Ex P5: 139 at p 1527.
\(^{436}\) See Ex P5: 139.
I thought it was a bit too expensive. We found out SUEZ undertake the collection contract for Mount Barker and they were in the middle of a three year contract when we purchased the site. They stayed with us for three months and then they decided that they would move that waste and SUEZ told us directly that they were going to charge the council an extra $12 per tonne to take their waste from Hartley to Brinkley. Adelaide Hills would be more than that again on the back of the distance but obviously Murray Bridge is on the doorstep, so they’d actually incur savings. Alexandrina, we understood we were probably like for like.

Mr Brown agreed that realistically the only site that could compete with Hartley was Brinkley. (607) That said, as at the time of Mr Pucknell’s email, he did not consider the Brinkley site as offering real competition. This was because he believed that the Authority had no intention of stopping SWR making commercial offers to the constituent councils. (607) He elaborated: (607)

… we were still being told that the authority has no intent to stop us getting in front of the councils to do commercial deals. We were told that they were off doing all of these other things.

SWR did not sense that the Authority was a major competitor and, even if it were, SWR was confident on the back of Hartley’s location that SWR could compete given a commercial opportunity. (608) To this end, Mr Brown said: (608)

Location, location, location. These things win or lose on the value of their location and that’s what we spend our energy on is having facilities in the right locations so that your customers can cost effectively get to them.

Mr Lucas referred to Mr Pucknell’s email of 7 November 2012 in his statement.437 He could not recall receiving the email. Despite that, he did recall the asset values referred to in the email having been discussed with him at about the time that it was sent. One of the assets discussed was the remaining capacity in cell 6. Mr Lucas recalled that it was the airspace in cell 6 that provided some justification for the amount of compensation that SWR ultimately paid.438

Mr Lucas considered the purchase of the Hartley landfill to be good for SWR and that it should be pursued because of the landfill’s strategic location. He also considered that the question of access to the constituent councils’ waste streams would determine whether SWR was prepared to pay any money to the Authority for the site.439

On 8 November 2012 Mr Pucknell followed up on his email of the previous day in a further email to Mr Lucas and Mr Brown.440 Attached to this email was some financial modelling that Mr Pucknell had undertaken in an attempt to identify the value of the Hartley landfill. Two scenarios were modelled. The
difference between the scenarios was the waste tonnages received at Hartley. In the first model, Mr Pucknell operated on the basis that 32,206 tonnes would be received from the constituent councils and in the second nil. The volume received in each scenario from sources other than the constituent councils was set at 10,000 tonnes. On an annual receipt of 32,206 tonnes of waste from the constituent councils and 10,000 tonnes from other sources, Mr Pucknell considered that SWR would realise a gross profit of $137,309.\footnote{Ex P5: 140 at p 1529.} If SWR only received 10,000 tonnes, Mr Pucknell considered that SWR would sustain a loss of $21,600.\footnote{Ex P5: 140 at p 1531.}

Mr Brown recalled seeing Mr Pucknell’s models.\footnote{Ex P5: 140 at p 1531.} With respect to the first scenario he considered the royalty and landfill levy figures used to be too high. Cutting to the chase, Mr Brown said that there was no way that SWR would pursue an opportunity such as acquiring Hartley if it only stood to make $137,309 a year.\footnote{Ex P5: 141.} As to the second model, Mr Brown said he agreed with Mr Pucknell’s analysis. He added that he thought it would have been a lot worse.\footnote{Ex P23 at [62].} He remarked that neither model truly reflected the long-term liability that would be taken on by SWR. Consistent with his earlier evidence, Mr Brown considered that liability in broad terms to be in excess of $3 million.\footnote{Ex P5: 141 at p 1532.} Referring to Mr Pucknell’s modelling, Mr Brown repeated that if there were no realistic prospect of SWR being able to enter a commercial deal with the constituent councils and secure the disposal of their waste at Hartley he would not have entered into the February 2013 deal with the Authority.\footnote{Ex P5: 141.}

At this stage in the negotiations, Mr Brown’s thinking was that the value of the licence and the opportunity presented by operating Hartley was in the region of about $1 million on the back of securing the waste of AHC and DCMB. He said that had the constituent councils’ waste streams been secured, the asset would have worked, although it would not have been a “star” performer.\footnote{Ex P5: 141.}

Mr Lumsden responded to Mr Levinson’s email of 5 November 2012 on 9 November 2012.\footnote{Ex P5: 141 at p 1532.} In his email, Mr Lumsden confirmed that the Authority was prepared to negotiate to develop a mutually acceptable exit strategy. Mr Lumsden then made plain the Authority’s attitude to the alleged breaches of licence and set out the Authority’s preferred exist strategy “for the benefit of the Harvey family”.\footnote{Ex P5: 141 at p 1532.} He stated that the Authority considered the Harveys to have repudiated the licence agreement. He also set out the Authority’s preferred exit strategy. Thereafter he answered \textit{in seriatim} the questions asked by Mr Levinson in his email of 5 November 2012.

In relation to Mr Levinson’s request for access to the modelling undertaken by the Authority to determine the price per tonne charged to constituent councils
for disposing of their waste at Hartley, Mr Lumsden advised that the model was sophisticated and developed for the Authority’s own use including permitting modelling for different scenarios. He stated that it was a commercially sensitive document which would not be provided to SWR.

572 Mr Levinson was cross-examined about the 9 November 2012 email. He agreed that it made no mention of the assets that the Authority would move from Hartley to Brinkley. He could not say that he understood at the time what assets the Authority sought to retain or the reason why, but he did know that some assets were to be moved to Brinkley. His focus was on the fact that the assets did not form part of the deal. He had no particular view as to whether or not they would be used at Brinkley. (269-270).

573 He subsequently said that he assumed that the equipment moved to Brinkley would be used for whatever the Authority’s purposes at Brinkley might be. He could not say that he drew any conclusion from the intended move of some assets to Brinkley other than that they were not part of the deal. (270)

574 Mr Levinson could not recall if, upon reading Mr Lumsden’s email and that the Authority wished to keep the price setting modelling confidential, he thought that the Authority was contemplating using it at Brinkley in competition with Hartley. (271-272)

ii. Consideration

575 The correspondence between Mr Levinson and Mr Lumsden in the period between the meetings of 5 and 12 November 2012 is consistent with it being accepted by all that the Authority did not control where the constituent councils chose to dispose of their waste streams.

576 In his evidence Mr Levinson said he appreciated that, despite the Authority not controlling where the constituent councils disposed of their waste, it was still open to SWR to condition any resolution on the councils contracting with SWR to dispose of their waste at Hartley. Whether Mr Brown and SWR realised this may not matter, the fact is SWR resolved to negotiate the matter on a basis that did not include any requirement that the constituent councils dispose of their waste at Hartley.

577 The Authority’s indication that it wanted to keep equipment that was used for landfilling at Hartley and move it to Brinkley was insignificant to SWR, I suspect because, after the second meeting at Wallmans, if not before, all knew that the Authority would continue to provide a landfill service at Brinkley.

578 Mr Pucknell’s emails of 7 and 8 November 2012 and his modelling are significant. This evidence is consistent with his concession that as at 5 November 2012 he understood that there was no guarantee that the constituent councils would dispose of their waste at Hartley. Again, by the time of the second Wallmans meeting he knew that the constituent councils would have a choice of
landfill at which to dispose of their waste once SWR commenced operations at Hartley. Mr Pucknell’s 7 November 2012 email assumed Mr Brown and Mr Lucas would know what the “Brinkley option” was. That was because they did, or at least Mr Brown did. Mr Pucknell’s analysis demonstrated value, but also acknowledged risk — “[a]ll the more reason to keep the offer around where I suggested yesterday”.  

That is, “$0.7m with council volume. Or $0.2m without”. Mr Brown understood what Mr Pucknell was “flagging”, however, in my view he was confident in his judgment about the potential of Hartley based on its location and the transport cost disadvantage of Brinkley, particularly for AHC and DCMB. As I have already stated, I reject Mr Brown’s assertions that he did not understand that Hartley would be in competition with Brinkley. His appreciation that he would likely lose RCMB’s waste reflects an understanding that Brinkley posed as an alternative to Hartley. If I am wrong and Mr Brown did not understand that Hartley and Brinkley were competitors, by 7 November 2012 Mr Pucknell understood as much and made it plain for both Mr Brown and Mr Lucas. The only reason to contemplate the additional cost of disposing of waste at Brinkley was to assess the likelihood of waste going to Brinkley.  

Consistent with Mr Brown’s opinion, Mr Pucknell concluded that Brinkley posed a significant cost disadvantage for waste “ex Adelaide side” (although he considered the disadvantage greater than Mr Brown did). In my view whatever the true cost disadvantage to the constituent councils of disposing of waste at Brinkley, SWR considered it of such significance that Brinkley was not a competitor for AHC’s and DCMB’s waste streams. “Location, location, location”, that is what drove Mr Brown’s evaluation of the opportunity that Hartley presented.

SWR points to Mr Pucknell’s emails of 7 and 8 November 2012 and his modelling as indicating that SWR would not have entered into the Deed of Settlement and the s 103E Deed without the Council waste streams. I do not think there can be any doubt that the viability and profitability of Hartley in SWR’s hands depended on attracting the council waste streams, but I would not go so far as to conclude that it was dependent upon attracting all of the constituent councils’ waste streams. First, it is to be remembered that Mr Brown did not agree entirely with Mr Pucknell’s conclusions, and Mr Pucknell’s modelling contained errors. Secondly, SWR always expected to lose RCMB’s waste stream and thought that securing AC’s was not certain, again due to the transport cost advantage of AC and RCMB disposing of their waste at Brinkley. SWR’s focus was always DCMB and AHC. Thirdly, Mr Brown said he agreed with what Mr Pucknell was attempting to flag, but did not say that in the course of the negotiation he relied upon Mr Pucknell’s modelling. I think it is likely that Mr Brown was prepared to sustain short-term losses in the belief that in the long-term waste streams that left Hartley would return because of the transport cost

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446 Ex P5: 140 at p 1528.
447 Ex P5: 139 at p 1527.
448 Plaintiff’s Closing Submissions at [648].
advantage it provided. Option 1 in Mr Levinson’s letter of 4 October 2012 suggests as much, so too the risk inherent in shutting the gate at Hartley if agreement could not be reached (a threat frequently made). Here it may also be recalled that SWR did not undertake any financial modelling of the opportunity before committing itself to the Litigation Management and Funding Deed and the Landfill Deed and did not do so afterwards with the exception of Mr Pucknell’s relatively rudimentary approach. In my view that is because Mr Brown was confident in his own judgment of the opportunity. As he said, “[w]e understand this sector very well”. (594)

I find that by 7 November 2012 at the latest, SWR knew that upon taking over the operation of Hartley it would be in competition with Brinkley for the constituent councils’ waste streams. I find that SWR expected that RCMB would dispose of its waste at Brinkley once the Authority moved to Brinkley and that whether AC would do likewise was finely balanced.

h. The third meeting at Wallmans Lawyers (12 November 2012)

It is not disputed that on 12 November 2012 a third meeting was held at Wallmans. The purpose of the meeting was to continue negotiations intended to resolve the dispute between the Harveys and the Authority. By this time it was largely resolved that the Authority would be leaving Hartley and would be leaving before it could make full use of the capital investments it had made. The issue was the terms upon which it would leave, and, in particular, the amount of any compensation it would receive.

Mr Brown, Mr Lucas, Mr Pucknell and Mr Levinson attended on behalf of SWR. Mr Lorenz, Mr Salver, Mr Coleman and Mr Lumsden attended on behalf of the Authority.

i. Mr Brown

At this meeting Mr Brown said offers were exchanged by the Authority and SWR. The Authority initially sought in the region of $1.5 million in compensation. That was not accepted by SWR and a counter proposal was put. That counter proposal was SWR’s starting offer which involved compensation of between $500,000-$700,000. (615)

From SWR’s point of view the value of the asset was inextricably linked to the volume of the waste received. If SWR could secure between 70-100% of the constituent councils’ waste, taking over the operations at Hartley was beneficial for SWR. (616)

SWR’s proposal was conditioned on SWR being able to get before each constituent council between the time of the 12 November 2012 meeting and settlement and put commercial offers to those councils to keep their business. (616-617) The final offer was that $900,000 in compensation be paid to the Authority. (617)
Mr Brown said SWR accepted the offer on the basis that it could do individual deals with the councils. In this regard, Mr Brown said words to the effect that:

… we agree on the basis that we can get in front of the relevant people at each Council to introduce ourselves and make them offers on commercial terms for our waste service at Hartley.

SWR was provided with the names of the officers at the constituent councils that managed the waste services of the councils.

Mr Brown confirmed that he was aware at the time that the Authority was establishing the site at Brinkley and that each council was locked in for at least a few years to contracts for waste collection which would not have budgeted for the extra transport cost of moving to Brinkley.

In his statement, Mr Brown said that at the time the offer was accepted he believed the following:

74.1 The Authority would move its staff and equipment to Brinkley.

74.2 There was no legal impediment to the Councils contracting with SWR to send waste to Hartley;

74.3 Each Council was able to engage in commercial negotiations with SWR in good faith if it wished to;

74.4 The Authority would not have any interest in interfering with any commercial approach by SWR to any Council as it had no commercial interest itself and was merely operating to serve its members;

74.5 The authority was not seeking to obtain the waste business from the Councils for itself and was not seeking to induce the Councils to move their waste business from Hartley to Brinkley;

74.6 The Councils were free to enter into long term contracts on normal commercial terms with SWR for the disposal of waste at Hartley; and

74.7 The authority would not interfere or hinder any attempts made by SWR to obtain the waste business from the Councils.

Mr Brown said that he held these beliefs on the basis of discussions with the Authority on 14 September, 5 November and 12 November 2012. He stated that had he known any of the above matters to be inaccurate, SWR would have “stuck to its position of paying nothing for the site, walked away from the deal or awaited the outcome of any litigation between the Harveys and the Authority”.

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449 Ex P23 at [70].
450 Ex P23 at [74].
451 Ex P23 at [77].
Mr Brown asserted that at no stage during the meetings did the Authority mention the constituent councils using Brinkley (as compared to Hartley), that the Authority’s intended to induce constituent councils to move to Brinkley nor that it was likely or possible that the constituent councils would enter into a contract with the Authority to move to Brinkley.\textsuperscript{452}

Following the meeting, Mr Brown said that he felt “anxious” to gauge the receptiveness of the constituent councils to a longer-term arrangement with SWR. Based on his experience in the industry, Mr Brown said he believed that it would cost approximately $15 more per tonne to transport the waste to Brinkley (as compared to Hartley). He was of the view that “in most instances those contracts would likely have been based on collection within the Council area and delivery to Hartley”.\textsuperscript{453}

In cross-examination Mr Brown made it plain that he could not recall the basis upon which the Authority had made the initial offer of $1.3 million nor any mention of the additional transport costs to Brinkley. (920-921) Mr Brown could not recall referring to SWR as being in competition with the Authority for the council waste streams. (923) Although he could not recall mentioning the presence of Mr Lorenz at SWR’s future meetings with the councils, he said that they “definitely” did not want him present at the meetings. (923) He maintained that he was told multiple times — including in this meeting — that the Authority would not interfere in SWR’s commercial negotiations with the councils. (924) He explained that his intention in setting up the meetings with the councils was to sell SWR as a new entrant into that part of South Australia. (924)

\textit{ii. Mr Lucas}

Mr Lucas attended the meeting at Wallmans on 12 November 2012.\textsuperscript{454} He recalled that at that meeting offers and counteroffers were exchanged. At the beginning of the meeting the Authority put an offer which involved SWR paying compensation in the amount of $1.3 million and the Authority leaving the site. That was rejected by SWR and a counteroffer of $500,000 made. Mr Pucknell outlined the rationale for the counteroffer during the course of the meeting. The counteroffer was rejected. Mr Lucas recalled that the SWR representatives then left the main room in which the meeting was taking place and retired to a smaller conference room to discuss a further offer. After discussion, Mr Levinson returned to the meeting alone and put a further offer of $700,000 on condition that SWR had access to the constituent councils in order to enter into agreements with them and that SWR would honour the current disposal rate of $37.70 per tonne to the end of the financial year. That offer was rejected and the Authority

\textsuperscript{452} Ex P23 at [78].
\textsuperscript{453} Ex P23 at [81].
\textsuperscript{454} Ex P22.
put a counteroffer requiring the payment of $900,000. This was accepted by Mr Brown and Mr Lucas. 455

Upon accepting the Authority’s offer, Mr Brown said words to the effect that, “it is on the basis that we will be able to get in front of the relevant people at each Council to introduce ourselves and make them offers on commercial terms for our waste service at Hartley”. 456 Mr Lucas recalled that Mr Lorenz provided the names of the relevant staff members of each of the councils.

In his statement, Mr Lucas said that at this time he was aware that the Authority was re-establishing some capacity at Brinkley. He also knew, or was of the understanding, that SWR was able to approach each of the constituent councils and engage in commercial negotiations with them about the disposal of their waste and that each of the constituent councils would make their own decisions about the disposal of waste and would not be dictated to by the Authority. He gained this knowledge and formed this understanding from his attendance at the meetings at Wallmans on 14 September and 12 November 2012 and from things said during the course of the site meeting on 23 October 2012. 457

Mr Lucas also knew that the constituent councils would sustain a significant increase in transport costs if they were to send their waste to Brinkley. He was confident that SWR could operate the site at Hartley efficiently and make a commercially competitive offer to each constituent council that would involve a lower cost in disposing to landfill at Hartley than at Brinkley. 458

Mr Lucas considered the value of the business to derive primarily from the constituent councils’ waste streams. To this end, he said that “[w]ithout the Council waste there was no reason to pay money for the business as well as taking over the liabilities for environmental management and paying a reasonable royalty to the landowner”. 459

Participation in the meeting was Mr Lucas’ final role in the negotiations with the Authority. The deed was prepared and signed without his involvement. 460

Mr Lucas was asked: (534)

Q I think at the meeting on 12 November you attended there was a discussion about Southern Waste making commercial offers to the member councils.

A Well, if it’s the meeting I’m thinking of, yes.

Q I’m talking about the final meeting at which there was an in principle price agreement.

455 Ex P22 at [38]-[39].
456 Ex P22 at [40].
457 Ex P22 at [42].
458 Ex P22 at [43].
459 Ex P22 at [46].
460 Ex P22 at [48]-[49].
Yeah, righto, yep, yep. That meeting definitely.

Mr Brown said that Southern Waste would like to get in front of the member councils to make an offer essentially as a competitor to the authority.

Yeah, I think that was - it wasn’t the wording I had in mind but that was the gist of it basically.

What was the wording you had in mind.

He wanted to get in front of the member councils to offer a commercial … I didn’t know he used the words ‘to compete with’ but he may have.

Mr Lucas could not recall if there was any discussion at the meeting about the additional transport costs for constituent councils should they go to Brinkley. He had no recollection of a figure of $7 per tonne and an additional cost being raised. He recalled the Authority seeking compensation at the outset in the amount of $1.3 million but could not recall the justification put for that sum.

Mr Lucas did have a recollection of it being said at some point that the worst result was that the gates to Hartley would be shut on the Authority so that the councils could not deposit waste at the site.

iii. Mr Levinson

To the extent that Mr Levinson’s statement covers the meeting on 12 November 2012, its content is largely the same as the statements of Mr Brown and Mr Lucas. Perhaps owing to notes taken during the meeting, Mr Levinson’s statement provides a more detailed summary of what occurred. According to Mr Levinson, Mr Brown said the following upon accepting the Authority’s offer of compensation in the sum of $900,000:

We agree to $900,000, we keep the rock, this is an offer that is resolved today, it is clear that it needs to be done soon. We will take over the licence and the long term total liability and release the Authority. All future capping, gas etc will be our risk once the EPA licence is transferred to us. This is based on us getting in front of the relevant personnel at each Council to introduce ourselves and make them offers on commercial terms for our waste service at Hartley.

Mr Levinson said that Mr Lorenz provided the details of contact persons from each council: Mr Salver from AHC, Mr Peters from DCMB, Mr Bond from RCMB and Mr Grenfell from AC.

Mr Levinson was cross-examined about his notes of the meeting of 12 November 2012. The first half of the first page constitutes notes that Mr Levinson had written to himself. The notes of the meeting are those that
follow after he records the names of those in attendance. (288) The notes record Mr Lumsden’s proposal that compensation in the sum of $1.5 million be paid to the Authority. Included in Mr Lumsden’s calculation was an assessment of profits lost to the Authority should it move to Brinkley. (288-289) Mr Levinson could not say that his note indicated anything to the contrary. Mr Levinson could not recall the context in which he made the note “[t]ransport costs $7/t → Brinkley”. It was possible, he conceded, that Mr Lumsden referred to the Authority seeking compensation for the additional costs that the councils would incur in taking their waste to Brinkley. However, Mr Levinson said he could not recall the constituent councils having to pay more in transport costs featuring in the discussion. (289) He did not have a clear recollection of exactly what was said or why it might have been said. He made the point that the Authority would not be carting waste to Brinkley, the constituent councils would be and that the relevant contracts for transportation were not contracts with the Authority. (289)

Mr Levinson recalled that, during the course of the meeting of 12 November 2012, SWR put an offer on the basis that it would like to get in front of the constituent councils to put to them a proposition regarding their waste streams. (290) Mr Levinson did not recall Mr Brown referring to SWR “as a competitor of the [A]uthority”. (290) It was put to Mr Levinson that Mr Brown said that Mr Lorenz should not be present when SWR meets with the councils. However, Mr Levinson could not recall reference to Mr Lorenz’s presence featuring in the conversation. (291)

As to any mention of transport costs, Mr Levinson said: (1023)

Q In November 2012 you also were told that the authority was seeking compensation because the councils would have additional transport costs of going to Brinkley of $7 per tonne.

A I think that might have been put at some stage in the course of negotiations.

Q That was put at the meeting on 12 November 2012, wasn’t it.

A That might be right, yes.

Q That’s why you’ve noted that in your notes.

A Yes, I think that sounds about right.

Q You would have had discussions with Mr Brown and Mr Pucknell about the additional transport costs that some of the member councils might incur by using Brinkley, hadn’t you.

A Yes, I don’t know how much detail I’d discussed with them but I think the topic had arisen.

Q The topic of additional transport costs on the part of some member councils, that had been discussed.
A I think so, yes.

Q Mr Brown and Mr Pucknell considered that the additional transport costs was $15 per tonne, didn’t they.

A Yes, I can’t remember the precise number but I think it was something of that order. I think it depended on which council it was but it was something up to that.

Mr Levinson also recalled Mr Lorenz providing a list to Mr Brown of the relevant people at each of the constituent councils. These were the people with whom discussions should be commenced over council waste. (1052)

iv. Mr Pucknell

Mr Pucknell could not remember the details of the Authority’s initial offer, however, he recalled that after hearing the offer he said words to the effect that:464

“We see the value quite differently based on a $2.8m liability on the Authority’s books for capping and post closure, but discounted to $1.6m, the cell space worth around $1.2-1.3m, site infrastructure at $200,000 and the EPA licence at $300,000”.

…”This means the value of the assets of $1.8m less the capping liability of $1.6 left a value to SWR of $200,000”.

Mr Pucknell recalled that SWR rejected the Authority’s initial offer, before putting a counteroffer to the Authority. The Authority subsequently rejected that offer before offering to accept $900,000 in compensation. Mr Pucknell recalled expressing concern to Mr Brown and Mr Lucas that this figure was too high. Despite his concerns, SWR accepted the Authority’s offer. According to Mr Pucknell, Mr Brown said words to the effect that:465

“SWR accepts the offer and SWR agrees to pay the price of $900,000 to be paid once the EPA licence was transferred and that we would keep the rock stockpile. This agreement was based on getting a deal done today and SWR getting on to [the] site soon. SWR will take over the EPA licence. SWR will take over the long term liability for the site and release the Authority from all future capping and gas management once the licence is transferred”.

Mr Pucknell stated that the offer was accepted on the basis of SWR getting in front of the constituent councils to offer commercial proposals.

In his statement, Mr Pucknell referred to himself as an advisor and not a decision-maker. He clarified that the decision to proceed with the purchase of Hartley was made by Mr Brown and Mr Lucas.466

In cross-examination Mr Pucknell said that he could not recall the Authority making it clear that it was seeking compensation for the loss of its licence or

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464 Ex P34 at [52].
465 Ex P34 at [57].
466 Ex P34 at [60].
additional transport costs but conceded that they may have. (1250-1251) Further, Mr Pucknell could not recall Mr Brown saying that he would negotiate with the constituent councils as a competitor of the Authority. (1252) He could not recall Mr Brown asking Mr Lorenz not to attend meetings between SWR and the councils. Nor did Mr Pucknell recall Mr Salver saying that “council waste streams were not to be part of the deal”. (1252) As far as Mr Pucknell was concerned, the fundamentals of the agreement were finalised by the negotiations that took place during the meeting. (1255) Mr Pucknell conceded that he was aware in November 2012 that each council would require time to assess any offers put by SWR. (1257) He said that, from his perspective, each council was free to make their own arrangements but that there could potentially be “a role for the authority within that sphere in terms of providing transport and other services or management services through the process”. (1260) He said that he did not turn his mind to potential procurement policy issues as he was under the impression that the councils were free to do what they wanted with their waste. (1261) However, he conceded that as of November 2012 he had minimal experience in waste procurement from local councils. (1262)

When asked if he envisaged back in November 2012 that councillors might be concerned about SWR having a monopoly in council areas, he said, “[n]o, it’s not something they factored at all”. (1264)

v. Mr Lorenz

Mr Lorenz stated that the Authority initially made an offer of $1.3 million. Mr Pucknell responded with an offer of $500,000. The Authority rejected this offer. After a private discussion between the SWR representatives, Mr Levinson offered $700,000. When he presented this offer to the Authority, Mr Levinson added that SWR would take over the site, the licence would be transferred and SWR would take on the existing environmental liabilities. He further clarified that the proposal was put on the basis of SWR being able to “get in front of member councils to put proposals for depositing waste at Hartley” and having access to the site by January 2013.467

Ultimately, compensation in the sum of $900,000 was agreed. Mr Lorenz said that when the representatives of SWR re-joined the meeting, Mr Levinson accepted the offer but said that it was on the basis that SWR would keep the stockpile of rock, take over the existing licence and liabilities and that it be able to present offers to the constituent councils for the depositing of waste at Hartley.468 In response, Mr Lorenz provided the details of relevant officers at each of the member councils to SWR’s representatives.

Mr Lorenz said he was not aware of any reason that would have prevented SWR from putting proposals to the constituent councils before or after the

467 Ex D146 at [165].
468 Ex D146 at [167].
Mr Lorenz conceded that he may have told Mr Brown at either the October site meeting or during the November meetings that he did not control the waste. (4802) When asked whether the Authority had used the constituent council waste as a “lure” during the meeting, Mr Lorenz said: (4916)

There was no lure and there was nothing to do with any guarantee of securing member council waste, it was to do with leaving the site, ResourceCo could talk to the member councils about putting proposals to them.

vi. Mr Salver

Mr Salver made a note of the meeting. It records the substance of the matters discussed. Mr Salver could not recall the initial Authority offer being $1.3 million. He recalled that SWR made what he considered to be a “low” initial offer of $200,000. That offer was rejected and Mr Levinson eventually offered $700,000. Mr Salver recalled that when Mr Levinson made that offer, he stated that it was on the basis of SWR being in a position to move onto the site in January 2013, SWR charging current dumping rates until June 2013 and the EPA being prepared to transfer the licence on settlement. Ex D131 at [61]. Mr Salver could not recall Mr Levinson specifying that the offer was conditional on access to the constituent councils’ waste streams. The parties ultimately agreed on compensation in the sum of $900,000. Mr Brown outlined the fundamental terms of the settlement as follows: Ex D131 at [64].

• SWR would make a payment of $900,000;

• SWR would take on current and post-closure liability;

• SWR would “like to get in front of the individual councils to make an offer to take their waste streams essentially as a competitor of the Authority”; and
Mr Lorenz would not be present when SWR presented their service offer to the councils.

Mr Salver recalled Mr Lorenz providing the names of Mr Peters from DCMB, Mr Bond from RCMB, Mr Grenfell from AC as well as his own name as the AHC representative.

In his oral evidence Mr Salver said he could not recall any discussion of the increased transport costs to Brinkley at the meeting. (4023) He denied saying to Mr Brown “we don’t see you as a competitor and we wish you well going and getting those relationships started”. (4026) As previously mentioned, Mr Salver denied telling Mr Brown at either meeting that if the $37 per tonne royalty payment were honoured, it would be “business as usual”. (4026)

Mr Salver was cross-examined on the substance of discussions at the meeting. He agreed that SWR outlined that it wanted to get in front of the individual constituent councils to make an offer as a competitor. Mr Salver agreed that this was consistent with his earlier report that SWR regarded the council waste streams as “crucial” to the deal. (4213)

Mr Salver was asked about the Authority’s position in the negotiations and whether he recognised that there was leverage in having both Brinkley and constituent councils’ waste streams. Mr Salver confirmed that he recognised the leverage in the lead up to the 12 November 2012 meeting and that the leverage allowed the Authority to achieve a “favourable” outcome in that meeting. (4330) That being said, he strongly denied viewing the waste stream as a “lure” for SWR to take over operations at Hartley. (4337)

vii. Mr Coleman

Mr Coleman did not keep any notes of the meeting. He recalled that a settlement was reached. Ex D92 at [93]. He had no precise memory of the offers and counteroffers that were made during the course of the meeting. Ex D92 at [94]. He did recall Mr Brown summarising the offer that SWR put to the meeting. Ex D92 at [95].

In cross-examination Mr Coleman was asked if at the time he thought it was “stupid” for SWR to buy Hartley without having secured the constituent councils’ waste streams. Mr Coleman said that he thought the opposite — that is, he thought that SWR knew of a waste stream that the Authority would “never be able to tap in to”. (3200) Further, he said that he did not believe that SWR was banking on the council waste streams. Mr Coleman considered that SWR viewed the constituent councils’ waste streams as a “bonus” and that reliance on securing the council waste streams by SWR “wasn’t feasible”. (3201) When asked what
he meant by not feasible, Mr Coleman clarified that he did not believe that SWR could operate Hartley any cheaper than it had been run by the Authority. (3203)

When asked if Mr Levinson advised that the offer was accepted on a “walk-in, walk-out basis”, Mr Coleman said he could not remember but conceded it may have been said. (3255) Although Mr Coleman recalled Mr Brown saying he wanted to get in front of the constituent councils, he did not recall Mr Brown saying that he wanted to make “offers on commercial terms for the Southern Waste waste service at Harley to those councils”. (3256)

viii. Botten Levinson’s letter of 13 November 2012

SWR’s final offer as agreed at the third meeting at Wallmans by Botten Levinson was reduced to writing and sent to Wallmans on 13 November 2012. The letter was written on the instructions of Mr Brown. (618) It opened stating that the offer contained in the letter was “a final offer”. The letter went on to set out the terms of the offer being:

Southern Waste ResourceCo (SWRC) will -

1. Pay $900,000 (exclusive of GST) to the Authority on settlement;

2. Take over all responsibility for the operation of the site on settlement;

3. Take over all responsibility for the future management of capping, landfill gas, carbon tax, post closure management and all associated liability on settlement;

4. Release the Authority from all liability relating to the capping and post closure management of the site;

The Authority will -

5. Take all necessary steps to transfer the EPA licence to SWRC expeditiously with a view to SWRC taking over operation of the site by January 2013;

6. Transfer the ownership of and rights to all fixed assets (including cells, roadways, fencing, systems, water tank and the rock stockpile located adjacent Cell 7 on the area of proposed Cell 9) to SWRC on settlement;

7. Provide free and unencumbered vacant possession of the site to SWRC on settlement;

8. Release the owners from all claims and causes of action relating to the dispute;

9. Pay any stamp duty payable for the transaction;

10. Consider this offer at a meeting of the Authority on Thursday 15 November 2012 and if accepted, put the offer to the member Councils of the Authority.

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474 Ex P5: 146.
475 Ex P5: 146 at p 1564.
476 Ex P5: 146 at pp 1564-1565.
expeditiously and no later than at the next ordinary meetings of those Councils or 30 January 2013 (whichever is the sooner);

11. If the offer is accepted, the Authority will provide copies of all documents in its possession concerning the site (other than those already provided) by 30 November 2012;

12. If the offer is accepted by the Authority at its meeting on 15 November then notwithstanding that the member Councils are yet to decide whether to agree, the Authority must use its best endeavours to prepare (cooperatively with SWRC) all necessary deeds, agreements, contracts, licence transfer applications and any other necessary statutory approval applications or assignments to be in a position to effect the settlement by 30 January 2013. The parties will each bear their own legal costs of the preparation negotiation and execution of such documents.

13. Use its best endeavours to prosecute the transfer of the EPA licence and support the grant of any other necessary statutory approvals for the operation of a landfill at the site by SWRC;

629 The letter went on to assert that settlement should take place within five business days of the later of execution of all necessary agreements, the transfer of the EPA licence and the granting of other statutory approvals. The letter indicated that it was intended that settlement occur on or about 30 January 2013. The penultimate paragraph to the letter stated: 477

SWRC remains committed to engaging with the constituent Councils to explore opportunities to provide services addressing their on-going waste requirements.

630 On 16 November 2012 Wallmans replied. 478 Mr Lumsden advised that at a meeting on 13 November 2012 the Authority’s Board had approved acceptance of the offer made by SWR subject to:

i. SWR not only releasing the Authority from all liability for capping and post-closure management of the site but indemnify the Authority in relation to the Authority’s prior occupation and use of the site;

ii. That SWR obtain the EPA’s confirmation that any ongoing liability in relation to the site would not be the responsibility of the Authority;

iii. That SWR pay any stamp duty payable for the transaction;

iv. That the Authority take all necessary steps to secure the transfer of the EPA Licence expeditiously subject to settlement occurring;

v. That the Harveys release and indemnify the Authority from all claims and causes of action in relation to the Authority’s prior occupation and use of the site, the licence to occupy and the capping and post-closure management of the site;

477 Ex P5: 146 at p 1565.
478 Ex P5: 150.
vi. That subject to (v) above being provided, the Authority would release the Harveys from all claims and causes of action relating to the dispute;

vii. That upon the acceptance of the offer the Authority would provide documents concerning the business operated at the site including documents already provided.

In his evidence Mr Brown recalled receiving the 16 November 2012 letter from Wallmans. (618-619)

ix. Consideration

Mr Levinson’s notes of the meeting commence with the following: \(^{479}\)

- 300k profit / 9-10 yrs
- Transport costs $7/t \(\rightarrow\) Brinkley
- You take on capping + monitoring. - want EPA sign off
- Cell constr 1.3m
- Road water etc fixtures + more 200k cameras.
- Stockpile - want access for 12-24 months (AHC use as road base)
  - $1.3
  - $200
  \(\rightarrow\) take on capping.
  - $1.5m.

To this point in his notes, Mr Levinson has quite obviously set out the basis upon which the Authority sought compensation in the amount of $1.5 million put by Mr Lumsden. Mr Levinson conceded that it was possible his note, “Transport costs $7/t \(\rightarrow\) Brinkley”, was a note of the increased transport cost that would be incurred in waste moving to Brinkley. Neither Mr Lorenz’s nor Mr Salver’s notes marry up with the opening notation made by Mr Levinson, but that appears to be because neither Mr Lorenz nor Mr Salver take a note of the Authority’s opening position. \(^{480}\) Rather, their notes record Mr Pucknell’s counteroffer.

Mr Pucknell’s counteroffer deals with each of the factors to which Mr Lumsden referred with the exception of transport costs.

It appears that after Mr Pucknell put SWR’s counteroffer no subsequent offer was put accompanied by any breakdown purporting to justify the offer. I can think of no reason for Mr Levinson to have made his note about transport costs beyond the obvious. I appreciate that Mr Lumsden was not called to give evidence. I infer that any evidence he could give could not assist the Authority on this issue. However, the inference to be drawn from Mr Levinson’s notes

\(^{479}\) Ex D16.

\(^{480}\) Ex D5: 137; Ex P5: 145.
remains. I find that Mr Lumsden did, in the course of putting the Authority’s opening offer, make reference to increased transport costs as a factor in relation to which the Authority sought compensation. Mr Levinson’s reference is to increased costs of $7 per tonne. That notation can only have been about the transport of waste.

I appreciate that no other witness recalls Mr Lumsden referring to transport costs. I think that may be explained by the course the negotiations took with Mr Pucknell’s counteroffer and thereafter offers being made devoid of justification.

Accepting as I do that Mr Levinson’s note records the effect of a statement made by Mr Lumsden, it constitutes a further example of the Authority indicating that it expected to receive waste at Brinkley. I do not think the disclosure, such as it was, came as any surprise. As I have said, Mr Brown always expected to lose RCMB’s waste and possibly AC’s waste to Hartley. Implicit in that expectation is an understanding that Brinkley would be accepting waste.

Mr Levinson notes that in the course of SWR putting its final offer, the offer which was accepted, Mr Brown stated that it was “based on us getting in front of all [councils] to introduce”. Mr Salver’s note was to the effect that SWR “would like to get on [sic] front of the individual councils to make an offer to take our waste streams essentially as a competitor”. Mr Lorenz’s note simply states, “get in front of councils”. I do not think there can be any doubt that SWR made clear its desire to meet with the constituent councils for the purpose of persuading the councils to dispose of their waste streams at Hartley. In the absence of any witness having a firm recollection of the actual words used, I am not prepared to make a more specific finding.

Consistent with Mr Levinson’s letter of 4 October 2012, it is likely that SWR’s starting position was that its first counteroffer was conditioned on SWR entering into contracts with the constituent councils. At some point that condition went by the wayside and was replaced by the provision of an opportunity to persuade.

There is no dispute, and I find, that during the course of the meeting SWR was provided with a list of contacts at the constituent councils. In providing that list the Authority indicated that the relevant officers were the appropriate persons at the respective councils who SWR might approach in order to put a proposal to secure the particular council’s waste stream. I am also satisfied that in providing the list the Authority confirmed the previously articulated view that the constituent councils were free to contract with SWR if they saw fit.

481 Ex D16.
482 Ex D5: 137 at p 1523.
483 Ex P5: 145 at p 1563.
Mr Brown was of the view that the Authority represented that the constituent councils were able to engage in good faith commercial deals. I do not characterise the representation in that way for the reason that it is overlaid by Mr Brown’s understanding of what amounts to good faith and what amounts to a commercial deal. Further, it tends to suggest some minimum guarantee when all that had been represented was that the Authority would not and could not prevent the councils from choosing to contract with SWR.

I accept that in providing the contact details the Authority implicitly represented that it would not hinder SWR in making contact with the council officers in order to discuss the particular council’s waste stream and to attempt to persuade the council to commit to disposing of its waste at Hartley. I do not think that the action carried with it an implied warranty that the Authority would not attempt to compete with SWR. Again, I consider that both SWR and the Authority understood that if SWR took over the operation of Hartley they would be operating in a competitive market. SWR considered that the key drivers to success in that competitive market were gate price and transport cost.

Throughout his evidence Mr Brown referred to commercial deals. I came to understand him to refer to a relatively simple cost/benefit analysis without any appreciation or analysis of the broader benefits of the Authority. Mr Brown did not appreciate that his cost/benefit analysis was overly simplistic in the environment in which the constituent councils and the Authority operated.

It is not disputed that no representative of the Authority present during the 12 November 2012 meeting ventured any opinion as to whether SWR could persuade any of the constituent councils to enter into a contract for the disposal of the council’s waste stream at Hartley.

No-one representing the Authority at the 12 November 2012 meeting, or, for that matter at any meeting with SWR ever said that the Authority was not seeking to obtain the constituent councils’ waste streams. No-one at either of the 5 or 12 November 2012 meetings who represented the Authority said anything to indicate that the Authority would not compete for the constituent councils’ waste streams. As I have said, SWR knew it was entering a competitive market. The purpose behind getting in front of the constituent councils was to persuade them to stay at Hartley and not to move their waste. To do that SWR had to offer a competitive gate price. Again, SWR knew as much, hence at the 5 November 2012 meeting Mr Brown said the $53/tonne rate set out in Mr Levinson’s 10 October 2012 letter was negotiable. I have already made observations that Mr Pucknell understood SWR to be entering a competitive environment. It is interesting to note that whilst Mr Lucas did not think Mr Brown used the words “to compete” in requesting that SWR be able to get before the constituent councils, he did not see fit to protest the description of the meetings as connected to competition. Furthermore, the request that Mr Lorenz not be present at SWR’s
meetings with the constituent councils amounted, in my view, to recognition that he represented a competitor.

I reject Mr Brown’s evidence that he was told on multiple times, including at the 12 November 2012 meeting, that the Authority would not interfere in SWR’s commercial negotiations with the councils. What he was told was that the Authority did not control where the constituent councils chose to dispose of their waste and that the constituent councils were free to contract with whomsoever they chose in relation to the disposal of their waste. In this context SWR was told that it could approach the councils. Mr Brown’s purported understanding is an embellishment. When Mr Brown made SWR’s final offer at the 12 November 2012, I consider he was confident in SWR’s ability to compete.

No other witness for SWR who attended the 12 November 2012 meeting heard Mr Brown ask the Authority or Mr Lorenz whether, if the $37/tonne gate price were secured, it would be business as usual at Hartley upon SWR taking over the operation of the landfill. I find that no such thing was said. What was put was that SWR would honour the current rate until the end of the financial year. Again Mr Brown has embellished.

At one level the constituent councils’ waste streams were obviously a lure that led SWR to execute the Deed of Settlement and the s 103E Deed. From the Harveys SWR knew the approximate tonnage received. Since receiving Mr Lumsden’s 25 September 2012 letter SWR knew more precisely the relevant tonnages and, I find, became more firmly of the view that if the larger of the constituent councils continued to dispose of their waste streams at Hartley, the landfill could be operated profitably. At that time there was no financial modelling to be pointed to. There was none. It was a matter of the judgment and experience of Mr Brown and Mr Lucas.

There is no evidence of any representative from the Authority making any representation as to the likelihood of SWR successfully securing the constituent councils’ waste streams. All that was warranted was that SWR could have access to the constituent councils and the Authority could not control any decision that the councils might make. SWR determined to proceed, dropping the requirement that the disposal of the constituent councils’ waste streams at Hartley first be secured. Once the parties arrived at an agreement, the time necessary to the Authority’s Board considering the offer and, if it approved the same, the constituent councils considering the offer and the Board’s recommendation, allowed for SWR to approach the constituent councils. As will be seen, SWR did so, with the exception of RCMB for the obvious reason.

The Botten Levinson and Wallmans letters of 13 and 16 November 2012 respectively speak for themselves. The agreement reached was not predicated on SWR securing the constituents’ council waste streams. Having said that, SWR maintained its desire to do so.
One last comment relevant to SWR’s case in relation to cell 6. The negotiations during the 12 November 2012 meeting started with Mr Lumsden’s offer and the Pucknell counteroffer accompanied by explanations justifying the figures put. In each case the amount to be paid in compensation included a component for the available airspace in cell 6. In each case a value was attributed to the airspace in cell 6 relative to the write-down value to which Mr Lumsden referred in his 25 September 2012 letter.

G. SWR gets before the constituent councils

In November and December 2012 Mr Brown and other SWR personnel met with representatives from AC, AHC and DCMB. Mr Lorenz had provided SWR with the names of the people he considered the appropriate contacts at the constituent councils with whom to commence discussions about waste. (4804-4805) Thereafter, Mr Fairweather arranged meetings with AC and DCMB on 22 November 2012 and AHC on 6 December 2012. Mr Fairweather left three messages for Mr Bond at RCMB. Ultimately, no meeting with RCMB took place.

In his statement Mr Brown said:

47. The purpose of the meetings with the Councils was to introduce SWR and our services to the Councils. It was not to conclude a long term contract at that time. Any such contracts would require further discussion and negotiation before any agreement could be concluded. I expected that this process may take several months after the initial meetings. I also expected that the contracts may have to be approved by meetings of the full Council in each case.

In evidence Mr Brown said: (619)

We saw these meetings as obviously very important in regards to introducing ourselves and putting offers forward to secure their waste, to continue disposing at the Hartley facility.

a. The 22 November 2012 meeting at AC
   i. An overview of the meeting

As mentioned on 22 November 2012 Mr Brown and Mr Fairweather met with Mr Grenfell at AC’s offices in Goolwa. Mr Brown did not know that Mr Grenfell was also a member of the Authority’s Board. (619) Mr Brown said in his statement that the purpose of the meeting was to gauge Mr Grenfell’s interest in discussing a long-term contract for the disposal of AC’s waste with SWR. From Mr Fairweather’s point of view the purpose was to develop a relationship that would allow for the future negotiation of long-term contracts for

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484 Ex P5: 154; Ex P5: 155.
485 Ex P5: 154.
486 Ex P63 at [47].
487 Ex P 23 at [83]; Ex P 38 at [11]; Ex D112 at [34].
488 Ex P23 at [83].
the disposal of AC’s waste at Hartley. Mr Grenfell described the meeting as a “meet and greet”. In his statement Mr Fairweather said that he and Mr Brown outlined for Mr Grenfell the various services that SWR could provide to AC, including the landfill facility at Hartley and other recycling services, and provided Mr Grenfell with some brochures about SWR and ResourceCo.

Mr Grenfell recalled Mr Brown saying words to the effect that “SWR would like to do business with Alexandrina Council”. Mr Fairweather’s recollection was slightly different. He recalled Mr Brown saying to Mr Grenfell words to the effect that “SWR would like to continue to receive waste from your Council when we take over the site”. Mr Fairweather recalled Mr Grenfell responding that he was “likely to follow whatever is the most commercially favourable result for the Council”. Not dissimilarly, Mr Brown recalled Mr Grenfell saying words to the effect that he believed “that the Council will most likely adopt the best commercial position for the Council”. Mr Fairweather stated further that Mr Grenfell referred to a map of the council area explaining that AC’s waste was divided in two. Mr Fairweather recalled Mr Grenfell saying “[t]here is nothing to really worry about the Council going elsewhere. Freight differential will most likely be a major influence on our decision making. I will let you know if anything changes”. Mr Brown recalled Mr Grenfell saying that he would let SWR know if anything changed.

In his statement Mr Grenfell conceded that AC’s waste stream was divided in two, but had no recollection of giving any indication as to where AC’s waste would go in future. Further he did not think he said that SWR had nothing to worry about, but may have referred to transport costs being an important factor in any decision as to where AC’s waste was taken and may have said, but could not recall doing so, that he would let SWR know if anything changed.

Mr Fairweather’s notebook contains no note of the 22 November 2012 meeting with Mr Grenfell.

In his oral evidence Mr Brown said that he “would have” talked about SWR intending to partner with AC to continue their business as usual and about other
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skills that SWR could bring to the region. (619-620) Mr Brown could not recall what Mr Grenfell said nor the effect of it. (620) He remembered that it was a very positive meeting. He recalled leaving the meeting thinking that SWR had a genuine opportunity to price AC’s waste into the Hartley facility. He said: (620)

Q … Had rates been mentioned at the previous meeting with Mr Grenfell at the Alexandrina Council.

A We hadn’t. We talked that we would be more competitive … [than] the authority rates, but we hadn’t delivered a rate letter at that stage, to my recollection.

In cross-examination Mr Brown said: (926-927)

Q You met with Alexandrina.

A Yes.

Q And they didn’t make any commitment to send any waste to Hartley or Brinkley did they.

A We talked about our commercial rates. We then at a point in time gave them commercial rates but we left that meeting very positive that we were going to do a lot of work with them.

Q You didn’t mention any rate at all at that meeting did you.

A I can’t recall if we talked rates there but we - as I’ve said they ended up staying with us for a long time.

Q You didn’t ask for any commitment from them.

A Yes.

Q You did didn’t you.

A We would have definitely talked about how we’d like to partner with them and take their waste moving forward. That was the whole basis of the meeting.

Q But you didn’t ask for any commitment on their part to send waste to Hartley did you.

A We just were told that we could go and commercially have discussions with them and that’s what we did. We can’t demand for anyone to do anything.

Q But you didn’t even put an offer to them.

A Yes, we did. We put lots of offers to them.

Q At that meeting in November with them which was the only meeting before you took over the facility at Hartley wasn’t it.

A I think that was our only meeting with them, yes.

Q You didn’t even put an offer to them.
A I think we would have. I can’t recall precisely but we definitely would have.

Q You didn’t even seek any assurance or commitment from them to use Hartley going forward.

A Yes, we would have. Not a commitment but we were - the whole basis of the meeting was to understand their view of staying a part of the authority or just leaving their waste at the Hartley facility and we were very confident that we were going to continue receiving that waste at the rates that we put forward.

Q Whatever they told you at that meeting you knew that they could change their mind before you took over the facility.

A Yes.

Q So there was always that uncertainty.

A Yes.

Q With the receipt of waste from Alexandrina.

A Yes.

Mr Brown was cross-examined further about the meeting with AC. Cross-examination focussed upon the constituent councils not receiving any long-term rate offer. Mr Brown denied this. (2193) He said: (2193)

A At all of those council meetings prior to settlement. We ended up getting - they needed security from a cost perspective over a long period of time, and where it ended up to was we would honour that $37.70 or seven for the long term.

Q So you say that you mentioned $37.70 as a long-term rate to each of the councils you met with in November and December 2012.

A And the authority discussions.

Q Just sticking with the councils first, you say that when you met the Alexandrina Council you mentioned $37.70/tonne as a long-term rate for them.

A Honouring their existing disposal rates, yes, but I don’t know if we -

Q For the long-term.

OBJECTION: MR LIVESEY OBJECTS

HIS HONOUR

Q Honouring their existing -

A Disposal rates.

Q Any more.

A For the long-term.
XXN

Q What period of time did you mention.

A They wanted seven years and the longer the better from our perspective. But once again we said the best way to get this business up and running is to keep your rate as is, and we take over the facility and we build relationships from there. There’s also lots of other discussions about the other services that we could provide at the facility as well.

663 After being reminded of his earlier evidence (at 620) and his denial that rates were discussed, he was asked: (2197-2198)

Q Do you agree that you didn’t discuss any dollar figures in terms of rates at any of those meetings.

A No.

Q So you say that you mentioned specific dollar rates at those meetings.

A I can’t recall if they were specific dollar rates but everyone was definitely aware that the rate that they had been paying previously would be honoured going forward. So it’s not -

Q Just sticking with what you said though -

OBJECTION: MR LIVESEY OBJECTS

MR LIVESEY: Again, with respect, the witness hasn’t finished.

MR COX: It’s going to take a long time with this witness -

HIS HONOUR: Let him finish his answer.

MR COX: If you Honour please.

HIS HONOUR

Q You were saying ‘So it’s not’ -

XXN

Q Please continue, I’m sorry.

A I’ve forgotten what I was going to say, sorry your Honour. From our perspective, you know, it’s a fairly simple transaction and you can break it apart as you wish, but we were focused on allowing all of the customer base to continue disposing of their waste at exactly the same arrangement that they were previously. Whether I spoke to them and looked them in the eye and said it’s going to be 37.70/tonne for nine months, it was all about business as usual and tenure and we wanted the relationship to be formed and build a long-term business with these councils.

Q Just coming back to what you said at the meeting, did you say at the Alexandrina Council meeting a particular dollar rate.
I can’t recall that.

Cross-examination returned to Mr Brown’s understanding of the purpose of the meeting with AC: (2276-2279)

Looking at Exhibit P63 produced, this is the first statement of 19 August, in paras.38-47 of your statement, you set out some statements about the meetings you had with member councils, beginning in November and December 2012.

Yes.

You state in para.47 that the purpose of the initial meetings in November and December 2012 was to introduce your company and your services to the councils.

Yes.

It wasn’t to conclude a [contract] at that time.

No but we were talking about the deed arrangements obviously.

You were talking about the deed arrangements with the member councils, were you.

Yes.

What did you say about the deed arrangements.

That we wanted the business to continue as usual and the price.

But you make it clear in para.47 that the purpose of the meetings wasn’t to conclude a long-term contract.

No, they were introductions as well.

And you expected that the negotiation process would take several months.

No.

Well, you say at para.47 you expected the process would take several months.

Where am I saying that?

Paragraph 47. So you disagree with that now, you didn’t expect it would take several months; is that your evidence.

Oh well, it took several months to conclude the deed, which it did. So I’d be referring to that.

So you didn’t expect the process with the member councils to take several months.

No.

You just expected the process with the deed would take several months.
A Yeah, which is what we were viewing was the commercial arrangements with the councils. It was all in line with our February takeover.

Q So whatever was in the deed was the agreed deal with the member councils.

A Initially, yes.

Q You say that you expected that the contracts would have to be approved by meetings of the full councils in each case.

A No.

Q Well you did say that in the last sentence of para.47; you say that’s wrong what you state there.

A I expected that the councils would discuss with the Authority the content of the deed and I’m sure they did. So from our perspective the critical date was the takeover date in February.

Q But in para.47 you’re clearly indicating, aren’t you, that you believed that there was going to be a negotiation process with the member councils that would take several months.

A Which happened between, from our perspective, between you know, late 2012 and February ‘13 and that’s why Alexandrina and Mount Barker stayed with us. They’d concluded that that’s what they wanted to do, from our perspective.

Q You’re just making this up, aren’t you.

A Not at all.

Q You had one meeting, one introductory meeting with Alexandrina Council in November 2012 where rates weren’t even discussed.

A So from our perspective, as I’ve said, they stayed with us, they were happy with the arrangement. Mount Barker stayed with us, they were very happy with the arrangement, as of the February start date.

Q Well, what was the process you expected would occur after the initial meeting with Alexandrina Council.

A As I’ve said, from our perspective it was a very simple structure. The complexities that you're suggesting weren’t there, we had a change of ownership at the landfill but the relationship between all of the councils and the commercial customers, from our perspective, was going to be exactly the same and it started that way and stayed that way.

Q In para.47 you make it plain, don’t you, that you expected that there would have to be a separate contract with each of the member councils.

A There were disposal contracts with the councils, yes and we struck those contracts.

Q You expected that there would be a contract with each of them, didn’t you.
A  Well I didn’t expect there’d be one with Murray Bridge but the others we did, yes definitely.

Q  And that’s what you’re addressing in para.47, you expected individual contracts with each of the member councils.

A.  Look, I - in terms of that detail, we - the start date and the commercial rate that was struck was the I suppose the complexity of the arrangement that we wanted to get right.

Q  You expected that there would be a process with each of the member councils separately, didn’t you.

A  No.

Q  Well, that’s what you’re addressing in para.47 isn’t it.

A  I don’t think so. As I’ve said, we - this wasn’t a complicated transaction at all, it was business as usual for the member councils. It’s exactly what they’d been paying and where their trucks had been disposing in the past. There’s not the complexity in it, from our perspective, that you’re suggesting.

Q  I’m just tackling you on what you say in para.47. In the first sentence you state ‘The purpose of the meetings with the councils was to introduce Southern Waste ResourceCo and our services to the councils’. That’s true, isn’t it.

A  Yes, did a lot of that.

Q  They were credentialing meetings.

A  Yes.

Q  In the second sentence you state ‘It was not to conclude a long-term contract at that time’; that’s true, isn’t it.

A  Yep.

Q  You didn’t even mention rates to any of the councils.

A  Yes, we did. They already knew the rates.

Q  The $37 and $53 figures.

A  No, the $37 figure probably. Because that was the rate that they were previously paying.

Mr Fairweather also said the meeting with Mr Grenfell was quite positive. (1356) Nothing was mentioned during the meeting about council procurement policy nor did Mr Grenfell refer to a shared services model involving the Authority or any other constituent councils. Further he said nothing about AC having any concern about the viability of the Authority if AC moved its waste to Hartley. Mr Grenfell did not mention Brinkley. (1357) Mr Fairweather was asked: (1357)
Q Was anything said about pricing for council waste at Hartley.

A I think in Mr Brown’s terms the way he generally speaks to people is ‘We don’t want to –’ he probably even said something like ‘We don’t want to rob you, we want to just keep things, we don’t want to upset the boat, we don’t want to rock the boat’. I can’t remember the exact words but I think he was - sorry, I don’t think, he was talking in those sorts of terms that ‘We’re just here to get to know you and we don’t want to upset anything, we just want -’ which is sort of how Simon does business, to be honest.

Q Was anything said about existing pricing.

A I can’t recall.

Mention was made of ResourceCo’s business model being one where it preferred to build long-term partnerships. In the meeting Mr Fairweather said SWR stated its intention to form a long-term partnership with AC. (1358) In response Mr Fairweather stated that Mr Grenfell said that he did not see any reason for AC’s waste to go anywhere, that his responsibility was to make a decision for AC and that he could not see anything for SWR to worry about. (1358) Mr Grenfell did not suggest that there would be any difficulty for AC in forming a long-term commercial relationship with SWR. Nor did he suggest any difficulty with pricing if it was continued at the then current rate. (1359)

In cross-examination Mr Fairweather said: (1605)

Q You first met with the councils in November and December 2012.

A Yes.

Q You first put offers to some of the councils in, what was it, October 2013.

A Outside of verbal offers where we were saying we don’t want to change anything, I think the words were used was something like, ‘rock the boat’.

Q You considered that an offer did you, to say ‘we don’t want to rock the boat’, that’s a long term offer for the deposit of waste is it, that’s what you understood.

A No, I think you’d formalise from there.

Q You considered that an offer did you, ‘we don’t want to rock the boat’, that’s a commercial offer is it, to your mind.

A Followed by a rate - I think you judge, I’ve spent my career in sales so we will judge the mood of a meeting, we probably didn’t use that language with every customer. I certainly would use it with someone like David Peters from Mount Barker.

Later in cross-examination Mr Fairweather said that Mr Brown said words to the effect that SWR would like to do business with AC. (1807-1808) Mr Grenfell responded by saying something along the lines that AC would have to consider what was best for it. No mention was made of pricing or rates by
anyone at the meeting. Mr Fairweather repeated that Mr Brown may have said something along the lines of SWR not wishing to “rock the boat” or “create any waves” or “[w]e’ll just keep everything the same”, but he made no direct link between his comments and disposal rates. (1808) No formal offer was put. (1808) No commitment was sought from AC and no commitment was made. (1808-1809)

Mr Fairweather accepted that Mr Grenfell did not give any indication as to where waste would go in the future. He disputed the contention that Mr Grenfell did not say that there was anything to worry about. He made that comment in the context of having commented that it made sense for AC’s waste to go to McLaren Vale and Hartley due to its geographical position. Mr Fairweather said that AC was not a big council, but did not concede that AC’s waste was not of interest to SWR. (1809) Mr Fairweather agreed with the proposition that whatever SWR was told at the meeting with Mr Grenfell, it could change unless AC was locked into a contract. (1810) He agreed there was always a risk that AC could send its waste elsewhere. He agreed that SWR did not ask about the arrangements between AC and the Authority. SWR did not ask about any discussions that AC might have had with the Authority. It did not ask about AC’s business plan or about collaborative arrangements with the Authority. He maintained that Mr Brown used words to the effect that SWR desired a long-term partnership with AC.

A formal offer was not made by SWR to AC until 15 October 2013. 670

In oral evidence Mr Grenfell said that no offer was made by SWR for AC’s waste stream and no price was discussed during the meeting of 22 November 2012. (3371) Further neither Brinkley nor AC’s procurement policy was mentioned.

In cross-examination Mr Grenfell agreed that at the time of the 22 November 2012 meeting it was still possible for SWR to walk away from Hartley, which, if it did happen, would mean that the Authority would remain liable for Hartley. (3471) He knew that negotiations were ongoing about the content of the Deed of Settlement at the same time as SWR was meeting with constituent councils to gauge interest and to attempt to secure their waste streams. (3471-3472)

Prior to his meeting with Mr Brown and Mr Fairweather on 22 November 2012 Mr Grenfell could have spoken to Mr Lorenz. That discussion could have included an update on the negotiations with SWR. (3472) Mr Grenfell agreed that by the time he was contacted by Mr Fairweather for the meeting on 22 November 2012 he had an understanding from Mr Lorenz of the purpose of Mr Fairweather’s approach and the current state of negotiations between the Authority and SWR. (3473)
With respect to the meeting of 22 November 2012 Mr Grenfell agreed that Mr Brown did most of the talking. He said SWR would have said words to the effect that they wanted to continue business with AC once they took over the operation of the Hartley landfill. (3473) He also agreed that Mr Brown may have said that he did not wish to rock the boat and that it should be business as usual. (3473-3474) Mr Grenfell recalled it being said that SWR wanted a long-term relationship with AC. For his part, Mr Grenfell said that he would not have said what is commercially favourable for the council, but rather considering what was in the best interests of the council. (3474)

It was put to Mr Grenfell that he certainly did not wish to put SWR off. That is, he did not wish to give SWR the impression that it had no prospect of getting AC’s waste stream. He said this was not in his thoughts at all. (3474) At that point in time there was lot of things up in the air. (3474-3475) He said:

Q You didn’t wish Mr Brown to think that there was no prospect of him getting the waste streams from your council continuing at Hartley.

A That was not in my thoughts at all. That was not part of my thought processes what Southern Waste ResourceCo, where our waste was going at that stage, ‘cos there’s a lot of things up in the air at that stage.

Q You understood that if you’d made it clear to Mr Brown ‘There’s no way you’re getting this waste’, that there was a risk that Southern Waste ResourceCo wouldn’t be interested in the Hartley deal. You understood that, didn’t you.

A No, not - we were talking about the, whether what long-term deal that Southern Waste ResourceCo could do for Alexandrina in the future, and I was of the assumption that pretty soon that they’ll, when the deal is done, then either the authority and Southern Waste ResourceCo will come up with an option that’s best for the councils and that’s what we’ll push forward with. If - it was my understanding that if the, where the waste streams were going was so important to Southern Waste ResourceCo, that would’ve been tied up as part of the deed.

Counsel then asked again whether Mr Grenfell understood that if he made it clear to Mr Brown that SWR was not going to get AC’s waste that would risk SWR walking from the deal with the Authority. He said he did not have that understanding. (3476)

By the time of the meeting of 22 November 2012 Mr Grenfell understood that SWR was not insisting as part of any deal with the Authority that the constituent councils commit to the disposal of their waste at Hartley. He also knew that SWR wanted to do a long-term commercial deal with AC. Mr Grenfell denied the proposition that he understood that if he did not reassure Mr Fairweather and Mr Brown about the prospect of SWR getting AC’s waste stream they might walk away from the deal agreed with the Authority. (3477) He gave the following evidence: (3477-3478)
Q If you had said to Mr Brown ‘Listen, I know you’re interested in this waste stream, but there can be no guarantees whatsoever that Southern Waste ResourceCo will get the waste stream’, that might put him off.

A It may have.

Q You didn’t say anything along those lines to him, did you.

A No, I didn’t.

Q You didn’t say to him, amongst other things, ‘Listen, Mr Brown, I’ve got to be straightforward with you. Before there’s any prospect that you might get a long-term commercial deal with my council, there is a procurement policy, a process that needs to be followed before we can even consider talking terms’, you didn’t say that, did you.

A No, I didn’t.

Q If you were being straightforward with Mr Brown, you would have said that, wouldn’t you.

A Mr Brown didn’t ask those questions.

Q You sat there, waiting to see what he did, and didn’t say.

A I did. Mr Brown asked for the meeting, for their meeting to come and talk to council about what they could do and what they wanted to do. I was letting Mr Brown run the conversation.

Mr Grenfell agreed that if AC were to switch service provider AC’s procurement policy and procedure would have been triggered. (3478) He agreed that it was part of his duties to be familiar with and apply the policy and that the council bore the responsibility of advising potential service providers of the existence and content of the policy. (3481) He agreed that he said nothing about the procurement policy to either Mr Brown or Mr Fairweather during the course of the 22 November 2012 meeting. (3483)

In cross-examination Mr Grenfell said that by the time of the meeting with SWR he had said to Mr Lorenz that AC’s waste was probably going to go to Brinkley. (3602) He said he did not tell SWR this because he was not asked. He was asked: (3603)

Q You well knew, I suggest, that Southern Waste Resourceco wanted to meet with each of the member [councils] to try and set up arrangements to secure member council waste.

A Yes, we had means.

Q And you knew, before Mr Fairweather made contact, that they were going to contact you for that purpose.

A Yes.
Q The reason was they wanted to meet with you, eyeball you and ask for your business.

A And they did.

Q And you sat there, as you said to his Honour yesterday, and you didn’t say very much. You listened.

A I listened.

Q And you didn’t say to Mr Brown or Mr Fairweather, even though they were talking about long-term deals, even though they were talking about business as usual, you didn’t say one word about ‘Well, I’ve actually said to Mr Lorenz I’m probably going to send the business to him’. You didn’t say that, did you.

A I said we would do what’s best for the council.

Q Could you answer my question please. You didn’t say to Mr Brown or Mr Fairweather ‘Actually, I’ve told Mr Lorenz I’m probably going to send the waste to Brinkley’, did you.

A I didn’t say that.

Cross-examination subsequently returned to the issue of Mr Grenfell deliberately withholding his opinion as to the likelihood that AC’s waste would go to Brinkley: (3604-3606)

Q … I’m putting to you that as a matter of fairness and transparency you should have said to Mr Brown ‘Mr Brown, I’ve already told Mr Lorenz I’m probably going to send the waste to Brinkley’. Do you accept that or not.

A No.

Q You agree that by not doing that, what you were doing was preferring the interests of the board and the authority over the interests of the council.

A No.

Q Because what you were doing was ensuring that there could be a deal done with the authority which would remove the long-term liabilities, secure compensation for the authority, enable it to move to Brinkley and jeopardise the chance that the council would get a lower rate with less risk from Southern Waste Resourceco.

A No, I don’t agree.

Q You didn’t think about it, did you.

A They were making it - they would come and speak to me for a 20-minute appointment in the office.

Q You were listening to them -

A Yes.
Q  - knowing full well what the board deliberations had been for the authority.

A  Yes.

Q  And you knew that if you said to Mr Brown ‘I’ve already said to Mr Lorenz it’s probably going to go to Brinkley’, he was likely to get up and leave your office and walk from the deal. You understood that, didn’t you.

A  The key word is ‘probably’.

Q  Yes.

A  Probably. At that stage the offers hadn’t been - there were offers - there was going to be other offers, there was other considerations to take into account.

Q  You knew that if you had said the truth of what you had said to Mr Lorenz to Mr Brown, he would probably walk.

A  I didn’t know at that stage. As you quite clearly laid out, we were - I didn’t know how they were going to make their business plan work if they hadn’t secured the tonnes of the council. If they were going to do to secure the tonnes of the council, that should have been done before - as part of the negotiation and it should have been the first thing that was signed up.

Q  Mr Lorenz told you ‘Don’t tell Southern Waste Resourceco that you’re probably going to send the waste to Brinkley’, didn’t he.

A  Not that I recall, unless he -

Q  He might have done.

A  I don’t believe so.

Q  He might have done.

A  I don’t believe so, unless you’ve got -

Q  Do you agree with this: if you had made it clear to Mr Brown on 22 November 2012 that your waste was probably going to go to Brinkley, that would have been a reason why he might have walked away from the Hartley deal; do you agree with that.

A  There’s a lot of mights and a lot of probablies in there and possibly could have. I can’t answer - I don’t know what Southern Waste Resourceco didn’t know then, didn’t know what their business plan was, I didn’t have access to their business plan.

Q  You knew that they wanted the member council waste.

A  I knew, we would have assumed that they wanted the member council’s waste, like everybody, yep, of course, they want member council waste because you want to get as much waste through a landfill as what you can get.
Q And if one of the four-member councils says [sic] to Mr Brown ‘You’re not going to get ours’ or ‘You’re probably not going to get ours’, that’s a reason for him to walk from the Hartley deal. You understood it.

A No.

Q Didn’t occur to you.

A They hadn’t - and whether it’s this point or whatever - at no time, even signing the deed or whatever, was there - did Alexandrina Council say ‘Yes, our waste is going to go to Hartley’ or ‘Yes, it’s going to go to Brinkley’.

Q You see what, in fact, happened during that meeting, is you said to Mr Brown and to Mr Fairweather ‘You’ve got nothing to worry about, it’s probably going to be determined by distance and transport’.

A Yes.

ii. Consideration

Mr Grenfell attended the meeting with Mr Brown and Mr Fairweather in his capacity as an officer of AC. He did not attend in his capacity as a member of the Authority’s Board. All present understood this.

There is no real dispute on the evidence that during the meeting at AC on 22 November 2012, Mr Brown and Mr Fairweather outlined the services that SWR and ResourceCo could provide to AC. That included the continued reception of that portion of AC’s waste already going to Hartley. I accept that the discussion included a desire expressed by either Mr Brown or Mr Fairweather that SWR develop a long-term relationship or partnership with AC. Further, it is not disputed, and I find, that Mr Grenfell said words to the effect that the Council would do what was best for the Council. Clearly, Mr Grenfell knew that SWR wanted AC’s waste stream. I find, as Mr Grenfell conceded, that the relevance of transport costs to the decision of where AC would dispose of its waste was raised during the meeting and that he said, “it’s probably going to be determined by distance and transport”. (3606) Further, I think it likely Mr Grenfell advised Mr Brown and Mr Fairweather that he would let them know if AC’s waste disposal plans changed.

I reject the suggestion that such comment was misleading in the sense of having the capacity to induce error. First, it was hedged by the qualifier, “probably”. Second, both Mr Brown and Mr Fairweather understood, as would the reasonable person, that Mr Grenfell was not vouching for what AC would or might do nor providing any guarantee.

I reject the suggestion that Mr Lorenz gave instructions to Mr Grenfell. There is no evidence of his having done so. I reject the suggestion that there was some sort of arrangement or understanding in existence between Mr Lorenz and Mr Grenfell that Mr Grenfell would do what was in the best interests of the Authority at the expense, potentially, of AC. I agree that it is likely, however,
that Mr Grenfell saw the best interests of AC as being aligned with the interests of the Authority. He indicated as much. (3539) As will be seen, his conduct in attempting to move AC’s waste to Brinkley is consistent with this being his position. However, equally what occurred at AC after settlement demonstrates the non-existence of any arrangement or understanding between the Authority and AC or between Mr Lorenz and Mr Grenfell. It also shows that Mr Grenfell’s opinion about the probable relevance of transport costs was not, at one level, misleading. The increase in costs associated with moving AC’s waste to Brinkley prevented it doing so until such time as SWR made its October 2013 offers and the Authority insisted that the constituent councils consider the future waste disposal model to which they wished to subscribe.

To the extent that I have made findings in relation to the 22 November 2012 meeting, I have not relied upon the evidence of Mr Brown unless supported by the evidence of Mr Fairweather and/or Mr Grenfell. Mr Brown’s evidence as to whether disposal rates were discussed and an offer or offers put during the 22 November 2012 meeting at AC is an example of why I consider his reliability as a witness to be suspect generally.

I reject the assertion that SWR discussed the content of the deeds with the constituent councils. No draft was in existence as at the time of the 22 November 2012 and 6 December 2012 meetings. I was left with the impression that Mr Brown was attempting to tailor his evidence to fit his understanding of SWR’s case. His attempts to salvage his evidence in the wake of the content of his supplementary statement being put to him were far from convincing. Being kind, he was loose with the truth, more likely, he embellished upon his evidence to suit SWR’s case and was caught out.

I find that disposal rates were not discussed in the 22 November 2012 meeting at AC. No specific offer was made. Ambitions were discussed including initially an assurance that at Hartley business would go on as usual, but matters rose no higher. The meeting was a first step in what SWR hoped would be a process of cultivating a commercial relationship with AC.

Did Mr Grenfell tell Mr Lorenz in advance of settlement that AC’s waste would move to Brinkley? I treat Mr Grenfell’s evidence at (3547) and (3661) as a concession that he may have done, but that, if he did, he said that AC’s waste would probably go to Brinkley or that it was more than likely that it would go to Brinkley. At a minimum, his thinking was that AC’s waste would probably go to Brinkley. Did he tell Mr Fairweather and Mr Brown something different?

Mr Fairweather said in his statement that Mr Grenfell said words to the effect that SWR had nothing to really worry about.502 In examination-in-chief he said: (1358)

502 Ex P38 at [17].
‘It is our undeniable intention or desire to form a long-term partnership with Alexandrina Council’.

What if anything did Mr Grenfell say in response to that.

That certainly he commented to us that he did not see any reason for waste to go anywhere, that Alexandrina, his responsibility was to Alexandrina Council to make a decision for that council and that he couldn’t see anything to worry about I think were his words, or at least words to that effect.

In cross-examination it was put to Mr Fairweather that Mr Grenfell did not say that there was “really nothing to worry about, or really worry about the council going elsewhere”. Mr Fairweather said, “[y]es, he did, in the context of the geographic comment that he made”. (1809)

In cross-examination it was put to Mr Grenfell that, bearing in mind AC’s history with the Authority, his approach to SWR as a competitor was to start from the position that there needed to be good reason to change. He said: (3635)

I think I’ve been fairly consistent in my language, I hope I have and I try to be; the objective of the council is to get the best outcome for the community and those things need to be considered in balance at that time.

You see, if you said to Mr Brown and Mr Fairweather at that 22 November 2012 meeting, ‘You two have got nothing to worry about, this is all going to turn on distance and transport’, that would have been quite a misleading way of describing the decision making, wouldn’t it.

If I would have said only that, it could have been.

In re-examination Mr Grenfell said that he did not believe he said to Mr Brown and Mr Fairweather the words, “you’ve got nothing to worry about”. (3675)

The difficulty in resolving this issue is that Mr Fairweather is not prepared to vouch for the words Mr Grenfell actually used, and Mr Grenfell does not concede that he used the words attributed to him. There is also a lack of completeness or comprehensiveness in the evidence of each of Mr Brown, Mr Fairweather and Mr Grenfell about the meeting and how it unfolded that renders it difficult to appreciate the context in which the statement might have been made. Mr Fairweather’s evidence was really about the impression he and Mr Brown were left with by what Mr Grenfell had said and his conduct. I do not doubt that Mr Fairweather and Mr Brown were left with the impression that AC had not as yet made any decision and that, when it did, transport cost differential would probably be a significant, perhaps the decisive, factor. At a minimum they would have been left with the impression that they were in a position to compete meaningfully with the Authority for AC’s waste. In reality Mr Grenfell thought it likely that AC’s waste would go to Brinkley despite the increased cost that such move would likely mean. At the time of the meeting Mr Grenfell would have been aware of the Authority’s understanding of the likely increase in travel costs
to the constituent councils if they moved their waste to Brinkley. I am satisfied that it is likely that Mr Grenfell let Mr Brown and Mr Fairweather think that they were in a position to compete meaningfully with the Authority for AC’s waste on a basis (price) that was not wholly reflective of the basis upon which any ultimate decision would be made. I am not in a position to find that Mr Grenfell went so far as to assure Mr Brown and Mr Fairweather that they had nothing to worry about. To be clear, I do not find that Mr Grenfell made any positive misrepresentation, rather I find that he did not disclose the entirety of his thinking. I accept that no decision had been made as to whether AC would actually move its waste to Brinkley, but I find that Mr Grenfell considered it likely it would do so and was of that opinion as of 22 November 2012. I do not think Mr Grenfell was less forthcoming than he otherwise might have been in furtherance of any arrangement or understanding with Mr Lorenz or between the Authority and the constituent councils. I am more inclined to think that he was influenced in his approach to Mr Brown and Mr Fairweather by his role on the Authority and the view that SWR had mounted a hostile takeover of Hartley. The question arises, how can Mr Grenfell’s approach to the meeting with Mr Brown and Mr Fairweather on 22 November 2012 be used in evidence against the Authority or at all? I return to this question below.

I accept that SWR considered the meeting positive. Mr Grenfell would have contributed to that impression. However, in a sense he only said what SWR already understood and already motivated them to pursue the Hartley opportunity. That is, he only highlighted the transport cost advantage that Hartley had over Brinkley which SWR was already confident would result in Hartley attracting a significant portion of the constituent councils’ waste streams. It is not as though SWR entered the meeting thinking that it would not be able to compete. To the contrary, SWR believed in relation to AC that it had a competitive advantage over Brinkley, albeit one not as great as in relation to the DCMB and AHC districts. Mr Grenfell fuelled a sense of confidence already in existence.

b. The 22 November 2012 meeting at DCMB

   i. An overview of the meeting

On 22 November 2012 Mr Brown, Mr Pucknell and Mr Fairweather met with Mr Peters from DCMB. In his statement Mr Pucknell said he thought Mr Stuart was also present at the meeting. Mr Fairweather said the purpose of the meeting was the same as in the case of the earlier meeting that day with AC (i.e. to develop a relationship with a view to negotiating a long-term contract for the disposal of DCMB’s waste at Hartley).
In his statement Mr Brown said he could not remember the words he used but did recall that he outlined the services SWR could offer the council and did say words to the effect that “we are keen to have a long term contract with you for Hartley”. He also recalled Mr Peters saying something to the effect of, “I understand the transport cost to us of going to Brinkley. We want to get a good deal for our ratepayers. We will look at the deal you put to us”. Mr Brown considered this response positive and that the two entities would proceed to negotiate a long-term contract over the coming months.

Mr Pucknell had no recollection of what was said during the meeting.

Mr Fairweather said that he, Mr Brown and Mr Pucknell outlined the services that SWR could provide to DCMB and provided Mr Peters with some brochures. Mr Fairweather records that Mr Brown said words to the effect that SWR would like to continue to receive DCMB’s waste at Hartley when it took over the site. Mr Brown added that it was a logical option for DCMB to dispose of its waste at Hartley given the location. Mr Fairweather records Mr Peters as saying words to the effect that he understood the transport advantages for DCMB disposing of its waste at Hartley and that DCMB would look at the long-term price that SWR offered as it had a responsibility to its residents, presumably, to obtain the best outcome for their rate payer dollars.

Part of the meeting with Mr Peters also involved discussion over the purchase of the Monarto Quarry by ResourceCo.

Mr Fairweather stated that the meeting concluded with Mr Brown saying words to the effect that SWR would contact DCMB in the future with a proposal to which Mr Peters replied that DCMB would have a look at any proposal received.

Again, Mr Fairweather’s notebook contains no note of the meeting.

In his oral evidence Mr Brown said that Mr Stuart was present. He said:

Q: Again as best you can recall what did you say or what was the effect of what you said.

A: Once again very similar to the other meetings. Very positive meeting on our service providing and how we wanted to partner with them and make this transition

506 Ex P23 at [93].
507 Ex P23 at [93].
508 Ex P63 at [46].
509 Ex P34 at [64].
510 Ex P38 at [22]-[23].
511 Ex P38 at [24].
512 Ex P38 at [25].
smooth. We had a very open chat about the authority, the cost differential to Brinkley from Mount Barker, and really good discussion.

Q As best you can remember, what was said in response to what you said or what was the effect of what was said.

A Once again, we’re very - we viewed them as the most commercial council out of the group. They were very focussed on getting the best value for their ratepayers and they said that they would be looking at our offering seriously.

On the voir dire, the transcript of which was subsequently tendered in evidence, Mr Brown said:\footnote{Ex D16: 598.} (1906)

Q In the meetings with Mount Barker council or the meeting in November 2012, you discussed the transport cost differential with Mr Peters.

A I can’t recall if I discussed it with Mr Peters.

Q You raised the difference between transporting to Hartley as opposed to Brinkley.

A Is that 14 or 13?

Q 2012, the initial meeting with Mr Peters.

A No, we wouldn’t have talked about it then.

Q Are you sure of that.

A Yes.

Q Why are you so sure of that.

A Because we had no inkling that that’s where they were going.

Q I’m saying you turned your mind to whether or not they would go to Brinkley or stay at Hartley.

A No, we knew commercially they’d stay at Hartley because it’s a lot cheaper option.

Q But you did turn your mind to whether or not they would go to Brinkley -

A No, we didn’t.

Q And you raised that with Mr Peters at the meeting.

A No, after settlement we definitely had those discussions but not prior to settlement.

In cross-examination it was put to Mr Brown that during the course of the meeting he did not seek any commitment from DCMB as to the disposal of its waste at Hartley. He said: (928)
A  We would have definitely [asked DCMB to commit its waste stream to Hartley]. We would have talked about it. That’s what we were there for.

Q  You knew that it was a risk at all times that they might send their waste to Brinkley.

A  We were very confident with Mount Barker on the back of the cost advantage that we had and the rate that we put forward. The rate that we put forward was in essence the rate that they’d been paying.

Q  Whatever you were told you understood again didn’t you that they might change their mind before you took over the facility.

A  Yes.

Q  You knew with all of these councils that there was a risk that they would stay with the herd.

A  No.

Q  They would stay together.

A  No.

Q  That they would maintain their longstanding relationship with the authority.

A  No, we didn’t. We were told exactly the opposite.

Q  You knew that there was a risk that the member councils might stick with the status quo with the authority.

A  No, we didn’t know that.

Q  You weren’t alive to that risk.

A  We knew Murray Bridge were going to take their waste to the Brinkley facility but that was pretty clear from day one.

Subsequently, Mr Brown was asked if during the course of the meeting with Mr Peters SWR put forward a specific dollar rate that would be charged DCMB to dispose of its waste at Hartley. He said that DCMB was “definitely driving those rate discussions at those meetings” before saying that he could not recall “whether I said 30 - if we’re talking, you know, “Guys this is going to cost $37/tonne for the next five years”’. (2198) Ultimately, he agreed with the proposition that everyone would have understood that it was to be business as usual, but could not recall what he “said to who and when”. (2198)

As mentioned, Mr Pucknell had no memory of the 22 November 2012 meeting at DCMB. (2132) That said, Mr Pucknell could recall mention being...
made of transport cost differentials, however he thought that topic was raised at a later meeting. (2134) He was asked: (2134)

Q There was no discussion about rates for the deposit of council waste at that meeting in November 2012 was there.

A I don’t think there would have been at that stage.

Q There was no commitment by the District Council of Mount Barker to become a customer of Southern Waste.

A In 2012?

Q Yes.

A No, I don’t think there was any commitment other than the commitment that came through the landfill deed.

Q So you view that as a commitment for an interim period.

A Yes.

Mr Fairweather described the meeting as very positive and quite congenial. There was some discussion about the Monarto Quarry before the meeting moved to discuss Hartley. (1365) He said the discussion about Hartley concerned “the provision of waste services and rates”. (1366) He did not think that dollar amounts were specifically mentioned. The discussion was about developing a long-term relationship. It was not suggested that the disposal rate would change from its existing level. Mr Fairweather said that Mr Peters said nothing about a council procurement policy, or about a shared services model that his council and others participated in, or that doing business with SWR might jeopardise the continuation of the Authority. Nothing was said by anyone about Brinkley. (1366) At the conclusion of the meeting SWR was very positive regarding the possibility of securing DCMB’s waste stream. At no time during the meeting did Mr Peters suggest that DCMB was considering moving its waste from Hartley. (1366) He said nothing on the topic. (1367)

In cross-examination Mr Fairweather said he came to realise that he was not across the nature of DCMB’s operations. Consequently, Mr Brown did more talking and Mr Fairweather said very little. Mr Brown outlined the services that SWR could offer DCMB. (1846) Mr Fairweather’s recollection was that Mr Peters made it clear that he was happy to entertain any proposal submitted by SWR. He also gained the impression that DCMB were keen to offload the interest it held in Monarto Quarry, a quarry adjacent to the Hartley landfill. (1846-1847)

Mr Fairweather could not recall any discussion during the meeting about rates for the disposal of waste at Hartley and DCMB did not commit to becoming a customer of SWR. (1848)
Mr Fairweather agreed that no formal proposal was put to DCMB relating to the price per tonne for waste disposed of at Hartley until the second half of 2013. (1847)

After the 22 November 2012 meeting with DCMB, SWR did not meet again with DCMB until 15 July 2013. Mr Fairweather said he had left it to Mr Pucknell to deal with DCMB. He understood Mr Pucknell to have a working relationship or rather an ongoing relationship with Mr Peters and left it to Mr Pucknell to handle SWR’s relationship with DCMB. (1849)

ii. Consideration

I am satisfied that Mr Stuart did not attend the meeting of 22 November 2012. Mr Peters attended in his capacity as an officer of DCMB. The meeting was with the council. This was understood by all present.

I am satisfied that in the meeting with Mr Peters on 22 November 2012, SWR outlined the services it could provide to DCMB including landfill services at Hartley after settlement. Rates were not mentioned. No offer was made. The meeting was introductory in nature with SWR hoping that a long-term contractual relationship for the receipt of DCMB’s waste at Hartley would eventuate. Mr Peters gave no commitment nor any indication as to what DCMB planned or might do with respect to its waste stream upon SWR taking over operation of Hartley. I find that it would have been obvious to Mr Peters that SWR wanted DCMB’s patronage at Hartley. I also find that Mr Peters indicated that DCMB would consider any proposal SWR submitted and would be guided by what was ultimately best for ratepayers.

I accept that DCMB’s waste was important to the viability of Hartley. There is, however, no evidence to suggest that Mr Peters was privy to SWR’s business model. There is no evidence to suggest that DCMB, or any of the other constituent councils for that matter, was in a position to analyse critically how SWR might operate Hartley with all, some or none of the constituent councils’ waste streams. That said, I think it safe to conclude that it was generally understood by Mr Lorenz and the Authority, including the Board, that without a significant portion of the constituent councils’ waste streams, the viability of Hartley would be questionable.

SWR’s confidence in relation to attracting DCMB’s waste stream and acceptance of losing RCMB’s waste stream was linked to its own appreciation of the impact of transport costs on the total cost of waste disposal. SWR was confident that it had a competitive advantage over Brinkley and any other alternative in relation to attracting DCMB’s waste stream to Hartley on the back of Hartley’s location. It was not for DCMB to disabuse SWR of its positive outlook, if, indeed it was in a position to do so. Again, DCMB did not know of SWR’s business model nor what it could offer in terms of a long-term rate for the disposal of waste at Hartley. At this time DCMB also knew that, without more, if
it moved its waste to Brinkley it was looking at an increased transport cost of around $7/tonne possibly more. Whilst I am happy to conclude that had Mr Peters been called to give evidence he could not have assisted the Authority’s case, so concluding does not mean that he was not genuine in his professed preparedness to consider any offer SWR might make.

It was submitted that if Mr Peters did have an open mind, he would have asked questions in the course of the meeting about SWR’s price and the terms of its service. The submission assumes the meeting was of a different character to that described by Mr Brown, Mr Fairweather and Mr Pucknell. It must also be remembered that SWR had not as yet taken over operations at Hartley and did not know when it would do so. Further, according to Mr Brown and Mr Fairweather the meeting was all about assuring DCMB that it was business as usual. If that is right, it does not give cause for any question unless and until there is change. As to the other services on offer, to what extent they were relevant to DCMB, I do not know, nor do I know the extent to which they were pushed in the meeting. What I might expect Mr Peters response to have been depends upon my being able to gain an appreciation of what was said, by whom and when and its relevance and importance to DCMB. Again the evidence of what transpired during the meeting was very general. I am not prepared to infer that Mr Peters did not have an open mind when he attended the meeting of 22 November 2012.

Mr Brown’s evidence as to whether the transport cost differential was discussed during the meeting with DCMB is another example of why I have been unable to accept him as a reliable witness. As a bare statement of fact, Mr Brown’s statement that as at 22 November 2012 SWR had no inkling that DCMB was going to Brinkley is true, but, as I have said, SWR knew that Brinkley posed as a competitor.

c. The 6 December 2012 meeting at AHC

i. An overview of the meeting

On 6 December 2012 Mr Brown and Mr Fairweather met with Mr Aitken, Mr Salver, Mr Piper and Mr Hancock of AHC. The purpose of the meeting was the same as those held with AC and DCMB on 22 November 2012. Mr Salver stated the purpose slightly differently. He said the purpose of the meeting was for SWR to attempt to obtain the waste business of AHC. (4231)

In his statement Mr Brown said he made a presentation about the ResourceCo Group and the services it offered. He advised Mr Aitken that SWR was negotiating to take over the operation of the Hartley site and was interested in having AHC as a customer. Mr Brown then told the meeting about SWR’s

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515 Ex P23; Ex P38; Ex D123; Ex D131.
516 Ex P38 at [35].
517 Ex P23 at [87].
experience in the waste industry. Mr Aitken was said to have commented that he was new to the council and enquired about SWR’s other services. Discussion then turned to concrete crushing. Mr Brown stated:

90. Although I cannot now recall the exact words, I recall that Mr Aitken [sic] expressed interest in the expertise and experience of SWR and [was] excited about the future. He said words to the effect:

“I want to build a relationship with you and am very keen to know what other services offerings you could provide at Hartley”.

91. The discussion did not expressly involve a comment by him that the AHC waste would stay at Hartley. However, when we explained the other waste and recycling services that we could offer to AHC (such as concrete crushing) we explained how those services would be offered and would fit into the Hartley site and transport to that site by or on behalf of AHC.

Mr Salver said very little.

In his statement Mr Fairweather said that after he and Mr Brown outlined the broader range of services SWR could offer and provided some brochures to those present at the meeting, Mr Brown said words to the effect that SWR was “keen to develop a long term relationship with you [AHC] for the receipt of your waste at Hartley when we take it over. We also have other recycling expertise that we can provide to your Council”. Mr Fairweather recalls Mr Aitken responding, saying something along the lines of, “I am happy that you are coming to the Adelaide Hills. I am interested in building a relationship with you and exploring the use of your services”. Mr Aitken did not commit AHC to continuing to send its waste to Hartley.

Mr Fairweather did not recall Mr Salver saying anything during the meeting.

Mr Fairweather’s notebook contains no reference to this meeting.

In evidence-in-chief Mr Brown said that he and Mr Fairweather were a lot more focused on AHC because of its location proximate to Hartley and its volume of waste. It was a very positive meeting about the services SWR could provide “and the rates that we could accept their waste for”. (620) He said:

… so we talked about the rate of disposal. We talked about other services. It was a very positive meeting, extremely positive in regards to Adelaide Hills Council seeing our brand and service offering coming to the Adelaide Hills Council. We took away from that meeting that we’re going to do a lot of business with this council.

518 Ex P23 at [88].
519 Ex P23 at [90]-[91].
520 Ex P38 at [36].
521 Ex P38 at [37].
522 Ex P38 at [38].
Q When you discussed rates, did you get into the precise rate that you were proposing.

A No.

Q Did you say anything about how it might compare with the authority rate that was then being charged.

A We said ‘We’ll be more competitive than your current disposal rate at the authority’.

In cross-examination Mr Brown said: (927)

Q Again you didn’t ask for any contractual commitment on their part to send waste to Hartley.

A We talked about it a lot at that meeting what their view was and that was the whole basis of the meeting.

Q But you didn’t ask for any commitment did you.

A Not a commitment but we were definitely wanting to fully understand what their view was and once again we left that meeting extremely confident that we were going to do business with the Adelaide Hills Council.

Q But you understood again that they might change their mind before you took over the facility.

A Anyone could have changed their mind, yes.

Mr Brown also said that during the AHC meeting “[w]e definitely talked about the disposal rate and the longevity of it” and offered to lock in a rate for five or seven years. (2195) Subsequently, Mr Brown said he could not recall if SWR put a specific rate to AHC at the December 2012 meeting. (2198)

In his oral evidence Mr Fairweather described the meeting with AHC as a “credentials meeting”. It was more formal than the meetings with the other constituent councils. Mr Fairweather presented a PowerPoint presentation to the council. (1371) The purpose of the meeting was for SWR to commence a relationship with the council, to pitch its services and to attempt to attract the council’s waste to Hartley. He said: (1373)

Q Did you or Mr Brown suggest that pricing would be changed by Southern Waste.

A No, we did not.

Q Was anything said by Mr Salver or Mr Aitken or the other two management team members, about a council procurement policy.

A No.
Q  Was anything said by them about a shared services model with other member councils and the authority.
A  No.
Q  Was anything said about the authority charter.
A  No.
Q  Had anything been said about the authority charter at the previous two meetings.
A  No.
Q  Was anything said about any problem with an inadequate time in which to conclude an agreement regarding the taking of waste at Hartley.
A  No.
Q  How would you describe your degree of confidence about securing Adelaide Hills council waste following this meeting.
A  High and I base that on Mr Aitken’s comments from my recollection it was something to the effect of we’re really pleased you’re coming to the Adelaide Hills, we have a transfer station at Heathfield, we’d even like to see if you couldn’t set up, we couldn’t - whether it was a joint venture or just set up a plant at - a construction and demolition recycling plant at Heathfield because they - it was something again to the effect of that they want to show their ratepayers that they’re in resource recovery or something to that effect.

In cross-examination Mr Fairweather said that he had no recollection of pricing or rates being discussed in the meeting with AHC. He said that AHC did not commit to staying at Hartley or to becoming a customer of SWR. (1840) He accepted that whatever was said during the meeting, AHC remained free to change its mind. (1841) Mr Fairweather said he understood that there was a risk that AHC would maintain its relationship with the Authority and remain a customer of the Authority. (1842) He said he did not appreciate the level of cohesion between the constituent councils. He said that initially SWR thought that the councils would make decisions more freely or independently. (1842) His understanding of the nature of the Authority was imperfect. He asked no questions during the meeting about the operations of the Authority. (1844-1845)

In his statement Mr Aitken said that as at the time of the meeting with SWR in December 2012 he had an open mind as to where AHC would dispose of its waste and was prepared to consider proposals presented by SWR. 524 Mr Aitken was of the view that if a proposal put were a good one catering for the long-term needs of the council, it would be considered. 525

524  Ex D123 at [18].
525  Ex D123 at [19].
Mr Aitken recalled that at the meeting SWR provided details as to its capabilities and the services it could provide to the council. He had no memory of any statement being made on behalf of SWR that directly referred to its desire to have the AHC as a customer. His recollection was that the discussion was more in the nature of an introduction. He denied that he said words to the effect that he was new to the council and asked what services SWR could provide for ratepayers as Mr Brown contends that he did. During the course of the 6 December 2012 meeting there was no discussion as to the rate that SWR would charge AHC for disposing of its waste at Hartley, nor was there any discussion to the effect that any rate that was charged would be more competitive than the Authority’s rate. The discussion was about the capability of SWR to provide waste and recycling services generally.

Mr Aitken accepted that he may have expressed interest in the capabilities of SWR but denied that he said that he wanted to build a relationship with SWR and was keen to know what other service offerings it could provide at Hartley.

In his oral evidence Mr Aitken described the meeting of 6 December 2012 with Mr Brown and Mr Fairweather as an opportunity for representatives of SWR to share with AHC a range of the services that they provide. From his recollection most of the meeting was about recycling and energy related parts of their operation. No formal offer was put during the course of the meeting nor were any rates discussed for any particular service that SWR might provide. Mr Aitken had no recollection of any discussion at all about landfill operations. No question was asked about Brinkley. Mr Aitken said that he did not turn his mind to the potential application of the Council’s procurement policy because no consideration was being given “to an offer or anything similar to an offer”. Mr Aitken said that he knew in 2012 that SWR was keen to get in front of the constituent councils to try and gain their business. His recollection was that Mr Brown did not say that SWR wanted AHC’s waste on a long-term basis. He knew that within AHC there was a view held that without the constituent councils’ waste streams, operating Hartley would have been more challenging. He said he gained the impression that securing the constituent councils’ waste streams was not a priority for SWR. He explained that he formed this view because all the councils had was clause 9 of the Deed of Settlement. If the waste were a priority he would expect to have received a firm offer; he “would have expected them to have done certain things to give the impression that they wanted to secure our council’s waste stream for a longer-term period”.

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526 Ex D123 at [25].
527 Ex D123 at [26].
528 Ex D123 at [27].
range of services that SWR could provide to the council. (3769) He was asked: (3769)

Q You understood that they were keen to obtain the waste streams.
A I believe they probably would have been, yes.

He was not prepared to concede that he understood that SWR needed AHC’s waste stream, but was aware of the view that without the constituent councils’ waste streams SWR would be in a financial predicament. (3769)

In cross-examination Mr Aitken was taken to a letter AHC received from Mr Brown dated 18 March 2013, after AHC had ceased to dispose of its waste stream at Hartley. 529 The letter opens describing SWR as being “enthusiastic about the opportunity of working with the Adelaide Hills Council and continuing our trading relationship for the disposal of your waste into the Hartley Landfill site”. 530 Mr Aitken was prepared to concede that in the 6 December 2012 meeting Mr Brown was enthusiastic about the services he felt that SWR was able to offer AHC. (3882)

In the second paragraph of the 18 March 2013 letter Mr Brown referred to having given an undertaking that disposal rates at Hartley would not change in the short term. Mr Aitken was not sure that such undertaking was given in December 2012. (3882)

In the third paragraph of the letter of 18 March 2013 Mr Brown referred to having indicated that SWR “would enter into rate discussions with our intent to “lock in” long-term, commercially viable agreements with member councils of AHRWMA”. 531 With reference to the third paragraph of the letter, in cross-examination Mr Aitken was asked: (3882-3883)

Q And he had done that as well during the course of your meeting, hadn’t he.
A I’m not aware that he had done that during the course of our meeting, no.
Q Is it more accurate to say that you don’t remember him doing that.
A My recollection - strong recollection is that he did not provide that.
Q Would it be fairer to say that your memory of the events of 6 December 2012 would have been better back in March/April 2013 than your memory is today.
A It’s possible but I have - I still have a recollection of that meeting.
Q Would it be right to say that your memory back in March/April 2013 of that meeting would have been better.

529 Ex P7: 264.
530 Ex P7: 264 at p 2354.
531 Ex P7: 264 at p 2354.
A I think you could probably easily surmise that that would be the case.

Mr Aitken was then taken to the letter he wrote in reply to SWR’s letter of 18 March 2013.\textsuperscript{532} It was put to him that nowhere in his letter did he complain about the accuracy of Mr Brown’s letter. He said he did not see the need to point out any inaccuracy. (3883) He elaborated: (3883-3884)

Q If the truth of it was that Mr Brown hadn’t said anything about long-term rates then it would have been very easy for you to say in your letter of April 2013 ‘What are you talking about? I had no understanding that you were interested in locking in long-term commercially viable agreements because you didn’t say anything about that at the meeting on 6 December’. Do you accept that.

A I accept it. Not only was it not mentioned to the best of my recollection at the meeting on 6 December, there was nothing forthcoming including what was established as part of the settlement that would suggest that there was any desire to lock in long-term arrangements with individual councils.

Q Could you answer my question please.

A Could you repeat the question?

Q Certainly. If in fact nothing had been said about locking in long-term commercially viable agreements with member councils, it would have been a very obvious thing for you to say that and point out in your letter by way of response.

A I don’t think there was a need to put that in the letter.

Cross-examination taxed Mr Aitken further with the notion that a proper response to Mr Brown’s letter, assuming Mr Aitken’s recollection of what occurred during the meeting of 6 December 2012 was accurate, was to correct Mr Brown. Mr Aitken remained firm that it was unnecessary to do so. (3884-3885)

Cross-examination returned to the 6 December 2012 meeting. Mr Aitken was asked: (3917)

Q My question of you, in its essence, was when you said just a few moments ago that it was possible that Southern Waste was interested in securing Adelaide Hills Council waste, in fact your state of mind at the meeting on 6 December 2012 was that you knew that Southern Waste was interested in securing Adelaide Hills waste at Hartley; that’s right, isn’t it.

A I’m not sure that is right. I believe that that would have been one of the reasons why Southern Waste wanted to meet with council staff. As I’ve said before, I can’t recall the waste stream being mentioned at all in that meeting, for whatever reason. It’s not my recollection that it was. I would have thought that it would have been probable that it would have but it wasn’t.

\textsuperscript{532} Ex P7: 273.
On a number of occasions Mr Aitken said that he could not recall SWR raising the question of AHC’s waste stream during the course of the meeting with SWR on 6 December 2012. (3918-3919, 3921, 3928) He had no recollection of Mr Fairweather referring to SWR taking over Hartley and was interested in having AHC as a customer. (3921) He did not tell Mr Brown and Mr Fairweather that AHC was not interested in having its waste go to Hartley and was not interested in the other services that SWR offered. (3923)

Ultimately, Mr Aitken did agree that in the period November to 6 December 2012 he would have assumed that SWR wanted AHC’s waste. (3925) He also conceded that he had been advised that SWR wanted to get in front of the constituent councils to “talk about a range of service offerings, including potential waste streams” and that to talk about waste streams was “[q]uite possibly” an obvious reason for the meeting. (3925, 3927)

The following exchange occurred: (3928-3929)

Q to suggest, as you have in the last 20 minutes or so, that there was any doubt in your mind about Southern Waste wanting your waste stream is not truthful, is it.

A I don’t know if I expressed a doubt about Southern Waste not wanting our waste stream leading up to that meeting from the 6th of December but following that meeting of 6 December one would have to reasonably question whether they did, given that the next time we heard from Southern Waste was in March and knowing that we only had waste that could be deposited at the Hartley site under that settlement until I think it was around November, so the nine-month period, and to not receive an offer until later in 2013, up and to that point, over that period of time, post 6 December I don’t think it - I think you could reasonably question how serious they were after that time.

Q That’s all hindsight reconstruction, isn’t it.

A No, I wouldn’t have said that was the case.

Q The obvious alternative explanation is that they thought they were getting it.

A I’m not sure why they would’ve thought they were getting it. I would’ve thought that Southern Waste as the service provider would’ve recognised that, as a service need of my council, I needed to know that beyond November 2013, that my council’s waste had somewhere to go.

Q If you were serious about a discussion with Southern Waste Resource Co it would have been the easiest thing for you, during the meeting on 6 December 2012, to say ‘How long are you prepared to keep the current gate rate for, Mr Brown?’, you didn’t ask him any questions along those lines, did you.

A As I’ve said before, my recollection is that the waste stream was not, to the best of my recollection, discussed at that meeting and I would’ve reasonably expected that something would’ve come through formally in order to at least start a negotiation for our waste stream going to the Hartley site beyond November.
Q You see, if you were serious about a discussion with Southern Waste Resource Co about its service offerings including receiving waste at Hartley you’d have asked the question ‘Are you prepared to improve on the current gate rate and give us something lower?’, do you agree.

A If that was the nature of the meeting and discussion at the meeting. As I said, I can’t recall the waste stream being discussed at the -

Q Can I suggest to you that if you were serious about securing the best outcome for your council, leaving aside your role as a board member of the authority, the questions I’m putting to you would have been obvious questions to see what benefit your council could secure.

A I think it would’ve been reasonable to assume that, following that meeting, that there would’ve been an approach made by Southern Waste for the waste stream being deposited at the Hartley site and that did not occur for some months after that meeting.

Q Again, if you were serious about exploring the best interests of your council and you had any serious question about the capacity of Southern Waste to meet its service offerings going on into the future you could have asked questions - if you had any - about the financial standing of the parent of Southern Waste but you didn’t ask those questions either, did you.

A I don’t recall asking those questions.

Mr Aitken was subsequently cross-examined on the applicability of the AHC’s procurement policy. It was then put to him that in the meeting of 6 December 2012 he was “actually representing the interests of the authority” and not AHC because he did not actively explore commercial outcomes for AHC with SWR. (3952) He agreed that he did not ask SWR for how long it was prepared to lock in a rate or for how long it was prepared to guarantee its current price, or whether it was prepared to entertain a contract of seven to 10 years in duration. (3952) He disagreed with the proposition that if he were truly acting in the interest of AHC he would have asked such questions. (3953) He explained:

(3953)

Your Honour, I think I may have raised this before, that in term[s] of my council I needed to know that there was a service provider that understood my council’s needs and I would have reasonably expected that following up from that meeting that we had on 6 December that we would have received something from Southern Waste, that would have at least given the understanding that as a council we need to know that we have a location beyond the next nine months with which to deposit our waste. That was a concern. That was a concern, that the service provider didn’t seem to understand that there was nothing coming from them in any way which would give me some comfort that they understood our business needs and that we would need to know that there was a location for our waste stream beyond November 2013. We had a provider, on the other hand, who we had worked with for a number of years, who we had a solid working relationship with and that we knew we were going to have at least some ability beyond, quite well beyond November for the time being, for the foreseeable future in order to house our waste and cover up on that list. So, no, I don’t believe that I or anybody else from my council needed to ask those questions at that meeting, given that we recognised that we would
expect something firmer coming from Southern Waste in relation to the possibility of depositing our waste stream beyond November 2013.

Mr Aitken disagreed with the proposition that he realised as at the time of the 6 December 2012 meeting that if he told Mr Brown that AHC was not interested in disposing of its waste with SWR at Hartley it was likely that Mr Brown “would walk from the negotiations and not settle on the Hartley site”. (3964) He also denied that it was important during the 6 December 2012 meeting to let Mr Brown think SWR had the chance of securing AHC’s waste because the Authority “was staring down a very large financial burden with the Hartley site”. (3996)

In his statement Mr Salver said that at the meeting of 6 December 2012 SWR told AHC about its experience in the waste industry and the services it could provide. No offer was made for the receipt of AHC’s waste at Hartley. To the best of his recollection, Mr Aitken did not say “I want to build a relationship with you and am very keen to know what other services offerings you could make at Hartley”.

In evidence Mr Salver said that at the 6 December 2012 meeting Mr Brown did not state that SWR wanted to enter into rate discussions with the intention of entering a long-term commercially viable agreement. (4034)

Mr Salver explained that he did not take a note of the meeting because it was no more than a meet and greet and an opportunity for them to present what ResourceCo could offer and its waste management skills and expertise. (4027) He said little at the meeting, possibly nothing. He agreed that the meeting was cordial. (4332) Mr Aitken would have opened the meeting in some way and may have said words to the effect that he was happy that SWR had come to AHC. (4333)

Mr Salver was certain that Mr Aitken did not say “I’m interested in building a relationship with you and exploring the use of your services”, but could not recall saying that he was keen to know of the other services SWR could provide. Mr Salver agreed that Mr Brown and Mr Fairweather outlined the services that SWR could provide. (4333) He could not recall if this included taking waste at Hartley. He could not recall if Mr Brown mentioned waste going to Hartley and it being business as usual. (4334) Nor could he remember it being said that SWR wanted a long-term relationship for the receipt of AHC’s waste at Hartley once SWR took over the landfill. (4335)

He denied that he was representing the Authority and not the council when at the meeting. (4334) Whilst he agreed that if any offer were made it would give rise to questions that would be asked by AHC of the provider, no offer was made. (4340) Whether AHC had leverage did not enter Mr Salver’s thinking during the

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533 Ex D131 at [77].
6 December 2012 meeting because no offer was put by SWR. (4335-4336) Similarly, he did not turn his mind to the possibility that any leverage that AHC had at the 6 December 2012 meeting would evaporate if AHC said that its waste would not go to Hartley, because no offer was made. (4336) Mr Salver said: (4336-4337)

Q Can I suggest to you that so far as you were concerned, you were just going to go through the motions of listening to what happened at the meeting but not contributing to the meeting in any concrete fashion.

A Your Honour, I am a far more professional and considered person than to do that. If an offer had been put, we would have fairly considered that offer. No offer was put until almost a year later and if this matter was crucial to that client, why did they not put a formal offer earlier in the piece that we could have then considered before they even signed the deed, took over the site and moved on?

Q The explanation is obvious, isn’t it, that Southern Waste might have thought that the waste was indeed going to Hartley.

OBJECTION: MR COX OBJECTS

MR COX: It’s asking this witness to speculate about Southern Waste’s intentions.

HIS HONOUR

Q Did you know that.

A No.

Q Did you think that.

A No.

Mr Salver did not turn his mind to the possibility that AHC’s waste was a lure. (4337) He said that they were expecting an offer to be made by SWR and were surprised when it did not come. Had an offer been made, the application of the procurement policy would have been discussed. (4338) Had Mr Brown said that SWR wanted a long-term contract to take AHC’s waste, the procurement policy would have to been mentioned. (4338-4339)

Mr Salver was adamant that SWR did not put an offer for the receipt of AHC’s waste at Hartley during the meeting. (4331, 4334, 4336, 4338, 4340-4342) He said: (4341-4342)

Q … the true position is that you well understood that what Southern Waste was doing at that meeting was telling you that they wanted your waste long-term at Hartley and you had decided to say nothing about that because you recognised were you to say anything about that, then there was a risk that the Hartley deal would not proceed.

A All hypothetical, your Honour.
Q You recognised that if you said anything about what you actually intended to do, then the Hartley deal would go and your council as a member of the authority would be left with a long-term liabilities at Hartley and left without the million dollars in compensation inclusive of GST.

A Your Honour, at a point in time, without an offer, if an offer had been put we would have considered it in the way that we did when the offer eventually came in October of 2013, and it’s at that time we went through a full and comprehensive process to understand the full implications of what would occur if the council was no longer going to be a member of that authority, and if other councils were no longer going to be a member of the authority, as to what the outcome, financial outcome would be for councils. That process was undertaken at that point in time. On 6 December 2012 nothing had been put and there was nothing to consider.

In bringing cross-examination to a close counsel returned to the 6 December 2012 meeting and put: (4349-4350)

Q Mr Brown said to you that ‘We are keen to develop a long-term relationship with you for the receipt of your waste at Hartley when we take it over’.

HIS HONOUR

Q Did he say that.

A No.

XXN

Q He said he wanted it to be business as usual for the council.

A No.

Q He said he didn’t want to cause any difficulties for council and the rates would remain.

A Might I ask what those difficulties were that was, intended.

HIS HONOUR

Q Did he say that.

A No.

XXN

Q And he went on to say the other complementary services that could be provided.

HIS HONOUR

Q Did he do that.

A I recall some mention of other offerings but said in the context of Resourceco as a business.

XXN
Q In response Mr Aitken said words to the effect ‘We are happy you are coming to the council and we are interested to explore the use of your services’.

A No.

Q And he said ‘We are interested in building a relationship with you’.

A Don’t recall if that was said, your Honour.

…

Q … was it ever discussed between you and Mr Lorenz or you, Mr Lorenz and Mr Aitken that you shouldn’t discuss Adelaide Hills’ waste and where it might go.

A Absolutely not.

Q Was it ever discussed between you and Mr Aitken, or you, Mr Aitken and Mr Lorenz that you were not to ask other member councils what they were going to do.

A Absolutely not. It’s up to them to decide where they wanted to go.

ii. Consideration

Mr Salver and Mr Aitken attended the meeting with Mr Hancock and Mr Piper in their respective roles as council officers. This was a meeting with the council and was understood by all as such.

I find that as at 6 December 2012 AHC knew that SWR was interested in securing the deposit of AHC’s waste stream at Hartley. Rates were not discussed in the meeting. Contrary to Mr Brown’s evidence no offer to lock in AHC’s waste for five or seven years was made. No discussion took place regarding “the disposal rate and the longevity of it”. (2195) AHC did not give any commitment as to where its waste stream would be disposed of in the future. That is unsurprising, the meeting was a prelude to the possibility of future negotiations and the eventuation of a contractual relationship.

I reject Mr Brown’s evidence that there was a lot of talk during the meeting about a contractual commitment to send AHC’s waste to Hartley. I reject Mr Brown’s suggestion that the whole purpose of the meeting was to discuss AHC’s view about a contractual commitment. No other witness in attendance at the meeting who gave evidence suggested that the discussion included what AHC’s view was about the possibility of contracting with SWR regarding AHC’s waste stream. No other witness gave evidence suggesting that SWR embarked upon any inquiry of AHC’s needs “to fully understand what their view was” about entering into a contractual relationship with SWR to send AHC’s waste to Hartley. (927) For these reasons and other the reasons I have previously given, I am not prepared to rely upon Mr Brown’s evidence as to what transpired during the 6 December 2012 meeting unless it is supported by other evidence. Accordingly, I am not prepared to conclude that AHC’s waste stream was
discussed otherwise than in the course of SWR’s general presentation about the services it could offer generally.

Mr Aitken’s evidence was guarded. He was wary of his cross-examiner and the questions asked. Like all witnesses in this trial, his evidence was affected by reconstruction, particularly regarding his attitude toward SWR and when it was that he decided AHC would move with the Authority to Brinkley. Mr Aitken and Mr Salver were close to Mr Lorenz. They were regularly updated on Authority activities and the views of the Authority and Mr Lorenz. Because of this they were closer to the negotiations between SWR and the Authority than the other Board members. Accepting this, I think it likely that AHC would have been expecting an offer from SWR on 6 December 2012. No offer came. I am not prepared to conclude that Mr Aitken had made up his mind as of 6 December 2012 as to where AHC’s waste would go once the Authority left Hartley, but absent an offer from SWR, and being closely acquainted with Mr Lorenz’s view about the viability and benefits of the Authority and the reasons for it, it is understandable that he reached the decision he did before settlement. I did not form the view that he was wedded to moving with the Authority come what may, or that he would relinquish his responsibilities to AHC in favour of the Authority or Mr Lorenz. Whether or not he was truly open-minded was never tested because no offer was forthcoming.

Again I reject the suggestion that if Mr Aitken and AHC were truly open-minded about potentially disposing of AHC’s waste stream with SWR, he and Mr Salver would have asked questions about the gate price and the duration of any contract that SWR could offer. Whether it might reasonably be expected that such questions would be asked by an Executive Officer in Mr Aitken’s position depends on the nature of the meeting. SWR treated the meeting as introductory. Mr Fairweather’s and Mr Salver’s evidence suggests it was. Accepting this, it is likely that it was not the sort of meeting where one might necessarily be expected to embark upon negotiation or discuss the details of a contract. Consistent with this, Mr Aitken’s interest in concrete crushing did not result in a detailed discussion of the terms on which the service could be provided. Of course, questions regarding price and terms could be asked, but that is different to suggesting that it may be inferred from the absence of such questions that the potential customer had a closed mind.

I do not think that Mr Aitken’s and Mr Salver’s discussions with Mr Lorenz about possible cost savings that might be realised if a putrescible transfer station was established at Heathfield indicative of a conclusive decision having been made by AHC about the future location for the disposal of its waste once the Authority left Hartley. What it demonstrates is an awareness that a move will see an increase in cost and a preparedness to work with the Authority to find a way to reduce that cost. That does suggest a preference for dealing with the

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534 Ex P6: 185; Ex P6: 188.
Authority, but bearing in mind the nature of the council’s legal and practical relationship with the Authority, it is understandable that such questions were raised. It is also to be remembered that the possibility of a putrescible transfer station operating to reduce the cost of disposing of waste to Brinkley was raised by AHC in January 2013, well after the 6 December 2012 meeting and in the absence of any offer from SWR.

I have no doubt that at the 6 December 2012 meeting Mr Aitken knew that SWR wanted AHC’s waste. He said he believed SWR probably wanted AHC’s waste stream and subsequently that AHC’s waste stream was not a priority for SWR. As to the former proposition, I reject it. He knew SWR wanted to get in front of the councils to do commercial deals for their waste streams. He knew that it was likely that without the constituent council’s waste streams SWR would, in its operation of Hartley, face a financial predicament. As to the latter proposition, it is understandable the more time passed without any offer coming from SWR and without and contact from SWR.

I accept Mr Aitken’s explanation for not, in replying to Mr Brown’s letter of 18 March 2013, correcting Mr Brown regarding what had transpired during the meeting of 6 December 2012. It seems to me perfectly reasonable not to be confrontational if it is not necessary.

I accept Mr Aitken’s evidence that at the time of the 6 December 2012 meeting he did not turn his mind to the possibility of Mr Brown walking away from the deal he had struck with the Authority if he indicated that AHC was not interested in disposing of its waste with SWR. I also accept that he did not go into the meeting thinking that the Authority was staring down a very large financial burden which it was about to offload on Mr Brown and that he should not jeopardise the Authority’s chances of doing so. I could detect no reason not to accept Mr Aitken on his oath. Further, it must be remembered that the Authority’s preferred option was not to leave Hartley and that the Authority was prepared to operate two landfills. It follows that the Authority was not troubled by the future liabilities associated with operating the Hartley landfill. Further, Mr Salver had described SWR’s actions as amounting to a hostile takeover. Against this background, giving Mr Brown reasons to walk away from the deal was more in keeping with protecting the Authority than giving him reason to remain. In fact, paradoxically, had SWR not applied time pressure as it did, and had the Authority had time to consult the constituent councils after an analysis such as that undertaken in the latter part of 2013 and early 2014, and the councils determined in the light of that analysis that it was in their best interests to commit to the Authority model and to dispose of their waste with the Authority, then the Authority could have made Hartley an unattractive proposition to any other potential operator pushing the Harveys to renew the lease.

Again, I doubt that SWR’s confidence in leaving the meeting with AHC was solely the product of things said or not said by the AHC executive.
d. A meeting with RCMB?

As mentioned SWR made a number of attempts at arranging a meeting with RCMB to no avail. Mr Brown said RCMB would not even take SWR’s calls. SWR thought that RCMB was likely to be a driver behind the re-opening of the Brinkley site and that it was probably sound for RCMB to dispose of its municipal waste at Brinkley. (623)

Mr Brown said that he “knew Murray Bridge were going to take their waste to the Brinkley facility”. (928) He said that was “pretty clear from day one”. (928) It was pretty clear because of SWR’s assessment of the cost advantage to RCMB of disposing of its waste at Brinkley, not from anything said or done by RCMB.

There is no evidence of RCMB being a participant in any arrangement or understanding with the Authority or the other constituent councils to deny SWR a genuine opportunity to compete for its waste stream.

In my view, SWR did not continue to pursue RCMB for a meeting because it considered that it could not compete with the cost advantage RCMB would realise in disposing of its waste stream at Brinkley. SWR, or at least Mr Brown, considered that the position might change down the track when the cost advantage to the remaining constituent councils of disposing of their waste streams at Hartley would force the cost of dumping at Brinkley up to the point where it became advantageous for RCMB to return to Hartley. Mr Brown did not appreciate that the Authority model allowed not only for commercial customers to subsidise the constituent councils, but for a degree of cross-subsidisation between the constituent councils.

e. Consideration

I find that in the meetings of 22 November 2012 and 6 December 2012 SWR did not make an offer to any of the respective councils to receive their waste at an agreed price for a particular term. I do not think it was a case of there being no reason for SWR to make an offer as an offer had already been made. Events had overtaken the offer contained in Mr Levinson’s 4 and 10 October 2012 letters. During the 5 November 2012 meeting at Wallmans Mr Brown said the $53 per tonne rate was negotiable, indicating that a counteroffer would be entertained or that a further offer may be made. At the conclusion of the 12 November 2012 meeting at Wallmans Mr Brown had made clear that SWR wanted to get in front of the constituent councils to do commercial deals. That is, SWR wanted to do individual deals with the constituent councils. That followed on from the fact that the Authority had made clear that it was for each council to determine where it disposed of its waste stream and that resolution of the dispute would not include the question of where the councils disposed of their waste.

535 Ex P23 at [94]; Ex P38 at [50].
streams in future. When offers did not come, I think it understandable that the likes of Mr Aitken would question their understanding of SWR’s plans.

I consider and find, that SWR was confident before the meetings with AC, DCMB and AHC that those councils would most likely dispose of their waste streams at Hartley. I find that this confidence was not eroded by anything said in the November and December meetings.

I find that SWR was given and had the opportunity to get in front of the constituent councils to do commercial deals. With that opportunity came the opportunity to ask the particular council any questions relevant to assessing the likelihood of securing that council’s waste stream in future. I find SWR considered that it had a competitive advantage in relation to the constituent councils’ waste streams, with the exception of RCMB’s waste stream. I find that SWR’s thinking was that if it maintained the current gate price at Hartley that would be sufficient in the short term to secure AC’s, AHC’s and DCMB’s waste streams because the additional cost for those councils to take their waste elsewhere would be prohibitive. As will be seen, that thinking was behind clause 9 of the Deed of Settlement. SWR assumed that the Authority’s business model was the same as its own.

I do not think that the constituent councils would have understood any offer to have been made prior to the November/December meetings. As I have said, no offer was made in the meetings beyond statements to the effect that nothing would change or it would be business as usual at Hartley. I find that none of the constituent councils either committed or were asked to commit to disposing of their waste stream at Hartley prior to settlement.

H. The Authority and the constituent councils August 2012 – February 2013

As mentioned, on 12 October 2012 Mr Lorenz emailed the members of the Authority’s Board. Attached to his email were Mr Levinson’s letters of 4 October 2012 and 10 October 2012. It is to be recalled that Mr Levinson’s letter of 4 October 2012 contained two options put by SWR and upon which it was prepared to settle the dispute. Mr Lorenz advised the Board that he was in the process of putting together an evaluation of the SWR proposal in order that it might be compared to other options. He commented, “[i]t doesn’t appear to be very attractive on the face of it and would suggest that they are not aware of our preparations for Brinkley”. The email also referred to the necessity of a special meeting being called to evaluate the proposal, probably in the coming week. The Board was also advised that Botten Levinson had requested a response to the SWR proposals by close of business on 18 October 2012.

536 Ex P5: 120.
537 Ex P5: 120 at p 1314.
By email dated 16 October 2012 Mr Lorenz advised the Authority’s Board that a special meeting would be convened on 17 October 2012. The purpose of that meeting, he stated, was to evaluate the “Harvey/ResourceCo proposal” and to “determine appropriate actions and provide a response”. Mr Lorenz also advised that Mr Lumsden would be in attendance.

The minutes of the special meeting of the Authority’s Board held on 17 October 2012 record the following persons as being present: Mr Lorenz, Mr Salver, Mr Bond, Mr Grenfell, Ms Maxwell, Mr Bailey, Mr Oliver and Mr Lumsden. The minutes indicate that in the course of discussing the options contained in the Botten Levinson letter of 4 October 2012, the following issues were raised:

- The rate per tonne for disposal of waste offered by SWR was at least $15 per tonne higher than the current member rate.
- The SWR offer had no goodwill component for income from the Authority’s commercial customers.
- Constituent councils would have reduced waste management and recycling options available in the future if the SWR offer were accepted.
- The overall SWR proposal would put the Authority at a significant financial disadvantage compared to its Brinkley option.
- Increased transport costs would be experienced by some constituent councils. It was also mentioned that over a three- to five-year timeframe these increased costs would be offset by increased efficiencies at Brinkley, assuming a new landform was approved allowing a greater depth of waste to be placed in future cells.
- The transfer of a liability for a landfill to another party.

The merits of seeking an injunction were also discussed as was a claim for damages in the event that the Authority was compelled to leave the site.

The minutes record that the Board rejected both options contained in the Botten Levinson letter of 4 October 2012. The minutes noted that in the event that the Authority was to leave the Hartley landfill, the Authority would undertake its remediation obligations on the site in a manner and according to a timeframe agreed with the EPA, not as set by Botten Levinson. The Board expressed an intention to make clear to the Harveys that it preferred to remain on

538 Ex P5: 122.
539 Ex P5: 122 at p 1368.
540 Ex P5: 127.
541 Ex P5: 127 at p 1390.
the site under suitable tenure arrangements, but acknowledged that in the light of the repudiation of the agreement by the Harveys, it appeared that remaining on the site was unworkable. The Board resolved: 542

1. That a letter be drafted seeking an extension to provide a response to Botten Levinson

2. Prepare a draft response with counter offers containing a short term exit and longer term exit reserving the Authority’s right to damages.

3. Briefing sessions to be held with respective Member Councils to update tenure issue and outline future steps.

On 18 October 2012 Mr Lumsden wrote to Mr Levinson informing him that the Board had met late the preceding day to consider the SWR proposal. 543 He advised: 544

The Authority, will now need to consult with its constituent members in relation to the terms of its response.

Mr Lumsden also requested an extension of time to 30 October 2012 within which the Authority would respond to SWR’s proposal.

On 19 October 2012 Mr Salver sent a confidential update to Mr Aitken, Mr Piper and Mr Hancock regarding the Authority and the Hartley landfill site. 545 He opened his email by referring to the fact that the Authority was being “kicked off” the Hartley site as a consequence of SWR making a “better offer” to the Harveys. 546 He characterised the actions of SWR as a “hostile takeover”. 547 He then referred to the special meeting of the Authority held two days earlier on 17 October 2012. He referred to the two options that had been put forward by SWR and summarised the content of each. He advised that the Board considered option one unacceptable. He referred to the Authority needing to buy time in order that it may gain EPA approval to commence operations at the Brinkley landfill. Approval, he said, was expected within three to four weeks. With respect to option two, he said: 548

Option 2 essentially gives AHRWMA a net result of zero and no compensation for the loss of a future income stream/profit which is typically around $100k per annum (plus member Councils’ discount rate). Further, member Councils will be paying $53 per tonne (plus CPI) as of 1 July 2013 which is considerably higher than our current $37.70 per tonne rate, and which ResourceCo state they would charge to member Councils for the balance of the 2012/13 FY. The $53 per tonne rate equates to an addition [sic] $375,000

542 Ex P5: 127 at p 1391.
543 Ex P5: 123.
544 Ex P5: 123 at p 1370.
545 Ex P5: 124.
546 Ex P5: 124 at p 1371.
547 Ex P5: 124 at p 1371.
548 Ex P5: 124 at p 1371.
cost to the Authority annually. The transport costs would remain the same as compared with using the Brinkley landfill which will cost our Council around $25,000 extra annually. Lastly, this option could result in a significant future landfill closure liability risk to the Authority if for whatever reason ResourceCo go bust or cease operating from the site.

Mr Lorenz advised that the Board had resolved to reject both options and had instructed Mr Lorenz to prepare a letter to the constituent councils outlining the options discussed by the Authority and recommending a preferred approach for their consideration and endorsement. He anticipated that the letter would be distributed to the constituent councils within the next two weeks. In the interim Mr Lumsden was to write to Mr Levinson advising that SWR could expect a response from the Authority to his letter of 4 October 2012 within a couple of weeks. Mr Salver brought his email to a close setting out the steps to be taken by the Authority, including that Mr Lumsden would write to Mr Levinson agreeing to an orderly exit from the Hartley site subject to appropriate compensation being paid.

In his oral evidence Mr Salver referred to the “better offer” SWR had made to the Harveys and considered SWR’s actions as “aggressive” and “unwelcome”. He agreed that it was essential for the constituent councils to work together to try and achieve the best outcome for the Authority “in what were becoming very difficult circumstances”. (4194) In Mr Salver’s opinion, the Authority was committed to Brinkley and it was becoming clear as the weeks passed that Brinkley was not merely a parallel option but probably the only option given the way that the negotiations were progressing. (4194)

Mr Aitken advised that he first became aware of issues associated with the Authority’s tenure at Hartley upon receiving Mr Salver’s email of 19 October 2012. (3795) He noted that the Authority’s Board considered that both options were unacceptable and agreed that option 2 provided no compensation to the Authority and that SWR proposed a higher disposal rate. (3697) Further, in the event that SWR took over Hartley, Mr Aitken considered that the Authority may be unable to discharge the site closure obligations in relation to Hartley.

Mr Aitken was aware at the time from his discussions with Mr Salver that the Authority had been undertaking work to recommission Brinkley as a backup landfill site in the event that an agreement could not be reached in relation to Hartley. That is to say, he considered Brinkley as “another option for the disposal of the authority’s landfill”. (3697)

Mr Aitken said that at the time of receiving Mr Salver’s email he was not considering a move to Brinkley. (3795) Whilst Mr Aitken said that Mr Salver’s
email spoke of the risks associated with Brinkley, it did not refer to the risks to which AHC would be exposed to if the council were to send its waste to Brinkley. (3795-3797) He agreed that at the time of receiving the email he was not considering the risks associated with the move of AHC’s waste stream nor any of the risks associated with AHC’s participation in the Authority’s establishment of Brinkley. Mr Aitken made clear that the risks associated with the establishment of Brinkley were a matter for the Authority to determine. (3797)

At the time of receiving Mr Salver’s 19 October 2012 email Mr Aitken had been informed of SWR’s “hostile takeover”. He agreed that the advice he received was that there was a risk that the Authority would be “kicked off” Hartley. In connection with this, Mr Aitken was also informed of the steps being taken by the Authority to commence operations at Brinkley. Thus, he was aware of the parallel strategy of, on the one hand, negotiating over Hartley whilst on the other, establishing the Brinkley landfill. (3797)

When asked if the intention was that, if the negotiations with respect to Hartley failed, there would be a move to Brinkley, Mr Aitken stated: (3798)

My understanding was that it was a matter for the authority. It didn’t necessarily determine where individual councils went or where our council’s waste stream went.

Mr Aitken reiterated that AHC’s waste stream did not necessarily need to move with the Authority to Brinkley. He said: (3798-3799)

Q ... At the time of this email [Ex P5: 124] you were thinking in terms that your council’s waste stream would either stay with the authority at Hartley if the negotiations proved fruitful or move with the authority to Brinkley if they did not.

A It was a possibility. The Brinkley site was a possibility but it may not have been with the authority, just like we still had an opportunity to still take our waste stream to the Hartley site and that was my understanding at the time.

Q To be clear about it, are you disagreeing with this proposition: that at the time of this email on 19 October 2012 your thinking was not either ‘Our waste will stay with the authority at Hartley’ or ‘Our waste will move with the authority to Brinkley’.

A It is possible.

Q It’s more than possible, I suggest. I suggest to you that that is precisely what you were thinking; do you agree with that.

A It’s possible that I was thinking that but I still believed at the time that I had an open mind to the outcome of the negotiations and that my mind was not turned at the time to the Brinkley site, it was turned to the possibility of an arrangement being made where our waste stream remained at the Hartley site. It may not be the case, that’s correct, it may not be the case.

Q What may not be the case.
It may not be the case. It may have been that an arrangement couldn’t have been made and that we would have to look at other options for our waste stream.

Such as the Brinkley option that was being opened up by the authority.

Brinkley was an option but it may not be one that we would as an individual council choose to take up.

Mr Aitken agreed that the 19 October 2012 email made no suggestion of a “third way”; that is, the question was limited to waste being disposed at either Hartley or Brinkley. (3799) He said he believed it was correct that SWR, as one of its options, wanted the Authority to use its best endeavours to secure constituent council waste at Hartley at market rates. (3799) He believed that it was part of the negotiations that he was not party to. (3880)

Later in cross-examination Mr Aitken said: (3804-3806)

In terms of dealing with the negotiations do you agree with this, that the information you were being given was to this effect: that ‘We need to negotiate with respect to Hartley to see whether we can continue authority operations and receiving member council waste at Hartley on the one hand’.

On the one hand.

‘On the other hand we need to have a parallel or back-up strategy at Brinkley so that if needs be the authority and member council waste can move to Brinkley’.

The option of a back-up for Hartley being the Brinkley site had been around long before this situation had occurred as far as I am aware so that situation didn’t change.

So what I put to you is correct.

That Brinkley was a back-up for the authority.

Yes, and steps were being taken to ensure that operations at the Brinkley landfill could commence so as to receive member council waste.

Been established to receive waste and that would have meant the possibility of member council waste.

Can I suggest to you at the time of this email on 19 October there was no suggestion of any doubt whatsoever about member council waste not following the authority to Brinkley.

I’m not convinced there wouldn’t have been any doubt that that was the case.

Please feel free to read this email again but what's being discussed are these two courses, this parallel strategy, and one of the issues with the parallel strategy is the increased transport cost, but there is no suggestion, apart from incurring that cost, that there won’t be a following the authority to Brinkley so far as this email is concerned.
A I wouldn’t have said there was an indication that member councils would necessarily follow the authority either.

Q The strategy was Hartley and the authority continuing as it was there or if needs be, Brinkley and the authority continuing as it had there, do you agree with that.

A I agree that the authority could continue there but that didn’t mean that the individual councils’ waste streams necessarily needed to follow suit.

Mr Aitken knew at the time of the 19 October 2012 email that SWR wanted the constituent councils’ waste streams to continue to be disposed of at Hartley. (3800) He was also aware that SWR was prepared to charge the constituent councils the then current disposal rate for the balance of the 2012/2013 financial year. (3800-3801) The assumption at the time was that if the Authority moved to Brinkley and with it AHC’s waste stream, AHC’s transport costs would increase by around $25,000. The increase in the transport costs turned out to be more than the estimate, but not much more. (3801)

Mr Aitken also said that mention was made at the time, 19 October 2012, to the risk of SWR “going bust or ceasing to operate from [the] site”. (3802) He had no reason to think that was not a possibility. However, apart from information such as that provided in Mr Salver’s 19 October 2012 email, Mr Aitken had no other information regarding the financial viability of SWR or ResourceCo at the time. (3802)

Mr Aitken said that at the time of the 19 October 2012 email Hartley remained an option for AHC. (3853)

On 25 October 2012 Mr Aitken, Mr Salver and Mr Lorenz met. In the past Mr Peppin, Mr Salver and Mr Lorenz had met fortnightly to provide support and mentoring to Mr Lorenz in addition to catching up on Authority business. Mr Salver was in the habit of making a note of things discussed at the meeting. Mr Salver’s notes for the meeting of 25 October 2012 record that four items were discussed. Item 1 concerned the Hartley licence and item 2 the Brinkley landfill. Items 3 and 4 are not presently relevant. Mr Lorenz is recorded as advising Mr Aitken and Mr Salver that the Harveys had allowed the Authority an extension of time in which to respond to the latest proposal. He also advised that ResourceCo had attempted to access the Hartley site in the past week. Mr Lorenz said he was in the process of arranging a meeting with Mr Hayes to clarify the implications of an early exit from Hartley and what legal action could be taken including seeking compensation and/or an injunction. Reference is also made in Mr Salver’s notes to the Authority’s intention of putting a counteroffer to the Harveys, that counteroffer having been discussed but not finalised at the Board meeting of 17 October 2012. The counteroffer was to be discussed with the Chief Executive Officers of the constituent councils before being forwarded to the Harveys. Turning to the Brinkley landfill, Mr Lorenz advised the meeting that

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553 Ex P5: 125.
the construction of cell 6A was now complete and the quality plan was to be inspected by the EPA in the that week. Following that inspection the Authority expected to receive EPA approval to use the cell. Reference was also made to the Authority intending to pursue a more secure form of tenure at Brinkley. RCMB had requested time to consider this matter, and in the interim an agreement had been drafted to give the Authority a two-year lease with a first option to purchase at the end of the lease.

On 1 November 2012 Mr Lorenz sent an email to the members of the Authority’s Board. Attached to the email were draft minutes of the special meeting held on 17 October 2012, in addition to a document setting out options to be put by the Authority’s legal advisors at the forthcoming meeting with SWR and the Harveys on 5 November 2012.

On 2 November 2012 Mr Lorenz provided Mr Stuart with the draft minutes of the Authority’s special meeting of 17 October 2012, the draft plan prepared for the meeting of 5 November 2012 and a copy of the Botten Levinson letter of 4 October 2012.

By late afternoon on 2 November 2012 Mr Lorenz had spoken to all of the constituent councils’ Chief Executive Officers, updating them on the outcome of the Authority’s Board meeting of 17 October 2012 and on the impending meeting with SWR on Monday 5 November 2012. I have dealt with the meeting between the representatives of the Authority and those of SWR elsewhere in these reasons.

On 6 November 2012 Mr Salver sent an email to Mr Aitken, Mr Piper and Mr Hancock. The purpose of the email was to let them know what had transpired at the 5 November 2012 meeting with the Harveys/SWR. Mr Salver said:

Brian Hayes presented the Authority’s offer which was a substantial shift from that presented at the previous meeting. The Authority at the last meeting indicated that we wished to remain on the site or seek compensation. However, the offer presented yesterday was that the Authority will agree to leave the site and negotiate an orderly exit. The orderly exit negotiations were to therefore focus on and how and when this will occur. It was noted that there are two landfill cells which can still be utilised in terms of remaining airspace at Hartley. Further, the Authority has obligations under the EPA licence for closure of the site which it would need time to fulfil. The Authority would therefore like to negotiate around utilising the remaining airspace and closing the site. Brian Hayes disclosed that the Authority has another site at Brinkley and that during the orderly exit of the site, we offer to pay an increased royalty of $3 per tonne (up from the current $1.90). Lastly we are seeking a 30 year access to the site in order to monitor it in accord with the EPA post closure requirements. It was indicated that the orderly exit of

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554 Ex P5: 127.
555 Ex P5: 129.
556 Ex P5: 130.
557 Ex P5: 138.
558 Ex P5: 138 at p 1524.
the site may take 2 to 4 years, and if these terms were agreed to, then there would be no compensation claims.

In response, Simon Brown of ResourceCo stated that they are more than happy to take on all the risk and liability of post site closure but that the Harvey’s [sic] would like the Authority off the site as soon as possible. They would therefore like to do this deal promptly. However, it became clear during our discussions that ResourceCo were not aware of Brinkley and that crucial to the deal is that they have an ongoing waste stream from the Authority going into Hartley. We pointed out that it makes no sense to dump waste at the Hartley [site] if member Councils have to pay a higher dumping rate $53 per tonne (which ResourceCo was seeking) when we have an alternate site with much lower dumping rates ($38 per tonne). This to my mind became the game changer as they immediately advised that the tonnage rate was negotiable and pressed the issue that they need our waste stream as they have to compensate the Harvey’s [sic] as soon as they take over the site. Without the waste coming into Hartley, they would be in a financial predicament.

Mr Salver then proceeded to advise Mr Aitken, Mr Piper and Mr Hancock of a further meeting set for the following Monday (12 November 2012). He added that SWR had been told that whatever proposal may be agreed had to be signed off by the Authority’s Board and constituent councils, a process that could take two to four months. He closed saying that the Authority considered that it had the upper-hand in the negotiation at present and should be able to negotiate a suitable outcome.

On 9 November 2012 Mr Lorenz, Mr Atiken and Mr Salver met. Mr Salver took notes. Under the heading, “Hartley Licence Negotiations”, he recorded:

We discussed the elements/parameters in preparation for Monday’s negotiation meeting with Southern Waste ResourceCo. In terms of compensation, there is about $2.8 million liability for capping and post closure costs. However, we would have earned about $3 million at the end of the life of the site which would have offset this cost. Michael’s costs are based on 45,000 tonnes per annum at $6.67 profit per tonne. If we are to continue to use Hartley, then we should negotiate a price of around $37.70 (i.e., our current costs) per tonne as opposed to the $53 per tonne which ResourceCo is wishing to charge us. To go to Brinkley would cost around $7 per tonne more in transportation costs. The best option for us is to negotiate that ResourceCo take on all post-closure liability and costs.

I note in passing the reference to the increased transport cost to Brinkley being around $7 per tonne. That figure accords with Mr Levinson’s note of the offer made by Mr Lumsden at the beginning of the 12 November 2012 meeting.

In cross-examination Mr Lorenz could not recall saying at the meeting words to the effect that, “[i]f we continue to use Hartley, we should negotiate a price of $37.70 as opposed to the $53 mentioned by ResourceCo”. (4712) He also could not recall saying words to the effect that the best option for the Authority...
was to negotiate that ResourceCo take on all post-closure liabilities and costs.

(4712)

I have dealt with the meeting between the representatives of the Authority and those of SWR held on 12 November 2012 elsewhere in these reasons.

On the evening of 13 November 2012 Mr Salver sent an email to Mr Aitken, Mr Hancock and Mr Piper briefing them on the outcome of negotiations which took place the previous day. The briefing records Mr Pucknell as putting an offer which was not accepted. Mr Salver then stated that the SWR representatives left the room in which the meeting was taking place to consider their position. They came back with a second offer. As part of putting that second offer Mr Salver records that SWR said that “[t]hey would like an opportunity to get in front of the individual councils to make an offer to take our waste streams essentially as a competitor with the Authority”. They also said that when they did have the opportunity to put a proposal to the individual councils, Mr Lorenz could not be present due to his conflict of interest. Mr Salver then records a second offer being put which after consideration prompted a counteroffer on the part of the Authority which was accepted. In short, the accepted offer was that SWR would take on all post-closure site closure costs, would pay $900,000 plus GST in compensation, would take over operations at Hartley by January/February 2013 and would charge the constituent councils who wished to use the Hartley site the Authority’s current dumping rate until June 2013. Mr Salver advised that the offer was considered to be good and worthy of acceptance by the Board. He brought his email to a close advising Mr Aitken, Mr Piper and Mr Hancock of the next steps to be taken before commenting, “[a]ll up I think we have negotiated a very good outcome for the Authority and the leverage gained from having the Brinkley site, and them wanting our waste stream, has served us well.”

In relation to the 13 November 2012 email Mr Aitken said in evidence:

(3700-3701)

Q … did you form any views, on receiving that email, about the approach the authority should be taking or were you generally comfortable with the approach.

A It seemed like a reasonable settlement proposal to me.

Q In the middle of the email there’s reference made to they - Southern Waste - liking an opportunity to get in front of the individual councils to make an offer to make it essentially competitive with the authority. Did you come to any views about how the operations or business of the authority would change if there was competition between the authority and Southern Waste.

A How the operations of the authority may change?

561 Ex P5: 153.
562 Ex P5: 153 at p 1672.
563 Ex P5: 153 at p 1672.
Q Yes. If the authority were operating at Brinkley and Southern Waste were operating at Hartley.

A There may be some changes should our council or any other council decide to move their waste stream to a location that wasn’t being operated by the authority.

Q Did you turn your mind to that at this time, 13 November 2012.

A At that time I still had an open mind as to where Adelaide Hills Council’s waste stream would or could go.

Mr Aitken believed that SWR wanted an opportunity to “get in front” of the constituent councils to make an offer to take their waste streams, essentially as a competitor of the Authority. (3933-3934) He was not sure if he had information to that effect from Mr Lorenz but certainly from Mr Salver. (3934) In relation to the passage in the email relating to Mr Lorenz not being present due to a conflict of interest, Mr Aitken understood the conflict to arise from the fact that Mr Lorenz was the Executive Officer of the Authority and SWR would have wanted to speak to representatives of the councils without Mr Lorenz being present. He said that it raised a conflict because SWR could have perceived the Authority as a competitor. (3934) He said: (3935-3937)

Q To be clear, the conflict is that if Southern Waste is putting proposals to member councils it’s thought, at least by Mr Salver at the time of his 13 November 2012 email, that Mr Lorenz shouldn’t be present when those proposals are being made to the member councils.

A If there were to be proposals made to individual councils.

Q That was the plan, wasn’t it.

A That was the intent as we understood it. I’m not suggesting that that is actually what transpired with the meeting. That was one of the things that it was believed that Southern Waste were going to be talking with individual councils about.

Q Because it was recognised that there would be a choice for the member councils to make, namely whether they would continue with the authority and move to Brinkley or whether they would stay at Hartley and become customers of Southern Waste Resourceco.

A They would have been the two most logical choices at the time.

Q Well they were the only choices in prospect at that stage, weren’t they.

A Yes, the most likely ones, yes.

Q What are the unlikely ones, Mr Aitken.

A The unlikely one probably would have been individual councils coming to some negotiated position with the rural city of Murray Bridge. But that is less likely to occur, it would be most likely to be through the authority, yes.

...
Q  What you have just described doesn’t find any expression in any of Mr Salver’s reports to you, does it.

A  No.

Q  It doesn’t find expression in any document that you authored at the time of these events, does it.

A  Not that I’m aware of.

Q  And it’s not in your statement either, is it.

A  Not that I’m aware of.

Q  The proposal that was put is set out in the four bullet points that follow, the first of them being taking on all post liability site closure costs, about $1.3 million. Agreed.

A  Yes.

Q  Second being $700,000 in compensation.

A  Yes.

Q  Agreed.

A  Yes.

Q  The third being wanting to be in a position to get onto the site by January ‘13 and Mr Salver says ‘We advise that a February start date would be more realistic’. Agreed.

A  Yes.

Q  And the fourth was that they would charge, that is to say Southern Waste would charge, the authority’s current dumping rates to member councils who wished to use the Hartley site until June ‘13.

A  That was the - at the time that was the proposal, yes.

Q  Yes, that was the alternative proposal to staying with the authority, wasn’t it.

A  Your Honour, do you mind if counsel just repeats that question?

Q  You took a long time to think about that but can I suggest to you that it’s pretty obvious, that what was being put forward in the fourth bullet point was the alternative on offer from Southern Waste Resourceco to remaining with the authority and travelling to Brinkley.

A  Your Honour, that’s through - that is up until June 2013, yes.

Q  Can I suggest to you that once you had got a clear choice to be made between service providers the procurement policy clearly applies but you didn’t think of that at the time, did you.
Your Honour, I’m not sure the context of the question.

The context is, Mr Aitken, that your council had a choice as to which of two service providers it would continue or go with. Agreed.

We had the choice to remain with our existing service provider or make a choice to go with Southern Waste.

Mr Aitken was aware at the time of the 12 November 2012 meeting that as part of SWR’s offer SWR would charge the Authority’s current dumping rate to the constituent councils that wished to use Hartley until 30 June 2013. He was also aware that if the agreement were adopted by the Authority’s Board it would then be referred to the constituent councils for consideration. Mr Aitken agreed that based on the information he had at the time, it appeared that SWR was interested in gaining the council waste stream. (3956)

Mr Aitken agreed that Mr Salver had expressed the view that without the councils’ waste streams, SWR was likely to be in a financial predicament. (3956-3957, 3962) However, Mr Aitken disagreed with the proposition that there was never any doubt in his mind that AHC was going to follow the Authority to Brinkley. (3957)

On 15 November 2012 the Authority’s Board met. In a report to the Board the SWR offer as contained in Mr Levinson’s letter of 13 November 2012 was set out. The proposal was then analysed in the light of the alternative being to reject the offer, to leave the Hartley site and pursue a damages claim. The analysis referred to the offer of $900,000 plus GST as “essentially a bonus”. The analysis included consideration of the “pros” and “cons” of accepting the offer. Under the heading, “Cons of Accepting Offer”, it was recognised that there was a risk that the Authority may lose some constituent council waste as SWR seeks to negotiate for their waste streams. It was noted that the potential loss of tonnage would be dependent on the rate per tonne charged taking into account transport costs and the benefits associated with equity holdings in the Authority. Under the heading, “Conclusion”, it is stated:

24. The original intent of the Authority in regards to the land tenure issue at the Hartley Landfill was to move from its current licence to a more secure form of tenure (either purchase or long term lease). In the event that the Authority could not negotiate an acceptable outcome with the Landowners it would have sought an alternative site and left. It would have however done this in an orderly timeframe giving it the ability to fully utilise cell assets that it had already created.

25. The proposal negotiated with SWR adequately compensates the Authority without the need to undertake an extended legal battle of which success is not guaranteed.

Ex P5: 149.
Ex P5: 149 at p 1581.
Ex P5: 149 at p 1582.
Ex P5: 149 at pp 1582-1583.
By commencing landfill operations at the Brinkley Landfill which has a newly constructed cell the Authority can commence longer term planning and be in total control of the types of activities that it chooses to undertake. In addition it will not have to deal with a hostile and difficult landowner.

If the Authority accepts the offer it will receive compensation totalling $5.7m using its own book values and the SWR cash payment.

If the Authority rejects the SWR offer and is successful in a damages claim the upper end of a compensation claim will be of a similar amount however our net legal fees will be approximately $180,000 assuming we are awarded costs. In addition we will still be on a site with a hostile Landowner who will still seek to introduce a landfill competitor to the site however they will have to start a new landfill which may take 3 to 4 years and not be guaranteed to be approved.

If the Authority rejects the SWR offer and is not successful in a damages claim it will still be liable for $4.5m in construction, capping and post closure costs. Its own legal costs will be approximately $300,000 and if costs are awarded to the Landowners an additional $120,000 would be payable. In addition the Authority would not be compensated for its transport relocation and new facility costs associated with commencing landfill operations at Brinkley.

The minutes for the meeting record that the Authority resolved to accept the SWR proposal, subject to constituent council approval. The proposal was to be presented to constituent councils with a recommendation that it be approved by them. The minutes also record that the outcome of constituent council recommendations be advised to SWR.

On 20 November 2012 Mr Salver sent an email to Mr Hancock, Mr Aitken and Mr Piper, copying in Mr Lorenz, advising them that the Authority’s Board had agreed to accept the settlement offer made by SWR subject to conditions including that the Authority would only vacate Hartley once Brinkley was operational (a matter of a week or two) and that the Authority would advise SWR of the development approval condition applicable to Hartley restricting the waste it may take to that of the constituent councils. Mr Salver also advised of the steps to be taken at the constituent council level and of a council workshop to be conducted on 5 December 2012 by Mr Lorenz as a means of updating the elected members of the outcome of the negotiation regarding Hartley and to answer any questions they may have. That workshop was to be conducted at AHC initially and then repeated at each of the other constituent councils. Mr Salver concluded his email reporting that SWR wished to make a presentation to AHC before 30 November 2012 or after 10 December 2012. He added that he had advised SWR that it should meet with the entire “Exec Team” from AHC and asked Mr Hancock, Mr Aitken and Mr Piper if they were happy for such a meeting to

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568 Ex P5: 148.
569 Ex P5: 153.
I deal elsewhere in these reasons with the meeting that took place between representatives of SWR and the AHC executive on 6 December 2012.

In cross-examination Mr Lorenz was taken to Mr Salver’s email of 20 November 2012 which he was copied into. He agreed that it was consistent with his understanding at the time that SWR wanted the opportunity to present to councils the services that it had to offer. (4903) It was also consistent with Mr Lorenz’s understanding that the Authority would only vacate Hartley once Brinkley was operational. (4903-4904) He was also aware that the Authority would write to SWR about a condition of the development approval for Hartley that permitted the Authority to receive waste only from the constituent councils. (4904)

SWR met with representatives from DCMB and AC on 22 November 2012 as discussed earlier in these reasons.

On 23 November 2012 Mr Lorenz forwarded to Mr Grenfell at AC by email a draft confidential report for the consideration of the council. (4903) It was for Mr Grenfell to determine whether or not the whole or parts of the draft would be included in the papers for the forthcoming council meeting. The content of the report is not materially different to that prepared for the Authority’s Board meeting on 15 November 2012.

Mr Lorenz also sent a copy of his draft report to Mr Salver at AHC who, after some editing, asked Mr Lorenz if, assuming he was happy with the edits, the report should be sent to other constituent councils. The amended draft confidential report was forwarded to Mr Bond at RCMB on 26 November 2012. In the covering email to Mr Bond he was advised that the same report had been sent to the other constituent councils. That same day, 26 November 2012, a copy of the draft report was sent electronically to Mr Peters at DCMB. The report was reworked slightly and incorporated within the agenda papers for DCMB to consider at its meeting on 3 December 2012.

Mr Salver was taken to the draft report in cross-examination. He said that he could not recall what the additional travel cost was thought to be for AHC if its waste stream was to be disposed of at Brinkley. He estimated it to be anywhere between $21,000 and about $30,000 per annum.

Mr Lorenz was also taken to the draft report in cross-examination. He said that there was nothing in the report that he significantly disagreed with. The report was going to be provided to AHC to enable it to make a decision on whether to accept the Board’s recommendation that SWR’s offer in settlement of

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570 Ex P5: 153 at p 1671.
571 Ex P5: 157.
572 Ex P5: 158.
573 Ex P5: 159; Ex P6: 160.
574 Ex P6: 161.
the dispute with the Harveys be accepted. (4569) In particular, he considered it was relevant for AHC to know what the cost of its decision-making might be so that it could make a fully-informed decision. (4570) He agreed that for some councils, such as RCMB, the budgetary impacts would be beneficial because of the lesser travel distance, but for AHC Mr Lorenz understood that it would incur an additional travel cost if it were to dispose of its waste at Brinkley. He said that it would be in the range of $20,000 to $30,000. (4571)

On 3 December 2012 AC met in the mid-late afternoon. Mr Lorenz attended to provide a briefing to the council.

The papers that went to the AC were prepared by Mr Grenfell.575 Item 25.2 of the council meeting papers is entitled, “Adelaide Hills Region Waste Management Authority - Hartley Land Tenure (Confidential)”.576 The information that followed was drafted by Mr Grenfell drawing upon the draft report provided by Mr Lorenz, however he could not recall whether he spoke to Mr Lorenz about the papers that went to AC. (3524) AC approved and endorsed the Authority’s recommendation that the settlement proposal be accepted.577

On the same date, 3 December 2012, the DCMB met and considered as part of its meeting the report regarding the resolution of the dispute between the Harveys/Authority. By the time of this meeting Mr Stuart agreed that it was possible he knew that there would be a transport cost differential between Hartley and Brinkley, though he did not know the precise detail of it. (3090)

On the evening of 3 December 2012 Mr Peters sent an email to Mr Lorenz and Mr Stuart advising them that DCMB had adopted the Authority’s recommendation in relation to SWR’s proposal.578 Mr Peters took the opportunity to request from the Authority further information about the additional transport cost to be incurred by DCMB if it were to dispose of its waste at Brinkley. Mr Stuart said that around the time this email was sent the issue of transport costs had been an ongoing matter. (2950)

Also on the evening of 3 December 2012 Mr Lorenz was advised that AC had adopted the Authority’s recommendation.579

Mr Lorenz attended a workshop at AHC on 5 December 2012. (4769) He made a presentation with the assistance of a series of PowerPoint slides that he had prepared. (4834) His PowerPoint slides were admitted in evidence.580 The slides traced the history of the dispute with the Harveys, the Authority’s decision in March 2012 to adopt a parallel strategy, one limb of which involved the re-

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575 Ex P6: 166.
576 Ex P6: 166 at p 1775.
577 Ex P6: 175.
578 Ex P6: 176.
579 Ex P6: 170.
580 Ex P5: 126.
establishment of Brinkley, the assumption of responsibility for the dispute by SWR, and the negotiations undertaken to date with SWR by the Authority. The slides also set out the offer made by SWR at the 12 November 2012 meeting which the Authority’s Board recommended should be accepted, subject to constituent council approval. In the balance of the slides, Mr Lorenz dealt with the “pros” and “cons” of accepting the proposal and the impacts for the constituent councils. As part of the ‘cons’, the relevant slide stated:\textsuperscript{581}

There is a risk that the Authority may lose some Member Council waste as SWRC seeks to negotiate for their waste streams. This will be dependant [sic] on the rate per tonne offered by SWRC taking into account transport costs and Member Council increased equity by continuing with the Authority.

The PowerPoint slides recorded the increase in transport costs for the constituent councils if they switched to Brinkley, stated that transport cost increases could be offset by cheaper landfill running costs as economies of scale were achieved over the next three years, advised that SWR would seek to engage with constituent councils to try and secure their waste at Hartley and that the benefits of disposing of waste at Hartley or otherwise were to be assessed by the constituent councils individually taking into consideration disposal rates, travel distance, equity in the Authority and any other relevant factors. In the course of the presentation AHC’s current equity in the Authority was said to be 33.74\% equal to $129,000 or $14.86 per tonne. The final slide in the presentation advised that the Authority intended to report to the AHC with a recommendation to accept the SWR offer and for the Authority to commence landfilling at Brinkley.

When cross-examined about the workshop on 5 December 2012 Mr Lorenz said: (4834-4836)

Q Do you accept that what you were telling the council was that there was going to be a report to council with a recommendation from the authority to accept the Southern Waste offer and commence land filling at Brinkley.

A So that’s for the authority to commence land filling at Brinkley.

Q Well it was pretty obvious, I suggest, that this entailed the Adelaide Hills waste, wasn’t it.

A This was a briefing to the Adelaide Hills Council but that’s talking about accepting - the authority would recommend that the Southern Waste Resourceco offer be accepted, the member councils needed to do their own process but the authority would then be commencing land filling at Brinkley. It didn’t say anything more than that.

Q Mr Lorenz, it was obvious to you, I suggest, that the effect of what you were saying to the member council representatives, and what you intended, was that you were going to recommend a move to Brinkley together with member council waste, including Adelaide Hills waste.

\textsuperscript{581} Ex P5: 126 at p 1384.
A It doesn’t say that.

Q You understood that that was the anticipated outcome as the result of the move to Brinkley.

A No, I did not.

Q It was your expectation, wasn’t it.

A Based on the modelling and projections that I had done that showed it was the best outcome for member councils I assumed that it was most likely that the waste would continue coming, or come to the Brinkley landfill because it produced the best outcomes.

Q And you said as much to Mr Salver and Mr Aitken, didn’t you.

A What I just said to you? Yes.

Q And they agreed that it appeared to be the best outcome, namely that Adelaide Hills waste go to Brinkley.

A No, they never did.

Q Because otherwise doing all that work that you did on the putrescible waste transfer station would have been a complete waste of time.

A No, I disagree. That was sometime after that they asked for that information, it wasn’t at this time.

Q I suggest to you on 5 December 2012 you spoke with Mr Aitken and Mr Salver and you made it clear to them that you thought their waste going to Brinkley was the best option and they agreed.

A I disagree but I did - I would have put the point that by all of the member council tonnes coming to the Brinkley landfill it produced the best results, in my opinion, for the member councils. That’s as far as I would have -

Q And you would have said the same thing to the elected members at the workshop.

A I don’t know that I did.

Q Can I suggest to you that it would have been the most obvious thing for you to do, namely to tell the elected members what was going to happen with their council’s waste.

A No, I didn’t know what was going to happen with their council’s waste.

Q You were going to make a recommendation that their waste go to Brinkley because that, in your view, was the best outcome. You said that.

A I was going to make a recommendation that the authority - well, the offer be accepted by Southern Waste Resourcesco, that was what the board’s recommendation was, it was up to the councils to make their own analysis and decisions about that, and that the authority would commence land filling at the Brinkley landfill.
Mr Salver said that he could not recall what was said about SWR and its potential offering to the elected members at the workshop other than what was documented. (4310) Nevertheless, he agreed that he would have likely responded to any enquiry from an elected member at the workshop that “[t]he authority is going to Brinkley and so is our waste and as best I can tell from the advice I have had from Mr Hockley, that is going to cost us about $40,000 a year”. (4311)

By the time Mr Lorenz met with Mr Aitken and Mr Salver (AHC) on 5 December 2012 both DCMB and AC had endorsed the Authority’s recommendation regarding the proposal put by SWR in Mr Levinson’s letter of 13 November 2012. RCMB was due to meet on 10 December 2012.

On 6 December 2012 SWR met with representatives of AHC. I deal with that meeting later in these reasons.

On 10 December 2012 the RCMB approved the Authority’s recommendation.

On 11 December 2012 AHC endorsed the Authority’s recommendation.  

Mr Salver wrote to Ms Maxwell on 12 December 2012 to advise the Authority of this outcome. Thus by 12 December 2012 all constituent councils had adopted the Authority’s recommendation that the settlement proposal be accepted.

On 4 January 2013 Mr Salver sent an email to Mr Lorenz. Council officers at AHC had begun to turn their mind to the question of reducing the additional transportation costs for AHC that would be incurred were it to dispose of its waste to Brinkley. In his email Mr Salver raised the possibility of establishing a transfer station at Heathfield or another appropriate site so that bulk skips could be used to relay the waste to Brinkley. He invited Mr Lorenz to look into the question of whether or not such operation would reduce transport costs for AHC and whether the licence for Heathfield allowed for such arrangement. On 7 January 2013 Mr Lorenz replied. He said he would take a look at the “economics of a transfer facility” but added that usually there needed to be a 70 to 80 km travel difference to make it work. He thought the licence for the Heathfield transfer station would allow for such arrangement, however development approval would be required for a new facility and some changes to the site environment management plan may also be required. That same day Mr Salver responded thanking Mr Lorenz and indicating that he looked forward to seeing any costings of the proposal.
In cross-examination Mr Salver was taken to his email of 4 January 2013. He said:

Q By this stage as I understand your evidence there had been nothing from Southern Waste Resourceco.

A No.

Q So far as you were concerned the waste was going to Brinkley.

A Business as usual.

Q You’d had conversation [sic] with your executive team members about that.

A Definitely with the director of engineering correct.

Q And with Mr Aitken as well.

A I assume so.

Mr Salver was referred to the passage in his email of 4 January 2013 about the transfer station at Heathfield and the use of bulk skips to cart waste to Brinkley. Mr Salver agreed that in this regard he was trying to drive down transport costs because they were “an additional cost that we had to consider and deal with”. He agreed that he had asked Mr Lorenz for advice about whether he thought this was something that may reduce the transport cost for AHC. His intention was to see if this option was worth pursuing. When asked if it was clear from his email that AHC had decided that its waste would be sent to Brinkley, he said “there was no other offer on the table, there was no other option. So it means … that it was business as usual” and that “[t]here was absolutely no other point of looking at it at that point in time”. He reiterated that the council was looking to drive down transport costs.

On 15 January 2013 Mr Lorenz, Mr Aitken and Mr Salver held one of their regular meetings. Mr Salver made a note of the discussion. Mr Salver’s note records that Mr Lorenz was currently in the process of reviewing the draft Deed of Settlement and had concerns about a couple of the conditions. One related to SWR’s desire to obtain a variation to the development approval in relation to the Hartley site. Another was in relation to SWR’s wish to occupy the Hartley site by 31 January 2013. The notes indicate that Mr Lorenz was in contact with the Authority’s lawyers about the issues.

Mr Salver’s notes also refer to the meeting being advised by Mr Lorenz that Brinkley was not yet operational due to outstanding matters to be resolved with the EPA. Further, the Authority’s long-term financial plan was in the course of being reviewed to account for optimistic and pessimistic outcomes after the move.
of the Authority’s operations to Brinkley. It was anticipated that the long-term financial plan would be completed by 18 January 2013 and upon completion would be presented to the Board for consideration.

Lastly, Mr Salver records some analysis undertaken by Mr Lorenz on the possibility of establishing a putrescible transfer station at Healthfield. It is unnecessary to go through the detail of Mr Salver’s note save to say that the outcome of Mr Lorenz’s analysis was that any benefits from establishing a transfer station were marginal at best. As indicated, the possibility of establishing a transfer station was to see whether it would result in efficiencies. (3706) The idea was not shelved with the Committee agreeing to discuss it further at the next meeting.

In his evidence Mr Aitken said that by mid to late January he was of the view that the Authority would receive AHC’s waste at Brinkley and that it was appropriate that that occur. (3978) However, he could not recall a discussion in this regard at the 15 January 2013 meeting. He was not sure if he said at the meeting words to the effect that AHC would be going with the Authority to Brinkley. (3979) Mr Salver said that at the meeting it was never discussed. (4303)

Mr Lorenz said: (4793)

Q Can I put this to you: that in your meetings with Mr Aitken and Mr Salver during January 2013, when you were talking about a putrescible waste transfer station and about the pessimistic long-term financial plan, no-one suggested that the Adelaide Hills waste was not coming to Brinkley, did they.

A No-one suggested, as in none of the other councils suggested either.

Q I'm putting to you Mr Lorenz what Mr Aitken and Mr Salver said to you.

A Yes, that they didn't tell me whether they were or weren't coming.

Q I suggest to you that in fact they did tell you they were moving to Brinkley and that was the very reason why you were asked to do the analysis of the putrescible waste transfer station.

A No.

In modelling outcomes using the Authority’s long-term financial plan, Mr Lorenz focussed on tonnages that might be received. (4792) Both his pessimistic and optimistic scenarios assumed receipt of waste from all constituent councils.

On 30 January 2013 Mr Lorenz, Mr Aitken and Mr Salver met yet again.589 Mr Lorenz updated the others on the negotiations regarding the content of the Deed of Settlement. Mr Salver’s note records the intention that the Deed of

589 Ex P7: 203.
Settlement be presented to the M & O Committee for sign off before being presented to the Authority’s Board at its meeting on 21 February 2013. Mr Salver’s note further records that the transfer of the Hartley EPA licence could not occur without the EPA agreeing. The notes also report ongoing endeavours at Brinkley to satisfy the EPA in addition to additional work being done on the long-term financial plan. In this latter regard additional data were required. Mr Salver’s notes record that the pessimistic option assumed annual dumping tonnages of 40,000 whilst the optimistic scenario assumed an annual tonnage of 56,000. The latter was reliant upon attracting waste from the nearby Riverland councils and commercial customers.

Mr Aitken said that at the time of the 30 January 2013 meeting there had been no discussion as to whether AHC would send its waste to Hartley or Brinkley. His thinking was that there was no other option beyond that identified in the settlement agreement for the Hartley site. Mr Aitken’s thinking was that AHC’s waste would be best placed with the Authority at Brinkley. (3708)

In relation to the 30 January 2013 meeting Mr Salver said: (4305-4306)

Q By this stage it was clear to you and Mr Aitken that Adelaide Hills’ waste was going to Brinkley.

A As I said I don't think we did discuss where it was going. It wasn’t an item that was separately discussed, meaning it was always an assumption at this stage, because there was no other offer, that the amount of tonnes being referred to in here (INDICATES) were as has been shown on the long-term financial plan.

Q As I understand your evidence because nothing had been put by anyone else you assumed that the Adelaide Hills’ waste was going to Brinkley; is that right.

A I personally assumed yes because of the fact that this is the scenarios that we are looking at, and in the absence of any other offer why would you think any different?

Q So far as you could tell Mr Aitken never said anything to you to suggest that he thought otherwise either.

A No, and as I say I don’t recall us having any discussion - to pull out ‘Where is our waste stream going?’, that I can state [categorically].

Q It was assumed.

A There was this [sic] nothing else on the table so yes I think we can put that matter to bed.

…

Q Can I suggest to you that it would have been a very obvious thing to be discussed but because it was so obvious you didn't make a note about it in either your 15 or 30 January notes.
A. I can almost categorically state to the best of my recollection we never discussed where the waste was going as a separate item.

Mr Salver agreed with the proposition that the long-term financial plan discussion that occurred during the 30 January meeting consisted of two options: the pessimistic option that assumed the receipt of waste from all constituent councils and the optimistic option which assumed the receipt of waste from all constituent councils in addition to waste from customers. (4312)

In the early afternoon of Saturday 9 February 2013 Mr Lorenz emailed members of the Authority’s Board to advise them that after much negotiation the Deed of Settlement was near finalised. The final sticking point that had concerned obtaining certain indemnities had been resolved. He added that everything depended on settlement taking place on Monday and the Authority vacating Hartley by Tuesday. Mr Lorenz referred to some practical issues involved in meeting the deadlines, not the least of which was that the Board was yet to consider and execute the relevant deed. Mr Lorenz advised that the appropriate way for the Board to meet the time limits was by way of an electronic motion. To achieve the desired outcome at least five Board members had to approve the motion once presented which Mr Lorenz considered may be difficult. He added:

We are not sure why the landowners are pushing this line so hard— they claim to be frustrated and have apparently already threatened to block our access to the site last week and have implied that they will block access after Tuesday if we do not vacate the site. They have also indicated that they might pull out of the negotiated deed if we do not give in on this point. We are still negotiating with their lawyers this weekend[ic] to see if a compromise can be reached or alternately we can hold our line on a 5 day settlement and see what happens which may involve a trip to the Courts for an injunction.

On 9 February 2013 Mr Lorenz also emailed Mr Peters, Mr Grenfell, Mr Salver and Mr Bond. He advised them that the negotiations were still fluid. The issue regarding indemnification had resolved but on the basis that the Authority settle on Monday and vacate Hartley on Tuesday. Further there would now be a Deed of Settlement and a second “short deed” dealing with the transfer of liabilities to which the EPA Act applied. Mr Lorenz advised that he was in the process of working through the practicalities of vacating Hartley early in comparison to pushing back and sticking to the Deed of Settlement’s original five-day settlement period. He commented that he was not so sure why SWR were “fixated on getting on site by Tuesday” and raised the possibility that it was the consequence of pressure from the Harveys.
Consideration

SWR is critical of the content of Mr Lorenz’s report which in one form or another was placed before each of the constituent councils. It is said that the report was superficial in the analysis undertaken in that all that is considered is the effect on Hartley and not the income, assets, liabilities and expenses associated with Brinkley.595 Whether or not this criticism is well founded, it must be remembered that what the constituent councils were asked to consider was whether to accept the Authority’s recommendation that the SWR offer as contained in Mr Levinson’s letter of 13 November 2012 should be accepted.596 The elected members of the constituent councils were not concerned with the question of where their particular council should dispose of its waste. Accordingly, it may be accepted that as far as the elected members of the constituent councils were concerned, at the time of December 2012 it was business as usual and would be until such time as an alternative was brought to the council.

The reports provided to each council in relation to the Authority’s recommendation flagged the possibility of some constituent councils choosing in future to dispose of their waste with SWR at Hartley. Implicitly, the reports flagged the competitive waste environment that would come into existence with the advent of SWR operating Hartley. Implicitly, the reports left to the councils, and to another day, the ramifications of competition for the councils. Whilst anticipated consequences for the Authority were flagged, no report suggested that the constituent councils were, in effect, deciding the future of the Authority or proofing the Authority against the ramifications of the foreshadowed offers from SWR. The “cons” indicate one or more constituent councils may chose not to move to Brinkley in future.

I accept the submission that each of the reports that went to the constituent councils in December 2012597 assumed that the councils’ waste streams would continue to be deposited with the Authority. However, as I have said, the question of where the councils should dispose of their waste was not up for consideration, and there was no necessity that it be considered at that time. All reports flagged the possibility of change.

The 12 November 2012 offer set out in Mr Levinson’s 13 November 2012 letter did not contain an offer regarding the gate price that would be charged by SWR for the receipt of the constituent councils’ waste streams at Hartley. Elsewhere I have dealt with the meetings between SWR and three of the constituent councils that took place in November and December 2012. Up until the execution of the Deed of Settlement, the only offer the councils had was that contained in Mr Levinson’s letters of 4 and 10 October 2012. True the Authority was told that rates, and in particular the $53 per tonne rate, were negotiable, but

595 Plaintiff’s Closing Submissions at [652].
596 Ex P5: 146.
597 Ex P5: 149; Ex P5: 157; Ex P5: 158; Ex P6: 160; Ex P6: 161.
nothing was forthcoming in this period from SWR. There was nothing then for council officers and councils to compare and evaluate. Why would a council or a council officer not prefer the status quo when the alternative was to become a customer of an entity whose first inclination was to charge the constituent councils $53 per tonne after 30 June 2013 and who was yet to provide any revised offer? Any assurance that it would be business as usual would provide little comfort.

I think it was understandable that the likes of Mr Salver viewed SWR as unwelcome. This was a hostile takeover in the sense that the Authority did not want to leave Hartley and was consistently confronted by threats that if it did not act by certain times the gate to the landfill would be shut. As indicated, the offer contained in Mr Levinson’s letters of 4 and 10 October 2012 provided reason to be wary of SWR. It was not until the Deed of Settlement that a gate price was guaranteed, and then for only 9 months following settlement. Without Brinkley, the Authority and the constituent councils would be price takers and, to a large extent, at the mercy of SWR.

At the time that Mr Aitken received Mr Salver’s 19 October 2012 email the question of whether the Authority would be leaving Hartley had not been finally resolved, but it was certainly looking likely. It think Mr Aitken’s evidence as to it being possible that his thinking at the time was that AHC’s waste would move with the Authority the product of hindsight and reconstruction. I doubt that at that point in time any of the constituent council officers who were also members of the Authority’s Board contemplated anything other than that their council’s waste would stay with the Authority for the simple reason that the alternative from 1 July 2013 was more expensive. At that point in time, whether SWR would make a further offer was not known. Whether or not Mr Aitken still had an open mind as to where AHC’s waste would go is difficult to determine. He said he believed he did. There is no independent evidence to suggest that he did not, or that he did for that matter. As we have seen, nothing was forthcoming from SWR in the 22 November 2012 meeting to test him and nothing was forthcoming thereafter.

I do not think it can be doubted that the Executive Officers of the constituent councils were aware before Christmas 2012 that SWR wanted them to dispose of their waste streams at Hartley and was interested in contracting with them for that to occur. It is apparent that Mr Aitken, Mr Salver and Mr Grenfell were closer with the Authority and Mr Lorenz than Mr Stuart and Mr Bond. Mr Aitken’s, Mr Salver’s and Mr Grenfell’s thinking about the competitive future could not but have been infected by their access to Mr Lorenz. That does not mean that there necessarily existed an arrangement or understanding not to accept or recommend accepting any offer put by SWR, or, alternately, to remain with the Authority whatever offer may be put. As they all made clear, no offer

598 Ex P5: 124.
came. The arrival of a competitor in what had effectively been a monopoly did not of itself immediately trigger an obligation or duty to reconsider the council’s waste disposal arrangements.

I. The deed negotiations

On 21 December 2012 Mr Levinson sent an email to Mr Lumsden at Wallmans attaching a “negotiation draft” Deed of Settlement for the Authority’s consideration (the first draft Deed of Settlement).\footnote{Ex P6: 184.} The deed was sent on Mr Brown’s instructions.\footnote{Ex P6: 184 at pp 1892-1893.} In his email Mr Levinson stated that he did not have final instructions from the Harveys on the content of the draft and that SWR would lodge a development application with AC to vary condition 8 of the planning approval relating to the Hartley site, a copy of which would be sent to Wallmans.

The recitals to the first draft Deed of Settlement stated:\footnote{Ex P6: 184.}

A. The Harveys own sections 299, 301 and 302 in the Hundred of Freeling, comprised in Certificate of Title Volume 5500 Folio 460 (“the Land”).

B. Since November 1991 the Authority has operated a bulk waste disposal facility on the site within the Land pursuant to agreements with the Harveys for the occupation and such use of the site (“Licence Agreement”).

C. The Authority operates the bulk waste disposal facility on the Land pursuant to licence no. EPA24 issued under the \textit{Environment Protection Act 1993} (“EPA licence”) and a development approval granted by the South Australian Planning Commission and affirmed by the Planning Appeal Tribunal (“Development Approval”).

D. When the Authority sought to exercise a right of renewal of the Licence Agreement in August 2011 the Harveys challenged the Authority’s entitlement to such renewal (“the dispute”).

E. The Harveys and SWR are parties to an agreement for SWR to occupy the site and operate a bulk waste disposal facility there if as a result of the dispute the Authority ceases to operate its bulk waste disposal facility and vacates the Land.

F. To avoid the expense, delay and inconvenience associated with litigation and without any admission as to liability on the part of any party, the Harveys and the Authority have resolved the dispute and the parties wish to record their terms of settlement in this Deed.

After the clauses dealing with the interpretation of the deed, clause 4 stated that subject to the conditions precedent being satisfied the Authority would vacate Hartley.

Clause 5 of the first draft Deed of Settlement provided that the resolution of the dispute between the Authority and SWR and the Harveys was conditioned on
the transfer of the EPA licence from the Authority to SWR on conditions acceptable to SWR and upon the variation of the development approval applicable to the landfill on conditions acceptable to SWR.

Clause 6 set out the pre-conditions applicable to the Authority:

6. The Authority must:

6.1 forthwith submit an application to the Environment Protection Authority for the transfer of the EPA licence to SWR;

6.2 take all reasonable steps in co-operation with SWR to support, facilitate and expedite the transfer of the EPA licence to SWR;

6.3 take all reasonable steps in co-operation with SWR to support, facilitate and expedite the variation of the Development Approval; and

6.4 forthwith provide to SWR copies of all documents in its possession or control relating directly or indirectly to the operation of the facility on the site, provided however that the Authority is not obliged to provide to SWR documents relating to the Authority’s financial business returns and profits from such operation.

6.5 Use its best endeavours to vary the easement registered on Certificate of Title Register Book Volume 5441 Folio 782 to remove reference to “the Waste Management Authority” expressed in the Memorandum of Grant of Easement numbered 7131525 including procuring from the District Council of Mount Barker all necessary consents and documents to give effect to such variation within 6 months of the date of settlement.

The pre-conditions applicable to SWR were set out in clause 7:

7. SWR:

7.1 must forthwith submit an application to the Alexandrina Council for the variation of the Development Approval;

7.2 will use its best endeavours to secure from the Environment Protection Authority acknowledgement or confirmation that upon satisfaction of the conditions precedent and SWR commencing to operate the facility on the site, the responsibilities and liabilities of the Authority in respect of its activities on the site will cease; and

7.3 will pay all stamp duty payable on this Deed and any other documents brought into existence for the purposes of effecting the settlement the subject of this Deed.

Settlement was to occur within five business days of SWR receiving notice of the transfer of the EPA licence or notice of the variation of the development approval, whichever occurred last in time.

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601 Ex P6: 184 at pp 1894-1895.
602 Ex P6: 184 at p 1895.
Clauses 9 and 10 dealt with the obligations of the parties on settlement. The Authority agreed to give free and unencumbered vacant possession of the site to the Harveys and SWR and to transfer ownership of and rights in all fixed assets to SWR. In return SWR agreed to pay the Authority $900,000, to take vacant possession of the site and assume liability for the environmental performance of the site past and future. Clause 10.3 stated that “without limiting the generality of the foregoing” SWR accepted responsibility for the covering and final capping of waste, for the management of landfill gas and for the post-closure management of the site relating to waste deposited prior to settlement, as well as 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.

Under clause 11 the Authority agreed to allow SWR the right to enter and operate the landfill for and on behalf of the Authority from 31 January 2013 until the conditions precedent were satisfied and settlement took place.

Clause 12 provided for SWR to issue a notice to the Authority in the event that it formed the opinion by 24 January 2013 that the conditions precedent were unlikely to be satisfied by 31 January 2013, that it intended to commence operation of the facility on 31 January 2013 in addition to imposing obligations on the Authority and SWR in the event that such notice was issued. Clause 12.1.4 provided that in the event that SWR did take over operating the landfill pending settlement, the Authority would pay $37 per tonne plus taxes and levies to dispose of waste at Hartley until settlement.

Clause 13 dealt with releases and indemnities relating to the dispute between the Harveys and the Authority and the environmental performance of the Authority prior to settlement. Under clause 13.3.2 SWR indemnified the Authority against all claims arising from the lawful and proper environmental performance by the Authority in the operation of the Hartley landfill. Whilst the deed contained mutual releases as between the Authority and the Harveys, it contained no indemnity given by the Harveys in favour of the Authority.

Clause 14 set out certain warranties provided by the Authority and which the Authority expressly acknowledged that SWR and the Harveys had relied upon. Included in those warranties was sub-clause 14.5 which warranted that the remaining airspace in cell 6 was 210,000 m$^3$. In the balance of this part of my reasons I make no further reference to the various iterations of clause 14.5 and the negotiations regarding the unfilled cell space at Hartley. Those issues are dealt with in detail in a separate section of this judgment.

With the exception of clauses 25 and 26 the remaining clauses of the deed may be passed over. Clause 25 provided that no party had relied on any statement by another party not expressly included in the deed and clause 26 that the deed constituted the entire agreement between the parties as to its subject matter.
On 21 December 2012 SWR applied to vary the planning approval applicable to Hartley, seeking the deletion of condition 8. On 29 January 2013 AC granted SWR’s application for development approval subject to two conditions neither of which are presently relevant.

On 7 January 2013, Mr Manning, on behalf of SWR, contacted the EPA requesting an amendment to the licence conditions relating to the Hartley landfill.

On 15 January 2013 Mr Aitken, Mr Salver and Mr Lorenz had one of their regular meetings. Mr Salver made a note of what was discussed. Mr Salver’s note records that Mr Lorenz was in the process of considering the first draft Deed of Settlement and had concerns with some of the conditions, that Brinkley was not yet operational, and that Mr Lorenz was undertaking a review of the Authority’s long-term financial plan attempting to forecast “optimistic vs pessimistic scenarios in relation to moving the operation to the Brinkley site”. Mr Lorenz’s review was to be put before the Authority’s Board.

Under cover of a letter dated 22 January 2013 sent electronically, Wallmans forwarded to Botten Levinson the draft Deed of Settlement with amendments marked up (the second draft Deed of Settlement). In the accompanying letter Mr Lumsden explained the amendments he had made. A notable addition was clause 9. It read:

The Authority or its members if so advised may for a period of 9 months following settlement, deposit waste at the facility for a fee of $37 a tonne (plus any statutory levies or taxes which may include without limitation an amount to recover any applicable prescribed levy imposed under Section 13 of the Environment Protection Act [and] any liability for carbon tax).

Mr Lumsden explained:

In your letter dated 10 October 2012 it was proposed that the member councils have the ability to deposit waste at the rate proposed in clause 12.1.4 of your Deed for a period of approximately 9 months.

I acknowledge that this has not been the subject of more recent discussions but incorporate a clause to this effect for your review.

In his oral evidence Mr Levinson was taken to the letter from Wallmans dated 22 January 2013 and in particular to the new clause 4.6. He said that there was never any dispute about clause 4.6 being included in the Deed of Settlement.
(292) He also agreed that there was never any suggestion that there be incorporated into the Deed of Settlement a guaranteed gate price following the expiry of clause 9. Clause 9 as featured in the second draft Deed of Settlement made its way into the final draft deed without amendment. (292)

In his supplementary statement Mr Levinson said:

40. I refer to clause 9 of the deed. That clause was proposed by Wallmans on behalf of the Authority. I viewed that clause as consistent with the offers that SWR had made previously. I understood that it was up to the Councils to decide where they deposited their waste, but that they would have the benefit of the certainty of the price guarantee under that clause while the long term contracts for their waste were negotiated and agreed with SWR over the months after the deed was executed.

41. On behalf of SWR I did not seek the inclusion of any obligation on member Councils to deliver waste to Hartley. I did not do so because firstly, the Councils were not themselves party to the negotiations or the deed. Secondly, the Authority had previously declined to agree to any settlement on the basis of Council waste streams. Thirdly, the Authority said that it did not control the waste of the member Councils and therefore it could not contract on their behalf to that effect. Fourthly, I expected that the time to obtain binding agreement[s] by the Councils to such contracts would be beyond the period contemplated for conclusion of the deed (which at that time was January 2013).

In cross-examination Mr Levinson repeated that clause 9 was inserted at the request of Mr Lumsden. (1041) Mr Levinson said that he also understood that the Authority would be speaking to the constituent councils about whether they wished to use Brinkley. (1043-1044) Negotiations with the councils could take up to six to eight months he thought, possibly longer. (1042-1043) He also understood that a decision by any of the constituent councils may go to the elected members. He said: (1044-1045)

Q … You understood, didn’t you, that a decision on the part of any member council might go to the elected members of the council. I think you have just given evidence to that effect.

A Yes, subject to the delegations of the CEO, I assumed that that might be the case.

Q The elected members might approach things differently than the management of any particular council.

A Yes.

Q They might take into account broader considerations than the management might take into account.

A Yes, I mean, they typically act politically rather than the way a public official might act.

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611 Ex P32 at [40]-[41].
You understood that that was a risk that Southern Waste faced as part of this process.

A  Yes.

The elected members might be more attuned to the interests of commercial operators within council area.

A  Yes, I mean they could be attuned or any political issue that might arise.

By political issue do you mean things such as the benefits of councils sticking together.

Possibly that, I mean it could be intra-council politics, it could be that a local resident or property developer near to any one of the sites didn’t like trucks going past and got in the ear of the relevant councillors to complain about it, that someone else had other aspirations to do other things. I mean just infinite political drivers as distinct from what the administrators might view as important; that’s always a risk.

Mr Brown was cross-examined on Mr Lumsden’s insertion of clause 9. He said: (845-847)

That clause states ‘The authority or its members, if so advised, may for a period of nine months following settlement deposit waste at the facility for a fee of $37 a tonne plus levies and taxes’.

A  Yes.

And you saw this proposed clause 9, didn’t you, around the time that the draft was received by Mr Levinson.

I can’t recall.

Because he sent this draft on to you, didn’t he.

I can’t recall if I saw a draft.

And you considered closely the terms of this clause, didn’t you, prior to signing the deed.

We considered closely obviously the price.

You understood, didn’t you, the authority merely had an option to deposit waste at the site.

That the authority did?

The authority or its members.

Yes.

Merely had an option to deposit at the site.

Yes.
Q  There was no commitment on their part.
A  Commitment on the authority’s part?
Q  Of the authority or its members … to deposit waste at the facility.
A  That’s right, yes.
Q  It was merely an option.
A  Yes.
Q  And it was only an option if they were so advised - if so advised.
A  Sorry?
Q  … you understood, didn’t you, from reading this clause that it didn’t commit any of
    the member councils to anything.
A  Yes, that’s right.
Q  And they might be advised to the contrary to deposit waste at Brinkley.
A  By the authority or by themselves.
Q  Just if so advised, they might take their own advice on the issue.
A  Yes.
Q  They might come to the view that ‘actually we don’t want to take up this option of
depositing waste at Brinkley’. You understood that, didn’t you.
A  Yes.
Q  And you understood as well, that this clause only covered a period of nine months
    following settlement.
A  Yeah, I can’t recall. I think it was in there because they potentially needed time
    with the nine month period.
Q  Potentially needed time to work out whether or not they were going to go to
    Brinkley or Hartley.
A  No.
Q  Potentially time for what.
A  Potentially time to understand where they stay.
Q  Whether they remained with the authority or became a customer of Southern Waste
    Resources.
A  Well they had already told us that they were going to be a potential customer so it
    was really an agreement re a fix[ed] price for a period of time.
Q None of the member councils told you that they were going to be a potential customer.
A Yes, they did.
Q Who told you they were going to be a potential customer.
A Mount Barker, a number of times.
Q That’s the words they used, is it ‘We’re a potential customer’.
A Look I can’t recall the exact words they used but definitely.
Q Well think hard, what words do you think they used. Did they say ‘potential customer’.
A As I said, I can’t recall but from my perspective the discussions we had with them, it was all about the best commercial outcome for their council and definitely, we thought that they were going to be a potential customer.
Q That’s what you thought.
A Yes.

Subsequently, Mr Brown said that he never asked the Authority why it had asked that clause 9 be inserted. (955) In re-examination he said that he thought the reason behind clause 9 was that “the cell may take longer to build at Brinkley and that the Hartley facility may be needed from a Murray Bridge disposal perspective”. (972) When cross-examined after being recalled Mr Brown said:

Q That clause [clause 9] made its way into the deed because the authority asked for it to be put in in January 2013.
A No, we jointly spent a lot of time on [it] together.
Q I suggest that clause was suggested to be included by the authority. Do you disagree with that.
A Yes. That was our whole focus on the transaction that we struck this rate that worked for everyone.
Q That’s fine. I’ll show you the drafts of the deed then, see if that causes you to revise your memory. If we start with the first version of the deed. If you could have please vol.6 of the tender book but keep vol.7 though, vol.6 if you go behind tab 191 you will see a letter from Wallmans to Mr Levinson attaching a copy of the draft settlement deed, incorporating the authority’s proposed amendments. That’s on p.1949.
A Yes.
Q And on the next page on p.1950 under the heading ‘New clause 9’ you will see Mr Lumsden state ‘In your letter dated 10 October 2012 it was proposed that
member councils have the ability to deposit waste at the rate proposed for a period of approximately nine months’.

A Yes.

Q ‘I acknowledge that this has not been the subject of more recent discussions, but incorporate a clause to this effect for your review’. Then if you turn ahead to clause 9 on p.1956, you will see the proposed clause included as a marked change in the deed.

A 1956.

Q Clause 9 as underlined.

A Yes.

Q Has an addition to the draft that your solicitors had sent Mr Lumsden.

A Yes.

Q Does that make you alter your evidence as a matter of joint discussion as opposed to being a suggestion of the authority [that] the clause be included.

A No, it was the whole basis of the discussion was the rates and the tenure was absolutely not an authority suggestion that it be in there. It was we were driving the bus in regards to the rate and the rate that worked for the councils going forward.

Q The only long-term rate, do you agree with this, the only long-term rate you would put to any of the councils before 11 February 2013, was the $53/tonne rate.

A That was as I’ve said an early, early first pass.

Q Yes, but do you agree that that was the only long-term rate you put to the councils prior to 11 February.

A Once again it depends on how you look at it from my commercial perspective.

Q I’m just talking about communications either oral or written to any of the member councils. Did you mention a rate other than the $53 rate.

A Absolutely.

Mr Lumsden inserted an additional indemnity in clause 10, one from the Harveys in favour of the Authority in the same terms as that provided by SWR.

Clauses 25 and 26 remained in the second draft Deed of Settlement albeit renumbered as clauses 22 and 23.

Under cover of an email dated 29 January 2013 Mr Levinson returned the draft Deed of Settlement to Mr Lumsden further marked up to show the additional amendments he had made (the third draft Deed of Settlement). In his

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Ex D7: 200.
covering email Mr Levinson advised that SWR agreed many of the changes proposed by Wallmans to the first draft Deed of Settlement. However, he had created a further amended version of the document in which he had accepted some of Mr Lumsden’s amendments and proposed further amendments. In the attached third draft Deed of Settlement clause 9 as inserted by Mr Lumsden had been accepted. Under clause 4.4 as newly amended the Authority was obliged to supply SWR with, amongst other things, copies of customer contracts and pricing information.

On 30 January 2013 Mr Aitken, Mr Salver and Mr Lorenz met. Mr Salver made notes of what was discussed. Mr Lorenz updated Mr Aitken and Mr Salver on the drafting of the Deed of Settlement. The latest draft, reviewed by Wallmans, was to be reviewed by the M & O Committee before being presented to the Board at its 21 February 2013 meeting. For immediate purposes it is unnecessary to refer further to the matters discussed at the meeting.

As at this point in time efforts were focused on SWR taking over operation of Hartley as of 1 February 2013.

On 4 February 2013 Mr Lumsden emailed Mr Levinson. He advised Mr Levinson that he had recently met with Mr Lorenz to discuss the draft Deed of Settlement. Amongst other things, Mr Lumsden advised that the Authority would not agree to providing customer contracts and pricing information as such material was “commercial in confidence” and insisted on being indemnified by the Harveys in the terms of clause 10.

Mr Levinson was cross-examined about his understanding of the reference in Mr Lumsden’s email of 4 February 2013 to the Authority wishing to remove reference to customer contracts in the draft Deed of Settlement. The point of the cross-examination was to ascertain whether or not he understood that it could be inferred that the Authority intended to retain that information for its own business moving forward. Mr Levinson could not say what he thought in reading that reference. He did not think that he asked Mr Lumsden for any further explanation. (297)

On Tuesday, 5 February 2013 Mr Levinson emailed Mr Lumsden. He made known the Harveys’ frustration at the delay in resolving the matter and that “matters that were made patent at the outset” were being revisited. He said that the Harveys would not indemnify the Authority. It is unnecessary to go into the debate regarding the necessity of indemnification. Suffice to say Mr Levinson expressed the view that indemnification by the Harveys for the Authority’s past use and future liability for the Hartley site was unnecessary in view of SWR’s assumption of responsibility for all liabilities associated with the EPA licence to

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613 Ex P7: 203.
614 Ex D7: 204.
615 Ex D7: 206.
616 Ex D7: 206 at p 2050.
operate the landfill. The email also dealt with the attitude of the EPA regarding such liability. In that regard, successive iterations of the deed had included a requirement that written confirmation be obtained from the EPA that all liabilities under the EPA Act would transfer to SWR and that the Authority be indemnified by the Harveys and SWR for any future liability arising under that Act. Attached to the email was a fourth draft Deed of Settlement with amendments marked up (the **fourth draft Deed of Settlement**). In his email Mr Levinson advised that the amended deed incorporated further changes. He stated that he was instructed that if the amended deed was not accepted and executed by close of business on the coming Friday the offer would expire and the site would be closed to further waste deposits from midday Saturday.

In his oral evidence Mr Levinson was taken to his email of 5 February 2013 to Mr Lumsden. He explained that the Harveys were angry that indemnification was pursued relatively late in the negotiation of the agreement. (1051) He agreed that in his email, he, on behalf of SWR and the Harveys, threatened the Authority that failing to accept the terms of settlement as contained in the attached fourth draft Deed of Settlement, by close of business on Friday, 8 February 2013, would result in the site being closed from midday Saturday. He agreed that the effect of such closure would be that the councils would be unable to dispose of waste at Hartley because there would be no operator operating the site. He could not recall whether SWR had, by this time, lodged an application with the EPA for the transfer of the Hartley licence from the Authority to it. (298) Mr Levinson could not say what SWR contemplated regarding the discharge of obligations in relation to the existing cells on the Hartley landfill in the event that the Authority was shut out from operating the landfill. He accepted that the effect of the threat was that both the Authority and the constituent councils would be shut out from using the Hartley landfill. (300)

In the fourth draft Deed of Settlement the obligation to provide customer contracts and pricing information was deleted.

The fourth draft Deed of Settlement contained the declaration that neither party had relied on any statement by another party not expressl

617 Ex D7: 208.
618 Ex D7: 208 at p 2081.
My instructions about what happens in the next few days are clear. The Harveys simply wont let this drag on if the deal is not to be finalised.

On 7 February 2013 Mr Lumsden emailed Mr Levinson. Referring to a telephone conversation he had with Mr Levinson on 12 December 2012, he said that the Authority had never resiled from the requirement that it be indemnified by the Harveys. The indemnity was one that would only be triggered if SWR failed to discharge its obligations. The Authority remained insistent that the Harveys provide the requested indemnity. He did not consider the indemnity onerous or unreasonable. It is unnecessary to set out the reasons Mr Lumsden gave in support of that view. He advised Mr Levinson that he was due to speak to his client about the issue later that morning.

The following day Mr Levinson emailed Mr Lumsden at 12.23 pm. He advised that he was awaiting instructions on the indemnification issue. In the meantime Mr Levinson amended the draft deed to incorporate the indemnities that the Authority sought. He asked if Mr Lumsden would advise as to whether his client would be prepared to execute the draft deed in the form of the attachment to the email (the fifth draft Deed of Settlement) on the assumption that the Harveys and SWR agreed. Clearly, Mr Levinson was concerned not to delay settlement further. Mr Levinson was now hoping that settlement take place on the following Monday (11 February 2013).

The fifth draft Deed of Settlement was sent to Mr Lumsden by Mr Levinson on Mr Brown’s instructions. Mr Lumsden replied to Mr Levinson’s email on the same day at 3.37 pm. Attached to the email was a further version of the draft Deed of Settlement (the sixth draft Deed of Settlement) marked up to show the amendments Mr Lumsden had made. Clause 11 required re-working to accord with the requirements of s 103E of the EPA Act and SWR’s assumption of liability for site contamination. It is unnecessary to deal with the requirements of s 103E of the EPA Act.

Mr Lumsden was yet to obtain instructions on the draft. He advised:

In relation to execution, as advised in my email last night, it is necessary for a resolution to be obtained to affix a seal to the document. If the terms are agreed, then this resolution can be obtained without the need for a meeting, however it would still be necessary for the document to be distributed electronically. Subject to board members being available, Michael [Lorenz] considers that this resolution could be obtained to permit execution of the document on either Monday or Tuesday.

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619 Ex D7: 208.
620 Ex P7: 209.
621 Ex P7: 211.
622 Ex P7: 211 at p 2099.
In relation to settlement, the deed provides that this occurs within 5 business days to allow our client to vacate the site and ensure a proper handover.

Subsequent discussions between Mr Levinson and Mr Lumsden resulted in the clauses dealing with the requirements of s 103E of the EPA Act being excised from the Deed of Settlement and incorporated within a second standalone deed. (the s 103E Deed).

The indemnification issue was ultimately resolved. At 10:33 pm on 8 February 2013, Mr Levinson sent a fresh copy of the s 103E Deed to Mr Lumsden. Again it is unnecessary to deal with the amendments made to the version that Mr Lumsden had sent through earlier in the day. In the email to which the second draft of the s 103E Deed was attached Mr Levinson said: 623

The Harveys have been patient. My instructions on this matter are that by one means or another your client will not operate the landfill at the site after Tuesday afternoon. My clients are prepared to issue the indemnity your client seeks but only if the settlement occurs within the periods set out in the deed of settlement most recently emailed to you. My clients have again indulged further delays beyond original timeframes (bearing in mind they had previously determined to prevent access by this weekend).

If your client wants to obtain the payment of $900,000 and the indemnities it cries for, it will need to arrange its affairs to settle by Monday.

Early in the afternoon of 9 February 2013 Mr Lorenz emailed the members of the Authority’s Board. 624 He advised them that negotiations on the Deed of Settlement were nearly finalised. He laid out the plan for the Board members to consider and vote on the deed.

Later on Saturday, 9 February 2013 Mr Pucknell emailed Mr Lorenz. 625 He referred to the solicitors as having resolved all differences as to the content of agreements and, in that light, asked whether “operationally” settlement could take place on Monday. 626 In bringing his email to a close Mr Pucknell asked: 627

Can you advise if settlement is going to occur Monday as if it is not then I expect that the operation will be impacted as noted below. (and we need to know this now)

What appeared “below” was a copy of Mr Levinson’s 10.33 pm email to Mr Lumsden of the day before containing the threat quoted above.

Mr Lorenz replied to Mr Pucknell that same day. 628 He referred to arrangements in place to execute the settlement and s 103E Deed the following day before stating: 629

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623 Ex P7: 216 at p 2130.  
624 Ex P7: 214.  
625 Ex P7: 216.  
626 Ex P7: 216 at p 2129.  
627 Ex P7: 216 at p 2129.  
628 Ex P7: 216.
In regards to when we hand over the site (the deed previously had 5 days) we are still working that through with your lawyers. Tuesday is not possible but before the end of the week should be. We want the handover to be managed properly including having adequate equipment ready on our new site and to make sure that you are actually ready to receive customers at Hartley and have agreements in place with Mount Barker Council which I haven’t [sic] evidenced yet. The last thing I want is for a half-baked handover to occur and for a public relations nightmare on Tuesday.

Mr Lorenz then referred to the fact that he was still awaiting documents from Botten Levinson to be put to the Authority’s Board on Monday for approval.

Mr Pucknell understood from this email that the Authority wanted adequate equipment at Brinkley. (1272) For what the Authority would use that equipment was not apparent to him: (1272)

Well, they needed to put it somewhere because they weren’t going to leave it at Hartley if they weren’t operating Hartley, and what they did at Brinkley would be their business, if they used it to support their transfer stations or landfill operations that was a matter for the authority.

Mr Levinson could not recall discussing with Mr Brown or Mr Pucknell the Authority’s intended transfer of equipment. (303) Mr Brown had known for some time that the Authority intended to transfer equipment to Brinkley. (862)

It was clear to Mr Lorenz at this time that SWR wanted access to Hartley as soon as possible. To allow that to happen, the Authority was moving as quickly as possible to ensure settlement. (4794) Arrangements were made for the Authority’s Board to consider the deeds and vote on an appropriate motion electronically so as to facilitate settlement on the Monday.

Mr Lorenz emailed the members of the Authority’s Board late on the afternoon of 10 February 2013 attaching the Deed of Settlement and the s 103E deed in their final forms. Ex P7: 216 at p 2129. The Board was to meet on 12 February 2013 out of session and electronically to consider the deeds. The recommendation and resolution to be voted on was included in Mr Lorenz’s email. He also advised: Ex P7: 218 at p 2133.

The only item that may vary is the settlement date. The worst case scenario has handover to Southern Waste ResourceCo occurring on Tuesday which we will try to negotiate to Thursday.

We have built a clause into the deed which safeguards Member Councils being able to continue to use the Hartley site at the same rate that is currently charged by the Authority. This clause was included in the event that SWR attempted something similar to this or in the event that Brinkley was delayed.
Mr Lumsden emailed Mr Levinson on Monday, 11 February 2013 shortly after 10 am.\(^{632}\) He advised that the earliest his client could settle and vacate the Hartley site was 5 pm on the coming Wednesday. Settlement on that date was conditioned on SWR accepting waste at Hartley from existing customers “(if required) from this Thursday. This is important for all parties and customers to ensure that there is a smooth transition”.\(^{633}\) In cross-examination Mr Levinson was taken to Mr Lumsden’s email of 11 February 2013. Mr Levinson was asked whether or not upon reading that email he understood that the Authority’s preference was to receive existing customers at Brinkley as was implicit in the email. He could not say what the Authority would be doing at Brinkley. He was focused on ensuring the finalisation and execution of the Deed of Settlement. He could not recall having a view as to what the Authority was doing at Brinkley. (303)

In his 11 February 2013 email Mr Lumsden went on to ask Mr Levinson to confirm in writing that that condition was accepted by his clients. He further advised Mr Levinson as to whom SWR should speak in order to make preparations for the takeover of Hartley immediately upon settlement. Mr Lumsden advised that the deed (the seventh draft Deed of Settlement), which excluded the clauses now catered for in the s 103E Deed, had been distributed to Board members for review and resolution. If the Authority’s Board agreed with the content of the document he anticipated it would be executed later that afternoon. In those circumstances he proposed that settlement occur at 5 pm on Wednesday, 13 February 2013. He asked that Mr Levinson advise whether or not that was suitable to his client. Approximately half an hour later Mr Levinson emailed Mr Lumsden.\(^{634}\) He advised that it was agreed that SWR would accept waste at Hartley from existing clients from Thursday and that the proposed date and time of settlement was agreed. He attached an amended Deed of Settlement containing the new dates and times at which settlement was to occur (the eighth draft Deed of Settlement).

Over the course of 10 and 11 February 2013 the Authority’s Board unanimously resolved that the Chairperson and Executive Officer affix the Common Seal of the Authority to the Deed of Settlement and s 103E Deed thereby executing the same.

On 11 February 2013 the s 103E Deed\(^{635}\) and the Deed of Settlement\(^{636}\) were executed. The recitals to the Deed of Settlement were not materially different to the very first draft. Under the Deed of Settlement the obligations of the Authority were set out in clause 4. It provided:\(^{637}\)

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\(^{632}\) Ex D7: 220.

\(^{633}\) Ex D7: 220 at p 2168.

\(^{634}\) Ex D7: 220.

\(^{635}\) Ex P7: 222.

\(^{636}\) Ex P7: 223.

\(^{637}\) Ex P7: 223 at p 2195.
4 The Authority must:

4.1 take all reasonable steps in co-operation with SWR to support, facilitate and expedite obtaining the approval for the transfer of the EPA licence to SWR on terms acceptable to SWR and the Authority (or without the imposition of any terms by the EPA as the case may be);

4.2 forthwith provide to SWR copies of all documents in its possession or control that have not already been provided that relate directly or indirectly to the operation of the facility at the site and that fall within the classes listed in Schedule B; and

4.3 Use its best endeavours to procure from the District Council of Mount Barker (following the production by Harvey of all necessary executed documents) all necessary consents and documents to give effect to the variation of the easement registered on Certificate of Title Register Book Volume 5441 Folio 782 to remove reference to “the Waste Management Authority” expressed in the Memorandum of Grant of Easement numbered 7131525 within 6 months of the date of settlement.

4.4 Nothing provided for in this Deed creates an obligation for 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.

Under clause 5 SWR was liable for the payment of all stamp duty payable on the deed and any other documents brought into existence for the purpose of effecting settlement subject of the deed. 638

The obligations of the parties on settlement were set out in clauses 7 and 8. They provided: 639

7 On settlement the Authority agrees:

7.1 Insofar as it occupies the Site to give free and unencumbered vacant possession of the Site to the Harveys and SWR by 5.00pm on 13 February 2013;

7.2 to cease operating the Facility on the Site and vacate the Land by 5.00pm 13 February 2013;

7.3 to transfer the ownership of and rights to all Fixed assets to SWR by 5.00pm on 13 February 2013; and

7.4 consent to the transfer of the EPA licence to SWR on the basis that such transfer has already been approved by the EPA.

8 On settlement SWR agrees:

8.1 to pay to the Authority the sum of Nine Hundred and Ninety Thousand Dollars ($990,000) including GST by bank cheque or other means acceptable to the Authority;

638 Ex P7: 223 at p 2195.
639 Ex P7: 223 at p 2196.
8.2 to take vacant possession of the Site;

8.3 to assume from 5.00pm on 13 February 2013 full responsibility and liability for the Environmental performance including (without limiting the generality of the foregoing)

8.3.1 the responsibility for covering and final capping of waste, management of landfill gas and post closure management of the Site relating to waste deposited by the Authority prior to settlement and its own activities on the Site post-settlement;

8.3.2 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).

Clause 9 remained as it was when first inserted into the second draft.

It is unnecessary to traverse the releases and various indemnities provided under the deed and the transfer of liability effected. No express warranty was included in the Deed of Settlement as to the airspace contained in cell 6. Clause 22 stated that the deed superseded “all prior agreements, understandings and negotiations in respect of matters dealt with in this deed”, clause 23 stated that no party had relied on any statement by another party not expressly included in the deed, and clause 24 declared that the deed constituted the entire agreement between the parties as to its subject matter.

At about 6 pm on 12 February 2013 Mr Pucknell emailed Mr Fairweather to advise him that SWR would be running the Hartley landfill as of Thursday morning. Mr Pucknell asked whether Mr Fairweather thought it would be a good idea to ring SWR’s contacts in the councils and advise them of the change of operator. Mr Fairweather responded around 9 pm that night in the affirmative. He said he would call the contacts that he had visited and have Mr Brazzale do the same with respect to the contacts that he had visited. Mr Brazzale was copied into Mr Fairweather’s response to Mr Pucknell. In the second part of his email Mr Fairweather specifically addresses Mr Brazzale, stating that he (Mr Fairweather) would contact DCMB, AC and AHC and asked Mr Brazzale to call any contacts that he had been speaking to of late regarding Hartley. Ten minutes later (or thereabouts) Mr Brazzale replied saying that he would do so. I note that no specific reference is made to RCMB. Mr Levinson was asked in cross-examination whether this was because SWR had “given up” on securing RCMB as a customer at Hartley. He could not recall that ever being said to him and he did not believe that to be the case. Mr Pucknell was of a similar opinion. While he was “vaguely aware” of an issue with the

640 Ex P7: 223 at p 2199.
641 Ex D7: 224.
642 Ex D7: 224.
643 Ex D7: 224.
council, he had not written them off as a “lost cause”. (1270) I have set out earlier in these reasons Mr Brown’s view regarding RCMB.

On 13 February 2013 the EPA granted SWR EPA licence 40042 to operate the Hartley landfill from 13 February 2013 to 31 January 2017 subject to 35 conditions. Throughout this period, the Authority was making arrangements to receive waste at Brinkley. (4841) Indeed, Mr Lorenz assumed and expected, on the basis of modelling undertaken by the Authority, that the council waste streams would come to Brinkley. (4840) However, he maintained that it was a decision for the individual constituent councils to make.

Consideration

The first draft Deed of Settlement contained no clause guaranteeing a gate price for the constituent councils. The only mention of a gate price was that contained in clause 12.2.4 which guaranteed a price up to settlement in the event that SWR issued the relevant notice on or before 24 January 2013 and took over operation of Hartley prior to settlement. The inclusion of clause 12.2.4 is not inconsistent with the statements made during the November and December meetings that it would be business as usual at Hartley upon SWR assuming operational control. A council might legitimately wonder, however, why no guarantee post-settlement?

Clause 9 was inserted into the Deed of Settlement at the request of the Authority. The documentary evidence makes this clear and Mr Levinson confirms the position. I reject Mr Brown’s evidence to the contrary. There was no joint discussion resulting in clause 9 being inserted into the deed. I also reject his evidence that the constituent councils had indicated prior to settlement that they were potential customers and it was a matter of agreeing a price for a period of time. There is no evidence of any discussion between SWR and the constituent councils after the meetings of 22 November and 6 December 2012 up to settlement. DCMB did not tell SWR a number of times before settlement that it was a potential customer. There is no evidence of conversations with DCMB save the meeting on 22 November 2012. The suggestion that some sort of commitment had been given is a fabrication. SWR was not “driving the bus” in relation to clause 9. SWR did not strike a rate that worked for everybody.

Clause 12.2.4 is interesting in one other respect. It suggests that the pressure to get the Authority out was not applied solely by the Harveys, if at all. As I have said, I find it difficult to accept that the time pressure was applied solely by the Harveys when it was SWR that had to be in a position to take over the operation of the landfill, it was SWR who was financially exposed upon takeover and it was SWR who had absolute control over the dispute under the Litigation Management and Funding Deed. I am prepared to accept that the Harveys were frustrated, but I very much doubt that the tight deadlines and accompanied threats

Ex P7: 229.
were driven by the Harveys. At a minimum SWR was complicit in the threats and the deadlines set and to suggest that it was the Harveys alone was to be less than candid.

916 I note that in the passages of cross-examination quoted in this part, Mr Brown did not dispute that he knew Brinkley presented as an alternative for the constituent councils. There was nothing in this part of his evidence to suggest that he was confused in making that concession or in some way did not understand the question. His evidence in re-examination was also significant. He said that he knew that a cell was under construction at Brinkley but thought the rate contained in clause 9 was to benefit RCMB pending the cell being ready. That is to say, he knew of the existence of Brinkley and that it posed as an alternative to Hartley, but did not think it was ready to receive waste. Until it was the gate price guaranteed in clause 9 gave RCMB some comfort in relation to the cost of coming to Hartley. The thinking continues, the guaranteed gate price did not provide comfort to AC, AHC and DCMB because they would come to Hartley in any event due to the prohibitive transport cost involved in going to Brinkley. Put slightly differently, clause 9 could only have been inserted for RCMB’s benefit as AC, AHC and DCMB would never go to Brinkley because of the additional transport cost.

917 I do not think that Mr Lorenz’s email of 10 February 2013 demonstrates that the constituent councils had decided to move with the Authority to Brinkley. Taken in isolation it does reflect an assumption on his part that the councils might choose to do so. In his evidence Mr Lorenz said he assumed that the constituent councils would move with the Authority, but with the exception of perhaps AC, no council told him before settlement that they planned to do so expressly. His email of 10 February 2013 is in keeping with his assumption.
Bearing in mind the allegations contained in the Second Statement of Claim, the evidence of events following settlement is relevant for the light those events may shine on what transpired before settlement.

**A. 11 February 2013 – 30 June 2013**

After settlement, RCMB did not deposit waste at Hartley. (630)

With respect to DCMB, Mr Stuart said that Mr Peters advised him in January 2013 that DCMB would not transfer its waste to Brinkley straightaway. He explained that this was to allow the council to “work through some issues”, including the exit from the Monarto Quarry. (2881) Mr Stuart considered that SWR’s offer as contained in clause 9 of the Deed of Settlement would assist in the “smoothing of the transfer of waste streams”. (2610-2611)

Between January and July 2013, there was no council resolution or minute that communicated DCMB’s decision regarding the delay in moving of waste from Hartley to Brinkley. (2883) As will be seen, DCMB began sending its waste to Brinkley in the second half of 2013. What occurred was a resumption after a short-term delay. (2905) Mr Stuart explained that he did not see that there was a “conscious decision to resume [disposing of] waste at Brinkley, ie with the Waste Management Authority because we were a member of that authority”. (2905) Mr Stuart agreed that by January 2013 he was not considering SWR as a long-term service provider. (2883) He explained that DCMB was “already committed to that by virtue of the subsidiary agreement”. (2905) By “subsidiary agreement”, Mr Stuart meant the arrangements that had been in place since 2007 and 2009. (2905) He said: (2897-2898)

A Well when I spoke to Mr Peters, what was put to me was that in order to facilitate an orderly exit that - my recollection was that Southern Waste ResourceCo were potentially interested in the quarry business and the advice given to me by Mr Peters was that it might be better to delay or not to delay but until we conclude this matter, to maintain disposal at Hartley because of the arrangements we'd enter - I believe entered into the temporary use of the weighbridge, it would be better for us to delay transferring to Brinkley. So in that sense there was a sense of this could be a strategic alliance of some sort, it was a seed that was planted.

Q When you say ‘a strategic alliance of some sort’, do you mean by that with Southern Waste ResourceCo.

A It was a possibility that was raised, a possibility.

Q And that possibility you thought did you allowed for the application of an exemption from the policy.

A Well I weighed it up against the fact that I understood that this would be a small delay in considering the matter, that I was asked for or given the understanding of it would be, not long to sort out, that we had assets that were being realised as part
of the quarry and that overall it was better to look at it as a holistic situation and to delay any decision to transfer waste for that period in the light of potential benefits.

Q  It wasn’t quite that, was it, Mr Stuart, because as I understand your evidence a decision had been taken to move the waste, it was just a question of delaying the implementation of that decision for a month or thereabouts.

A  Well we were a member of the authority and by virtue of the authority we entered into an arrangement many years ago about cooperating and committing, and in that sense it was a delay, delay of returning to that commitment.

Q  Are you saying by that that your view about the commitment had not changed, it remained.

A  My view - my view of the commitment that the council has entered into by virtue of being a member of the subsidiary is that it is a member of a subsidiary and it has equity ownership in that subsidiary and as a protocol by which council should enter into to formally resign from that situation.

Q  And you didn’t have that in mind.

A  When?

Q  When you were speaking with Mr Peters.

A  I had - I didn’t have it in mind that we were going to resign from the authority, no.

Had it not been for DCMB’s involvement with the Monarto Quarry, Mr Stuart would have expected DCMB’s waste to have moved to Brinkley “sooner than what it did, straightaway almost”. (2901)

By July 2013 Mr Stuart saw competition between the Authority and SWR as an issue for the Authority, but he also saw the presence of SWR as giving rise to potential opportunities. (2911-2913) As will be seen, in the second half of the year Mr Stuart prompted the Authority to investigate such possibilities.

Telephone records indicate that on 11 February 2013 Mr Lorenz and Mr Aitken spoke on the telephone for a little short of 10 minutes. Mr Aitken had no recollection of what the call was about. At that particular point in time, he and Mr Lorenz were discussing a range of things including the long-term financial plan of the Authority, the transfer station at Heathfield and the possibility of a deposit on items service operated through the transfer station. Mr Aitken agreed that the call may have been to inform Mr Lorenz that AHC was planning to instruct East Waste to take AHC’s waste to Brinkley.645 (3728-3729)

As mentioned, Mr Lorenz sent an email to the Authority’s Board members confirming that the motion contained in his email of 10 February 2013 was passed unanimously.646 He reported that the Deed of Settlement and the s 103E

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645 East Waste collected the municipal waste in the AHC district for AHC.
646 Ex P7: 226.
Deed had been executed “on our side” and that SWR and the Harveys had agreed to extend settlement by two days until the close of business Wednesday. He added, “[w]hilst not ideal for us or our customers we shall do our best to cope operationally and transition customers to the Brinkley Landfill”. Mr Grenfell responded saying, “[t]hat’s great Michael, can you please advise Marina at FRWA of the changes as they effect them”. In cross-examination it was put to Mr Grenfell that:

Q The changes affected them because you expected at that time that your waste would move across to Brinkley.

A No.

Q You wanted her to start making those changes from the date of settlement.

A No.

Q And I suggest to you that that was the view that you held; namely, that your waste should move with the authority to Brinkley.

A No.

Q It was certainly your preference, wasn’t it.

A Not at that stage.

Q In general terms your preference was that the waste would move with the authority.

A Not at that stage.

Mr Grenfell said that increased cost was one reason why at that point in time AC’s waste should not move. He was asked:

Q But you thought that those increased costs would be within your level of delegation.

A That’s right but it’s still increased costs.

Q A matter of $20,000-odd or less per annum.

A Yeah.

Q That was no reason not to make the move.

A At that stage, as we hadn’t had any reason that we had to move, we would continue to support the authority, we wanted to support the authority but from a long-term perspective, it wasn’t sorted.

Q Your preference was to move with the authority to Brinkley.

647 Ex P7: 226 at p 2210.
648 Ex P7: 226 at p 2210.
649 Ex P7: 226 at p 2210.
A  Not at that stage.

Q  And indeed -

A  In the longer term we wanted to support the authority but, at that early stage, a lot of the stuff hadn’t been sorted out, hadn’t been resolved.

Mr Grenfell agreed that potentially AC’s waste would move to Brinkley subject to certain issues being sorted out which included transport costs. (3533) He said he expected that increased cost would be off-set by a greater efficiencies achieved in the operation at Brinkley. (3533-3534) He said: (3535)

Q  So that’s [transport costs] not, so far as your council responsibilities were concerned, a reason against moving to Brinkley, is it.

A  Correct.

Q  You see, the only issue about the move to Brinkley was a matter of logistics, actually getting it organised.

A  One of, yes.

A  Well it was the only issue, wasn’t it.

A  Yes.

In the light of that evidence, cross-examination returned to Mr Grenfell’s email of 12 February 2013. Mr Grenfell said that in relation to the request in his email that Mr Lorenz advise Ms Wagner at FRWA of the changes, he meant the question of invoicing and who would greet trucks at Hartley. (3535-3536) He explained that by invoicing he meant from whom the relevant account would come. (3536) There were operational details that needed to be worked out between the Authority and FRWA he said. (3536-3537)

Mr Grenfell gave evidence that there were discussions with Mr Lorenz about there being some justification for either the council or Mr Grenfell to move AC’s waste to Brinkley. Mr Grenfell said: (3537-3539)

Q  And that conversation had been something that had cropped up between the two of you from time to time over the previous month, hadn’t it.

A  Not - I don’t believe before 2012.

Q  Just to be clear, we’re talking the last half of 2012, the first few months of 2013. Do you understand the timeframe I’m asking you about.

A  Yes, yes, yes, yes.

Q  So in that timeframe of - just let me ask the question -

A  Okay.
Q - and feel free to agree or disagree, depending on what I ask you. The last half of 2012, the first two months of 2013 until settlement was a time when there was negotiation with Southern Waste ResourceCo, wasn’t there.

A That’s correct.

Q And for a time there was uncertainty about what would happen.

A Correct.

Q At a later point in time – we’ll come to the precise time in a moment - at a later point in time it became clear that the authority was going to move to Brinkley.

A Yes.

Q And Mr Lorenz wanted to know whether your waste was going to move with the authority.

A Yes.

Q And you had a conversation about that from time to time.

A Yes.

Q In the period that I’m describing.

A I don’t believe that we had those conversations in that period, I believe it was after 2013.

Q It was an obvious issue for the authority to know what waste it would or wouldn’t have, wasn’t it.

A The authority was pretty focused on resolving the Hartley issue. I don’t recall having discussions with Mr Lorenz about where our waste was going.

Q That’s not true, is it, because both you and he were vitally interested in what waste the Authority could command to meet the expenditures that it was incurring in setting up and running Brinkley.

A Obviously, as part of the Authority’s going forward, they were working on the assumptions that all the member council waste to go across.

Q That was your preference, wearing your hat as a board member.

A From a - from a board member, yes.

Q And so far as your capacity as a council officer was concerned, you needed some justification.

A That’s correct.

Q And if you could get that, then it would be your recommendation to your council to move.
A But those recommendations needed to be placed on the other offers that were available as well.

Q Yes, whatever those offers might have been.

A That’s right.

Q But your preference was to stay with the Authority.

HIS HONOUR: Personal? Or council?

XXN

Q In both capacities.

A The information they had - had to hand at that date was that the Authority was a known thing, known entity that we were working with and to be able to move forward at that stage without the other offers being on hand -

Q So whether it was in your capacity as -

A - for those things.

Q Sorry, you finish.

A Well, at that stage the Authority was the known thing and that's - that had been our - the way we'd been operating. Until other offers come in, that's the way we were doing it.

Mr Grenfell agreed that he was comfortable dealing with the Authority, that there had been no competition so far as landfill was concerned and that the idea of competition was something that had not seriously been considered or even planned for. (3539-3540) However, AC did not use the Authority for any services other than the landfill it provided. Accordingly, if AC were to get “real good rates out of Southern Waste ResourceCo and stay at the Hartley site, [it] would have been better for us”. (3540) He added that if AC could get an operator that provided everything at the Hartley site there was no reason why AC would not continue to deposit its waste there. (3540-3541) If a different operator came in and operated Hartley providing the same service but with similar rates and long-term tenure, there was also no reason why AC would move. (3541)

On 12 February 2013 AHC instructed East Waste to dispose of AHC’s waste at Brinkley. In making that decision Mr Aitken did not necessarily require a long-term rate. He was searching for certainty beyond the nine months provided for in clause 9 of the Deed of Settlement. (3711-3712) He acknowledged that equity in the Authority was a relevant factor in his decision. Further, Mr Aitken had taken into account the other benefits and services which came with being a member of the Authority. (3712) On balance, he felt that it was appropriate, in the absence of any offer from SWR or anyone else, for AHC to maintain a service provision relationship with the Authority and have its waste moved to Brinkley.
Mr Aitken agreed with the proposition that the Authority did not control the constituent councils insofar that they were free to determine where they disposed of their waste. Mr Aitken was not directed by anyone from the Authority nor anyone from the other constituent councils to dispose of AHC’s waste at Brinkley. (3714)

Mr Aitken could not recall if he advised Mr Salver to inform Mr Lorenz of his decision to move AHC’s waste to Brinkley. (3998) There was no email from Mr Aitken notifying Mr Lorenz of the decision, but stated that the decision may have been communicated to Mr Lorenz by other means. (3998-3999) Mr Aitken had no recollection of when or how he advised Mr Lorenz of his decision. (3999-4000)

On 13 February 2013 the Authority ceased operations at Hartley. The following day, SWR commenced operations at Hartley. In his evidence Mr Brown said that upon commencing operations at Hartley, he had no reason to think that the constituent councils would not continue to dispose of their waste at Hartley. (630)

On the morning of 14 February 2013 Mr Lorenz sent an email to the Authority’s Board members.650 He advised them that settlement occurred the previous day, including payment of the settlement amount.651 He further advised that all equipment had been moved to Brinkley and that the Authority was now focused on moving customers from the Hartley landfill to the Brinkley landfill. He added that the constituent councils’ kerb-side collected waste was currently going to Hartley but would progressively move to Brinkley as collection transport times and schedules were revised. During the period of transition, the Authority had extended its opening hours at Brinkley. He brought his email to an end by referring to ongoing negotiations with the EPA regarding “some Brinkley cell requirements”.652

On 15 February 2013 Mr Fairweather met with Mr Lorenz at a café on Rundle Street called “Simply Coffee”. Mr Fairweather made notes of the conversation during the course of the meeting which were tendered in evidence.653 During the course of the meeting Mr Lorenz provided Mr Fairweather with a copy of the Hartley customer list. Mr Fairweather’s notes record:654

- M. Lorenz

→ Business as usual for us at Hartley.

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650 Ex P7: 231.
651 See Ex P7: 230.
652 Ex P7: 231 at p 2243.
653 Ex P7: 235.
654 Ex P7: 235 at p 2257.
JF asked and re-confirmed by ML that all ok to hold rates + keep taking all member council waste.

JF pushed for greater clarity.

Lorenz then told me about Hartley Brinkley at Murray Bridge.

Informed that over $1 million investment that the authority had to recoup.

Accordingly taking Murray Bridge waste to Brinkley but others would stay due to extra cartage.

We closed this meeting on the understanding that we would continue to present to AHRWMA councils + ML wouldn’t stand in our way.

i.e. would let AHRWMA councils make a commercial decision.

As indicated, during the course of the meeting Mr Fairweather asked Mr Lorenz whether it was acceptable to hold the gate price charged to the constituent councils in order to continue taking waste from them. Mr Lorenz confirmed that that was so. Mr Fairweather said he stressed the issue and said words to the effect, “[s]o you are sure that we can continue to invoice the member Councils at the same rate and they will keep sending their waste to us?” Mr Fairweather said Mr Lorenz responded by saying that the Authority was developing the Brinkley site, that it had invested over $1 million into that site and that the Authority was looking to recoup that investment. Mr Lorenz said that RCMB waste would go to Brinkley but the waste to the other councils would stay at Hartley because of the extra cartage cost involved. The meeting ended with Mr Fairweather saying that SWR would continue to market itself to the constituent councils in order to attract their waste to Hartley, and Mr Lorenz replying that he would not stand in SWR’s way and that each of the constituent councils made their own commercial decisions.

Mr Fairweather was cross-examined about the meeting. He was adamant that Mr Lorenz told him that it would be business as usual for SWR at Hartley and he was equally adamant that he asked Mr Lorenz if it was acceptable to hold the existing rates charged to constituent councils. Mr Fairweather confirmed that he asked Mr Lorenz if Hartley would continue to take waste from the constituent councils. He said that was one of the express reasons why he was sent to the meeting by Mr Brown. It was put to Mr Fairweather that during the course of the meeting he asserted that he thought the constituent councils were required to take their waste to Hartley. He could not recall making such assertion. It was also put to him that Mr Lorenz explained the optional rate that was available to constituent councils under the Deed of Settlement. He could not recall this being

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655 Ex P38 at [55].
656 Ex P38 at [56].
657 Ex P38 at [56].
658 Ex P38 at [57].
said. (1772) His source of information as to the amount to be charged to constituent councils was other than the Deed of Settlement. (1773) He was asked:

**Q** Did you think that the member councils had the legal right to deposit waste at Hartley at $37 a tonne for a period.

**A** Absolutely, because I asked and pressed Mr Lorenz at the 15 February meeting on three separate occasions to make sure that I could confirm that member councils were able to continue to deposit waste at Hartley at the pre-existing rate.

**Q** What was the basis or source, what was the source for the legal right, in your understanding. That is the legal right of the member councils to deposit waste at Hartley at $37 a tonne.

**A** At that point in time, I had no - I was asking the Executive Officer of the Authority to confirm that to me. I didn’t press him on what aspect of the agreement or otherwise that existed between the councils and the Authority allowed them to do that. I just asked him that it was possible.

Mr Fairweather confirmed that he had not seen the Deed of Settlement. (1774) Mr Fairweather was unaware of the “legal right” to the existing rate as provided in the deed. (1775) It was put to Mr Fairweather that it was for SWR to decide who could deposit waste at Hartley and at what cost. This was conceded, however, Mr Fairweather maintained that he sought clarification on the matter from Mr Lorenz. He repeated in cross-examination that this was one of the reasons that Mr Brown sent him to the meeting, “to hear it from the horse’s mouth”. (1775) He explained that in the introductory meetings SWR had said that it did not want to change anything and wanted to offer pre-existing rates on settlement. (1775)

Mr Fairweather said that when he asked Mr Lorenz whether Hartley would continue to receive waste from the councils, Mr Lorenz’s response was “[y]es, should be business as usual at Hartley” or words to that effect. (1776-1777) Mr Fairweather conceded that towards the end of the meeting, Mr Lorenz said that it will ultimately be up to each council where they choose to dispose of their waste. To that end, Mr Lorenz said he could not say what the constituent councils would or might do. He maintained that he “pressed” Mr Lorenz on whether it would be business as usual at Hartley. Mr Fairweather said he then asked, “Michael, I need to make sure I understand this point properly. Is it business as usual at Hartley?” (1777) Mr Lorenz was said to have responded, “[y]es, but you do understand there’s a million dollars been invested at Brinkley”. (1778) It was then that Mr Lorenz said that at some point the Authority had to recoup its investment. It was Mr Fairweather’s evidence that that was the first time he learnt of the magnitude of the investment that the Authority had made at Brinkley. (1778) When asked about his understanding of the Brinkley site prior to the meeting, Mr Fairweather said he understood it to be a “small transfer station and very small landfill” and that that was the extent of his knowledge. (1781) He could not recall learning anything from Mr Brown about Brinkley.
(1781) He could not recall speaking with Mr Pucknell about the magnitude of the investment at Brinkley. (1778)

After his meeting with Mr Lorenz and in the light of the reference to the $1 million investment in Brinkley by the Authority, it was plain to Mr Fairweather that the Authority customers were going to be harder to get than SWR first thought. (1787) The size of the investment indicated that the Authority was looming as a major competitor. (1788) Mr Fairweather did not have a clear recollection of his response to Mr Lorenz’s disclosure. He thought he said words to the effect, “[t]his could pose a problem for us now, Michael”, or “[t]his is going to make things difficult”, with Mr Lorenz saying, “[w]e’re not going to stand in your way, push ahead”. (1789) Mr Fairweather said he was worried. (1789) He rang Mr Brown immediately after the meeting and whilst he was in the street. Upon being informed of the investment made at Brinkley, Mr Brown said, “[y]ou’re fucking kidding me”, before adding, “[a]ll these councils, it’s always a closed shop, it looks like we’ve, you know, been done again”. (1790)

During the meeting Mr Fairweather told Mr Lorenz that it was SWR’s intention to continue to offer contracts to the constituent councils to receive waste at Hartley. No offer had been made as at this time to any of the councils and no offer was made until much later in 2013. Mr Fairweather maintained that Mr Lorenz told him that he, meaning the Authority, would not stand in the way of any deals. (1782)

Mr Fairweather was asked why he did not take any action upon learning that the Authority was a more significant competitor than previously thought. He said that in his view it became more imperative to approach commercial customers because he considered SWR had a more “unencumbered run at them”. (1792)

In his evidence about the meeting at Simply Coffee, Mr Lorenz recalled that there was mention of a significant amount of money in terms of the investment or building of the Brinkley landfill. It was true to say that recovery of the investment was part of the Authority’s long-term financial planning. Mr Lorenz agreed that he may have indicated that it was likely that RCMB’s waste would go to Brinkley due to the proximity of the landfill to the council region. (4862) He did not say anything about the other constituent councils going to Brinkley. Further, Mr Lorenz disagreed with the suggestion that he raised the topic of extra transport costs with Mr Fairweather. He said he did not say to Mr Fairweather that because of extra transport costs the constituent councils with the exception of RCMB would stay at Hartley. He agreed that the topic of whether SWR could continue to present itself to the constituent councils was raised. However, he could not recall there being any reference to contracts being offered. He denied that he said he would not stand in SWR’s way in relation to any attempt to enter into contractual relations with the constituent councils. (4863) He disagreed that
he said anything to Mr Fairweather about the councils making their own commercial decisions. (4864)

On Monday, 18 February 2013 Mr Fairweather learned that AHC had ceased to dispose of waste at Hartley. (1784) He did not respond to the news by calling Mr Lorenz or AHC. He did not contact the Authority. SWR did not do anything about the loss of AHC’s waste stream for some months. (1785)

On the same day, 18 February 2013, Mr Pucknell received an email from an SWR employee working at the Hartley landfill setting out the loads received. 659 Mr Pucknell forwarded the email to Mr Fairweather and Mr Brazzale with the question, “[n]o MB or Adelaide Hills?” 660 Mr Brazzale quickly responded indicating that he had spoken with an SWR employee at Hartley and that DCMB did deposit waste at Hartley but AHC did not. 661 In a subsequent email sent on the same day to Mr Pucknell, Mr Brazzale commented: 662

Brinkley must be open. Adelaide Hills is disappointing they are travelling an extra 20 mins cartage would be a lot more

On 18 February 2013 Mr Lorenz sent a lengthy email to Mr Peters. 663 The primary purpose of the email was to advise Mr Peters that Brinkley was now open and in a position to receive DCMB’s waste. In addition, it advised: 664

… The Authority will continue to charge the same waste disposal fee. During this period we will assess the operating costs and project this into our long term financial plan model. Whilst initially (between now and end of this financial year) the cost per tonne to operate for the Authority will be higher I am confident that we will be able to ultimately reduce the cost per tonne to equivalent or potentially less than at Hartley and these savings will be passed onto Member Councils. For this to work though [we] will require all Member Council waste to come to the Authority’s new Brinkley Landfill site.

We should have enough information in the next few months and will be able to advise of any fee structure changes. Any proposed adjustments following a review of the long term financial plan will be advised as soon as possible to Member Councils.

Mr Lorenz apologised for the speed with which settlement had taken place and mentioned that the Authority had hoped for a longer transitional period. He then stated: 665

The DCMB as an Equity Member of the AHRWMA are entitled to reduced member rates and also benefit from any increase in equity in the Authority that can be reflected back as dividend payments or reduced disposal rates. To assist the DCMB in assessing any potential route/scheduling impacts with its domestic waste collection transporter and its

659 Ex D7: 240.
660 Ex D7: 240 at p 2268.
661 Ex D7: 240.
662 Ex D7: 240 at p 2267.
663 Ex P7: 236.
664 Ex P7: 236 at p 2258.
665 Ex P7: 236 at p 2258.
own operational waste in coming to the new Brinkley Landfill the Authority has extended the operating hours of the Brinkley facility over those at the Hartley Landfill. The site will be open from 7.00am until 5.00pm Monday to Friday and can potentially be accessed on weekends should you require. In addition if any of your transporter’s drivers are running late during this transition period we will stay open if they contact us to let us know.

Mr Lorenz stated that he was hopeful that DCMB would be able to make the adjustment to sending its waste to Brinkley with minimal issues.

On 18 February 2013 Mr Lorenz sent emails to Ms Wagner and Mr Grenfell at AC and to Mr Aitken and Mr Salver at AHC in similar terms to the email sent to Mr Peters.

Later in the afternoon of 18 February 2013, Ms Wagner sent a reply to Mr Lorenz copying in Mr Grenfell. She thanked Mr Lorenz for his email and commented that she had received an account application form from SWR suggesting that the transitional period may be short lived. She advised that FRWA would look at its tour planning and that the Authority’s weekend opening offer may be of interest. She requested that a price list be forwarded to her as she was in the middle of compiling next year’s budget. She added in her email that it would assist FRWA if Brinkley was open on New Year’s Day. Mr Lorenz responded later that evening indicating that the Authority was prepared to look at opening on New Year’s Day and advised that the current price per tonne to landfill was $37.70 per tonne plus the $21 per tonne EPA levy. He indicated that the coming year’s rate had not yet been confirmed. Normally, the disposal component was adjusted in line with CPI and any increase in the EPA levy was simply passed on. In short, it was expected that the total cost of disposal of waste per tonne to landfill would go from $58.70 to $68.80. That price could not be confirmed until the anticipated increase in the EPA levy was known.

Mr Grenfell was taken to Mr Lorenz’s email of 18 February 2013. He agreed that one of the reasons for AC to continue to deposit waste with the Authority was that as an equity member, AC was entitled to reduced rates. He agreed that Mr Lorenz’s email was written on the assumption that AC’s waste would go to Brinkley. Mr Grenfell said his thinking was that AC’s waste would more than likely go to Brinkley. He may have had conversations with Mr Lorenz before that date to that effect. He agreed that from the middle of 2012 leading up to February 2013, he had said to Mr Lorenz that it was more than likely that AC’s waste would go to Brinkley.

Mr Lorenz did not accept that his email to Ms Wagner was in the nature of advice about arrangements necessary to transition AC’s waste to Brinkley. He

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666 Ex P7: 238.
667 Ex P7: 241.
668 Ex P7: 238.
669 Ex P7: 238.
said that the Authority had put in place transitional arrangements that facilitated the receipt of constituent councils’ waste including AC’s. (4848) Mr Lorenz did accept that he assumed that AC’s waste would come to Brinkley, hence his email appraises Ms Wagner of the steps necessary for that to occur. (4849)

Mr Lorenz agreed that in the week commencing Monday, 11 February 2013, he had a telephone conversation with Ms Wagner. He said that in that conversation he updated Ms Wagner on what had been occurring and the Authority’s move to Brinkley. (4850) The discussion did not include transitioning AC’s waste to Brinkley. (4851)

The Authority’s Board met on 21 February 2013. A verbal report was given during the course of the meeting regarding the move from Hartley to Brinkley. The minutes record that the Board simply resolved to accept the report. (4852)

On 26 February 2013 Mr Lorenz updated Mr Bond, Mr Aitken, Mr Stuart and Mr Dinning on the move to Brinkley. In the email exchanges that followed between the Chief Executives and Mr Lorenz it is plain that the Authority was aware of the likelihood that anything put in writing may become public and/or be used in legal proceedings. The email exchanges also indicate that the Authority was in the process of reviewing its long-term financial plan and projected tonnages received into Brinkley, including on the basis that DCMB may potentially hold back its waste.

On 27 February 2013, Mr Aitken, Mr Salver and Mr Lorenz had one of their regular catch-up meetings. Mr Salver, as usual, took notes of the meeting. Mr Salver’s notes record the meeting being updated on the settlement agreement and the move to Brinkley, including that the EPA had approved of cell 6 at Brinkley for use as of 15 February 2013. Mr Lorenz also advised the meeting that he had met with SWR to discuss the Authority continuing to dispose of its waste at Hartley and the associated charges. The meeting was advised that SWR was attempting to attract the Authority’s customers to Hartley. It appears that the transitional arrangements with some customers were yet to filter through and, accordingly, Mr Lorenz was asked to contact them and remind them of the switch to Brinkley. The third item in Mr Lorenz’s notes related to the capacity at the Brinkley site. The current cell had an anticipated life of two years. Planning for the future had to commence. The last item was the review of the long-term financial plan and assessment of the risk of losing DCMB. Mr Salver’s notes record:

Long Term Financial Plan Review & Mt Barker Council risk: Michael advised that he has heard that SWR has approached Mt Barker Council to obtain their waste stream for the
Hartley site. This would have an impact on the LTFP of the Authority if DCMB diverted its waste stream to Hartley as opposed to Brinkley. It was suggested that this issue be flushed out at the next M&O Committee.

On 1 March 2013 Mr Brown asked Mr Pucknell to forward a paper entitled, “Hartley Information Paper”, which Mr Pucknell had prepared, to Mr Heard and Mr Lucas. The Information Paper appears on its face to have been produced in large part from the information in or attached to the emails Mr Pucknell sent to Mr Brown and Mr Lucas on 7 and 8 November 2012.

The Information Paper commenced by advising the reader of the location of Hartley and that SWR operated the landfill under a licence agreement with the Harvey family. The paper then identified the nature of the asset and accompanying liabilities acquired by SWR. Under the heading, “Other Issues”, the paper stated:

The Authority is looking to re-open its Brinkley Landfill (at Murray Bridge) and divert the Council Waste to their site. The Murray Bridge site has transport disadvantage of $15 / tonne versus Callington (For waste from the Adelaide side of Callington). The loss of volume remains a risk but location wise Adelaide and Mt Barker should continue to come to Callington.

We have modelled the landfill without the council volume (10k tonne scenario) and minimum royalty.

I understand this to be an expansion of Mr Pucknell’s understanding evident in his 7 November 2012 email that Brinkley was a competitor.

Under the heading, “Customers”, the Information Paper advised that Hartley accepted approximately 40,000 tonnes of mainly kerbside waste from the constituent councils. Those receipts were supplemented by smaller volumes of commercial waste from local companies and outlying councils. With respect to future growth, the paper suggested that tonnage may be obtained from SITA, Solo and the Mitcham Council. There is then a brief reference to anticipated costs moving forward before the paper concludes:

We see this as a great asset that will compliment our portfolio and support our SA Waste strategy. At $900k plus costs it is a good buy and we see earnings potential of $500k per annum in the medium term.

Attached to the Information Paper were three financial models for the Hartley landfill each reflecting a different scenario. The scenarios differed according to the tonnage received. The first scenario calculated a gross profit of $137,309 on receipt of 42,206 tonnes of waste of which 32,206 tonnes is council...
waste. The second, a loss of $21,600 where no waste is received from the councils, and the third, a gross profit of $524,360 upon receipt of 80,000 tonnes, 20,000 tonnes coming from the councils.

At the time of the email from Mr Brown to Mr Pucknell telling him to send the Information Paper on to Mr Heard and Mr McMahon, SWR had been on site at Hartley for two weeks. In that time RCMB had not sent any waste to Hartley and neither had AHC. Both AC and DCMB continued to dispose of their waste at Hartley. The Information Paper sounded no alarm bells.

DCMB was due to meet on 4 March 2013. A report prepared for the meeting revealed some of the council’s anxieties following settlement. The purpose of the report was to inform DCMB that the Hartley landfill had been disposed of. The report noted:

Due to a very short settlement period to execute the contract, a full assessment needs to be made on commercial impacts.

Under the heading “Discussion”, the report noted:

9. AHRWMA now operates out of Brinkley within the Rural City of Murray Bridge Council area and would like to retain Member Councils business.

10. Southern Waste Resource Co, having purchased a new business and would also like to retain Member Councils business.

11. There are a number of commercial arrangements between Monarto Quarries and AHRWMA that will have impacts on Council that need to be worked through.

12. Approaches have already been made by Southern Waste Resource Co to continue such commercial arrangements, e.g. access to the weighbridge.

13. As the settlement period was only 48 hours instead of 30 days Council will need to determine the impacts on this major change in service provision given the significant additional distance of cartage to Brinkley.

14. There are further flow-on impacts from this sale by AHRWMA in relation to Monarto Quarries.

The Report concluded with the following:

As a result of a major business change due to the sale of the Hartley landfill from AHRWMA there is expected to be a significant increase in costs. Further information in relation to the possible impact on this Council’s budget is being sought. Ongoing assessment of waste disposal at that site will remain a risk issue.
On 13 March 2013 Mr Aitken, Mr Salver and Mr Lorenz had another of their regular meetings. Mr Salver’s notes of the meeting show that the Authority was adjusting to change. That included undertaking its own modelling on the basis that it may lose tonnage to SWR at Hartley. Mr Lorenz’s modelling indicated that the Authority would break even if it received 20,000 tonnes but that the optimal tonnage was 40,000 per annum. His modelling accounted for a 6,000 tonne loss to SWR. There was discussion at the meeting of the equity distribution amongst the constituent councils, models of which had been prepared to demonstrate adjustments in the event that DCMB and AC did not move their waste to Brinkley. Mr Salver’s notes state that:

… It was clear that each Council needs to decide how much of its waste stream will be going to Brinkley. In order to make this decision we all need the updated financials from Michael, including the additional transport costs of getting waste to Brinkley. Michael will circulate these figures shortly. We will then need to decide on how much of our waste stream will go to Brinkley.

On 13 March 2013 Mr Lorenz sent an email to Mr Bond, Mr Grenfell, Mr Salver and Mr Peters, the members of the M & O Committee. Attached to that email were two documents. The first document was an “equity comparison” comparing the constituent councils’ equity in the Authority if all continued to dispose of their waste streams at Brinkley in comparison to the position where only AHC and RCMB did so. The second document was a map showing how to get to Brinkley. Mr Lorenz had not previously undertaken any financial modelling.

On 30 March 2013 Mr Peters sent an email to Mr Lorenz. The purpose of the email was to arrange a meeting between Mr Lorenz, Mr Peters and Mr Aitken to discuss DCMB’s waste disposal and the status of the Monarto Quarry sale. Mr Lorenz responded on 3 April 2013. He expressed the opinion that the sooner the meeting took place the better. He added that the annual business plan and long-term financial plan were close to being ready and each would be affected if DCMB did not dispose of its waste at Brinkley. Mr Lorenz hoped to have some financial modelling of different scenarios to Mr Peters later that day.

As mentioned above, on 18 March 2013 Mr Brown wrote to Mr Aitken at AHC. In the opening paragraph to his letter Mr Brown referred to the meeting that he and Mr Fairweather had with the AHC executive team in November 2012. He stated that SWR was enthusiastic about the opportunity of working with AHC moving forward. In the second paragraph, he expressed his concern “at recent events with regard to your council’s waste”.

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685 Ex P7: 261. Mr Salver’s notes suggest the meeting was on 14 March 2013. He corrected this in his evidence. (4032)
686 Ex P7: 261 at p 2335.
687 Ex D7: 259.
688 Ex D7: 266.
689 Ex P7: 264.
690 Ex P7: 264 at p 2354.
SWR’s recent purchase of the Hartley landfill after negotiations in good faith with the Authority. He referred to SWR as having given an undertaking that disposal rates would not be changed in the short term.

In the third paragraph, he referred to SWR’s previously stated intention to enter into rate discussions with constituent councils to lock in long-term commercially viable agreements. He expressed SWR’s continued commitment to doing so.

In the next paragraphs of his letter Mr Brown said:

Subsequent to finalising the purchase of Hartley, we have been told by Michael Lorenz, Executive Officer of AHRWMA, that steps were taken by The Authority well in advance of settlement to develop the Brinkley Landfill in Murray Bridge. In order for your waste to now be dumped at the Brinkley landfill, there is additional cartage of approximately 80-100km round trip. Along with the significant cost impact of the additional cartage, there is also the carbon impact to be considered.

As you are aware, Southern Waste ResourceCo removed the post-closure liabilities from AHRWMA for the Hartley site; something that was extremely important to Michael Lorenz at settlement. Accordingly, we cannot understand the move to Brinkley, as by moving to another landfill The Authority has re-activated these liabilities and in turn re-exposed AHC to same.

Finally, without the disposal volume as discussed pre-settlement with the Authority and its member councils, the commercial viability of Hartley may be threatened, whilst concurrently another landfill is to be opened at great expense. I’m sure you would agree this seems paradoxical.

Mr Brown then concluded his letter expressing the desire to discuss the matters to which he had referred urgently.

In cross-examination Mr Brown agreed that his letter of 18 March 2013 was the first contact he had had with Mr Aitken since the meeting in November 2012. Mr Brown denied that his letter was intended to put pressure on Mr Aitken. He said that SWR was still trying to work “very commercially” with the council. It was put to Mr Brown that the statement in his letter that SWR became aware of steps taken by the Authority to develop Brinkley subsequent to finalising the purchase of Hartley was false. He denied that to be so. He said that whilst SWR knew the Authority was moving to Brinkley it had no understanding that prior to settlement and that the Authority was reliant on the constituent councils’ waste and would compete for the same. He said “[i]f we’d known that, we would never have settled”. Taxed again with the false aspect of his letter, he said that SWR knew the Authority was going to Brinkley but had no understanding of what their business model was. Counsel put the question a number of times. Ultimately:

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691 Ex P7: 264 at pp 2354-2355.
Q  You knew that steps were taken by the authority well in advance of settlement, to
develop the Brinkley landfill in Murray Bridge.

A  Yes.

Q  You knew that in August 2012.

A  Yes.

Q  Because you had the minutes of the meeting of 8 March 2012 sent to you by
Mr Levinson stating that in August 2012.

A  Yes.

Q  It was misleading to tell Mr Aitken that you only learnt this subsequent to
finalising the purchase of Hartley.

A  Well what we were saying was we had no comprehension that all of the waste was
going there.

Taxed further with the allegation that his letter was false and misleading,
Mr Brown conceded ultimately that it might be read that way but explained that
what he was trying to say was exactly what he had repeated on numerous
occasions in his evidence, namely, that SWR could not understand the
Authority’s and the constituent councils’ strategies and that had they made
known their plans from the outset SWR would have stayed well away from the
opportunity to operate the Hartley landfill. (815)

Cross-examination further pressed the fact that the letter was misleading as
to SWR’s state of knowledge regarding Brinkley. Mr Brown would not concede
that it was. Ultimately, his explanation was that SWR was “extremely upset that
Mr Aitken had said to us in our November meeting that we could do commercial
deals and they would honour those deals, and our view is that they had already
made up their mind to go to the Brinkley facility”. (817) Mr Brown attempted to
explain his letter as reflecting SWR’s state of mind upon learning of “their entire
strategy”. (817)

In his statement, Mr Aitken said he was surprised to receive the letter of
18 March 2013.692 Whilst there had been a general discussion in December 2012
nothing in the way of a formal proposal had been put to AHC and SWR had not
followed up with AHC since the December meeting. Furthermore, to
Mr Aitken’s knowledge his council had not given any commitment that it would
enter into a long-term agreement with the Authority. Mr Aitken replied to the
letter.693 At the time of his reply he said was still giving consideration to the
position of AHC in relation to its future waste stream.

692  Ex D123 at [47].
693  Ex P7: 273.
In his oral evidence Mr Aitken confirmed that after the meeting of 6 December 2012 with Mr Brown and Mr Fairweather, he did not hear from SWR again until 20 March 2013 when he received Mr Brown’s letter of 18 March 2013. In the intervening period AHC had not received any offer from SWR that would govern the long-term disposal of its waste at Hartley. (3716) Mr Aitken was taken to the third paragraph of Mr Brown’s letter where it stated that SWR “indicated that we would enter into rate discussions with our intent to “lock in” long-term, commercially viable agreements with member councils of AHRWMA”. 694 In that same paragraph it also referred to an assurance given in the pre-Christmas meeting that rates going forward would be in line with the disposal rates that AHC was previously paying at Hartley. Mr Aitken said he could recall no discussion along those lines in the meeting of December 2012. He said there was no discussion of rates at all during that meeting. (3717)

Mr Aitken said that as at 20 March 2013, in relation to any proposal, he would have had regard to the long-term ability of SWR to meet the needs of AHC. Mr Aitken was concerned with the ability of SWR to run a landfill, given the Authority’s experience with the landlord. He was unaware of SWR’s financial viability and did not seek information on the topic. All he could say was that SWR was an organisation unknown to AHC. (3763)

On 10 April 2013 Mr Aitken, Mr Salver and Mr Lorenz met. As was customary Mr Salver made notes of the meeting. 695 The first item discussed was the letter that AHC had received from SWR suggesting that if AHC did not dispose of its waste at Hartley, it may have to bear the post-closure liability. Mr Salver recorded that Mr Lorenz was to forward a copy of the Deed of Settlement to AHC to assist in responding to the SWR letter. Next Mr Salver’s notes record that a meeting took place between Mr Lorenz and Mr Peters on 9 April 2013. The notes state: 696

Their concerns relate to the quarry operations at Hartley for which DCMB still have about 7 years lease over and is losing an estimated [redacted in original] per annum for this business. They therefore wish to get rid of it and are trying to handball the quarry to ResourceCo. Due to this issue and their concerns over increased transport costs to take waste to the Brinkley site, DCMB is currently taking their waste stream to Hartley. This will have an impact on the Authority’s LTFP if the situation continues in the long term. This matter will be raised at the forthcoming Board meeting to ensure that all member Councils continue to take their waste stream to Brinkley.

Lastly, Mr Salver noted a discussion about the possibility of a one-off dividend being paid to the constituent councils to defray the additional transport cost of taking waste to Brinkley.

694 Ex P7: 264 at p 2354.
695 Ex P7: 268.
696 Ex P7: 268 at p 2360.
On 18 April 2013 Mr Lorenz sent an email to Ms Stokes. That email was the third in a chain dealing with the date of the next Board meeting. As part of his email to Ms Stokes, Mr Lorenz commented that the Authority was not ready for a Board meeting “due to not knowing DCMB’s intentions with their tonnages which are still not coming to Brinkley”. He went on to express his confidence that DCMB would soon start disposing of its waste at Brinkley. He added:

… To get DCMB across the line I think that we will need to suggest making a dividend payment to all Member Councils. Somewhere in the vicinity of a one off payment of $100-150k split amongst members according to their current equity balance (DCMB is currently 40%). This will offset the increase in transport cost for DCMB that Andrew Stuart has raised with me as an issue and part of the reason that they haven’t brought their tonnes to Brinkley yet.

Mr Lorenz proceeded to advise that the increased transport cost to DCMB was in the region of $50,000-$60,000 per annum and that the net cost to the Authority of DCMB not bringing its waste to Brinkley was around $300,000 plus per annum. He concluded, “[f]ingers crossed it gets sorted soon”.

In evidence Mr Lorenz agreed that without DCMB’s tonnage the viability of Brinkley was at risk because of the increased gate price that may need to be charged. (4677) Once the price climbed to a point where it was non-competitive, the future of the Authority would need to be discussed. (4678)

On 18 April 2013 Mr Fairweather came across Mr Aitken at a local government seminar. Mr Fairweather enquired when Mr Aitken intended to respond to Mr Brown’s letter of 18 March 2013. Mr Aitken informed Mr Fairweather that he planned to discuss his response with Mr Salver and that he was considering AHC’s long-term financial planning and the investment that had been made at Brinkley.

According to Mr Fairweather in around April 2013 he had a telephone conversation with Mr Salver. Mr Salver could not recall this conversation. (4035) It was Mr Fairweather’s recollection that Mr Salver said that AHC would not be dumping at Hartley under any circumstances as he would support the Authority commercially and that he would follow the Authority’s recommendation on where AHC should dump its waste. Mr Salver did not want to discuss the matter any further as he had made up his mind. When Mr Fairweather asked Mr Salver why he was making this decision, considering it would increase transport costs, Mr Salver responded by stating that the increased
transport costs were carefully considered as part of AHC’s long-term financial plan and was not a concern for the council.\textsuperscript{706} In his evidence, Mr Salver denied that he would have said that under no circumstances would AHC be disposing of its waste at Hartley. (4035)

On 18 April 2013 Mr Grenfell instructed FRWA by email to commence disposing of AC’s waste at Brinkley.\textsuperscript{707} He explained that the waste deposited at Brinkley had an impact on the dividend that AC received from the Authority. The following day Mr Grenfell received an email from Ms Wagner at the FRWA.\textsuperscript{708} She advised:\textsuperscript{709}

Hi Simon

We are certainly working on this but it is not that easy; the diversion to Brinkley will add one hour to the working day of the driver and we need to check per round regarding legal work/driving times.

We also need to cost this for council so that you know what the required additional funding [is].

I will be in contact as soon as we have completed the review.

Thank you

Marina

Mr Grenfell confirmed in cross-examination that Ms Wagner’s email set out a number of logistical issues which required review before the waste could be moved to Brinkley. Mr Grenfell agreed that his instruction was to move the waste. (3552) By this time, he had received several costings over a period of time but nothing in the form of “hard costs”. (3553) It was put to him that he had made the decision in the absence of financial information from FRWA. He conceded as much. (3553). At this stage, Mr Grenfell assumed the additional transport cost to be between $5,000 and $10,000. (3378)

Mr Grenfell said that it was likely that before sending the email, he had spoken to Mr Kerr and Ms Wagner. (3548) He said they probably would have discussed the impact that the continued disposal of waste with the Authority had on AC’s dividend. (3548-3549) He confirmed that at this stage, he believed the decision about where to send waste was his alone to make. (3549) Mr Grenfell agreed that, as a Board member of the Authority, it was his preference that AC’s waste go to Brinkley, however, in his council officer capacity, whether AC’s waste would go to Brinkley was a matter of what was best for the council. (3549)

On 24 April 2013 Mr Aitken wrote to Mr Brown in response to the latter’s letter of 18 March 2013.\textsuperscript{710} He apologised for the delay in responding. He

\textsuperscript{706} Ex P38 at [48].
\textsuperscript{707} Ex P7: 271.
\textsuperscript{708} Ex P7: 272.
\textsuperscript{709} Ex P7: 272 at p 2367.
\textsuperscript{710} Ex P7: 273.
explained that the primary reason for the delay related to the council working with the Authority to finalise and review the Authority’s long-term financial plan for the operation of the Brinkley site. That action included an analysis of the implications of the additional travel cost for AHC’s waste to be deposited at Brinkley and the Authority’s post-closure liability costs for the Brinkley site in future. He then stated:711

At this point in time, all our waste is currently being processed at the Brinkley site and in accordance with the analysis of the Long Term Financial Plan, our Council will continue to utilise this landfill site into the future. However, there may be an opportunity to collaborate with Southern Waste ResourceCo in some recycling waste streams, and we may contact you in the future after we have considered our options in this regard.

Whilst I appreciate your concerns about the commercial viability of the Hartley site with Council having diverted its waste stream to the Brinkley site, this matter is not a matter for our consideration. The Brinkley site is proving to be an appropriate location for the disposal of our waste stream and, as stated as earlier, we will continue to utilise that site.

The letter proceeded to refer to the Deed of Settlement and the fact that post-closure liability for the Hartley landfill was the responsibility of SWR and not the Authority.

In his evidence Mr Aitken explained that he was prepared to wait and see what DCMB did in respect to the disposal of its waste. DCMB and AHC were the largest waste producers of the four constituent councils. Waste from DCMB and AHC was important to the viability of Brinkley and the Authority and its operations. Mr Aitken recalled speaking to Mr Stuart around the time of sending his letter of 24 April 2013 to SWR as to DCMB’s intentions. (3717) His recollection was that DCMB was yet to make a commitment one way or other. (3717-3718) For his part, in the short term, and in the absence of a long-term option put by SWR, Mr Aitken had closed his mind to “getting into bed” with SWR. (3887)

Mr Pucknell gave evidence of his having attended a meeting in April 2013 with Mr Brown, Mr Fairweather, Mr Peters and Mr Stuart. (1094-1096) No other witness gave evidence of such meeting. I find that there was no such meeting. Mr Pucknell was mistaken. I think it likely that the meeting he attended was in the second half of 2013 and that his memory has in this instance failed him.

On 2 May 2013 the Authority’s Board met.712 Item 5 on the agenda concerned the “Dividend Option”. The minutes record that a report was prepared and received on the Authority dividend option. The report stated:713

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711 Ex P7: 273 at p 2369.
712 Ex P7: 274.
713 Ex P7: 275 at p 2374.
With the successful relocation of the Authority’s landfill operations from Hartley to Brinkley our borrowings are now fully paid down and there has been a significant increase in the Authority’s equity position.

The Authority’s End of Financial Year projections indicate that all loans will be paid off and that cash and cash equivalents will be approximately $0.5m growing to approximately $1.2m over the next two years.

As a result of the relocation of sites there has been an increase in waste collection transport costs for most Member Councils. These increased transport costs were identified as part of the overall assessment and decision to relocate to the Brinkley landfill site. Over the next 3 to 5 years whilst operating at the Brinkley landfill there should be a gradual reduction in our landfill operating costs which will substantially offset any increased transport cost.

The Authority does not need to build up significant surplus cash holdings and as such is in a position where it can return a dividend to Member Councils. A dividend would also assist some Member Councils with offsetting their increased waste collection transport costs.

The report also referred to the fact that the Charter allowed for dividends to be paid on a proportionate basis equal to the relevant constituent councils’ equity in the Authority. The report then set out the equity held by each constituent council in the Authority before it was made clear that the Authority could afford a dividend payment of up to $150,000. Next the report set out the distribution of the $150,000 dividend to each of the constituent councils in accordance with their current equity balances. The report concluded by recommending that the question of whether or not a dividend be paid be deferred to the Authority’s June meeting and that in the meantime that the Audit Committee prepare a dividend policy to guide the Authority in determining whether a dividend should be paid.

The meeting also had the benefit of a Performance Report. Mr Lorenz provided a report for the consideration of the Board. In that report it is noted that the actual landfill budget revenue was “unfavourable by $41k”. The report explained that the cause was the delay in tonnages commencing at Brinkley and that matters were expected to improve in the last quarter with all constituent councils disposing of their waste streams at Brinkley. The report noted that the favourable revenue results shown arose from a one-off payment related to the Hartley landfill (the $990,000 paid by SWR).

On 5 June 2013 the Authority Audit Committee decided to recommend that a dividend of $150,000 be paid to the constituent councils to be divided proportionate to the constituent councils’ equity holdings in the Authority. The Committee did not think that there was any need to develop a dividend policy.

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714 Ex P8: 276.
715 Ex P8: 276 at p 2379.
716 Ex P8: 288. The minutes of the meeting are erroneously dated 5 June 2012.
On 6 June 2013 Mr Aitken, Mr Salver and Mr Lorenz met. Once again Mr Salver took notes. 717 The second item dealt with at the meeting was the DCMB waste stream. Despite the Audit Committee demonstrating that a dividend would outweigh the increased cost of transportation to the Brinkley site, DCMB continued to send its waste to Hartley. The notes recorded the view that the issue needed to be addressed because DCMB’s waste was crucial to the long-term viability and sustainability of the Authority. The Committee also noted that AC’s waste was not currently going to Hartley. Mr Aitken was tasked with the responsibility of speaking to the Chief Executive Officers of each of DCMB and AC about where they intended to dispose of their waste in the future.

On 6 June 2013 Mr Peters sent an email to Ms O’Flaherty, the accountant at AC, which was copied to Mr Lorenz.718 Mr Peters alluded to the Board meeting of the previous day and requested that a copy of the budget and the long-term financial plan be provided electronically. He expressed the view that detailed financial accounts should go to the Audit Committee for discussion and analysis and a higher-level report be prepared for the Board. He then requested that the Audit Committee consider a number of future possibilities, one where all constituent councils disposed of their waste at Brinkley and a second where only two councils, did so. He then stated:719

... given our decision re the dividend and now that Andrew has returned from the USA I will update him about the situation and ask him to start shifting rubbish to Brinkley.

Mr Peters concluded his email advising that DCMB had secured an offer for the Monarto Quarry from a source other than ResourceCo.

On 7 June 2013 Mr Lorenz circulated the draft minutes for the Audit Committee of 5 June 2013.720 Mr Peters appears to have read the draft minutes almost immediately and within 15 minutes responded with suggested amendments.721 In the same email he added that he had caught up with Mr Stuart late the day before and recommended that DCMB shift its waste to Brinkley. He advised Mr Lorenz that that shift should occur shortly. By return of email Mr Lorenz forwarded to Mr Peters the Authority’s long-term financial plan in spreadsheet format.722 The long-term financial plan reflected receipt of waste from all constituent councils.

On or around 6 June 2013 Ms Wagner provided Mr Grenfell with an estimate of the additional cost associated with taking AC’s waste to Brinkley.723 It predicted an increase in cost of approximately $55,000 annually. This followed the email exchange in April 2013 between Ms Wagner and Mr Grenfell, in which

717 Ex P8: 284.
718 Ex P8: 283. AC provided financial/accounting administrative support to the Authority.
719 Ex P8: 283 at p 2407.
720 Ex P8: 285.
721 Ex P8: 285.
722 Ex P8: 286.
723 Ex P8: 287.
Ms Wagner raised concerns about the cost of diverting waste to Brinkley. On 10 June 2013 Mr Grenfell responded to Ms Wagner’s cost analysis. He wrote:

Dear Marina,

Thanks for the price breakdown for the costs to take the waste to Brinkley. These costs do seem a bit high and inconsistent in that there are ten trucks disposing of the waste I would have thought this was an additional 920km not 1242km. Is there an explanation for this?

A further revised costing for transporting AC’s waste to Brinkley was provided to Mr Grenfell on 22 July 2013. This estimated increase in cost of diverting waste to Brinkley at $11,650 per annum.

Between June 2013 and early 2014, AC continued to deposit its waste at the Hartley landfill. Mr Grenfell agreed that at the time of receiving the analysis of the increased costs of the move in June 2013, he had not changed his mind as to where AC’s waste should be disposed. (3553) Mr Grenfell explained that the move to Brinkley did not occur as there were “a lot of negotiations, a lot of offers coming in” to the end of 2013. (3555) He gave the following evidence: (3555-3556)

Q Do you agree that you’ve said to his Honour a few times this afternoon that you’d made the decision in April of 2013 and then when you exchanged the emails on 19 April and then 10 June 2013 nothing in those emails caused you to change your decision.

A That’s correct, but there was other things not in those emails ... but in other instances that probably gave me moments to pause about that decision.

Q There’s no email that we see is there in which you communicate a change in your decision or instruction, do you agree.

A No, there isn’t.

Q So far as we can tell from the emails you made a decision and you didn’t change it.

A The emails would read that way.

Q And likewise this email of 8 January 2014 is a reiteration of the instruction to start the transfer of Alexandrina Council’s waste from Hartley to Brinkley.

A Yes, it is.

Q You said you were aware that this will have a financial impact and can advise what the cost will be.

A Yes.

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724 Ex P8: 287.
725 Ex P8: 287 at p 2417.
726 Ex P8: 313.
Q And you said that you would like to see this commence as of 1 February 2014 once the summer season is over.

A Yes.

Q There’s no suggestion there of a need to speak to council is there.

A No, there isn’t.

Q And there’s no suggestion that anyone apart from you is involved in the decision-making, do you agree.

A It doesn’t state that in that email.

Q No. And the truth of it was that at this time in January 2014 you were still operating on the basis that this was part of your delegated authority.

A At that stage, yes, but there was other obviously offers that were coming forward from Southern Waste ResourceCo that the board had considered and that they were going back to that would have gone back to the council.

Despite Mr Grenfell’s evidence that his opinion about diverting to Brinkley did not alter, the waste continued to be disposed of at Hartley.

On 26 June 2013 Mr Stuart sent an email to Mr Lorenz containing a “first draft” of a letter he intended to be delivered to Mr Lorenz as the Executive Officer of the Authority.\textsuperscript{727} The email stated:\textsuperscript{728}

\begin{quote}
... The advent of a commercial operator into the region introduces a new ongoing challenge to the AHRWMA operation. The DCMB has been a key long term and contently significant partner in the AHRWMA subsidiary and looks forward to maintain that relationship for the long term. I trust that you will continue to work with your Board to explore ways to recognise patronage from the subsidiary members for the long term. This could be in the form of a pricing structure that offers a bonus or rebate for significant tonnage in an absolute sense and/or for the increase in tonnage a percentage from one year to the next.

I am confident that alternative pricing structure models can be presented to the Board for consideration over the coming months to ensure there is incentive to maintain and protect and hopefully increase patronage for the long term.
\end{quote}

Mr Lorenz replied electronically later that same day. He thanked Mr Stuart and assured him that the Authority would be able to provide additional contractual/Charter incentives to ensure the continued commitment of constituent councils and protect the Authority from future negative external influences.\textsuperscript{729}

The Authority’s Board met on 27 June 2013.\textsuperscript{730} The Board resolved that a dividend be paid to the constituent councils in accordance with the Audit

\begin{footnotes}
\item[727] Ex P8: 291.
\item[728] Ex P8: 291 at pp 2456-2457. See also Ex D72.
\item[729] Ex P8: 291.
\item[730] Ex P8: 276 and Ex P8: 292.
\end{footnotes}
Committee recommendation. As at this time DCMB was yet to switch to disposing of its waste to Brinkley. The minutes record that the Board had received a letter from DCMB advising that it was considering transferring its waste to Brinkley but was still in the process of analysing costings over future years. The minutes record that DCMB was keen to see some competitive price reduction introduced to assist with the increased transport costs. The minutes also record that the Authority had effectively offset increased costs by paying the dividend and that, financial position permitting, a dividend would be paid in future on an annual basis. The minutes of the meeting reveal that the plan of action in regard to DCMB was:

Executive Officer to respond to DCMB including requirement[s] for them to advise the Authority more clearly what information we could provide them to assist in their decision making process. [The] Authority would like to see DCMB waste tonnage starting to go to Brinkley and concurrently review future pricing structure/dividends/incentives. Meeting to be arranged between Authority and Andrew Stuart, DCMB, to discuss situation of current waste tonnage disposal.

Consideration

I note that SWR did not make an offer to any of the constituent councils between settlement and the end of the 2012/13 financial year.

I have already found that Mr Aitken and Mr Salver were close to Mr Lorenz and that whilst Mr Aitken had not made up his mind as at the time of the 6 December 2012 meeting about whether AHC would move its waste with the Authority, he had arrived at such decision by the time of settlement. I would not say that there was never any doubt that AHC’s waste would move with the Authority. It was, however, always more likely than not and became firmer when SWR made no offer in December 2012.

In the period from settlement to the end of the 2012/13 financial year AC continued to dispose of a portion of its waste stream at Hartley as it had done prior to settlement, despite Mr Grenfell’s opinion and instructions that it move. What is noteworthy is the absence of evidence of any complaint by the Authority about AC’s failure to move its waste. That suggests that any arrangement or understanding posed no obstacle to the council exercising a choice to take its waste elsewhere. I will return to the inferences to be drawn from AC’s actions below.

I add that Mr Grenfell’s evidence was unsatisfactory on the question of when he decided that AC should move its waste to Brinkley. My impression as that he wanted to distance himself from how early in the piece he informed Mr Lorenz that it was likely that AC’s waste would go to Brinkley. Still the documents show when he first purported to instruct FRWA to make the change. Whatever his intentions it seems that internal policies and procedures at AC and

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731 Ex P8: 292.
732 Ex P8: 292 at p 2460.
FRWA prevented his instructions being carried out, an outcome with which he did not disagree. It seems to me that in considering AC’s response, it would be wrong to simply look at Mr Grenfell’s intentions. His intentions were defeated by the internal operations of AC and its relationship with another subsidiary. Accordingly, his intentions cannot be considered AC’s intentions.

DCMB did not move its waste between settlement and the end of the financial year. Whilst it is true that Mr Stuart conceded that he considered that DCMB’s waste would move to Brinkley in time, and that it was intended that DCMB return to the commitment it had given to the Authority, the fact remained that DCMB was not precluded from pursuing its own best interests. The “Discussion” section of the paper presented to DCMB on 4 March 2013 is telling, particular paragraph 13 — “[a]s the settlement period was only 48 hours instead of 30 days Council will need to determine the impacts on this major change in service provision given the significant additional distance of cartage to Brinkley”.

The consequence of DCMB and AC not disposing of their waste at Brinkley was that the Authority’s financial position suffered. Again, it is significant that nowhere did the Authority or Mr Lorenz complain. Rather, steps were taken to attempt to entice DCMB and AC to move.

RCMB moved its waste with the Authority immediately. There is no evidence that it did so because of any commitment as opposed to taking advantage of the acknowledged cost advantage to it of dumping its waste at Brinkley.

I agree with the contention that SWR expected the constituent councils, with the exception of RCMB, to dispose of their waste at Hartley after settlement. But I do not think that expectation was the product of anything more than SWR’s confidence in the competitive advantage it enjoyed by reason of the proximity of Hartley to AC, AHC and DCMB.

Mr Lorenz gave evidence that he assumed that the constituent councils would move their waste to Brinkley on the basis of previous financial modelling. His emails of 14 and 18 February 2013 are consistent with that assumption. True they are also consistent with him knowing that the constituent councils intended to move their waste streams, but there is no indication of DCMB advising him of his intentions. Had he known the true position, and in particular that the largest depositor of waste did not intend moving its waste until it had resolved some other issues, I think his emails would likely have been very different. The emails of 18 February 2013 in particular are written in a persuasive voice with the Executive Officers being informed that for the Authority’s plans...

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733 Ex P7: 256.
734 Ex P8: 276.
735 Ex P7: 231; Ex P7: 236; Ex P7: 237; Ex P7: 238; Ex P7: 239; Ex P7: 241.
to work and the possibility of a disposal cost less than that charged at Hartley realised the anticipated benefits to the councils all constituent councils must dispose of their waste at Hartley. It seems odd that Mr Lorenz would see the need to make this point, if he and the Authority already knew that the constituent council tonnages were guaranteed.

As I have said earlier in these reasons, Mr Lorenz quickly realised that if the Authority left Hartley and commenced landfilling at Brinkley, it would find itself in competition with SWR. In my view, his 18 February 2013 emails reflect his understanding of what Mr Stuart called the “new paradigm”, but they do not reflect some sort of joint enterprise in which the councils were joined with the Authority in responding to SWR’s entry into the market. (2883)

There is no dispute that Mr Fairweather met Mr Lorenz at Simply Coffee on 15 February 2013. On anyone’s case during the course of their meeting Mr Fairweather and Mr Lorenz spoke about where the constituent councils would dispose of their waste. On anyone’s case Mr Fairweather became aware of the size of the investment that the Authority had made at Brinkley. With that realisation came the realisation that the Authority and Brinkley posed a greater threat to SWR than Mr Fairweather previously thought. I find that there was discussion of the likelihood that RCMB would dispose of its waste at Brinkley in a context that, at a minimum, suggested that what AC, AHC and DCMB might do could not be predicted with the same certainty. I am not prepared to find that Mr Lorenz said words to the effect that if SWR maintained the current gate price the remaining councils would dispose of their waste streams at Hartley. I find SWR’s and Mr Fairweather’s new found urgency suspect. What happened for SWR suddenly to lose confidence in the advantages associated with the location of Hartley? Here I bear in mind that, as I remarked above, no alarm bells are sounded in Mr Pucknell’s Information Paper and he did not strike me as the sort of person who would let something false or inaccurate go to his Board. If SWR now knew that Brinkley was a very real competitor where it had not appreciated as much before, why did it not do anything virtually immediately to attract the constituent councils’ waste? Mr Fairweather’s account of the conversation strikes me as odd. Why would he be sent to confirm that if SWR held the gate price at the current level SWR could expect to receive all constituent council’s waste? Clause 9 left SWR with no option but to hold the gate price at its current level for a period of nine months following settlement. And what was there to push for greater clarity about? If Mr Lorenz did indicate that holding the current rate should see SWR receive the constituent councils’ waste streams and that it would be business as usual at Hartley, what was the clarification needed? I bear in mind that Mr Fairweather’s notes of the conversation are not a verbatim account nor are they a comprehensive account of all topics raised. I find that as at 15 February 2013 SWR fully appreciated the competitive threat posed by Brinkley where before, as Mr Brown regularly and candidly said, SWR had not shown much interest in what went on at Brinkley. In view of appreciating the threat posed by Brinkley, I think it likely that Mr Fairweather indicated that SWR
would continue to approach the constituent councils to secure their business. I do not think it likely that Mr Lorenz said that he would not stand in SWR’s way. To make such comment would suggest he thought he could prevent SWR approaching the councils. Mr Lorenz impressed me as someone who was precise and clinical. I did not get the impression that it was the sort of thing he would say. That said, for the same reasons it is likely that Mr Lorenz voiced no opposition to such course which would have allowed Mr Fairweather to think that there existed no impediment to the constituent councils contracting with SWR for the disposal of their waste at Hartley.

In his letter of 18 March 2013 Mr Brown misrepresented what transpired at SWR’s meeting with AHC on 6 December 2012. SWR did not put and there was no discussion with AHC to the effect that “rates going forward would be in-line with the disposal rates you were previously paying at the site”. Further, Mr Brown knew well before settlement that the Authority intended to move its operations to Brinkley, contrary to the assertion in his letter. These are further examples where Mr Brown is loose with the truth.

I find that the letter of 18 March 2013 was written with a view to pressuring AHC. Mr Brown’s denial on the grounds that SWR was still trying to work “very commercially” with AHC rings hollow considering that there had been no contact since 6 December 2012. However, I do accept that Mr Brown did not understand the competitive risk that Brinkley or the Authority posed to SWR at Hartley and thus had no comprehension that all of the constituent councils’ waste could go to Brinkley.

I accept Mr Fairweather’s evidence that he had a telephone conversation with Mr Salver in April 2013. And I accept that during the course of that conversation they discussed AHC having moved its waste to Brinkley. I think it likely that Mr Salver explained the move by reference to his knowledge of the Authority’s and Mr Lorenz’s position on the viability of Brinkley. I am, however, not persuaded that Mr Salver would have said words to the effect that his mind was made up as to where AHC would dispose of its waste or that under no circumstances would AHC dump at Hartley. My understanding is that the decision as to where AHC’s waste went was not his, but Mr Aitken’s or the elected members of council. In fact Mr Salver had no operational responsibility for waste at AHC. Further, Mr Salver did not strike me as the sort of person who would be blunt and aggressive particularly when relations between AHC and SWR had not reached such point.

Unlike SWR, the Authority responded to the new paradigm. The dividend option amounts to a step taken to entice DCMB in particular to move its waste to Brinkley. The dividend option is strongly indicative of there being no commitment prohibiting the constituent councils taking their waste elsewhere and of the Authority understanding as much. There was nothing unlawful or

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736 Ex P7: 264 at p 2354.
improper regarding the payment of the dividend. The distribution of profits to the constituent councils was provided for in the Charter.\textsuperscript{737}

Mr Stuart’s draft letter of 26 June 2013 to Mr Lorenz demonstrates that, as he said in his evidence, he began to think about possibilities arising from the new paradigm. As will be seen, he also began to agitate for closer consideration of such possibilities.

B. 1 July 2013 – 30 April 2014

On 1 July 2013 Mr Peters sent an email to Mr Pucknell.\textsuperscript{738} The purpose of the email was to advise that DCMB had decided to move its waste from Hartley to Brinkley as “a commercial arrangement had been agreed … with the Authority”.\textsuperscript{739} A little over an hour later Mr Pucknell replied.\textsuperscript{740} He requested an opportunity to discuss the issue of where DCMB disposed of its waste “before this is locked away”.\textsuperscript{741} He asked if it would be appropriate for SWR to write to the chief executive seeking a meeting. Mr Peters replied stating that it would not hurt, but suggested SWR wait a few days as the council was in the process of adopting budget and fixing rates.\textsuperscript{742} Mr Pucknell forwarded the emails to Mr Brown. (632)

On 4 July 2013 Mr Peters advised Mr Lorenz that DCMB’s waste would shift from Hartley to Brinkley.\textsuperscript{743} Mr Peters also reported that he had advised ResourceCo of the decision and had been advised in turn that ResourceCo intended to write to Mr Stuart to seek a meeting to discuss the arrangement. Mr Peters said:\textsuperscript{744}

I advised Andrew this is what they want to do and this is also what you advised they will try to do!

I would be pleased to participate in any other alternative modelling in anticipation of endorsement from the audit committee and then the board to come up with a pricing strategy to minimise freight costs etc.

Later that same day Mr Lorenz responded electronically.\textsuperscript{745} He said:\textsuperscript{746}

I will send through some various modeling to show equivalent future discount rates per tonne calculations v dividends. I am also keen to look at some alternative equity benefit calculation methods that will directly reward increased/maintained tonnages for individual members.

\textsuperscript{737} Ex P1: 4 at cl 1.5.7.
\textsuperscript{738} Ex P8: 294.
\textsuperscript{739} Ex P8: 294 at p 2472.
\textsuperscript{740} Ex P8: 294.
\textsuperscript{741} Ex P8: 294 at p 2472.
\textsuperscript{742} Ex P8: 295.
\textsuperscript{743} Ex P8: 299.
\textsuperscript{744} Ex P8: 299 at p 2485.
\textsuperscript{745} Ex P8: 298.
\textsuperscript{746} Ex P8: 298 at p 2482.
We are also mindful that ResourceCo recently offered an extremely low (unsustainable) rate to some commercial customers which we shall monitor the effect of and whether we need to intervene. Our modeling had allowed for the scenario (assuming DCMB tonnes still coming) but I will look to see at what rate there is a net benefit for the Authority to win them back. I certainly don’t want to enter into a bidding war unnecessary if it leads to unsustainable rates.

Mr Peters replied. He agreed with the observations made by Mr Lorenz and expressed the view that he thought that the dividend proposal would secure DCMB’s waste going forward but Mr Stuart, he said, was “keen for us to look at longer term situations”. Mr Peters explained that this was why he was particularly interested in the financial projections for the Authority.

The following day Mr Brown sent a letter electronically to Mr Stuart. Mr Peters was copied in on the email. In the letter Mr Brown introduced himself before asking to meet Mr Stuart. He wrote:

I am writing to express our wish to meet you urgently in response to news that the District Council of Mt Barker (DCMB) is considering moving the disposal of its waste from the Hartley Landfill to the Brinkley Landfill at Murray Bridge. As you know, we (SWR) recently purchased the Hartley Landfill at a cost of almost a million dollars. In doing so, we conducted negotiations in good faith with the Adelaide Hills Regional Waste Management Authority (AHRWMA) in regards to waste volumes remaining in place. At the outset, we gave an undertaking that disposal rates would not be changed in the short-term.

We have continually indicated that we would like to enter into rate discussions with our intent to “lock in” long-term, commercially viable agreements with member councils of AHRWMA. SWR is committed to a long-term rate arrangement that works for the DCMB, also incorporating recycling and resource recovery at the Hartley facility. I note that we have maintained the pre-existing rate structures since we took over the Hartley site in February this year and apart from the impact of the recent Levy increase we have not attempted to increase this rate. Thus we find it concerning that the Council now wishes to move its waste to Brinkley. In order for your waste to now be dumped at the Brinkley landfill, there is additional cartage of approximately 90 km round trip or approximately $8-$12/tonne of waste incremental cost to DCMB. Along with the significant cost impact of the additional cartage, there is also the carbon impact to be considered in transporting the waste to Murray Bridge.

The letter went on to refer to the fact that SWR took on the post-closure liabilities for Hartley, commenting that doing so was extremely important to Mr Lorenz, before stating that SWR could not understand why in re-establishing Brinkley the Authority had reactivated such liabilities and exposed DCMB to the same.

In the penultimate paragraph of his letter Mr Brown commented that without disposal volume as discussed pre-settlement with the Authority and its constituent councils the commercial viability of Hartley may be threatened. He
concluded his letter by referring to the fact that he wished to discuss the matters raised urgently with Mr Stuart and would welcome an opportunity to do so at Mr Stuart’s earliest convenience. Mr Stuart’s executive assistant responded suggesting a meeting on Monday, 15 July 2013.\footnote{Ex P8: 304.}

In his evidence Mr Brown explained that where he referred in the letter to not being able to understand why the council would reactivate liabilities previously passed on, he had thought that avoiding such liabilities was another reason why the constituent councils would continue to dispose of their waste at Hartley. (634) For DCMB to take its waste to Brinkley did not make sense to SWR. DCMB was the largest equity holder in the Authority. He said that the viability of Hartley would be threatened if there was no council waste coming into the landfill. (635)

Within an hour of receipt of Mr Brown’s letter of 5 July 2013, Mr Peters emailed Mr Lorenz.\footnote{Ex P8: 302.} He professed to being unsurprised at the speed with which SWR had responded to the news that DCMB intended to take its waste to Brinkley. Mr Peters was looking for some assistance from Mr Lorenz in relation to the contention contained in Mr Brown’s letter about DCMB being exposed to a fresh liability consequent upon the re-establishment of Brinkley. It is apparent from Mr Peters’ email that that was an issue which he thought Mr Stuart would be assisted in knowing more about prior to meeting with Mr Brown. Mr Lorenz responded to Mr Peters’ email later that same day.\footnote{Ex P8: 302 at p 2490.} He said: \footnote{Ex P8: 302 at p 2490.}

This is a similar argument that SWR tried to use with Adelaide Hills Council. At no time did the Authority ever suggest it would continue to use the Hartley site. In any case the Authority can not direct where Member Council waste goes – this is up to individual Councils - a point that was made very clear in negotiations. Similarly our settlement agreement makes no reference to a future commitment of Member Council tonnes to Hartley.

Mr Lorenz goes on to comment that Mr Brown’s argument regarding liability was nonsensical in relation to the Hartley landfill as all liability for that landfill lay with SWR. He commented that the fact that the Authority now had a new site and consequently a future liability was part of running a landfill. There was nothing unusual in that and the future liability was allowed for in the Authority’s long-term financial planning. Mr Lorenz continued: \footnote{Ex P8: 302 at p 2490.}

I would expect that SWR will do what they can to try and influence member councils and that their future tactics are likely to reveal the type of organisation that they are. Again this is something we have been expecting. As long as Member Councils remain committed with tonnages the Authority remains the best vehicle for future waste management and recycling, not only in terms of cost structure but in terms of value

751 Ex P8: 304.
752 Ex P8: 302.
753 Ex P8: 302.
754 Ex P8: 302 at p 2490.
755 Ex P8: 302 at p 2490.
adding across the region and achieving outcomes that would be unattainable as individual Councils.

I will have our lawyers, who helped put the agreement together, confirm the security of our position in view of SWR’s letter.

Between 10 and 12 July 2013 Mr Lorenz provided Mr Peters with the information he sought in their email exchange of 5 July 2013, in addition to advising on the calculation of the cost to dispose of waste per tonne at Brinkley as applied in the long-term financial plan. Mr Lorenz also reminded Mr Peters that the benefit of disposing of waste with the Authority was not limited to that service. In one email Mr Peters commented:

I think Andrew will hear them out and I can then discuss afterwards with Andrew quoting the figures you have just provided me (not to disclose to Resource Co).

I have no doubt that they will try to do a counteroffer so it is a matter of trying to convince Andrew other longer term benefits plus this as you have outlined.

On 15 July 2013 Mr Brown, Mr Pucknell and Mr Fairweather met with Mr Stuart and Mr Peters as arranged. Mr Fairweather made brief notes of the meeting. Those notes record that Mr Stuart said words to the effect that SWR should present its offer and that SWR should differentiate between an offer made to DCMB and an offer made to the Authority. Mr Stuart stated that the offer would ideally be a long-term deal for at least five years and that price would be important. In his statement, Mr Stuart said that he could not recall saying that any offer should clearly differentiate between an offer made to DCMB and an offer made to the Authority. Further, he did not consider that he said words to the effect of encouraging an offer of only five years.

In his evidence Mr Brown said that they spoke openly about SWR losing DCMB’s waste and how SWR could not understand the move, believing from information supplied by Suez, that it cost DCMB an additional $12 per tonne to take its waste to Brinkley. Mr Brown said that during the meeting Mr Stuart referred to there being a lot of political pressure on DCMB to dispose of its waste with the Authority. Despite this, Mr Stuart said that he remained keen “to do what’s best for the council”. Mr Brown said that he, Mr Pucknell and Mr Fairweather would have pushed hard to get a commercial resolution to the problem, but they were not getting anywhere. He said that as Mr Peters walked them out Mr Peters said that Mr Stuart was being pressured by the mayor of Mount Barker to take DCMB’s waste back to the Authority.

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756 Ex P8: 305.
757 Ex P8: 305 at p 2496.
758 Ex P52.
759 Ex P52.
760 Ex D74 at [38.1.4].
761 Ex D74 at [38.1.5].
Mr Peters had also said that Mr Lorenz had been lobbying hard for this to occur. (637)

Later in his evidence, Mr Brown denied that he discussed with Mr Stuart the landfill disposal rate, other services provided by the Authority or the fact that acceptance of SWR’s proposal would result in a change in the council’s business model. Further, he denied that there was any mention of the equity the council had in the Authority. (2256) Mr Brown said that Mr Stuart did not mention the potential for lower rates associated with the existing shared services model. (2256-2257) Whilst he could not recall if during the 15 July 2013 meeting he stated that there was “a big claim on the way”, SWR “definitely spoke about where this was heading”. (2258) The following day SWR issued letters of demand to the Authority and Mr Lorenz as discussed below.

Mr Stuart was asked whether at the time of meeting with SWR in July 2013, there was a lot of “political pressure” on the council to continue to dispose of its waste at Brinkley. He said that leaving the Authority would have been subjected to intense examination. (2620-2621)

In cross-examination, Mr Stuart described the meeting as a “sales pitch”. (2737) He recalled enquiring as to the other services SWR could offer beyond waste disposal. He could not recall the words used in the meeting. His evidence was that he was genuinely interested in what SWR had to offer. (2738) He ultimately determined that there was nothing mentioned in the meeting that was worth taking to the council.

Mr Stuart was cross-examined about what was said at the meeting. He said that Mr Brown questioned why any council would not want to deal with SWR. (2951) Mr Stuart recalled expressing to Mr Brown in the meeting that he was interested in securing the best deal for ratepayers. He recalled referring to political considerations. (2953) Mr Stuart made plain that at the time of the meeting, he had not formed a negative view about the reputation of SWR. He agreed that it looked as though SWR had the capability to meet various needs of the council. (2958). Mr Stuart said that he viewed SWR as a potential “service provider for the landfill operation” to the Authority. (2961) With SWR as a landfill operator, the Authority could still exist. (2961)

Later in the evening on 15 July 2013, Mr Stuart sent an email to Mr Lorenz advising him that the meeting had taken place. He stated:

I must say there was some news they shared with us that David [Peters] heard and I must say somewhat surprised me.

Mr Stuart invited Mr Lorenz to contact either himself or Mr Peters. The following morning, Mr Lorenz replied to Mr Stuart. In his email, Mr Lorenz

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762 Ex P8: 306.
763 Ex P8: 306 at p 2499.
referred to the Authority’s exposure to any liability for environmental liabilities at Hartley. Although it is not clear from Mr Lorenz’s email, exposure to environmental liabilities at Hartley was one of the issues that surprised Mr Stuart arising out of his meeting with SWR on 15 July 2013. Mr Lorenz assured him that he will have the Authority’s lawyers check the effect of the s 103E Deed.

The following day, on 16 July 2013, Mr Brown sent an email to Mr Peters and Mr Stuart. He copied in Mr Pucknell and Mr Fairweather. Mr Brown opened his email by thanking Mr Stuart and Mr Peters for meeting with SWR. He then assured them of SWR’s commitment to finding a way to operate in the Hartley region and to develop a long-term relationship with DCMB and the Authority moving forward. He then stated:

As mentioned yesterday, we have offered the Authority disposal fees fixed until the end of September 2013 at $37.70 per tonne (plus the country EPA levy and carbon tax and other statutory charges) and further would be willing to extend this to the end of December 2013.

On the back of the historical non-compliance issues arising on the site, rates would have to increase no more than $10.00/tonne long-term to cover the additional compliance costs. We would undertake to work with the Authority and the member councils to resolve this and provide a transparent long-term rate structure for up to 10 years.

Mr Brown then professed an interest in exploring the use of biosolids, I assume sourced from DCMB, as part of its landfill operation. Doing so would result in an economically viable disposal option for such material for DCMB. Mr Brown also referred to the Monarto Quarry in which SWR had an interest albeit on condition of selling the material quarried to the constituent councils. However, before any commitment to operate the quarry could be given, Mr Brown stated that there were a number of issues that needed to be worked through.

In the penultimate paragraph to his email of 16 July 2013 Mr Brown stated:

I would also like to reiterate that we do not believe we are a competitor to the Authority, rather we are a potential service provider to them. We will try and salvage this relationship with the Authority and we are still open to offering our service to them and their members. We have a letter going to the Authority on this issue shortly which you will no doubt hear of in the time ahead.

Mr Stuart recalled having meetings with representatives of SWR in the second half of 2013 but could not recall the precise dates of those meetings. He confirmed in cross-examination that he did not “act” on Mr Brown’s letter of 7

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764 Ex P8: 306.
765 Ex P8: 307.
766 Ex P8: 307 at p 2501.
767 Ex P8: 307 at p 2501.
768 Ex D74.
August 2013. In his mind, the letter did not respond to some of the concerns raised by him at the meeting on 15 July 2013. (2970)

On 16 July 2013 Botten Levinson wrote to Ms Stokes.769 A similar letter was sent to Mr Lorenz the same day.770

The letter to Ms Stokes referred to the extent of SWR’s liability for environmental liabilities associated with the Authority’s past operation of Hartley and recent concerns expressed by the EPA regarding groundwater quality and monitoring at the site attributable to the Authority’s management of the site. The letter stated that the EPA’s concern would result in SWR incurring considerable unforeseen expense. The letter asserted that such cost was not subject of any indemnity provided as part of settlement.

The letter then moved to misrepresentations and unconscionable conduct. It stated that SWR was “very concerned at what appear to be irregularities between what was represented during the course of the settlement negotiations in and around October and November last year and what our client has recently discovered”.771 Ms Stokes was advised that SWR would pursue any loss or damage with “considerable vigour”.772 The letter, authored by Mr Levinson, then set out SWR’s concerns. Those concerns may be summarised as follows:

- that the Authority through its officers and agents misrepresented or negligently misstated the available airspace in cell 6;
- that cells 5 and 6 had been negligently and/or consciously overfilled with the consequence that the cell space recoverable in new cell 7 was reduced;
- overfilling of cells 5 and 6 resulted in difficulties in the construction of cell 7 resulting in an increased cost to ensure EPA compliance;
- the Authority had failed to disclose a survey of cell 6 thereby breaching the covenants comprised in the Deed of Settlement and engaging in unconscionable and misleading and deceptive conduct;
- the available airspace in cell 6 had a significant impact on the price paid by SWR;
- SWR would not have offered to settle had the true state of cell capacity been disclosed; and

769 Ex D8: 309.
770 Ex D8: 310.
771 Ex D8: 309 at p 2505.
772 Ex D8: 309 at p 2505.
• SWR would suffer loss arising from additional cost in constructing extra cell space and in ensuring compliance with EPA requirements.

The letter next alleged that the Hartley site had been negligently operated, or, alternately, that it was knowingly or negligently represented to SWR that it had been operated properly in accordance with the EPA licence. It repeated that such breaches were not protected by the Deed of Settlement. The letter proceeded to enumerate six breaches of licence condition before asserting that the breaches were obvious and must have been known to the Authority.

Next the letter turned to allegations of unconscionable conduct and misleading and deceptive representations. It stated:

Unconscionable conduct and misleading and deceptive representations

SWR offered to settle the dispute with AHRWMA on the basis that it would be afforded an opportunity to engage directly with the member Councils to offer and negotiate potential commercial terms for disposal by them of waste at the site. It was represented that such access would be provided and that such negotiations could take place.

It is since been made apparent to SWR that -

1. AHRWMA failed to disclose the existence of contracts then in existence between AHRWMA and Councils that would defeat or frustrate such negotiations by SWR;

2. AHRWMA failed to disclose negotiations that it was undertaking (at that time, leading up to the execution of the settlement in February and since) for contracts with councils in relation to the Brinkley site that would defeat or frustrate such negotiations by SWR;

The letter alleged:

It also appears that AHRWMA and or its office holders or employees have lobbied, approached or made representations to staff and/or elected members of the member Councils that are contrary to the representations to SWR, adverse to SWR, and false and misleading and in breach of Part IV of the Competition and Consumer Act. In particular we understand that it has been represented by staff of the AHRWMA that SWR is a competitive threat to AHRWMA and the Councils and that SWR cannot be trusted to offer and honour competitive long term disposal rates for the Hartley landfill. This is despite the fact that SWR offered to negotiate commercially acceptable rates with councils and the Authority and sought to settle the dispute with AHRWMA on that basis. SWR was prevented from doing so because it was asserted by AHRWMA that it could not speak for the Councils and thus could not procure any such arrangement.

The letter provided a “preliminary estimate of loss” of $6 million. The letter made plain that the estimate did not include the lost opportunity to operate the landfill to the promised capacity nor any claim that the Harvey family may have for lost income or damage to their land. In addition, the letter contended

773 Ex D8: 309 at pp 2507-2508.
774 Ex D8: 309 at p 2508.
775 Ex D8: 309 at p 2508.
that the Authority would be required to address the liabilities arising at Hartley not catered for by the Deed of Settlement and the s 103E Deed.

Against a background of highlighting the potential damages and costs for which the Authority may be liable in the event of proceedings, the letter stated that SWR would nonetheless prefer to “salvage the situation”. In that regard, the letter requested an opportunity for SWR to meet with the Board of the Authority and its solicitors to discuss the matters raised in the letter in an endeavour to reach a resolution “before SWR is forced to resort to litigation”. The letter then stated:

I reiterate that SWR does not see the AHRWMA or any member Council as a competitor or a threat. SWR remains prepared to enter into open discussions about commercially acceptable long term disposal rates at Hartley for the AHRWMA and/or its member Councils.

The Chair was advised that a separate letter had been sent to Mr Lorenz containing allegations about his conduct and a claim that SWR intended to make against him. Consequently, it was contended that Mr Lorenz should not be at any meeting that was subsequently convened between the Board of the Authority and SWR. Lastly, the letter sought a response within seven days upon threat of formal notice to commence action in either the Supreme or Federal Courts being given.

Botten Levinson’s letter to Mr Lorenz of 16 July 2013 alleged that Mr Lorenz had made false and misleading representations to SWR and had engaged in unconscionable conduct. More particularly, the letter alleged that Mr Lorenz had wilfully deceived SWR by withholding critical information on the airspace in cell 6 knowing that was material to the settlement reached on 11 February 2013 and to the value of the site. It was also asserted that SWR offered to settle the dispute between the Authority and the Harveys on the basis that it would be afforded an opportunity to engage directly with the constituent councils to negotiate for the disposal by them of their waste at Hartley, however:

… you have represented that SWR is a competitive threat to AHRWMA and the Councils and that SWR cannot be trusted to offer and honour competitive long term disposal rates for the Hartley landfill. This is despite the fact that SWR offered to negotiate commercially acceptable rates to Councils and the Authority and sought to settle the dispute with AHRWMA on that basis. SWR was prevented from doing so because you asserted that AHRMWMA could not speak for the Councils and thus could not procure any such arrangement.

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776 Ex D8: 309 at p 2509.
777 Ex D8: 309 at p 2509.
778 Ex D8: 309 at p 2509.
779 Ex D8: 310 at p 2516.
The letter advised Mr Lorenz that his actions had caused substantial loss and damage, estimated at $6 million, and requested that certain specified remedial steps be taken immediately.

Similar to the letter to the Chair, the 16 July 2013 letter to Mr Lorenz was brought to a close by stating that if no response was received within 14 days then SWR would have no option but to provide formal notice for the purposes of the Supreme Court or Federal Court rules and to take further action against Mr Lorenz.

In evidence, Mr Brown was taken to the 16 July 2013 letter written by Botten Levinson to Mr Lorenz. He conceded that the letter was written on his instructions. (820) When it was put to Mr Brown that he had the opportunity to negotiate with the constituent councils in November 2012, he agreed. (822) It was put to him that by 11 February 2013 SWR knew where it stood with the constituent councils. (822-823) He denied this. He accepted he had been given an opportunity to engage with them. He had taken up that opportunity. He was taken back to the Botten Levinson letter of 16 July 2013 and the allegation, “it was represented by you at a meeting on 12 November 2012 and other occasions that access would be provided and that negotiations could take place”. (823) He agreed that after 12 November 2012 he had meetings with the constituent councils as he had stated in his evidence. He agreed that those meetings had enabled him to attempt to negotiate with those councils. (823)

It was put to Mr Brown that at the time of the 16 July 2013 letter SWR did not have any evidence that there was a contract in existence between the Authority and constituent councils. He agreed. (823) It was put to him that without such evidence the whole purpose of the 16 July 2013 letter was to put commercial pressure on Mr Lorenz. (823-824) Mr Brown responded as follows:

A We - that’s when obviously we decided that we were going to take action on this matter, yes.

Q But what was the basis for the allegation that it had been made apparent to Southern Waste that Mr Lorenz had failed to disclose the existence of contracts then in existence between the authority and the councils.

A Whether they were written contracts or obligations, it was clear to us that the member councils, all of their waste was controlled by the authority, whereas we were clearly told that the authority didn’t control their waste.

Q What contracts did you know about.

A I am saying that I have never seen a contract, but it’s -

Q This is just a fabricated allegation, isn’t it.
I didn’t write this letter. As I said, we were involved in it, and we were more involved in it in regards to the costs that we had lost on the back of the volume not coming to the facility.

Mr Brown was taken to the first paragraph under the heading “[u]nconscionable conduct and misleading and deceptive representations”, contained in the letter of 16 July 2013. He repeated that the letter was sent on his instructions. He agreed that SWR did not have a document that evidenced the existence of a contract as per the allegation contained in the letter. He was asked then on what basis was it apparent to SWR as at 16 July 2013 that there were such contracts in existence.

If they weren’t written contracts, they were definitely verbal contracts because Mount Barker and Alexandrina left via pressure of their mayor. It was clear by then that if the member councils’ waste didn’t stay together as one, that the authority wouldn’t be viable. Whether they were actual written contracts or obligations, it was definitely clear to us that Mount Barker and Alexandrina had been pressured to take their waste back to the Brinkley facility.

Cross-examination further probed the basis for the assertion that there were contracts in existence. Mr Brown fell back on his belief that pressure was brought to bear on AC and DCMB to take their waste to Brinkley. He understood that pressure to have been applied in the period between February 2013 to July 2013. In relation to DCMB he understood the pressure to have been applied by the mayor but he could not provide the Court with any source of the alleged pressure applied in the case of AC. As to the pressure brought to bear by the mayor of DCMB, Mr Brown’s source of knowledge was statements made by Mr Stuart and Mr Peters.

It was pointed out to Mr Brown that AC only moved its waste from Hartley to Brinkley after SWR instituted these proceedings. He said he could not recall what happened with AC. He was asked:

Q Well, as of 16 July 2013 are you seriously telling his Honour that you thought that you knew that pressure was being put on the Alexandrina Council to move its waste.

A Yes.

Q What was the basis for that belief.

A Just what you hear in the market.

Q What have you heard.

A Marina Wagner we know quite well and I think she’d mentioned something, but as I said it wasn’t a huge - by this point in time we knew exactly what was going on.

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Ex D8: 310 at p 2516.
He denied yet again, in effect, that the letter was written purely to bring pressure to bear in order to prompt one or more of the constituent councils to return to Hartley. (831)

In his evidence, Mr Levinson confirmed that there were two claims of $6 million — one against the Authority and the other against Mr Lorenz personally. (315) Mr Levinson was taken to in his letter of 16 July 2013 to the Chair of the Authority. Initially, Mr Levinson disagreed with the proposition that he did not have a single document that supported the existence of a contract between the councils and the Authority. He referred to an email from the Coorong District Council which stated that it had a contract with the Authority that it could not break. (316) However, he agreed that as at 16 July 2013, SWR had not disclosed a single document evidencing the existence of contracts between the Authority and the constituent councils regarding the disposal of the constituent councils’ waste streams. (316-317) He further agreed that SWR was running its case on the basis of the documents disclosed by the Authority and the constituent councils. (317) He could not recall for certain what documents were available to him as at 16 July 2013; he did not think that there was no document that could substantiate the assertion made in the 16 July 2013 letter, he could not answer. (317)

Mr Levinson was then taken to SWR’s First List of Documents. It was put to him that, as of 16 July 2013, SWR had not disclosed a single document that showed that it knew of any contract between the councils and the Authority. (318) He said: (318-319)

A  Again, I can’t recall precisely what other documents we had. There were discussions that the client had had with various employees of the various councils and … there was, I think, email or letter correspondence with them. I don’t recall precisely when all that material was available but I think it was around about that time, for instance, I think there was some communication with the Adelaide Hills Council where it had said that it wasn’t going to send its waste to them and that it was going to stick with the authority. So there would be material like that I think I had seen at that point. But I agree, there was no copy of a contract as such.

Q  Well you refer to the Adelaide Hills decision, that’s not evidence that a contract was in existence before settlement under the settlement deed, is it.

A  No, I think the word contract is probably too limiting, in a sense. It’s probably more accurate to say, as the case is pleaded, I forget the phrase, a contract understanding or arrangement, as distinct from a contract as such.

Q  But it wouldn’t matter if it was a contract arrangement or understanding, you didn’t have a document on 16 July 2013 that evidenced that either.

A  Well there was no single document, you know, bearing that title or that was - if you like - a succinct undertaking or arrangement between them but my recollection is that there were documents in addition to discussions and feedback that the client had had with the various councils to support that contention.
And: (320-321)

Q Did you have a document as of 16 July 2013, the date of your letter -?
A Yes.

Q - which evidenced that there was a contract between the authority and member councils that would defeat or frustrate the negotiations you refer to in your letter that is a contract in existence prior to 13 February 2013.
A No, I didn’t have any contract document as at July 2013 that was in existence prior to February 2013. What I had was the other documents that I’ve referred to that indicated or suggested not necessarily a contract as such, a contract I think in relation to the Coorong Council but as far as the other councils were concerned, I don’t think the word ‘contract’ is appropriate, it’s probably broader than that. It would have been an arrangement or understanding.

The documents that Mr Levinson referred to were documents 11 and 13 in SWR’s First List of Documents. He explained that they were not of themselves documents that constitute a contract or an understanding but rather are documents from which Mr Levinson inferred and upon which he based the allegation contained in the paragraph of the letter to the Chair quoted above. (321)

In relation to the paragraph in Botten Levinson’s 16 July 2013 letter to the Chair stating that SWR did not see the Authority or the constituent councils as a threat, he said that the purpose of that paragraph was to indicate that despite the disappointment of being in the position that it saw itself in, SWR was not precluding future commercial arrangements but that the loss and expense incurred had to be addressed. (322)

On 18 July 2013 Mr Lorenz advised the Authority’s Board by email that DCMB had commenced disposing of its waste at Brinkley. In the same email Mr Lorenz took the opportunity to advise Board members of the Botten Levinson letter to the Authority of 16 July 2013. He said that the claims made by SWR were refuted and that it was thought that SWR did not have any basis to take action against the Authority. Mr Lorenz also referred to the fact that SWR had written separately to him, making allegations about his conduct and a claim that it was intending to bring against him. He had not received the letter as yet but stated that he would provide a copy to the Board when he did. Lastly, he advised that the Authority was awaiting legal advice on its position and that a special meeting may be required to consider that advice once it became available.

In cross-examination, Mr Stuart confirmed that between January and July 2013, there was no council resolution or minute that communicated DCMB’s decision regarding the movement of waste from Hartley to Brinkley. The decision to move was made by Mr Stuart, in consultation with Mr Peters. (2883)

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781 Ex P8: 311.
Mr Stuart confirmed that in July 2013, Mr Peters had advised him that the ongoing issues with the Monarto Quarry had been resolved. It was against this backdrop that Mr Stuart and Mr Peters took the view that as a member of the Authority, and in the absence of anything else, they would resume patronage of the Authority. (2882) That being said, Mr Stuart understood at that stage that the potential for competition was an issue. (2913)

Following on from the 15 July 2013 meeting, on 7 August 2013 Mr Brown wrote to Mr Stuart offering to accept DCMB’s waste stream at $34.70/tonne to 30 June 2014, at $38.70/tonne for the following financial year, then at $38.70 per tonne increasing by the CPI for the next three years. In follow-up discussions with Mr Stuart, Mr Brown was referred back to the Authority to advance matters. The lack of any real response led SWR to conclude that the negotiations with the Authority that had taken place and resulted in SWR thinking that the taking over of Hartley “had been concocted”. (637)

On 8 August 2013 Mr Brown, Mr Pucknell and Mr Fairweather met with Mr Peters and Mr Stuart. I understand that during the meeting SWR presented DCMB with the letter of 7 August 2013 to which reference is made above.

Mr Fairweather took notes of the discussion. He recorded Mr Stuart as asking whether SWR could meet with the Authority and informing the meeting that he had asked Mr Lorenz to enter into discussions with SWR. There was some discussion about the politics of some people wishing to keep the Authority involved. Mr Fairweather said he sought a “stay of execution” in respect of legal proceedings.

Mr Fairweather said that in the meeting Mr Brown said words to the effect that he did not see SWR as a competitor to the Authority and that they “needed to “sell this to [the Authority]””. According to Mr Fairweather, Mr Stuart indicated a preparedness to lead the way in waste management amongst the constituent councils, raised the question of whether a joint venture discussion could be taken forward and also asked whether SWR was prepared to run both the Hartley and Brinkley sites.

Mr Stuart could not recall what was discussed at the meeting.

Mr Brown was cross-examined on the 8 August 2013 meeting. His evidence was that Mr Stuart made plain that he was interested in securing long-term security for the council’s waste disposal. (2262) Mr Brown said: (2263)

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782 Ex P8: 318.
783 Ex P52 at [13].
784 Ex P8: 319.
785 Ex P52 at [13.3].
786 Ex P52 at [13.4].
The whole sort of inference of the catch-up was once again based around the pressure being put on Mount Barker to take their waste back to the authority. There's no discussion at all about - you know, this a massive change in their business, they'd been disposing their waste with us for, what, five months previously. So why did we not have those discussions earlier? It was just from our perspective, it was a business as usual issue until he was pressured to take his waste back to the authority.

Mr Peters emailed Mr Lorenz that day to advise that the message conveyed at the meeting “was rather than be in competition if there is a reasonable commercial arrangement that can suit all parties etc … better than legal battle etc”. 787

SWR met with the Authority’s Board in August 2013 and made a presentation about what it could offer by way of disposal rates and other services. (638) As part of the presentation SWR showed photographs indicating that some cells at Hartley had been overfilled, that there was less airspace than stated, and that leachate ponds and other infrastructure was sub-standard. (638)

Thereafter, Mr Brown wrote to the Authority on 20 September 2013 making the following offer:788

- **Disposal rate of $34.70/tonne + applicable EPA levy.**
- Agreement term is 20/9/13 – 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.

[emphasis in original]

The offer was expressed to be subject to SWR’s usual terms and conditions and to remain open for 30 days from the date of the letter. Mr Brown then referred to SWR’s preparedness to work with the Authority in dealing with other waste streams such as sludges and muds, biosolids, contaminated soils and waste, and to consider various recycling and resource recovery opportunities. In closing his letter Mr Brown said he looked forward to “the re-engagement of our two organisations as we work toward mutually beneficial commercial, environmental and regulatory outcomes”. 789

Mr Brown said that the revised deal was intended to address a concern expressed by Mr Stuart regarding the long-term viability of DCMB taking its waste to Brinkley. Mr Stuart was concerned that the Authority was subsidising transport costs and would be in no position to pay a future royalty to constituent councils. (639) Speaking of the offer made in the 20 September 2013 letter,

787 Ex P8: 319 at p 2541.
788 Ex P8: 329 at p 2574.
789 Ex P8: 329 at p 2575.
Mr Brown said he did not think that there was a cheaper waste disposal rate available in the State. (640)

On 30 September 2013 Mr Lorenz, Mr Aitken and Mr Salver had one of their regular catch-up meetings. Mr Salver made a note of the matters discussed. The first topic discussed was the SWR offer of 20 September 2013. Mr Salver noted that the rate of $34.70 per tonne was very competitive. Mr Lorenz was tasked with undertaking an analysis of that offer against the long-term financial plan to determine what impact it would have on the Authority’s operations at Brinkley. Mr Lorenz’s analysis was to include a scenario whereby the then current waste stream deposited at Brinkley was split between Brinkley and Hartley. The analysis was to be presented to the Authority’s Board for consideration. It was noted that it might be necessary for the matter to be reported to the constituent councils before any final decision was reached. There was also discussion of cells 6 and 7 at Hartley relevant to SWR’s complaint about overfilling and the construction of those cells.

On 9 October 2013 Mr Lorenz emailed Mr Brown saying that the 20 September 2013 offer was currently under consideration and an answer would be forthcoming after the next meeting of the Authority’s Board on 21 November 2013. Later that same day Mr Brown emailed Mr Lorenz to say that SWR struggled to see why the Authority needed two months to consider SWR’s proposal. He asked why a meeting could not be convened sooner. The following day Mr Lorenz emailed Mr Brown advising him that he would convene a Management Committee meeting within the next two weeks. He said:

… At this time we can give an indication whether your offer will be further pursued. If the Authority and the Member Councils were to consider your offer it would be a significant change to one of the Authority’s core activities and future structure and activities. In addition we will need to consider the remaining space at the Brinkley Landfill and what impacts that will have for each Member Council.

On the afternoon of 15 October 2013 Mr Lorenz sent an email to the Board members of the Authority. He attached for their information a copy of the SWR letter of 20 September 2013. He advised that he had arranged for the M & O Committee to meet to consider the offer and provide feedback. He further advised that it was expected that an analysis of the offer would be presented at the next Board meeting on 21 November 2013. He added that if the Board considered the offer worth pursuing it would be up to individual constituent councils to make independent evaluations. He concluded his email advising that
there were “some significant implications in terms of the Authority’s key current and future activities” to be considered in the course of evaluating the offer.  

Subsequently, Mr Brown wrote to each of the constituent councils extending to them the same offer as contained in his 20 September 2013 letter to the Authority as detailed below. Mr Brown explained that he made express offers to the councils after speaking to Mr Stuart who advised in effect that SWR should do so.  

On 16 October 2013 Mr Brown emailed Mr Stuart attaching a letter of offer to DCMB which superseded the offer made by SWR on 7 August 2013. The email advised that the offer was almost identical to the offer made to the Authority and had also been extended to each of the constituent councils. Mr Brown then stated:  

We are concerned at the delay by the AHRWMA in considering the September offer (we are told it won’t be considered until a meeting of the Authority on 21 November). I urge you to consider the spending that is currently being undertaken at Brinkley (which further cements the Councils’ commitment to stay at Brinkley) to be placed on hold whilst we are in the middle of resolving these issues and whilst we attempt to gain a true understanding of the best long-term disposal option for your waste.  

We visited the Brinkley site last week and were shocked at the level of activity being undertaken for the receipt of such a small amount of waste. It is my belief that these capital works are being undertaken in order to commit the member councils of AHRWMA to stay at Brinkley; and I believe you should be aware of this point.  

We are open to discuss the opportunities for your Council on its own and/or as part of the AHRWMA. We would appreciate any means by which you are able to expedite the consideration of these offers (by your Council and by the AHRWMA).  

In his statement Mr Stuart said that after a decision had been made by DCMB to transfer its waste to Brinkley, SWR requested the opportunity to meet with him. He recalled having meetings with Mr Brown and Mr Pucknell in the second half of 2013, although could not remember the exact dates, Mr Stuart recalled that in all the meetings he attended with SWR he said words to the effect that “my job is to recommend to Council the best deal for ratepayers that takes into account relationship, risk and price”. His constant message in these meetings was to ask SWR to put forward its best position. He also encouraged SWR to be creative as to the elements of any offer to be put. He thought that this was necessary given that the landfill disposal price was only one factor to be considered by the constituent councils. Other factors to be considered included the certainty of rates in the long-term, the provision of other services (both those that were offered at the time by the Authority and those potentially capable of

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796 Ex P8: 342 at p 2645.
797 Ex P8: 339; Ex P8: 340; Ex P8: 341; Ex P8: 343; Ex P8: 345.
798 Ex P8: 343.
799 Ex P8: 343 at p 2649.
800 Ex D74 at [33].
801 Ex D74 at [36].
being offered by SWR in the future), the significant change in business model from the “co-owner/operator” model to a model under which each council was a client only, and the relationship between DCMB and SWR.\(^802\)

On 15 October 2013 Mr Brown wrote to AHC extending to it the same offer as contained in his letters to DCMB and the Authority.\(^803\) In relation to the letter of 15 October 2013\(^804\) Mr Aitken considered a variety of factors relevant to the decision to not accept the offer. One was that there be a long-term secure location for the disposal of AHC’s waste. In this regard long-term was in excess of seven to 10 years mainly because AHC needed to have an economical location at which it could physically deposit its waste. In addition, there was some advantage in the equity that the council had in the Authority. (3719) In resolving to not proceed with the SWR offer of 15 October 2013 Mr Aitken said that he gave no consideration to the council’s procurement policy. He said there was no need to trigger the procurement policy because the council was not undertaking a procurement exercise. It was considering an offer. He explained that he had simply chosen to stay with the existing provider and all that had changed was the location at which that provider provided the desired services. (3721)

Mr Brown also wrote to Mr Dinning of AC on 15 October 2013 and 21 October 2013.\(^805\) The letters contained a proposal in the same terms as that made to DCMB, AHC and the Authority. Similar letters were sent to RCMB.\(^806\)

Mr Grenfell forwarded the offer sent to the Authority to Ms Dunstall of AC.\(^807\) In his forwarding email Mr Grenfell commented that AC would need to determine what its best waste option was moving forward. He added that such a decision would need to take into account all aspects including cost, quality, other benefits to the council, surety of tenure, travel distance and strategic aims. He requested to meet with other relevant senior council officers to discuss how to progress the offer. (3382) Mr Grenfell said: (3382)

\begin{quote}
Q At that point the council is still disposing of waste at Hartley.
A That’s correct.
Q You hadn’t further actioned the request you had earlier made to send the waste to Brinkley.
A No, there was a lot of things happening at that time with legal claims, with different offers coming in and obviously, year, a lot of different things happening in that space at that time; it was changing quite readily.
\end{quote}

\(^802\) Ex D74 at [37].
\(^803\) Ex P8: 341.
\(^804\) Ex P8: 341.
\(^805\) Ex P8: 340; Ex P8: 346.
\(^806\) Ex P8: 339; Ex P8: 345.
\(^807\) Ex P8: 344.
Q And the different estimates you were getting on the additional costs of transporting waste to Brinkley.

A Yes, I knew it was going to be easy for the regional waste authorities to just move all their waste or take the waste to Brinkley but there would be costs implications, but also a major impact was what’s happening with the offers and whether the council were going to accept the offers and that issue.

The M & O Committee met on 23 October 2013. Mr Grenfell, Mr Peters, Mr Lorenz, Mr Bond and Mr Salver were present. The minutes notes record that an analysis undertaken showed that when looking at the net cost per tonne for disposal (that is, excluding other financial and non-financial benefits), the SWR offer was slightly cheaper for three of the four constituent councils but slightly more expensive when applied to the constituent councils collectively. The meeting discussed the difficulty in long-term planning for the Authority where constituent councils were considering alternative offers. The minutes record:

An option considered in order to get a means of comparison was for individual Member Councils to run a tender process for the disposal of their waste to which the Authority could then respond. This would then enable the member Council’s to compare the SWR offer against what the Authority will offer. The M&O Committee instructed the EO to obtain legal advice with regard to the best process to adopt in this instance (i.e. how best to consider the offer from SWR and whether or not we should go down the tender path). The goal of proceeding down this path is to enable member Councils to determine who to commit to for the foreseeable future, whilst protecting both the Councils and the Authority’s interests in this instance.

The meeting also discussed the Authority’s desire that the constituent councils commit to the Authority for a period of seven plus years in order that it might proceed with long-term financial planning.

In the midst of the consideration by the constituent councils and the Authority of SWR’s offers, Mr Peters sent an email to Mr Lorenz on 23 October 2013. He had been reviewing the Authority’s long-term financial plan. After making a number of suggestions to the current plan he also suggested that an additional plan be prepared, one in which the constituent councils do not dispose of waste to Brinkley but, instead, switch their waste streams to Hartley. Mr Peters suggested that it might be useful for the Authority to be put in touch with a project manager that DCMB had used for a number of politically sensitive capital works so as to ensure that appropriate prudential rules were followed. Such contact might be useful particularly in relation to advice concerning offers by the councils to enter into long-term contracts that either the Authority or ResourceCo could bid for and which would be considered on a commercial basis.

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808 Ex P8: 347; Ex P8: 349.
809 Ex P8: 349.
810 Ex P8: 349 at p 2676.
811 Ex P8: 348.
On 29 October 2013 Mr Grenfell replied to SWR’s letter of 21 October 2013 stating that council staff were investigating the matter and would respond by 20 November 2013.\(^{812}\)

Mr Grenfell was taken to SWR’s offer of 21 October 2013 in cross-examination. He confirmed that it was not presented to the council. Rather, the offer was taken to the Authority. Mr Grenfell confirmed that the offer did not alter his preference as an officer of the council nor as a member of the Authority. He agreed that as at January 2014, SWR’s offer was ultimately put to one side as the Authority had resolved to reject it.\(^{3556}\)

On 30 October 2013 Mr Fairweather called Mr Stuart.\(^{813}\) Mr Stuart did not take notes. He confirmed in cross-examination that he had no specific recollection of the call.\(^{(2745)}\) The phone call concerned SWR’s offer to DCMB. Mr Stuart advised Mr Fairweather that he was waiting for the outcome of the meeting of the Board of the Authority.\(^{814}\) Mr Stuart considered that the Authority was obliged to advise the constituent councils of the threat of litigation. He expressed some disquiet at whether the constituent councils had been kept fully informed by the Authority. Mr Stuart asked Mr Fairweather to contact him later that week when he would know the outcome of the emergency Board meeting of the Authority and know what DCMB intended to do.\(^{815}\)

On the same day Mr Fairweather emailed Mr Lorenz on behalf of Mr Brown.\(^{816}\) Mr Fairweather referred to Mr Lorenz’s email of 10 October 2013 to Mr Brown in which Mr Lorenz stated that the Management Committee was to be convened to evaluate the proposal SWR put to the Authority. Mr Fairweather asked whether the Management Committee would determine whether the proposal would be advanced. He also referred to the statement made in Mr Lorenz’s 10 October 2013 email that if “the Authority and Member Councils were to consider your offer it would be a significant change to one of the Authority’s core activities”, and said that he was “keen to explore and understand” this statement further.\(^{817}\)

On 31 October 2013 Mr Salver had a telephone conversation with Mr Fairweather. Mr Fairweather made notes of the conversation which were tendered with his supplementary statement.\(^{818}\) In his evidence Mr Salver largely accepted the content of the phone call as set out by Mr Fairweather in his notes.\(^{(4035)}\) The telephone conversation was in relation to SWR’s letter of offer to AHC. Mr Fairweather stated that Mr Salver had explained that the process of considering the offer was slow because it had to go through the internal

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\(^{812}\) Ex P8: 350.
\(^{813}\) Ex P52 at [17].
\(^{814}\) Ex P52 at [17.2]-[17.3].
\(^{815}\) Ex P52 at [17.4].
\(^{816}\) Ex P8: 338; Ex P9: 351.
\(^{817}\) Ex P8: 338 at p 2636; Ex P9: 351 at p 2679.
\(^{818}\) Ex P52.
management processes of the Authority, then to the Authority’s Board and on to the constituent councils. Mr Salver had instructed Authority staff to consider both the offer to AHC from SWR and the previous offer to AHC from the Authority and report to the Authority’s Board. Mr Fairweather queried whether this meant that the SWR offer to AHC was going to be taken to the Authority, and noted that if this were so, the Authority would have the opportunity to match or better SWR’s offer whereas SWR would not have the same opportunity to match any offer made by the Authority. Mr Salver responded by stating that the constituent councils were not asking the Authority to provide further information for the councils to consider and that the Authority made no decisions in relation to where the constituent councils’ waste was deposited. However, later in the conversation, Mr Salver is said to have contradicted this statement by stating that the councils invested in the Authority to determine where they took their waste.

1099 Mr Fairweather then asked Mr Salver about the letter of offer sent by SWR to AHC. Mr Fairweather stated that he did not understand why AHC had to involve the Authority in its consideration of the offer. Mr Salver said that the situation was different now as SWR had provided rates for a seven-year period. Mr Fairweather stated that SWR was not being treated equally to the Authority because of the constituent councils disclosing SWR’s offer to the Authority’s Board. Mr Salver told Mr Fairweather that AHC was not going to review the SWR offer until Mr Lorenz considered comments from the Management Committee and had provided feedback and analysis to the Authority at its next Board meeting on 21 November 2013. The conversation was brought to a close with Mr Fairweather stating that he found the process difficult to accept.

1100 On 4 November 2013 Mr Lorenz advised Mr Fairweather by email that SWR’s proposal had been considered by the Management Committee and was to be referred to the Authority’s Board for further consideration at the Board’s meeting on 21 November 2013.819 Subsequently, Mr Fairweather tried to find out what the Management Committee’s attitude toward the SWR proposal was, but to no avail.820

1101 On 5 November 2013 Mr Aitken wrote to Mr Brown.821 After referring to SWR’s offer dated 21 October 2013, Mr Aitken advised:822

As discussed between Marc Salver and Jim Fairweather on 31 October 2013, the four Councils representing the Adelaide Hills Regional Waste Management Authority (AHRWMA) are preparing data in order to compare and assess your offer. This information is intended to be provided to the AHRWMA Board meeting later this month, and after that, the offer may be formally tabled by the respective Councils for their consideration.

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819 Ex P9: 352.
820 Ex P9: 352.
821 Ex P9: 353.
822 Ex P9: 353 at p 2687.
The letter then requested an extension of time in which to consider the proposal as it was unlikely that the council would consider it before December that year.

On 8 November 2013 Mr Lorenz circulated some financial modelling that he had undertaken to the members of the Authority’s Audit Committee.\(^{823}\) Mr Lorenz commented in the accompanying email that if the Authority were wound up at that time it might break even. He added:\(^{824}\)

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Essentially the LTFP indicates that the Authority is viable and will return good value for Member Councils provided that they are committed with their waste tonnes. This is a decision that will need to be made by Member Councils assuming that the Board recommends to remain committed to its Business Plan and Charter to achieve benefits for Member Councils through shared services and more critically it assumes that Member Councils back it up by committing their waste tonnes.

To enable us to plan long term we need to know that Member Councils will be committed to the Business Plan/LTFP for a minimum period of time without being undermined by “discounted offers” being made. Or else we need to know that Member Councils would prefer to be clients in which case the Authority wraps up its operations.
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On 11 November 2013 Mr Lorenz sent further financial modelling to the members of the Audit Committee.\(^{825}\) This time he attempted to show the net change in equity that would occur in a number of scenarios all different in the tonnages received at Brinkley. The intention was that the modelling would show the net change in equity and net difference in transport cost should one or more of the constituent councils dispose of their waste at Hartley and the benefit or otherwise to the councils if they all disposed of their waste at Brinkley.

In an email to Mr Stuart dated 13 November 2013, Mr Lorenz made plain that the decision whether or not to accept SWR’s offer was not a simple one to be made on the spot.\(^{826}\) Acceptance of the offer by the Authority or one or more of the constituent councils meant determining to become a client of SWR or another entity resulting in a significant departure from the past approach. Depending upon how many councils took up the offer it may result in the Authority being wrapped up. Bearing in mind the significance of the issues, Mr Lorenz advised that at the Board meeting he would make clear that the constituent councils should either commit their waste tonnages in support of the Authority’s long-term financial plan and the associated outcomes or determine to be clients of SWR. He anticipated that the issue would then have to be taken back to the constituent councils.

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\(^{823}\) Ex P9: 355.

\(^{824}\) Ex P9: 355 at p 2696.

\(^{825}\) Ex P9: 356.

\(^{826}\) Ex P9: 357.
On 14 November 2013 Mr Lorenz sent an email to all Board members to the following effect:827

This Memo is to inform you that our Budget for 2013/14 will require revision at the December first half yearly review. Our first quarter is showing a 192k unfavourable result. The main reason for the unfavourable position is due to Southern Waste ResourceCo (SWR) offering significant discounts to our commercial customers. This has resulted in an initial drop off of 90% in our commercial tonnes, well beyond budgeted reduced tonne levels.

The extent to which the budget is changed will depend on outcomes from our Board Meeting on Thursday 21 November 2013. Documents for this Board Meeting are in the process of being completed and will include an assessment of the SWR proposal (provided to Board Members last month). The assessment will be done in the context of our Long Term Financial Plan with several scenarios and will include other financial and non-financial items.

Mr Salver and Mr Lorenz engaged in an email exchange relating to the foreshadowed loss that the Authority would sustain in the 2013/14 financial year.828 In the course of that exchange Mr Lorenz said that the Authority was looking at picking up additional tonnage from non-member councils in addition to 2,000 tonnes from AC. He added that the Authority had not adjusted rates for commercial tonnes, believing that the rates being charged by SWR were not sustainable.

In that same email exchange Mr Lorenz emphasised that the upcoming Board meeting he would be highlighting the need for all constituent councils to commit to the long-term financial plan and business plan of the Authority or, as he had previously said, determine whether to become clients of SWR.

SWR wrote to Mr Laubsch, the Deputy Chair of the Authority, on 15 November 2013 elaborating upon additional services that SWR could provide to the Authority, intending that the Authority take such benefits into account at its meeting on 21 November 2013 at which time it was due to consider SWR’s offer.829 In his evidence Mr Brown said that SWR did not receive any formal response to its 20 September 2013 offer. Emails were received, he said, but no formal response. (643)

Mr Brown said that in the absence of the constituent councils’ waste SWR had worked hard to attract other commercial waste. The task was difficult, however, because of the availability of other landfills closer to collection points and the extra cost that would be incurred in taking residential waste to the Hartley landfill. (643-644) He considered the prospects of growth in attracting commercial waste to Hartley as “very limited”. (646) The use and storage of

827 Ex P9: 360 at pp 2734-2735.
828 Ex P9: 360.
829 Ex P9: 359.
trommel fines had worked in reducing some of the cost liabilities associated with operating the Hartley landfill. (647)

On 15 November 2013 Mr Brown sent an email to Mr Lucas, Mr Jarvis, Mr Pucknell, Mr Fairweather, Mr Manning and Ben Lucas. Attached to the email was a copy of the letter of 15 November 2013 to Mr Laubsch. In the email Mr Brown says, “[w]e have decided to send this out first which is our last olive branch to the Authority and the claim will follow next week before they all meet”.

In the papers that went to the Board for the purposes of the meeting on 21 November 2013, there was a recommendation made regarding the SWR offer as contained in SWR’s September letter. The recommendation was 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.

(2a) 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.

In the accompanying report, under the heading, “Discussion”, the papers stated:

Discussion

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 55% loss of Commercial tonnes due to competition from the Hartley landfill.

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.

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830 Ex D9: 364.
831 Ex D9: 364 at p 2752.
832 Ex P9: 369.
833 Ex P9: 369 at p 2792.
834 Ex P9: 369 at pp 2793-2794.
10. A core underlying assumption contained within the LTTP 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 LTTP.

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 is it [sic] 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.”

The minutes for the Board meeting of 21 November 2013 show that the recommendation contained in the Board papers was subject of a resolution carried unanimously.

On the morning of 22 November 2013 Mr Fairweather sent an email to Mr Lorenz wishing to know the outcome of the Authority’s meeting on the previous day. Mr Lorenz responded advising Mr Fairweather that the Board had determined that its recommendation, which at that stage was confidential, was to go to the constituent councils for a decision. 835

On 22 November 2013 Mr Stuart sent an email to Mr Lorenz copying in Mr Peters. He enquired of Mr Lorenz of the outcome of the Authority’s recent Board meeting. 836 On the following Monday, he received a response. 837 That response attached the draft minutes and papers relating to the confidential report items. After reading the documents provided by Mr Lorenz, Mr Stuart sent an email to Mr Peters on 26 November 2013. 838 He referred to a meeting he was soon to have with Mr Lorenz and enquired as to whether or not Mr Peters would be accompanying him. He then asked Mr Peters to advise him about DCMB’s position with respect to the proposals agreed to by the Authority’s Board. He

835 Ex D9: 371.
836 Ex D9: 374.
837 Ex D9: 374.
838 Ex D9: 374.
said, “I have quickly read the reports. I cannot see a pricing strategy to smooth or offset transport. There are winners and losers”. 839

In November 2013 Mr Stuart was in contact with SWR. It appears that Mr Stuart’s view as to the services that SWR could provide and the disposal rate offered were not, at least initially, the same as Mr Lorenz’s. In an email exchange with Mr Peters on 28 November 2013, Mr Pucknell refers to meeting with Mr Stuart on 27 November 2013. 840 He referred to it as having been suggested that the next positive step would be for DCMB to meet with Mr Brown and Mr Lorenz in an effort to work towards a mutually agreeable commercial decision. In his email Mr Pucknell said that SWR is keen to continue to explore all avenues toward a resolution.

On 4 December 2013 Mr Brown, Mr Pucknell and Mr Fairweather met with Mr Stuart, Mr Peters and Mr Lorenz. Mr Lorenz attended as an observer. A summary of what occurred at the meeting was provided in Mr Lorenz’s email to members of the Authority’s Board on 13 December 2013 841 and the notes Mr Fairweather took at the meeting. 842

The meeting commenced with Mr Stuart asking if SWR could do a deal incorporating the Authority into any commercial arrangement with DCMB, stating that any deal made would need to be long-term, address post-closure environmental liability and be commercial in the context of competitive rates. 843 Mr Brown then spoke about the historical dealings with the parties, the fact that SWR acquired the Hartley site for the purpose of obtaining constituent council waste, his belief that the constituent councils had indicated that they were prepared to provide their waste to Hartley, the process being derailed and that bad feeling now existed between the parties which he hoped to resolve. 844 Mr Stuart stated that an issue with the offer from SWR was that it did not address whether SWR would manage Brinkley. According to Mr Fairweather, Mr Brown responded that SWR was prepared to look into managing Brinkley, and when Mr Stuart asked what would happen if operations at Brinkley were kept on hold and not commenced, Mr Brown responded that this would need to be considered. 845

Mr Fairweather stated that Mr Lorenz then turned to explain the issues at Brinkley, including the cost incurred by the Authority to re-open Brinkley and the detail of work at the site. Mr Brown responded to Mr Lorenz by stating, among other things, that it was illogical for both SWR and the Authority to be

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839 Ex D9: 374 at p 2821.
840 Ex P9: 380.
841 Ex P9: 388.
842 Ex P52.
843 Ex P52 at [22.1].
844 Ex P52 at [22.3].
845 Ex P52 at [22.6].
operating separate landfills seeking to attract the same waste. According to Mr Brown he also stated that the amount the Authority had spent at Brinkley seemed strange, as if the Authority purposefully wanted to make it difficult for the constituent councils to leave the Brinkley site. Mr Stuart stated that each council could pick any provider, with Mr Peters adding that DCMB did not have a long-term contract in place with the Authority.

Some scenarios were put forward at the meeting whereby if the constituent councils were to accept SWR’s offer the Authority could continue to provide services to the councils by treating SWR’s price as a wholesale rate and adding a rate per tonne on top to fund the Authority’s other services. SWR made it clear that the existing proposal was based on all tonnes from the constituent councils coming to Hartley.

SWR raised compliance issues and associated tidy up costs, indicating that these would be a factor in any outcome. DCMB strongly put that the conditions of any agreement pursued would need to include that SWR agree not to pursue any damages or claims. SWR further indicated at the meeting that it had a writ ready to go but would put it on hold for the moment, adding that it needed to know that the Authority was moving down a path within the next week.

In cross-examination, Mr Stuart described his interaction with SWR:

What I’m saying was that there was a repetitive theme in the interactions I had with Southern Waste ResourceCo, whoever they were, of frustration, being frustrated, you know, didn’t know who to deal with or didn’t feel as though they were getting an engagement.

In the afternoon of 4 December 2013 Mr Stuart sent an email to Mr Dinning, Mr Bond and Mr Aitken. He advised his fellow chief executives that he had met earlier that morning with Mr Brown, Mr Fairweather and Mr Pucknell. He added that Mr Lorenz and Mr Peters were also in attendance. He said that he offered what was to follow in his email for the information of the other chief executives. He said:

I’ve been concerned with the entry of ResourceCo (effectively taking over AHRWMA’s site at Hartley) and the AHWMA [sic] “relocating” to Brinkley.

Effectively I have anticipated this development as a “game changer”

A situation has developed where there are now two landfills servicing the region and arguably the region is not big enough to support two.

In addition there is pending a legal dispute between ResourceCo and AHWMA [sic].

846 Ex P52 at [22.7].
847 Ex P64 at [8.5].
848 Ex D74.
849 Ex P9: 383.
850 Ex P9: 383 at p 2865.
Furthermore Recent numbers indicate that the AHWMA [sic] has lost commercial tonnage to Resourceco and combined with Resourceco’s attractive (aggressive?) price setting a commercial competition is underway. The implications are the AHWMA [sic] has less tonnage therefore it has implications for its finances.

The above is a thumbnail sketch of the current picture.

I encourage you to acquaint yourselves of the current status via your Board members and Michael Lorenz.

I am not a AHWMA [sic] Board member.

I guess the biggest concern I have is that Resourceco warrant that they seek a commercial outcome with the Authority essentially they would ask that the AHWMA [sic] direct members current tonnage to Hartley.

Resourceco are offering a ten year term at rates lower than the AHWMA [sic] rate – indexed to CPI.

In return my understanding is that any legal action will be dropped. And – it means Resourceco also have the ownership of risk in managing the landfill operationally and long term.

I think there exists the basis of a deal that I strongly encourage the AHWMA [sic] to objectively and commercially evaluate.

Mr Stuart went on to state that he foresaw a role for the Authority in the future, either in managing a form of sub-contracted service to ResourceCo or in the provision of other services. He then stated:851

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

Mr Stuart then advised that he had encouraged Mr Lorenz, with the benefit of the discussion with SWR earlier that day, to provide information to the Board so that SWR’s proposal could be considered with commerciality foremost in mind.

Later that evening, Mr Lorenz sent an email to Mr Grenfell advising him in a summary way of the receipt of Mr Stuart’s email which had derailed plans for draft reports to be prepared by the Authority for the constituent councils. In the light of Mr Stuart’s email Mr Lorenz had spoken to Mr Bond, Mr Aitken and Mr Salver, all stating that they would hold back any report going to their respective councils until Mr Stuart and DCMB were ready to make a decision.

Mid-morning on 5 December 2013 Mr Fairweather emailed Mr Lorenz.852 He referred to the meeting at the DCMB offices that took place the previous day.

851 Ex P9: 383 at p 2865.
The purpose of the email was to confirm that SWR awaited a response to its offer to be “presented 1 week hence”. Mr Fairweather assured Mr Lorenz of SWR’s commitment to work with the Authority to reach a suitable commercial outcome in the circumstances prevailing.

On 11 December 2013 Mr Aitken contacted Mr Brown. He referred to his letter of 5 November 2013 and noted that there had been a meeting between Mr Brown, Mr Stuart and Mr Lorenz on 4 December 2013. He further noted that this meeting resulted in a need for additional consideration of SWR’s offer and further discussions with the Authority. As a consequence, Mr Aitken stated that AHC would not be in a position to report to SWR before Christmas and sought an extension of time for consideration of SWR’s offer until February 2014.

On 12 December 2013 Mr Bond wrote to Mr Brown at SWR replying to Mr Brown’s letter of 21 October 2013. Mr Bond advised Mr Brown that he intended to put the commercial merits of SWR’s offer before the council once he had gained a clear understanding of the mutual benefit that might arise from that offer. He advised that it was improbable that council would consider the offer before February 2014.

On 13 December 2013 Mr Lorenz responded to Mr Fairweather’s email of 5 December 2013. Mr Brown and Mr Pucknell were copied in on that email. Mr Lorenz said:

Insofar as any arrangement is to be reached between Southern Waste ResourceCo and the Authority’s member councils, this is a matter that each council will need to give consideration to.

I understand that the member councils are considering their options but that no decision will be made until the next available council meetings which are scheduled in late January and early February 2014.

I understand that it is SWR’s current position that a claim will be pursued regardless of which path, councils choose. You have also indicated that if the councils were to accept the SWR proposal, SWR could arrange for payments of its claims to be remitted via an additional rate per tonne on top of the proposal. Please confirm whether my understanding is correct.

On 13 December 2013 Mr Lorenz also emailed the Authority’s Board members. He commenced his email by stating that it was an update intended to bring the Board members up to speed with things that had occurred since the meeting of 21 November 2013. He advised that subsequent to the Board meeting

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852 Ex P9: 373.
853 Ex P9: 373 at p 2814.
854 Ex D118.
855 Ex P9: 353.
856 Ex D9: 387.
857 Ex P9: 373.
858 Ex P9: 373 at p 2819.
859 Ex P9: 388.
he commenced preparation of a report to go to each constituent council outlining the resolution and recommendations made by the Board. However, in the course of communicating with DCMB concerns were raised that the Authority had not rigorously pursued all possible commercial outcomes with SWR. DCMB made clear that it would not commit to any option until such time as it was satisfied that commercial negotiations with SWR had been fully considered. Mr Lorenz also advised that the Chief Executive Officers of the constituent councils had indicated by email that they wished to delay consideration of the Authority’s recommendation by their councils until DCMB was satisfied that all commercial outcomes with SWR had been pursued and assessed.

Mr Lorenz went on to explain that he had met with Mr Brown, Mr Pucknell and Mr Fairweather on 4 December 2013. Mr Stuart and Mr Peters were present at the meeting. He reported that scenarios were put forward whereby if the constituent councils were to accept the SWR offer, the Authority might continue to provide different services to the constituent councils, funded by adding a rate per tonne to the waste received at Hartley by SWR. Mr Lorenz added:

SWR raised compliance issues and associated tidy up costs as per their previous allegations and indicated that these would factor in any outcome. It was put strongly by DCMB that if any agreement were to be pursued it would require SWR to agree not to pursue any damages or claims.

SWR also indicated that their existing proposal is based on “all” tonnes from Member Councils coming to the Hartley Landfill.

SWR indicated at the meeting that they had a writ ready to go but would put it on hold at the moment. Adding to that SWR said that they needed to know that the Authority was moving down a path within the next week.

SWR also put forward that consistent with one of the Authority’s objectives that they have been removing additional recyclables out of domestic waste streams at a project in NSW and were achieving further reductions in waste to landfill at 40%.

Out of this meeting it was expected that the Authority would consider and evaluate whether any other commercial options were feasible along the lines of the scenarios raised in the meeting.

Mr Lorenz explained that following the meeting he had been contacted by SWR to see if they could assist him. He took the opportunity to seek clarification as to whether a claim would be pursued by SWR regardless of what constituent councils chose to do. He was advised that SWR’s position was that a claim would be pursued in any event. However, if the constituent councils accepted the SWR proposal and in the event that SWR was successful in the litigation, the amount payable pursuant to any order of a court could be remitted via an additional fee per tonne on top of the proposed rate per tonne.

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860 Ex P9: 388 at pp 2878-2879.
Mr Lorenz brought his email to a close advising that there was a meeting of the chief executives of the constituent councils scheduled to take place in the near future, however in the meantime SWR had given notice of their intention to file a claim. The consequence was that Mr Lorenz had arranged to meet with the Authority’s lawyers on the coming Monday to prepare a response.

On 8 January 2014 Mr Grenfell sent an email to Ms Wagner in which he instructed her to arrange for the transfer of AC’s waste from Hartley to Brinkley. In that email, he wrote:

Dear Marina,

As previously discussed can you please start to arrange the transfer of Alexandrina Council’s waste disposal from the Southern Waste Resource Co site at Hartley to the AHRWMA site at Brinkley. I’m aware that this will have a financial impact on your operations. Can you please advise what the additional costs will be and when you will be able to transfer all of Alexandrina Council’s waste from Hartley to Brinkley.

I would like to see this commence as of the 1st February 2014 once the summer season is over.

At this stage the decision was one made by Mr Grenfell alone and not the council. He viewed the decision as one involving the incursion of an additional cost which he was advised would be in the region of $11,000. This decision fell within his financial delegations.

On 19 February 2014 Mr Kerr emailed Mr Grenfell and Ms Wagner. Mr Kerr was an employee of FRWA. He referred to a cost analysis undertaken revealing the additional cost of taking AC’s waste to Brinkley to be approximately $41,000. The increased cost estimate exceeded Mr Grenfell’s financial delegations; his instruction to Ms Wagner of 8 January 2014 was withdrawn and the matter was taken to council.

On 20 February 2014 the Authority’s Board met. The Board resolved to reaffirm the recommendations made at its 21 November 2013 meeting. Further:

(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.

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861 Ex P9: 389.
862 Ex P9: 389 at p 2880.
863 Ex D108.
864 Ex D9: 395.
865 Ex D9: 395 at pp 2954-2955.
On 7 March 2014 Mr Lorenz sent an email to Mr Dinning at AC, copying in Mr Grenfell.\textsuperscript{866} Attached to that email was a letter written by Mr Lorenz. The letter opened advising that, prompted by several offers made by SWR, the Board of the Authority had undertaken an analysis of the Authority continuing with its adopted business and long-term financial plans. A report had been prepared containing the analysis. The report was attached to the email. The letter advised that the outcome of the analysis was that the Board was satisfied that it was in the best interests of the constituent councils to continue with the current business model (which included the Authority operating the landfill). The letter then said:\textsuperscript{867}

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 [to] individually 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.

The letter referred to the anticipated legal proceedings to be instituted by SWR and that the Authority had received a rule 33 Notice. Attached was a copy of SWR’s Statement of Claim.

The AC met on 17 March 2014. One of the items on the agenda was the council’s support of the Authority’s business model.\textsuperscript{868} The council papers included a report prepared by Mr Grenfell and the material provided by Mr Lorenz. The papers referred to the SWR offer as resulting in a potential saving of $12,600 per annum, but contended that a SWOT analysis revealed the “most important points” for AC as being:\textsuperscript{869}

- Long term certainty with a AHRWMA controlled waste facility
- Value adding for member Councils through a shared services model with AHRWMA
- Ability to establish trust with SWR at the Hartley Landfill
- Long term uncertainty with the Hartley site in regards to cost.

Given that waste disposal and management is a core function of local government [it] is preferred that Council retain in control of their waste disposal options.

The minutes for the meeting record:\textsuperscript{870}

Moved Cr Walker seconded Cr Oliver:

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\textsuperscript{866} Ex P10: 400.
\textsuperscript{867} Ex P10: 400 at p 3038.
\textsuperscript{868} Ex P10: 403.
\textsuperscript{869} Ex P10: 403 at pp 3049-3050.
\textsuperscript{870} Ex P10: 404 at p 3093.
1. That Council reaffirms its ongoing membership of the Adelaide Hills Region Waste Management Authority and commits to sending its waste to their facility at Brinkley until April 2021.

Mr Grenfell agreed that as at 17 March 2014 when the AC met, there had not been any serious question about AC’s ongoing membership of the Authority. (3557)

On 20 March 2014 Mr Grenfell wrote to Mr Lorenz. He advised him of the outcome of the AC council meeting held on 17 March 2014. He said that he would advise Ms Wagner to start to dispose of AC’s waste at the Brinkley site as soon as possible. Six minutes later, Mr Grenfell instructed Ms Wagner and Mr Kerr to move AC’s waste. (3572)

On 20 March 2014 Mr Laubsch sent an email to Mr Aitken. Attached to that email was a letter in terms not materially different to that sent by Mr Lorenz on 7 March 2014 and 20 March 2014 to Mr Dinning and Mr Aitken respectively. Similar emails attaching similar letters were also sent to Mr Stuart and Mr Peters and to Mr Bond. Each of Mr Laubsch’s emails and the attached letters informed the recipient that the Authority’s Board had recommended to its constituent councils in the report accompanying the letter that they reaffirm their commitment to the Authority model. However, the email acknowledged that it was a matter for each constituent council to determine after making an independent assessment whether they wished to commit to the Authority’s current business model, or, opt for a landfill client model where the councils become clients of another landfill operator.

On 3 April 2014 Mr Peters sent an email to Mr Grenfell enquiring as to the outcome of the AC meeting on 17 March 2014 in relation to the report received from the Authority. In his response, Mr Grenfell confirmed that AC had resolved to reaffirm its commitment to the Authority. (3577)

Under cover of a letter dated 7 April 2014 AC formally advised the Authority of the resolution passed on 17 March 2014. The Authority was also advised that it was expected that FRWA would commence its disposal of AC’s waste to the Brinkley site as of 1 April 2014.

At its meeting on 14 April 2014 RCMB resolved to commit to its membership with the Authority and process its waste streams through the Brinkley landfill in accordance with the long-term business and financial plans of

871 Ex D10: 408.
872 Ex P10: 407.
873 Ex P10: 405.
874 Ex P10: 400 and Ex P10: 405.
875 Ex P10: 406 and Ex P10: 409.
876 Ex D10: 412.
877 Ex D10: 412.
878 Ex P10: 414.
the Authority. The council directed Mr Bond to reject all approaches by SWR to procure waste streams from RCMB.

On 15 April 2014 Mr Bond wrote to Mr Lorenz advising that RCMB was committed to membership of the Authority and committed to processing its waste streams through Brinkley “in accordance with the long term business and financial plans of the Authority”. In this letter Mr Bond also advised that he had “been directed to reject all approaches by Southern Waste ResourceCo to procure waste streams from the Rural City of Murray Bridge”.

Also on 15 April 2014 Mr Salver sent an email to Mr Grenfell, Mr Bond and Mr Peters. The purpose of the email was to enquire as to whether AC, RCMB and DCMB had made a decision as yet with respect to the “SWR matter and what the resolutions were”. He included in his email resolutions that he had drafted for the forthcoming AHC council meeting and wished to ensure that his recommendations were consistent with those that the other Executive Officers were recommending to their respective councils. He advised that he was going to recommend:

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.

Mr Peters responded the same day, advising Mr Salver that DCMB had not as yet made a final decision. Mr Grenfell also responded, advising of AC’s reaffirmation of its support for the Authority and the Authority’s business plan.

As at 15 April 2014, DCMB had not made a final decision as to where to commit its waste. Mr Stuart considered that there would be a change in business model should DCMB decide to deposit its waste with SWR. He explained:

... SWR representing a price per tonne for us to deposit waste, in essence, and that that model was really that they were offering a service and that the council would be contracting with them in a commercial environment, and that was a very different environment to the one that they had thus far. With the Authority we are a member of a subsidiary, and therefore, if you like, a co-owner by virtue of equity. A very different scenario. And with the Authority we have voting rights on how the Authority conducts its business, with the Authority the Authority provides and has a charter to fulfil best

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879 Ex D10: 423.
880 Ex P10: 418 at p 3201.
881 Ex P10: 418 at p 3201.
882 Ex P10: 419.
883 Ex P10: 419 at p 3202.
884 Ex P10: 419 at p 3202.
885 Ex P10: 419.
886 Ex D10: 420.
887 Ex P10: 419.
practice in waste practice. They’re only a few of the differences between the council being a part owner and an entity, as it were, having board representation, to one of engaging in a contract with a third-party, and that had many then other flow-on considerations such as the nature and bona fides of the person you’re dealing with, those sorts of matters enter my mind.

When asked what he meant by “the nature and bona fides of the person you’re dealing with”, Mr Stuart explained that there was a “great degree of goodwill” with the Authority” and that to enter into a contract with another party required a lot of due diligence and care about the nature of the relationship. (2614-2615) He made plain that price was not determinative; the decision also depended on the other party’s reliability, reputation and risk. (2615) In that connection, Mr Stuart noted that DCMB would be a “price taker under one model and not under the other”. (2615)

Mr Stuart was asked what sorts of risks he envisioned he might suffer as a consequence of leaving the Authority. He made plain that he was concerned that the council would have “nothing concrete to fall back on” should things with SWR turn sour. (2623)

On 22 April 2014 AHC resolved to continue to dispose of its waste with the Authority at the Brinkley landfill. The resolution passed committed AHC to disposing of its waste at the Brinkley landfill for the next 10 years “unless circumstances arise requiring a review of this decision”. In support of that resolution Mr Salver had prepared a report. Among other things that report stated:

- the long-term financial plan indicated that the Authority was still viable and would return good value for the constituent councils provided that they committed their waste streams to Brinkley;
- all constituent councils needed to be committed to either the current business model or to a landfill client model (i.e. taking their waste streams to another landfill site). If one member withdrew its waste tonnes, the Authority’s long-term financial plan would no longer be as viable when compared to the rate offered by SWR;
- if AHC were to pursue SWR’s offer, it would involve a significant change to the Authority’s long-term business plan and future existence; and
- the Authority’s long-term viability and sustainability depended on the constituent councils’ waste streams coming to Brinkley.

888 Ex D10: 425.
889 Ex D10: 425 at p 3276.
890 Ex P10: 424.
891 Ex P10: 424 at pp 3219-3220.
Mr Salver agreed that in making the decision, no thought was given by the council or its officers to the council procurement policy. He confirmed that the Authority was not a new subsidiary. It was a pre-existing subsidiary offering an existing service. He agreed that all that had happened from his point of view was that his service provider had moved premises.

On 23 April 2014 Mr Salver sent an email to Mr Peters, Mr Grenfell and Mr Bond, copying in Mr Lorenz and Mr Aitken, in which he advised that AHC had resolved to advise SWR that it was committed to the Authority and the disposal of its waste at Brinkley. He concluded his email by stating:

David, [Mr Peters] can you please advise Andrew that three of the member Councils have now resolved to commit their waste streams to the Authority, and we now look forward to hearing what Mt Barker Council’s decision is in this regard.

On 23 April 2014 Mr Piper, AHC’s acting CEO, wrote to Mr Brown to advise of AHC’s decision in relation to SWR’s offer of 21 October 2013. Mr Piper informed Mr Brown that the AHC had resolved at its meeting on 22 April 2014 to decline SWR’s offer and to continue to take its waste streams to the Authority’s landfill site at Brinkley for at least another 10 years, unless circumstances arose necessitating a review of that decision.

Mr Stuart did not put the Authority’s recommendation to DCMB. He explained that he remained interested in exploring with SWR an acceptable arrangement for all constituent councils of for DCMB alone.

C. Consideration

SWR contends that Mr Lorenz’s email of 10 October 2013 reflected his thinking and that a move to Hartley “represented a change of focus, a change of objectives and a change of the underlying assumptions pursuant to which the Authority and the member Councils conducted business”. I agree to the extent that it was clear to Mr Lorenz that acceptance of SWR’s offer would result in the constituent councils moving from a position of being owner/operator/customer to customer. That involved a change in the model to date committed to by the constituent councils, and potentially meant the end of the Authority.

I do not think it is accurate to characterise the core underlying assumption to which the Board papers for the 21 November 2013 meeting refer, as being that the constituent councils would stick together. Any assumption was one made by the Authority. That assumption, as I have endeavoured to explain, was that the constituent councils had committed to the Authority model for so long as that model addressed their needs. The question was, were the councils each satisfied

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892 Ex D10: 425 at p 3276.
893 Ex D10: 426.
894 Ex D74 at [68].
895 Plaintiff’s Closing Submissions at [767].
896 Plaintiff’s Closing Submissions at [770].
that the model continued to address their needs in the wake of SWR’s offers? Mr Lorenz was clearly of the view that it did. The Authority agreed. In the end, each of the councils also agreed.

I do not find Mr Salver’s statement that AHC invested in the Authority to determine where it took its waste necessarily inconsistent with the AHC’s entitlement to determine for itself where it took its waste. AHC had no waste management expertise. (4327, 4300) It is understandable that it turned to the Authority for advice. The same may be said of all the constituent councils in view of the history of their association with the Authority not to mention the role of the Authority as prescribed in the Charter. But turning to the Authority for advice is not to be equated with delegating decision making power. Clearly, AHC retained the power to decide for itself whether it would dispose of its waste with the Authority or otherwise.

To my mind the treatment of SWR’s offers in the latter half of 2013 and into 2014 demonstrates the independence of each of the constituent councils from the Authority not simply as a matter of law, but as a matter of practical reality. Mr Stuart’s actions also demonstrate the point, as does the non-actioning of Mr Grenfell’s instructions at AC. Clearly, Mr Stuart had an open mind throughout 2013. Those actions compelled the councils to consider whether the Authority model served their individual interests. The fact that the Authority model achieved the best outcome for the constituent councils if they all disposed of their waste at Brinkley, does not alter the fact that it was for each council to determine whether it wished to subscribe to that model or to become a customer of SWR.

I see nothing untoward in Mr Lorenz attempting to persuade the constituent councils that the Authority model best served their interests. I see nothing untoward in Mr Lorenz expressing the ultimate decision as one of whether the councils wished to move from a position of owner/operator/customer to customer. The frequency with which Mr Brown and other representatives from SWR said that SWR did not see itself as a competitor to the Authority could not mask the fact that, in truth, whilst the Authority and SWR both vied for the constituent councils’ waste streams they were very much in competition. When Mr Brown said he did not see the Authority as a competitor that reflected a view that the Authority would withdraw from the market to the extent that SWR entered it.

The Authority’s and Mr Lorenz’s conduct post-settlement reflects the limits of the commitment given in 2007. The constituent councils were not bound to accept the services of the Authority including landfilling. They were committed to a model and a direction for so long as doing so suited their individual purposes. The minutes of the M & O Committee meeting of 23 October 2013 suggest that the SWR offer was given proper consideration. Ultimately,
Mr Lorenz used the tools available to him to demonstrate to the satisfaction of the constituent councils that the model continued to meet their needs.

Mr Stuart described the political pressure that impacted upon him. (2620-2621) I have paid no regard to the evidence of things supposedly said by Mr Peters or by Ms Wagner to SWR on the topic of political influences. I have no doubt, however, that councils and council officers would have weighed as part of any decision the tangible and intangible benefits of membership and ongoing membership of the Authority including political considerations. The simple fact is that each of the constituent councils were not persuaded that SWR’s offer, as competitive as it might be in terms of price, was the better option for each particular council. That was not the product of the operation of the core underlying assumption that may be traced to the councils’ prior commitment to the Future Directions Study, it was a matter of what elected members considered was best for ratepayers. The Authority’s offer was considered better than SWR’s. There is no evidence to suggest that the elected members of the constituent councils did not approach the question of whether to support the Authority model or become a customer of SWR with open minds.

For SWR the issue has always revolved almost exclusively around price and its understanding of costs drivers. It has largely failed to appreciate the intangible considerations that attach to local government decisions and the broader benefits that the Authority model could provide to the constituent councils.

I am left with the very firm impression that SWR misjudged the competitive environment it largely created when it took over the operation of the Hartley landfill. Confidence in the costs advantages associated with Hartley’s location led SWR not to follow up on the 22 November and 6 December 2012 meetings. It was not until DCMB announced that it would be moving its waste that SWR reacted. I suspect that until this point SWR always thought that cost would drive AHC back to Hartley and it could survive on the waste streams of AC, DCMB and commercial customers.

It could be said that it was not confidence but more reliance upon assurances given that led SWR not to follow up on the meetings of 22 November and 6 December 2012. I have already indicated that I find that no assurance or commitment was given by any of AC, AHC or DCMB to the effect that they would continue to dispose of their waste stream at Hartley once SWR took over the site.
VI

A hotchpotch of matters

A. The constituent councils’ decision of where to dispose of their waste — the relevant factors

a. Mr Stuart

In his written statement, Mr Stuart set out the factors that he would take into account in making any decision with respect to where DCMB would dispose of its waste on a long-term basis: 897

17.1. Obtaining details as to costs and rates. I recognised that there would be an increase in transport costs in taking waste to Brinkley.

17.2. Long term security of an alternative offer.

17.3. Whether the other shared services offered by the Authority would be part of an alternative offer.

17.4. The fact that DCMB who operated the Monarto Quarry was in discussion with a number of parties, including SWR, in relation to the disposal of that asset and the potential for the quarry to be an element of discussions in relation to the Council continuing to deposit waste at Hartley.

In addition to these factors, Mr Stuart said that other important factors to be considered were; certainty, long-term relationship, the broader services provided and the appropriate business model. With respect to the business model it was a matter of considering whether DCMB would be a part-owner/customer of the Authority’s landfill and other operations or the customer of another landfill. The decision was not one that only concerned the landfill disposal fee. 898

Mr Stuart said he was mindful of issues that could arise as a result of DCMB refusing to take its waste to Brinkley. Such issues included the likely impact this would have on the Authority’s viability and the effect upon the interests of the other constituent councils, as DCMB was one of the larger constituent councils in terms of waste disposal. 899 However, ultimately, his primary obligation was to DCMB’s ratepayers. Furthermore, if SWR had offered a proposal that was sufficiently advantageous to DCMB than it was likely that such proposal would be accepted. This decision would have been determined by the elected members of the council. 900 Subsequent to that decision being made, DCMB would need to decide whether or not it should leave the Authority. 901 Mr Stuart also had regard to the fact that the other constituent councils could decide to wind up the Authority. If this were to occur the equity in the Authority of approximately $1.4 million, as at the time of his statement, which was

897 Ex D74 at [17].
898 Ex D74 at [20].
899 Ex D74 at [22].
900 Ex D74 at [23].
901 Ex D74 at [24].
proportionately held by each of the constituent councils, would not be wholly realised. Mr Stuart recalled that DCMB’s share was approximately $500,000.  

Mr Stuart was examined and cross-examined on the factors informing his decision to divert waste to Brinkley. He was asked about the reference in his statement to a “significant change in business model”.  

He explained that by that he meant that a contract with SWR would be a departure from the environment in which the council had been operating. He explained that with the Authority, the council was a “member of a subsidiary, and therefore, if you like, a co-owner by virtue of equity”.  

He went on to explain that there were many factors that had to be considered before the council could enter into a contract with another party:  

... I think required a lot of due diligence and care about the nature of the relationship, you know, it wasn’t just about their price, it was about how good are they and how reliable are they, what’s their reputation, many matters that entered into my mind as to anticipating that if we got to a point where we received a sufficiently attractive offering it would have been not only about price, but reputation, the nature of the parties we were doing business with, the reliability and the risk, so many factors, and that's why I said it was a very different business model, we were in fact going to be a price taker under one model and not under the other.

Further, Mr Stuart was concerned about the other services the Authority had provided. In his view, SWR had failed to address fully those concerns.  

In cross-examination, Mr Stuart explained that security was a relevant factor. One element of security was the reliability of the services provided. He was also cautious about becoming beholden to one service provider and the risk of suffering price gouging. Earlier in these reasons I have referred to Mr Stuart’s evidence on the relevance of political considerations to any decision. For convenience I repeat a small portion of what Mr Stuart said:  

The prospect of the political dimension to sending it elsewhere was a very relevant one because the council was a member of the authority, it was a member of a subsidiary. It had committed to becoming a member of the subsidiary and it had been a member of that subsidiary for a long, long time. Relationships had been built and formed with that subsidiary membership. To contemplate a new relationship would have meant that quite rightly I would have expected the council to have had to have been satisfied with the new relationship and leaving an old relationship, potentially.

b. Mr Grenfell

Mr Grenfell stated that AC’s equity of approximately $200,000 in the Authority was only one of the factors he considered when assessing SWR’s proposal in 2013. His primary concern when advising and acting for the Council was to “have a secure long term arrangement for its waste on

902 Ex D74 at [25].
903 Ex D74 at [37].
904 Ex D112 at [57].
commercially acceptable terms". In this regard, Mr Grenfell set out the non-financial factors that were relevant to his decision making:

58.1. Long term certainty with a AHRWMA controlled waste facility;

58.2. Value adding for member Councils through a shared services model with AHRWMA;

58.3. The ability to establish trust with SWR at the Hartley Landfill; and

58.4. Long term uncertainty with the Hartley site in regards to cost and access to the facility by SWR.

Mr Grenfell stated that at all times the decision made by AC about the disposal of its waste was based on what was in the best interests of the council. The fact that the best interests of the council was the yardstick against which proposals were measured meant that the council was “constantly reviewing all aspects of its business”. He explained that if a proposal were considered “beneficial” by the council, then the council could elect to accept the proposal. To this end, he said:

If a proposal were to be presented that secured both long term arrangements for waste and provided for a significant improvement on the financial benefits of taking waste to the Authority’s site at Brinkley then I may recommend to my Council that it should change its arrangement and accept such a proposal. In the absence of these matters being addressed, I would see no point in moving. The threats that had been made by SWR since settlement have also caused me to lose trust in this organisation.

Mr Grenfell agreed that he was comfortable dealing with the Authority, that there had been no competition so far as landfill was concerned and that the idea of competition was something that had not seriously been considered or even planned. His view, however, was that AC did not use the Authority for any services other than the landfill it provided. Accordingly, if AC were to “get real good rates out of Southern Waste ResourceCo and stay at the Hartley site, [it] would have been better for us”. Later in cross-examination, Mr Grenfell agreed with the proposition that there was no financial benefit to be gained by AC sending its waste to Brinkley.

Cross-examination turned to the non-financial factors. As to long-term certainty, whilst the lease holder arrangement at Brinkley did not on its face provide security, there was the relationship with RCMB to take into account. Security was provided by the fact that Brinkley was controlled by local government. As to “value-adding”, Mr Grenfell agreed that the benefit was neutral in AC’s case as it did not take advantage of any additional services.
offered by the Authority. (3565) Mr Grenfell agreed that long-term contracts could have overcome trust issues with SWR and long-term uncertainty with Hartley. He added, however, that one of his concerns was with SWR’s ability to stick to an agreement. In this regard, he referred to the claims made by SWR in relation to the transfer of Hartley. (3565-3566)

At the meeting of 22 November 2012, Mr Grenfell conceded that he never mentioned any of the non-financial benefits referred to in the paper that he ultimately put before AC in January 2014. Mr Grenfell was asked as to the most important factor on his mind at the time he wrote his report for the council’s consideration in January 2014. He said the most important consideration was that AC was getting the best outcome for the community. He agreed that at the time of his report, the financial considerations favoured the proposal put by SWR, but in terms of achieving the best outcome for the community, long-term certainty was with the Authority. (3568) Mr Grenfell said all factors were considered, and accordingly, the recommendation made. (3569)

c. Mr Salver

On 21 November 2013 Mr Salver attended a meeting of the Authority during which Mr Lorenz presented a report on SWR’s proposal. In his written statement, Mr Salver stated that it was at this meeting that he formed the view that subject to commitment by all constituent councils, it was in the interests of the councils to take their waste to Brinkley. He formed this view based on a number of factors, including: 910

116.1. the long term financial modelling;

116.2. the long term security offered as a result of dealing with an Authority;

116.3. the other non financial benefits such as community education programs, access to specialist advice from the Waste Strategy Coordinator, and the ability to pursue other waste initiatives for the benefit of the councils.

Mr Salver was cross-examined on each of these factors. By long-term financial modelling, Mr Salver meant modelling undertaken by the Authority which indicated that the Authority would be viable if the councils disposed of their waste at Brinkley. He also noted that there were benefits to the constituent councils in terms of equity over the 10-year period which was the subject of the financial modelling. As to long-term security, Mr Salver referred to the fact that there was security in AHC being a member of the Authority. He confirmed that he had no prior dealings with SWR or ResourceCo or the Lucas companies. As to the community education programs, advice and other waste initiatives, Mr Salver explained that, unlike the Authority, AHC had no internal waste management expertise. The ability to access that expertise was “invaluable” to the council. (4039)

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910 Ex D131 at [116].
On 8 April 2014 Mr Salver presented a PowerPoint presentation to AHC. Reference is made to this presentation in Mr Salver’s written statement. That presentation listed the “pros” and “cons” of committing to the Authority on a long-term basis and of switching to SWR. As to SWR’s proposal, Mr Salver wrote that the “pros” of switching was that it would allow the council to enter into a “7 + 3 year contract and competitive fixed rates with no liabilities” and that there were no staffing or asset management risks and liabilities. As to the “cons”, Mr Salver wrote that AHC would be at the mercy of SWR or another commercial operator, there was no long-term certainty, destiny or vision, there was no equity in the business, no gains from waste management initiatives and no ability to pursue beneficial strategic initiatives. Mr Salver further recorded that there was a risk that SWR would cease operations and not honour its contracts. In such circumstances, the council would need to find an alternative landfill. When cross-examined the presentation, Mr Salver explained:

… The offer that was put to the Authority was purely on a rate and a term. Nothing else. The Authority, on the other hand, has a number of services and expertise etcetera, that it offers member councils and those were articulated in here. So all that I have done is present the facts and, ultimately, it was up to the elected members to make their own considered decision.

It was put to Mr Salver that there was no long-term security at Brinkley as there was no lease. Mr Salver disagreed; in his view, there was security in the sense that they were dealing with a site that was owned by one of the constituent councils.

d. Mr Aitken

Mr Aitken stated that he had an open mind as to where AHC’s waste should go. He explained that he was not “wedded” to the Authority and that there were a number of factors relevant to a determination on where the waste should be disposed. He listed the financial factors as price, price certainty and the council’s equity in the Authority. As to non-financial factors, he stated that long-term security for the disposal of the council’s waste and the other services that were being provided by the Authority. Mr Aitken made plain that it was not simply a question of comparing rates per tonne of waste dumped; there were a number of factors that needed to be weighed, including “long term certainty in relation to price per tonne, a long term secure location for depositing waste, equity impacts, other service offerings (including education, recycling and advice)”. Mr Aitken referred to the PowerPoint presentation made by Mr Salver set out above. He added that an additional factor to be considered was

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911 Ex P10: 416.
912 Ex D131 at [127].
913 Ex D123 at [41].
914 Ex D123 at [41].
915 Ex D123 at [56].
that AHC would need to employ a staff member to address waste issues. This would be a cost that AHC would not otherwise need to bear.\footnote{Ex D123 at [69].}

Mr Aitken explained that “price certainty” was ensuring that any long-term arrangement did not allow for any large increases or price gouging. While equity in the Authority was a factor, it was not the only factor to consider. Long-term security was also relevant. (3712) As to the other services provided by the Authority, Mr Aitken said: (3712)

Some of those relate to access to advice, opportunities for education and in terms of waste management and recycling, so there were a range of other benefits that come with being a member of the authority.

In relation to Mr Brown’s letter of 15 October 2013,\footnote{Ex P8: 341.} Mr Aitken considered a variety of factors relevant to the decision not to accept the offer. One was that there be a long-term secure location for the disposal of AHC’s waste. In this regard, long-term was in excess of seven to 10 years mainly because a council needed to have an economical location at which it could physically deposit its waste. Mr Aitken said that any provider would need to be able to address that as part of any offer. Again, he explained that there was some advantage in the equity that the council had in the Authority. (3719) His determination was that the overall offer was not one that was as good as the arrangements with AHC remaining part of the Authority. (3720)

In cross-examination, Mr Aitken refused to concede that the utility of the equity in the Authority was limited. He conceded that it was less valuable than equity in ordinary commercial businesses and that “you can’t spend it necessarily straightaway” but it did provide access to dividends which can be spent. (3757) Mr Aitken accepted that there were times when it was more difficult to be able to provide a dividend to the constituent councils. (3758)

Mr Aitken said he would have had regard to the long-term ability of SWR to meet the needs of AHC in 2012/2013. At that time, he had little understanding of SWR’s financial capacity. He explained that he was not so concerned with financial capacity, his concern related to SWR’s ability to operate a landfill at Hartley given the circumstances with the landowner which the Authority had confronted. He did not undertake any research on ResourceCo. (3763) Mr Aitken confirmed that there was a “whole range of risks that an operator would need to be able to fulfil”, including asset production and environmental risks. (3764) Mr Aitken said that he questioned whether SWR could adequately address those risks. (3764)

It was put to Mr Aitken in cross-examination that there was no security of tenure at Brinkley as at February 2013. He disagreed and referred to the relationship with RCMB. That is to say, Mr Aitken was reliant upon RCMB
being accommodating in addition to there being negotiations on foot between the Authority and RCMB regarding tenure at Brinkley. (3784-3785)

With regard to transport costs, East Waste had advised Mr Aitken that it would cost AHC an additional $44,000 per annum to take its waste to Brinkley. (3986-3987) Mr Aitken’s evidence was that he did not consider this to be a significant imposition when one had regard to AHC’s total waste budget. He was confident that this was a worst case scenario and that over time changes in practice would reduce the cost. (3987) Mr Aitken was also concerned about there being a call for financial contributions from the constituent councils for long-term liabilities at Hartley. (3994-3995)

e. Consideration

The decision for council officers and councils as to where to dispose of their waste was and is an evaluative one. It is in the nature of evaluative decisions that reasonable minds may differ as to the factors to be taken into account, the weight to be attributed particular factors and, possibly, as to the actual decision reached. None of Mr Stuart, Mr Grenfell, Mr Salver and Mr Aitken referred to factors to be taken into account in determining where their respective councils would dispose of their waste that struck me as irrelevant or contrived.

I accept that equity holdings in the Authority were of a different nature to equity holdings in an ordinary corporation, but I do not accept that equity in the Authority was not a relevant consideration or that it had no value to the constituent councils. Its value very much depended upon the performance of the Authority.

True there was no long-term security at Brinkley because the Authority and RCMB were yet to hammer out the terms of any long-term lease or sale, but I accept the evidence that, nonetheless, because the landlord at Brinkley was RCMB the other constituent councils considered that they enjoyed security despite the absence of a long-term lease.

I also accept the relevance of political factors. I imagine political considerations had more than one dimension; there was the council’s relationship with the Authority, the council’s relationship with the other constituent councils, and there was the council’s obligations to its constituents. All may be relevant to differing extents.

I did not gain the impression that any of Mr Stuart, Mr Aitken, Mr Grenfell or Mr Salver were raising irrelevant and peripheral issues in an attempt to bolster the position they or their council had taken.

I could detect nothing in the evidence to suggest that when AHC, AC and RCMB considered the October 2013 offers made by SWR, the elected members did not undertake an independent assessment of the relevant factors in arriving at
their conclusions. Nothing in the evidence suggests that the outcomes were the product of any contract, arrangement or understanding. It seems to me that the offers were considered on their merits.

I agree to a large extent with Mr Salver that SWR’s offer was really one that only addressed price and term. Term, of course, would have also addressed in part ongoing environmental management obligations and liabilities, but it was open to council officers and councillors to conclude that the offer did not address additional factors relevant to the decisions to be made. Further, no doubt, the future relationship with SWR was also a factor to be considered, informed by what had occurred since February 2013.

B. Procurement Policy

Section 49(a1) LGA requires a council to develop and maintain procurement policies, practices and procedures directed towards obtaining value in the expenditure of public money, providing for ethical and fair treatment of participants, and ensuring probity, accountability and transparency in procurement operations. Without limiting sub-s (a1), s 49(1) LGA requires councils to prepare and adopt policies on contracts and tenders, including policies on the contracting out of services, competitive tendering and the use of other measures to ensure that services are delivered cost-effectively, the use of local goods, and services and the sale and disposal of land or other assets.

Section 49(2) LGA provides that the policies must:

(a) identify circumstances where the council will call for tenders for the supply of goods, the provision of services or the carrying out of works, or the sale or disposal of land or other assets; and

(b) provide a fair and transparent process for calling tenders and entering into contracts in those circumstances; and

(c) provide for the recording of reasons for entering into contracts other than those resulting from the tender process; and

(d) be consistent with any requirement prescribed by the regulations.

Section 99 LGA sets out various functions of the chief executive officer of a council, including to ensure that the policies and lawful decisions of the council are implemented in a timely and efficient manner and to coordinate proposals for consideration by the council for developing objectives, policies and programs for the area. Under s 109(2) LGA all council employees are under a duty to act at all times with reasonable care and diligence in the performance of official duties.
The constituent councils had each adopted policies and procedures for the purposes of s 49 prior to 2013 and thereafter. Counsel for SWR explained the relevance of the procurement policies: (2391-2392)

Each of the councils has a procurement policy that applies to the procurement of both goods and services, and here the deposit of waste we would say would be a service. The question will be the question of the application or non-application of those policies in the decision making process by the councils as to the deposit of waste in February 2013 and July 2013. We say if in February 2013 the policy ought to have been applied but wasn’t, it supports the inference that there was some form of arrangement between the council and the authority.

SWR submitted that there is no evidence that the councils applied any procurement policy in relation to the services as were (or as were to be) provided or offered at Hartley or Brinkley by the Authority or SWR.

The Authority submitted that to the extent that this submission related to February 2013, it was untenable as none of the constituent councils were undertaking any procurement process at that time as there was no offer from SWR which arose for consideration. In relation to the offers made in the latter half of 2013, the Authority submitted that it is of no moment as none of the constituent councils were undertaking a procurement process; they were working with an existing service provider and had received an unsolicited bid from an alternative service provider. He further submitted that there were no obligations on the councils to implement a procurement exercise upon receipt of an unsolicited offer from a commercial operator.

a. District Council of Mount Barker

Mr Stuart gave evidence that he had a procurement policy at the back of his mind as a matter to consider if and when there was a proposal he thought worthy enough to present to DCMB. In December 2012 Mr Stuart did not consider that there had been a proposal as such. He described the meeting with SWR as a “sales pitch”. (2605) In the course of being cross-examined, Mr Stuart conceded that he gave no active consideration to the procurement policy in relation to SWR between January and July 2013. (2883) He confirmed that he did not raise the procurement policy at any of his meetings with SWR. (2992) He also acknowledged that the procurement policy was not applied between February and June 2013, when DCMB was utilising the services of SWR. (2777) As to why the procurement policy was not applied in that period, Mr Stuart explained that he viewed SWR as a provider of “casual services”, and that the exemption regarding public risk and emergency services applied. He viewed it as a temporary arrangement to facilitate an orderly transition to Brinkley. (2777-2779) As to why the procurement policy was not applied in late 2013, Mr Stuart said that he did not consider the offer put forward by SWR as worthy of submitting to council. He said he would have considered the procurement

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918 Ex P13: 527; Ex P13: 528; Ex P13: 530; Ex P14: 559.
919 Plaintiff’s Closing Submissions at [916].
policies upon receipt of some documentation on the proposal, but things had not quite reached that point. (2606) In that connection, he explained: (2879)

Well we never asked for a process to be triggered, it was the representation made by them, a cold call almost. I can only offer that I didn’t ask for them to meet me, I didn’t ask for them to submit, they made representations and I expressed ‘Well, you know, we’re happy to listen’ and it never reached the stage where there was a formal process invoked per se.

b. **Alexandrina Council**

Mr Grenfell said there was no discussion about procurement policies at the meeting with SWR in November 2012. (3371) Mr Grenfell said he considered the procurement policy in February 2013 when SWR began operating the Hartley site. He explained that he did so because they would be procuring services from a new service provider. Mr Grenfell said that at that stage he did not know whether AC would continue to dispose of its waste at Hartley, or whether its waste would be diverted to Brinkley. It was put to Mr Grenfell that this was not true and that, in fact, he had not considered the procurement policy. Whilst Mr Grenfell conceded that there was no document that evidenced his consideration of the policy, he maintained that he had indeed considered the policy, albeit alone. (3515) Later in his evidence, Mr Grenfell confirmed that he had not considered the procurement policies at the time of SWR offers in 2013. He emphasised that the offers were unsolicited. (3629) He said that he did not consider the application of the procurement policy to the decision in March 2014 to commit the council’s waste to the Authority. (3392)

c. **Adelaide Hills Council**

In relation to the December 2012 meeting with SWR, Mr Aitken said that he did not turn his mind to procurement issues “[b]ecause there was no consideration being made to an offer or anything similar to an offer”. (3721) Further, Mr Aitken gave no consideration to the procurement policy when the council decided to move to Brinkley because it was staying with an existing provider just at a different location. (3721) In determining not to proceed with SWR’s offer, Mr Aitken did not consider the procurement policy as the council was not “undertaking a procurement exercise”, it was merely “considering an offer”. (3721) Mr Aitken could not recall, in his capacity as the chief executive officer, recommending to elected members that they actively engage in the procurement policy in the period of 2012 to 2016. (3911)

Mr Salver gave evidence that he did not turn his mind to the council’s procurement policy in 2012/2013 or in 2014. The policy was not raised by him between December 2012 and the middle of February 2013 as nothing was put on the table by SWR. (4231) As to why he did not consider the policy in 2013-2014, Mr Salver explained that it did not apply as SWR’s bid was unsolicited. (4099-4100) Mr Salver conceded that the October 2013 offer represented a choice between two service providers and that “classically” that was a situation to which
procurement policies applied. (4224) At that stage, he had not turned his mind to the policy. He explained that “the procurement policy would apply in the event that we were going to go to tender but in this instance we were treating it as an unsolicited bid”. (4224)

d. The Authority

Mr Lorenz accepted that when a council is considering an offer from a potential service provider, its policy must adhere to the constituent council’s procurement policy or the Authority’s own purchasing policy. (4867) He gave evidence that he thought the procurement policy did not apply at the time of negotiating the Deed of Settlement with SWR. (4912) He said that the policy did not apply as the discussions occurred in the context of settling a claim: (4912)

This was a settlement of a claim, we were being compensated for leaving the Hartley landfill site for the Brinkley landfill site. There was no choice to deal with anyone else on the matter, so it’s not like we were purchasing a service off of someone. It was through a legal claim so it didn’t require, apart from going to the member councils to get their approval for the execution but it’s a different matter than purchasing a product.

e. Consideration

SWR submitted that I should find that Mr Stuart, Mr Grenfell, Mr Aitken and Mr Salver did not consider or apply the councils’ procurement policies because they had no intention of seriously entertaining any proposals from SWR. The corollary of that submission is that the constituent councils had some form of pre-existing arrangement with the Authority.

Each of the council officers was less than impressive in their evidence regarding the potential for the application of the relevant procurement policy. I do not think any was lying, merely overly concerned at justifying the approach they had taken to SWR and its offers. I do not think this was the product a contract, arrangement or understanding such as that pleaded by SWR, more the desire to appear competent and compliant. To be fair, the circumstances were unusual.

Mr Grenfell deserves special mention. I was not persuaded by his evidence that he did consider the AC procurement policy as he said he did, but I do not find that he did not consider the policy because he had no intention of seriously entertaining any proposals from SWR. I have already referred to Mr Grenfell’s evidence and his desire to switch AC’s waste to Brinkley, which did not occur. I have referred to no offer being made to AC and Mr Grenfell being of a like mind to Mr Lorenz regarding what best suited AC. Nonetheless, AC did not switch its waste until after the elected members decided to do so in 2014. Mr Grenfell was less than convincing at times, but AC’s actions deny the existence of a contract, arrangement or understanding preventing or hindering AC from disposing of its waste with SWR.

920 Plaintiff’s Closing Submissions at [928], [932], [937] and [942].
I accept the Authority’s submission that the fact that procurement policies were not raised in the meetings in November and December 2012 is unsurprising. In his statement, Mr Brown described the purpose of the meetings as being to “introduce SWR and our services to the Councils”.\footnote{Ex P63 at [47].} He said in cross-examination that the meetings were “credentialing meetings” and agreed that it was “not to conclude a long-term contract at that time”. (2278-2279) Earlier in these reasons I have found that no offer was made in the course of the 22 November and 6 December 2012 meetings and no offer was made to the constituent councils at all prior to settlement. The meetings were a prelude to the possibility of future negotiations and the eventuation of a contractual relationship. I am satisfied that at the time of these meetings the council executives rightly considered that matters had not progressed to a stage where procurement policies were enlivened.

As to the constituent councils’ failure to consider or adopt procurement policies early in 2013, I accept that there was a change in the commercial paradigm in which the councils operated. However, from AHC’s and RCMB’s point of view, they continued with the same service provider albeit at a new location, paying the same gate price. AC and DCMB switched service provider, albeit temporarily in the case of DCMB, and always with the intention of reverting to the original service provider. Later in 2013 the constituent councils and the Authority were confronted by unsolicited bids from SWR. A process was then undertaken leading to the elected members at RCMB, AHC and AC considering SWR’s offer.

In my view, the apparent no consideration of purchasing and procurement policies by the chief executive officers, the councils and the Authority during 2013 and into 2014 do not support the claim that there was in existence a contract, arrangement or understanding prohibiting or hindering the constituent councils from using Hartley or contracting with SWR to use Hartley. As I have said, no need arose to consider the procurement policies prior to settlement. After settlement, arguably contrary to their policies, AC and DCMB switched service provider and did not continue to dispose of their waste with the Authority. That is hardly suggestive of an arrangement or understanding of the kind pleaded by SWR. In the latter part of 2013 and into 2014, SWR offers were subject of a deliberative process at the Authority level and at the council elected member level, with the exception of DCMB. Whether or not the Authority’s purchasing policy and the procurement policies of the councils should have been applied in the course of that process, the evidence of the transparent process itself suggests there was no arrangement or understanding of the kind pleaded by SWR unless the process was all a charade, which I do not consider it to have been.
C. Prudential policy

Section 48 LGA imposes prudential requirements upon councils and subsidiaries of councils.\textsuperscript{922} In particular, s 48(aa1) states that a council must develop and maintain prudential management policies, practices and procedures for the assessment of projects to ensure that the council:

(a) acts with due care, diligence and foresight; and

(b) identifies and manages risks associated with a project; and

(c) makes informed decisions; and

(d) is accountable for the use of council and other public resources.

Section 48(1) states that without limiting sub-s (aa1), a council must obtain and consider a report that addresses the prudential issues set out in s 48(2) before the council engages in any project (whether commercial or otherwise and including through a subsidiary) where the expected operating expenses calculated on an accrual basis of the council over the ensuing five years is likely to exceed 20\% of the council’s average annual operating expenses over the previous five financial years, or, where the expected capital cost of the project over the ensuing five years is likely to exceed $4 million, or, where the council considers that it is necessary and appropriate. “Project” is defined in s 4 LGA to include any form of activity or enterprise, the provision of facilities or services, or any form of scheme, work or undertaking.

As mentioned earlier, s 48(2) LGA enumerates the prudential issues to be addressed by a prudential report. The prudential issues include the financial viability of the project, any risks associated with the project and any steps that can be taken to manage, reduce or eliminate those risks.

SWR submitted that the Authority’s exit from Hartley and move to Brinkley was a “project” for the purposes of the Act.\textsuperscript{923} The contention is that the non-consideration of prudential requirements by the chief executives of the constituent councils and by the Authority is a further indicator of the existence of an arrangement or understanding preventing or inhibiting the constituent councils from disposing of their waste with SWR.

\textbf{a. District Council of Mount Barker}

Mr Stuart gave evidence that he understood that prudential requirements may be enlivened where capital costs might exceed $4 million over five years. (2989) Mr Stuart said that by early 2014 he had never seen an independent report or assessment of the move to Brinkley on behalf of the Authority. (3067) He explained that the circumstances in which the move to Brinkley had arisen was

\textsuperscript{922} Local Government Act 1999 (SA), ss 48(aa1) and 48(7).

\textsuperscript{923} Plaintiff’s Closing Submissions at [878].
that the owners of Hartley no longer wanted the Authority on site. (3067-3068) Such circumstances, in Mr Stuart’s opinion, mitigated a consideration of the prudential policy as an “obvious thing to do as a first step”. (3068) However, he agreed that at some stage it was essential that the prudential requirements be objectively reviewed and analysed. (3068)

b. Alexandrina Council

Mr Grenfell gave evidence that in his capacity as a Board member of the Authority he had never discussed prudential requirements. (3505) In his capacity as an Executive at AC, he said that he did not consider that the diversion of waste from Hartley to Brinkley triggered prudential requirements as the expense was not $4 million or greater than 20% of the operating budget. He disclosed that the operating budget for AC was $35 million. (3393) In cross-examination, Mr Grenfell conceded that “[o]n the face of it” the move to Brinkley would trigger the prudential requirements as the costs over a five-year period “would reach $4 million”. (3505) Mr Grenfell agreed that there were “various budget items in the accounts from time-to-time which show the anticipated expenditure” of the move to Brinkley. (3506) It was put to Mr Grenfell that apart from whether the $4 million threshold was reached, another good reason for obtaining a prudential report was that there were risks associated with a large development (such as the move to Brinkley). Mr Grenfell disagreed and said that the risks the Authority was dealing with were no different to the then current day-to-day risk of operating and managing the landfills. (3508)

c. Adelaide Hills Council

Mr Aitken confirmed that he was reasonably familiar with the requirements of the LGA. (3838) He understood that the requirements apply to subsidiaries as well as councils. (3856) Mr Aitken said he did not consider that the prudential requirements applied to the decision to divert AHC’s waste from Hartley to Brinkley. He explained that he did not consider the diversion to have a “significant cost over a five-year period”. (3723) He did not see prudential matters as an issue that needed to be discussed. (3793) Mr Aitken could not recall a time when he had considered a prudential report. (3839) Further, he was not aware of any paper in 2012 or 2013 that addressed the question of AHC’s exposure to risk through involvement with Brinkley. (3794) Mr Aitken could not recall any meeting, email or report from October to December 2012 in which the Authority considered the financial risks of moving to Brinkley. (3854-3855). Mr Aitken said that based on the information available to him he was not convinced that a prudential review was required. He conceded, however, that it was something that possibly should have been considered. (3852)

Mr Salver gave evidence that he did not view consideration of prudential policies as being part of his role. He explained he left that to the financial advisors of the council and the audit committees as well as Mr Lorenz himself. (4257) When asked if there had ever been a prudential report prepared in
connection with the Brinkley site, Mr Salver replied, “[n]o, not to my knowledge”. (4260)

d. The Authority

When asked whether he gave thought to obtaining a prudential report in relation to Brinkley, Mr Lorenz replied: (4913)

I believe all of the analysis and the valuation that we did covered [sic] off on the general concepts of what a prudential review would require, so we’re looking at risk and the like and I believe it covered off in general - I may not have given specific thought to the prudential review requirements specifically.

Mr Lorenz gave evidence that the Authority did not have someone externally review its deliberations and costings in 2012. (4913) However, he explained that the prudential requirements did not apply as it was not a “project”, merely a continuation of normal operations. (4914)

e. Consideration

It must be remembered that the decision to incur expenditure on the re-establishment of Brinkley was made in 2011, prior to SWR becoming involved with the Harveys. The obligations imposed by s 48 LGA bite before the project is commenced. I do not accept SWR’s characterisation of the project for the purposes of s 48 LGA from the Authority’s point of view, as being the exit from Hartley and the move to Brinkley. To my mind, the project included the re-establishment of Brinkley, the risks associated with operating two landfills, the risks associated with moving to Brinkley where the Authority would operate one landfill and at the same time be responsible for post-closure liabilities. It seems to me that they were some of the issues arising at the time that the Authority decided to re-establish Brinkley as a back up. Whatever inadequacies there were at that time in the consideration of prudential issues and whatever the shortcomings in the Authority’s discharge of its obligations under s 48 LGA, they cannot be linked to the arrival of SWR as a competitor. As I have said, the time at which decisions were made to commence the project and the time for prudential issues to be considered had passed before SWR became involved with the Harveys. The decisions were made at a time when competition was a possibility, but the competitor was unknown.

I accept the submission that there were compelling reasons to consider the re-establishment of Brinkley without undergoing a full prudential report. The dispute with the Harveys posed an immediate risk to the Authority’s tenure at Hartley and with it a risk to the security of arrangements for the disposal of the constituent councils’ waste streams.

At the end of the day, however, there is nothing in the evidence regarding the non-consideration of prudential requirements in the re-establishment of Brinkley that suggests that it is more likely that the Authority engaged in
misleading or deceptive conduct as alleged. After all, whatever the adequacy of the Authority’s assessment of risk associated with re-establishing and moving to Brinkley, it disclosed its intentions to SWR.

D. Competitive neutrality

SWR submitted:924

The Authority did not implement, nor did it turn its mind to implementing the principles of competitive neutrality as it did not view SWR as a competitor in the market. As the member Councils had committed their waste streams to the Authority by way of a pre-existing understanding and this formed the majority of the Authority’s waste streams, SWR did not have access to contest those waste streams and so was not a competitor in that market in the eyes of the Authority.

The Court should find that the principles of competitive neutrality were not considered by members of the Authority at any point in the period from 2012 through to 2014.

a. District Council of Mount Barker

Mr Stuart gave evidence that he was aware of the principles of competitive neutrality in general terms and the fact that it applied to both councils and subsidiaries. He said that the principles did not apply to the Authority so long as it was not engaging in significant business activity. (2697) He explained that the Authority was never set up to make a profit, even though the Charter allowed profits to be distributed between the constituent councils on a proportional basis. (2700) He confirmed that competitive neutrality was never raised with SWR. Mr Stuart’s view was that “[a]t some point” it would have become necessary to raise the policy. In his view, negotiations with SWR never reached that point. (2992)

b. Alexandrina Council

Mr Grenfell was aware of the principles of competitive neutrality in a general sense. (3574) Mr Grenfell was taken to the categories of “significant business activity” in the “Revised Clause 7 Statement on the Application of Competition Principles to Local Government under the Competition Principles Agreement” and asked whether, by 2012, the Authority received an annual revenue in excess of $2 million.925 He confirmed that it had. He agreed that competitive neutrality became an issue in 2012 with an increase in the Authority’s revenue and the introduction of an element of competition. (3580) He agreed that clause 1.3 of the Charter would need to be considered in a review of the Charter. (3575) Despite this, competitive neutrality was not considered in 2013 or in 2015/2016. (3628-3629)

924 Plaintiff’s Closing Submissions at [956]-[957].
925 Ex P82.
c. **Adelaide Hills Council**

Mr Aitken did not pay any attention to the principles of competitive neutrality from 2012 to 2014 in relation to SWR and the Authority. He explained that he did not think the principles applied. This was because in his view the Authority was not offering competitive undercutting of any commercial waste streams. (3724)

Mr Salver gave evidence that in 2012 he did not think the competitive neutrality principles applied. (4194-4195) Mr Salver was not familiar with the principles of competitive neutrality. He said it was because the Authority had been operating in the same way for many years. (4195)

d. **The Authority**

Mr Lorenz understood that a significant business activity was defined in many ways including where the annual revenue stream exceeded $2 million. He agreed that by 2012 the annual revenue of the Authority exceeded that amount. (4911) Mr Lorenz gave evidence that he did not consider competitive neutrality in 2012 when looking to re-establish the Brinkley site. (4914) He agreed that there was nothing in any of the Authority’s minutes of 2013 which suggested that consideration had been given to competitive neutrality. (4911)

e. **Consideration**

It is unnecessary to consider Sch 2 clause 32 of the LGA and the effect of clause 1.3 of the Charter on the application of competitive neutrality principles to the Authority. It is also unnecessary to arrive at any view as to whether the Authority’s business had grown to the extent that the competitive neutrality principles did, despite clause 1.3, apply to the Authority between August 2012 and May 2014. SWR contends that the failure to consider the competitive neutrality principles occurred because the Authority did not view SWR as a competitor. I reject the submission. As I have indicated above, Mr Lorenz recognised from the time of the first meeting at Wallmans that if SWR took over operations at Hartley, SWR and Hartley would present as competitors to Brinkley and the Authority. In the report recommending that the Authority’s Board accept the settlement reached in the third Wallmans meeting, Mr Lorenz referred to the risk of losing waste streams to Hartley. That risk was referred to in all reports that went to the elected members of the constituent councils for the purpose of considering whether to endorse the Authority recommendation to accept the settlement reached at the third meeting at Wallmans. When DCMB did not switch its waste to Brinkley, Mr Lorenz set about analysing the effect upon the viability of Brinkley that the loss of tonnage would have. He repeatedly refers in emails and reports to the fact that the constituent councils will have to decide where they want to dispose of their waste. The dividend option was a means of competing with the SWR gate price and hopefully persuading DCMB to switch

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926 Ex D4: 115.
its waste to Brinkley. Ultimately, Mr Lorenz sought to persuade the constituent councils that if they all disposed of their waste streams at Brinkley, the Authority could charge a competitive price with the consequence that the advantages of disposing of waste at Hartley as a customer of SWR were outweighed by the advantages of being a customer/owner at Brinkley and disposing of waste at Brinkley. Mr Stuart challenged Mr Lorenz’s and the Authority’s appreciation of the competitive landscape in which the Authority operated. In short, Mr Lorenz and the Authority were acutely aware of SWR as a competitor and set about to compete.

E. The Ditkuns’ evidence

a. Anthony Ditkun

Anthony Ditkun is a mechanic who performed contract work for the Authority at both Hartley and Brinkley. He and Joanne Ditkun are married.

Mr Ditkun worked on a full-time basis for the Authority, and appears to have been directly answerable to Mr Coleman. At work he would see and speak with Mr Coleman on a daily basis. He described his rapport with Mr Coleman as a “good working relationship”.

In late 2012, Mr Ditkun became aware that the Authority was leaving Hartley and moving to Brinkley. He stated that he learnt this through conversations that he had with Mr Coleman. He recalled being advised that ResourceCo would take over the Hartley site. In his statement, Mr Ditkun recounted being concerned about the potential implications of the transition on his employment. He recalled a discussion that he had with Mr Coleman approximately two weeks before the Authority’s departure from Hartley. According to Mr Ditkun, he said, “[a]ren’t you worried about ResourceCo coming in and taking over the dump and the Council waste?”, to which Mr Coleman responded, “[n]ah, they’ll never get it”. When Mr Ditkun asked Mr Coleman if he was sure, Mr Coleman allegedly replied, “[t]hese idiots think that they are going to get the Council waste but they won’t because it is coming with us to Brinkley”. Mr Ditkun recalled this conversation taking place while he was installing a pump motor on a water cart at Hartley. He said Mr Coleman had made similar statements to him more than once at Hartley.

Mr Ditkun was cross-examined on his evidence about the location and timing of the conversation. It was put to Mr Ditkun that the water cart to which he referred was not purchased by the Authority until mid-April 2013. (2072) Mr Ditkun responded saying, “I’m talking about what’s referred to as the water
cart by staff at the site”. (2072-2073) It appears that the Authority had more than one item of equipment capable of being described as a water cart.

Mr Ditkun was taken to the invoices that he issued to the Authority for the work that he provided in the weeks leading up to the Authority’s departure from Hartley. (2074) The following exchange occurred: (2074-2075)

Q If I could show you a bundle of your invoices for late 2012 early 2013. Unfortunately I only have one copy but we’ll have other copies made. Could you look through those invoices please and tell us if you see any mention of you repairing a water cart at Hartley about two weeks before the authority left Hartley.

A No, I can’t see it there.

Q There’s no mention of you working on a water cart in the two weeks prior to leaving for Hartley.

A I can’t see an invoice there for one.

Q Sorry, prior to leaving Hartley for Brinkley.

A I can’t see one, an invoice there for it, no.

Q There’s no mention of you working on the water tank on a trailer or whatever you described before.

A I can’t see an invoice there for one, no.

The invoices submitted to the Authority for payment by Mr Ditkun for the period 2 December 2012 to 10 February 2013 were tendered.\textsuperscript{932} No invoice was submitted for the installation of a pump motor on a water cart during that period. There was an invoice dated 4 December 2011 that refers to the supply and fitting of a “water pump on trailer hoses etc and test operation good”.\textsuperscript{933} Mr Ditkun was never asked if the trailer referred to in the invoice was the water cart to which he referred in his evidence.

In examination-in-chief Mr Coleman denied making the statements Mr Ditkun said he made. (3166-3167) Mr Coleman acknowledged in cross-examination that around Christmas 2012 he would have had conversations with Mr Ditkun about the move to Brinkley. He said that he did not know if the councils were moving to Brinkley at that time. (3206) He stated that he would have said “I hope they move but we don’t know”. (3207). When pressed on the topic, Mr Coleman said that it was “impossible” for him to know what the councils were going to do. He acknowledged that his belief at the time was that RCMB’s waste was most likely moving to Brinkley, due to the location. (3207)
Mr Ditkun was also cross-examined about the circumstances under which he left the Authority. In particular, he was questioned on allegations of overcharging: (2058-2059)

Q  Mr Ditkun, you stopped working at the Brinkley site after allegations over overcharging had been raised with you.

A  Sorry, I don’t understand that.

Q  Shortly before you stopped working for the authority, suspicions of overcharging had been raised with you hadn’t they.

A  Overcharging who?

Q  You don’t recall being spoken to about suspected overcharging.

A  I don’t - I’m sorry, I don't follow your question. Who's -

Q  You don’t recall Mr Coleman or anyone else raising suspicions of overcharging with you.

A  Me overcharging?

Q  No.

Q  Do you recall discussions where you were asked to provide documents to support charges that you had made.

A  I had to provide them with an invoice, correct.

Q  But in 2015 in particular, you had discussions with Mr Coleman where he wasn’t happy with the invoices and supporting documents you provided to support charges you’d made.

A  He asked me to start filling in a day sheet.

Q  And you were unhappy about that, weren’t you.

A  I filled in the day sheets.

Q  You were asked to provide diary records to support charges you’d made.

A  He asked to see my diary, my personal diary.

Q  And you told him you’d lost it.

A  I did lose it.

Q  He issued an instruction to you on 17 April 2015 requiring you to hand in daily timesheets at the end of the day.

A  Not sure on the date, but.
Q He wanted you to identify, day-by-day didn’t he, the hours you worked and the work you’d allegedly undertaken because of disputes you were having with him about overcharging, potentially.

A I don’t recall a dispute about overcharging, I’m sorry.

Mr Ditkun recalled being instructed to provide daily timesheets at the end of each day and that a new process for future maintenance and repairs was implemented. He conceded that the Authority began querying his timesheets as he had been charging 40 minutes of travel time despite living in Murray Bridge and working at the Brinkley site. (2059) Mr Ditkun clarified in re-examination that he had recorded the 40-minute travel time as it took him 20 minutes to get there and 20 minutes to return home. (2082) Mr Ditkun said these inquiries by the Authority led to issues of trust developing between himself and the Authority. (2059-2060)

Mr Ditkun was asked whether or not he recalled Mr Lorenz raising issues regarding the quality of his work, his efficiency and his charges. He said he had no knowledge or recollection of such concerns being raised. (2060)

It was put to Mr Ditkun that he was unhappy with a 40-hour working week as this would result in him having to work for others as well as the Authority. Mr Ditkun denied this. If his hours were reduced to 20 then difficulties would arise. He also denied emotionally breaking down in front of other Authority employees due to financial stress. (2062)

Mr Ditkun did not recall saying words to the effect that he no longer wanted to report to Mr Benjamin Tume, who was the site manager at Brinkley. It was at this time that it was put to him that that statement consequently led to a discussion occurring between Mr Coleman and Mr Ditkun where it was agreed that Mr Ditkun’s position would be “phased out over a six-month period”. (2063) Mr Ditkun denied that such conversation took place. (2063)

Mr Ditkun was provided with a document entitled, “Process for Future Maintenance and Repairs”, dated 17 April 2015. Initially, Mr Ditkun had no recollection of being handed the document by Mr Coleman around that date nor previously seeing this document. He was then taken to another document entitled, “Tony”, dated April 2015. He was asked whether or not he recalled seeing this second document. Mr Ditkun responded in the affirmative and advised that indeed he does have recollection of being provided with both documents from Mr Coleman. (2063)

Mr Ditkun was pressed on whether he believed the document entitled, “Process for Future Maintenance and Repairs” was implemented as a result of trust issues arising between the Authority and himself. His response was, “[n]ot that I know of”. (2066)
Mr Ditkun advised that he was expected to provide invoices to the Authority for the work that he performed on a fortnightly basis. (2066) It was at this point that Mr Ditkun was taken to an email.934 The email was sent to Mr Lorenz from Mrs Ditkun. The subject matter of the email was “AM and J Ditkun”. Mr Ditkun had no recollection of previously seeing the email. (2066) He added that he had no knowledge that his wife was going to discuss his work situation with Mr Lorenz. (2067) The following was then put to Mr Ditkun: (2068-2069)

Q ‘We are really quite concerned about this. It now seems that after seven years work has dried up for Tony’.

A Yes.

Q And that was your concern at the time, wasn’t it.

A Would have been a constant discussion that my wife and I had, yes.

Q She was raising things with other staff members at the site on your behalf, wasn’t she.

A I’m sorry, I don’t follow that question.

Q She was raising issues with other staff members on your behalf, wasn’t she.

A Not that I know of. I don’t - I don’t - what sort of questions?

Q Well, she was trying to get you more work, wasn’t she.

A Well, it clearly says here that we’re trying to work out why it’s dried up.

Q Yes.

Mr Ditkun was then asked if he knew that his wife had complained to Mr Tume about his reduced hours with the Authority. He said that he had no knowledge of this. (2069)

b. Joanne Ditkun

Joanne Ditkun worked with the Authority from approximately May 2009 to July 2015. She first worked as an independent contractor. In July 2012, she became an employee of the Authority.

In her statement Mrs Ditkun stated that she began work in 2009 at the Hartley site.935 She worked there until October 2012 at which time she was allocated to manage the transfer stations at Heathfield and Brinkley.936 She reported to Mr Coleman. In her statement, Mrs Ditkun described how her relationship with Mr Coleman broke down. In particular, she noted that

934 Ex D58.
935 Ex P60 at [7].
936 Ex P60 at [7] and [9].
Mr Coleman “largely dismissed” her suggestions regarding staff performance.\textsuperscript{937} She said that it escalated to a point where Mr Coleman would either ignore her or tell her to “shut up”.\textsuperscript{938} Due to the deterioration of this relationship, Mrs Ditkun was relocated to RCMB in June 2014 and engaged as an employee for a further 12 months.\textsuperscript{939} She recalled speaking with Mr Lorenz shortly before her contract expired about the future of her employment with the Authority. Mr Lorenz issued her a letter sent electronically which terminated her employment.\textsuperscript{940} She has not worked for the Authority since.\textsuperscript{941}

Mrs Ditkun recalls having a conversation with Mr Coleman at some time in late 2012 in which Mr Coleman said words to the effect that “the farmers who own the site have kicked up a fuss and the Authority is leaving Hartley and moving all of its operations to Brinkley” and that “ResourceCo will be taking over the Hartley dump”.\textsuperscript{942} Mrs Ditkun said that she knew that the waste of the constituent councils was the main income for the Hartley site. She explained that she asked Mr Coleman why ResourceCo was buying Hartley if the council waste stream was moving to Brinkley. She asked Mr Coleman this question on several occasions. Mrs Ditkun recalls Mr Coleman saying “ResourceCo don’t know that the Authority is setting up at Brinkley”, referring to ResourceCo as “stupid” and for not having “done their homework”.\textsuperscript{943} According to Mrs Ditkun, Mr Coleman added that ResourceCo were “idiots for thinking that the council waste will go to Hartley”.\textsuperscript{944}

Mrs Ditkun was cross-examined on the topic of the conversations she had with Mr Coleman in the latter half of 2012 in relation to the Authority’s move to Brinkley and SWR’s takeover of Hartley. Mrs Ditkun was taken to her statement where she recorded having had several discussions with Mr Coleman in the period of October to December 2012. (2121) Earlier in her evidence, she recalled that the statement had occurred sometime between October 2012 and February 2013. The following was put to Mrs Ditkun: (2122)

\begin{verbatim}
Q You repeatedly came back to the same question, did you.
A I wouldn’t have used exactly the same question, but along the same lines.
Q Well multiple times between October 2012 and February 2013 you asked Mr Coleman the same question about why ResourceCo were buying the site.
A Yes.
\end{verbatim}

\textsuperscript{937} Ex P60 at [13].
\textsuperscript{938} Ex P60 at [13].
\textsuperscript{939} Ex P60 at [14].
\textsuperscript{940} See Ex D61.
\textsuperscript{941} Ex P60 at [16].
\textsuperscript{942} Ex P60 at [28].
\textsuperscript{943} Ex P60 at [29]-[30].
\textsuperscript{944} Ex P60 at [30].
Q What I suggest is it was actually discussed between you, was that you asked ‘Do you know why ResourceCo were buying the Hartley site, and he said he didn’t know, ‘They must have other waste streams, because it doesn’t stack up’.

A No, that’s not the conversation I recall.

Q He didn’t say ResourceCo were stupid.

A Do you want me to answer?

Q Yes. He didn’t say ResourceCo were stupid.

A Yes he did.

Mrs Ditkun rejected the suggestion that Mr Coleman never said that SWR was stupid and that it had not done its homework. (2122-2123) It was then put to her that Mr Coleman never expressed an opinion regarding where he thought constituent councils might deposit their waste. Again, Mrs Ditkun rejected this. It was Mrs Ditkun’s recollection that Mr Coleman made these statements during October to February 2012. It was her understanding that Mr Coleman stated that SWR had no knowledge of the Authority setting up at Brinkley. (2123)

Mr Coleman agreed that in November or December 2012 there would have been discussions about what was happening. (3177) Mr Coleman denied saying that ResourceCo were stupid and had not done their homework. He further denied thinking or saying that ResourceCo were idiots for thinking the council waste was going to stay at Hartley. (3177-3178) He confirmed that the only thing he would have said to Mrs Ditkun about SWR was that he did not know why SWR would buy the site. He said: (3178)

I knew what the bottom line was for the authority and I couldn’t understand how you could pay a much higher royalty of what I at that time understood to be the royalty and be - to make a profit, basically.

In cross-examination Mr Coleman was pressed on whether he thought that ResourceCo was stupid to buy the site without the council waste streams. He denied the proposition and explained that he thought the opposite. That is, he thought SWR was smarter than he was and that it knew of a waste stream that the Authority would never be able to tap into. (3200) He said: (3202)

I really thought there was something I didn’t know. I really thought I was the one - when I worked in Adelaide you kept abreast of what everyone was doing. When you were at Murray Bridge or Heathfield, I’ve got no idea what they’re doing in the city and it doesn’t bother me.

Mr Coleman denied that it was clear in his mind that the constituent councils’ waste streams were moving across to Brinkley. (3204)

Returning to the cross-examination of Mrs Ditkun, she was also questioned about her and her husband’s exit from the Authority. It was put to
Mrs Ditkun that she had a poor relationship with some of the staff at the Heathfield transfer station and in particular with Mr Andrew Schneider. (2103-2104) The following exchange occurred: (210)

Q What do you say your issues were with Mr Schneider.
A I just don’t think he liked working with women.
Q Mr Coleman raised concerns with you about the impact you were having on harmony in the workplace.
A No, probably the other way around. I would actually go to him if I was having issues with the staff.
Q He had concerns that he expressed to you that you were undermining the role of Mr Tume as the site manager at Brinkley.
A Not to my knowledge.
Q He told you to back off.
A No, not to my knowledge.

…
Q … In June 2013 your role as the supervisor of the transfer station came to an end.
A June 2013, it was actually June 2014. My contract had not run out though at that point.
Q Yes, in June 2014 you were told weren’t you, that it wasn’t sustainable for you to continue as a full-time employee for what was essentially a .6 role.
A No, that’s incorrect.
Q And also it became apparent by early 2014 that the Mount Barker transfer station wasn’t going to proceed.
A I have no knowledge of that.

Mrs Ditkun rejected the assertion that following a review of the Authority’s operations, it was subsequently decided that her role had been made redundant. Mrs Ditkun responded that if her role had been made redundant it had not been explained to her. Mrs Ditkun stated that despite this assertion, she was offered a 12-month contract at RCMB as a result of a conversation she had had with Mr Lorenz regarding her working relationship with Mr Coleman and in particular his bullying tactics. (2105) Counsel asked Mrs Ditkun whether or not she had told Mr Lorenz and Ms Maxwell that she no longer enjoyed the job. Mrs Ditkun said that she did not. (2106)

Mrs Ditkun was taken to complaints about her husband overcharging for work. She conceded that she knew her husband had been charging for travel
time, but did not know that her husband had been charging for work that he was unable to justify with any supporting documentation. (2106) Mrs Ditkun was taken to an email that she sent to Mr Lorenz on 30 April 2015.\(^\text{945}\) (2112) She accepted counsel’s suggestion that she was concerned over her husband’s reduction in hours. The email reflected those concerns. She was taken to another email chain that was between herself and Mr Lorenz.\(^\text{946}\) The emails were exchanged after Mrs Ditkun’s employment with the Authority had ended. (2113)

It was at this point that Mrs Ditkun was again taken to her statement and in particular paragraph 16. (2114) The following exchange occurred: (2114-2115)

Q You say in para.16 of your statement that shortly before the contract, your contract was due to end you met with Mr Lorenz to ask about your future employment -

A Mm-hmm.

Q And Mr Lorenz issued a letter by email to you terminating your employment a week or so after your meeting.

A Mm-hmm.

Q But isn’t it the case as set out in this email to you that you made it quite clear to Mr Lorenz and Ms Maxell that you weren’t interested in continuing in the role.

A It doesn’t actually - I don’t state that I’m not interested in the role, that’s – Michael’s stated that I wasn’t interested in the role.

Q So you deny do you that you said to Ms Maxwell and Mr Lorenz that you were not interested in continuing in the role.

A I used probably the words to effect that I was uninterested if there was no job to be on offer because at that point there was no job on offer and they said well they might be able to - I said I need to - I said I had to find out what it was that I was - if I was going to be continuing with them and they weren’t sure what they were - because they were still procrastinating about what the role might be if there was a role.

Mrs Ditkun advised that she was the one who called the meeting as she wanted to speak with Mr Lorenz and Ms Maxwell regarding her future with the Authority, given that her contract was close to expiring. (2115) It was put to Mrs Ditkun that she was not interested in continuing working for the Authority. Mrs Ditkun rejected that assertion, stating: (2115)

A No, that’s incorrect. As I explained I said I wasn’t interested if there was a future role because there was no role to be interested in. I was getting frustrated particularly because I was two or three weeks at the end of my contract and they hadn’t had anything to offer, the councils haven’t agreed on any sort of job role and Michael didn’t have anything to offer.

\(^{945}\) Ex D58.

\(^{946}\) Ex D61.
Mrs Ditkun stated that in addition to a prior meeting with Mr Lorenz, she and Mr Lorenz had discussions via telephone discussing her contract. (2116)

c. Consideration

SWR invites me to treat Mr Coleman’s statement made to Mr Ditkun that SWR would not get the councils’ waste because it is “coming with us to Brinkley” as a statement made by the Authority and as one indicative of the existence of an agreement, arrangement or understanding between the Authority and the constituent councils. The first question is, was the statement made?

Mr Coleman held the position of Operations Manager with the Authority. He was not an employee, but a contractor. He attended all three meetings at Wallmans as part of the Authority’s negotiating team. Mr Coleman reported to Mr Lorenz, who, it appears, had sole responsibility for instructing the Authority’s lawyers. I do not think there can be any doubt that Mr Coleman was in a position to know about SWR’s interest in the constituent councils’ waste streams and what SWR had been told regarding who controlled where the councils disposed of their waste. But knowing these things, meant he also knew that there was no guarantee that the councils would simply move their waste with the Authority to Brinkley. Being close to the Authority and Mr Lorenz it is likely, however, that Mr Coleman assumed as much in the absence of being told something to the contrary.

Mr Ditkun and, for that matter, Mrs Ditkun, did have an axe to grind with the Authority. His invoices do not include an invoice for the installation of a pump motor on a water cart, suggesting he is mistaken as to when the conversion took place or has lied. I do not know what to make of the 4 December 20912 invoice As I do not know if it relates to the same water cart as that which Mr Ditkun was working on. Mr Ditkun does not vouch for the actual words used by Mr Coleman, only the effect of the words he used. His evidence on other topics lacked attention to detail. He informed the Court that Mr Coleman had asked to see his diary in order that Mr Coleman could check its content against invoices issued purportedly for jobs done. Mr Ditkun told Mr Coleman he lost his diary and in Court added “I did lose it”. Mr Ditkun, however, gave evidence that her husband did not lose his diary. Rather, he did not want to hand it over.

Mr Coleman conceded that he would have had conversations with Mr Ditkun about the Authority moving and SWR taking over Hartley. I think it likely that in the course of these conversation he expressed an opinion or opinions about SWR and its intentions. I think it likely that he commented on what he thought the constituent councils would do. It seems to me that as part of ongoing discussions about the future of the Authority at Hartley and moving to Brinkley, how busy the Authority would be at Brinkley and the related topic of

947 Ex P56.
job security is the sort of thing that would have been bandied about. I am not prepared to find, however, that Mr Coleman used the words attributed to him by Mr Ditkun. As I have said, Mr Ditkun does not vouch for the actual words used and his reliability for the additional reasons I have given is questionable. I was also concerned at his credibility bearing in mind his evidence about the loss of his diary at the time it was requested, and the evidence of his wife on the same topic.

I find that Mr Coleman did have conversations with Mr Ditkun in which they discussed the Authority’s move to Brinkley and related matters. I find that during one or more of those conversations, and before moving, Mr Coleman ventured an opinion as to the likelihood of the council waste following the Authority. I am not prepared to find that Mr Coleman used any particular words but I am prepared to find that it is likely that he conveyed the impression that he expected the constituent councils’ waste streams to follow the Authority. I return to the question of the use to be made of Mr Coleman’s statement below.

Turning to Mrs Ditkun, SWR invites me to treat Mr Coleman’s statements made to Mrs Ditkun that SWR was “stupid” and had not “done its homework”, that ResourceCo did not know that the Authority was setting up at Brinkley, and that SWR was an “idiot” for thinking that the councils’ waste would go to Hartley as indicative of the Authority’s attitude toward SWR and as indicative of the existence of an agreement, arrangement or understanding between the Authority and the constituent councils. As in the case of Mr Ditkun, the first question is, were the statements made?

As I have said, Mrs Ditkun had an axe to grind. Nonetheless, for the same reasons as I have given in relation to the statements that Mr Ditkun said Mr Coleman made, I find it likely that Mrs Ditkun did have conversations with Mr Coleman in which the future of the Authority at Hartley was discussed. I find that during more than one those conversations, Mr Coleman remarked that SWR did not know about Brinkley. That was, after all, the Authority’s understanding prior to the second meeting at Wallmans. In this regard, the second meeting at Wallmans was held on 5 November 2012, within the timeframe during which Mr Coleman made the statements Mrs Ditkun said he made. In that context he may have referred to SWR as having not done its homework and possibly used derogatory terms. I think it likely those statements were made some time in November 2012. If Mr Coleman was content to venture an opinion as to the likelihood of the councils’ waste following the Authority to Brinkley to Mr Ditkun, as I have found, it is likely he was content to do likewise when speaking to Mrs Ditkun on the topic of the Authority moving. I so find. I consider that the future of those working at Hartley would have been a lively topic of conversation in December 2012 and January 2013. I think it likely that in that timeframe Mr Coleman ventured an opinion as to the constituent councils’
waste streams moving to Brinkley. As with Mr Ditkun’s evidence, I deal with the use to be made of Mrs Ditkun’s evidence below.

F. Mr Heard’s evidence

1274 Mr Heard was formerly the Chairman of the Executive Committee of the ResourceCo. He gave evidence on the *voir dire* the transcript of which was tendered at trial.949

a. Evidence on the *voir dire*

1275 Mr Heard said that in his capacity as Chairman he would have conversations with Mr Brown on a very regular basis. (1940-1941) It was in those conversations that Mr Heard and Mr Brown would discuss the business of SWR. He explained that very soon after the acquisition of Hartley, it was apparent to Mr Heard that they had a dispute on their hands. He said that at this stage he became involved in questioning management on the process they had adopted in making the decision to purchase the site. (1941)

1276 Mr Heard was aware of the discussions surrounding the takeover of the Hartley landfill and the agreement reached with the Harveys in 2012. (1942) He was also aware of the negotiations with the Authority and was kept informed on the status of those negotiations from time to time. He said that he would formally meet with Mr Brown once a month for Executive meetings but would speak to him and meet with him much more regularly than that. (1945) Mr Heard confirmed that, as a result of conversations with Mr Brown, the Authority was establishing a landfill at Brinkley. (1946) He said: (1946-1947)

Q Mr Brown’s view was that he considered that the member councils would continue to use Hartley because of the transport cost differential of using Brinkley.

A That was one reason. The other was that they had given undertakings that they would be supportive of the ResourceCo site.

Q Mr Brown told you that.

A Yes.

Q You didn’t see any documents that stated that, did you.

A No, there weren’t any documents in support.

Q You understood that one of the objects of the authority was to develop cooperation between the councils.

A Yes.

Q And that the authority was then coordinating the waste management needs of the four councils.

949 Ex D16: 598.
A  Yes.

Q  Prior to the handover of the Hartley site you expected that some of the commercial challenges then that the Brinkley site would be lost to the Hartley site.

A  No, I don’t think we hoped that any of the material would go to that site.

Q  You hoped to retain it all but you understood that you might lose some.

A  Yes.

When asked what he meant by “undertakings”, Mr Heard explained that he received information from the ResourceCo management that the constituent councils would continue to support Hartley. (1951) He said that the basis of those undertakings was the fact that without the revenue from the constituent councils the value of the Hartley landfill was considerably less. (1951-1952).

When asked whether he and his colleagues at SWR were aware in 2012 that there would be competition for customers after handover, Mr Heard replied that they suspected there might be but hoped there would not be. That hope was held on the basis that the SWR setup was cheaper than anything else in terms of transport but had similar costs for disposal. (1950) When asked if he was aware prior to handover of a risk that the constituent councils may go to Brinkley, Mr Heard said that he was not aware at the time and that he only became aware later on. (1951) Mr Heard recalled there being a difference in the expected transport cost for the constituent councils to use Brinkley as opposed to Hartley, but could not recall the precise figure. (1952) He confirmed that Mr Brown viewed Hartley as a strategic site because of its proximity to Mount Barker and because of the commitment SWR thought it had from the constituent councils. (1953)

Mr Heard was taken to Mr Pucknell’s Information Paper which referred to the fact that the Authority was looking to reopen its Brinkley landfill and divert the councils’ waste stream to that site. Mr Heard gave evidence that he and his colleagues at SWR were of that understanding prior to the takeover of the Hartley site. To this end he said: (1954)

Yes, they were looking - yes, that’s right, but we believed that we could compete and keep them.

It was Mr Heard’s understanding that RCMB would most likely use Brinkley because of the transport disadvantage, but that AHC and DCMB would stay at Hartley. It was put to Mr Heard that such was not guaranteed. (1955) He responded: (1955)

There were undertakings given by people acting on authority which we believed would keep those councils within the Authority and keep the business with Resource [sic] going. 

950 Ex D7: 257.
He conceded that there was no mention of any such undertakings in the Information Paper prepared by Mr Pucknell. (1957) Despite this, he again confirmed that his expectation was that AHC and DCMB would stay with Hartley and that RCMB would move to Brinkley due to the transport differential. His evidence was that AC’s waste was too small to cause concern. (1958) Mr Lorenz was said to have given the undertakings on behalf of the councils on the condition that the prices were “competitive”. (1963) Mr Heard agreed that there was nothing that bound the constituent councils to deposit their waste at Hartley. However, he said that SWR were “led to belie[ve] that they would continue” to do so. (1965) He acknowledged that there was nothing in the deed to that effect. (1965)

Mr Heard could not recall the date of settlement. (1967) Despite giving evidence that he was aware of the re-establishment of Brinkley, he said that he became aware of the risk of the constituent councils moving to Brinkley within a couple of months of settlement after the councils had ceased depositing their waste at Hartley. (1967-1968)

b. Consideration

In closing submissions, counsel for the Authority explained the use of his evidence as follows:951 (4958-4959)

The defendant does not contend that the knowledge of Heard, the chairman of the board of ResourceCo, should be imputed to SWR. But from Heard’s admitted knowledge can be inferred the actual knowledge of Brown, Pucknell and Fairweather. That is, based on, among other things, Heard’s statements of what he knew, together with the admissions of Brown, Pucknell, Lucas and Fairweather, it can be inferred that Brown knew what Heard admitted he knew. This is an inference of actual knowledge on the part of SWR: see, e.g. Westpac Banking Corporation v The Bell Group (2012) 44 WAR 1 (discussing distinction between constructive knowledge and inferred actual knowledge).

Counsel for SWR submitted that there is no clear foundation for such a finding. To this end, counsel said: (5119)

Things might have been said by Mr Brown, it’s not clear, there’s no satisfactory basis ultimately for finding that these things emerged from Mr Brown; as distinct from simply being errors, for example, or impressions. …

SWR further submitted that Mr Heard was prone to speculate and that his evidence suggested that he had no personal knowledge of dates of events.952 SWR contended that the small scale of the takeover would not have attracted the attention of the ResourceCo Chairman.

I do not think the analysis in Westpac Banking Corporation v The Bell Group (In liq) (No 3) applicable.953 The principle discussed, involves the

951 Defendant’s Closing Submissions at p 31 [165].
952 Plaintiff’s Closing Submissions at [117]-[122].
953 (2012) 44 WAR 1 at [2178]-[2199] (Drummond AJA).
aggregation of knowledge of officeholders and employees within a corporation, extending to include agents of the corporation. That is not the position here. I do not understand Mr Heard to be a member of the SWR Board or to hold any position within SWR or to be an agent or servant of SWR in any respect. Mr Heard’s knowledge of the negotiations between SWR and the Authority and of SWR’s knowledge and understanding in entering the deeds is the product of what he was told by officers of SWR, primarily Mr Brown and Mr Pucknell, reporting to him in his capacity as Chairman of the Executive Committee of the ResourceCo Group. (1898-1899, 1922-1923, 1940-1945). His evidence is, prima facie, hearsay. Of course, to the extent that the SWR officers reported to him facts and matters contrary to SWR’s interests, and accepting those officeholders to be repositories of SWR’s corporate knowledge (as Mr Brown and Mr Pucknell no doubt were), such reports are admissible if relevant in exception to the hearsay rule.

On a number of occasions Mr Brown gave evidence to the effect that he did not understand that upon taking over the operation of Hartley, SWR would be in competition with the Authority at Brinkley. (599-600, 2334, 2344) However, he also said: (2345)

Q If you expected to lose Murray Bridge’s waste because of the distance to travel, then to get Murray Bridge back you must have expected to have to compete with someone.

A Yep, so I -

Q So there was a competitor out there.

A We didn’t see it that way. We saw - it ends up competing against their own costs structure because you can’t run one of those facilities with a very small amount of tonnage, so naturally we thought those discussions would take place.

Q Does that just mean that your competitor would not be very competitive.

A Correct.

Q Still means there’s a competitor but you were in a position of strength.

A Yes.

SWR’s case in part is that the Authority was not intending to compete with SWR and that implicitly the Authority represented that it was not interested in keeping the constituent councils’ waste. That is to say, SWR did not understand it was entering a competitive environment. Mr Heard’s evidence that SWR knew that the Authority was looking to reopen Brinkley and divert waste to that landfill before entering into the Deed of Settlement and s 103E Deed and that SWR believed it could compete and keep the constituent councils’ waste at Hartley

955 Plaintiff’s Closing Submissions at [991], [1000], [1003], [1008], [1012.4] and [1015].
have the capacity to constitute statements against interest in that those statements suggest that SWR did in fact appreciate that it was entering a competitive environment and that Brinkley, and necessarily the Authority, posed as the competitor. Mr Brown’s evidence at (2345) is a concession to similar effect.

Mr Heard’s evidence assists in assessing whether to accept Mr Brown’s concession or the seemingly inconsistent evidence that Mr Brown gave earlier. It assists in assessing the strength of the inference to be drawn from Mr Pucknell’s Information Paper, and it assists in determining what to make of, and what weight to give to, the evidence of Mr Pucknell and Mr Levinson who said that they understood come settlement that the constituent councils would have a choice of landfills. As a statement against interest it is also evidence of the corporate plaintiff’s knowledge and understanding.

In Reid v Kerr Wells J said:956

It has always seemed to me that if some kind of imputation is to be made against a witness, then, at some stage — ultimately — the precise nature of that imputation should be made clear to the witness so that he is given an opportunity to meet it and, if he can, to explain it or destroy it … I am well aware that there are more ways of taking a fort than by frontal attack, but I also hold it to be a fundamental principle that, when all arts and devices of cross-examination have been exhausted for the purpose of testing whether a particular witness merits adverse criticism, then, at some stage, and in some fair manner, he should be given the opportunity of meeting the implication and answering it. …

In Viscariello v Macks the Full Court remarked:957

The rule [in Browne v Dunn] has two aspects. First, it is a rule of practice designed to achieve fairness to witnesses and a fair trial between the parties. Second, it relates to the weight or cogency of the evidence. As a general proposition, evidence which is not inherently incredible and which is unchallenged ought to be accepted. The evidence may, of course, be rejected if it is contradicted by facts otherwise established by the evidence or the particular circumstances point to its rejection.

[footnote omitted]

Mr Heard’s evidence was not put unequivocally to Mr Brown. However, he was cross-examined on his knowledge and understanding regarding the Authority’s intentions at Brinkley and whether the Authority would be a competitor for the constituent councils’ waste come settlement. In terms of procedural fairness, I consider that SWR and Mr Brown were given the opportunity to put their case on these issues. Accordingly, I consider that Mr Heard’s evidence may be used for the purposes I have identified above.

G. Mr Brown’s visits to Brinkley

Following the decision of the Authority’s Board in March 2012 to re-establish Brinkley, the Authority commenced the construction of a new cell at the

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site. Construction was almost complete by September/October of the same year. In cross-examination, Mr Brown conceded that he knew from the minutes of the March 2012 meeting of the Board that the Authority was re-establishing the site but that he did not know to what extent. (698) In that connection, he gave evidence that he knew by 9 February 2013 that the Authority wanted to move its landfills equipment to Brinkley and that was the purpose of the “transition period”. (862) He also conceded that he knew that the Authority was reopening a cell at Brinkley. (706)

1294 In his initial witness statement, Mr Brown said:958

… I had driven past the Brinkley site on one or two occasions prior to February 2013 and could observe that some works were underway to construct a cell and some shedding. The scale of the works was not readily apparent from the road. I was not certain how much of the work was part of extra capacity for the RCMB waste transfer station and how much was the work of the Authority to revive and expand the landfill.

1295 In his supplementary statement, Mr Brown said:959

I had driven past the Brinkley site but had not been able to observe the nature or size of the work being undertaken.

1296 When cross-examined, Mr Brown said that he had not “ever been there purposefully to visit the facilities”. (676) He explained that he was driving past the site and “saw some activity”. (789) He initially said he could not recall whether he stopped to have a look. (789) He later said he was sure he would have stopped but not for a long time as there was not much to see. (792) He said he had never been into the facility and that he just “had a look out of curiosity” and explained that he “didn’t see much at all”. (789) He denied seeing a constructed cell that was ready to receive waste. (792) Mr Brown was taken to his statement and the reference to works being undertaken on a cell. He said that he could not recall whether the cell was finished. (795) He said he did not make any enquiries about the cell after his visit as it “didn’t interest” him. (795-796) He could not recall seeing excavators conditioning the lining of the cell. His evidence was that it was difficult to ascertain what was going on in sites such as the Brinkley site, without driving through and having a “good look”. (794) Although he drove four kilometres off the freeway to see the site, Mr Brown said he did not enter the facility as it was against the law. (794) Mr Brown was sure that he would have driven down Brinkley Road which formed the western boundary to the landfill. (791) It was put to Mr Brown that he would have seen the back wall of cell 6 as Brinkley Road was well above the finished height of the cell. Mr Brown replied, “I can’t answer that”. (794)

1297 Mr Brown was shown the third photograph of Ex D24. It shows “View Point A” at the end of a driveway leading into the landfill and to cell 6. He was

958 Ex P23 at [97].
959 Ex P63 at [30].
also shown the fourth photograph of the same exhibit. It shows the view from the top of the driveway, looking down into the landfill site. Mr Brown was asked:

(794)

Q  Can you remember, did you drive to point A [featured in Ex D24].
A  I think I just stopped where that photo is and just had a quick look.
Q  So, straight down the driveway for want of a better description.
A  Yes.
Q  So as we look at photograph No.4, you stop thereabouts, not so far from the sign, and looked straight down that road.
A  Yeah.
Q  The sign being the black and yellow one to the left-hand side there that I meant.
A  Yes.

1298  Counsel for the Authority submitted that from the outer gate, there was a clear view down the driveway into the facility and of the cells.960 (4395)

1299  Mr Brown gave conflicting evidence on the number of times he visited the Brinkley site. As set out above, in his first witness statement he said that he had driven past the site “on one or two occasions prior to February 2013”.961 At trial, he denied visiting the site more than once. (789) Later in cross-examination, he was taken to his statement. He was asked: (795)

Q  You then go through the meetings with the councils, which were in November, that’s para.83, Alexandrina, Adelaide Hills, Mount Barker, Murray Bridge, and then at para.97, you refer to the fact that you had driven past the Brinkley site on one or two occasions prior to February 2013.
A  Yep.
Q  Those visits or those drive-pasts, as you term them, they were after the meetings with the councils, weren’t they, after you learnt information about Brinkley.
A  I can’t recall when they were at all, to be honest.

1300  Mr Brown could not recall when he visited the Brinkley site. (676, 789) Further he could not remember the time of day or whether the facility was open. (791) In cross-examination, he agreed that he could not exclude the possibility that the visits occurred sometime between November 2012 and February 2013. (795)

960  See also Defendant’s Closing Submissions.
961  Ex P23 at [97].
I find it likely that Mr Brown visited the site on more than one occasion. The fact that he personally visited the site is demonstrative of an interest in what was occurring at Brinkley. However, it is unclear for how long Mr Brown remained at the site, when he visited the site, if he remained outside the facilities, from what vantage point he looked upon the site and what he saw. Mr Brown also failed to give evidence on the time of day during which he visited, although obviously it was not after dark. I think it likely that what he saw merely confirmed what he knew, that the Authority was or had established a landfill. I think it likely that Mr Brown gained some appreciation of the size of the operation, but I can be no more specific.

In making my findings I have not relied upon the observations I made in the course of the view at all. I attended four years and more after Mr Brown did. Much would have changed for no other reason than that the landfill had been continually used and thus the cell built up giving a false impression of what may or may not have been seen from Brinkley Road when Mr Brown attended the site.
Findings

What follows should be read together with the findings I have made at various points in this judgment where I have paused to make observations and to draw conclusions, generally signalled by the use of the sub-heading, “Consideration”. I also indicate that the evidence contained in Ch IV Sections B, C, and D was largely undisputed. Those sections should be read on the understanding that I am satisfied that the facts referred to were proved on the balance of probabilities.

I have set out the background that resulted in SWR and the Authority entering into negotiations to resolve the dispute between the Harveys and the Authority. The first step in those negotiations involved the meeting at Murray Chambers. By that time the Authority was advanced in the re-establishment of Brinkley. The Authority remained hopeful that it could remain at Hartley but was preparing to move to Brinkley if necessary. In this regard the Authority was content to operate two landfills with the attendant liabilities. By the conclusion of the meeting at Murray Chambers the precariousness of the Authority’s tenure at Hartley was clear.

It is also to be recalled that by this time SWR had executed the Litigation Management and Funding Deed and the Landfill Deed and, in doing so, was committed to the removal of the Authority from Hartley, to taking over the operation of the landfill and to paying a royalty to the Harveys in accordance with the Landfill Deed. That commitment was given in the knowledge of the waste tonnage received at Hartley, despite there being no guarantee as to the tonnages of waste that might be received, and without any regard to what might drive customers including the constituent councils to deposit their waste at that landfill beyond Mr Brown’s and Mr Lucas’ appreciation of the costs associated with waste disposal and the transporting of waste. In fact, SWR’s appraisal of the opportunity to take over the operation at Hartley reflected its assessment of the cost advantages that the councils proximate to Hartley would enjoy by choosing to dispose of their waste at Hartley. That is to say, SWR considered that Hartley’s location assured that the councils proximate to the landfill would dispose of their waste at Hartley, thus the landfill came with an assured customer base. That is not to conclude that SWR thought it would necessarily get the same tonnage; as mentioned above, there was no guarantee as to the tonnages of waste that might be received and RCMB would likely dispose of its waste at Brinkley. Nevertheless, in my view Mr Brown’s and Mr Lucas’ assessment was that the location of Hartley meant that it would attract sufficient tonnage to warrant the commitment given to the Harveys. Bearing in mind the investment inherent in that commitment, the motivation to remove the Authority, and to do so quickly, must have been significant. The aggressive or bullish approach that SWR adopted in the negotiations reflects this. A further point must be made; SWR must have been confident that it would be able to secure the necessary approvals to operate the landfill and, if necessary to construct a cell, or, that pressuring the
Authority would see it agree to the transfer of the EPA licence it held, perhaps in the interests of the constituent councils. As it turned out the transfer of the EPA licence never loomed as a sticking point in the negotiations.

At the conclusion of the meeting at Murray Chambers the Authority was yet to be made aware of SWR’s role in the negotiations. It was told that the Harveys wanted it to leave Hartley and that SWR would take over, but SWR’s effective role as principal in the negotiations was yet to be revealed. Nothing was said that would have suggested to the Authority that anyone was interested in the constituent councils’ waste streams once it had departed. The only reference made was to the possibility of the new operator accepting waste from the Authority’s current customers, a matter that was left as being something for the new operator to determine. Whatever plans SWR may have had for Hartley at this point in time (15 August 2012), from the Authority’s point of view, no reason arose to think that they were dependent upon or necessarily linked to obtaining the constituent councils’ waste streams.

Whilst the Authority remained unaware of the true nature of SWR’s involvement as at the time of the Murray Chambers meeting, Mr Levinson’s 13 September 2012 email indicates that SWR had commenced investigating the Authority. The email confirms that SWR was aware of the Charter, the constituent councils, that AHC sent 8773 tonnes of waste to Hartley in 2010/2011, that DCMB sent all its waste to Hartley, the Authority’s net profit after depreciation and expenses, the total income received from users in 2010/2011, that Brinkley existed and that the opening of Brinkley impacted the “user charges” receipts in 2010/2011. Further, from the Harveys, SWR knew the approximate tonnages disposed of at Hartley and had gained some insight into the operation of the Authority. Lastly, Mr Brown was aware since around August 2012 that the Authority was considering moving its operations to Brinkley.

Earlier in these reasons I have found that at the first meeting at Wallmans (14 September 2012) Mr Brown said words the effect that:

- if SWR took over Hartley, it wanted to keep the existing customer base;
- Hartley represented a long-term play for SWR; and
- SWR would grow the Hartley business and develop opportunities.

I have also found that Mr Brown did not elevate the importance of SWR securing the constituent councils’ waste streams to a level where those present would have understood that the waste streams were critical to SWR. That said, for the reasons I have given, I am satisfied that the Authority’s representatives left the first meeting at Wallmans knowing that SWR was operating on the basis

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962 Ex D16.
963 Second Statement of Claim at [20].
that it would receive the constituent councils’ waste. No need arose for Mr Brown to elevate the importance of the constituent councils waste streams — he considered that most of the waste, at least DCMB’s and AHC’s, would come to Hartley in any event because of the landfill’s location and because of the cost associated with dumping elsewhere. It must also be remembered that SWR placed the Authority under significant time pressure, indicating that it was prepared to gamble on taking over the operation without any arrangement in place as to where the constituent councils would dispose of their waste.

I have also found that it is evident from Mr Lorenz’s report to the Authority964 that he appreciated from the time of the first meeting at Wallmans that upon SWR taking over operations at Hartley, SWR posed a risk to the Authority model and that the Authority and SWR would be in competition for the constituent councils’ waste streams. Again, Mr Brown said he was aware around August 2012 that the Authority was re-establishing Brinkley and always expected to lose RCMB’s waste stream. For the reasons I have given, I treat such acknowledgement as an acceptance that SWR would operate Hartley in a competitive environment, an environment in which the operation at Brinkley and the Authority was a competitor. Ultimately, Mr Brown conceded as much.

I have also explained why Mr Brown was comfortable with the Authority’s move and did not concern himself with it; on his assessment the transport cost for AHC and DCMB to take their waste to Brinkley was prohibitive and it was the AHC and DCMB tonnages with which he was most concerned.

It was submitted that during the course of the first Wallmans meeting:965

900. The Authority did not make the obvious response to the statements by Mr Brown that it intends to keep the waste and that it had re-established Brinkley for that purpose. It knew that if it said this, the prospect of SWR entering into the Deed and of paying any compensation to the Authority would be much reduced. Mr Lorenz made the point in his report to the board about the meeting (Ex D4.115) that it appeared that SWR did not know of Brinkley and the Authority’s plans for that site and that consideration needed to be given as to whether that information was disclosed to SWR.

991. Two points arise: first, it is clear from that note that the Authority knew that it is SWR’s understanding that it will or is likely to receive the waste of the member Councils (if the deal is done) and secondly, the Authority knew that it was SWR’s understanding that the Authority had no interest in keeping that waste.

The first Wallmans meeting was the first time that the Authority had come face to face with SWR. The Authority knew SWR intended taking over Hartley. Mr Brown said words to the effect that there are “2 ways we can go” and then set out the two options. The discussion that ensued was preliminary in nature. Litigation remained a possibility. I do not think it can be said, that the Authority did not inform SWR that it planned to receive the constituent councils’ waste

964 Ex D4: 115.
965 Plaintiff’s Closing Submissions at [990]-[991].
streams at Brinkley for fear that the prospect of SWR entering into the deeds and of SWR paying compensation would diminish, perhaps disappear. The Authority was yet to formulate a position and put none. That said, I am satisfied that at end of the first meeting at Wallmans the Authority knew that SWR wanted the constituent councils’ waste streams and assumed that it would get those streams if it took over Hartley to the exclusion of the Authority.

I do not think it can be inferred that the Authority thought that SWR was labouring under the impression that the Authority had no interest in keeping the constituent councils’ waste streams. Nothing said by the Authority would have given SWR that impression nor would the fact of saying nothing. In my view, it was more likely that SWR was indifferent to the Authority’s interests. At the risk of repeating myself, SWR’s thinking was relatively simple — secure the site and the tonnage will come, because, if you secure the site, you secure the competitive advantage over all other known landfills with respect to the waste streams of AHC, DCMB and likely that portion of AC’s waste deposited at Hartley.

Mr Lumsden’s letter of 25 September 2012 was written in response to Mr Levinson’s letter of 14 September 2012. The purpose of the letters was to request and provide information about the Authority’s operation of Hartley in order that SWR could formulate a settlement proposal. SWR submits that the questions asked in Mr Levinson’s letter reflect its then understanding of the basis upon which the constituent councils disposed of their waste at Hartley. It is to be recalled that Mr Levinson’s letter requested the current disposal terms that applied to each council disposing of waste at Hartley and confirmed that SWR was prepared to put a proposal in settlement of the Authority’s dispute with the Harveys “but only if the constituent Councils are prepared to enter into long term (at least 5 years) agreement to supply the waste to the site”. The letter is suggestive of an understanding on Mr Levinson’s part that the constituent councils were customers of the Authority. That was also Mr Brown’s position. In his reply Mr Lumsden indicated that there were no contractual arrangements between the Authority and the constituent councils requiring that they dispose of their waste at Hartley, that the constituent councils were member councils of the Authority and that they paid a reduced rate. Mr Lumsden referred Botten Levinson to the Charter. It is true that the letter ventures no opinion on whether SWR was right to think that it could attract the constituent councils’ waste streams upon taking over the operation of Hartley, but none was called for.

As I have said, if there were any doubt in the Authority’s mind that SWR was keen to attract the constituent councils’ waste streams, Mr Levinson’s letter of 14 September 2012 made things abundantly clear.

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966 Ex P4: 112; Ex P4: 114.
967 Ex P4: 112 at p 1138.
968 Ex P4: 114.
Before moving on, mention should be made of the threat contained in Mr Levinson’s letter. For the reasons I have already given, I reject the suggestion that time was driven by the Harveys. I find that the time pressure was applied by SWR and obviously, intentionally so. At a minimum, bearing in mind the control SWR had of the dispute and its resolution under the Litigation Management and Funding Deed, SWR was complicit. That time pressure would have left an impression on the mind of the Authority representatives to the effect that SWR was prepared to take the risk of Hartley being closed and the landfill left inoperable until such time as SWR was able to obtain the necessary approvals.

Turning to Mr Levinson’s 4 October 2012 letter to Mr Lumsden, option 2 was expressly subject to the constituent councils entering into agreements with SWR for the continued disposal of their waste streams at Hartley. Implicit in the fact that compensation would only be paid under option 2 if SWR secured the constituent councils’ waste streams and in there being no payments attaching to option 1, was an acceptance that if contractual agreements were not entered there was a risk that the waste may go elsewhere. If that is right, it is an acceptance that the constituent councils might favour alternative service providers. Option 2 was also an acknowledgment of the relationship between the Authority and the constituent councils in that it obliged the Authority to use its best endeavours to procure agreements on SWR’s behalf.

Botten Levinson’s 10 October 2012 letter is important. It suggests the position of strength that SWR considered it would occupy once it commenced operations at Hartley in that it must have thought that the constituent councils would accept the $15.30 per tonne increase come 1 July 2013. But the $53 per tonne price would have substantially eroded, possibly eradicated, the transport cost differential between Hartley and Brinkley (assessed by Mr Brown and Mr Pucknell to be in the region of $12-$15) and with it the cost advantage that Hartley had over Brinkley in relation to AHC’s and DCMB’s waste. It is possible that SWR thought that the $37.70 gate price would mean retaining AHC’s and DCMB’s waste streams and eradicating competition before the end of the financial year. I think that unlikely. It seems to me that the more likely conclusion is that SWR had misjudged the competitive risk that Brinkley posed. What is clear is that SWR made no attempt to survey comprehensively the environment in which it intended to operate, hence Mr Lorenz’s comment that it appeared that SWR was not aware of the Authority’s preparations at Brinkley is understandable.

Here mention should be made of Mr Coleman’s statements to Mrs Ditkun. I have found that around the time of the Wallmans meetings Mr Coleman remarked in conversation with Mrs Ditkun, possibly in disparaging terms, that

969 Ex P5: 117.
970 Ex P5: 119.
971 Ex P23 at [45].
972 Ex P5: 120.
SWR was unaware of Brinkley. I do not stay to consider whether Mr Coleman’s statement can be used against the Authority. Assuming it could, it does not advance matters because, in any event, the Authority disclosed the existence of Brinkley and its intentions during the second meeting at Wallmans if, indeed, SWR was not already aware of its existence.

As for Mr Ditkun’s evidence, again irrespective of whether Mr Coleman’s statements are admissible against the Authority, the fact that Mr Coleman expected the council waste to move is of no real moment. So did Mr Lorenz. No one had told them differently. It does not cause me to think that there was executed a contract, arrangement or understanding any different to what I have described.

I have found that during the site meeting on 23 October 2012 Mr Brown made clear SWR’s interest in gaining access to each of the constituent councils for the purposes of doing a deal with each. I have also found that Mr Lorenz informed Mr Brown that the Authority did not control where the constituent councils disposed of their waste, that it was for the councils to determine where they would dispose of their waste and that the Authority was moving to Brinkley. I do not accept that in making statements to this effect Mr Lorenz conveyed that the Authority would not compete with SWR for the constituent councils’ waste streams. A statement to the effect that the constituent councils were free to contract with whomsoever they wished does not carry with it any implication as to whether the Authority would seek to enter into contracts or arrangements with the constituent councils. I accept and find that the Authority through Mr Lorenz conveyed during the 23 October 2012 site visit that it had no control over the choice that any of the constituent councils might make as to where they disposed of their waste and that there was no impediment to the constituent councils contracting with SWR for the disposal of waste at Hartley should they choose to do so.

I do not find that Mr Lorenz told SWR that he would put SWR in front of the constituent councils.

By this time (23 October 2012), at the latest, Mr Brown understood that RCMB would likely take its waste to Brinkley once SWR took over operation of Hartley. That knowledge carried with it an understanding that Brinkley would be in a position to take council waste, that at least in relation to RCMB’s waste SWR could not hope to compete with Brinkley, that Brinkley was a competitor, and, lastly, that, just as he had been told, it was up to the councils to choose where they disposed of their waste.

Turning to the second meeting at Wallmans (5 November 2012), I have found that:

973 Second Statement of Claim at [20].
in the course of outlining the Authority’s position Mr Hayes said that the Authority had Brinkley and would move to Brinkley but could not simply walk away from its obligations in relation to the Hartley landfill;

- Mr Hayes said the Authority did not need Hartley as it had Brinkley;
- Mr Lorenz said words to the effect that the Authority did not control the decision as to where the constituent councils disposed of their waste; and
- Mr Hayes said words to the effect that it was open to SWR to approach the councils in an attempt to secure agreements that their waste be disposed of at Hartley.

I do not think it can be doubted that by this time the Authority well understood that SWR wanted the constituent councils’ waste streams. Mr Brown had said as much on 14 September 2012, 23 October 2012 and again on 5 November 2012. Mr Levinson had stated the same in his letter of 4 October 2012 to Mr Lumsden. However, it also remained the case that SWR was happy to proceed without securing those waste streams. The consequence, as Mr Brown said during the meeting, was that less would be paid in compensation.

I have also found that by 5 November 2012 it was clear to Mr Pucknell that the constituent councils would have a choice between Brinkley and Hartley for the disposal of their waste. Similarly Mr Levinson appreciated from what Mr Salver said during the 5 November 2012 meeting that the councils had such choice. I have found that Mr Brown was already aware by this time that Hartley and Brinkley would be competitors. I think it likely and I find that it was stated on behalf of the Authority that it made no sense for the constituent councils to dispose of their waste at Hartley at a rate of $53 per tonne when the Authority had an alternate site, prompting Mr Brown to reply that the rate was negotiable. First, it was never suggested that the Authority did not make this comment and secondly, the response is what I would have expected from Mr Brown. As he said in evidence on more than one occasion, the rates set out in Mr Levinson’s letter of 10 October 2012 were just a “first pass”. (2192)

I reject the submission that it is implicit in the statements that the Authority did not control the decision as to where the constituent councils disposed of their waste and that it was open to SWR to approach the councils in an attempt to secure agreements that their waste be disposed of at Hartley, that the Authority would not compete with SWR for the constituent councils’ waste streams. In my view, SWR knew it was entering a competitive market and knew that the Authority and Brinkley were competitors. Mr Levinson’s notes of what Mr Hayes said acknowledge as much; the Authority had an alternative to Hartley, but it could not simply leave Hartley due to its environmental obligations. The Authority’s proposal was to cease landfilling at Hartley once it had filled the current constructed cells and capped them, thereafter performing its monitoring obligations only. Meanwhile, SWR could construct its own cell on
the Hartley site and commence its own landfilling operation. Mr Hayes was indicating that the Authority had no intention of leaving the landfilling business. It wanted to fill its cells at Hartley before moving to its alternative at Brinkley.

SWR submitted that the Authority’s statements to the effect that it could not force the constituent councils to send their waste to SWR, could not promise the constituent councils’ waste streams as part of any resolution, and, that SWR was free to approach the councils to obtain their business, gave rise to the inference that the Authority would not approach the constituent councils itself to obtain their business. To stop the process of reasoning here would be to reason from facts different to what I have found to be the true position. In particular, putting to one side SWR’s knowledge, it is to ignore the announcement that the Authority did not need Hartley as it had Brinkley. As I have said the inference that arises from Mr Hayes’ statement is that the Authority can do at Brinkley, and intends to do at Brinkley, what it was doing at Hartley. The inference is that Brinkley is a substitute for Hartley, not that Brinkley represents a departure from the landfilling market. Mr Pucknell and Mr Levinson appreciated this. If it be thought that their knowledge and understanding cannot be attributed to SWR, I have found in any event that Mr Brown knew the competitive threat that Brinkley posed.

Mr Pucknell’s emails of 7 and 8 November 2012 reinforce my conclusion that before the third Wallmans meeting SWR knew that upon taking over the operation of Hartley it would be in competition with Brinkley for the constituent councils’ waste streams. I have also found that by that time SWR expected that RCMB would dispose of its waste at Brinkley once the Authority moved to Brinkley and that whether AC would do likewise was in the balance.

I am fortified in my findings as to SWR’s knowledge of Brinkley and that it presented as competition by the concession made by Mr Brown in his evidence, (2345) and the admissions made by SWR to Mr Heard.

I have found that at the third meeting at Wallmans (12 November 2012):\

- in the course of putting the Authority’s first offer, Mr Lumdsen justified the amount sought, in part, on the basis of an increased cost of transporting waste to Brinkley of $7/tonne;
- the Authority’s opening offer was rejected and Mr Pucknell put a counteroffer;
- upon the Authority rejecting the counteroffer put by Mr Pucknell, Mr Levinson put a further offer to settle the dispute on the basis that SWR would pay the Authority $700,000 on condition that SWR was

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974 Plaintiff’s Closing Submissions at [1003].
975 Second Statement of Claim at [27].
able to get in front of the constituent councils to put to them proposals for the receipt of their waste at Hartley;

- the $700,000 offer was rejected and a counteroffer including compensation in the amount of $900,000 was put and accepted;
- SWR stated its desire to meet with the constituent councils for the purpose of persuading the councils to dispose of their waste streams at Hartley; and
- SWR was provided with a list of contacts at the constituent councils with whom it could make contact about the respective council’s waste disposal.

SWR submits that in supplying the list of names of contacts at the constituent councils with whom SWR could make contact about the relevant council’s waste stream, the Authority suggested that it would not compete for the constituent councils’ business. What may be inferred from things said during the third meeting at Wallmans must be understood in the light of all that had gone before including, relevantly, the Authority’s disclosure that it was moving to Brinkley and, as I have said, that Brinkley was a substitute for Hartley. At the third meeting, in putting the Authority’s opening offer Mr Lumsden referred to the increased transport cost that the Authority would sustain upon leaving Hartley. The statements that the Authority did not need Hartley because it had an alternative at Brinkley and wanted compensation for the increased transport cost to Brinkley do not allow room for the suggestion that the Authority was not going to continue operating in the landfill market. The reverse is true; the Authority was contemplating, and made known, that its customers would be required to pay an additional $7 per tonne to take their waste to Brinkley. Further, the Authority had indicated that it wanted to move equipment that was used for landfilling at Hartley to Brinkley.

Obviously, with the repeated requests made by SWR to have access to the constituent councils and potentially their waste streams, the Authority representatives must have realised that SWR considered those waste streams important to SWR’s future plans. I stop short of finding that they must have realised that securing the waste streams was critical. The Authority was not privy to SWR’s future plans nor the business model it employed. Further there was the contrary indication arising from the continual threat to shut the gate at the landfill. But even allowing for those things, the Authority’s representatives and the Authority would have known that SWR considered the constituent councils’ waste streams important to SWR’s future intentions.

My findings in relation to the meeting at AC on 22 November 2012 have been set out at length earlier in these reasons. Mr Grenfell was not candid with Mr Brown and Mr Fairweather. Mr Grenfell’s lack of candour cannot be sheeted

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976 Plaintiff’s Closing Submissions at [1008].
home to the Authority. I have rejected any suggestion that Mr Grenfell acted in furtherance of any arrangement or understanding with Mr Lorenz or the Authority. I appreciate that he was a member of the Board of the Authority, but he was not acting in that capacity when he met with Mr Brown and Mr Fairweather. His conduct adds nothing directly to SWR’s case against the Authority. I have considered whether it is circumstantial evidence of the contract, arrangement or understanding that forms a central plank to SWR’s case. SWR’s case is not one of an overt conspiracy formed between the Authority and the constituent councils, or the Authority and the officers of the councils, in response to SWR’s hostile takeover. Where then is the evidence of a meeting of minds between the Authority and the constituent councils, which manifests itself in Mr Grenfell’s conduct, consistent with SWR’s case as pleaded? There is none. Mr Grenfell’s conduct could be viewed as some indication of the strength of the core underlying assumption, however AC’s action post settlement suggests that Mr Grenfell’s view was a personal view, not shared by AC more generally. In the end I have concluded that Mr Grenfell’s conduct during the 22 November 2012 meeting does not advance SWR’s case much.

I do not repeat my findings in relation to the meetings with AC and DCMB on 22 November 2012 and with AHC on 6 December 2012. No offer was made by SWR to AC, DCMB and AHC for their waste during those meetings. No offer was made by SWR to any of the constituent councils for their waste before settlement. There is no evidence of any interference on the part of the Authority in SWR’s approaches to AC, AHC, and DCMB, nor is there any evidence that the Authority prevented the possibility of further approaches either in person or otherwise. It is not contended that the Authority was in any way responsible for SWR not getting before RCMB. SWR simply chose not to follow up on the 22 November 2012 and 6 December 2012 meetings and gave up on RCMB, at least in the short term. None of the constituent councils committed to disposing of their waste with SWR.

In the period between the 22 November 2012 and 6 December 2012 meetings and settlement, SWR made no offer to any of the constituent councils for the receipt of their waste at Hartley. At settlement the constituent councils had no guarantee of the gate price at Hartley beyond the nine-month period referred to in clause 9 of the Deed of Settlement.

Earlier in these reasons I have set out my findings regarding the nature of the relationship between the Authority and the constituent councils. I have found that the constituent councils had made a form of commitment to the Authority. The commitment I have found was in existence imposed no obligation on the constituent councils to dispose of their waste streams at Hartley. The constituent councils remained committed to the Authority at their pleasure.

In paragraph 29 of the Second Statement of Claim the Authority pleads that from the things said and not said in the three meetings at Wallmans and during
the 23 October 2012 onsite meeting, the Authority implicitly warranted and
represented that:977

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 from 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.

These implied representations may be reduced to two broader notions:

1. there was no pre-existing contract, arrangement or understanding
   (paragraphs 29.1, 29.4 and 29.6); and

2. the Authority would not compete with SWR for the constituent
councils’ waste streams (paragraphs 29.2, 29.3 and 29.5).

As indicated above the question is whether, in all the relevant
circumstances, the words that were actually used conveyed something more than
the literal meaning.978

I remind myself that the determination is an objective one, but that I may
take into account the state of knowledge of the individuals concerned979 when
considering the content and circumstances of the conduct. I also remind myself
of the standard of proof applicable and the guidance to be found in the judgment

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977 Second Statement of Claim at [29]. Paragraph 29.7 concerned representations allegedly made in
relation to cell 6. I have dealt with that separately, as indeed I have with all matters pertaining to
cell 6.

978 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198 (Gibbs CJ);
*Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978)
140 CLR 216 at 227 (Stephen J); *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd*

979 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [25]-[27] (French CJ).
of Dixon J in *Briginshaw*. Further, I have also had regard to the advice of McLelland CJ in equity in *Watson v Foxman*:

... Where the conduct is the speaking of words in the course of a conversation, it is necessary that the words spoken be proved with a degree of precision sufficient to enable the court to be reasonably satisfied that they were in fact misleading in the proved circumstances. In many cases (but not all) the question whether spoken words were misleading may depend upon what, if examined at the time, may have been seen to be relatively subtle nuances flowing from the use of one word, phrase or grammatical construction rather than another, or the presence or absence of some qualifying word or phrase, or condition. Furthermore, human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.

I am satisfied and I find that what was said by the Authority in the meetings conveyed that SWR was at liberty to approach the constituent councils in order that it might put to them proposals which, if accepted, would result in the councils disposing of their waste streams at Hartley.

I am satisfied and I find that what was said by the Authority in the meetings conveyed that the Authority did not consider that the constituent councils were bound to dispose of their waste streams at a landfill operated by the Authority. It seems to me that this implication necessarily arises from the Authority’s numerous statements to the effect that it did not control where waste from the constituent councils was dumped and that it was up to the constituent councils to determine where they disposed of their waste streams.

I do not think the implication can be stated more precisely. The implication, as I have found it to be, is capable of being understood as both the Authority knowing a fact and the Authority holding an opinion.

I do not find that anything said by the Authority or its representatives during the meetings conveyed that there was in existence a contract, arrangement or understanding that would render it less likely that the constituent councils would use Hartley or enter into a contract with SWR for the disposal of their waste streams.

I do not find that the Authority warranted that SWR would “have a free run to negotiate” with the constituent councils, or that SWR could negotiate with the councils free from interference from the Authority. What was implicit in advising SWR that it could approach the councils directly and in the provision of

980 (1938) 60 CLR 336 at 362.
982 Plaintiff’s Closing Submissions at [1012.3].
the list of contacts, was that the Authority would not inhibit SWR in any approach it made nor would it inhibit the councils in receiving such approach. What was conveyed was a representation as to a future matter.

For the reasons I have given, the Authority did not represent or warrant, either expressly or implicitly, that it would not compete with SWR for the constituent councils’ waste streams. As I have said the Authority also stated that it was moving to Brinkley where its customers would incur an additional $7/tonne in transport cost. When the Authority said that it did not control the waste of the constituent councils, it conveyed the freedom of choice that the constituent councils had to dispose of their waste where they saw fit, not that the Authority had no interest in that waste. It conveyed that the constituent councils might choose to dispose of their waste otherwise than with the Authority. That was an expression of opinion.

I think it is inaccurate to say that the settlement transaction was irrational if it did not come with the constituent councils’ waste as if that irrationality was appreciated by all and therefore formed a part of the context in which the meaning of things said was to be assessed. The hostile takeover created a competitive environment of a very different order to what existed previously. As the meetings unfolded the rationality of the decision to offer compensation and take on the environmental liabilities was evaluated according to whether SWR thought it could win the constituent councils’ waste streams. The value of the opportunity was reflected in SWR’s evaluation of its ability to attract customers to Hartley knowing of the presence of Brinkley. Both SWR and the Authority knew that a significant factor in this regard was transport costs. It was because of the competitive advantage of Brinkley in relation to transport costs that SWR always thought it would not attract RCMB’s waste stream. That is not to descend to the subjective, the point is that the parties knew that cost advantages were important to the assessment of the value of the opportunity.

Pausing here:

1. With respect to paragraph 29.1, I find that during the meetings the Authority conveyed implicitly that it did not consider that the constituent councils were bound to dispose of their waste streams at a landfill operated by the Authority.

2. With respect to paragraph 29.2, I find that during the meetings the Authority conveyed implicitly that it would not inhibit SWR in any approach it made to the constituent councils for the purpose of entering into a contract for the disposal of the constituent councils’ waste streams at Hartley, nor would it inhibit the councils in receiving such approach. The Authority had reasonable grounds for making this
representation. It intended to comply with the representation and did so comply.

3 I find that no warranty or representation was made either expressly or implicitly in the terms of paragraphs 29.3, 29.4 or 29.5.

4 Paragraph 29.6 suggests that the Authority implicitly conveyed that it was possible that the constituent councils would enter into contracts with SWR on “usual commercial terms”. I find that no warranty or representation, express or implied, was made in those terms. What the Authority did convey implicitly, and I find, was that the constituent councils may enter into contracts with SWR. There is no evidence capable of supporting an implication that the constituent councils would enter into contracts with SWR nor venturing any opinion as to the terms of any contract.

1351 In my view representation 1 (paragraph 29.1) could be both an expression of opinion and the representation of a fact. Representation 2 (paragraph 29.2) is a present representation of future intent. Representation 4 (paragraph 29.6) is an opinion.

1352 Were the representations that I have found misleading or deceptive? Were they capable of inducing error having regard to the notional cause and effect relationship between the representations and the state of mind of SWR? Were the constituent councils bound to dispose of their waste streams with the Authority? Did the Authority inhibit SWR in its attempts to gain the business of the constituent councils?

1353 Earlier in these reasons I set out my findings regarding the existence of a contract, arrangement or understanding between the Authority and each of the councils. I have found that the Future Directions Study and the 2007 resolutions of the constituent councils were not followed by the individual councils contracting with the Authority. I have found, however, that in the resolutions that each council passed in 2007 a form of commitment to the Authority was made. I have found that such commitment was not legally binding. It was a commitment to the Authority model as laid out in the Future Directions Study and which revolved around the operation of Hartley. It was a commitment to a model intended to service and satisfy the needs of the councils without guaranteeing that it would, and without any guarantee that the constituent councils would remain customers if it did not, or, even if it did. The commitment was unenforceable. The Authority received the constituent councils’ waste streams at their pleasure.

1354 I have found that moving forward in time numerous strategies, plans and budgets were prepared by the Authority on the assumption that the constituent councils would continue to dispose of their waste streams at Hartley. I have accepted that strategies prepared by some of the councils were similarly prepared
on the assumption that the individual council would continue to dispose of its waste stream at Hartley. The simple fact is no better alternative was on offer. There was a core underlying assumption, but there was no suggestion that the core underlying assumption could not be abandoned without notice by any of the constituent councils should they receive a better offer, or its needs change, or should it simply want to change.

My conclusion is not altered by the evidence as to the possible application of procurement, prudential and competitive neutrality principles and policies for the reasons I have given. Nor is it altered by the preparation of the many plans, strategies and budgets in the period from 2007 to 2013 that operate on the assumption that the constituent councils will continue to dispose of their waste with the Authority. These things are indicative of a commitment or understanding in existence no different to that which I have described. Equally, that Mr Lorenz’s long-term financial plans since 2007 operated on the assumption that all constituent councils would dispose of their waste is unsurprising. Importantly, once the Authority lost AC’s and DCMB’s waste in 2013, Mr Lorenz set about adjusting his long-term financial plan to project outcomes catering for the loss of tonnage. The many references in Authority’s publications to the application of a shared services model are indicative of no more than a method of resource sharing and allocation allowing for a reduction in operating costs and expenses. No doubt such model allowed for the Authority and the constituent councils to achieve the benefits associated with reduced costs and economies of scale, but the nature of the commitment or understanding remained as I have described.

SWR has submitted that the constituent councils and the Authority regarded the fact that being a member of the Authority created some form of obligation on the constituent councils to the Authority. In my view the fact of membership of the Authority within the Charter framework would attract significant weight in any decision made by a council officer or constituent council not to use the services provided by the Authority, if for no other reason than that the council would still be liable for its administration contribution to the Authority. Then, of course, there was the value that the constituent councils placed on the equity that each held in the Authority and the desirability of being an owner/customer and not simply a customer. And there was always the political dimension to which Mr Stuart referred. To my mind these would be some of the factors to be weighed in any decision to be made by a constituent council or a council officer if approached by an alternate service provider. They are not indicative of an obligation. They are indicative of the capacity of the Authority to meet all of a constituent councils needs. They are indicative of the potential competitive strength enjoyed by the Authority.

984 Plaintiff’s Closing Submissions at [832]
Accepting this, I do not think it was erroneous or likely to lead SWR into error for the Authority to convey in the meetings that it did not consider that the constituent councils were bound to dispose of their waste streams at a landfill that the Authority operated. It was clearly not erroneous to state that the Authority did not control where the constituent councils disposed of their waste and that it was for the councils to determine where they disposed of their waste.

AC’s and DCMB’s actions post-settlement in not moving their waste immediately are indicative of the nature of the commitment given in 2007 and subsisting in February 2013 and the fact that control as to where a council disposed of its waste remained with the constituent councils. AC and DCMB did not move their waste with the Authority. No warning nor explanation was given. Neither AC nor DCMB could be compelled to move their waste. No penalty could be imposed. Equity in the Authority would be affected but so too exposure to liabilities. It was up to the individual council to determine whether disposing of its waste with the Authority was, in all the circumstances, in the best interests of its ratepayers.

I accept that Mr Grenfell attempted to move AC’s waste and that he considered it would be better for AC to take its waste to the Authority at Brinkley. But his decision was not actioned. The machinations of the council bureaucracy prevented that occurring because, it appears, of the increased transport cost. AC’s actions amounted to an expression of the right to abandon the model committed to in 2007 if the council considered that it no longer served the council’s interests.

I also accept that Mr Stuart considered that the decision not to move with the Authority to Brinkley was temporary, whilst DCMB sorted through a number of issues including what to do with Monarto Quarry. But temporary or not, DCMB was not bound and could please itself as to where it disposed of its waste stream. Here it is to be recalled that the consequence of AC’s and DCMB’s actions was that the Authority returned a negative revenue result. Further, the Authority then set about predicting whether it could survive without DCMB. At no stage did DCMB suggest to the Authority that it would definitely move its waste until July 2013. By that time a dividend had been paid and Mr Lorenz’s long-term financial plan demonstrated a capacity to keep costs down and pay a dividend in future provided all constituent councils disposed of their waste at Brinkley. AC continued to dispose of waste at Hartley.

Mr Stuart’s agitation for greater analysis of the September and October 2013 offers also demonstrates the power that the constituent councils had to insist that the Authority address their needs. True DCMB remained with the Authority despite Mr Stuart refusing to put to his council the Authority’s February 2014 recommendation, but in my view that was the product of an assessment of the value to that council of disposing of waste with the Authority, including taking into account political considerations.
To my mind, it speaks volumes as to the nature of the commitment that nowhere in the course of the consideration of the offers made by SWR in the second half of 2013 did the Authority purport to rely upon the fact of the 2007 resolutions as in some way having a binding effect on the constituent councils. At no time in the period that AC and DCMB continued to take their waste to Hartley did the Authority invoke a contract, arrangement or understanding such as that pleaded, as requiring that they dispose of their waste streams at Brinkley. Rather, the Authority set about seeking to persuade the constituent councils that the best return for them and their ratepayers could be achieved through the Authority at Brinkley. That was an exercise ultimately in competition.

**SWR submitted.**

1018. Clearly, SWR was led into error by the representations. It is inconceivable that SWR would have continued with the transaction if the Authority had said (1) “you can have access to the member Councils but by the way they have a pre-existing commitment to send their waste to the Authority”; or (2) you can have access to the member Councils but by the way, the Authority will be seeking to have the member Councils as customers at Brinkley”.

The first proposition contemplates the existence of an agreement, arrangement or understanding of a different kind to that which I have found to exist. The proposition cannot be maintained in the light of the content of the commitment that I have found was given by the constituent councils.

As for the second proposition, I have found that the Authority did indicate that it was a competitor and SWR knew that it was a competitor.

Having regard to the notional cause and effect relationship, in my view SWR did not find itself with an underperforming asset because of the existence of a pre-existing contract, arrangement or understanding that the Authority had with the constituent councils. Rather, SWR found itself in possession of an underperforming asset because it was unable to satisfy the constituent councils that it could satisfy their needs better than the Authority. Mr Brown continually spoke of his desire to do commercial deals and his frustration at not being able to do commercial deals. I was left with the firm impression that he failed to appreciate the broader considerations that may be taken into account by local government entities. For Mr Brown it was all about gate price and transport costs. Mr Aitken, Mr Grenfell, Mr Salver and Mr Stuart were all cross-examined about the sorts of factors they and their councils would take into account in determining where to dispose of the councils’ waste streams. They mentioned such things as security for the disposal of their waste streams, equity in the Authority, price, liabilities, relationship, other services and political considerations. Cross-examination sought to undermine the relevance or weight of many of these factors, but the fact remained that the basis upon which a council would arrive at a decision was different to that of an ordinary commercial

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985 Plaintiff’s Closing Submissions at [1018].
customer. SWR did not appreciate this. Nor did it foresee that the Authority model ultimately posed as a highly competitive alternative. I hastily add that the Authority’s ability to compete was tested immediately upon settlement with the loss of AC’s and DCMB’s tonnage.

In my view the Authority did not mislead or deceive SWR in conveying to SWR that the constituent councils were not bound to dispose of their waste streams at Hartley.

Prior to settlement, and after the third meeting at Wallmans, SWR met with each of AC, DCMB and AHC. There is no evidence to suggest that the Authority interfered with those meetings in any way. I have found that no offer was made by SWR in any of the meetings with AC, DCMB and AHC for the receipt of those councils’ waste streams. In the period between the 6 December 2012 meeting at AHC and settlement, SWR did not make an offer to any of the constituent councils. I have found that clause 9 of the Deed of Settlement was inserted at the suggestion of Mr Lumsden and not as a consequence of anything moving from SWR.

As at settlement all the constituent councils had was at best an assurance that it would be business as usual at Hartley. RCMB did not have that. They also knew that SWR had contemplated charging them $53 per tonne at one stage.

AHC and RCMB moved their waste immediately. No offer was put to RCMB by SWR for the receipt of RCMB’s waste at Hartley until October 2013. SWR wrote in protest to AHC on 18 March 2013, but put no offer. SWR subsequently met with officers from AHC, but still put no offer to AHC for the receipt of its waste. It was not until October 2013 that SWR put an offer to AHC for its waste. I note that there was no action taken upon SWR learning of the extent of the reinvestment in Brinkley on 15 February 2013.

In June 2013 the Board resolved to pay a dividend to the constituent councils which was intended to defray the increased transport cost that some had sustained in moving their waste to Hartley. The dividend was also intended to provide some incentive to DCMB to bring its waste back to the Authority.

DCMB moved its waste to Brinkley in July 2013. SWR responded immediately requesting a meeting, then making an offer on 7 August 2013 followed by an improved offer in October 2013.

Until offers were made in the second half of 2013, the Authority having indicated that it would compete for the constituent councils’ waste and SWR knowing as much, there was nothing for the Authority to interfere with. Once SWR made offers in August, September and October 2013, the Authority set about analysing the offer and providing a report on the same. Here it is to be recalled that SWR sent the offer to the Authority on the understanding that the constituent councils would consult the Authority. Clearly, SWR intended that the
Authority consider the offer and equally clearly expected it to provide some sort of analysis to the constituent councils.

The Authority resolved at its 21 November 2013 meeting to recommend to the constituent councils that they reject the September/October SWR offers. In February 2014 after giving the matter further consideration at the instigation of Mr Stuart the Authority again recommended that the constituent councils reject the SWR offers. Subsequently, AC, AHC and RCMB resolved to reject the offers made to them by SWR. There is no evidence to suggest that the Authority interfered with the consideration by AC, AHC or RCMB of the September/October offers. There is no evidence that those councils did not evaluate the costs and benefits of the SWR offer for themselves.

I find that the Authority did not mislead SWR in conveying to SWR that it would not inhibit SWR in any approach it made to the constituent councils for the purpose of entering into a contract for the disposal of the councils’ waste streams at Hartley, nor would it inhibit the councils in receiving such approach.

I admit to being perplexed by SWR’s inattention to the constituent councils between 6 December 2012 and the second half of 2013. It has caused me to consider closely the question of whether SWR was misled by any representation made by the Authority. In the end it seems to me that it is more probable than not that SWR was simply prepared to rely upon clause 9 of the Deed of Settlement, thinking that the competitive environment they had entered was one where the normal costs drivers, of which they were well aware, would dictate decisions by the constituent councils and council officers as to where waste would be deposited.

I turn to SWR’s non-disclosure case. In paragraph 32 of the Second Statement of Claim SWR articulates those facts that SWR claims it did not know, but which, it contends, the Authority knew or ought to have known would be material to SWR’s decision to enter in to the Deed of Settlement and s 103E Deed. Paragraph 32 states:

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 the then 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;

Second Statement of Claim at [32].
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.

I have found that during the meetings the Authority conveyed implicitly that it did not consider that the constituent councils were bound to dispose of their waste streams at a landfill operated by the Authority, that the Authority would not inhibit SWR in any approach it made to the constituent councils for the purpose of entering into a contract for the disposal of the councils’ waste streams at Hartley, that the Authority would not inhibit the councils in receiving such approach and that the constituent councils may enter into contracts with SWR. I have also found that the Authority disclosed of the existence of Brinkley and that it intended to continue operating a landfill business at Brinkley receiving waste from customers including those constituent councils who chose to dispose of their waste at Brinkley.

Bearing those findings in mind, paragraph 32.1 can be put to one side. There was no contract, arrangement or understanding of the kind pleaded by SWR. That is to say, there was no contract, arrangement or understanding binding the constituent councils to dispose of their waste with the Authority. The understanding or commitment I have found to have existed did not inhibit a constituent council in any way from switching its waste to another service provider if it wished to do so. Accordingly, such commitment, arrangement or understanding as there was, was not one, I consider, that the Authority knew or ought to have known SWR would consider relevant to it’s decision to enter the Deed of Settlement and s 103E Deed.

Similarly, the contentions subject of paragraphs 32.2 and 32.3 may be put to one side. I am satisfied that the Authority disclosed the existence of Brinkley and its intentions, including that it planned to continue to receive waste from whichever of the constituent councils chose to dispose of their waste at Brinkley.

Paragraphs 32.4 and 32.5 contend that the Authority knew or ought to have known that the Authority’s opinion of a likelihood that the constituent councils would enter into a contract with the Authority for the disposal of waste at Brinkley and not with SWR for the disposal of waste at Hartley was material to SWR’s decision to enter the Deed of Settlement and s 103E Deed. The underlying premise is that there was an agreement, arrangement or understanding in place rendering it unlikely that the constituent councils would contract with SWR and likely that they would contract with the Authority. That said there is a difference between paragraphs 32.4 and 32.5 on the one hand, and paragraph 32.1 on the other. The former contemplate a contract, arrangement or understanding that is not prohibitive but is inhibitive.
The 2007 commitment and the relationship between the constituent councils and the Authority since then would undoubtedly be factored into any decision to be made by a council officer or the elected members of a council as to where to dispose of the council’s waste. But that would take place as part of a wider evaluation of the benefits and costs associated with disposing of waste with the Authority or an alternative service provider. No doubt the Authority’s experience and knowledge of operating in the local government context would have interested SWR, but the fact of the commitment in 2007 and the Authority’s relationship with the constituent councils is not inhibiting of itself. It merely forms part of the context in which an offer or proposal would fall to be considered. What then was the Authority to say? The evidence does not suggest that the constituent councils would never contract with SWR or that the Authority knew that the councils would never contract with SWR. Under what circumstances would one or more of the constituent councils contract with SWR in preference to the Authority? One only has to ask the question to understand that the fact of the commitment and the relationship between the Authority and the constituent councils gave rise to no obligation to venture an opinion regarding the likelihood or otherwise that the constituent councils would contract with SWR. The constituent councils were not homogenous and there are simply too many variables for a meaningful opinion to be provided in the abstract. Further, the Authority could not know what SWR could or was prepared to offer.

In paragraph 33 of the Second Statement of Claim SWR pleads that the Authority engaged in misleading and deceptive conduct by failing to disclose:

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.

...  

Paragraphs 33.1, 33.2 and 33.3 can be put to one side for the same reason as paragraphs 32.1, 32.2 and 32.3.
The question becomes, in all the circumstances did the Authority engage in misleading or deceptive conduct by not telling SWR of the likelihood that the constituent councils would dispose of their waste at Brinkley and not Hartley. I think the answer is no. The negotiations were conducted at arm’s length, by two sophisticated entities, each well resourced and each having the assistance of advisers. SWR was not a new player to the waste industry but was part of a larger group with considerable experience in the industry and considerable resources. SWR had been made aware of the Charter which governed the relationship between the Authority and the constituent councils. SWR had been made aware that the constituent councils were free to contract with other service providers for waste services. The issue was whether SWR could make an offer that was sufficiently attractive to one or more of the constituent councils bearing in mind the alternative. The issue was whether SWR could compete with the Authority.

Once it is accepted that there was no binding contract, arrangement or understanding, this is not a case of impossibility in terms of it being impossible for SWR to win any of constituent councils’ waste streams.

There is no evidence of the Authority possessing knowledge of SWR’s ability to cater for the needs of any one or more of the constituent councils necessary to venturing an opinion as to SWR’s ability to compete with the Authority and satisfy the needs of the constituent councils. There is no evidence of the Authority being in a position to predict what the councils might do if confronted by an offer from SWR, whatever that offer may contain. Any opinion would have been in the nature of the Authority bidding against itself.

The evidence of what occurred post-settlement is not helpful here. When SWR finally made offers it was in a context where litigation had been threatened, allegations made and relationships soured. Trust was now an issue. That could not but have effected consideration of the offers made. SWR met with Mr Stuart and Mr Peters in July 2013 and still did not address the needs of DCMB to the satisfaction of Mr Stuart. Mr Stuart encouraged SWR to be creative. Mr Stuart was not convinced that there was no role for SWR.

This is not a case of the plaintiff being put on a false trail or being given a false impression that the defendant was obliged to correct to avoid being misleading or deceptive. This is a case in which a competitive environment was created where competition did not previously exist, and one competitor has not been as successful in competing as it had hoped. In my view that has not occurred because of any misleading or deceptive conduct. In my view the circumstances were not such that it was misleading or deceptive for the Authority not to venture an opinion on the likelihood or otherwise of any and all of the constituent councils entering into contracts with SWR for the disposal of their waste streams at Hartley.

The claim made in relation to cell 6 aside, I dismiss the claims under the ACL SA.
Cell 6

A. Introduction

Earlier in these reasons I have quoted passages from the 1991 LEMP that dealt with the construction of cells for landfill purposes. The initial volume of a cell is that portion of the total volume that can be filled before the construction and filling of adjoining cells. My understanding is that the initial volume is filled by the depositing of waste in a manner that results in, in effect, the creation of a stepped pyramid rising from the clay liner to a height no greater than the post-closure surface of the cell, allowing for settlement and capping. The steps, or lifts, allow for a stable platform from which waste can be deposited to the next step. Mr Jarvis explained:

17.3 When SWR took over the Hartley site, cell 6 was being filled with its southern end abutting cells 4 and 5, its eastern face forming a batter slope, its northern face part of the active filling area and its western face (also part of the active fill area) forming a batter slope adjacent to the future cell 7. All of the perimeter faces are batters because waste cannot be placed vertically. The interface to Cell 4 and Cell 5 is an example of the space which becomes available once the adjacent cell is constructed.

17.4 The angle of repose for an exposed batter face of waste in a cell is less than 90 degrees. Therefore, it is only when an adjacent cell is filled that the “V” shaped air space valley between the cells can be filled with waste up to the perpendicular boundary line between the cells. One half (or thereabouts) of the “V” shaped valley of the former cell is not available until the filling of the adjacent cell.

The total airspace of a cell is the volume between the surface of the cell and the clay liner base. Accessible airspace is the volume readily available for filling with waste.

SWR pleaded that in an email dated 22 January 2013 the Authority warranted and represented that the available airspace in cell 6 for the receipt of waste was 11,000 m³ immediately, and that, following the construction of cell 7, an additional 134,000 m³ would become available (the first representation).

Further, in a letter dated 25 September 2012 the Authority advised that the write down asset value of cell 6 was, as at 1 July 2012, $1.2 million (the second representation). SWR pleads further that those representations amounted to misleading and deceptive conduct in that:

5 Cell 6 did not have an immediately available capacity of 11,000 m³ and would not have a further 134,000 m³ available upon construction

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987 Ex P18 at [17.3]-[17.4].
988 Ex P39 at p 3.
989 Ex P39 at p 3.
990 Second Statement of Claim at [28].
991 Second Statement of Claim at [21] and [31].
992 Second Statement of Claim at [35.7], [35.8], [36] and [37].
of cell 7, but had substantially less immediately available and future capacity.

6 Cells 5A and 5B and cell 6 had been overfilled requiring the removal of waste and the rectification of those cells and their capping and additional expense in the construction of cell 7.

The Authority made the representations, it is pleaded, so as to induce SWR to enter into the Deed of Settlement and the s 103E Deed. Whilst SWR has also pleaded that it entered into the Deed of Settlement and s 103E Deed in reliance upon the representations as to the cell space in cell 6 and the write down value attributed to the cell, in opening counsel made clear that SWR did not put its case so high. Rather SWR put that it would not have paid what it did in compensation had it known the true position regarding the available cell space in cell 6. (69-72)

In the Third Defence the Authority admits that it sent the email and the letter containing the representations but adds:

34. In a telephone discussion on 25 January 2013 between Mr Lumsden on behalf of the Authority and Mr Levinson on behalf of SWR, the issue of cell capacity was further discussed. At this time the substance of the conversation was as follows:

31.1. Mr Lumsden said it was not possible to give an accurate figure in relation to capacity and that there were a range of issues that affect capacity, namely settlement of fill, final contours and cap thickness;

34.2. the Authority was seeking a survey for its own purposes and would be happy to share this with SWR; and

34.3. Mr Levinson said that he understood that cells would be progressively filled in as time progresses.

35. The Authority says that:

35.1. the Authority through its lawyers to SWR refused to consent to the incorporation of any warranty as to capacity, stating by email on 29 January 2013:

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

35.2. and SWR thereupon agreed to delete without further discussion the proposed form of warranties as to cell capacity which were previously in the draft Deed; and

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993 Second Statement of Claim at [29.7].
994 Second Statement of Claim at [34].
995 Third Defence at [19.2] and [33].
996 Third Defence at [34]-[36].
35.3. the Deed provided at clause at 4.4 that there was no obligation on the Authority to make available additional cell space if filled prior to settlement.

36. The Authority says further in relation to the issue of cell capacity that:

36.1. there were numerous attendances at the Land [Hartley] by representatives of SWR who would have observed the diminishing cell capacity on site including but not limited to the following attendances:

36.1.1 23 October 2012 – Simon Brown, David Lucas and Chris Pucknell;

36.1.2 29 November 2012 – Andrew Manning, Brett Jarvis, Chris Pucknell and Tim [sic];


B. The representations in context

a. The documentary evidence

It is to be recalled that the meeting at Murray Chambers on 15 August 2012 concluded with the Authority’s legal advisors undertaking to obtain instructions on whether the Authority was prepared to litigate the question of its right to renew the licence or wished to negotiate an orderly departure from the Hartley landfill and, possibly, compensation. There is no evidence of any further communication between the parties until 31 August 2012 when Mr Rudd wrote to Mr Lumsden. In that letter Mr Rudd advised that in response to the Authority’s request for time to consider its position following the meeting of 15 August 2012, the Harveys had agreed not to take steps to prevent the Authority from continuing to operate the Hartley landfill until close of business on Friday 14 September 2012. Mr Rudd then stated:

If your client has not indicated its position by that time then my clients will take such action as they may be advised to terminate your client’s activities on the subject land and its occupation of the land without further notice.

The balance of the letter set out the alleged breaches of the EPA licence committed by the Authority in the course of the conduct of its operations at Hartley in addition to allegations of late payment of royalties.

Again there is no evidence of any further communication until the meeting at Wallmans on 14 September 2012. Elsewhere in these reasons, I have set out in some detail the evidence regarding that meeting. That meeting concluded with the agreement that SWR would put a proposal to the Authority for its consideration. It is to be recalled that by this time negotiations had turned to the
terms on which the Authority would leave Hartley, although the Authority remained hopeful that it would not have to leave.

In his notes of the 14 September 2012 meeting Mr Levinson recorded that Mr Lumsden undertook to provide Botten Levinson with information necessary for SWR to formulate a proposal for the consideration of the Authority. As mentioned, that offer evolved to Mr Levinson agreeing to write to Mr Lumsden providing him with a list of information that SWR would require. Later that day Mr Levinson sent the promised letter to Mr Lumsden. It is also to be recalled that in his letter of 14 September 2012 Mr Levinson advised Mr Lumsden that he was instructed “to extend the deadline (by which time my clients will take action to restrain your client’s access to the land) from 21 September 2012 until 28 September 2012”. He then commented that the parties were thus left with two weeks in which to reach an agreement or at least seriously engage in negotiations. Following on from that Mr Levinson provided Mr Lumsden with a list of information that SWR required in order for it to put a formal proposal to the Authority. That list included information regarding the remaining airspace in cells already constructed, a site plan depicting the various cells, the construction cost (unamortised) of the cells with remaining capacity and design and construction detail for the cells with remaining capacity.

In the same letter Mr Levinson sought permission on behalf of his client to inspect the Hartley site and permission to speak to any of the engineers or other consultants involved in the design, construction or operation of the cells at the site and the gas capture system.

On 25 September 2012 Mr Lumsden wrote to Mr Rudd in reply to Mr Levinson’s letter of 14 September 2012. In paragraph 4 of his letter Mr Lumsden advised:

4. **Remaining air space in the current cells**

- Cell 5A/B – 60,000m³ remaining (approx.)
- Cell 6 – 200,000m³ remaining (approx.)
- Cell 7A/B – 398,000m³ 60% excavated
- Cell 8 – 107,000m³ to be constructed
- Cell 9A/B – 392,000m³ to be constructed

The Total Remaining Space in cells 5A/B, 6, 7A/B, 8, 9A/B is approximately 1,157,000m³. The available volume would depend on final design plans and EPA requirements.

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999 Ex P4: 112 at p 1138.
1000 Ex P4: 112 at pp 1138–1139.
1001 Ex P4: 114.
1002 Ex P4: 114 at p 1143.
In paragraph 8 Mr Lumsden advised:

8. **The construction cost (unamortised) of the cells with remaining capacity**

As at the date of construction of Cell 6 (May 2010) the cost was $1,638,000. The written down asset value of this Cell as at 1 July 2012 is $1,200,000.

As at 1 July 2012 the cost of construction of Cell 7 (60% excavated) was $94,000.

The second of the two representations that SWR relies upon regarding the available airspace in cell 6 is the write down asset value of the cell as referred to in Mr Lumsden’s 25 September 2012 letter. It appears that the write down value provided was taken from the Authority’s 2011/2012 Annual Report.

On 4 October 2012 Mr Levinson wrote to Mr Lumsden. His letter contained two options for the resolution of the dispute between the Harveys and the Authority. Elsewhere in these reasons, I have set out the two options. It is unnecessary to do so again. That said, it is to be noted that option 2 included agreement by SWR to pay “the book value (approximately $1.2m) for the existing cell space depending on an independent audit of the design and construction of the cells and the remaining cell capacity within 7 days of the completion of the audit).” That proposed obligation suggests that the previously mentioned cell capacity at the site was not relied upon by SWR. That is unsurprising. Cell 6 was in use. Consequently, the available space would be changing daily and would have changed significantly since 30 June 2012.

Mr Levinson concluded his letter of 4 October 2012 as follows:

Our clients want to continue to expedite the resolution of this matter by one means or another. This offer will remain open to be accepted in principle for 2 weeks (until close of business on 18 October 2012).

On 23 October 2012 Mr Brown and Mr Lucas met Mr Lorenz at Hartley. I have dealt with the evidence of this meeting at length elsewhere in these reasons. Both Mr Brown and Mr Lucas saw that cell 6 was in use.

On 7 November 2012 Mr Pucknell sent an email to Mr Lucas and Mr Brown. I have also referred to this email earlier in these reasons. Mr Pucknell commenced the email announcing that it contained preliminary thoughts that he committed to paper whilst he was sitting on an aeroplane. Under the heading, “Cells”, Mr Pucknell wrote, “[c]ell airspace remaining was 260k m3
has [a] value on books of $1.2 m”. Following this observation, he wrote, “[q]uery if that cell space is really there ready to go. Need to survey”.

Earlier in these reasons I have referred to the meeting at Wallmans on 12 November 2012 and that at that meeting both Mr Lumsden and Mr Pucknell put proposals arriving at a dollar figure to be paid in compensation justified in part on the value of cell 6 as determined having regard to its write down value of $1.2 million.

On 29 November 2012 Mr Jarvis, Mr Manning and Mr Pucknell met Mr Lorenz at Hartley. In his statement, Mr Jarvis said that he believed Mr Wadlow also attended but he was not certain. Mr Jarvis observed cell 6 to be partly filled and partly covered on its eastern and part of its northern flanks with daily or interim cover and was being used for active landfill. It was not clear to him what volume of cell space remained in cells 5 and 6. Mr Jarvis considered that the available airspace would need to be determined by obtaining a survey of the landfill and approved landfill profile. Without a survey, he considered it was not possible to determine how much airspace remained in cell 6. In his statement, Mr Jarvis said that he further observed that there was relatively little capacity left in cell 6.

In his examination-in-chief, Mr Manning recalled observing during his site inspection of 29 November 2012 that “the tipping point of cell 6 appeared slightly higher when compared to adjacent contours and gradients of the site”.

On 3 December 2012 Mr Jarvis emailed Mr Manning. The content of the email suggests that there had been discussions between Mr Pucknell and Mr Jarvis regarding the operations of the Hartley landfill. Mr Jarvis stated:

I had a look at the site on google maps, appears to show cell 6 not long after opening and it appears the cells are excavated substantially into the ground (lemp mentions 8m) which may go a long way towards providing sufficient daily cover. Quality of is unclear, what we saw being used last week is not really ideal due to rock size so may require further processing prior to use. Closure materials would likely need to be sourced elsewhere.

Survey of the site should occur for an understanding of current and future airspace, cell 6 may be closer to full than expected.

On 5 December 2012 Mr Manning sent an email to Mr Pucknell copying in Mr Jarvis. On the second page of that email under the heading, “Site Survey”, Mr Manning stated:

Ex P5: 139 at p 1526. 1010
Ex P5: 139 at p 1526. See also Ex D6: 167.
Ex P18 at [8]. 1012
Ex P18 at [9.3]. 1013
Ex P18 at [15]. 1014
Ex D6: 167 at p 1780. 1015
A volumetric metric survey needs to be undertaken to determine remaining available landfilling airspace remaining in cell 6 and in future cells to assist in future planning and construction of disposals.

1413 It was Mr Manning’s understanding that the content of his email, and in particular the paragraph quoted immediately above, was a recommendation Mr Jarvis had previously made to management. (374)

1414 Earlier in these reasons I have traced the communications attaching to the various draft deeds of settlement. It is to be recalled that the first draft of the Deed of Settlement contained a warranty that the airspace available in cells 5A and 5B had 60,000 m³ accessible upon construction of cell 7, whilst that available in cell 6 was 210,000 m³. It should also be observed that clause 25 of the first draft Deed of Settlement stated that “[n]o party has relied on any statement by another party not expressly included in this Deed”. 1019

1415 In an email dated 15 January 2013 sent by Mr Manning to Mr Jarvis, Mr Lucas and Mr Pucknell, Mr Manning stated that he had been through information provided by the Authority as part of the pending transfer of the Hartley site. Mr Manning also stated that Mr Lorenz had provided him with a concept plan for future cell design at Hartley. Clearly, Mr Lorenz and Mr Manning had spoken. In his email Mr Manning detailed a number of “key points” relating to cell design/construction including the following:

Based upon limited airspace remaining in cell 6 we will need to consider commencing construction of cell 7 soon after transfer – AHRWMA have noted that cell 7 has been formally approved for construction through a design specification and is 2/3 excavated to the proposed current design level. Based upon AHRWMA estimations we have ~3 months of practical landfilling capacity remaining in cell 6. Cell 6 will not be at capacity in 3 months however Golders/AHRWMA note that cell 7 needs to be constructed and filled in parallel with cell 6 to allow practical placement of waste against batter slopes to assist in managing overall cell stability. Once cell 7 is constructed and commences disposal we will be able to transfer operations back into cell 6 to fill to final height.

1416 On 22 January 2013 Wallmans wrote to Botten Levinson enclosing the second draft Deed of Settlement. As mentioned above, in his covering letter Mr Lumsden referred to his having inserted a new clause 4.6 which provided that, “[n]othing provided for in this Deed creates an obligation for 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”. Clause 14.5 in the first draft Deed of Settlement remained in the second draft Deed of Settlement

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1016 Ex D6: 172.
1017 Ex D6: 172 at p 1826.
1018 Ex P6: 184 at pp 1897-1898.
1019 Ex P6: 184 at p 1899.
1020 Ex D6: 187.
1021 Ex D6: 187 at p 1911.
1022 Ex D6: 191.
1023 Ex D6: 191 at p 1955.
albeit with some slight amendment including being renumbered as clause 11.5. Clause 25 also remained, albeit now renumbered as clause 22.

Late on the afternoon of 22 January 2013 Mr Lumsden sent the email to Mr Levinson containing the first of the two representations upon which SWR relies. The subject of the email was cell capacity in cells 5A, 5B and 6 at Hartley. Mr Lumsden informed Mr Levinson that cell 6 had approximately 11,000 m³ of immediately available space and that an additional 134,000 m³ would become available upon the construction of cell 7, giving a total of approximately 145,000 m³. Mr Lumsden also advised that he had sought clarification on cells 5A and 5B. He concluded his email stating, “[p]lease note that these figures are estimates only and that a detailed survey would be required to get a more accurate assessment”.

The following morning Mr Levinson sent an email to Mr Lumsden thanking him for his email of the previous day. He then said:

I note that in your letter of 25 September 2012 you advised that the remaining space in cell 6 was 200,000m³ (compared to below 145,000m³). How does this change effect [sic] the carrying value of the cells assets? Again, I note that in your letter the written down asset value was $1.2m for cell 6.

On 23 January 2013 Mr Jarvis again visited the Hartley landfill. It appears that he was accompanied by Mr Manning, Mr Lucas and Mr Lorenz. Mr Manning again observed that the tipping height of the active cell, cell 6, appeared high. Mr Jarvis observed that cell 6 had continued to be the main operation point for waste placement. Mr Jarvis remained of the opinion, that in order to assess the remaining capacity of cell 6, a survey would be required and as such he was not able to assess this himself.

On 25 January 2013 Mr Manning emailed Mr Jarvis. He reported that Mr Lorenz had confirmed that there was no specification for the construction of cell 7. He added, “we will need to get this moving, would you use Golders or Tonkins? Probably use the one that will finalise the fastest”. The urgency in continuing and completing the construction of cell 7 was because the immediately available airspace in cell 6 would likely be exhausted within three months.

Also on 25 January 2013, Mr Lumsden and Mr Levinson engaged in the telephone conversation referred to in the Third Defence. During the course of
that conversation Mr Lumsden said something to the effect that he could not get a precise figure as to the remaining space in cell 6. Mr Levinson recalled Mr Lumsden saying that there were a whole range of issues that could affect cell space including settlement of the fill, final contours and cap thickness. (293) The Authority, Mr Lumsden had said, intended to obtain a survey for its own purposes and was happy to share that survey with SWR. Further, the Authority continued to use cell 6. (294)

Four days later, on 29 January 2013, Mr Levinson forwarded the third draft Deed of Settlement electronically to Mr Lumsden. Clause 4.6 as inserted into the second draft Deed of Settlement remained. So too clauses 11.5 (now clause 11.6) and 22 remained. In his covering email Mr Levinson suggested that the warranty regarding cell capacity could be addressed “by the survey detail and any further detail your client has on cell design, construction and certification of construction”. In his evidence Mr Levinson said the reference to a survey of existing cells was made in relation to the telephone discussion he had had with Mr Lumsden. (296)

On 4 February 2013 Mr Lumsden sent the email to Mr Levinson to which I have already referred. In that email, with specific reference to draft clause 11.6 and the warranties as to airspace, Mr Lumsden stated that “[w]e consider that it is too difficult with the available information to give a meaningful warranty as to capacity, given that differing assumptions, capping and compaction methods may impact on the capacity and therefore propose that this clause be deleted”. The following day Mr Levinson forwarded to Mr Lumsden the fourth draft Deed of Settlement. The warranty as to cell space had been deleted from the draft by Mr Levinson. Mr Levinson could not recall any further discussion on the question of the warranty regarding the available airspace in cell 6. However, he said that SWR never requested that the Authority provide it with a copy of any survey undertaken as to the available space in cell 6. Rather it was assumed that the survey would be provided. (301)

Above I have noted that each of the draft deeds passing between Mr Levinson and Mr Lumsden was marked up in order that one may see the particular amendments the other had been made and vice versa. As I have said Mr Levinson deleted the warranty contained in clause 11.6 after receiving Mr Lumsden’s email of 4 February 2013. In his email of 5 February 2013 Mr Levinson stated:}

1033 Ex P6: 199. See also transcript at p 293.
1034 Ex D7: 200.
1035 Ex D7: 200 at p 2006.
1036 Ex D7: 204.
1037 Ex D7: 204 at p 2046.
1038 Ex D7: 206.
1039 Ex D7: 206 at p 2050.
The amended deed attached incorporates some of your further changes which have regrettably taken a long time to receive. I am instructed that if the amended deed is accepted and executed to effect settlement by COB this Friday then the deal remains. The offer will expire if settlement is not effected by that time. I am instructed that the site will be closed to further waste deposition by your client from midday Saturday.

As previously mentioned in these reasons the remaining drafts of the Deed of Settlement and the deed finally executed contained no warranty as to available airspace in cell 6. Further, the drafts and the final Deed of Settlement contained declarations that nothing provided for in the deed created an obligation for the Authority to increase the immediately available cell space at the site in the event that what was available was filled prior to settlement.

b.  **The oral evidence**

i.  **Mr Brown**

On 23 October 2012 Mr Brown, Mr Lucas and Mr Lorenz attended at the Hartley landfill. In his statement Mr Brown said he could see that cell 6 was being used at that time.\(^{1040}\) It appears that during this meeting there was discussion about the operations of the site and cell construction. No detail has been provided as to the extent to which cell 6 and the available space in cell 6 may have featured in that discussion.

In his evidence Mr Brown accepted that during the course of the 5 November 2012 meeting, in response to a statement by Mr Hayes regarding compensation for the Authority for the cells that it had built, Mr Brown said something to effect that “we are offering $800,000 for the cells without getting into a detailed valuation”.\(^{1041}\) I interpolate, a detailed valuation would have necessitated a survey of the kind that Mr Manning and Mr Jarvis considered necessary. Mr Brown’s statement suggests that SWR was not concerned about obtaining such a survey at that time.

Mr Brown said that he had been involved with Mr Levinson in the preparation of the first draft of the Deed of Settlement.\(^{1042}\) (843) He received a number of drafts of the Deed of Settlement in the course of the negotiations in addition to being advised of the changes made to each draft. (842) Mr Brown said that first draft Deed of Settlement sent to Wallmans on 21 December 2012 was sent on his instructions. (843)

Mr Brown was taken to the second draft of the Deed of Settlement forwarded to Botten Levinson under cover of a letter from Wallmans dated 22 January 2013\(^{1043}\) and to the second page of the letter where under the sub-heading “Clause 4.6”, it is explained that new clause 4.6 declares that the Authority had

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\(^{1040}\) Ex P23 at [50].

\(^{1041}\) Ex P23 at [58.4].

\(^{1042}\) Ex P6: 184.

\(^{1043}\) Ex D6: 191.
no obligation in relation to ensuring available cell space on the Hartley site. Mr Brown said that “it wasn’t a real focus of mine, the cell space”. (843) It was put to him that he understood that the Authority had inserted in the draft a clause that ensured that it had no obligation in relation to ensuring cell space on the site. He said, “once again, it wasn’t - we were really obviously interested in the licence and not so much the cell space, from my perspective anyway, some of our people were very interested in it but I wasn’t”. (843-844) Mr Brown said he could not recall reading clause 4.6. (844) It was put to him that he knew from discussions he had that there was a risk that there would not be any available airspace at the site at the time of settlement. He denied this. He also denied discussing the issue with Mr Levinson. He agreed that he had received communications from Mr Pucknell and Mr Levinson on the topic but said that SWR did not know that the cells were overfilled. He could not recall whether or not he had discussions with Mr Pucknell and Mr Levinson on the topic. (844)

Mr Brown was taken to the email exchange between Mr Lumsden and Mr Levinson on 22 and 23 January 2013 regarding the airspace in cell 6 and to Mr Lumsden’s reference to the volumes provided as being estimates only and that a detailed survey was required to get an accurate assessment of airspace. (848) Mr Brown was asked: (848-849)

Q You received a copy of this email [Mr Lumsden’s email of 22 January 2013], didn’t you, from Mr Levinson, on around 22 January 2013, didn’t you.

A I can’t recall that, no.

Q He asked for your response.

A My response?

Q Yes -

A I can’t -

Q Yours and Mr Pucknell’s.

A I can’t recall.

Q And he’s responded, hasn’t he, the next day, we see at the top of 23 January 2013 that email at the top of the page, that email is written on your instructions, isn’t it.

A Yeah, I can’t recall those emails, sorry.

Q There were communications between you and Mr Pucknell and Mr Lucas and others about how to respond to this, weren’t there.

A I can’t recall.

\[1044\] Ex D6: 192.
Q You understood that the figures that were indicated in this email were estimates only.

A Yeah, but as I’ve said I think we all understood that there was a lot more capacity than was stated obviously. We were of the view - I don’t need to go back over it - yeah, we had no understanding that the cell 6 had been overfilled.

Q But just sticking with my question, you understood that they were estimates only, didn’t you, when you received these numbers in.

A Yes.

Q And that was on or around 22 January.

A Yes.

Q And you understood that the authority was saying that a detailed survey would be required to get a more accurate statement.

A No.

Q You didn’t understand that.

A I wasn’t involved in those discussions, no.

Q You understood it yourself though, didn’t you, that given they are estimates, you need a detailed survey to get a more accurate assessment.

A No.

Q So you didn’t believe that, did you.

A I did - as I said I wasn’t involved in any of those discussions.

Q Are you sure of that.

A Yes.

Q You were involved in email communications on the topic, were you.

A Loosely, but our people were more involved in the issues on site, Brett Jarvis and Andrew Manning, and it didn’t concern me.

Mr Brown knew that there were discussions about cell space and how things such as cell space, compaction, cap thickness and settlement of waste could affect such waste, but “it was not on [his] radar as a major issue”. (850) Mr Brown “loosely” understood that the Authority continued to fill cell 6 which would affect the accuracy of any estimate given as to future space. (850)

Mr Brown was taken to the third draft of the Deed of Settlement.1045 His attention was drawn to clause 4.6 which was incorporated into the deed as

1045 Ex D7: 200.
suggested by the Authority previously. It was put to him that the change was made on his instructions. Mr Brown said he could not recall that and he did not think so. It was also put to him that he knew that SWR had agreed to clause 4.6 being included in the draft Deed of Settlement. He said he could not recall that. (851) He was asked if he had read the draft Deed of Settlement before it was returned to Mr Lumsden. His answer was not responsive to the question. He said, “I wasn’t involved in the cell capacity at all. I was very loosely but, -”. (852) He agreed that he was copied in on communications on the question of cell capacity. It was put to him that he was aware that a clause was going to be included in the Deed of Settlement stating that the Authority had no obligation to ensure that there was available cell space on site. Again his answer was not responsive. He said, “[a]s I’ve said, it wasn’t something that was on my radar at all”. (852) He then said he could not recall expressly exonerating the Authority from any obligation to provide cell space at the site upon settlement. His response was that he could not recall knowing such thing. (852)

Mr Brown was taken to Mr Lumsden’s email to Mr Levinson of 4 February 2013 in which Mr Lumsden referred to cell capacity and the inability to give a meaningful warranty as to such capacity. Mr Brown said that he did not know that it was the Authority’s position that a meaningful warranty as to capacity could not be given. He did not know that the Authority had proposed that any warranty as to space in cell 6 be excluded from the draft deed. He did not provide instructions that any warranty as to cell space in cell 6 be excluded from the deed. (857)

Mr Brown’s attention was drawn to the deletion of clause 11.6 which contained the warranty as to cell space in cell 6. It was put to him that he approved the deletion. He said he could not recall doing so. (859)

Mr Brown was next taken to clause 20 in the fourth draft Deed of Settlement. He said he understood at the time that the position was as stated in that clause (the fourth draft deed superseded all prior agreements, understandings and negotiations in respect of matters dealt with in the deed). His attention was then drawn to clause 21. He said he did not understand the position to be as stated in clause 21 (that no party had relied on any statement by another party not expressly included in the deed). (859) His attention was then drawn to clause 22 and he said that he did understand at the time he signed the deed that it was comprehensive as to what it dealt with. (859-860)

Mr Brown said: (860)

We knew that they weren’t prepared to warrant the exact capacity of the facility and there can be obviously depending compaction rates and you know capping thickness and things like that that can vary but we were dealing in good faith and as I said I was more focused on the other parts of the opportunity.
That said, Mr Brown conceded that he was willing to accept the deletion of the cell capacity warranty and understood that a cell capacity warranty would form no part of the agreement as a result of the deletion. (860) It was put to him: (860-861)

Q  So you understood that there was no agreement between the parties if there was going to be any cell capacity in cell 6.

A  No. We were still of the view that there’d be substantial cell capacity in cell 6.

Q  I’m just asking about the terms of the agreement. You understood that the terms of the agreement did not provide that there would have to be any cell capacity.

A  Yes.

Q  In cell 6.

A  Yes.

Q  You entered into the deed upon that basis.

A  Yes.

Q  And you signed it in February 2013. Sorry, you understood that -

A  Sorry, yes.

Q  - when you entered into the deed in February 2013.

A  Yes.

ii. Mr Lucas

Mr Lucas confirmed that he visited the Hartley landfill site on 23 October 2012. At the time of his visit he could not see the cell liner for cell 6 because the cell was in active use. (549)

Mr Levinson sent numerous communications to Mr Lucas during the period September 2012 to February 2013. Mr Lucas could not say whether or not those communications included copies of the draft Deed of Settlement. He said that he would have been bombarded with emails and may not have read them. That said he was aware that changes were being made to the draft deed from time to time. He recalled that there were discussions about things such as the cell capacity in cell 6. He knew there were discussions between the lawyers and, as a consequence of those discussions, changes were made to the deed. (538) It was put to him: (538)

Q  Mr Levinson was communicating information he learned from Mr Lumsden from time to time, the authority’s lawyer.

A  Yes.
Q About the cell 6 capacity issue.
A Yes.
Q And there were changes made to the agreement as a result of those discussions.
A Yes.
Q And ultimately there was a warranty that had been in the agreement which was deleted because the authority couldn’t give a precise estimate of the capacity.
A Yes.

…
Q You were kept informed about that by Mr Levinson.
A That’s correct.

Mr Lucas was then taken to clauses 22, 23 and 24 of the Deed of Settlement. The particulars of those clauses were put to him as part of a series of questions seeking to ascertain his knowledge of the content of the deed. He said he did not drill down into the nitty gritty of the document at the time. (539) He said he generally recalled the details of what became clause 9 being raised and discussed in the period between September 2012 to February 2013. (539) Mr Lucas was taken to clause 4.4 in the Deed of Settlement. It was put to him that he understood that one of the risks was that there might not be any airspace left at the site at the time of settlement. He agreed that was a risk but at the time he thought it was an unlikely risk. He agreed that he understood that to determine precisely what space was available in a cell would require a survey. (540-541)

Mr Lucas was then taken to Mr Manning’s email of 15 January 2013. As mentioned, Mr Manning had noted in this email that “[b]ased upon AHRWMA estimations we have ~3 months of practical landfilling capacity remaining in cell 6”. Mr Lucas recalled being informed about cell 6 issues prior to settlement. He knew at this time that cell 7 was not ready to be used. Whilst he was not aware of the timeframe in which it would take to get cell 7 ready for use post-settlement, he did not know at the time that it was going to be a year. (549)

iii. Mr Manning

One of Mr Manning’s first involvements with the Hartley landfill was when he attended an inspection of the site on 29 November 2012. He was accompanied by Mr Jarvis, Mr Pucknell and Mr Wadlow from SWR. They met Mr Lorenz and Mr Coleman from the Authority. The purpose of the visit was to

1048 Ex P7: 223.
1049 Ex D6: 187.
1050 Ex D6: 187 at p 1911.
1051 Ex P17 at [7].
allow Mr Manning and the other SWR representatives to gain an understanding of the nature of the cells and infrastructure currently in place at Hartley.

As part of his visit to the site on 29 November 2012, Mr Manning was able to look over cell 6. He observed that no leachate pond had been constructed at the time to service cell 6. He recalled commenting at the time of his visit that the tipping point of cell 6 was slightly higher when compared to adjacent contours and gradients of the site. He explained that the tipping point was the working platform where waste was received, tipped and placed in a systematic way across the then area of the cell in use. (334) Mr Manning’s inspection of cell 6 was that the steepness of that cell in certain parts, when compared to adjacent contours and gradients, suggested that there was potentially less airspace available than what SWR had been told and had assumed. (334) Having conducted this inspection Mr Manning reduced his observations to a report which he provided to Mr Jarvis. No mention is made in his report of any suspicion regarding the available airspace in cell 6.

Mr Manning visited Hartley a second time on 23 January 2013, accompanied by Mr Jarvis and Mr Lucas. Mr Lorenz attended from the Authority. The purpose of this visit was to better understand what initial works would be required to occur once SWR took over operational control of the landfill. He again observed that the tipping point for cell 6 appeared high.

In cross-examination Mr Manning was taken to the email he received from Mr Jarvis on 3 December 2012, referred to earlier in these reasons. When asked whether he could recall Mr Jarvis informing him that cell 6 was closer to full than expected, he said that Mr Jarvis had raised it as part of their visit to the site earlier in 2013. (372) It was Mr Manning’s understanding at the time of receiving Mr Jarvis’ email that Mr Jarvis had recommended to management that a survey be obtained. (373)

Cross-examination then turned to a meeting Mr Manning had with Mr Lorenz on 9 January 2013. Though the subject of this meeting was the transfer of the EPA licence, it was put to Mr Manning that Mr Lorenz had informed him that there was about three months of capacity left in cell 6. (374-375) Mr Manning could not recall this being mentioned. It was also put to Mr Manning that Mr Lorenz said that SWR needed to get cracking with cell 7. Mr Manning could not recall him saying this either and his memory did not improve upon being presented with his email of 15 January 2013. (375-376)

Mr Manning said that his understanding was as per his email, namely that there was approximately three months of landfilling capacity left in cell 6. (376)
Later in cross-examination, however, when asked how many months of disposal capacity there was in cell 6, he said, answering that “[w]ith difficulty” that he would not say three months but less than three months. (385)

**iv. Mr Jarvis**

As mentioned, Mr Jarvis went to Hartley on 29 November 2012. As also mentioned, the purpose of the visit was for SWR to understand the layout of the site, the nature of the infrastructure and the way in which it was operated.\(^{1057}\)

Referring to the Hartley landfill survey plan,\(^{1058}\) Mr Jarvis observed during his site visit on 29 November 2012 that cells 1 to 4 had been substantially filled and had what appeared to be an interim cap.\(^{1059}\) Cells 5A and 5B were largely filled but were still being used.\(^{1060}\) Cell 6 was partly filled and partly covered with daily or interim cover on its eastern and part of its northern flanks and was being used as an active landfill.\(^{1061}\) Cell 7 was not ready for use as it was only partially excavated; (470) cells 7A and 7B were in the process of being constructed and earthworks in this regard had been undertaken.\(^{1062}\) None of cells 8, 9A and 9B had been constructed.\(^{1063}\)

Whilst at the site on 29 November 2012 Mr Jarvis was not able to determine the remaining capacity of the established cells.\(^{1064}\) He was not able to compare the active cells to a completed cell to approximate the remaining capacity in the active cells.\(^{1065}\) This was largely because of the absence of survey reference points which could be used to determine the extent to which any cells had been filled to their approved level. He formed the view that it was not possible to determine the volume remaining in cell 6 or the shape of the cell relative to the profile of the terrain without a survey. He said that SWR had no way of knowing at this time what the final landform was supposed to resemble. (424) In the past he had been accustomed to dealing with landfills where known survey marks were in place to which reference could be made to determine capacity. In addition regular surveys are normally undertaken as the landfill is shaped. No aids to determining capacity were available during the course of his site visit at Hartley. He was also not sufficiently familiar with the site to make any accurate approximation of the remaining capacity.\(^{1066}\)

In his statement Mr Jarvis said:\(^{1067}\)

\(^{1057}\) Ex P18 at [8].
\(^{1058}\) Ex P7: 219.
\(^{1059}\) Ex P18 at [9.1].
\(^{1060}\) Ex P18 at [9.2].
\(^{1061}\) Ex P18 at [9.3].
\(^{1062}\) Ex P18 at [9.4].
\(^{1063}\) Ex P18 at [9.5]-[9.6].
\(^{1064}\) Ex P18 at [13].
\(^{1065}\) Ex P18 at [13].
\(^{1066}\) Ex P18 at [14].
\(^{1067}\) Ex P18 at [15].
SWR needed to obtain a survey of the landfill and the approved landfill profile so that SWR could determine the volume of cell space remaining, particularly in cells 5 and 6.

He said that without the survey it was not possible to determine the volume of cell space available in cells 5 and 6. Nonetheless, from his inspection on 29 November 2012 he formed the view that there was relatively little capacity in cell 6. It was the layout of the terrain that caused Mr Jarvis to form this opinion. The surrounding terrain to which the cell would ultimately be built up to match suggested to him that there was not much in the way of cell space remaining in cell 6. (424) He also observed that cell 7 was not ready to receive waste.

Mr Jarvis advised Mr Manning of his observations in the email of 3 December 2012 to which reference has been made. At the time he sent that email he did not expect that cell 6 had been overfilled or filled beyond its approved profile.

Mr Jarvis again visited the Hartley landfill on 23 January 2013. Mr Jarvis was unable to recall who he attended with, but as mentioned earlier, it appears that he was accompanied by Mr Manning, Mr Lucas and Mr Lorenz. His observations were largely consistent with those he made on 29 November 2012, including his view as to the remaining capacity of cell 6. Cell 6 had continued being the main operation point for waste placement. He also did not see evidence of construction work for any future cell in the short term. Mr Jarvis remained of the view that in order to determine the remaining capacity of cell 6 a survey was required.

Mr Jarvis visited Hartley on 14 February 2013 and again on 25 February 2013. During his 14 February 2013 inspection, he observed that the liner to cell 6 had been covered by waste. That was unusual in his experience because ordinarily a portion of the constructed liner was left visible and accessible for connection in the construction of an adjoining cell. (438) On both occasions, he observed that more waste had been deposited into cell 6. It remained the case that without a survey the capacity of cell 6 could not be determined. Cell 7 was partly excavated. Mr Jarvis walked over the site with Adam, an employee of Allsurv Surveys, who had been engaged by SWR. He understood from talking to Adam that cell 6 had limited capacity. It was not clear to Mr Jarvis where extra capacity was available in cell 6 as he could not relate the height and shape of the...
existing landfill profile to the approved profile. As there appeared to be limited and uncertain available space in cell 6 and waste was continuing to be delivered to the site, Mr Jarvis started to develop concepts for the development of cell 7 in March 2013.

By reference to Mr Manning’s email of 15 January 2013, Mr Jarvis agreed that within SWR there were discussions about commencing construction of cell 7 soon after transfer. However, he could not recall the content of the discussions. In particular, he could not recall any mention during the course of his November 2012 on-site visit of there only being approximately three months of practical landfill capacity in cell 6, but conceded that as Mr Manning had said as much in his email it must have been raised at that time.

Mr Jarvis said that the availability of cell space was important because of SWR’s obligation not to overfill the cell. He agreed with the proposition that in January 2013 he could not determine how much space was available in cell 6. He agreed that it seemed that the best information SWR had from the Authority was that there was about three months of space available. He also agreed that SWR knew that it would have more space in cell 6 when cell 7 was constructed.

Mr Jarvis was taken to Mr Lumsden’s email to Mr Levinson of 22 January 2013 in which Mr Lumsden advised as noted above, that cell 6 had space of approximately 11,000 m³ immediately available. Mr Jarvis could not recall whether he was told as much in January 2013 but there were “numbers bandied around”.

Mr Jarvis agreed that when SWR took over the site in February 2013 he knew that there was limited capacity in cell 6 and he understood that there was work to do to construct cell 7. Independent consultants had to be engaged to help deal with the design. He understood that it was likely to take some weeks for that design to be prepared. There was substantial excavation to be undertaken as 55,000 m³ of material had to be excavated which Mr Jarvis estimated could be done in a couple of weeks.

v. Mr Lorenz

On 23 October 2012 Mr Lorenz attended the Hartley landfill along with Mr Lucas and Mr Brown. During the course of the meeting, Mr Lorenz identified particular aspects of the site as they drove up to the top of the landfill and looked over cell 6.

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1077 Ex P18 at [22].
1078 Ex P18 at [25].
1079 Ex D6: 187.
1080 Ex D146 at [131].
On 9 January 2013 Mr Lorenz met with Mr Manning at the Tap Inn at Kent Town. During the course of the meeting, Mr Lorenz said words to the effect that Mr Manning “would need to get cracking on a new cell design for cell 7 as [Mr Lorenz] considered that there was only approximately 3 months of space remaining in this cell”.

As at 22 January 2013 Mr Lorenz’s estimate was that there was approximately 11,000 m³ of immediately available space in cell 6. He further estimated that once cell 7 had been constructed there would be a further 134,000 m³. Mr Lorenz’s estimation was based on the information that Mr Coleman had provided to him in early January 2013. Mr Coleman told Mr Lorenz that he believed that cell 6 was three months from capacity. However, Mr Lorenz was of the opinion that without a detailed survey being conducted, any estimate would not be accurate.

In his evidence Mr Lorenz advised that the Authority had slightly overfilled cell 6 as it was believed that it would settle back to what was the final approved height for that site. Doing so accorded with Mr Lorenz’s experience at the Wingfield landfill were cells were overfilled to the tune of 10%. (4429-4430)

In cross-examination Mr Lorenz was asked whether he recalled providing instructions to Wallmans with respect to the capacity of cell 6 in September 2012. Mr Lorenz advised that he would not have provided such advice at that time. (4903)

vi. Mr Coleman

In early January 2013 Mr Coleman advised Mr Lorenz that he thought there was about three months’ capacity left in cell 6 which, he said, equated to 10,000 to 12,000 m³. That meant that approximately 4,000 m³ was taken up every month at Hartley. (3215) When asked if it would be fair to say that between September 2012 and January 2013 the available space in cell 6 was nothing like 200,000 m³, he said that without looking at the documents he would not be able to tell because there would be space available once cell 7 was constructed. (3216)

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1081 Ex D146 at [196.2].
1082 Ex D146 at [196].
1083 Ex D146 at [196.1].
1084 Ex D146 at [195].
A What I meant when answering Michael was what we had without doing more work.

... 

HIS HONOUR

Q Because you build it in a pyramid.
A That’s right.
Q And then you build cell 7.
A Then you see -
Q Then you can fill the batter.
A - that available space, yes, your Honour.

He said he did not know if there would have been about 150,000 m³ available space as at January 2013 even taking into account any work that might be done with cell 7. (3217) Cross-examination continued: (3217-3219)

Q … And is it fair to say that you wouldn’t be in a position to provide any reliable estimate about the available cell space in cell 6 as at January 2013.
A No, I think those calculations were done by somebody else.
Q Not by you.
A No.

... 

Q … As at September 2012, assuming no further work’s to be done [on cell 7], [there] … would be nothing like 200,000 available square metres of space in cell 6, do you agree.
A Yes.
Q And as to the second step, whether there was 200,000 sq m available with further work to be done in connection with cell 7 you would not know the answer to that, is that correct.
A No.
Q Is that correct.
A That’s correct.
Q And you’d not be in a position to provide any reliable advice about that.
Q Not without looking at documentation. I can work it out but not with what I’ve got in front of me.
A And were you asked for that information in September 2012 or can’t you remember.

Q No, I wasn’t.

C Consideration

The first draft Deed of Settlement sent by Botten Levinson to Wallmans contained warranties in clause 14.5 as to the unfilled cell space in the constructed cells at Hartley. Clause 14.5.1 warranted that cells 5A and 5B had remaining space of 60,000 m³ available upon the construction of cell 7, whilst clause 14.5.2 warranted that cell 6 had 210,000 m³ in available remaining space. It appears that Mr Levinson took the cell space volumes, which were included in the first draft Deed of Settlement, from Mr Lumsden’s letter of 25 September 2012 and that the volume figure for the cell space in cell 6 included in the draft deed was erroneously transcribed. Further, it is to be observed that Mr Levinson did not treat the volumes that Mr Lumsden provided as estimates or approximations, but rather as having been determined with certainty.

It is to be emphasised, as Mr Levinson made plain in his 21 December 2012 email, that this was a negotiation draft. In a sense then clause 14.5 amounted to an invitation to provide a warranty in the terms of the clause. In this regard, it is not suggested that a warranty as to available cell space formed a component of the in-principle agreement reached at the 12 November 2012 Wallmans meeting.

Confronted by clause 14.5 the Authority, I infer, turned its mind to the question of whether it was prepared to accept the invitation. That gave rise to two questions. First, what was the remaining cell space in the constructed cells? Second, how should the parties deal with the fact that, whatever the remaining cell space, it was diminishing daily by virtue of the continued operation of the landfill? In the second draft Deed of Settlement the second of these questions is dealt with by the insertion of clause 4.6. Clause 4.6 reflected the fact that landfilling operations at Hartley were ongoing with the consequence that whatever the content of any warranty as to available airspace within constructed cells, such warranty would be for a volume greater than the airspace actually available upon settlement. Clause 4.6 relieved the Authority of having to provide cell capacity equal to any warranted volume.

That left the question of whether the Authority was prepared to accept the invitation to provide a warranty as to available unfilled cell space and, if so, the volume of such space to be warranted. In the second draft Deed of Settlement, by inserting clause 4.6 and leaving clause 11.5 (formerly clause 14.5) in the draft, the Authority signalled that, as at that point in time, it was prepared to entertain SWR’s invitation to provide a warranty as to unfilled cell space. That said, clause

1085 Ex P6: 184 at p 1898.
1086 Ex P6: 184 at p 1891.
1087 Ex D6: 191 at p 1955.
14.5, now clause 11.5, was amended. Clause 14.5 of the first draft Deed of Settlement read:

14.5 Remaining landfill cell space of constructed cells at the facility comprises -
14.5.1 60,000m$^3$ in cells 5a and 5b that may be accessed following construction of cell 7;
14.5.2 210,000m$^3$ in cell 6;

Clause 11.5 of the second draft Deed of Settlement read:

11.5 As at [………..] the remaining landfill cell space of constructed cells at the facility is approximately:
11.5.1 60,000m$^3$ in cells 5a and 5b that may be fully accessed following construction of cell 7;
11.5.2 210,000m$^3$ in cell 6 which can be fully accessed following the construction of Cell 7;

Clearly clause 11.5 of the second draft Deed of Settlement in its incomplete form necessarily implicitly conveyed that before the content of the invited warranty could be finalised and agreed further information was required by the Authority. More particularly, bearing in mind the fact that landfilling operations at Hartley continued and that the approximate volumes included supposedly reflected the position in September 2012, if the invitation to provide the warranty were ultimately accepted and the warranty given as to volumes at a specified date after September 2012, the volume amounts, particularly in relation to cell 6, would be different to those first inserted in the first draft Deed of Settlement. If the critical date was to be 25 September 2012, Mr Levinson’s draft Deed of Settlement invited consideration of whether a precise warranty could be provided.

In my view, it is in this context that Mr Lumsden’s email of 22 January 2013 falls to be understood. The volumes Mr Lumsden provides in his email are a step in the negotiation as to whether the Authority is prepared to provide the warranty that SWR has invited it to provide and, if it is, the volume of cell space it is prepared to warrant exists. In context, the email is not so much a warranty, as an indication of a warranty that may be given if SWR is prepared to accept a warranty framed in terms indicative of it being an approximation or estimate with the attendant imprecision. The alternative, as flagged by Mr Lumsden, was to obtain a detailed survey.

Having regard to the offers made during the course of the 12 November 2012 meeting by Mr Lumsden and Mr Pucknell, I do not think it can be doubted that the airspace in the constructed cells was a factor considered in the course of

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1088 Ex P6: 184 at p 1898.
1089 Ex D6: 191 at p 1959.
1090 Ex D6: 192.
determining the amount to be paid in compensation. The relevance of cell space to the amount to be paid in compensation is what lies behind Mr Levinson’s email of 23 January 2013. However, the write down value as contained in Mr Lumsden’s 25 September 2012 letter was expressly stated as being the position as at 1 July 2012. The write down value may be considered a crude expression of the airspace available in a cell. Mr Lumsden’s 22 January 2013 email signalled that the write down value was dated, possibly unreliable. Mr Levinson clearly understood this hence he asked, in effect, what the Authority considered the write down value of cell 6 to be in the light of Mr Lumsden’s email of 22 January 2013.

Negotiations regarding the questions of whether the Authority would provide a warranty as to cell space, and precisely what volume of cell space, continued. As indicated, the Authority considered that without a survey it could not provide a meaningful warranty. In my view Mr Lumsden’s 4 February 2013 email made plain that the Authority was not prepared to provide a warranty as to the available airspace in cell 6 or any of the constructed cells. Implicitly, this was accepted by SWR with the deletion of clause 11.6 (formerly clause 11.5) from the draft Deed of Settlement being undertaken by Mr Levinson. Importantly, all prior discussions regarding cell space must be viewed through the prism of the 4 February 2013 email. The Authority, through its solicitors, ultimately expressly refused the invitation to provide SWR with a warranty as to the cell space in the constructed cells at Hartley.

The negotiations were undertaken at arm’s length with the benefit of expert advice by sophisticated entities with substantial experience in operating landfills. The significance of the Authority’s refusal to provide a warranty as to unfilled cell space without the benefit of a survey would have been and was, judging by the evidence of Mr Brown, Mr Lucas, Mr Pucknell, Mr Jarvis and Mr Manning understood by SWR. SWR itself recognised the necessity of a survey to determine what unfilled cell space in cell 6 existed.

Whatever the true position regarding the unfilled cell space available in cell 6, I find that the only representation the Authority made, or the only warranty given, was that the Authority would not vouch for the unfilled volume of airspace in that cell.

In my view, the estimates provided in the email of 22 January 2013 were not misleading or deceptive or likely to mislead or deceive. First, they were expressly stated as estimates. Secondly, there is no evidence to suggest that despite Mr Lumsden’s email of 22 January 2013 referring to the estimates given as estimates, the Authority in some way conveyed that it would be safe for SWR nonetheless to rely upon the estimates. Thirdly, the Authority made clear that

1091 Ex D6: 192.
1092 Ex P4: 114.
1093 Ex D7: 204.
precision would require a survey. Fourthly, they were provided, and would have been, and were, understood as a step in a process of negotiation over whether an express warranty was to be, and could be, provided in the Deed of Settlement. Fifthly, subsequently, the Authority declined to provide any warranty as to unfilled cell space because it was too difficult on the available information. Sixthly, the Authority’s refusal to provide the warranty invited was accepted by SWR after a process of negotiation involving discrete discussion of the cell space question. This is not a case where the significance of an alteration in position or retraction is not made clear or goes by unappreciated.

The character of the 22 January 2013 email cannot be determined in isolation. Considered in the light of the entirety of the negotiation concluding with Mr Lumsden’s 4 February 2013 email, I find, for the reasons I have given that the Authority did not engage in misleading or deceptive conduct within the meaning of s 18 ACL SA in providing the estimates contained in the email of 22 January 2013 as to the available airspace in cell 6.

I return to the write down value for cell 6 provided in Mr Lumsden’s 25 September 2012 letter. No evidence was adduced to suggest that the write down value for cell 6 taken from the Authority 2011/2012 Annual Report was erroneous. I accept that at a general level the write down value suggested that cell 6 was a little over 25% full. However, in a very real sense the negotiation between Mr Levinson and Mr Lumsden overtook any inference to be derived from the write down value as to the unfilled space in cell 6 and the value of cell 6. Mr Levinson did not follow up on the enquiry made in his email of 23 January 2013 because, I infer, the obtaining of a survey would provide the information necessary to determining the value of the unfilled cell space and the relevance thereof to the assessment of the compensation payable. By its email of 4 February 2013 the Authority implicitly indicated that it would not vouch for any extrapolation as to unfilled cell space from the write down value provided in September 2012 absent a survey. In my view, the write down value provided by the Authority in Mr Lumsden’s letter of 25 September 2012 was not misleading or deceptive nor likely to mislead or deceive. The Authority made it clear that it could not vouch for all prior estimates as to the unfilled cell space in cell 6 and that the only way to get any precision as to the available cell space was by having a survey done. As I have said, necessarily implicit in the Authority’s position was that it could not vouch for any extrapolation from the write down value. SWR understood this.

If I am wrong in my conclusion that there was no misleading or deceptive conduct engaged in by the Authority regarding the unfilled space in cell 6, and assuming the estimates or the write down value were misleading or deceptive or likely to mislead or deceive, I would find nonetheless that SWR did not rely upon the estimates or the write down value in determining to execute the Deed of Settlement and the s 103E Deed.
Both Mr Brown and Mr Lucas acknowledged that SWR entered into the Deed of Settlement and, I infer, the s 103E Deed, knowing that there was no agreement that there would be any cell capacity in cell 6, and knowing that the terms of the settlement did not require that there be any cell capacity in cell 6. Both men accepted the risk that the available cell space in cell 6 might not be as thought, but determined nonetheless to run the risk.

In this regard it is to be recalled that Mr Pucknell, Mr Jarvis and Mr Manning all suggested that a survey be obtained and that the Authority had indicated that it intended to obtain a survey. SWR did not insist on proceeding before a survey was obtained, rather upon forwarding the fourth draft Deed of Settlement to Wallmans on 5 February 2013, in which clause 11.6 had been deleted, presumably on the instructions of SWR, SWR insisted that settlement take place by close of business on 8 February 2012 or otherwise the site would be closed to the disposal of waste by the Authority and the constituent councils from midday on 9 February 2013. In the circumstances any loss sustained by SWR on account of the cell space in cell 6 being less than the estimated volumes or less than a volume extrapolated form the write down value of cell 6, cannot be said to have been sustained because SWR relied upon those estimates or that write down value. I find that no such reliance occurred. In my view, as mentioned above, SWR was confident in its ability to attract the AC, AHC and DCMB waste streams which would allow for the profitable operation of the landfill throughout the duration of SWR’s tenure. SWR knew that it had to commence constructing cell 7 virtually immediately upon taking over the operation of Hartley. It knew that it would have to outlay significant expenditure almost immediately but, I conclude, confident in obtaining the AC, AHC and DCMB waste streams, was confident that such costs would be recovered. I was left with the impression from the evidence of Mr Brown and Mr Lucas, and I find, that the opportunity as they understood it to be, relegated the question of available cell space in cell 6 to the insignificant.

I would dismiss the claim insofar as it relates to the alleged warranties given in relation to the airspace in cell 6.
IX

In trade or commerce?

In view of my conclusions regarding the question of whether the Authority engaged in misleading or deceptive conduct as alleged, it is unnecessary to deal with the question of whether the alleged conduct occurred in trade or commerce. However, in case the matter goes higher, I set out briefly my reasons for concluding that had the alleged misleading or deceptive conduct been proven to have been engaged in, it did not occur in trade or commerce.

Earlier in these reasons I set out the applicable test drawn from the joint reasons in *Nelson* — the conduct must occur in the course of activities or transactions which, of their nature, bear a trading or commercial character.\(^{1094}\)

In the present case the relevant transactions are the entry into the Deed of Settlement and s 103E Deed. Neither of those deeds concerned the sale and acquisition of a business. Rather the deeds reflect a compromise reached in a legal dispute regarding the right to renew a lease to occupy land and operate on that land a landfill. The compromise did not involve the transfer to SWR of a right to occupy or operate Hartley for consideration. It concerned the terms upon which the Authority would cease to occupy the land, would relinquish all responsibilities for the land and the waste deposited on it, and forego all rights under the lease pursuant to which it had occupied the land and operated a landfill. SWR’s right to occupy the land and operate the landfill is derived from the Landfill Deed.

I think it is clear that the transactions subject of the deeds may be described as business or commercial in character. However, in my view they were not entered in the course of activities or transactions which, of their nature, bear a trading or commercial character. Whilst it was essential to both SWR and the Authority that they have a landfill for their operations, neither could be said to be in the business of buying and selling or leasing landfills. The relevant activities would be either the Authority’s receipt of waste to be disposed of in the landfill for a fee or SWR’s waste receipt and treatment operations and recycling for a fee. If this is right, the transactions subject of the deeds did not occur in the course of those activities. There is no doubt that they occurred for the purpose of engaging in trade or commerce from SWR’s point of view, but they did not take place in SWR’s trade or commerce. Equally, they did not occur in the Authority’s trade or commerce.

For these reasons, in my view the alleged conduct did not occur in trade or commerce.

\(^{1094}\) (1990) 169 CLR 594 at 604 (Mason CJ, Deane, Dawson and Gaudron JJ).
X

The claim under the Misrepresentation Act 1972 (SA)

In the alternative to its case under s 18 ACL (SA), SWR pleaded that it is entitled to relief under s 7 of the Misrepresentation Act 1972 (SA). Section 7(1) of that Act provides:

(1) Where a contracting party is induced to enter into a contract by a misrepresentation made—

(a) by another party to the contract; or

(b) by a person acting for, or on behalf of, another party to the contract; or

(c) by a person who receives any direct or indirect consideration or material advantage as a result of the formation of the contract,

and any person (whether or not he or she is the person by whom the misrepresentation was made) would, if the misrepresentation had been made fraudulently, be liable for damages in tort to the contracting party subjected to the misrepresentation in respect of loss suffered by him or her as a result of the formation of the contract, that person is, subject to subsection (2), so liable to that contracting party, in all respects as if the misrepresentation had been made fraudulently and were actionable in tort.

Section 7(1) of the Act provides for the recovery of damages where a contracting party is induced to enter into a contract by a misrepresentation made by another party to the contract. The effect of the section is that “when a misrepresentation induces a party to enter into a contract, the representor is liable for damages in tort as if the representation had been made fraudulently”.

In Mitchell v Valherie White J said:

It is clear enough that it is not every statement made in contractual negotiations, or as a prelude to contractual negotiations, which will be regarded as conveying a representation. To constitute a representation, the statement must be a representation of fact:

The essence of misrepresentation is that it led the representee into error. This must be tested objectively — would a reasonable person in the position of the representee have been led into error by the statement?

Statements that are so vague as to be incapable of being given any reasonably precise meaning or because they are exaggerated commendatory opinion rather than a statement of any factual matter do not give rise to an actionable misrepresentation. …

[footnotes omitted]

The meaning of any representation of fact and the question of whether it is a misrepresentation is to be determined objectively having regard to the context in which the statement was made, including the respective experience and

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1095 RRG Nominees Pty Ltd v Visible Temporary Fencing Australia Pty Ltd (No 4) [2019] FCA 686 at [450] (White J).

1096 (2005) 93 SASR 76 at [71]-[72].
knowledge of both the maker of the representation and those said to have relied upon the representation.\textsuperscript{1097}

A misrepresentation may constitute misleading or deceptive conduct, but misleading and deceptive conduct is a broader concept, hence in \textit{Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd}, in the course of considering s 52 TPA, Lockhart J commented:\textsuperscript{1098}

Misleading or deceptive conduct generally consists of representations, whether express or by silence; but it is erroneous to approach s 52 on the assumption that its application is confined exclusively to circumstances which constitute some form of representation. …

Further, the circumstances in which silence constitutes a misrepresentation are more confined than in a claim of misleading and deceptive conduct. Relevantly, in \textit{Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd} Bowen CJ said:\textsuperscript{1099}

Dealing with the question of misrepresentation constituted by silence, there are cases which show, for example, that an omission to mention a qualification, in the absence of which some absolute statement made is rendered misleading, is conduct which should be regarded as misleading. So too is the omission to mention a subsequent change which has occurred after some statement which is correct at the time has been made where the result of the change is to render the statement incorrect so that thereafter it becomes misleading. This also may be regarded as constituting misleading conduct. However, the general position between contracting parties has been expressed in the following way:

“The general rule, both of law and equity, in respect to concealment, is that mere silence with regard to a material fact, which there is no legal obligation to divulge, will not avoid a contract, although it operates as an injury to the party from whom it is concealed.”

\textit{(Smith v Hughes} (1871) LR 6 QB 597 at 604; and see \textit{Ward v Hobbs} (1878) 4 App Cas 13; \textit{W Scott, Fell & Co Ltd v Lloyd} (1906) 4 CLR 572; cf \textit{Chadwick v Manning} [1896] AC 231 at 238.) Under the general law it is important to consider whether there is a legal obligation to divulge. …

Bowen CJ went on to distinguish this position to the broader categories of misrepresentation by silence under the TPA:\textsuperscript{1100}

The notion of relationships giving rise to an obligation to make disclosure is one which may well prove useful in determining some of the cases which may arise under s 52 of the \textit{Trade Practices Act} 1974. However, the court will not be restricted to cases where such a relationship has already been held to exist at common law or in equity. The court is likely to be faced with situations under s 52 between particular parties, where it will feel bound to hold that such an obligation to disclose arises from the circumstances.

\textsuperscript{1097} \textit{Mitchell v Valherie} (2005) 93 SASR 76 at [7]-[8] (Sulan J); see also \textit{Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd} (1982) 149 CLR 191.

\textsuperscript{1098} (1988) 79 ALR 83.

\textsuperscript{1099} (1986) 12 FCR 477 at 489-490.

\textsuperscript{1100} \textit{Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd} (1986) 12 FCR 477 at 490.
This passage was cited with approval by Glesson CJ in the decision of *Lam v Ausintel Investments Australia Pty Ltd.*\(^{1101}\)

SWR’s case under the *Misrepresentation Act 1972* (SA) relies upon the same conduct and implied representations pleaded as part of its case under s 18 ACL.\(^ {1102}\) I have found that the Authority did not engage in the misleading and deceptive conduct alleged in the pleadings. My findings that there was no misleading and deceptive conduct forecloses the possibility of there being any misrepresentation made within the meaning of the *Misrepresentation Act 1972* (SA). I dismiss the claim under the *Misrepresentation Act 1972* (SA).

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\(^{1101}\) (1989) 97 FLR 458 at 475.

\(^{1102}\) Second Statement of Claim [39]-[40].
Orders

The claim is dismissed.
Abuse of process?

A. Was the action an abuse of process?

The Authority seeks indemnity costs on the basis that the proceedings were instituted for an ulterior or collateral purpose or because SWR has been delinquent and acted unreasonably in the conduct of the matter. As to the former in paragraph 45 of the Authority’s Third Defence it states:

45. The Authority denies that SWR is entitled to the relief claimed or any relief and the Claim should be dismissed with costs payable on a solicitor client or indemnity basis on the ground that the Claim is being pursued for the purpose of trying to pressure the Authority’s Member Councils into commercial arrangements involving the Member Councils:

45.1 depositing their waste at Hartley in the future; and

45.2 causing the Authority to shut down the Brinkley landfill.

With respect to the allegation of delinquency and unreasonable conduct, it is said to arise from SWR’s failure to make full and timely disclosure, from Mr Brown’s false evidence and from the allegation made in cross-examination of a number of the Authority’s witnesses that the Authority’s representatives lured SWR into executing the Deed of Settlement and s 103E Deed with the promise of the constituent councils’ waste streams.

An abuse of process can take many forms. The categories are not closed. In Williams v Spautz the joint reasons provide the following example of an abuse of process:

… To say that a purpose of a litigant in bringing proceedings which is not within the scope of the proceedings constitutes, without more, an abuse of process might unduly expand the concept. The purpose of a litigant may be to bring the proceedings to a successful conclusion so as to take advantage of an entitlement or benefit which the law gives the litigant in that event.

Thus, to take an example mentioned in argument, an alderman prosecutes another alderman who is a political opponent for failure to disclose a relevant pecuniary interest when voting to approve a contract, intending to secure the opponent’s conviction so that he or she will then be disqualified from office as an alderman by reason of that conviction, pursuant to local government legislation regulating the holding of such offices. The ultimate purpose of bringing about disqualification is not within the scope of the criminal process instituted by the prosecutor. But the immediate purpose of the prosecutor is within that scope. And the existence of the ultimate purpose cannot constitute an abuse of process when that purpose is to bring about a result for which the law provides in the event that the proceedings terminate in the prosecutor’s favour.

Defendant’s Supplementary Closing Submissions at [4.2]-[4.3].
Third Defence at [45].
It is otherwise when the purpose of bringing the proceedings is not to prosecute them to a conclusion but to use them as a means of obtaining some advantage for which they are not designed or some collateral advantage beyond what the law offers.

[footnotes omitted]

That said, an intention to prosecute an action to its conclusion does not preclude a finding that the proceedings constitute an abuse of process.1106 The “collateral advantage” need not be the sole purpose of the proceedings, but it must be the predominant purpose.1107 Proceedings serve many purposes, including “the protection or vindication of particular legal rights or immunities, the maintenance or affection of particular legal relationships, and the imposition or enforcement of particular legal penalties, liabilities and obligations”.1108 The pursuit of a legal remedy will not necessarily be an abuse of process because one of the purposes of the pursuit is to achieve an outcome that naturally flows from a remedy (e.g. the vindication of plaintiff’s reputation flowing from a verdict in a civil action for defamation).1109

The onus of proving an abuse is a “heavy one” and it lies with the party alleging it.1110

The Authority’s starting point is SWR’s attitude and approach in the course of the negotiations. It refers to the repeated threats to “shut the gates” and the time pressure applied. I have referred to SWR as being aggressive and bullish.

Next the Authority refers to Mr Brown’s 18 March 2013 letter to AHC which gave a false account of the 6 December 2012 meeting. Then, on 15 July 2013 Mr Brown, Mr Pucknell and Mr Fairweather met with Mr Stuart and Mr Peters to discuss DCMB’s waste remaining at Hartley. Later that evening, Mr Brown sent an email to Mr Fairweather and Mr Pucknell in which he queried whether he should send an email Mr Peters and Mr Stuart to thank them for the meeting and to advise them that “our letter has gone off and we would still like to offer the authority a price”.1111 The letter to which he refers is the 16 July 2013 letter of demand sent to the Authority.

Mr Fairweather responded:1112

Simon,

I agree. I think after our positive approach we presented today we should continue along those lines. We don’t weaken our negotiating stance by confirming what we talked about without offering something concrete as yet. Then we can get back together after the dust

1106 Viscriello v Macks [2014] SASC 189.
1111 Ex D13: 515 at p 3908.
1112 Ex D13: 515 at p 3908.
settles from the Lorenz and AHRWMA letters. Then we can formalise our offers to Mt. Barker and The Authority and even Adelaide Hills.

Just my thoughts.

Cheers,

Jim.

Mr Fairweather was cross-examined about what he meant by this email:

Q So you still didn’t want to offer anything to Mt Barker, you agree with that.

A I think that Mr Brown says ‘We would still like to offer the Authority a price and then I think we should continue along the positive lines we presented today’, meaning that we would be looking to give them a price and then I just said that ‘I don’t think it weakens our position to not give them a price right now’.

Q You wanted to hold off still giving them a price. You wanted to send the demand letters first and see what happens when the dust settles.

A I am probably more meaning to let the air clear after they have been received and then - and I say ‘Then we can formalise our offer to Mt Barker and the Authority and even the Adelaide Hills’.

The following day, Botten Levinson sent the letters of demand to Ms Stokes\(^{1113}\) and Mr Lorenz.\(^ {1114}\) Those letters are discussed in detail elsewhere in these reasons. Put briefly, the letters contained allegations that the Authority and Mr Lorenz (in his personal capacity) had acted unconscionably and had made misleading and deceptive representations during settlement negotiations with SWR. SWR’s loss was estimated to be $6 million. The letters to Ms Stokes noted:\(^ {1115}\)

I reiterate that SWR does not see the AHRWMA or any member Council as a competitor or a threat. SWR remains prepared to enter into open discussions about commercially acceptable long term disposal rates at Hartley for the AHRWMA and/or its member Councils.

Mr Levinson explained that the purpose of that paragraph was to indicate that despite the disappointment of being in the position that it saw itself in, SWR was not precluding future arrangements with the Authority or its constituent councils. However, he clarified that the loss and expenses incurred had to be addressed. (322)

It was put to Mr Brown that at the time of sending these letters he did not have any evidence of a contract between the Authority and the constituent councils. It was put to him that without such evidence the purpose of the letter was to put pressure on Mr Lorenz. (823-824) He denied this and explained: (824)

\(^{1113}\) Ex D8: 309.

\(^{1114}\) Ex D8: 310.

\(^{1115}\) Ex D8: 309 at p 2509.
Whether they were written contracts or obligations, it was clear to us that the member councils, all of their waste was controlled by the authority, whereas we were clearly told that the authority didn’t control their waste.

Mr Brown denied that the purpose of the letters was to bring pressure to bear on the constituent councils in order to induce them to deposit their waste at Hartley. (831) When later cross-examined on the voir dire, Mr Brown explained his view at the time as follows:1116 (1913-1914)

We obviously paid a million dollars and settled the opportunity. We initially we were obviously upset that Adelaide Hills and Alexandrina left, but we thought that we could still dust ourselves off and build a business out of obtaining or keeping Mount Barker. And once we got word that we were leaving we had some meetings with them and they said that they’d been pressured to stay as one in the Authority, which is exactly the deal that we didn’t agree to do, and we were extremely upset about that. We also started to unravel the issues on the site that we’d found which were substantial; the air space issue is the largest, from my perspective. When you buy an asset and you have free air space you can generate revenue out of it. When you have bought an asset that has been overfilled and you have to spend a lot of money, which we did on a new cell and sort out the existing issues, yeah, we thought we were very misled and we decided to take the gloves off with it because we couldn’t get any sense out of - we thought we were getting a lot of sense out of Mount Barker Council and when that stopped that’s when we decided to issue proceedings.

In cross-examination, Mr Pucknell was questioned about SWR’s motives in bringing the claim against the Authority: (1327)

Q … I’ll put that more specifically, you knew that they would be pressured by the expenditure of legal costs defending a claim brought by Southern Waste ResourceCo.

A Anyone would, yes.

Q And that was all designed to try to force a commercial result satisfactory to Southern Waste ResourceCo.

A I think it was a path to getting the authority to the table I think.

Q And you wanted to get the authority in front of a judge in order to try to force a commercial result.

A That’s not my words I don’t think.

Q No, they’re Mr Brown’s words, aren’t they.

A It sounds like something Simon might say but I can’t confirm that for sure.

Mr Fairweather was cross-examined on the same topic: (1660)

Q In 2013 you had discussions with Mr Brown about putting legal pressure on the authority.

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1116 Ex D16: 598.
A In when, sorry, what time frame?
Q 2013.
A Yes.
Q And indirectly putting legal pressure on the member councils.
A Yes.
Q And that would involve legal costs pressure as a way of getting the authority and the member councils to the table.
A Yes.
Q You supported that strategy.
A Was supportive of trying to make an outcome. For want of a better expression it’s his train set. So if that’s the strategy he wants to embark on, then I’m an employee under that structure.
Q You mean Mr Brown by that answer.
A Yes.
Q And Mr Brown told you that he thought the only way to bring the commercial discussion to a head was to issue proceedings.
A Not those exact words but words to the effect.

On 5 September 2013, in response to an email from Mr Jarvis about potential problems with the cells at Hartley, Mr Brown sent an email to Mr Jarvis, Mr Pucknell and Mr Manning in which he wrote: \(^{1117}\)

I am all over it legally Brett.

It is the only way we will get them to the table unfortunately.

We need to sign off on the site issues promptly as well.

Regards Simon.

Mr Brown was taken to this email and asked whether he believed that the only way to get a commercial deal with member councils was to make legal claims against the Authority and Mr Lorenz. He explained that SWR had found it extremely difficult to understand who it was “dealing with” \(^{(834)}\) He said: \(^{(834)}\)

It was nearly impossible for us to realise who was controlling these matters, so it was extremely important for us to bring this to a head and we thought the only way that we could it, unfortunately, is to issue proceedings and we obviously - we had discussions with and did presentations to the authority and we obviously had lots of individual

\(^{1117}\) Ex D13: 518 at p 3912.
discussions with the councils prior to issuing these proceedings and none of them were going anywhere. So, yes, that’s how we got to be where we are.

Later in cross-examination, Mr Brown said that it was his view that the dispute needed to be resolved in front of a judge, as, “the whole thing” was a “mess”. (1911) He explained that SWR had incurred significant costs and that they had concerns with the state of the Hartley landfill. As to the issues with the cells, he said: (1911)

…We agreed to pay money for the cell space that was presented and it wasn’t there, the liner issues and just the infrastructure that needed to be put in to the site to get our EPA licence back under control.

Mr Brown denied that raising the matters in the letter of demand was part of a strategy. (1912)

On 20 September 2013 SWR extended an offer to the Authority for the deposit of the constituent councils’ waste at Hartley for a seven-year period at a cost of $34.70 per tonne.1118

On 3 October 2013, in response to an email from Mr Manning concerning cells 6 and 7A at Hartley, Mr Brown wrote:1119

Thanks Andrew.

Unfortunately the only way we will bring this to a head is to get them in front of a judge.

Chris can you update the group of our discussion re bringing this to a head.

They will continue to fuck around forever if we let them.

Regards Simon.

Later that month, Mr Brown wrote to each of the constituent councils extending to them an offer in the same terms as that sent to the Authority in September 2013.1120 Ultimately, those offers were not considered until the following year, and then only by the elected members of AHC, AC and RCMB.

Mr Fairweather was asked whether the 3 October 2013 email represented the view that he and Mr Brown had in October 2013. He agreed. He said that he thought Mr Brown felt as though SWR would be “strung out” for a very long time. (1803) In cross-examination on the voir dire, Mr Brown was shown this email and asked whether it was his view in October 2013 that the only way to bring the commercial discussions to a head was to bring proceedings.1121 He said: (1924)

1118 Ex P8: 329 at p 2574.
1119 Ex D26.
1120 Ex P8: 339; Ex P8: 340; Ex P8: 341; Ex P8: 343; Ex P8: 345.
1121 Ex D16: 598.
I had that view for a while, unfortunately. The only way that this was going to be resolved was in front of a judge. We needed to work out whether we were naive or whether we had the wool pulled over our eyes. There has never been any intent at all on our behalf to put forward a claim. If we wanted to, you know, walk away from these proceedings we would have done it a long time ago. It’s something that we are very passionate about, the way that we were misled throughout this transaction.

Mr Heard was taken to this email in the course of being cross-examined on the *voir dire*. He said that he had discussions with Mr Brown about how SWR might convince the constituent councils to deposit their waste at Hartley. He explained that he and Mr Brown discussed “getting it in front of a judge” many times. He denied that there was a deliberate strategy to delay extending long-term offers to the constituent councils until after the letters of demand were sent. It was put to Mr Heard that the primary purpose of the letters was to force the constituent councils to the table. Mr Heard replied “[we] were trying to get their business”. He was questioned about the “strategy” of offering to concede the claim if the constituent councils agreed to deposit their waste at Hartley long-term:

Q And you’re aware, aren’t you, that the plaintiff has offered to give up its present claim and pay its own costs if the member councils agree to deals for the deposit of their waste on a long-term basis.

A Yes.

Q And you agreed with that strategy.

A Yes.

Q Because the purpose of the proceedings is to try and obtain those long-term deals you described.

A Yes.

Q And that’s why the plaintiff is willing to spend money on the proceedings.

A Either get the business from the councils or get reimbursed for the misrepresentations that Resourceco claimed occurred.

Mr Heard reiterated that SWR adopted the principle that it would make every endeavour to get the business back and to settle its differences with the Authority and its constituent councils. He said that if that was not going to be successful then SWR had no other option but to sue. According to Mr Heard, “the last thing that Resource Co wanted to do was to have another legal battle on their hands over this issue”. It was put to him that the battle would be “worth taking up” if there was a prospect of retaining the constituent councils’ waste on a long-term basis. To that proposition, he replied, “that or being reimbursed for our losses”.

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1122 Ex D16: 598.
As for SWR being delinquent, the Authority contends that inferentially SWR must have been in possession of documents that it failed to disclose on topics including:

- the assessment of the opportunity that Hartley posed, including by KPMG, and the commercial motivations behind the Landfill Deed and the Litigation Management and Funding Deed, including the waste streams behind the Landfill Deed and the analysis behind the Litigation Management and Funding Deed;

- documents revealing SWR’s understanding of the terms, effect and implications of the Landfill Deed and the Litigation Management and Funding Deed;

- The dissemination and evaluation of the documents referred to in exhibit D15;

- the target list of councils and commercial customers prepared by SWR post-settlement and dealings with other councils and commercial customers post-settlement;

- documents explaining how Mr Pucknell arrived at the conclusion that Brinkley posed a transport cost disadvantage of $15 per tonne for councils Adelaide side.

No documents on these topics have been disclosed, yet, as I have said, the Authority contends that inferentially I should conclude they exist or at least documents falling within the categories exist and that SWR and its solicitors and counsel have determined that they should not be disclosed.

The Authority complains that between September 2012 and 11 February 2013 SWR has identified over 500 communications over which privilege is claimed. Only “half a dozen communications or so” in that three-month period were disclosed. The Authority finds this incredulous.

To this the Authority adds that some of the disclosure that has been made has been inadequate, for example, documents such as emails have been produced without dates or names of addressees and documents disclosed late (for example exhibit D15), some during the trial itself and then some in the defence case (for example, the 2007 council resolutions).

The Authority contends:  

32. This claim has been brought as a continuation of SWR’s strategy to try to obtain Member Council waste. It has been advanced in circumstances where SWR knows that many of its elements are without foundation. It knows that it entered into the

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1123 Defendant’s Closing Submissions at pp 348-349 [32]-[33].
settlement deeds with full knowledge of the risks that all of the Member Councils might choose to take their waste to Brinkley. It is also made in circumstances where SWR knows that it has had a continuing opportunity to present offers to the Member Councils, but has sought to conceal those facts from the court.

33. SWR has failed to give disclosure throughout the action. A number of crucially relevant to documents were disclosed only very shortly before trial. Documents relating to the “2007 resolutions” were produced without explanation during cross examination of the Authority’s witnesses. Emails have been disclosed in circumstances where, without explanation, either the date of the email or the identity of the recipients is not recorded. Contrary to all objective evidence, SWR claims that the Hartley Information Paper was prepared only after settlement. As discussed throughout the Authority’s submissions, there are other documents which must exist, which have not been disclosed at all.

The Authority’s contentions ignore the cross-examination of Mr Levinson, Mr Brown, Mr Pucknell, Mr Fairweather and Mr Hollingworth on the issue of disclosure. Whilst I may have some suspicions about adequacy of searches, which for that matter may be said to apply equally to Mr Stuart’s, Mr Grenfell’s and Mr Aitken’s evidence on disclosure, I did not gain the impression that anyone was intentionally withholding documents or did not believe that an appropriate search had been made.

SWR also pointed to the Authority’s failures in making adequate and timely disclosure including, for example, despite SWR’s pleaded case, the late disclosure of the 2007 council resolutions. Those resolutions were not dealt with in any of the witness statements provided by the Authority nor disclosed by the Authority. They were obtained by way of third party discovery from some of the councils. Lastly, SWR also contended that the Authority was equally guilty of late disclosure, including disclosure during the trial and that, minded of how it was that disclosure of the 2007 resolutions occurred, the Court could not be satisfied that there were no other documents evidencing the commitment to which those resolutions refer.

B. Consideration

I have found that Mr Brown and Mr Lucas assessed the Hartley opportunity thinking that the costs drivers that lead the ordinary customer to choose a particular landfill applied no less to the constituent councils. I have found that they misjudged the capacity of the Authority to compete for the constituent councils’ waste streams. In answer to Mr Brown’s question whether SWR was deceived or naïve, I have found it was not the former.

I have found that SWR was aggressive and bullish during the negotiations. I have found that if they did not apply the time pressure, they were complicit with the Harveys in doing so. There can be no doubt that the intention was to have the Authority leave Hartley as quickly as possible. I think it the case that, believing the ordinary costs drivers applicable, SWR considered that the sooner the Authority left Hartley the sooner SWR could begin to make money. I have found
that the prospect of the EPA licence not being transferred was not considered an obstacle of great moment by SWR.

I have found that knowing that the Authority intended to move to Brinkley where it would continue in the landfilling business, SWR expected to lose RCMB’s waste stream to Brinkley and possibly AC’s. However, once again, thinking that the costs drivers that lead the ordinary customer to choose a particular landfill applied no less to the constituent councils, SWR expected to retain AHC’s and DCMB’s waste streams. As I have said, SWR’s attitude was one of secure the landfill and the tonnage from those councils proximate would likewise be secured. In this connection SWR relied upon the fact that it had agreed in clause 9 of the Deed of Settlement to charge the constituent councils the same rate to dispose of waste at Hartley as the Authority had been doing immediately prior to settlement. Thus, bearing in mind the increased transfer cost for AHC and DCMB to take waste to Brinkley, SWR believed that receipt of AHC’s and DCMB’s waste at Hartley was assured.

I do not doubt that from the beginning SWR was intent upon obtaining AHC’s and DCMB’s waste streams. I see nothing wrong with that. Equally, I see nothing wrong with SWR adopting the approach it did to the negotiations with the Authority.

The loss of AHC’s waste would have come as a shock to SWR. Elsewhere I have commented on Mr Brown’s 18 March 2013 letter. That letter, like the 16 July 2013 letters of demand, was inaccurate. I have also been critical of Mr Brown in my findings and I have found that on occasion he was untruthful. Nonetheless, I am not persuaded that these proceedings were instituted for an ulterior purpose such as to amount to an abuse of process. In my view, Mr Brown’s thinking was relatively simplistic in that he and SWR could not understand why the gate price they had offered, bearing in mind the increased transport cost to Brinkley, did not result in AHC and DCMB disposing of their waste at Hartley. Being of this mindset, it is only a short step to conclude that there must be an agreement, arrangement or understanding in place preventing the constituent councils from disposing of their waste with SWR and that he had been lied to by the Authority in the course of the negotiations. Comments made by council officers appear to have fuelled Mr Brown’s suspicions.

I have no doubt that, ultimately, SWR’s intention is to attract the constituent councils’ waste streams to Hartley and that it was hoped that these proceedings assisted in that outcome being achieved. After all, volume is essential to the profitability of a landfill. Nonetheless, I do not think SWR set about contriving a spurious claim, engaging solicitors and counsel, and embarking upon a trial of that claim for the purpose of applying costs pressure in the hope that the Authority would simply relent and a commercial deal would be done. SWR has prosecuted the matter to its conclusion.
I am not persuaded that the action has been pursued for an ulterior purpose such as to amount to an abuse of process.

I do not think that cross-examination of some of the witnesses called by the Authority to suggest that the constituent councils’ waste streams were used as a lure to induce SWR to enter into the Deed of Settlement and s 103E Deed went beyond the proper presentation of the SWR’s case. It seems to me that if there were a contract, arrangement or understanding that bound the constituent councils to dispose of their waste with the Authority, as SWR believed, then knowing that fact, any suggestion that SWR could contract with the constituent councils for the receipt of their waste could be said to amount to use of the waste streams as a lure.

This matter is complex. Late changes to pleadings only added to complexity and to difficulties for both sides in making timely disclosure. Reliance upon non-legally trained people to conduct searches and to determine what documents answer a description in a list and what do not without the benefit of understanding the pleadings and the legal issues they give rise to, is fraught with risk but often necessary for practical reasons.

As I have said none of the witnesses tackled on the question of disclosure, called by both SWR and the Authority, struck me as intentionally withholding documents or as not believing that an appropriate search had been made. I am not satisfied that SWR was delinquent, or remiss in meeting its disclosure obligations.

For the above reasons, any costs award made against SWR in view of my dismissal of its claim should not be made on an indemnity basis.