

How the Environment Act affects existing contracts'

📅 20 January 2023 👤 Michael Mousdale

This article was originally published on January 19, 2023 at [Let's Recycle](#)

In the area of waste management, the Environment Act 2021 contains a range of provisions relating to issues such as producer responsibilities, charges for single-use plastics, deposit return schemes, prevention of waste crimes and other miscellaneous provisions.

These provisions introduce a more comprehensive duty on waste collection authorities to collect and separate recyclables and residual waste, including a new duty to collect food waste (currently waste collection authorities have a discretion whether to collect this).

Dry and wet recyclables shall not be collected together and, importantly, food waste must be collected at least once a week. Government has said these provisions will be introduced in 2023, but there is nothing imminent. But, these provisions will undoubtedly add to the cost burdens of waste collection authorities. However, government has indicated (when the Environment Bill was in consultation) that “the additional burden presented... will be appraised in line with the New Burdens Doctrine and costs of new duties will be funded”.

For waste collection authorities, this may provide some comfort, despite a generally challenging financial environment. On the face of it, whether a waste collection authorities collects its domestic waste itself or engages a waste contractor, the cost of this will be met by additional resource from government.

However, the effect and cost of these new duties will be felt more widely than simply on the collection arrangements. It is not clear whether the assurance from government will also apply beyond the specific duties and address the consequential costs which will be faced in the sector.

This is because the effect will also be felt in arrangements made for recycling, the management of household waste recycling centres (HWRCs) and waste transfer and disposal contracts, especially those which employ energy from waste (EfW) as an end destination for disposal whether directly or through off-take contracts.

Food waste

The separate collection of food waste will not only impose new costs on collection, but will also affect disposal. Removal of food waste from the residual waste stream will affect its volume and composition. Not only will waste volume be reduced, but this may also affect the calorific value of the waste delivered to EfW facilities.

The calorific value of waste sent to EfW could change

The operators of those facilities may have to source additional waste, perhaps from the commercial market, to both maintain volume but also the mass balance. Even if the waste disposal authority (WDA) benefits financially from the reduced volume of waste (which might be the case on a take and pay basis which does not impact guaranteed minimum tonnages), the food waste still needs to be disposed of somewhere.

Disposal contracts will typically contain qualifying change in law provisions. In larger scale projects such as PFI/PPP, such clauses will protect the contractor from any financial downside which follows the introduction of new legislation.

However, it is important for all parties that they pay careful attention to those provisions to check that they provide the protection/pass the risk (depending upon your perspective) anticipated. One of the key facets of a change in law provision is that protection is usually not given for changes which could be anticipated when the contract commenced. In this case, government's intentions were clear from the Resources and Waste Strategy in December 2018 (and possibly before).

The private sector is unsurprisingly wary of taking the risk on any changes in law, even where foreseeable, in an area which has typically been full of future policy proposals. In negotiating contracts, therefore, they will often succeed in securing carve-outs for particular risks or even include a "waste law list" of potential measures which will nevertheless be deemed to be qualifying changes in law, despite their foreseeability. We have already seen that protection given for separate food collections.

The alternative methods of treatment for food waste tend to be either anaerobic digestion or in-vessel composting. The economics of such arrangements are complex, with the sale of power and compost potentially of some value. However, whether this can fully compensate for the additional cost of placing a new contract remains to be seen. The position is further complicated by the fact that where the waste collection authorities and the WDA are separate (in two-tier areas), it may be the WCA which seeks to find a source for the food waste, making use of its own powers of recycling.

HWRCs

Extended recycling on the doorstep will potentially reduce the amount of waste which is currently brought to HWRCs. This might be felt once (if) the deposit return scheme gets up and running (less plastic to run through recycling contracts) and also if waste collection authorities decide to combine food waste collection with collection of garden waste.

These changes will bring environmental benefits but authorities will need to be well-prepared.

Currently most waste collection authorities make a charge for collection of garden waste, which means that many householders will take that waste to the HWRC. If, however, it is collected for free with food waste (for which a charge cannot be made), this will see an overall reduction in the amount of garden waste brought to the HWRC.

These changes will undoubtedly bring environmental benefits. But authorities and contractors alike will need to be well-prepared to make sure that they do not get caught out in their current contractual arrangements.

Contact



Michael Mousdale
Consultant

Michael.Mousdale@brownejacobson.com

+44 (0)330 045 2499

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