

**Dated** **2000**

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**CITY OF WANNEROO  
AND  
CITY OF JOONDALUP  
AND  
CITY OF SWAN**

**AGREEMENT  
RELATING TO  
THE OPERATION OF THE  
MOTIVATION DRIVE  
MATERIALS RECOVERY FACILITY**

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## DRAFT AGREEMENT

This Agreement dated

2006~~0~~

BETWEEN **CITY OF WANNEROO** of Wanneroo Road, Ashby, Western Australia (“Wanneroo”)

AND **CITY OF JOONDALUP** (“Joondalup”) of Boas Avenue, Joondalup, Western Australia

and

**CITY OF SWAN** (“Swan”) of Midland Square, Morrison Road, Midland, Western Australia

(together “Joondalup/Swan”).

## RECITALS

- A. Wanneroo owns the Facility Land and operates the Facility on the Facility Land.
- B. The parties have agreed that Joondalup and Swan will deliver, and Wanneroo will receive and process and sell, certain Recyclable Material at the Facility on the terms and conditions set out in this Agreement.

## OPERATIVE PROVISIONS

## 1. DEFINITIONS AND INTERPRETATION

## 1.1 Definitions

In this Agreement, unless the context requires otherwise:

“**Actual Costs of the Facility Modifications**” means the costs actually met by Wanneroo in carrying out the Facility Modifications under clause 3.15(2);

“**Commencement Date**” means the date described as the Commencement Date of the Term in Schedule 1;

“**Depreciation**” has the meaning given to it in clause 3.7;

“**Estimated Costs of the Facility Modifications**” means the estimate agreed by the parties of the costs of carrying out the Facility Modifications which agreed estimate is \$525,000~~3,600,000~~;

## ATTACHMENT 1

**“Facility”** means all buildings, improvements, plant and equipment on the Facility Land used for the receipt and processing of Recyclable Material and Non-Recyclable Material under this Agreement;

**“Facility Land”** means the land known as Lots 15 and 257 Motivation Drive Wangara and being more particularly described as Lot \_\_\_\_ on Plan \_\_\_\_\_ and being the whole of the land comprised in Certificate of Title Volume \_\_\_\_ Folio \_\_\_\_\_;

**“Facility Modifications”** means modifications to the Facility, as it existed prior to this Agreement, which modifications will enable the Facility to be used for the purposes envisaged by this Agreement;

**“First Extended Term”** means the period described on the First Extended Term in Schedule 1 and commencing on the day after the expiry of the Term;

**“Joondalup/Swan Representatives”** means the persons or officers described as such in Schedule 1;

**“Market Rent”** has the meaning given to it in clause 3.7;

**“Non-Recyclable Material”** means all waste other than Recyclable Material;

**“Operating Costs”** has the meaning given to it in clause 3.7;

**“Operating Revenue”** has the meaning given to it in clause 3.9;

**“Operational Cost Contribution”** means the amount or amounts described as the Operational Cost Contribution in clause 3.6 and calculated in accordance with clause 3.6;

**“Operational Team”** means the Joondalup/Swan Representatives and the Wanneroo Representative;

**“Recyclable Material”** means;

- (a) aluminium and steel cans;
- (b) clear HDPE and PET plastic bottles coded 1 and 2;
- (c) glass bottles and jars;
- (d) ~~non-foil lined liquid paperboard milk and juice cartons;~~
- (e) newspapers and cardboard;
- (f) used engine oil car batteries; and
- (g) any other items agreed by all members of the Operational Team;

**“Revenue Entitlement”** means the amount or amounts described as the Revenue Entitlement in clause 3.9 and calculated in accordance with clause 3.9;

**“Second Extended Term”** means the period described as the Second Extended Term and commencing on the day after the expiry of the First Extended Term;

**“Services”** means the obligations of Wanneroo under this Agreement including those set out in clauses 4 and 5 and Schedule 2;

**“Term”** means the period of years described as the Term in Schedule 1;

**“Wanneroo’s Plant”** means all plant, vehicles and equipment used by the Wanneroo in the provision of the Services;

**“Wanneroo’s Representative”** means the person or officer described as such in Schedule 1.

## **1.2 Interpretation**

In this Agreement, unless the context indicates a contrary intention:

- (a) words suggesting the singular include the plural and vice versa;
- (b) words suggesting any gender include any other gender;
- (c) a reference to a day means any day, which is not a Saturday, Sunday or a public holiday;
- (d) reference to a person include a company, corporation, and unincorporated or incorporated association or statutory authority;
- (e) references to clauses, paragraphs, subparagraphs and schedules are to clauses, paragraphs, and subparagraphs of, and schedules to, this Agreement as amended from time to time in accordance with the terms of this Agreement;
- (f) a document will be incorporated into and form part of this Agreement if the parties sign the document and it is referred to in this Agreement and a reference to such a document is to that document as amended from time to time in accordance with the terms of this Agreement;
- (g) headings used for clauses, paragraphs, subparagraphs, schedules and the table of contents are for ease of reference only and will not affect the interpretation of this Agreement;
- (h) references to any agreement or instrument are to that agreement or instrument as amended, novated, supplemented, varied or replaced from time to time;
- (i) references to laws include any modification or re-enactment of those laws, or any legislative provisions substituted for such laws, and all orders, local laws, planning schemes, by-laws, regulations and other statutory instruments issued under those laws;
- (j) use of the words “includes” or “including” means without limitation, unless the contrary intention appears;
- (k) a reference to any body is:
  - (i) if that body is replaced by another organisation, deemed to refer to that organisation; and

- (ii) if that body ceases to exist, deemed to refer to the organisation which most nearly or substantially serves the same purposes or objects as that body; and
- (l) all dollar amounts specified in this Agreement are in Australian dollars.

## **2. TERM**

### **2.1 Term**

Joondalup/Swan engage Wanneroo to provide the Services during the Term commencing on the Commencement Date subject to and in accordance with the terms and conditions contained in this Agreement.

### **2.2 Discussions for First Extended Term**

There is no compulsion on either Wanneroo or Joondalup/Swan to agree to an extension of the Term, however:

- (a) not later than 6 months prior to the expiry of the Term, the parties shall enter into discussions concerning the possibility of the parties entering into a renewal of this Agreement for the First Extended Term with the intent of finalising those discussions not later than 3 months prior to the expiry of the Term;
- (b) in the event that the parties agree to a renewal of this Agreement for the First Extended Term, then this document shall continue to apply unless varied in writing by the parties.

### **2.3 Discussions for Second Extended Term**

There is no compulsion on either Wanneroo or Joondalup/Swan to agree to an extension of the First Extended Term, however:

- (a) not later than 6 months prior to the expiry of the First Extended Term, the parties shall enter into discussions concerning the possibility of the parties entering into a renewal of this Agreement for the Second Extended Term with the intent of finalising those discussions not later than 3 months prior to the expiry of the First Extended Term;
- (b) in the event that the parties agree to a renewal of this Agreement for the Second Extended Term, then this document shall continue to apply unless varied in writing by the parties.

## **3. FINANCIAL OBLIGATIONS**

### **3.1 Quarterly calculations by Wanneroo**

- (1) As soon as practicable following each quarter of the Term, Wanneroo shall:
  - (a) calculate the Operational Cost Contribution and the Revenue Entitlement of

each of Joondalup and Swan; and

- (b) provide a written statement of those calculations to Joondalup and to Swan.
- (2) In doing the calculations, Wanneroo shall use the figures shown in the separate financial statements kept in accordance with Item 2.5 of Schedule 2.

### 3.2 Payment of deficit by Joondalup and Swan

If the difference between the Operational Cost Contribution and the Revenue Entitlement in respect of Joondalup or Swan is a deficit then, Joondalup or Swan, as the case may be, shall pay the amount of the deficit to Wanneroo within 14 days after receipt of the statement referred to in clause 3.1(1)(b).

### 3.3 Payment of surplus by Wanneroo

If the difference between the Operational Cost Contribution and the Revenue Entitlement in respect of Joondalup or Swan is a surplus, then Wanneroo shall pay to Joondalup or Swan, as the case requires, the amount of the surplus within 14 days after sending the statement referred to in clause 3.1(1)(b).

### 3.4 GST

- (1) If GST is imposed or levied in respect of any Supply made by Wanneroo under this Agreement then despite any other provision of this Agreement the Operational Cost Contribution shall be increased by the GST Amount.

- (2) In this clause:

“**GST**” means any form of goods and services tax or similar value added tax;

“**GST Amount**” means the Operational Cost Contribution (after deducting the GST Exempt Component) multiplied by the Rate;

“**GST Exempt Component**” means any part of the Operational Cost Contribution which solely relates to a supply that is free or exempt from the imposition of GST;

“**GST Legislation**” means any legislation which imposes, levies, implements or varies a GST or any applicable rulings issued by the Commissioner of Taxation;

“**Rate**” means the rate at which GST Legislation from time to time imposes or levies GST on the relevant Supply under this Agreement;

“**Supply**” includes supply as defined under GST Legislation.

### 3.5 Government taxes, duties and charges

If:

- (a) there is a variation in, or repeal of, an existing government tax, duty or charge; or
- (b) any new government tax, duty or charge is introduced,



that affects the cost to Wanneroo of supplying any of the Services, then the Operating Costs will be changed to reflect the net effect of the variation or the new tax, duty or charge on the cost of supplying those Services (and Wanneroo must provide Joondalup and Swan with evidence of that net effect).

### 3.6 Operational Cost Contribution

The Operational Cost Contribution payable by each of Joondalup and Swan in respect of each quarter of the Term is calculated in accordance with the following formula:

$$\text{Operational Cost Contribution} = \frac{A}{B} \times (\text{Market Rent} + \text{Depreciation} + \text{Operating Costs})$$

Where:

- A is the number of tonnes of Recyclable Material and Non-Recyclable Material deposited at the Facility by Joondalup or by Swan, as the case may be, during the previous quarter;
- B is the number of tonnes of Recyclable Material and Non-Recyclable Material deposited at the Facility by all of the parties during the previous quarter.

### 3.7 Market Rent, Depreciation and Operating Costs

For the purpose of clause 3.6:

“Market Rent” is:

- (a) ~~in the case of the first year of the Term - the then current annual market rent of the Facility Land (disregarding the Facility and any other improvements) as determined by an independent valuer agreed by the parties, and \$220,000~~
- (b) in the case of each subsequent year of the Term (and of the First Extended Term and the Second Extended Term) - is the amount arrived at by applying the following formula:

$$X \times (100\% + Y)$$

Where:

- X is the “Market Rent” payable immediately prior to the commencement of the relevant year;
- Y is the percentage increase (if any) in the Consumer Price Index (All Groups) for Perth between the commencement date of the relevant year and the commencement date of the previous year.

If the Consumer Price Index figure referred to in this clause is no longer provided by the Australian Bureau of Statistics then the parties shall utilise such figure in substitution as Wanneroo shall reasonably

determine.

**“Depreciation”** is an amount equal to:

- (a) 5% per annum of the building costs (agreed by the parties to be \$600,000); plus
- (b) 10% per annum of the equipment costs (agreed by the parties to be \$710,000); plus
- (c) 20% per annum of the computer costs (agreed by the parties to be \$10,000); plus
- (d) 20% per annum of the Actual Costs of the Facility Modifications.

**“Operating Costs”** means:

- (a) the costs incurred by Wanneroo in maintaining and operating the Facility to provide the Services including, without limitation, the costs of sorting the Recyclable Material, insurance, utilities, repairs, composition audits, commodity preparation, disposal of Non-Recyclable Material and selling costs (but does not include any item of a capital nature the cost of which exceeds \$1020,000) and any other items agreed by the Wanneroo Representative and the Joondalup/Swan Representatives; and
- (b) an amount in respect of Wanneroo’s administrative costs being an amount of 5% of Wanneroo’s annual administrative costs and distributed overheads of its Environmental Waste Services department as shown in Wanneroo’s annual budget. (replace with fixed \$100,000?)
- (c) an amount of \$8 per tonne of material delivered to the facility for processing if the City of Wanneroo is directly operating the facility rather than using a contractor to lease the site and operate the facility.

### 3.8 Purchase of capital items over \$1020,000

- (1) If Wanneroo considers that the purchase of an item of a capital nature, the cost of which item exceeds \$1020,000, is necessary in the maintenance or operation of the Facility to enable Wanneroo to provide the Services then Wanneroo shall give to Joondalup and Swan written details of:
  - (a) the reasons for the proposed purchase; and
  - (b) the item and the purchase price.
- (2) Following receipt of the details referred to in subclause (1), the parties shall cause a meeting or meetings of their representatives to be held with a view to discussing and agreeing upon whether the proposed purchase as soon as reasonably possible but, in any event, no later than 28 days after receipt of the details.
- (3) If the parties agree to the proposed purchase then they shall indicate their agreement by causing their representatives to sign the details of the purchase as agreed.

- ~~(3a) Alternatively an email with the above details can be sent to the parties and their response accepting the proposal shall constitute authority to proceed with the purchase.~~
- (4) If the parties fail to agree to the proposed purchase within 28 days after receipt of the details by Joondalup and Swan then any of the parties may give to the other parties notice that a dispute exists under this subclause.
- (5) If notice of a dispute is given under subclause (4) then the dispute may be referred for determination by an independent engineer agreed by the parties or, failing agreement, nominated at the request of any of the parties by the President of the Institution of Engineers (W.A. Division).
- (6) The independent engineer shall act as an expert and not as an arbitrator and the determination shall be binding on the parties.
- (7) The independent engineer shall determine:
- (a) if the item or any other item of a capital nature is necessary in the maintenance or operation of the Facility to enable Wanneroo to provide the Services under this Agreement; and
- (b) if so, what is the minimum cost of the item required for that purpose.
- (8) The cost of the independent engineer shall be included in the “Operating Costs” for the current quarter.
- (9) The amount of:
- (a) the cost of the item agreed under subclause (3); or
- (b) the minimum cost determined by the independent engineer under subclause (7),
- shall be included, for the purpose of clauses 3.6 and 3.7, in the “Operating Costs” of the quarter in which the item is purchased.
- (10) If the parties fail to agree to a proposed purchase referred to in this clause then the failure is to be treated as a failure to agree to a variation to the annual budget for the purpose of clause 3.13.

### 3.9 Revenue Entitlement

- (1) The Revenue Entitlement payable to Joondalup in respect of each quarter of the Term is calculated in accordance with the following formula:

**Revenue Entitlement =**

$$\frac{CJ \times DJ}{(CJ \times DJ) + (CS \times DS) + (CW \times DW)} \times (\text{Operating Revenue})$$

$$+ (\text{Actual Costs of the Facility Modifications} \div 60)$$

Where:

- CJ is the number of tonnes of Recyclable Material and Non-Recyclable Material deposited at the Facility by Joondalup during the previous quarter; Where a delivery contained recyclable material compacted at a rate greater than 250kg per cubic metre, then the additional weight of material above 250kg per cubic metre shall not be counted in this calculation for City of Joondalup revenue entitlement.
- DJ is the percentage of Recyclable Material in a delivery by Joondalup according to the auditor's report referred to in Item 2.4 of Schedule 2 for the previous quarter;
- CS is the number of tonnes of Recyclable Material and Non-Recyclable Material deposited at the Facility by Swan during the previous quarter; Where a delivery contained recyclable material compacted at a rate greater than 250kg per cubic metre, then the additional weight of material above 250kg per cubic metre shall not be counted in this calculation for City of Swan revenue entitlement.
- DS is the percentage of Recyclable Material in a delivery by Swan according to the auditor's report referred to in Item 2.4 of Schedule 2 for the previous quarter;
- CW is the percentage of Recyclable Material in a delivery by Wanneroo according to the auditor's report referred to in Item 2.4 of Schedule 2 for the previous quarter. Where a delivery contained recyclable material compacted at a rate greater than 250kg per cubic metre, then the additional weight of material above 250kg per cubic metre shall not be counted in this calculation for City of Wanneroo revenue entitlement.
- DW is the percentage of Recyclable Material in a delivery by Wanneroo according to the auditor's report referred to in Item 2.4 of Schedule 2 for the previous quarter.

- (2) The Revenue Entitlement payable to Swan in respect of each quarter of the Term is calculated in accordance with the following formula:

**Revenue Entitlement =**

$$\frac{CS \times DS}{(CJ \times DJ) + (CS \times DS) + (CW \times DW)} \times (\text{Operating Revenue})$$

$$+ (\text{Actual Costs of Facility Modification} \div 60)$$

Where

CJ, DJ, CS, DS, CW and DW have the same meaning as in subclause (1).

- (3) For the purpose of this clause:

**“Operating Revenue”** is the proceeds of sale derived by Wanneroo from the sale of all Recyclable Material delivered by or on behalf of the parties and processed at the Facility during the previous quarter.

- (4) Where any of the parties use more than one type of container for the collection of Recyclable Material and Non-Recyclable Material then, for the purpose of subclauses (1) and (2), the formula will be applied separately in respect of Recyclable Material and Non-Recyclable Material from each type of container.
- (5) During the First Extended Term and the Second Extended Term, the formula for calculating the Revenue Entitlement shall be varied by deleting the following:

“+ (Actual Costs of the Facility Modifications ÷ 60)”.

### 3.10 Annual budget

- (1) On or before 30 April, or as soon afterwards as possible, in each year of the Term, Wanneroo shall prepare, and deliver to Joondalup and Swan, a draft annual budget for the following financial year for the maintenance and operation of the Facility, which budget shall comprise:
- (a) the Market Rent;
  - (b) the Depreciation;
  - (c) a fair estimate of the Operating Costs;
  - (d) a fair estimate of Operating Revenue including estimated sale prices of each class of Recyclable Material;
  - (e) estimate of tonnages for each class of Recyclable Material which estimates are provided or confirmed by each party.
- (2) ~~The parties acknowledge that the annual budget for the period commencing on the Commencement Date and expiring on 30 June 2001 has been agreed by the parties and have been signed for the purposes of identification.~~
- (3) Wanneroo shall prepare the draft annual budget in accordance with the best practice accounting practices in local government.
- (4) Following preparation and receipt of the draft annual budget, the parties shall cause a meeting or meetings of their representatives to be held with a view to the parties discussing and agreeing upon the annual budget as soon as reasonably possible, but in any event no later than 31 May.

- (5) If the parties agree to the budget then they shall indicate their agreement by causing their representatives to sign the budget as agreed.
- (6) If either Joondalup or Swan, or both, disagree with the budget then, no later than 7 June, it or they shall give to the other parties notice in writing of the disagreement.

**3.11 Variation of Operating Costs shown in annual budget**

- (1) If Wanneroo considers that a variation should be made to the amount of the Operating Costs as shown in the annual budget agreed under clause 3.9, then Wanneroo shall give to Joondalup and Swan written details of the proposed variation and a report in writing of the reasons for the proposed variation.
- (2) Following receipt of the proposed variation under subclause (1), the parties shall cause a meeting or meetings of their representatives to be held with a view to the parties discussing and agreeing upon the variation as soon as reasonably possible but, in any event, no later than 28 days after receipt of the proposed variation.
- (3) If the parties agree to the variation then they shall indicate their agreement by causing their representatives to sign the variation as agreed.
- (4) If either Joondalup or Swan, or both, disagree with the variation then, no later than 35 days after receipt of the proposed variation, it or they shall give to the other parties notice in writing of the disagreement.

**3.12 Operating Costs not to exceed annual budget**

For the purpose of determining the Operational Costs Contribution under clause 3.6, the Operating Costs shall not exceed the Operating Costs as shown in the annual budget discussed under clause 3.10 together with:

- (a) any variation of the budget discussed under clause 3.10~~11~~; and

- (b) any amount referred to in clause 3.8(a) in respect of an item of a capital nature.

### 3.13 Right of Joondalup or Swan to withdraw in certain circumstances

- (1) If Joondalup or Swan, or both, fail to agree to:
  - (a) the annual budget for 2 consecutive financial years; or
  - (b) 2 consecutive variations to the annual budget,then, Joondalup or Swan, or both, as the case may be, may withdraw from this Agreement by giving notice to the other parties by not later than 30 June of the current financial year, and the withdrawal takes effect from 30 June of the following year.
- (2) Subclause (1) does not apply to:
  - (a) the annual budget for the period commencing on the Commencement Date and expiring on 30 June ~~2001~~2007; and
  - (b) the annual budget for the financial year commencing 1 July ~~2001~~2007,or any variations to those budgets.
- (3) The withdrawal by a party under this Item will not affect any accrued rights of that party.
- (4) For the avoidance of doubt, the withdrawing party shall have no right to any Revenue Entitlement accruing after the effective date of the withdrawal.

### 3.14 Payment of one-third of Estimated Costs of Facility Modifications

No later than 7 days after the date of execution of this Agreement by all the parties, Joondalup and Swan shall each pay to Wanneroo a sum equal to one-third of the Estimated Costs of the Facility Modifications.

### 3.15 Facility Modifications

- (1) Upon receipt of the sums paid to it by Joondalup and Swan under clause 3.13, Wanneroo shall:
  - (a) deposit those sums; and
  - (b) transfer an amount equal to one-third of the Estimated Costs of the Facility Modifications from its municipal fund,into a separate, interest earning, trust account.
- (2) Wanneroo shall carry out the Facility Modifications and shall use the monies in the trust account and any interest only for the purpose of meeting the costs of the Facility Modifications.

## **ATTACHMENT 1**

- (3) If the costs of the Facility Modifications exceed the monies in the trust account and interest, then Joondalup and Swan shall each pay to Wanneroo one-third of the excess within 14 days after receipt of an invoice from Wanneroo.
- (4) If the costs of the Facility Modifications are less than the monies in the trust account and interest then, within 14 days after completion of the Facility Modifications, Wanneroo shall pay to each of Joondalup and Swan one-third of the balance of the monies and interest remaining in the trust account, and Wanneroo shall be entitled to retain and transfer the remaining one third into its municipal fund.
- (5) Wanneroo shall give to Joondalup and Swan regular written details of the costs of the Facility Modifications.

### **3.16 Variation of Operating Revenue shown in the annual budget**

- (1) If Wanneroo considers that there will be a significant variation in the amount of the Operating Revenue as shown in the annual budget agreed under clause 3.10, then Wanneroo shall call a meeting of the Operational Team to discuss variations to the annual budget and, if all of the parties agree, Wanneroo shall implement the agreed variations to the Operating Costs.
- (2) For the avoidance doubt, a disagreement as to any variations to the budget discussed under subclause (1) shall not constitute a failure to agree by Joondalup or Swan for the purpose of clause 3.13.

## **4. SERVICE OBLIGATIONS OF WANNEROO**

### **4.1 Carrying out the Services**

Wanneroo shall perform the Services during the Term in accordance with the terms and conditions set out in this Agreement.

### **4.2 General Service Standards**

Wanneroo shall perform the Services in a timely fashion and with due care and diligence.

## **5. GENERAL OBLIGATIONS OF WANNEROO**

### **5.1 Wanneroo's employees and subcontractor**

#### **(1) Sufficient numbers of employees**

Wanneroo shall engage sufficient employees with adequate skills and training to carry out the Services in an efficient manner.

#### **(2) Unacceptable behaviour**

Wanneroo shall ensure that no employee, of Wanneroo:

- (a) consumes any alcoholic beverage;



- (b) is intoxicated; or
- (c) is under the influence of any drug which could impede his or her ability to safely or efficiently perform the Services,

while engaged in the performance of the Services or any related activities.

**(3) Conduct of employees**

Wanneroo shall ensure that all employees, of Wanneroo conduct themselves towards the councillors of Joondalup/Swan, Joondalup/Swan's employees and all members of the public in a civil and helpful manner.

**(4) Appearance of employees**

Wanneroo shall ensure that its employees in respect of their personal appearance and attire, are neat, clean and tidy; and

**(5) Subcontractors**

Wanneroo shall use all reasonable endeavours to ensure that all agents and subcontractors observe the requirements of subclauses (2), (3) and (4).

**5.2 Wanneroo's Plant**

Wanneroo shall ensure that all Wanneroo's Plant:

- (a) complies with all applicable Acts, regulations, local laws and by-laws;
- (b) is suitable for the purpose for which it is to be used; and
- (c) is maintained in good repair and condition.

**5.3 Compliance with laws**

Wanneroo shall comply with and observe and ensure that its employees, sub-contractors and agents comply with and observe all Acts, planning schemes, regulations, local laws and by-laws in any way applicable to the performance of the Services under this Agreement.

**5.4 Insurance**

**(1) Public risk insurance**

Wanneroo shall effect and keep in force throughout the Term a public risk policy of insurance in an amount of not less than \$10,000,000.00 and shall produce to Joondalup/Swan on demand a certificate of the currency of that policy.

**(2) Workers' compensation insurance**

Wanneroo shall effect and keep in force throughout the Term a policy of insurance against claims for workers' compensation and damages by any person employed by

Wanneroo in connection with the performance of the Services.

**(3) Motor vehicle insurance**

Wanneroo shall effect and keep in force through the Term a third party insurance policy in relation to all vehicles used by Wanneroo in connection with the performance of the Services.

**5.5 Indemnity**

Wanneroo shall indemnify Joondalup/Swan and keep Joondalup/Swan indemnified from and against all claims, demands, writs, summonses, actions, suits, proceedings, judgments, orders, decrees, damages, costs, losses and expenses of any nature whatsoever which Joondalup/Swan may suffer or incur in connection with loss of life, personal injury or damage to property arising from or out of any occurrence in connection with the performance by Wanneroo of the Services except to the extent caused or contributed to by Joondalup/Swan.

**6. OBLIGATIONS OF JOONDALUP AND SWAN**

Joondalup and Swan shall observe and perform the obligations of Joondalup and Swan set out in Schedule 3.

**7. MUTUAL OBLIGATIONS OF THE PARTIES**

Each party mutually agrees with each of the other parties that it shall perform and observe the mutual obligations set out in Schedule 4.

**8. TERMINATION**

**8.1 Termination by Joondalup/Swan for default**

- (1) Joondalup/Swan may, by giving notice in writing to Wanneroo, immediately terminate this Agreement if:
  - (a) Wanneroo commits, persistently, any material breach of this Agreement that is not capable of being rectified; or
  - (b) Wanneroo commits any material breach of this Agreement which is capable of being rectified, and if Wanneroo has not rectified the breach, after receiving a notice of breach from Joondalup/Swan within a reasonable period specified in the notice; or
  - (c) a termination event specified in clause 8.2 occurs.
- (2) Joondalup/Swan may terminate this Agreement pursuant to subclause (1) without prejudice to any other rights or remedies against Wanneroo under this Agreement or otherwise, and without releasing Wanneroo in respect of any antecedent breach or failure to observe or perform any term or condition of this Agreement.

## **8.2 Termination Events**

The following events are termination events for the purposes of clause 8.1:

- (a) a receiver of the income of Wanneroo is appointed under the Local Government Act 1995; or
- (b) Wanneroo is abolished or disestablished.

## **8.3 Power of Joondalup/Swan to perform obligations**

If Wanneroo defaults in the performance or observance of any of Wanneroo's obligations under this Agreement then Joondalup/Swan may perform any such obligation without prejudice to any other rights or remedies against Wanneroo.

## **9. MISCELLANEOUS**

### **9.1 Relationship of parties**

Nothing in this Agreement shall operate or be deemed to create a partnership between the parties to this Agreement.

### **9.2 Entire agreement and variation**

This Agreement:

- (a) constitutes the entire agreement between the parties as to its subject matter;
- (b) in relation to its subject matter, supersedes any prior understanding or agreement between the parties and any prior condition, warranty, indemnity or representation imposed, given or made by a party; and
- (c) may only be amended in writing signed by all parties.

### **9.3 Severability**

If any provision of this Agreement or the application of a provision to a person or circumstances is, or becomes, invalid or unenforceable then the remaining provisions are not to be affected by the invalidity or enforceability, and each provision of this Agreement will be valid and enforceable to the fullest extent permitted by law.

### **9.4 Assignment and sub-contracting**

#### **(1) No assignment**

Wanneroo is not entitled to assign or transfer the whole or any part of its rights and obligations under this Agreement.

#### **(2) Sub-contracting**

- (a) Where the consideration of a proposed subcontract is worth \$50,000 or less then

Wanneroo shall be entitled to subcontract any part of the Services without the consent of Joondalup/Swan.

- (b) Where the consideration of a proposed subcontract exceeds \$50,000 then Wanneroo shall be entitled to sub-contract any part of the Services only with the prior written consent of Joondalup/Swan's Representatives which shall not be unreasonably withheld in the case of a responsible subcontractor having appropriate experience, skills and personnel.

**(3) Wanneroo to provide information**

With any application for the consent of Joondalup/Swan's Representatives to any sub-contracting, Wanneroo shall provide all such other information as may reasonably be required by Joondalup/Swan's Representatives, including, evidence that the proposed sub-contractor will be capable of performing any obligations of Wanneroo under this Agreement that it is to be sub-contracted to perform by being in possession of adequate motor vehicles and equipment and employing a sufficient number of employees with all necessary skills and training.

**(4) Wanneroo remains liable**

Unless otherwise agreed in writing by Joondalup/Swan, no sub-contracting of any of the Services shall relieve Wanneroo from any liability under this Agreement or at law in respect of the performance or purported performance of this Agreement and Wanneroo shall be responsible for the acts and omissions of any sub-contractor or any sub-contractor's employees and agents as if they were the acts or omissions of Wanneroo.

**9.5 Non-waiver of rights**

Any time or other indulgence granted by Joondalup or Swan to Wanneroo or any variation of the terms and conditions of this Agreement or any judgment or order obtained by Joondalup or Swan against Wanneroo will not in any way amount to a waiver of any of the rights or remedies of Joondalup or Swan in relation to the terms of this Agreement.

**9.6 Service of notices**

**(1) Method of giving notices**

A notice required or permitted to be given by one party to another under this Agreement shall be in writing, addressed to the other party and:

- (a) handed to the party's chief executive officer;
- (b) delivered to that party's address;
- (c) sent by pre-paid mail to that party's address; or
- (d) transmitted by facsimile to that party's facsimile number.

**(2) Time of receipt**

Subject to clause 9.11, a notice given to a party in accordance with this clause shall be treated as having been duly given and received:

- (a) if handed to the party's chief executive officer, immediately;
- (b) if delivered to a party's address, on the day of delivery;
- (c) if sent by pre-paid mail, on the third day after posting; or
- (d) if transmitted by facsimile to a party's facsimile number and a correct and complete transmission report is received, on the day of transmission.

**(3) Addresses of parties**

For the purposes of this clause, the address or facsimile number of a party is the address or facsimile number stated in Schedule 1 unless notice of another address or facsimile number has been given to the other parties.

**9.7 No fettering of powers of Joondalup or Swan**

It is acknowledged and agreed that this Agreement does not fetter or restrict the powers or discretions of Joondalup or Swan which it has under any written law that may apply to the Services or subject matter of this Agreement.

**9.8 Contract interpretation**

No rule of contract interpretation shall be applied in the interpretation of this Agreement to the disadvantage of one party on the basis that it prepared or put forward any document comprising part of this Agreement.

**9.9 Inconsistency**

If there is any inconsistency between any provision this Agreement and any provision of the Schedules of this Agreement then the provisions within the body of this Agreement shall prevail to the extent of the inconsistency.

**9.10 Governing law**

The law of Western Australia governs this Agreement and any legal proceedings or arbitration under this Agreement.

### 9.11 Force majeure

- (1) If Wanneroo, Joondalup or Swan is unable at any time whether wholly or in part by reason of force majeure to carry out all or any of its obligations under this Agreement then that party shall give to the other prompt written notice to that effect, giving full particulars of the force majeure as is claimed to exist and to have occurred, and, thereupon, the obligations under this Agreement of the party giving that notice shall, to the extent that they are affected by the force majeure, be suspended during but no longer than the continuance of the force majeure.
- (2) The party claiming force majeure shall immediately take all reasonable steps within its power to remove or overcome the effects of that force majeure.
- (3) For the purpose of this clause “**force majeure**” means any cause beyond the control of the party affected which that party could not reasonably have foreseen and guarded against, including, act of God, changes in legislation, fire, riots, civil commotion or civil unrest, interference by civil or military authorities or act of war (declared or undeclared), strikes and other industrial action, but does not include the negligence by any party including acts which under normal circumstances are avoidable, or delays by Wanneroo or its employees, agents or subcontractors.
- (4) If a force majeure continues for a period of more than one calendar month after any notice is given then any party may terminate this Agreement by giving not less than 7 days’ written notice to the other parties and any termination pursuant to this subclause shall in no way affect or prejudice the rights and obligations of any of the parties under this Agreement in respect of any act, matter or thing occurring under this Agreement prior to the termination.
- (5) For the purpose of this clause, “**force majeure**” in the case of Wanneroo includes a breakdown of the Facility and a shutdown of the Facility for necessary repairs.

### 9.13 Several obligations of Joondalup/Swan

The obligations of the Joondalup and Swan under this Agreement are several and not joint.

### 9.14 Joint rights of Joondalup/Swan

Unless expressly provided otherwise, the rights of Joondalup and Swan under this Agreement are joint and not several.

## 10. DISPUTE RESOLUTION

### 10.1 No proceedings

A party must not start court proceedings (except proceedings seeking interlocutory relief) in respect of a dispute arising out of this Agreement (“**Dispute**”) unless it has complied with this clause.

### 10.2 Notification of dispute

A party claiming that a Dispute has arisen must notify the other party to the Dispute giving details of the Dispute.

### 10.3 Reasonable efforts to resolve Dispute

- (1) During the 7 day period after a notice is given under clause 10.2 (or longer period agreed in writing by the parties) (“**Negotiation Period**”), the parties must use their reasonable efforts to resolve the Dispute.
- (2) Within the first 3 business days of the Negotiation Period, the Operational Team must meet and use their reasonable endeavours to resolve the Dispute.
- (3) Within the next one day of the Negotiation Period, if the Dispute continues, the relevant directors of the parties must meet and use their reasonable endeavours to resolve the Dispute.
- (4) Within the next one day of the Negotiation Period, if the Dispute continues, the chief executive officers of the parties must meet and use their reasonable endeavours to resolve the Dispute.

### 10.4 Dispute resolution process

If the Dispute is not resolved within the Negotiation Period, the parties must meet and agree on:

- (a) a process for resolving the Dispute other than by litigation or arbitration (such as by further negotiations, mediation, conciliation or expert determination);
- (b) the procedure and timetable for any exchange of documents and other information relating to the Dispute;
- (c) the procedural rules and a timetable for the conduct of the selected mode of proceeding;
- (d) a procedure for the selection and compensation of any independent persons engaged by the parties to assist in resolution of the Dispute; and
- (e) whether or not the parties should seek the assistance of a dispute resolution organisation.

### 10.5 Failure to agree on process

If the parties are unable to agree on a process for resolving the Dispute in accordance with clause 10.4 within 15 days after the end of the Negotiation Period, the Dispute will be referred to a reputable independent dispute resolution centre nominated by Joondalup/Swan to be agreed for mediation in accordance with the dispute resolution centre’s then current mediation guidelines.

### 10.6 Commencing proceedings

Either party may commence court proceedings after:

- (a) that party has complied with the dispute resolution process agreed between the parties in accordance with clause 10.4; or

(b) the Dispute has been mediated in accordance with clause 10.5.

**10.7 Breach of this clause**

If, in relation to a Dispute, a party breaches any provision of this clause 10, the other party need not comply with those clauses in relation to that Dispute.

**10.8 Continued performance of obligations**

Joondalup, Swan and Wanneroo will continue to perform their respective obligations under this Agreement pending the resolution of a dispute.



## SCHEDULE 1

## REFERENCE SCHEDULE

Item No.	Description	Details
1.	Addresses and facsimile numbers	<p>City of Wanneroo Wanneroo Road, Ashby WA 6949 Facsimile No: 9405 5299</p> <p>City of Joondalup Boas Avenue Joondalup WA 6027 Facsimile No: 9400 4501</p> <p>City of Swan Midland Square Morrison Road Midland WA 6056 Facsimile No: 9274 3200</p>
2.	Term	5 years
3.	Commencement Date	1 July <del>January</del> 2001 <del>2007</del> or such earlier date on or after 1 January 2001 as may be agreed in writing by all members of the Operational Team.
4.	Representatives of Joondalup/Swan	<p>Environmental &amp; Waste Management Coordinator of City of Joondalup; and</p> <p>Manager of Transport and Waste Services of City of Swan</p>
5.	Wanneroo's Representative	Manager <del>Environmental-Waste</del> <u>&amp; Fleet</u> Services of City of Wanneroo
6.	First Extended Term	1 year
7.	Second Extended Term	1 year

## SCHEDULE 2

## SERVICES

## Item No.

**2. Description of Services****2.1 Receival, sorting and sale**

Wanneroo shall:

- (a) receive and sort all Recyclable Material and Non-Recyclable Material delivered to the Facility by Joondalup and Swan;
- (b) dispose of the Non-Recyclable Material to landfill; and
- (c) use reasonable endeavours to sell the Recyclable Material for the best price available.

**2.2 Delivery hours**

Wanneroo shall keep the Facility open for receiving deliveries of Recyclable Material by or on behalf of the parties during the following times:

- (a) Monday to Friday between 7 am and 4 pm (excluding public holidays);
- (b) on such Saturdays between 7 am and 4 pm in lieu of a weekday public holiday as may be agreed by the members of the Operational Team; and
- (c) such other days and times as may be agreed by the Operational Team.

**2.3 Reporting requirements**

Wanneroo shall provide to Joondalup and to Swan, on request, no later than the end of the second week of ~~every~~ the month, the following reports relating to the previous month. Information shall be provided in a format agreed by the Operational Team.

- (a) Tonnage of Recyclable Material and Non-Recyclable Material received at the Facility from each of the parties.
- (b) Information with respect to sales of Recyclable Material.
- (c) Tonnage of Non-Recyclable Material disposed of to landfill.
- (d) Details of Operating Costs and Operating Revenue (as defined in Schedule 3);
- (e) other information agreed to be provided by the Operational Team.

## 2.4 Composition audits

- (1) As soon as reasonably possible after the Commencement Date, the Operational Team shall agree upon:
  - (a) an ~~independent~~ auditor for the purpose of conducting the audits referred to in this Item; and
  - (b) the audit procedure to be followed by the parties and by the auditor.
- (2) During each quarter of the Term, Wanneroo shall cause the auditor to carry out an audit of a delivery of Recyclable Material and Non-Recyclable Material by each of the parties for the purpose of determining the percentage of Recyclable Material and of Non-Recyclable Material in the delivery.
- (3) Upon receipt of the same, Wanneroo shall provide a copy of the auditor's report to Joondalup and Swan.

## 2.5 Separate account and financial statements

- (1) Wanneroo shall establish and use a separate account and shall keep separate financial statements for all expenditure and income relating to the operation of the Facility.
- (2) Wanneroo shall keep the financial statements in accordance with best practice accounting practices in local government.

## 2.6 Weighing of vehicles

Wanneroo shall:

- (a) on the occasion of each delivery, weigh, at a certified weighbridge located at the Facility Land, the gross weight of all vehicles delivering Recyclable Material and Non-Recyclable material to the Facility and all vehicles transporting Recyclable Material from the Facility;
- (b) from time to time as Wanneroo considers reasonable, weigh the tare weight of all such vehicles;
- (c) maintain a record of each vehicle and its gross and tare weights.

## SCHEDULE 3

## OBLIGATIONS OF JOONDALUP AND SWAN

**3.1 Delivery procedures**

- (1) As soon as reasonably possible after the Commencement Date, the Operational Team shall agree upon a written procedure for the delivery of Recyclable Material and Non-Recyclable Material to the Facility by Joondalup and Swan.
- (2) Joondalup and Swan shall observe the written procedure agreed from time to time by the Operational Team.

**3.2 Title to Recyclable Waste**

Upon delivery of any Recyclable Material or Non-Recyclable Material to the Facility, that Recyclable Material and Non-Recyclable Material shall become the property of Wanneroo.

**3.3 Joondalup and Swan to inspect vehicle loads for Contamination**

- (1) Joondalup and Swan shall cause to be superficially inspected their respective vehicle loads before commencing delivery to Wanneroo.
- (2) Where an inspection under sub-item (1) reveals contamination which may adversely affect:
  - (a) the processing of Recyclable Material for sale; or
  - (b) the operation of the Facility,

then, Joondalup or Swan, as the case may be, shall dispose of the vehicle load to some site other than the Facility.

**3.4 Joondalup and Swan to have no liability for quality of deliveries**

Notwithstanding the obligations of Joondalup and Swan under Item 3.3, or any breach or alleged breach of those obligations, neither Joondalup nor Swan shall be responsible or liable, whether in damages or otherwise, for any injury, loss or damage to Wanneroo or to any other person, including damage to the Facility, by reason of the nature, content or quality of the material delivered to and processed by Wanneroo under this Agreement.

SCHEDULE 4

MUTUAL OBLIGATIONS OF THE PARTIES

**4.1 Exclusive use of Facility**

- (1) Each of the parties shall exclusively use the Facility for the receipt, processing, disposal and sale of all Recyclable Material collected by or on behalf of the party from residences in its district.
- (2) A party may, but is not obliged to, use the Facility for the receipt, processing, disposal and sale of Recyclable material collected by or on its behalf from any source within its district other than residences.
- ~~(3) Where it does not adversely affect the cost of processing recyclables at the facility, the City of Wanneroo may accept material from other sources for processing at the facility. This material shall be counted as part of the City of Wanneroo's delivery quantities for sharing of costs in this agreement.~~

**4.2 Meetings of the Operational Team**

The parties shall cause their representatives to attend meetings of the Operational Team, every 3 months or such other intervals as may be agreed by the Operational Team, to discuss any matter related to the operation of this Agreement.

EXECUTED by the parties.

**THE COMMON SEAL of CITY OF WANNEROO )**  
was hereunto affixed pursuant to a resolution of the )  
Council in the presence of: )  
)

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Mayor

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Chief Executive Officer

**THE COMMON SEAL of the CITY OF )**  
**JOONDALUP** was hereunto affixed in the presence of: )  
)  
)

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Mayor

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Chief Executive Officer

**THE COMMON SEAL of CITY OF SWAN was )**  
hereunto affixed pursuant to a resolution of the Council )  
in the presence of: )  
)

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Mayor

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Chief Executive Officer

## **ATTACHMENT 1**