



NSW Container Deposit Scheme

Common Dispute Deed

NSW Container Deposit Scheme: Common Dispute Deed

Minister for the Environment of the State of New South Wales
State

Exchange for Change (NSW) Pty Ltd
Scheme Coordinator

Tomra Cleanaway Pty Limited
Network Operator

[and all parties who have delivered an Accession Deed Poll]

Clayton Utz
Lawyers
Level 15,
1 Bligh Street
Sydney NSW 2000
PO Box H3
Australia Square Sydney NSW 1215
Tel +61 2 9353 4000
Fax +61 2 8220 6700
www.claytonutz.com

Our reference 708/80179515

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Common Dispute Deed

NSW Container Deposit Scheme - Common Dispute Deed

Date:

Parties:

1. Exchange for Change (NSW) Pty Ltd ACN 620 512 469 of Level 4, 126-130 Phillip Street Sydney NSW 2000 (**Scheme Coordinator**);
2. Tomra Cleanaway Pty Limited ACN 620 427 116 of Level 31, 133 Castlereagh Street, Sydney NSW 2000 (**Network Operator**);
3. Minister for the Environment for and on behalf of the Crown in right of the State of New South Wales (**State**);
4. All parties who have delivered an Accession Deed Poll.

Recitals:

- A The State has entered the Scheme Coordinator Agreement with the Scheme Coordinator.
- B The State has entered the Network Operator Agreement with the Network Operator.
- C The Scheme Coordinator has entered into a Network Arrangement with the Network Operator.
- D The Scheme Coordinator has entered into Supply Arrangements with Suppliers which have acceded to and are parties to the Common Dispute Deed.
- E The Scheme Coordinator intends to enter into Supply Arrangements with other parties each of which will be a Supplier, and will accede to and become party to the Common Disputes Deed.
- F The intention of this deed is to provide a process for the determination of a Common Dispute arising under one agreement and to bind related parties and the Scheme Coordinator under other agreements to the determination, without the need to have the dispute determined again and separately under those other agreements.
- G The terms of this deed will apply to Common Disputes where the Scheme Coordinator advises some or all of the parties to this deed that a Common Dispute exists.

It is agreed as follows.

1. Definitions and Interpretation

1.1 Definitions

Act means the Waste Avoidance and Resource Recovery Act 2001 (NSW).

Accession Deed Poll means a deed substantially in the form of Schedule 2 to this deed.

Common Dispute means a dispute which involves a question of law (including a question of contract interpretation) or a question of fact, that is of general application or importance to a Network Operator Agreement, Scheme Coordinator Agreement, Network Arrangement or Supply Arrangement between the Scheme Coordinator and another Scheme Participant and in respect of which the Scheme Coordinator has given a Notice of Common Dispute.

Effective Date means the date on which the later of the Scheme Coordinator, the Network Operator and the State executes this deed.

Notice of Common Dispute means a Notice of Common Dispute given under a Scheme Coordinator Agreement, Network Operator Agreement, Supply Arrangement or a Network Arrangement.

Notice of Participation means a notice given under clause 2(b) of this deed.

Network Operator means Tomra Cleanaway Pty Limited.

Network Operator Agreement means the agreement entered into by the Network Operator and the State in relation to the Scheme on or about the date of this deed.

Network Arrangement means a contract between the Scheme Coordinator and a Network Operator in relation to the NSW Container Deposit Scheme.

Market Share means:

(a) If the Common Dispute relates to a Supply Arrangement, the proportion calculated as:

(i) The daily average number of containers supplied by that particular Supplier; divided by

(ii) the daily average of the total containers supplied by all Suppliers which are either an SP Party or a Related Scheme Participant,

in each case based on data for the 12 months period prior to the date of the Notice of Common Dispute, as such amounts are determined in accordance with the Scheme Payment and Contribution Methodology.

(b) If the Common Dispute relates to a Network Arrangement, the proportion calculated as:

(i) The daily average number of containers recovered by that particular Network Operator; divided by

(ii) The daily average of the total number of containers recovered by all Network Operators which are either SP Party or a Related Scheme Participant,

in each case, based on data for the 12 month period prior to the date of the Notice of Common Dispute (or such shorter period, if the Notice of Common Dispute is issued prior to the first anniversary of the execution of the particular Network Operator's Network Arrangement), as such amounts are determined in accordance with the Verification Methodology.

Portal means the online portal to be developed by the Scheme Coordinator in accordance with the Scheme Coordinator Agreement.

Scheme has the meaning given in the Act.

Scheme Coordinator Agreement means the agreement entered into by the Scheme Coordinator and the State in relation the Scheme on or about the date of this deed.

Supplier means each Supplier that has acceded to this deed on or after the Effective Date.

Supply Arrangement means a contract between the Scheme Coordinator and a Supplier in relation to the Scheme.

1.2 Interpretation

In this deed unless the context otherwise requires:

- (a) references to a person include an individual, a body politic, the estate of an individual, a firm, a corporation, an authority, an association or joint venture (whether incorporated or unincorporated), or a partnership;
- (b) the words "including", "includes" and "include" will be read as if followed by the words "without limitation";
- (c) a reference to any Party to this deed includes that Party's executors, administrators, successors, and permitted substitutes and assigns, including any person taking part by way of novation;
- (d) a reference to this deed or to any other deed, agreement, document or instrument is deemed to include a reference to this deed or such other deed, agreement, document or instrument as amended, novated, supplemented, varied or replaced from time to time;
- (e) words in the singular include the plural (and vice versa) and words denoting any gender include all genders;
- (f) headings are for convenience only and do not affect the interpretation of this deed;
- (g) where any word or phrase is given a defined meaning, any other part of speech or other grammatical form of that word or phrase has a corresponding meaning; and
- (h) no rule of construction applies to the disadvantage of a Party on the basis that the Party put forward or drafted this deed or any part.

2. Common Disputes

If a Notice of Common Dispute has been issued:

- (a) The Common Dispute must be resolved in accordance with the procedure set out in clauses 2 and 3 (the **Dispute Resolution Procedure**).
- (b) The State may at its absolute discretion, at any time prior to a determination under this deed, give a Notice of Participation to the Scheme Coordinator in which case the State will be a party to the dispute. Irrespective of the State issuing a Notice of Participation, clause 3.9 will apply in respect of the State.
- (c) The parties to the dispute are the Scheme Coordinator and the Supplier or Network Operator to which the Notice of Common Dispute was issued ("**SP Party**") and, if the State has issued a Notice of Participation, the State.
- (d) If the Scheme Coordinator considers in its absolute discretion that the Common Dispute relates to other Scheme Participants which are party to a Supply Arrangement or Network Arrangement, then the Scheme Coordinator must notify via the Portal those other Scheme Participants ("**Related Scheme Participants**") with a copy to the SP Party, within 14 days of the Notice of Common Dispute being issued which notice must clearly identify each of the Related Scheme Participants to allow the SP Party to be able to comply with clause 3.4. The Related Scheme Participants are not parties to the Common Dispute.

3. Dispute resolution procedure

3.1 Dispute Resolution Procedure

- (a) Within 7 days of a Notice of Common Dispute being issued, a senior representative from each party must meet and use all reasonable endeavours acting in good faith to resolve the Common Dispute by joint discussions.
- (b) Compliance with the Dispute Resolution Procedure is a condition precedent to any entitlement to claim relief or remedy (whether by way of proceedings in a court or otherwise) in respect of the subject of a Common Dispute.
- (c) Nothing in this clause 3 prevents a party seeking urgent injunctive or declaratory relief from a court in connection with the Common Dispute.
- (d) The parties' obligations under the Network Arrangement and the Supply Arrangement (as applicable) will continue despite the existence of a Common Dispute between some or all of the parties.

3.2 Referral to Expert Determination

If the Common Dispute is not resolved within 20 days after the issue of the notification to Related Scheme Participants via the Portal under clause 2(d), the Common Dispute will be referred to expert determination (**Referral Date**).

3.3 Expert Determination

- (a) The expert must be appointed, and the expert determination must be conducted in accordance with the Resolution Institute Expert Determination Rules as modified by Schedule 1.
- (b) The parties to the Common Dispute must enter into an agreement with the appointed expert on such terms as the parties and the expert may agree or as determined in accordance with the rules for the expert determination.
- (c) An expert determination conducted under this clause 3 is not an arbitration and the expert is not an arbitrator. The expert may reach a decision from his or her own knowledge and expertise.
- (d) The expert must:
 - (i) disclose to the parties to the Common Dispute any interest he or she has in the outcome of the determination; and
 - (ii) not communicate with one party to the Common Dispute or a Related Scheme Participant without the knowledge of the other.
- (e) Unless otherwise agreed between the parties to the Common Dispute, the expert must notify the parties to the Common Dispute of his or her decision upon an expert determination conducted under this clause 3 within the period set out in the agreement between the parties to the Common Dispute and the expert, by providing it to them via the Portal.
- (f) The determination of the expert will be immediately binding on the SP Party, the Scheme Coordinator and the Related Scheme Participants on receipt, who must give effect to it unless and until it is revised in an amicable settlement or a court judgment.

- (g) The date of the expert's determination will be the date it is provided to the parties to the Common Dispute and the Related Scheme Participants via the Portal (**Date of Expert Determination**).

3.4 Involvement of Related Scheme Participants

- (a) Communications provided to the expert or another party relating to the expert determination, must be provided via the Portal to the Related Scheme Participants.
- (b) The Scheme Coordinator must provide via the Portal a copy of each communication received from the expert (including the expert's decision), to the Related Scheme Participants within 1 day of receipt of the communication.
- (c) The SP Party will allow the Related Scheme Participants an opportunity to review and comment upon the draft submissions and evidence (including expert opinions) that the SP Party proposes to submit in the expert determination by providing drafts to the Related Scheme Participants at least 14 days before the SP Party is due to make its submission.
- (d) The Related Scheme Participants may comment on the draft submissions provided that any comments are provided via the Portal to the SP Party at least 7 days before the SP Party is due to make its submission in the expert determination.
- (e) The SP Party must consider and take account of any comments provided in accordance with paragraph (c) above, in the preparation of its submissions;
- (f) The SP Party must:
 - (i) provide the Related Scheme Participants with a draft of any proposed offer to settle the Common Dispute not less than 14 days prior to submitting that proposed offer to the Scheme Coordinator; and
 - (ii) not settle, waive or compromise the Common Dispute without the prior written consent of all of the Related Scheme Participants.
- (g) If it appears to the expert, or on application by a party to the Common Dispute, that the SP Party is not able adequately to represent the interests of the Related Scheme Participants, the expert may make such directions as he or she thinks fit concerning the substitution of one of the Related Scheme Participants for the SP Party, and make such other orders as it thinks fit. In this case, thereafter references to the SP Party in the Dispute Resolution Procedure will be references to the substitute party.

3.5 Costs of the expert determination

- (a) Subject to clause 3.5(c), each party to the Common Dispute will:
 - (i) bear its own costs in respect of any expert determination; and
 - (ii) pay an equal share of the expert's costs.
- (b) Each Related Scheme Participant will bear its own costs of participation in the Dispute Resolution Process.
- (c) If the Common Dispute relates to a Supply Arrangement, the SP Party and each Related Scheme Participant who is a Supplier will be responsible for the costs incurred by the SP Party in any expert determination in proportion to its Market Share. If the Common Dispute relates to a Network Arrangement, the SP Party and each Related Scheme Participant who is a Network Operator will be responsible for the costs incurred by the SP Party in any expert determination in proportion to its

Market Share. If the Common Dispute relates to both a Supply Arrangement and a Network Arrangement, the SP Party and each Related Scheme Participant will be responsible for the costs incurred by the SP Party in any expert determination in the proportions as determined by the expert.

3.6 Notice of dissatisfaction

- (a) If:
 - (i) a party to the Common Dispute is dissatisfied with the expert's determination then it may, within 21 days after the Date of Expert Determination, give notice of its dissatisfaction by providing it to the other party via the Portal; or
 - (ii) the expert fails to give its determination within the time required (if any is agreed with the expert), then any party may, within 21 days after this period has expired, give a notice of dissatisfaction by providing it to the other party via the Portal,

(Notice of Dissatisfaction).

- (b) A Notice of Dissatisfaction issued under this clause 3.6 must:
 - (i) state that it is given under this clause 3.6; and
 - (ii) set out the matter in Dispute and the reason(s) for dissatisfaction.
- (c) If the SP Party or a Related Scheme Participant considers that a Notice of Dissatisfaction should be issued then;
 - (i) it must provide notice of that fact to the SP Party and the Related Scheme Participants of that fact and its reasons for holding that view via the Portal within 10 Business Days after the Date of Expert Determination; and
 - (ii) the SP Party must take into account any notice provided under clause 3.5(c) when deciding whether or not to give a Notice of Dissatisfaction.

3.7 Proceedings

If a Common Dispute has not been resolved (in whole or in part):

- (a) where a party has given a Notice of Dissatisfaction pursuant to clause 3.6, within 14 days after the Notice of Dissatisfaction was provided via the Portal; or
- (b) where clause 3.7(a) does not apply, within 120 days of the notification of the Notice of Common Dispute to the Related Scheme Participants;

(irrespective of whether clauses 3.2 to 3.7 have been complied with), any party may commence legal proceedings.

3.8 Final and binding decision

If the expert has given a determination as to a Common Dispute, and no Notice of Dissatisfaction has been given within 20 days of the Date of Expert Determination, then the determination will become final and binding.

3.9 Binding Nature of Common Dispute

- (a) The parties to this deed unequivocally and unreservedly agree that, if they receive a Notice of Common Dispute:
 - (i) provided that clause 3.4(f) has been complied with, they will be bound by any settlement of the subject matter of that Common Dispute to the extent that it touches upon or concerns any right, remedy, benefit or entitlement in a Network Arrangement or a Supply Arrangement to which they are a party and the State will be bound to the extent it resolves the dispute under an agreement between the State and the Scheme Coordinator or Network Operator.
 - (ii) any determination by an expert or a court in relation to that Common Dispute will be binding on the parties to that Notice of Common Dispute without the need for a separate appointment or determination under this deed to the extent that such determination is binding on the parties to this deed; and
 - (iii) the parties agree to accept in full and final resolution of all and any entitlement, privilege, benefit or liability, which they may have arising out of or in connection with this deed or any Network Arrangement or Supply Arrangement in respect of the Common Dispute, which has been determined in respect of the Common Dispute in accordance with this deed.
- (b) The parties agree that the provisions of this deed apply to a Common Dispute the subject of a Notice of Common Dispute whether or not they participate in the Dispute Resolution Procedures.

3.10 Time for Compliance

Any remedy or benefit to which a party to this Deed is entitled pursuant to clause 3.8 must be paid or granted by the relevant party by the later of:

- (a) 30 days of the binding settlement or determination of such entitlement under this deed; or
- (b) the date such remedy or benefit must be paid or granted by the party responsible for paying or granting it under any provision of this deed.

4. Governing Law

This agreement is governed by and is to be construed in accordance with the laws in force in the State of New South Wales.

5. Jurisdiction

- (a) The parties irrevocably submit to the non-exclusive jurisdiction of the courts of the State of New South Wales and the courts to which the appeals from those courts may be made with respect to any arbitration or proceedings that are permitted to be brought at any time.
- (b) The parties irrevocably waive any objection they may now or in the future have to the venue of any proceedings, and any claim they may now or in the future have that any proceedings has been brought in an inconvenient forum, where that venue falls within clause 5(a).

6. Proportionate Liability

Notwithstanding anything else, to the extent permissible by law, the expert will have no power to apply or to have regard to the provisions of any proportional liability legislation which might, in the absence of this provision, have applied to any Common Dispute referred to expert determination pursuant to this clause.

7. Accession of Supplier

- (a) A party signing an Accession Deed Poll (the **Accession Party**) covenants and agrees with all parties to this deed from time to time (whether original or by accession) (**Existing Parties**) on and from the date of delivery of an Accession Deed Poll to the Scheme Coordinator (**Accession Date**) to observe, perform and be bound by this deed so that, from the Accession Date, the Accession Party will be a party to this deed and will assume the rights and obligations of a party as specified in this deed.
- (b) Each Existing Party:
 - (i) irrevocably and unconditionally consents to the Accession Party becoming a party to this deed on and from the Accession Date;
 - (ii) agrees that the Accession Party will be entitled to exercise all rights, privileges and benefits afforded to it as a party as specified in this deed; and
 - (iii) agrees that it continues to be bound by this deed notwithstanding the accession contemplated in clause 7(a) of this deed.

8. Counterparts

This deed may consist of a number of copies, each signed by one or more parties to this deed. The date of this deed is the Effective Date.

Schedule 1 - Rules for the Expert Determination Process

Resolution Institute Expert Determination Rules

In accordance with, and subject to the Resolution Institute Expert Determination Rules including Schedules A and B, the Parties agree to modify the application of those Rules as follows:

Modifications are underlined.

1. **RULE 5 Role of the Expert**

1. The Expert shall determine the Dispute as an expert in accordance with these Rules, the Contract, the requirements of procedural fairness, and according to law.
2. [no modification]
3. [no modification]
- 3A. The rules of evidence do not apply to the Process.
4.
 - (a) The Expert shall be independent of, and act fairly and impartially as between the parties, giving each a reasonable opportunity of putting its case and dealing with that of any opposing party, and a reasonable opportunity to make submissions on the conduct of the Process.
 - (b) The Expert must take all reasonable steps to avoid any conflict of interest, potential conflict of interest or other circumstances that might reasonably be considered to adversely affect the Expert's independence or capacity to act fairly and impartially in relation to the Dispute.
 - (c) If at any time during the Process, the Expert becomes aware of any circumstances that might reasonably be considered to adversely affect the Expert's independence or capacity to act fairly or impartially in relation to the Dispute, the Expert must inform the Parties immediately.
 - (d) The Expert's mandate will be terminated 7 days after the notice is provided by the Expert under clause 4(c) above, unless the Parties agree otherwise.
5. [no modification]

2. **RULE 10 The Expert's Determination**

1. Unless otherwise agreed between the Parties, the Expert must notify the parties of his or her decision within 28 days from the acceptance by the expert of his or her appointment. As soon as reasonably practicable after receiving the submissions and evidentiary material from the parties pursuant to Rule 9, the Expert shall determine the Dispute between the parties and notify such determination in writing to the parties.
2. [no modification]
3. Unless otherwise agreed by the parties, the Expert's determination:
 - (a) may include for the payment of interest on any monetary sum determined, in such amount as the Expert considers reasonable;
 - (c) may make such orders as he or she considers appropriate for the restitution of any amount so paid, and such other orders as he or she considers appropriate; and
 - (d) to the extent permitted by law, will not apply or have regard to the provisions of Part 4 of the Civil Liability Act 2002 (NSW) (and any equivalent statutory provision in any other state, territory, or the Commonwealth).

4. [no modification]

3. Rule 12 Waiver of Right to Object

Rule 12 is deleted in its entirety.

Schedule 2 - Accession Deed Poll

Accession Deed Poll

Dated

Supplier [Insert full name of relevant Supplier] [Insert ABN] (Supplier)

Background

- A. The Supplier seeks to enter into a supply arrangement with the Scheme Coordinator for the purpose of section 38 of the Waste Avoidance and Recourse Recovery Act 2001 (NSW).
- B. This deed poll is entered into in accordance with clause 7 of the Common Dispute Deed dated [] (Common Dispute Deed).
- C. As of the Effective Date the Supplier agrees to perform its obligations as the Supplier under the Common Dispute Deed.

Operative provisions

1. Definitions and interpretation

1.1 Definitions

In this deed poll:

Effective Date means the date of delivery of this deed to the Scheme Coordinator.

1.2 Definitions in Supply Arrangement

- (a) Unless otherwise defined, expressions used in this deed poll have the meanings given to them in the Common Dispute Deed.
- (b) Clause 1.2 of the Common Dispute Deed applies to this deed poll as if it was set out in full in this deed poll.

2. Accession to the Common Dispute Deed

- (a) A party signing this deed poll (the **Accession Party**) covenants and agrees with all parties to the Common Dispute Deed from time to time (whether original or by accession) (**Existing Parties**) on and from the date of delivery of this deed poll to the Scheme Coordinator (**Accession Date**) to observe, perform and be bound by the Common Dispute Deed so that, from the Accession Date, the Accession Party will be a party to the Common Dispute Deed and will assume the rights and obligations of a party as specified in the Common Dispute Deed.
- (b) The Accession Party confirms that it has been supplied with a copy of the Common Dispute Deed.
- (c) This deed poll is made by the Accession Party in favour of each Existing Party and is irrevocable.
- (d) Each Existing Party may enforce the terms of this deed poll against the Accession Party as if it were a party to this deed poll.

3. Governing law

This agreement is governed by the law applying in and must be construed according to the law in force in New South Wales.

Executed as a deed poll

Accession Party

**Executed by [insert name of Accession Party]
ABN [insert ABN]** in accordance with
section 127 of the Corporations Act 2001 (Cth):

Signature of director

Signature of company secretary/director

Full name of director

Full name of company secretary/director