

Recycling Industry Support for Councils – Guidance Notes and Model Contract Clauses



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1 Introduction

1.1 Background

Local government has long provided waste management services to residential ratepayers and Victorian Councils have, in the past few decades introduced kerbside recycling services to improve the environmental, economic and social outcomes associated with managing household waste.

The management of household recycling is made up of three principal components:

- collection of commingled recycling from households (and some commercial premises) by Councils, or contractors on behalf of Councils;
- sorting of commingled recycling at material recovery facilities (**MRFs**) and dispatch of baled recyclables to reprocessors, with reject materials being sent to landfill; and
- reprocessing of recyclables into raw materials and consumer goods.

Traditionally local government paid for recycling collection and sorting services, but approximately fifteen years ago the market dynamic within Victoria changed, when a number of MRF operators began paying Councils a proportion of the income that they received from the sale of baled, sorted material.

Victoria's Councils took advantage of this recycling rebate system to provide residents with a low-cost household recycling service predicated on strong markets for metals, clean paper and cardboard, and hard plastics. The service was also reliant upon markets for lower quality mixed bales of partially sorted paper and plastics in South East Asia, where the additional cost associated with refining low quality recyclables was absorbed by Chinese and other South East Asian recycling companies.

In early 2018, in response to a growing internal supply of recycling, the Government of the People's Republic of China adopted its National Sword Policy, designed to restrict the import of low quality recycling and stimulate development of its domestic recycling industry. China's import restrictions have led to Victorian MRF operators investing in new sorting equipment and/or slowing processing lines at MRFs to improve product quality and maintain export markets. In turn, Victorian MRF operators are seeking to pass these additional sorting costs on to Councils.

It is important to recognise that materials managed through kerbside recycling schemes represent only a small proportion of the total amount of recycling that is managed within Australia and internationally. Markets for a large number of recovered materials (including ferrous and non-ferrous metals, clean cardboard and paper, and hard plastics) remain strong, and Victorian communities continue to support recycling and are keen to see Councils retain their recycling services.

1.2 Victoria's Recycling Industry Strategic Plan

The Victorian Government has recognised the challenges that exist within the State's recycling sector and is providing financial and practical support to the continued delivery of local government recycling services.

In July 2018 the Victorian Government issued its *Recycling Industry Strategic Plan* (RISP) with the aim of building a resilient recycling sector that is part of a circular economy and characterised by:

- adaptability to market disruptions and opportunities
- cost-effective, safe and reliable household services
- high recovery rates
- long-term supply of recycled materials is aligned with demand from downstream markets and uses.

Goal 1 of the RISP aims to stabilise the recycling sector by providing financial and practical support for the continued delivery of local government recycling services. This action is supported by new approaches to collaborative procurement of recycling services, which are also being developed by MWWRG and DELWP.

1.3 Victorian Government support to the recycling sector

The Victorian Government recognises that recent changes in the sector are posing serious challenges for Councils in the management of household recycling services. Contracts for kerbside recycling services generally have minimal flexibility to adjust to market changes, meaning that the impact of commodity price fluctuations is often borne by one party. This contractual situation puts pressure on collectors and processors and has led to uncertainty for councils and households about potential disruptions to kerbside recycling (as experienced in early 2018).

It is important that Victorian Councils develop new pricing arrangements with MRF operators that are fair and transparent, to provide clarity and certainty for the community, a more diverse recycling industry and greater resilience to market changes.

To address this situation in the short term, the State has provided temporary funding to local governments for the continuation of recycling services subject to a number of conditions, including that councils make their best endeavours to incorporate greater flexibility and transparency into their recycling service contracts. As many contracts between Councils and MRFs are not due to expire for quite some time yet, Councils may wish to seek to amend existing contracts on commercial terms that are viable in the current environment.

This document provides local government with guidance on amending existing or negotiating new recycling contracts in the future to allow for greater flexibility and transparency in pricing and services.

1.4 Kerbside recycling services

Kerbside recycling refers to the receipt and sorting of commingled (mixed) recyclable materials that households present for collection in their recycling bins. The collection of kerbside recycling is primarily managed by local government and the collected kerbside materials are delivered to a MRF.

MRFs sort the materials into separate and distinct classes or commodities (including paper/cardboard, glass, plastics, aluminium and steel). The materials may be sorted into sub-classes or more specific commodity specifications. MRFs remove non-recyclable material and arrange for the disposal of any residual waste that may be present in the commingled recycling.

MRFs sell or otherwise provide the sorted classes of materials to other operators. Those other operators may:

- consolidate and prepare the material for further sale or provision to other downstream processors (such as a material handler, broker or trader);
- further process the materials into a state of readiness for further downstream use (such as another MRF, glass beneficiation or plastic sort, wash and process); and/or
- use the material directly into a cyclic process stage as whole or part of making a new product (such as a paper recycling mill, steel smelter or aluminium smelter).

2 The Guidance Notes

Under the *Environment Protection Act 1970* (Vic), regional Waste Resource Recovery Groups (**WRRGs**) are tasked with, among other things, facilitating:

- the provision of waste and resource recovery infrastructure and services by Councils; and
- the development of contracts for the joint procurement of waste management facilities and waste and resource recovery services.

To support Councils in negotiating amended contracts with MRFs, and at the direction of the Department of Environment, Land, Water and Planning (**DELWP**), the Metropolitan Waste and Resource Recovery Group (MWRRG) has developed these Guidance Notes and accompanying Model Clauses which set out:

- pricing review and compensation principles addressing the need for a transparent, "open book" payment regime and an appropriate allocation of risk in respect of fixed and variable costs; and

- commercial mechanisms for dealing with fluctuating market conditions such as those being experienced presently.

In developing these materials, MWRRG has:

- held meetings with Councils and MRFs;
- obtained legal advice regarding contractual issues, the relevant legislative framework and the drafting of the model contract clauses;
- proposed certain principles and concepts that Councils may wish to consider addressing in their contracts with MRFs to ensure transparency in calculating compensation payable to MRFs for the performance of recyclables services; and
- engaged Equilibrium OMG Pty Ltd to develop a recycling pricing model that will assist Councils in assessing the potential costs of recycling services.

3 Legal issues

There are numerous legal issues that MWRRG and Councils will need to consider in using these Guidance Notes and Model Clauses. In particular, care will need to be exercised to ensure the requirements of the *Competition and Consumer Act 2010* (Cth) (the **CCA**) are observed.

3.1 General

Under the CCA, it is likely that Victorian Councils will be viewed as competitors in the acquisition of recycling processing services. This means that certain coordinated action by Councils has the potential to raise risks for both MWRRG and those Councils.

Presently, only one exemption has been granted by the Australian Competition and Consumer Commission (**ACCC**) that is relevant to this issue. It applies to MWRRG and Brimbank City Council, Melbourne City Council, Port Phillip City Council and Wyndham City Council and permits the undertaking of certain joint actions (in particular, joint tendering, negotiations and decisions regarding contractual variations). Beyond this exemption, MWRRG and Councils need to be mindful of the following limitations on their actions imposed by the CCA.

3.2 Cartel behaviour

The CCA requires that Australian businesses compete fairly. This means that if competitors agree to act together in some way, particularly in relation to pricing, this can be viewed as anti-competitive behaviour, otherwise known as a 'cartel'.

Councils should not, therefore, enter into any form of contract, arrangement or understanding (**CAU**) with each other either to share commercial or pricing information that is confidential to an MRF, or to deal or take a particular position in their negotiations with an MRF. Councils will need to ensure that they separately and independently conduct their own negotiations to vary their respective processing agreements.

Similarly, MWRRG will not make suggestions or recommendations to any Council in connection with pricing or other commercial proposals made in the course of negotiations with MRFs.

3.3 Concerted practices

The CCA prohibits both CAUs and "concerted practices" between Councils and MWRRG if their purpose, or likely effect, is the substantial lessening of competition in a market.

The prohibition against concerted practices was introduced into the CCA in November 2017 and in broad terms means cooperation between two or more persons, or conduct that would be likely to establish such cooperation, falling short of a CAU.

For example, sharing competitively sensitive information, such as a MRF's planned future pricing, output or capacity, between Councils or with the MWRRG could potentially give rise to concerted practices. Councils will

need to obtain independent legal advice in relation to such issues before using the Guidance Notes and Model Clauses detailed in this document.

4 Status of recycling contracts

In the first instance, Councils will need to determine whether to:

- affirm and seek amendment of existing contracts with MRFs; or
- terminate those contracts.

MWRRG has obtained legal advice on this issue based on what we understand is the standard form recycling contract entered into by Victorian Councils and MRFs. On the basis of that advice, MWRRG makes the following observations for consideration by Councils.

4.1 A note on contractual models

This guide is intended to provide advice to councils that have a direct contractual relationship with a MRF. It is worth noting that some councils have a contractual relationship with a recycling collector, which in turn holds a contract with a MRF. These councils may have limited opportunity to influence the contractual arrangements between the collector and the MRF, but may wish to refer to the model clauses provided in this document when negotiating the contract with their processor, with an aim to achieving increased transparency and cost-sharing in the future, where possible.

4.2 Termination

If Councils' preferred outcome is to exit certain existing contracts with MRFs, Councils may wish to take into account the matters that are described below. It is also recommended that independent legal advice be obtained if a Council is considering terminating the contract, given the potential costs involved.

4.2.1 Impact of external events on the profitability of the contract

Previously, contracts between Councils and MRFs were based on Council receiving payment from the MRF operator from revenue generated through the on-selling of recycled commodities. With the change in market conditions, Council may wish to consider whether the contract can be said to remain valid, that is, does the reversal of this fundamental commercial premise give rise to an entitlement to terminate?

MWRRG suggests that unless there are specific provisions in a recycling contract that expressly entitle the Council or the MRF to act on such occurrences as external events impacting the profitability of the contract, it is unlikely that either party will have a basis to terminate the contract.

In principle, either could argue that an existing contract has been frustrated, a legal concept that arises where, in the absence of default, the circumstances in which performance of the contract is required differ radically from those that prevailed at the time the contract was entered into. Frustration results in a contract being treated as at an end, however, it is only available in exceptional circumstances. Mere inconvenience in the performance of a contract, or commercial losses, are not sufficient to substantiate frustration.

In the case of an existing contract between a Council and a MRF, the inability to export recycled goods does not make it impossible to collect material for recycling which, commercially, is the reason why the contract was entered into. It simply means the MRF will be required to do so at a cost and not for profit.

4.2.2 Force Majeure

The standard form recycling contract does not entitle either party to terminate for prolonged force majeure. Moreover, "force majeure" is afforded a common and narrow definition, citing war, civil disturbance, fire, lightning, explosion, flood and so on. The force majeure regime in the existing contracts between Councils and MRFs would not, therefore, apply in the current context.

4.2.3 Termination rights

Contracts typically include clauses that regulate parties' rights in the event of default, relevantly, by conferring termination rights on the non-defaulting party.

In the standard form recycling contract reviewed by MWRRG, the contractor is not (as is generally the case in Council contracts) afforded any contractual termination rights. While the contractor would still be entitled to terminate a contract at common law, the threshold for exercising such a right is relatively onerous; that is, the right would only arise if there had been either a fundamental breach of contract or repudiatory conduct by the Council.

Conversely, while the standard contract confers reasonably expansive default based termination entitlements on Councils, it does not allow Councils to terminate for convenience. In other words, so long as the contractor continues to perform its contractual obligations and none of the other express termination rights arise (which include, for example, failing to disclose conflicts of interest or effect insurances, failing to "agree on any matter in respect of which there must be agreement" and persistent default), no right of termination will arise. And, even if that continued performance precipitates an event of insolvency on the contractor's part, since the introduction of amendments to the *Corporations Act 2001* on 1 July 2018 (the "ipso facto" reforms), a statutory stay is likely to be imposed on Councils preventing them from being able to terminate for MRF insolvency unless the insolvency results in performance issues that fall within a separate termination power under the contract.

Accordingly, in the absence of poor performance or one of the other specific events triggering a termination entitlement, the only viable means of bringing an existing recycling contract to an end would be by the mutual agreement of the parties to terminate. As stated above, given the terms of the existing contracts are not commercially tenable for MRFs, they are likely to be willing participants in a negotiated termination, if this results in them entering into new, and more viable arrangements.

4.3 Variation and amendment of existing recycling contracts

If Councils decide to preserve current recycling contracts, Councils may wish to consider effecting amendments so as to better align the commercial position under those contracts with the prevailing market conditions, in particular in relation to pricing, payment mechanisms and termination.

4.3.1 Deed of Amendment

Any amendments to the recycling contracts should be effected by a "Deed of Amendment" that is executed by both parties. If amendments are documented in the form of a "side letter", that letter should still be formally executed by the parties "as a deed" so that it is binding on them.

4.3.2 Section 186 of the Local Government Act 1989

If existing recycling contracts are to be amended, the requirements of section 186 of the Act will need to be considered and addressed.

The purpose of section 186 is to ensure that Councils achieve value for money in procuring contracts with a material cost (consistent with the objectives of Council under section 3C(2)(b)). Section 186 is a statutory requirement and takes precedence over contractual obligations in recycling contracts.

The reference to "contracts" in section 186 is intended to have a broad meaning and any amended recycling contract which has a total value in excess of \$150,000 is likely to fall within the category of contracts to which section 186 applies.

If this is the case, Councils will not be able to amend existing contracts with their MRFs without running a competitive process *unless* a Ministerial exemption has been obtained. Any Council failing to comply with this requirement would be in breach of section 186.

Breaching section 186 of the Act could expose a Council to the claim that contracts entered into by it are invalid on the basis the Council acted outside its powers under the Act.

4.3.3 Obtaining Ministerial exemption

No specific guidance is available in terms of the factors that will influence the Minister in deciding whether or not to grant an exemption under section 186. However, the intent of section 186 is clearly to ensure that the objectives of "Best Value Principles" prescribed in section 208C of the Act are achieved, including value for money.

It is therefore likely that when applying for an exemption to section 186 to permit the variation of an existing recycling contract (rather than undertaking a competitive tender), a Council will need to provide evidence demonstrating that maintaining the existing contract (in amended form) will satisfy the Best Value Principles in a way that could not be bettered through a competitive tender process.

To do this, a Council will need to demonstrate, first, that there is no competition in the relevant area for delivery of that service, and secondly, through such means as price benchmarking, that they are obtaining value from the contract as varied.

5 Existing recycling contracts - variation principles and model clauses

Within Victoria, individual Councils have agreed contracts with MRF operators that specify prices and the length of the contract term, both determined by the market at the time of tender.

MRF operators have limited control of a variety of external factors that influence the day-to-day cost of operations, including:

- global commodity prices and the strength of the Australian dollar;
- global manufacturing and production activities;
- certain shifts in consumption patterns and activities;
- international trade agreements; and
- international environmental treaties to which Australia is a signatory.

The market reset that has resulted from China's adoption of stringent restrictions on the importation of recyclables means that Councils may wish to review their recycling contracts to recognise and appropriately allocate the risks to which Councils and MRFs are now exposed in the recycling market; and to provide processes for managing those risks in a sustainable manner. Under a flexible pricing model the pricing agreed by Council and MRF operator would properly reflect the greater sharing of risk associated with the sorting and onward management of commingled recycling.

5.1 Pricing reviews

MRFs derive revenue from the following:

- a recycling processing charge or "gate fee" (per tonne of material processed); and
- the sale of recyclables.

Since the introduction of the China Sword policy MRF operators have been seeking consistency in terms of contract prices and terms. This is a signal from the market first, that the MRFs deliver a service that is strongly reliant upon gate fees, and second, that MRFs have little control over the prices that they can obtain for baled, sorted recyclables.

Consequently, for the majority of municipal waste and recycling contracts (within Victoria, nationally and internationally), the gate fee that is charged to Councils has become the primary source of revenue for MRFs.

5.1.1 Gate fees

The "gate fee" is typically made up of a number of components, including:

- a share of the capital and financing costs associated with the physical asset (the material recovery facility and the land on which it is located); and
- processing costs, which include costs associated with:
 - labour;
 - equipment maintenance;
 - cleaning;
 - use of energy and consumables;
 - professional costs; and
 - charges for the disposal of contamination.

Revenue that is derived from the sale of recyclables is less certain and can be subject to significant variation over the life of a recycling contract. In particular, it is impacted by:

- market demand for particular materials (which, in turn, will be influenced by local, national and global commodity prices and economic activity);
- the quality of the recycled materials (i.e. the extent to which materials are contaminated or mixed with waste material, particularly food waste);
- distance to market for recycled materials (the cost of transporting recycled materials to market will reduce the amount of revenue that is obtained from their sale); and
- the extent to which an MRF is able to gain access to markets (which will be determined by an MRF's knowledge of, and participation in, active markets and/or the amount of marketing the MRF is prepared to undertake).

In recent years, Victorian Councils have benefited from a local recycling processor market that has been dominated by an aggressive demand for recycling driven by local off-take opportunities and the export of surplus materials to SE Asia. This has resulted in Councils receiving a significant proportion of the revenue that MRFs have derived from the sale of recyclables, so much so that this revenue effectively offset most if not all of the gate fee charges that a Council would normally expect to pay.

However, the significant drop in revenue means this is no longer the case. Existing contracts could accordingly be reviewed to address this significant change in risk profile for Councils and the MRF market and the likely continued volatility in the market. In particular, pricing mechanisms could include mechanisms that provide a greater degree of control over costs changes borne by Councils.

The Victorian Government Purchasing Board (**VGPB**) sets the policies that govern the procurement of non-construction goods and services across all Victorian Government departments and some public bodies. The VGPB provides the following advice with respect to pricing review mechanisms:

“Before considering an appropriate price review mechanism, it is important to understand the main influences, or drivers, on the cost. This will help determine the most appropriate mechanism to manage cost increases and help determine which cost components are ‘controllable’ by the supplier and which components are ‘uncontrollable’. There is some strong support for the notion that ‘controllable’ components should remain fixed during the term of the contract or are at least forecastable. It is also important to understand the relative proportion of each component to gauge its impact on price changes. This understanding of cost drivers and their impacts can help influence the procurement process and the contract (including the term) ...

The pricing review mechanism must be an evidence-based process and is best managed with a sufficient understanding of cost drivers, proportion of elements and how these elements are managed by the supplier.”¹

Conceptually, the pricing of recycling contracts may be impacted by the following factors:

- changes in both domestic and foreign law;
- the composition of commingled recycling that is collected by or on behalf of Councils and supplied to MRFs;
- contamination levels present in commingled recycling;
- compaction rates of collected commingled recycling;
- the fixed costs incurred by MRFs;

¹ Guide to Managing Contract Price Review, Victorian Government Purchasing Board

- the variable costs incurred by MRFs; and
- revenues earned by MRFs from the sale of processed recycling.

The relative ability of Councils and MRFs to manage or influence the risks attending these pricing factors are summarised in the Table 1 below:

Table 1 Pricing factors

Pricing factor	Council's ability to influence	Recycling processor's ability to influence
Composition of commingled recycling		
Acceptable material types	Limited	✓
Competing opportunities for recycling	Limited	Limited
Market demand for different materials	Limited	Limited
Contamination levels		
Residents' level of understanding of recycling schemes	✓	Limited
Residents' willingness to comply with recycling schemes	✓	Limited
Residents' willingness to supply 'clean' recyclables	✓	Limited
Compaction of recycling		
Compaction of recycling by collection contractors	✓	✗
Impregnation of paper and cardboard by glass	✓	✗
Fixed MRF costs	✗	✓
Variable MRF costs	✗	Limited
Revenues from sale of processed recycling	Limited	Limited

Each of the events that may impact pricing, and how they might be dealt with in the MRF contracts in a controlled manner that ensures best value for money outcomes, are set out below.

5.1.2 Change in law

Issue

During the life of a long term recycling processing contract there are likely to be changes in waste and recycling specific legislation or policy which affect the services provided by MRFs. Changes in law or policy are often difficult to price, particularly where these are not foreseeable as at the date of contract. While the standard form recycling contract reviewed by MWRRG allocates the risk of changes in law to the MRF, in the current market this practice encourages behaviours that are not conducive to value for money outcomes, in other words, it will drive MRFs to include price contingencies to cover risks, whether or not they actually occur.

Solution

To better manage this risk, Councils may wish to consider those changes in legislation and Approvals or Council requirements that are likely to have a significant impact and are currently not in bill form. In doing this, Councils should distinguish between those changes in law that are foreseeable, the risk of which should be borne by

Council, and those that are not known and are unlikely to have a significant impact, the risk of which should be allocated to the MRFs.

MWRRG proposes that those changes in law for which MRFs may be entitled to compensation include:

- specified domestic laws and Council policy requirements which are not currently known and the impact of which is not foreseeable and could have a significant impact on MRF costs, as set out in a prescribed "Waste Law" list; and
- foreign law and policy impacting the importation of recyclables.

To the extent that a MRF is entitled to financial compensation, this could constitute a variable or "uncontrolled cost" to be calculated in accordance with a detailed pricing review mechanism that should be incorporated in MRF recycling contracts. The principles of a pricing review mechanism that could be adopted by Councils are set out in section 6 below.

MWRRG has also developed and set out in this document a proposed "change in law" Model Clause providing for the risk allocation discussed above. Councils will note that domestic laws and Council policy requirements, changes in which will constitute a "change in law", are proposed in the "Waste Law" list. Councils - when amending or renewing contracts - will need to consider and settle that list.

5.1.3 Composition of commingled recycling

Issue

The key factors that influence the composition of commingled recycling collected from households are:

- the presence or absence of particular material types (e.g. glass, plastics, cardboard, paper, metals) in the domestic waste stream;
- the existence of competing opportunities for recyclable materials (e.g. container deposit schemes);
- the extent to which residents participate effectively in recycling schemes by placing the correct material types in the commingled recycling bin; and
- market demand for different types of recyclable material (i.e. the extent to which recycling processors are willing to recognise particular material types as contracted recyclables).

The composition of commingled recycling can fluctuate owing to either "revolutionary" or "evolutionary" change. Revolutionary change occurs when the material composition of commingled recycling waste alters as a result of changes in recycling policies or collection methodologies introduced by Councils. Evolutionary change occurs when socio-economic or other general factors (for example, changes in household consumption or behaviour or changes in the use of packaging materials by manufacturers) impact the composition of commingled household waste.

Solution

Contractors are generally prepared (albeit reluctantly) to accept the risk of evolutionary change. This is not usually the case with respect to revolutionary change, given that Councils control or are normally positioned to influence collection arrangements.

This risk allocation could be captured by the proposed change in law regime (as set out in the Model Clause in section 8). The financial consequences would thus be assessed via the pricing mechanism.

5.1.4 Contamination levels

Issue

Contamination is material that Council and the MRF operator agree should not be present in the kerbside recycling bin. In the past, MRF operators have generally accepted contamination in commingled recycling as a cost of doing business and have not always enforced specifications or otherwise made claims against Councils for remuneration in respect of the cost of disposing of contamination materials.

With tighter requirements for the quality of the sorted material commodities, MRF operators are seeking a more transparent approach, where the control of contamination in commingled recycling bins and the costs of managing contamination, are more directly the responsibility of the local government.

Such an approach provides clarity between the obligations of local government to manage contamination that is due to the behaviour of their residents and reduces the financial impact of contamination on MRF operations.

Contractual provisions around managing contamination should, however, ensure that the levels of contamination and associated costs for which that local government is responsible are due to the factors that local government can influence and manage.

Factors that influence contamination levels in commingled recycling include:

- residents' understanding of commingled recycling scheme requirements;
- the attitudes and behaviours of residents and their willingness to comply with recycling scheme requirements, by placing the correct material types in the commingled recycling bin; and
- the extent to which residents wash recyclables before placing them in their commingled recycling bin.

Effective participation by residents in recycling schemes can be achieved through a combination of:

- education and provision of guidance to residents; and
- auditing and enforcement.

Contamination in the form of contrary materials (i.e. material types that residents place in the commingled recycling bin that are not accepted by MRFs):

- increases the quantity of material that has to be processed by MRFs, thereby reducing the efficiency of the sorting process; and
- adds costs to the recycling process associated with the transport and disposal (or recovery) of the contrary materials.

Physical contamination of acceptable materials types with waste (e.g. food waste) reduces the market value (revenue potential) of sorted recyclables, and/or increases the costs incurred by MRFs in delivering quality/high value recyclables to the market.

Solution

Councils are better placed than MRFs to influence household management of contamination in commingled recycling. MWRRG has therefore included in this document a proposed Model Clause giving effect to the following risk allocation:

- commingled recycling is to be audited by Council on an annual basis to assess the level of contamination received by the MRF in the preceding 12 month period;
- contamination levels are to be expressed in tonnes based on the percentage of contamination determined in the annual audit; and
- costs payable by Council to an MRF on account of contamination are to be paid annually in arrears and calculated in accordance with the following principle (which should in turn be included in the pricing mechanism):

$$A = (B \times C) + (B \times D)$$

where:

- A = *the payment to be made by Council*
- B = *the assessed annual level of contamination (by tonnes) present in the total annual quantity (in tonnes) of commingled recycling delivered by a Council's collection contractor to the MRF*
- C = *the annual agreed landfill disposal (or recovery) charge (in \$ per tonne)*

$D = \text{the annual agreed transport charge to an agreed disposal or recovery point (in \$ per tonne per km)}$

To provide a workable solution, Councils may agree to an accepted level of contamination with their MRF operator. In which case, any costs payable by the Council to the MRF operator would only apply if the agreed contamination level were exceeded.

It should be noted that the commingled kerbside recycling system and compaction of material in a collection vehicle can contribute to contamination levels due to cross-contamination between different material types (see section 5.1.5 below).

5.1.5 Compaction of commingled recycling during collection

Issue

Commingled recycling may be compacted to a greater or lesser extent by collection contractors with the intention of maximising the efficiency of the collection process, particularly in rural areas where collection routes are longer due to greater distances between tenements.

The degree of compaction influences the bulk density of commingled recycling that is delivered to MRFs, and high levels of compaction may:

- necessitate increased effort at the feed-in stage at MRFs, leading to the need for additional labour and/or equipment, which can add cost to the recycling process; and
- lead to the crushing of glass containers present in the commingled recycling, causing the broken glass to impregnate the paper and cardboard present in the commingled recycling and consequently reduce the market value of such materials.

Solution

Again, Councils have greater opportunity to control the extent to which commingled recycling is compacted during collection, relevantly by imposing appropriate obligations on its collection contractors. Councils may wish to therefore consider including in their contracts (if and to the extent that they do not do so presently) provisions that:

- require MRFs to notify Councils should they consider any loads are over compacted (a threshold bulk density level will need to be specified for this purpose);
- address the management of over compacted loads by MRFs; and
- permit financial adjustment on account of costs incurred by MRFs in dealing with over compacted loads (which should be determined in accordance with the pricing mechanism).

Councils, if including this provision, should aim to ensure that their contract requires the MRF operator to inform Council immediately of any reportable compaction incidents for which it may later make a claim for compensation.

5.1.6 Fixed MRF costs

Issue

MRFs incur a range of fixed, operational costs which include:

- costs associated with the creation and operation of the MRF, including:
 - site acquisition costs or cost of leasing land;
 - building construction costs or cost of leasing buildings; and
 - purchase of fixed and mobile equipment;
- asset management costs, including:
 - maintenance of the building fabric;
 - equipment maintenance and replacement; and
 - cleaning and general housekeeping; and

- professional services costs, including:
 - insurance;
 - management systems and certification (OH&S, environmental and quality systems); and
 - financial and systems auditing.

Solution

In the context of VGPB's guidance on managing contract price reviews, most if not all of the above fixed costs can be considered to be "controllable" such that the MRFs should bear the risk associated with increases in these costs, subject only to annual CPI increases.

5.1.7 Variable MRF costs

Issue

The variable costs incurred by MRFs include:

- energy costs, including:
 - electricity for equipment operation and lighting;
 - mains gas for space heating; and
 - bottled gas for vehicle operation (fork-lifts);
- process consumables, including:
 - cooling oils and lubricants;
 - Solvents and cleaning chemicals; and
 - equipment spares;
- IT, marketing and communications costs;
- labour costs; and
- disposal costs for contamination.

Solution

While MRFs have less control over price increases associated with these sorts of costs than fixed costs, some (for example, process consumables, IT, communications and labour) can be recognised as the normal costs of 'doing business' and should be covered by a provision for CPI adjustments.

Other variable costs (particularly energy costs) often fluctuate in response to national and international government policy and other economic factors that are beyond the control of MRFs and could be regarded as "uncontrollable". Energy providers generally do not fix pricing in contracts for any significant period of time. In these situations, it may be reasonable for MRFs to pass on certain of those price increases to Councils.

MWRRG proposes that Councils consider, in their pricing review mechanism, providing for financial adjustment in respect of the following "uncontrollable" costs:

- increases in energy costs that are beyond CPI, excessive and outside the normal control of an MRF; and
- costs for the transport and disposal or recovery of contrary materials (contamination and rejects) in commingled recycling received by MRFs - refer to section 5.1.4 above.

Sample clauses providing for such adjustment are included in the Model Clauses section of these Guidance Notes.

5.2 Other contractual issues

In addition to considering the inclusion of a pricing review mechanism and discrete clauses to deal with the issues identified in section 5.1, Councils may also wish to consider revising existing recycling contracts to include provisions dealing with the following matters.

5.2.1 Force Majeure

The standard recycling contract considered by MWRRG defines "Force Majeure Event" to mean "war (whether declared or undeclared), civil disturbance, fire, lightning, explosion or flood".

It then provides simply that the MRF "will not be liable for any delay in performing or failure to perform the Recyclables Service as a result of the occurrence of a Force Majeure Event", provided the MRF has used "best endeavours to avoid or mitigate the effect of the Force Majeure Event" and then resumes performance of the Recyclables Service "as soon as possible".

Councils may wish to consider a more tailored definition and entitlement to terminate should a Force Majeure Event persist longer than a prescribed duration. For example, Councils may prefer to end the contract where there is prolonged force majeure that effectively frustrates performance of the contract. As force majeure is a shared risk and not fault based, each party would bear its own costs consequent upon a termination on this basis.

5.2.2 Variations

The standard recycling contract does not incorporate a variations clause (which is standard in most services contracts). In order to maximise flexibility in terms of Councils' ability to change the services being provided and ensuring there is a methodical and transparent approach to costing this, Councils may wish to consider including such a clause.

5.2.3 Termination for convenience

As noted previously, so long as the MRF continues to perform its obligations, the only viable means by which Council may end a contract is a negotiated, mutual termination.

Given the uncertainty that attends the recycling market, it would be optimal for Councils to negotiate the inclusion of a termination for convenience provision. However, the amount payable by Councils on a termination for convenience cannot be so high as to make it practically impossible to exercise. That said, it needs to recognise that Council is terminating a bargain that the MRF was entitled to, for Councils' own purposes. Termination for convenience payments will typically cover all costs incurred to the date of termination, and that will be incurred on account of demobilisation costs. MRFs terminated on this basis typically also seek payment of some loss of profit on the residual, unperformed services. If any loss of profit is included in the calculation it should be limited and reflective only of the period of time that a MRF may take to find other work to replace the lost contract. Councils may also wish to consider seeking to exclude or significantly limit the payment of redundancy costs to very specific and identified roles as these can create a significant liability.

5.2.4 Contract term and renewal options

Similarly, to facilitate future flexibility and to align with the parameters of the Act, for the reasons outlined in section 4.3.3, the term of existing contracts should be negotiated to expire no later than the contract end date stated on the Instrument of Approval (where applicable) when negotiating contracts with existing providers where a Ministerial exemption to Section 186 of the Act has been obtained. Options to extend beyond that period, exercisable by Councils, may be included.

5.2.5 Set off

The standard form recycling contract does not contain an express right of set off exercisable by Councils. Particularly once the pricing mechanism is reset to provide for payments to MRFs, such a clause may be included for the benefit of Councils.

6 Development of price review mechanism

Any pricing mechanism and formulae to be incorporated in renegotiated contracts will require careful drafting. What follows are observations as to the key principles that desirably may inform the preparation of that price review mechanism, however, the primary premise should be that the variable components of the costing will **only** be subject to adjustment where a permissible adjustment event has occurred under the contract (for example, a change in law or a variation in commodity price).

In this context, points to be considered by Councils include the following:

- (a) the price reset, that is, the proposed fixed gate fee per tonnage;
- (b) as noted in section 5.1, the gate fee is comprised of numerous cost elements. Each of these should be disclosed with the fixed cost and variable components distinguished. There should also be a clear definition of what is included in "costs" and "profit" respectively, potentially following alliancing principles;
- (c) where, under the contract, the MRF is entitled to compensation calculated in accordance with the price review mechanism, the relevant formula for such calculation and identification of the components of the gate fee that are subject to adjustment;
- (d) obligations on the MRF to provide:
 - (i) data and evidence of actual tonnage of recyclables collected, including supporting invoices; and
 - (ii) a full, verified breakdown of costs incurred (including those of subcontractors) on an open book basis so as to achieve transparency with respect to operating costs;
- (e) provisions allowing the Councils to request additional documents and information to verify costs and to arrange audits of the MRF's records for the purposes of verifying payment claims;
- (f) payment on the basis of profit and cost sharing to respond to the variable commodity prices;
- (g) potentially, an income sharing fee (for the variable pricing of recycling commodities). This could be linked to internationally recognised commodity price indexes to support more transparent pricing in the recycling service supply chain;
- (h) upper and lower price thresholds providing appropriate and agreed triggers for price adjustment; and
- (i) the frequency of price reviews and the relevant indices.

7 Recycling pricing model

7.1 Use of the pricing model

MWRRG, in conjunction with Equilibrium OMG Pty Ltd, has developed a recycling pricing model to provide insight into how MRF operators set prices and the factors that determine and influence those prices for processing commingled recycling. The model can also be used to provide an indication of how changes to commodity prices influence the viability of MRF operations. The model is not intended to be an accurate guide to the pricing that is offered by any particular MRF operator.

The pricing model is based on data that is currently available to MWRRG and Equilibrium; the actual performance of any MRF or MRF operator may of course vary. The pricing model is designed to inform contract negotiations and future Council procurement processes by providing:

- transparency into how MRF operators price their services; and
- insights into the constituent activities that may contribute towards the price offered by a MRF operator which may include internal factors (such as capital costs, labour costs, etc.) and external ones (such as commodity price changes).

7.2 Key issues

The pricing model sets out the key issues that have an impact on the pricing of MRF services and may be used to agree service levels and financial arrangements for the processing of commingled recycling, such as:

- **Material parameters**, including:
 - determining the fundamental material requiring handling and sorting parameters for the processing service; and
 - setting acceptable parameters for quantity, composition, compaction, or quality requirements.
- **Operational costs** (or per tonne conversion costs) for the MRF operation, including costs associated with:
 - labour;
 - consumables;
 - disposal of residual material (MRF rejects); and
 - finance, lease or rent.
- **Capital costs**, including:
 - purchase costs for land, buildings, plant and mobile equipment; and
 - depreciation and amortisation costs for plant and equipment.
- **Commodity price**, including:
 - price per tonne that can be achieved for each commodity;
 - pricing term period;
 - long-term average pricing for commodities;
 - forecast trend pricing for commodities; and
 - pricing impact for the overall basket of goods being received and processed.
- **External price impacts**, including:
 - fluctuations in international currency exchange rates;
 - material purchase specifications; and
 - accreditation requirements.
- **Legal and compliance costs** for operations and reporting.
- **Insurance, emergency and contingency costs.**
- **Other MRF activities**, including:
 - receipt and processing of commercial and industrial recyclables;
 - shipping materials to other locations for processing; and
 - any other activity that may be part of the operation.
- **Ancillary pricing factors**, including
 - annual changes to operating costs resulting from increases in charges for labour, energy, consumables, etc. (these may be represented by annual CPI increases).

7.3 Indices, factors and calculations

Commodity prices are the prices that MRF operators receive for the paper/cardboard, plastics, metal and glass from a commingled kerbside recycling service. Those commodity prices generate revenue for the MRF operator and help achieve a financial benefit if the revenue generated is greater than the operating costs. If a kerbside recycling agreement is to be subject to changes to commodity prices, an agreed approach to assessing commodity prices and commodity price changes is needed.

The pricing model uses reports and indices to track and report commodity pricing. The published and reported prices may not always precisely reflect the actual sales price that a MRF may achieve for a commodity at any given time.

Prices for some commodities are tracked and reported, locally or globally. Public reports may be accessed to determine an agreed approach to calculating commodity prices. Such reports and indices may include the following:

- London Metal Exchange
- RESI / PPI
- IndustryEdge
- Tex Steel Index

Actual prices achieved by MRF operators may need to factor in matters such as freight costs, exchange rates, licensing and certification costs and other factors.

Separate to any published reports, MRF operators may also present their own approach to assessing and reporting commodity prices.

7.4 On-going reporting

MWRRG intends providing regular reports using the pricing model.

This will enable procurement officers to keep abreast of changes in the MRF industry and determine whether any issues arising warrant attention.

8 Model clauses

These Model Clauses have been developed by MWRRG to support and assist Councils in considering negotiating amendments to their existing contracts with MRF operators necessitated by current market conditions.

Specifically, the existing contracts do not contain mechanisms responding to unexpected occurrences or fluctuations in market conditions. Councils may wish to consider including these model clauses in existing or future contracts to provide a means of recalibrating the commercial arrangements between the parties and effecting any necessary adjustments to avoid the risk of those contracts being frustrated.

Contractual provisions that could be included in contracts with MRFs to deal with change include an appropriate change in law clause, force majeure and termination for convenience clauses and a variation clause allowing parties to change the Services in a regulated way. In particular, councils may wish to consider including a detailed price review mechanism to facilitate price certainty and the delivery of a value for money outcome.

In this respect, note the "Pricing Schedule" referred to in the Model Clauses to be prepared by Councils as appropriate for their specific requirements. Details including applicable rates, thresholds and formulae will need to be included in the Annexure referred to as the Pricing Schedule.

The Pricing Schedule will need to include details such as:

- applicable rates, for example energy usage charges, charges for the transport and disposal of contamination, and adjustment indices (refer to Section 5.1.7 of the Guidance);
- excess thresholds, for example thresholds relating to energy charges and disposal charges); and
- price review mechanisms (refer to Sections 6 and 7 of the Guidance).

Councils should not discuss or exchange information with any other Council, regarding the Pricing Schedule adopted or proposed to be used by them in relation to their contract with any MRF for the collection and processing of recycled materials.

In the Model Clauses:

- 'Annexure' is used to refer to an annexure to the Contract; and

defined terms correspond with those expressions used in the standard form recycling contract provided to MWRRG and which is typically used by Victorian Councils, except where otherwise indicated.

Model Contract Clauses

Below are Model Clauses available for use in contracts between Councils and operators of materials recycling facilities (MRFs). Any Council utilising these Model Clauses will need to ensure that the relevant contract is appropriately amended so as to effect consistency both in terms of defined terms and operative clauses. Councils should seek their own independent legal advice in connection with the Model Clauses, including for the purposes of amending these clauses to be consistent with existing contracts.

1. Change in Law and Statutory Requirements

The following defined terms are used in this clause and are recommended for inclusion in the definitions provision of the relevant contract.

1.1 Definitions

In this Contract:

Approval means any licence, permit, consent, approval, authorisation, determination, certificate, permission or the like from any Authority or under any law, or any requirement made under any law, which must be obtained or satisfied (as the case may be) to perform the Recyclables Services.

Authority means any:

- (a) government or any governmental, semi-governmental or local government authority, local council, administrative or judicial body or tribunal, department, commission, public authority, agency, Minister, statutory corporation or instrumentality; or
- (b) person having a right to impose a requirement, or whose consent is required, under law in connection with any part of the Recyclables Services.

Change in Law means any one or more of the following that occurs after the date of this Contract:

- (a) any Waste Law; or
- (b) any law, regulation or policy of a foreign jurisdiction in connection with the importation of solid waste or recyclables,

is:

- (c) amended or repealed;
- (d) applied or interpreted differently as a result of a decision of a court of competent jurisdiction; or
- (e) made or enacted,

and that occurrence:

- (f) increases the costs of the Contractor in performing; or

(g) decreases the revenue derived by the Contractor from the performance of, the Recyclables Services and was not caused by the Contractor or any person for whom the Contractor is responsible.

Claim includes any claim, action, demand, suit or proceeding (including by way of contribution or indemnity), whether for an increase in the consideration payable under the Contract, the payment of money (including damages) or any other relief or remedy, and whether made:

- (a) under or in connection with the Contract (including any direction of the Superintendent);
- (b) in connection with the Recyclables Services or either party's conduct before the date of this Contract; or
- (c) otherwise at law, including by statute, in tort (for negligence or otherwise, including negligent misrepresentation) or for restitution (including restitution based on unjust enrichment).

Statutory Requirements includes:

- (a) all Acts, Ordinances, regulations, rules, by-laws, orders, awards, proclamations and subordinate legislation of the Commonwealth and the State or Territory in which the Recyclables Services or any part thereof is being carried out;
- (b) Approvals;
- (c) the requirements of an Authority; and
- (d) fees and charges payable in connection with the foregoing.

Pricing Schedule means Annexure [X].

The "Pricing Schedule" is to be prepared by Councils as appropriate for their specific requirements. Details including applicable rates, thresholds and formulae will need to be included in the Annexure referred to as the Pricing Schedule. Councils should not discuss or exchange information with any other Council, regarding the Pricing Schedule adopted or proposed to be used by them in relation to their contract with any MRF for the collection and processing of recycled materials.

Waste Law has the meaning set out in Annexure [A].

Ensure provisions to the following effect are included in the interpretation clause of the relevant contract. Paragraph (a) is required because of the prohibition on the making of Claims contained in clause 1.4 and the operation of the Australian Consumer Law.

1.2 Interpretation

- (a) Any provision of the Contract which seeks to limit or exclude a liability of a party, is to be construed as doing so only to the extent permitted by applicable law.

- (b) A reference to any Statutory Requirement means a reference to that Statutory Requirement as amended, consolidated, substituted, re-enacted or replaced.

The following substantive clause allocates the risk of compliance with Statutory Requirements to the Contractor. It is subject only to clause 1.4, which affords the Contractor relief for changes that are considered foreseeable, both in terms of changes in domestic law (namely, a change to a "Waste Law"), and changes in international law or policy impacting the importation of recyclables. If this Model Clause is used, Council will need to ensure that any contradictory provisions in its relevant contract are removed or appropriately amended.

1.3 Statutory Requirements

Subject to clause 1.4, the Contractor must:

- (a) comply with all applicable Statutory Requirements in performing the Recyclables Services; and
- (b) without limiting clause 1.3(a), apply for, obtain, satisfy and maintain all Approvals required for the performance of the Recyclables Services.

1.4 Change in Law

- (a) The Contractor must, no later than [10] Business Days after becoming aware of any actual or likely Change in Law, give a written notice to the Superintendent which identifies and provides details of:
 - (i) the Change in Law; and
 - (ii) the actual or likely impact of the Change in Law on the costs of the Contractor in performing, or the revenue derived by the Contractor from the performance of, the Recyclables Services.
- (b) If the Principal considers that a Change in Law has occurred and the Contractor has not provided a notice under clause 1.4(a), the Principal may (in its absolute discretion) direct the Contractor to submit a notice under clause 1.4(a) in respect of that Change in Law and the Contractor must comply with any such direction no later than [10] Business Days after the date on which it is given.
- (c) If a Change in Law occurs, the Contractor:
 - (i) must take all reasonable steps to mitigate any adverse impacts of the Change in Law; and
 - (ii) is entitled to compensation calculated in accordance with the Pricing Schedule.
- (d) The Contractor is not entitled to compensation under this clause [X] to the extent it is already compensated by any other payment calculated in accordance with the Pricing Schedule or otherwise under the Contract.
- (e) Except as expressly stated in this clause [X], the Contractor is not entitled to make, and the Principal is not liable for or in connection with, any Claim arising out of or in connection with any Change in Law.

2. Collected Material

Ensure an appropriate definition of "Contamination" is included in the relevant contract.

2.1 General

The Contractor must:

- (a) accept all Collected Material delivered to the Sorting Facility, irrespective of its composition (including the proportion or nature of any Contamination in the Collected Material); and
- (b) not cause or contribute to the Contamination of Collected Material delivered to the Sorting Facility.

2.2 Contamination

- (a) The Contractor must inspect all loads of Collected Material delivered to the Sorting Facility and, if the Contractor considers that any load contains Contamination, it must:
 - (i) record details of the relevant load, including the registration number of the Collection Vehicle, the time of arrival of the Collection Vehicle and a copy of the weighbridge docket;
 - (ii) prepare a report including a full assessment and breakdown of the quality of the load together with such supporting documentary evidence as is reasonable;
 - (iii) notify the Principal in writing of the relevant load on the day on which it occurs; and
 - (iv) not later than [2] Business Days after receipt of a load referred to in clause 2.2(a), provide the Principal with copies of the records, reports and documentary evidence referred to in clauses 2.2(a)(i) and (ii) in a format directed by the Principal.
- (b) The Contractor agrees that:
 - (i) during the Contract Term, on the date each year stated in Annexure [X] the Principal will audit the records, reports and documentary evidence provided in accordance with clause 2.2(a)(iv) and assess the quantity (in tonnes) of Contamination received by the Contractor at the Sorting Facility in the preceding 12 month period; and
 - (ii) it is a condition precedent to the Contractor's entitlement to an assessment under clause 2.2(b)(i) that the Contractor has complied with the requirements of clause 2.2(a).
- (c) If the Contamination quantity assessed under clause 2.2(b)(i) exceeds the maximum threshold specified in [insert], the Contractor will be entitled to compensation determined in accordance with the Pricing Schedule.

- (d) Except as expressly stated in this clause [X], the Contractor is not entitled to make, and the Principal is not liable for or in connection with, any Claim arising out of or in connection with any Contamination.

3. Force Majeure

3.1 Definitions

In this clause [X]:

Force Majeure Event means any:

- (a) earthquake, tropical cyclone, natural disaster, landslide, seismic activity, tsunami or mudslide;
- (b) war, act of a public enemy (whether war is declared or not), civil war, rebellion, revolution, military usurped power, military insurrection or military commotion;
- (c) 'terrorist act' as defined in the *Terrorism Insurance Act 2003* (Cth);
- (d) fire or explosion caused by any of the events referred to in paragraphs (a), (b) or (c);
- (e) flood which might, as at the date of Contract, be expected to occur less frequently than once in every 100 years;
- (f) ionising radiation or contamination by radioactivity; or
- (g) *[insert others if required]*,

which:

- (h) is beyond the reasonable control of the affected party;
- (i) is not caused by an act or omission of the affected party (or any person for whom it is responsible); and
- (j) could not have been overcome, prevented or avoided by the affected party taking reasonable steps to minimise, avoid or mitigate the effects of, the Force Majeure Event.

3.2 Suspension

- (a) If a Force Majeure Event occurs:
 - (i) the obligations of each party under this Contract which are prevented by the Force Majeure Event will be suspended to the extent of such prevention;
 - (ii) the failure to perform the obligations suspended under clause 3.2(a) will not be a breach of this Contract by the Principal or the Contractor; and
 - (iii) the parties must resume performance of obligations suspended under clause 3.2(a) promptly upon the Force Majeure Event ceasing to prevent performance of those obligations.

3.3 Notice

The Contractor must give written notice to the Principal not later than [2] Business Days after the occurrence of a Force Majeure Event.

3.3 Termination

If a delay or failure by the Contractor to perform its obligations due to Force Majeure Event exceeds [X] days, the Principal may immediately terminate this Contract by written notice to the Contractor.

4. Adjustments

If used, the following should be carefully interfaced with the payment provision (including the "Pricing Schedule") and adjustment mechanisms contained in the relevant contract. Details including applicable rates, thresholds and formulae will need to be included in the Annexure referred to as the Pricing Schedule. It will be imperative to ensure there is no potential "double up" between this adjustment regime and other available forms of adjustment or compensation in the contract (relevantly for any Change in Law). Councils may wish to consider whether there are any other variable costs that are not identified in this clause that should be included and similarly addressed.

4.1 Payment Rates

In identifying the relevant charges, ensure they **do not** relate to volume consumption, the risk of which should be borne by the Contractor.

The parties acknowledge and agree that the Payment Rates include the following variable costs:

- (a) the usage charges specified in [section X of the Pricing Schedule] for the supply of electricity, mains gas and bottled gas (**Energy Charges**); and
- (b) charges for the disposal of Contamination being:
 - (i) the landfill disposal (or recovery) charge (in \$ per tonne) specified in [section X of the Pricing Schedule]; and
 - (ii) the transport charge to an agreed disposal or recovery point (in \$ per tonne per km) specified in [section X of the Pricing Schedule],**(Disposal Charges).**

4.2 Energy Charges

- (a) The Energy Charges will be indexed annually on each anniversary of the Commencement Date in accordance with [part X of section X of the Pricing Schedule].
- (b) Within [X] Business Days after each anniversary of the Commencement Date during the Term, the Contractor may give written notice to the Principal if it considers that an Energy Charge actually incurred by the Contractor in the performance of the Recycling Services in respect of the preceding 12 month period exceeds the corresponding indexed Energy Charge by more than [insert appropriate threshold] (**Energy Charge Excess**).

- (c) The Contractor must provide the Principal with documents and evidence requested by the Principal to verify the matters the subject of the Contractor's notice under clause 4.2(a).
- (d) Subject to the Contractor having complied with its notice requirements under clauses 4.2(b) and 4.2(c), if the Principal is satisfied that:
- (i) the Energy Charge actually incurred and paid by the Contractor exceeds the corresponding indexed Energy Charge by more than [insert appropriate threshold]; and
 - (ii) the Energy Charge Excess could not have been avoided or mitigated by the Contractor,

then the Contractor will be entitled to have the applicable Payment Rate adjusted by the amount of the Energy Charge Excess.

- (e) **[DRAFTING NOTE - Given the rate reset under clause 4.2(d), Councils could consider incorporating drafting in their existing contracts to address the following:**
- the imposition of regular (suggest 6 monthly) reporting obligations on the Contractor;
 - the reports should be supported by documentation evidencing charges actually imposed on and paid by the Contractor in respect of Energy Charges;
 - if the aggregate Energy Charges amortised over the preceding [6] month period produce an average Energy Charge that is less than the Energy Charge the subject of the adjusted Payment Rate under clause 4.2(d), the contract should contain a mechanism providing for a payment adjustment / rebate in Council's favour].

4.3 Disposal Charges

This clause provides for the indexation of the Disposal Charges. It also contains optional drafting affording the Contractor the ability to seek adjustment for material variations in these charges, assuming they are paid at specified rather than actual rates.

- (a) The Disposal Charges will be indexed annually on each anniversary of the Commencement Date in accordance with [part X of section X of the Pricing Schedule].

Optional subclauses (b) to (e):

- (b) If a Disposal Charge actually incurred by the Contractor in the performance of the Recycling Services at any stage exceeds the corresponding indexed Disposal Charge by more than [insert appropriate threshold] (**Disposal Charge Excess**), the Contractor may give written notice to the Principal to that effect not later than [X] Business Days after the relevant Disposal Charge is incurred.
- (c) A notice given by the Contractor under clause 4.3(b) must be supported by documentary evidence of the Disposal Charge incurred and paid by the Contractor.
- (d) Subject to the Contractor having complied with its notice requirements under clauses 4.3(b) and 4.3(c), if the Principal is satisfied that:

- (i) the Disposal Charge actually incurred and paid by the Contractor exceeds the corresponding indexed Disposal Charge by more than [insert appropriate threshold]; and
- (ii) the Disposal Charge Excess could not have been avoided or mitigated by the Contractor,

then the Contractor will be entitled to have the applicable Payment Rate increased by the amount of the Disposal Charge Excess.

- (e) **[DRAFTING NOTE - Given the rate reset under clause 4.3(d), Councils could consider incorporating drafting in their existing contracts to address the following:**
 - the imposition of regular (suggest 6 monthly) reporting obligations on the Contractor;
 - the reports should be supported by documentation evidencing charges actually imposed on and paid by the Contractor in respect of Disposal Charges;
 - if the aggregate Disposal Charges amortised over the preceding [6] month period produce an average Disposal Charge that is less than the Disposal Charge the subject of the adjusted Payment Rate under clause 4.3(d), the contract should contain a mechanism providing for a payment adjustment / rebate in Council's favour] .

4.4 Acknowledgments

The Contractor acknowledges and agrees that:

- (a) no variation to or adjustment of the Payment Rates will in any way invalidate this Contract;
- (b) except as expressly stated in this Contract, the Contractor is not entitled to:
 - (i) any variation to or adjustment of the Payment Rates; or
 - (ii) make any Claim in connection with changes, increases or fluctuations in connection with the Payment Rates; and
- (c) it is not entitled to compensation under this clause [X] by way of variation to or adjustment of the Payment Rates to the extent it is already compensated by any other payment calculated in accordance with the Pricing Schedule or otherwise under the Contract.

Annexure [A]

Waste Law means any of the following Acts, as amended or replaced from time to time:

- (a) *Dangerous Goods Act 1985 (Vic);*
- (b) *Environment Protection Act 1970 (Vic);*
- (c) *Environment Protection Act 2017 (Vic);*
- (d) *Local Government Act 1989 (Vic);*
- (e) *Occupational Health and Safety Act 2004 (Vic);*
- (f) *Planning and Environment Act 1987 (Vic);*
- (g) *Sustainability Victoria Act 2005 (Vic);*
- (h) *Environmental Protection and Biodiversity Conservation Act 1999 (Cth);*
- (i) *National Environmental Protection Council Act 2001 (Cth);* or
- (j) *Product Stewardship Act 2011 (Cth),* and
- (k) any Regulations and binding policies and guidelines made under or pursuant to the above Acts,

to the extent to which either the Act or the relevant instrument relates to:

- (l) the imposition of further restrictions on, or further requirements in relation to, the performance of the Recyclables Services by the Contractor, including in relation to the collection, sorting or processing of recyclable material;
- (m) the imposition of further restrictions on, or further requirements in relation to, the management, storage or stockpiling of recyclable and waste materials at waste and resource recovery facilities;
- (n) the introduction of a container deposit scheme in Victoria for containers or other recyclable material currently collected as part of the Recyclables Services;
- (o) the introduction of requirements that, or the provision of incentives to encourage, manufacturers to increase the amount or proportion of recyclable content in products and/or packaging; or
- (p) an increase to the landfill levy or any other direct charge (other than annual or periodic increases to account for indexation and the like) charged for, or payable in relation to, disposal of residual waste components/contaminants contained in material collected as part of the Recyclables Services.