

**Investigation into Wodonga City Council's
overcharging of a waste management levy**

April 2018

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The Victorian Ombudsman respectfully acknowledges the Traditional Owners of the lands throughout Victoria and pays respect to them, their culture and their Elders past, present and future.

Letter to the Legislative Council and the Legislative Assembly

To

The Honourable the President of the Legislative Council

and

The Honourable the Speaker of the Legislative Assembly

Pursuant to sections 25 and 25AA of the *Ombudsman Act 1973* (Vic), I present to Parliament my *Investigation into Wodonga City Council's overcharging of a waste management levy*.



Deborah Glass OBE

Ombudsman

24 April 2018

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Foreword

The three Rs of local government are, famously, roads, rates and rubbish. While all three feature regularly in complaints to the Ombudsman, this case concerns ‘rubbish’ – or more specifically, a waste management charge levied by a local council in which over 30 per cent of the revenue raised was used to fund services other than waste management.

Wodonga City Council raised some \$18 million surplus over the last decade through this charge – money that was indeed spent on council services, such as parks and playgrounds. But not on waste.

As every ratepayer knows, councils raise funds for general services through rates. While the council argues it has been transparent, did the average ratepayer in Wodonga really know they were paying extra in waste charges to subsidise other council services? Or when they received their annual rates bill and saw the line item for waste management, did they think they were paying solely for this essential service?

The council said it acted in good faith, believing the practice to be compliant with the Local Government Act, and that they consulted the community. I accept that the legislation does not explicitly require the council to recover only its reasonable costs.

However, the intent is clear. And our investigation found they maintained the practice, among other things, to avoid ‘unnecessary negative public reaction which may result from shifting the charges [to general rates]’. A widespread adoption of this approach creates the risk that councils could charge ratepayers an arbitrary figure for waste services, to be used on anything related to council activities, while avoiding the scrutiny that invariably attaches to rate rises.

While this practice long pre-dated rate capping, it raises issues about how revenue is raised, in an era when far greater transparency is expected of government. Although the council suggested the waste charge is ‘revenue neutral’ for ratepayers, as the money would have been recouped anyway in some form, this misses the point.

As Local Government Victoria pointed out, funding council services through a flat fee also raises issues of inequity and regressive taxation, as it is unrelated to a person’s capacity to pay.

Rate capping – which has been in effect since July 2016 – does put financial pressures on councils, especially rural councils with a smaller rate base and, often, ageing infrastructure. But those financial pressures need to be faced head on, in partnership with their communities, rather than buried in the financial fine print.

The financial pressures on councils and their communities are likely to increase with the latest developments in recycling household waste. All the more reason for councils to be open and transparent with ratepayers about the true costs of a service.

I am pleased this council has accepted my recommendation that they reduce their waste management charge to only recover the reasonable cost of the service provided. But 72 of the 79 Victorian councils have separate waste charges, and I encourage them to satisfy themselves that the charge reasonably reflects the service provided. To do otherwise is to undermine the public’s trust in how their money is spent.

Deborah Glass
Ombudsman

Background

The complaint

1. On 18 June 2016 the Ombudsman received a complaint that the Wodonga City Council (the council) had been over-charging its ratepayers a waste management levy by 'approximately 3.7 million [dollars] per annum' above the cost of running the service since at least 2008. The complainant stated those excess funds were used to pay for other council operations.
2. The complainant stated the council had not provided transparent information in its yearly budget about waste charges over the past years and that staff had raised concerns about the practice.
3. Ombudsman officers made enquiries under section 13A of the *Ombudsman Act 1973* (Vic) with the council on 19 October 2016 and 8 November 2016; and also met with the complainant on 6 February 2017, in order to assess whether an investigation should be conducted.
4. On 24 March 2017 the Ombudsman notified the Hon Natalie Hutchins MP, the Minister of Local Government at the time, Cr Anna Speedie, the council's Mayor and Ms Patience Harrington, the council's Chief Executive Officer, of her intention to conduct an investigation pursuant to section 15B of the *Ombudsman Act*.

Jurisdiction and methodology

5. The Ombudsman's jurisdiction extends to investigating complaints about administrative actions taken by or in an authority. The meaning of 'authority' includes a body corporate that is established under an Act for a public purpose.¹ As a body corporate established under the *Local Government Act 1989* (Vic) for the benefit of its community, the council satisfies this definition. Further, staff of a council also satisfy the definition of 'authority' under the Act.²
6. The investigation involved:
 - obtaining and reviewing the council's:
 - financial records
 - budget documents
 - Rating Strategy 2015
 - Strategic Resource Plan 2017 – 2027
 - internal briefing notes and reports
 - reviewing publicly available information about the council's waste management charge, including media articles
 - interviewing officers from the council, Local Government Victoria (LGV) and the Essential Services Commission (ESC), all of whom appeared on a voluntary basis³
 - the Ombudsman providing a draft report to the council for comment and considering its response.
7. All witnesses were given the opportunity to attend the interview with a legal representative. All chose to attend without legal representation.

1 *Ombudsman Act 1973* (Vic) s 2. Refer to the definitions of 'authority', 'public statutory body', 'specified entity' and also Schedule 1 item 13.

2 *Ombudsman Act 1973* (Vic) Schedule 1 item 15.

3 *Ombudsman Act 1973* (Vic) s 2. Refer to the definition of 'voluntary appearance'.

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8. This report includes adverse comments about the council.
 9. In accordance with section 25A(3) of the Ombudsman Act, any other parties who are or may be identifiable from the information in this report are not the subject of any adverse comment or opinion. The Ombudsman is satisfied that:
 - it is necessary or desirable in the public interest that the information that identifies or may identify those parties be included in this report, and
 - this will not cause unreasonable damage to those parties' reputation, safety or well-being.
 10. In reaching the findings in this report, the standard of proof applied is the balance of probabilities. In determining whether that standard has been met, the seriousness of the allegations made and the gravity of the consequences that may result from any adverse finding has been considered, as per the High Court decision of *Briginshaw v Briginshaw*.⁴
 12. However, in addition to the charge described above, the council also levies a separate 'waste management' charge to cover other purposes. This is explained further below. As a result, ratepayers within the council's municipality pay the following two compulsory service charges:
 - a garbage and recycling disposal charge, and
 - a waste management charge (also known as a levy).
 13. Under the council's 2015 Rating Strategy, ratepayers may also elect to pay a separate third charge, namely the green waste charge. However, this charge is not compulsory.
 14. According to the council's 2017-18 to 2026-27 Strategic Resource Plan, ratepayers paid \$500.20 per household as a total for both the garbage and recycling charge and the waste management levy for the 2016-17 year, and a total of \$480.20 for the 2017-18 year.
 15. This investigation concerns the council's administration of its 'waste management charge' only.

Waste Management Charge

11. The council's website states:

Domestic waste charges

Waste management services provided by the council include general waste, recycling and green waste collection.

Approximately half the charge is allocated against all households and businesses for the provision of community waste services for example street bins and operation of the Waste Transfer Station.

The remainder covers the contract costs for the collection of the bins.⁵

Role of Local Government Victoria

16. Local Government Victoria's (LGV) role includes overseeing the administration of the *Local Government Act 1989* (Vic) and providing policy advice to the Minister for Local Government. It also provides support to Victorian local councils by issuing guides for better practice, such as the *Local Government Better Practice Guide 2014 – Revenue and Rating Strategy*. LGV assisted the investigation by providing evidence on its views regarding the levying of rates and charges.

⁴ *Briginshaw v Briginshaw* (1938) 60 CLR 336.

⁵ Wodonga City Council, *Your rates* <<http://www.wodonga.vic.gov.au/roads-rates-rubbish/rates/rates-calculated.asp#domesticwaste>>.

Role of the Essential Services Commission

17. In 2015 the Essential Services Commission (ESC) conducted a review and reported to both the Minister for Finance and Minister for Local Government on options and a recommended approach for a rate capping framework.⁶ Under the current rate capping system, the ESC provides advice to the Minister for Local Government on setting the average rates cap for each financial year; assesses council applications for a higher cap; and also monitors councils' compliance with the applicable rate cap.⁷ The ESC assisted the investigation by providing evidence on its views regarding rate capping legislation.

Relevant legislation and policies

Legislation

18. Section 162 of the Local Government Act provides that a council may declare a service rate or annual service charge 'for the collection and disposal of refuse':

162 Service rate and service charge

(1) A Council may declare a service rate or an annual service charge or any combination of such a rate and charge for any of the following services –

- (a) the provision of a water supply;
- (b) the collection and disposal of refuse;
- (c) the provision of sewage services;
- (d) any other prescribed service.

(2) A service rate or service charge may be declared on the basis of any criteria specified by the Council in the rate or charge.

19. The council's 'waste management charge' is an annual service charge for 'the collection and disposal of refuse', and falls within the scope of section 162(1)(b).
20. There is no express reference in the wording in section 162(1) about the extent to which the charge must reflect the cost of providing the service.
21. In contrast the New South Wales *Local Government Act 1993* (NSW) requires that income generated from waste management charges be calculated so as to 'not exceed the reasonable cost' of providing that service:

504 Domestic waste management services

(3) Income obtained from charges for domestic waste management must be calculated so as to not exceed the reasonable cost to the council of providing those services.

22. Broadly speaking the South Australian *Local Government Act 1999* (SA) provides that a council cannot recover a service charge exceeding the cost to the council of establishing, operating, maintaining, improving and replacing the cost of the service:

155 Service rates and charges

(1) In this section –

prescribed service means any of the following services:

...

(b) the collection, treatment or disposal (including by recycling) of waste;

...

(5) A council must not seek to recover in relation to a prescribed service an amount by way of service rate, annual service charge, or a combination of both exceeding the cost to the council of establishing, operating, maintaining, improving and replacing ... the service in its area (being a cost determined taking into account or applying any principle or requirement prescribed by the regulations).

⁶ Essential Services Commission, *Local Government, Local Government Rate Capping & Variation Framework Review* <<https://www.esc.vic.gov.au/project/local-government/22765-local-government-rates-capping-variation-framework-review/>>.

⁷ Essential Services Commission, *Fair Go Rates system* <<https://www.esc.vic.gov.au/local-government/fair-go-rates-system/>>. See also, *Local Government Act 1989* (Vic) ss 185D-185E.

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23. The Western Australia *Local Government Act 1995* (WA) requires councils to recover only the cost of providing the service and to refund or provide a credit to ratepayers if money raised is more than the cost to provide the service, in certain circumstances:

6.38 Service charges

- (1) A local government may impose on -

- (a) owners; or
- (b) occupiers,

of land within the district ... a service charge for a financial year to meet the cost to the local government in the provision of a prescribed work, service or facility in relation to the land.

...

- (4) A local government may only use the money raised from a service charge -

- (a) to meet the cost of providing the specific service for which the work, service or facility charge was imposed; or
- (b) to repay money borrowed for anything referred to in paragraph (a) and interest on that money.

- (5) If a local government receives more money than it requires from the service charge imposed under subsection (1)(a) it -

- (a) may, and if so requested by the owner of the land, is required to, make a refund to the owner of the land which is proportionate to the contributions received by the local government; or
- (b) is required to allow a credit of an amount proportionate to the contribution received by the local government in relation to any land on which the service charge was imposed against future liabilities for rates or service charges in respect of that land.

- (6) If a local government receives more money than it requires from the service charge imposed under subsection (1)(b) it is required to make a refund to the person who paid the service charge which is proportionate to the contributions received by the local government.

The council's Rating Strategy 2015

24. Section 6.1 of the council's (current) 2015 Rating Strategy states:

6.1. Service Rates and Charges

The council is empowered under section 162(1)(b) of the Local Government Act (1989) to levy a service charge for the collection and disposal of refuse. The council currently applies two compulsory service charges - for garbage collection and recycling, and waste management, and one optional service charge being for green waste collection. Both these operate as a charge per assessment.

The council applies a garbage charge and recycling charge to cover the collection and disposal of waste and recycling, and associated capital works. These charges are supplemented by user charges at waste transfer stations.

A waste management levy is a charge levied to all occupied properties to cover the costs of waste management, which includes street cleaning, tip rehabilitation to comply with Environment Protection Agency directions, transfer station administration and other general waste management functions for the city.

In previous years, the council increased the waste charge to cover the cost of the establishment of a waste transfer station and some rehabilitation costs for the old landfills.

The current charge returns a net surplus for direct operating costs relating to waste management, and garbage collection and disposal. After allowing for indirect costs and land restoration costs the net surplus is approximately \$1.6 million per annum (as per 2014-15 Budget).

The current surplus is partially used for other environmental issues such as management of Wodonga's environmental lands, parks and gardens' activities, environmental sustainability based programs and activities, and some other programs. Council is currently experiencing an escalation in its waste disposal costs at the Albury Tip, and this will likely continue into the future.⁸

8 Wodonga City Council, Rating Strategy 2015 <http://www.wodonga.vic.gov.au/about-us/corporate-documents/strategies-plans-policies/images/Wodonga_Rating_Strategy_2015.pdf>.

The council's Strategic Resource Plan 2017-18 to 2026-27

25. Section 5.7 of the council's Strategic Resource Plan 2017-18 to 2026-27 states:

5.7 Waste service charges

(a) The council is empowered under section 162(1)(b) of the Local Government Act (1989) to levy a service charge for the collection and disposal of refuse.

Wodonga Council has used this option through the raising of garbage, recycling and green waste charges on the annual rate assessment. These funds are utilised for contractor payments for the collection and disposal of household waste services, eg the weekly green and fortnightly yellow and red lidded household bins.

...

(b) A separate waste management levy is levied to all occupied properties to cover the costs of all waste management actions other than the household service listed above.

In previous years this waste management levy was increased to cover the cost of the establishment of the waste transfer station in Kane Road and the decommissioning and rehabilitation of the old landfill site on Beechworth Road.

Incremental increases in the levy over that period to counter possible price spikes, has eventuated in a net surplus of approximately \$2-3 million against direct operating costs relating to garbage collection and disposal.

This surplus is used for other environmental issues such as managing council's environmental lands, street sweeping, cigarette disposal bins, landfill rehabilitation to comply with Environment Protection Agency directions, waste transfer station administration, and various green waste management activities undertaken by the parks and gardens teams and some other environmental programs.⁹

⁹ Wodonga City Council, *Strategic Resource Plan 2017-2018 to 2026-2027* <[http://www.wodonga.vic.gov.au/about-us/corporate-documents/council-plans/images/Strategic%20Resource%20Plan%202017-18%20%20Adopted%20\(D17.9567\).pdf](http://www.wodonga.vic.gov.au/about-us/corporate-documents/council-plans/images/Strategic%20Resource%20Plan%202017-18%20%20Adopted%20(D17.9567).pdf)>. Investigators also reviewed the equivalent paragraphs in the previous version *Strategic Resource Plan 2016-2017 to 2025-2026* and found no substantial differences between this and the current version.

Investigation

Evidence of surplus and expenditure

26. The council's response to the Ombudsman's written enquiries from 2 November 2016 stated that for the 2015-16 financial year, its income from waste charges was \$8.2 million and direct waste expenditure was \$5.8 million. Taking into account other waste-related income,¹⁰ the surplus for 2015-16 was \$3.37 million.

27. The council stated that the surplus:
 ... was re-invested into other waste and related programs ... the surplus forms part of the council's consolidated revenue. As such it is an important component of the council's general revenue which funds a range of operational services.

28. The council provided a table showing the other 'operational services' which were funded by the surplus generated from the waste management charge (Appendix A). This included items such as:

- Lake Hume reserves
- environmental lands
- children's fairs
- reserves and parks
- road maintenance
- sporting grounds
- fire access track maintenance
- playgrounds
- emergency response
- mowing.

29. As the items above appear unrelated to waste management, further detail was requested from the council.

Figure 1: Total waste and 'other' expenditure



*2015-16 total of waste and 'other' expenditure
 Source: Wodonga City Council

10 The other waste-related income comprised of income generated from waste transfer station user fees (\$378,067), costs recovered and government grants (together \$590,657).

30. In its response dated 24 May 2017 the council provided information showing that the surplus was spent on items such as:

- outdoor furniture
- security services
- fire planning
- construction of facilities on reserves and nature trails
- soccer nets
- property maintenance and operation costs e.g. water bills, equipment for maintenance work, landscaping, weeding, pest control, mowing, removal of graffiti, repairs to plumbing
- roadworks
- drainage installation
- food and drink
- fishing jetties
- management of various wetlands and nature trails
- energy efficient lighting upgrades.

31. Investigators reviewed the council's 2016-17 Operating Budget. This shows that the adopted operating budget for the Lake Hume Reserves, Environmental Lands, Parks & Gardens business units¹¹ was spent on activities such as:

- building nature trails
- implementing fire management strategies
- maintenance of parks and gardens, such as revegetation activities, pest species removal, fencing replacement
- upgrade of irrigation systems.

32. A comparison of the Operating Budget with the information provided in the council's 14 December 2016 response is shown below:

Expenditure of surplus	Amounts stated to be funded by the waste management surplus (Appendix B)*	Adopted operating budget for the business unit
Lake Hume Reserves	\$104,095	\$104,000 [^]
Environmental Lands	\$535,882	\$527,946 ^{**}
Parks & Gardens	\$2,599,732	\$4,376,256 ^{^^}

* Investigators queried the discrepancy between the amounts provided in the Council's response of 14 December 2016 (Appendix B) and in its earlier response of 2 November 2016 (Appendix A). The Council clarified the discrepancy was because the 2 November 2016 expenditure amounts included offsetting revenue whereas the 14 December 2016 response only showed gross expenditure.

[^] Wodonga City Council, 2016-2017 *Budget - Operating Budget by Business Unit*, 131.

^{**} Ibid, 128.

^{^^} Ibid, 130.

¹¹ Wodonga City Council, 2016-2017 *Budget - Operating Budget by Business Unit* <<http://www.wodonga.vic.gov.au/about-us/corporate-documents/council-plans/Downloads.asp?whichcategory=55&ArealD=13&SortOrder=Alpha>>, 124-126.

33. A comparison of the expenditure amounts as shown in the Operating Budget and the council's 14 December 2016 response suggests the waste management charge surplus may subsidise:

- the entire operational budget for the Lake Hume Reserves and Environmental Lands business units
- more than half of the Parks and Gardens business unit's operating budget
- various activities unrelated to waste management categorised under these three business units.

34. A report prepared by the council to review its ratings strategy in 2010 noted the surplus was in effect subsidising general rate revenue:

The draft Rating Strategy 2010 noted that the current waste management rates currently generated surplus revenue was therefore cross subsidising general rate revenue by \$1.48 million [*sic*].

Timespan of practice

35. In response to enquiries the council advised that 'the current Waste Management Charge arrangements have been in place since at least the early 2000s.'

36. The 'direct waste expenditure' relates to waste management, street garbage collection services and costs for operating a waste transfer station and landfill rehabilitation. The table illustrates the surplus generated from waste management charges has generally increased from \$1.6 million to \$2.4 million over the past decade.

37. The council provided the investigation with a table outlining the surplus generated from waste management charges for each financial year from 1 July 2006 to present. In summary, the surplus generated from 1 July 2006 to 30 June 2016 was as follows (in millions of dollars):

	06-07	07-08	08-09	09-10	10-11	11-12	12-13	13-14	14-15	15-16
Income from waste management charges	3.9m	4.0m	4.3m	4.6m	5.1m	5.6m	6.2m	6.6m	6.8m	8.2m
Total direct waste expenditure	2.2m	2.2m	3.1m	3.0m	4.0m	4.0m	4.1m	4.6m	4.5m	5.8m
Surplus	1.6m	1.9m	1.2m	1.6m	1.1m	1.7m	2.1m	2.0m	2.3m	2.4m

Nexus between expenditure of section 162(1)(b) charges and surplus revenue

38. At interview the council was asked about the nexus between expenditure items and section 162. The following exchange occurred:

Investigator: We have had a discussion with Local Government Victoria about waste charges ... LGV's view was that section 162 ... particularly relates to the collection and disposal of refuse ... Looking at some of the financial documents you provided, whilst some of those costs relate to collection of refuse, some of them don't. I would like your comments on that ...

Council Officer 1: Can you refer us as to things it's not [related to section 162]?

Investigator: For example, you've mentioned here [referring to council's spreadsheet] ... those environmental capital projects relate to things like energy efficient lighting upgrades, fishing jetties and wetlands, sustainable public lighting action plans and so forth. My question is, on the face of it, that doesn't look like it has anything to do with the collection and disposal of refuse ... I'm keen to get your thoughts on that.

Council Officer 2: We've evolved over time ... [section 162] says we may levy a charge and it says to offset the cost of collecting and disposing of refuse. But it doesn't say whether it needs to under or over recover, but, whatever isn't covered comes back to general rates ... There was a time back when we said, there was a surplus ... The question was, what do you do with the surplus? Well it's not going into anyone's pockets, but it goes into general rates. It's just another form of revenue recovery. If it doesn't come from here, it will come from there. But we are open and transparent. The obvious waste disposal items, such as kerbside waste collection and landfill transportation, there was a surplus and the rest of it would go into environmental type activity. That was in our Ratings Strategy.

Decision making process

39. Although current arrangements regarding the waste management charge have been in place since the early 2000s, it appears the arrangement was first reviewed by the council in 2010 during a community consultation process for creating its 2010 Ratings Strategy. The council's Ratings Strategy is a public document which sets out the council's framework for levying rates and charges.¹²
40. The council provided evidence to the investigation showing it conducted a formal consultation process with the community in accordance with the requirements of section 223 of the Local Government Act to create the Ratings Strategy, including:
- putting out public notices (eg website, information sessions, newspaper) to invite submissions from the community on the matter
 - meeting with ratepayers about the issue and inviting written submissions.
41. In 2010 the council also developed a 'Rating Strategy Working Group' to advise on the development of the Rating Strategy. The Group comprised individuals representing a wide range of interests, including residential, business and rural ratepayers.¹³ Although the council received 12 submissions from the community regarding the Ratings Strategy that year, none of those specifically related to the waste management charge.

¹² Wodonga City Council, *Rating Strategy 2015*, 1.

¹³ The Group included a residential ratepayer, property developer, accredited property-valuer, a welfare organisation, rural ratepayers and farmer and business developer.

42. When asked to provide a copy of legal or other advice it received about compliance with section 162, the council stated it had not obtained any written legal advice; but in 2008 it had obtained verbal advice by telephone from the Municipal Association of Victoria (MAV) and LGV. The council's internal briefing notes at the time record:

Both organisations concur with the view that section 162 applies to our garbage charges and accordingly there is no requirement that our garbage charges be revenue neutral. LGV, however, did indicate that the use of service fees to generate profits, as a general principle, was not encouraged.

43. The notes show a recommendation was made to councillors to leave the waste management charges 'as they are', despite LGV's advice that it was not encouraged, because it:

- had not received any objections from the public
- had received advice that the charges did not contravene the Local Government Act
- could implement strategies in the future (eg free bins) to reduce the surplus
- wished to avoid 'unnecessary negative public reaction which may result from shifting the charges [to general rates]'.

44. In 2015 the 2010 Rating Strategy was reviewed and another Working Group was set up. Again, extensive community consultation was undertaken and again, no submissions were received by the council regarding the waste management charge.

Discretion in levying rates and charges

45. The council gave evidence that there is no requirement under section 162 of the Local Government Act to levy the waste charge on a cost basis. It was also noted that each municipality is different and has different needs, and so the Act confers on councils a discretion regarding how to levy rates and charges, to allow for flexibility in generating revenue.

46. The investigation asked LGV for its views on how the discretion to levy a waste charge pursuant to section 162 should be exercised. In response, Dr Graeme Emonson, Executive Director, stated:

[Section 162] makes no specific reference to the rate or charge defraying the specific cost of a service; however, it does align the specific service with a specific charge or rate.

The 2014 LGV *Revenue and Rating Guide* provides good practice guidance to local governments on the design and application of user fees which may include waste charges under Section 162.

The waste management charge levied by Wodonga City Council should be calculated and applied in accordance with the *Revenue and Rating Guide*. For good practice, it would be reasonable to expect the revenue raised from the waste management charge levied by Wodonga City Council be only used to recover the cost to council of providing collection and disposal of refuse services.

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47. Dr Emonson also observed that the levying of service charges, such as waste charges, raises issues of inequity and regressive taxation, due to its nature as a flat charge:

... a service rate or service charge is usually levied on the basis of units of services received or consumed. General rates, however, are levied on property value, which broadly equates to the concept of 'capacity to pay'.

By levying a waste charge at an amount greater than the cost of providing the waste service, the additional revenue raised effectively substitutes an equivalent amount that would be otherwise collected from general rates. As rates are calculated on the basis of property value, lower valued properties generally pay more when a flat charge is applied compared to an *ad valorem* calculation of rates. This regressive impact is accentuated where more revenue is raised via a service charge compared to the cost of providing the respective service.

48. At interview, Mr Andrew Chow, Director of Local Government at the ESC, observed that these issues may have arisen due to the absence of a definition of 'refuse' in the Local Government Act:

We think there are a number of things that Wodonga (or any council) can group together under waste service and related costs. Currently, the Act does not define what is 'waste' ie What's in and what's out? ... When it is less than clear, in terms of how councils term those costs and those services, it will vary from council to council. You've got a pretty challenging issue at hand.

49. LGV's views on what it considers good practice for levying waste charges under section 162 was put to Mr Chow. Mr Chow commented:

When there is an authority to charge, even if they can't define exactly what they are charging, it helps if we are clear about the outcomes or the impacts arising from those charges. There may be two ways of solving that - one, obviously, is to have a working definition of what those charges encompass. But it might be interpreted as burdensome in the sense that you want [councils] to be innovative. Another option is to do like as currently operating under special charges [section 163 of the Local Government Act], ie there are some principles or process that go with it - the cost benefit, cost reflectivity, process requirements. So that there are the checks and balances if you can't define the outcomes ...

50. In response to the Ombudsman's draft report, Mr Chow also stressed that the comments he gave are his own and are not those of the ESC. The investigation notes his comments are consistent with those of the ESC, as discussed further below.

Rate capping

51. On 2 December 2015 the *Local Government Amendment (Fair Go Rates) Act 2015* (Vic) came into operation. The purpose of these amendments was to set a cap on increases in rate revenue ('rate capping') that can be levied by a council in a financial year. This was due to concerns in the community that council rates were continuing to increase on average 6 per cent a year.
52. Only general rates and municipal charges are capped. Service charges such as waste charges and other service levies are not capped. General rates for the 2016-17 financial year were capped at 2.50 per cent, 2.00 per cent for 2017-18 and 2.25 per cent for 2018-19. Should a council wish to increase its general rates above this amount it must apply to the ESC for approval.
53. Mr Chow gave evidence that the rate capping legislation was deliberate in excluding service charges, such as waste charges. The rationale was that the provision of services by a council is typically subject to a tender process and so is largely determined by market forces. He stated that subjecting charges that are sensitive to market forces to a cap would be difficult, but had previously recommended to government to consider 'enshrining the cost reflectivity principle in the Act' as a 'check and balance' if service charges were to be excluded from the cap.
54. The ESC's 2015 report *A Blueprint for Change, Local Government Rate Capping & Variation Framework Review* states:
- If service rates and charges are to be excluded from the cap, we continue to believe there is merit in the Government reviewing the [Local Government Act] provisions regarding service rates and charges to require that these charges must reflect the efficient costs of providing the underlying service.
- ...
- The Commission recommends that the Government consider amending the *Local Government Act 1989* to require that service rates and service charges must reflect the efficient costs of providing the underlying service.¹⁴
55. Mr Chow appeared as the Director for Local Government of ESC, at a public hearing of the Standing Committee on the Environment and Planning - Inquiry into Rate Capping Policy, in which he stated the levying of service rates and charges should not result in large profits:
- The cap is calculated excluding service rates and charges in those councils that actually have it outside of the general rates. We also allow councils who are thinking of separating it out to do so, and when they do that they have to do it on the basis that it is revenue neutral - in other words, it does not result in a windfall gain to the council when the council makes a change. So for the community and the ratepayers as a whole it is kept neutral¹⁵ ...

¹⁴ Essential Services Commission, *A Blueprint for Change, Local Government Rate Capping & Variation Framework Review - Final Report* (2015) 123.

¹⁵ Evidence to the Standing Committee on the Environment and Planning- Inquiry into rate capping policy, Parliament of Victoria, Melbourne, 18 October 2016, 35 (Mr Andrew Chow, Director, Local Government, Essential Services Commission) <https://www.parliament.vic.gov.au/images/FINAL_SCEP_Rate_capping_policy_18_October_2016_Essential_Services_Commission.pdf>.

56. At interview investigators asked the council whether the waste charge was deliberately raised to circumvent rate capping. The following discussion occurred:

Investigator: You can understand how someone may be concerned about this surplus that is being raised and going onto general rates as a way of looking as though ...

Council Officer 1: ... [the surplus is] compensating for rate capping?

Council Officer 2: That's totally unfair. Rate capping just came in. So there's never been a shift...

Council Officer 1: We've never even thought about it that way. The answer to the question is no.

57. Shortly after the interview the council provided the following written response:

11. Assertions that Council has sought to avoid rate capping through its Waste Management Charge arrangements are fundamentally denied and are not supported by the facts. The current Waste Management Charge arrangements have been in place since at least the early 2000's. Since then percentage increases in the Waste Management Charge have been identical to the increase in general rates, with the exception being the introduction of the Organics Third bin in 2015/16. Since the introduction of rate capping the following annual adjustments have applied.

Year	General rates	Waste Management Charge
2016/17	2.5%	2.5%
2017/18	2.0%	Reduction of \$20 or 4%

Further, benchmarking exercises such as those conducted by the MAV use a "combined rates and charges per assessment" figure (including the waste management charge) when seeking to compare the relative rates costs across all council. This survey is the primary source of rates benchmarking referred to across the state by media and the community. For this reason any suggestion in the community that waste management charges are being overpriced or manipulated so that the rates component appears more favourable when compared with other Victorian councils in the MAV survey is also ill-informed.

58. It is not disputed that arrangements for waste charges were well in place before rate capping legislation came into effect. However, the briefing report from 7 July 2008 shows the council was cognisant of issues relating to over-charging and considered whether the surplus should be reduced or eliminated. The briefing report noted that eliminating the surplus would increase general rates by about 7 per cent:

A one-off correction in say 2009/10 by reducing waste management rates by \$1.5 million, and adding this amount to the general rates revenue would result in an increase in general rates of approximately 7%, with a corresponding reduction in waste management rates of 34%.

Although this shift would be revenue neutral the increase in general rates would likely attract negative media and community attention.

59. The briefing report ultimately recommended to councillors that the waste charge arrangement should remain unchanged, including the 'apparent cross subsidy between garbage charges and general rates', for the following reasons:

- To date no concerns have been raised by the general public
- We are not in contravention of the Act
- In future Council may consider waste management initiatives, such as free green bins for all, which will reduce the apparent surplus (eliminates risk of reducing collection charges now, then increasing them again if Council decides to introduce this initiative in several years time), and
- It avoids unnecessary negative public reaction which may result from shifting the charges, and its varying impacts between customer groups (despite being revenue neutral overall).

Table 3: Council financial analysis excerpt

Change needed to break even (%)	2008-09	2009-10	2010-11	2011-12	2012-13
General Rates revenue excluding waste charges	6.7%	7.1%	7.2%	7.5%	8.0%
Waste management rates	-31.8%	-33.6%	-34.1%	-35.3%	-37.9%

60. The council's analysis (reproduced above) for 2008-09 to 2012-13 shows that if the waste management charge was to be recovered on a cost basis, then general rates would increase between 6.7 and 8 per cent.
61. After the investigation commenced the council decreased the garbage and recycling charge by \$20 from 2016-17 to 2017-18, but the waste management levy remained the same.¹⁶

Municipal charge

62. The council gave evidence that although it has the discretion to raise a municipal charge, it chose not to; and if the waste charge was to be reduced to cost level then the council would raise a municipal charge instead:

The reality is, if you didn't pay for it that way, then you'd pay for it in another way. It's only a shift in tariff between the two ... if this was not acceptable to somebody you could just switch between the two and it'd come back to you anyway. It's just a different line on the invoice.

...

The simple response is, make sure that line is absolutely spot on and [we] go on and charge a municipal charge. That's really what's going to happen here.

63. Further evidence was given that the council's fixed charges (ie combined municipal and waste charges), in comparison to other Victorian councils, are somewhere 'in the middle of the pack'¹⁷ and 'ranked at 21 of 78' of all Victorian councils from highest to lowest in amount. The council provided a MAV Rates and Charges survey graph supporting this.
64. However this evidence relates to combined municipal and waste charges. In contrast, a separate MAV survey which refers to waste charges only, shows that for the 2015-16 financial year, the council had the second highest waste charge, out of all 79 Victorian councils.¹⁸
65. The council also stated at interview that the 'real' issue is not about establishing a nexus between the surplus revenue and section 162, but rather, determining a reasonable balance between variable (that is, general rates, the amount of which depends on a property's valuation) and fixed components of revenue (eg flat charges such as service or municipal charges).

¹⁶ Wodonga City Council, *Strategic Resource Plan 2017-2018 to 2026-2027*, 34.

¹⁷ At interview with the Council officers.

¹⁸ Email from Wodonga City Council dated 24 May 2017, 'Attachment K'.

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66. The council added that restructuring the waste charge to cost level would be an unnecessarily difficult process:

So to move [the surplus] from here to here, I [would need to] cross this big boundary here [the ESC] ... then you guys would have no questions for me then. We'd all be happy, but I have to cross this boundary. This costs us \$100,000, community consultation all over the place, ESC's submission, their time, our time and for councillors a lot of political pain trying to explain to communities [that] we've got a submission to the ESC but all we're doing is moving between two lines. This is quite [an] onerous, horrendous fixed [charge] that really in the end, it moves between two lines ... what have we achieved?

67. The council's suggestion of raising a municipal charge was put to LGV, to which Dr Emonson responded:

The Act currently permits a council to raise a municipal charge to 'cover some of the administrative costs of the council'. Whilst the Act does not define these administrative costs, it does limit the amount that can be raised in that it must not exceed 20 per cent of the total revenue to be raised through a combination of the municipal charge and general rates in that financial year (Section 159).

The Council is permitted to raise revenue by way of municipal charge, but may only do so through the declaration of a municipal charge as part of the budget process. The levying of such a charge must only be to cover some of the council's administrative costs. The levying of a municipal charge should not be used for another purpose. The 2014 *LGV Revenue and Rating Guide* discusses these concepts in more detail with guidance for councils.

It is noteworthy that with the introduction of the Fair Go Rates System, the municipal charge is included in the rate cap calculation.

Conclusions

Application of section 162

68. The council's waste management charge is a service charge pursuant to section 162(1)(b) of the Local Government Act, which provides that a council may declare a service rate or an annual service charge for 'the collection and disposal of refuse'.
69. Unlike waste charge legislation in other states, section 162 does not explicitly state that waste management charges must be levied at the cost of providing waste management services. However the provision surely requires waste management charges to be levied for a specific purpose, namely, 'the collection and disposal of refuse'.
70. The investigation identified that:
 - The council levies a waste management charge at levels substantially above the fair cost of providing waste management services, and generates a substantial surplus.
 - This surplus is then used to subsidise activities unrelated to waste management and also general rate revenue.
 - While not set up with the intention of doing so, the arrangement has allowed the council to avoid general rate increases.
71. The evidence shows the council has, since 2006, levied waste management charges substantially above the actual cost of providing those services, and has generated revenue ranging from \$1.1 million to \$2.4 million per financial year. These amounts are the net amounts, taking into account 'direct waste expenditure' from gross revenue generated from the charges.
72. The evidence shows the surplus has been spent on operational areas unrelated to waste management and which would ordinarily be funded by general rates. For the 2015-16 financial year, it appears the surplus subsidised the entire operational budgets for the Lake Hume Reserves and Environmental Lands business units, more than half of the \$4.4 million Parks and Gardens business unit and substantial non-waste related activities within those units.
73. The calculation of rates and charges is not, as the council has rightly stated, 'an exact science'; and given the nature of taxation, there may be challenges in correlating the provision of services to specific operating and broader infrastructure costs. However the view that general rates, municipal and waste charges are 'just a different line on the invoice' is not acceptable. The Local Government Act requires that a waste management charge be levied 'for ... the collection and disposal of refuse', and it is wrong to levy a waste management charge for operations other than that purpose. The waste charge is required to be levied for that particular purpose, unlike general rates or municipal charges.

Rate capping

74. The use of the waste management surplus to effectively subsidise general rates was and continues to be an entrenched practice in the council, having been in place since at least 2006-07. Since December 2015, this practice has enabled the council to continue to avoid increases in general rates, the key issue which rate capping legislation sought to address.
75. The council disagrees with this conclusion stating:

In fact, if Council had been intent on avoiding general rate increases it would not have increased the waste management service charge in the manner that it did. With two exceptions, every percentage increase in the general rate has been matched by an increase in the waste management service charge. For example, in the 2016/2017 Financial Year there was a general rate increase of 2.5% and an increase in the waste management service charge of 2.5%. The only exceptions have been in the 2015/2016 Financial Year (when a third – organics – collection service was introduced) and in the current Financial Year (when there was a 2% increase in the general rate but a reduction of 4% in the waste management service charge).

The post-2008 evidence is simply at odds with the conclusion ...

Regressive taxation

76. Victorian councils are required to have regard to the equitable imposition of rates and charges, under section 3C(2) (f) of the Local Government Act. Utilising waste management charges – a regressive form of taxation – to fund general rates gives rise to issues of fairness and equity. Unlike general rates the flat nature of the waste management charge allows no consideration of a ratepayer's capacity to pay.
77. The council gave evidence that it would be prepared to raise a municipal charge to compensate for the surplus revenue lost if it was to levy the waste management charge on a cost basis. Under the Local Government Act, councils may declare a municipal charge under section 159 to cover some of its 'administrative costs'.
78. 'Administrative costs' are not defined in the Local Government Act, and like service charges, a municipal charge is also a flat tax. As noted by the Review Advisory Committee in the 2016 Review of the Local Government Act, the absence of definition may lead to issues of transparency, as it is unclear what councils may or may not recover under this provision. Further, as a flat tax, using the municipal charge as a means to compensate for the surplus revenue raised from waste management charges and to avoid general rate increases may be inconsistent with principles of equity and fairness.

Revenue neutrality

79. In response to the Ombudsman's draft report, the council stated it disagrees with the conclusion that the waste management charge generated considerable revenue:

It is not as though the waste management service charge has led to Council deriving additional revenue ... Any over-charging only goes to the manner in which Council's overall income from rates and charges has been apportioned. If the waste management service charge had been in a lower amount and raised less revenue it is likely that the general rate would have been higher or a municipal charge would have been levied (or both).

...

[There is] insufficient emphasis on the fact that the use of the waste management service charge has been revenue neutral to ratepayers, having regard to the fact that any revenue foregone from a lower waste management service charge would have been compensated by revenue from a higher general rate or a higher rate and municipal charge.

Opinion

80. On the basis of the evidence obtained in the investigation:

- The council appears to have acted in a manner that is wrong pursuant to section 23(1)(g) of the Ombudsman Act, by levying funds for 'the collection and disposal of refuse' under section 162(1)(b) of the Local Government Act, and using those funds for purposes other than for the 'collection and disposal of refuse'.

Recommendations

Pursuant to section 23(2) of the Ombudsman Act, it is recommended:

Recommendation 1

That the council reduce its waste management service charge to only recover the reasonable costs of the collection and disposal of refuse and to effect the above within three years from the finalisation of this investigation.

Council's response:

Council accepts this Recommendation and gives an assurance that it will work with the Essential Services Commission to implement what is recommended. In accepting this Recommendation, Council wishes to have it recorded that:

- it has been, and will continue to be, completely transparent with its community in relation to how the waste management service charge has been levied and how its proceeds have been spent;
- community consultation has been, and will continue to be, an essential element in the development of Council's Rating Strategy; and
- Council's use of the waste management service charge has not led to any extra impost on the community because the total amount of revenue derived from rates and charges during the relevant years would have been the same. The revenue derived from the waste management service charge would have instead been revenue derived from a higher general rate or a municipal charge (or a combination of both).

Recommendation 2

That Local Government Victoria consider recommending that section 162 of the *Local Government Act 1989* (Vic) be amended to require that charges for the collection and disposal of refuse reflect the reasonable cost of providing that service.

Local Government Victoria's response:

LGV considers that there is benefit in making the requirement explicit and will consider this in the current review of the *Local Government Act 1989*.

Council's response:

Council supports this Recommendation, and intends to itself make representations to the Minister for Local Government that the nature of the service charge for the 'collection and disposal of refuse' requires clarification.

In doing so, Council wishes to have it recorded that:

- at all times it acted in good faith, genuinely believing that section 162 could be used to raise the revenue that was, in fact, raised;
- the vagueness of the language of section 162 (and particularly the vagueness of the concept of 'refuse') led to Council forming the belief that it was entitled to levy the waste management service charge in the way that it did (especially since Council considered that it was doing no more than specifying the 'criteria' referred to in section 162(2)); and
- the unsatisfactory terms of section 162 and its reform have implications for all Victorian councils, and that other councils may similarly have had an impression that a waste management service charge could be used to raise revenue beyond the cost of providing the service of collecting and disposing of household waste, recyclables and green waste.

Appendix A

Income		
Waste Management		
• Section 162 fees	8,165,285	
• Costs recovered and grants	590,657	
Waste Transfer Station fees	378,067	
Total	9,134,009	9,134,009
Direct waste expenditure		
Waste Management	3,472,061	
Street Garbage	297,355	
Waste Transfer Station	1,159,601	
Landfill Rehabilitation provision	852,117	
Sub total	5,781,134	5,781,134
Other waste related expenditure		
Lake Hume Reserves	52,201	
Environmental Lands	482,744	
Parks and Gardens		
• Children's Fair	1,339	
• Reserves and parks	1,652,104	
• Road maintenance	8,242	
• Sporting grounds	570,464	
• Fire access track maintenance	18,131	
• Rural roadsides	421	
• Playgrounds	112,656	
• Central Business District	85,110	
• Bushlands / hill	364	
• Emergency response	17,728	
• Additional mowing	133,841	
• Environmental related projects	231,502	
Sub total	3,366,847	3,366,847
		(13,972)

The numbers shown in the table above are expressed in dollars. The (13,972) relates to the loss incurred, after subtracting the total 'direct waste expenditure' and 'other waste related expenditure' from the total income.

Source: Wodonga City Council.

Appendix B

Wodonga Council - year ended 30 June 2016

Dissection of other waste, collection and disposal, and environmental expenditure

Business Unit	\$	Waste and Litter Collection	Green waste collection and disposal	Graffiti and Vandalism clean up	Other environmental activity
Lake Hume Reserves	104,095	84,385	14,489	-	5,221
Environmental lands	535,882	1,728	363,920	1,077	169,157
Parks and gardens activities	2,599,732	170,549	1,979,193	1,348	-
Environmental related capital projects	230,914	-	48,273	-	182,641
Buildings Maintenance	15,000	-	-	15,000	-
Grand Total	3,486,292	258,001	2,405,875	17,425	804,991

Source: Wodonga City Council.



Victorian Ombudsman's Parliamentary Reports tabled since April 2014

2018

Investigation of a matter referred from the Legislative Council on 25 November 2015
March 2018

2017

Investigation into the financial support provided to kinship carers
December 2017

Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre
November 2017

Investigation into the management of maintenance claims against public housing tenants
October 2017

Investigation into the management and protection of disability group home residents by the Department of Health and Human Services and Autism Plus
September 2017

Enquiry into the provision of alcohol and drug rehabilitation services following contact with the criminal justice system
September 2017

Investigation into Victorian government school expulsions
August 2017

Report into allegations of conflict of interest of an officer at the Metropolitan Fire and Emergency Services Board
June 2017

Apologies
April 2017

Investigation into allegations of improper conduct by officers at the Mount Buller and Mount Stirling Resort Management Board
March 2017

Report on youth justice facilities at the Grevillea unit of Barwon Prison, Malmsbury and Parkville
February 2017

Investigation into the Registry of Births, Deaths and Marriages' handling of a complaint
January 2017

2016

Investigation into the transparency of local government decision making
December 2016

Ombudsman enquiries: Resolving complaints informally
October 2016

Investigation into the management of complex workers compensation claims and WorkSafe oversight
September 2016

Report on recommendations
June 2016

Investigation into Casey City Council's Special Charge Scheme for Market Lane
June 2016

Investigation into the misuse of council resources
June 2016

Investigation into public transport fare evasion enforcement
May 2016

2015

Reporting and investigation of allegations of abuse in the disability sector: Phase 2 – incident reporting

December 2015

Investigation of a protected disclosure complaint regarding allegations of improper conduct by councillors associated with political donations

November 2015

Investigation into the rehabilitation and reintegration of prisoners in Victoria

September 2015

Conflict of interest by an Executive Officer in the Department of Education and Training

September 2015

Reporting and investigation of allegations of abuse in the disability sector: Phase 1 – the effectiveness of statutory oversight

June 2015

Investigation into allegations of improper conduct by officers of VicRoads

June 2015

Investigation into Department of Health oversight of Mentone Gardens, a Supported Residential Service

April 2015

Councils and complaints – A report on current practice and issues

February 2015

Investigation into an incident of alleged excessive force used by authorised officers

February 2015

2014

Investigation following concerns raised by Community Visitors about a mental health facility

October 2014

Investigation into allegations of improper conduct in the Office of Living Victoria

August 2014

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