

NSW Container Deposit Scheme: Supplier Side Deed

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

Exchange for Change (NSW) Pty Ltd
Scheme Coordinator

[*]
Supplier

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Supplier Side Deed

Date

Parties

The Honourable Gabrielle Cecelia Upton MP, Minister for the Environment (State)

Exchange for Change (NSW) Pty Ltd (ACN 620 512 469) of Level 4, 126 Phillip Street, Sydney NSW 2000 (**Scheme Coordinator**)

[*] (ABN [*]) of [*] (Supplier)

Background

- A. By deed dated 28 July 2017 (the **Scheme Coordinator Agreement**) between the State and the Scheme Coordinator, the State appointed the Scheme Coordinator in connection with the management and administration of the Scheme for the purposes of the Act.
- B. By agreement dated on or about the date of this deed (the **Supply Arrangement**), the Scheme Coordinator entered into an agreement with the Suppliers requiring the Suppliers amongst other things to pay to the Scheme Coordinator contributions towards the cost of the management, administration and operation of the Scheme.
- C. In accordance with the Scheme Coordinator Agreement, the Scheme Coordinator must execute this deed and arrange for the execution of this deed by the Supplier.
- D. By executing this deed, the parties wish to make provision for:
 - (a) the State's rights to carry out an obligation under the Scheme Coordinator Agreement or Supply Arrangement which the Scheme Coordinator was obliged to carry out but which it failed to carry out within the time required in accordance with the Scheme Coordinator Agreement or Supplier Arrangement (as applicable); and
 - (b) agrees to give effect to the novation of the Supply Arrangement to the State (or its nominee) in the event of termination of the Scheme Coordinator Agreement or as an alternative to termination of the Supply Arrangement under clause 11.3(a) of its general conditions (as applicable).

Operative Provisions

1. Definitions

1.1 Supply Arrangement definitions

Definitions in the Supply Arrangement apply in this deed unless the context requires otherwise or the relevant term is defined in this deed.

1.2 Definitions

Assumption Notice means the notice referred to in clause 4.1.

Claim means any claim, notice, demand, action, proceeding or litigation and includes any claim for the payment of money or relief from performance whether the claim, notice, demand, action, proceeding or litigation:

- (a) is in any way in connection with this deed or either party's conduct before this deed, including; or
- (b) otherwise arises at law or in equity including:

- (i) by statute;
- (ii) in tort for negligence or otherwise, including negligent misrepresentation; or
- (iii) for restitution.

Default Event means:

- (a) any default (howsoever described) by the Scheme Coordinator under the Supply Arrangement; or
- (b) any other event or circumstance,

which alone or with the giving of notice or passage of time or both, would entitle either:

- (c) the State to terminate, rescind, accept the repudiation of, or suspend any or all of the Scheme Coordinator's obligations under, the Scheme Coordinator Agreement; or
- (d) the Supplier to terminate, rescind, accept the repudiation of, or suspend any or all of the Scheme Coordinator's obligations under, the Supply Arrangement.

Default Event Notice means the notice referred to in clause 3.2(a).

Liability includes any liability of any kind whether for debt, cost (including legal costs, deductibles or increased premiums), expense, loss, damage, compensation or charge and whether:

- (a) liquidated or not;
- (b) arising from or in connection with any obligation (whether as a principal obligation, a surety or an indemnity);
- (c) legal or equitable, and whether arising under or for breach of contract, in tort (including negligence), restitution or at Law;
- (d) present, prospective or contingent; or
- (e) owed, incurred or imposed by or to or on account of or for the account of any person alone or severally or jointly with another or others.

Novation Date has the meaning given in clause 4.2(b).

Scheme Commencement Date means the "Scheme commencement day" as defined in the *Waste Avoidance and Resource Recovery Act (Container Deposit Scheme) Regulation 2017* (NSW).

Transferee has the meaning given in clause 4.2(a).

1.3 Interpretation

In this deed:

- (a) headings are for convenience only and do not affect interpretation,

and unless the context indicates a contrary intention:

- (b) an obligation or a liability assumed by, or a right conferred on, 2 or more persons binds or benefits them jointly and severally;

- (c) "person" includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
- (d) a reference to a party includes that party's executors, administrators, successors, permitted assigns, including persons taking by way of novation and, in the case of a trustee, includes a substituted or an additional trustee;
- (e) a reference to a document (including this Agreement) is to that document as varied, novated, ratified or replaced from time to time;
- (f) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;
- (g) a word importing the singular includes the plural (and vice versa) and a word indicating a gender includes every other gender;
- (h) a reference to a party, clause, section, schedule, exhibit, attachment or annexure is a reference to a party, clause, section, schedule, exhibit, attachment or annexure to or of this Agreement, and a reference to this Agreement includes all schedules, exhibits, attachments and annexures to it;
- (i) if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
- (j) no rule of construction applies to the disadvantage of a party on the basis that the party put forward this Agreement or any part thereof;
- (k) if the day on or by which anything is to be done in accordance with this Agreement is not a Business Day, that thing must be done no later than the next Business Day;
- (l) other than as set out in clause 1.3(k) a reference to "day" is a reference to a calendar day, a reference to "week" is a reference to a calendar week, a reference to "month" is a reference to a calendar month and a reference to "quarterly" is a reference to 3 monthly;
- (m) the words "including" and "includes", and any variants of those words, will be read as if followed by the words "without limitation";
- (n) the meaning of "or" will be that of the inclusive, being one, some or all of a number of possibilities;
- (o) the word "subcontractor" will include all suppliers and consultants;
- (p) a reference to "\$" or "dollar" is to Australian currency;
- (q) a reference to time is a reference to the then current time in Sydney, Australia;
- (r) a reference to a right includes any benefit, remedy, discretion, authority or power;
- (s) a reference to an obligation or a liability assumed by, or a right conferred on, two or more persons binds or benefits them jointly and severally;
- (t) the term "may", when used in the context of a power, right or remedy exercisable by a party, means that the party can exercise that power, right or remedy in its absolute and unfettered discretion, and the party has no obligation to the other party to do so; and

- (u) where there is a reference to an Authority, institute or association or other body referred to in this deed which:
 - (i) is reconstituted, renamed or replaced or if its powers or functions are transferred to, or assumed by, another entity, this deed is deemed to refer to that other entity; or
 - (ii) ceases to exist, this deed is deemed to refer to that new entity which serves substantially the same purpose or object as the former entity.

2. Commencement

This deed commences and comes into force on the Effective Date.

3. State's right to cure a Default Event

3.1 State's right

- (a) On becoming aware of any Default Event the State may (but is not obliged to) take steps to cure or remedy, or procure the cure or remedy of, that Default Event.
- (b) Upon the State exercising any of its rights under this clause 3, the Scheme Coordinator's obligations under the Supply Arrangement are suspended to the extent and for such period as the Scheme Coordinator is prevented from performing such obligations by the State's exercise of its step-in rights.
- (c) If the State exercises its step-in rights, the State may, after giving reasonable prior notice to the Scheme Coordinator and the Supplier, cease to exercise those rights, and in any event, will cease to exercise its step-in rights once the relevant Default Event has been remedied.

3.2 Restriction on right to terminate or suspend

The Supplier must not terminate, rescind, accept the repudiation of, or suspend the performance of any or all of its obligations under, the Supply Arrangement unless each of the following conditions has been satisfied:

- (a) the Supplier has given to the State prior notice (**Default Event Notice**) setting out details of the Default Event giving rise to the right to terminate, rescind, accept the repudiation of, or suspend the performance of any or all of its obligations under, the Supply Arrangement;
- (b) either:
 - (i) if the Default Event is capable of cure or remedy within 20 Business Days, that Default Event has not been cured or remedied within 20 Business Days (or such longer period as is agreed between the parties) after the date on which the Default Event Notice is received by the State;
 - (ii) if the Default Event is not one described in clause (i), but is nevertheless reasonably capable of cure or remedy, the State has not commenced curing or remedying the Default Event within 20 Business Days after the date on which the Default Event Notice is received by the State and the State has not continued to diligently pursue that cure or remedy; or
 - (iii) the State notifies the Supplier in writing within 20 Business Days after the date on which the Default Event Notice is received by the State that

the State elects not to cure or remedy, or procure the cure or remedy of, the Default Event.

3.3 No Liability

The Supplier and the Scheme Coordinator acknowledge and agree that:

- (a) without limiting the liability of the Scheme Coordinator (which continues to be responsible for the performance of its obligations under the Scheme Coordinator Agreement and Supply Arrangement (as applicable)), the State will not be liable for any obligation or Liability of the Scheme Coordinator under the Scheme Coordinator Agreement or the Supply Arrangement by reason only of the State performing any one or more the Scheme Coordinator's obligations under the Scheme Coordinator Agreement or the Supply Arrangement (as applicable); and
- (b) the Scheme Coordinator and the Supplier each release the State from any such obligation or Liability.

3.4 Scheme Coordinator to compensate State

Any reasonable Loss suffered or incurred by the State arising in connection with the exercise of its step-in rights under this deed will be a debt due from the Scheme Coordinator to the State.

3.5 No limitation on other rights

The exercise (or failure to exercise) by the State of its rights under this clause 3 will not limit the State's rights against the Scheme Coordinator under the Scheme Coordinator Agreement or otherwise according to law.

4. Novation of Supply Arrangement

4.1 Option

If:

- (a) the State terminates the Scheme Coordinator Agreement;
- (b) the Supplier issues a written notice under clause 11.3(b) of the Supply Arrangement; or
- (c) the Scheme Coordinator Agreement expires or is otherwise no longer in force,

then the State may (in its absolute discretion) exercise its rights under this clause 4 by giving a notice (**Assumption Notice**) within 20 Business Days to the Scheme Coordinator and the Supplier.

4.2 Novation

- (a) Promptly following the receipt of an Assumption Notice, the parties must novate the Supply Arrangement so that the State or its nominee (**Transferee**) and the Supplier are parties to a new contract on the same terms as the Supply Arrangement, as amended by this deed.
- (b) From the date such novation comes into effect (**Novation Date**), any reference in the Supply Arrangement to the Scheme Coordinator shall be read as a reference to the Transferee.

4.3 Rights and obligations of the State and the Supplier under the Supply Arrangement

If the State gives an Assumption Notice then, subject to clause 4.6, on and from the Novation Date:

- (a) the Transferee:
 - (i) will be bound by and must comply with the terms of the Supply Arrangement, as may be amended by this deed; and
 - (ii) will enjoy the rights and benefits conferred on the Scheme Coordinator under the terms of the Supply Arrangement,in all respects as if the Transferee had originally been named in the Supply Arrangement as a party instead of the Scheme Coordinator; and
- (b) the Supplier will comply with the terms of the Supply Arrangement (as amended by the novation deed) on the basis that Transferee has replaced the Scheme Coordinator under the Supply Arrangement.

4.4 Release by Supplier

Without limiting clause 4.6 the Supplier acknowledges that neither the State nor its nominee (if applicable) will be responsible for any obligations or Liabilities of the Scheme Coordinator under or in respect of the Supply Arrangement arising prior to the Novation Date.

4.5 Release by the Scheme Coordinator

- (a) The Scheme Coordinator will remain liable to the Supplier in respect of any rights against the Scheme Coordinator which may have accrued to the Supplier prior to the Novation Date.
- (b) Nothing in this clause affects the obligations of the Scheme Coordinator to the State or its nominee (if applicable) under the Scheme Coordinator Agreement.

4.6 Obligations and Liability prior to the Novation Date

Nothing in this deed releases the Scheme Coordinator or the Supplier from any obligation or liability under the Supply Arrangement arising or accruing before the Novation Date and neither the State nor its nominee (if applicable) assumes any such obligation or liabilities.

4.7 Indemnity

The Scheme Coordinator indemnifies the State or its nominee (if applicable) against any Claim or Liability incurred or made against the State or its nominee (as applicable) by the Supplier or any other person in connection with any act, matter, default or omission of the Scheme Coordinator in respect of the Supply Arrangement prior to the Novation Date.

4.8 Amendments to Supply Arrangement

On and from the Novation Date, the terms of the Supply Arrangement will be deemed to be amended as required to reflect the fact that the Scheme Coordinator Agreement is at an end, and that the Supply Arrangement must operate independently of the Scheme Coordinator Agreement, on the basis that:

- (a) the rights and obligations that Transferee will assume under the Supply Arrangement from the Novation Date will be equivalent to those that the Scheme

Coordinator would have had under the Supply Arrangement had the Scheme Coordinator Agreement not been terminated; and

- (b) the rights and obligations that the Supplier will assume under the Supply Arrangement from the Novation Date will be equivalent to those that the Supplier would have had under the Supply Arrangement had the Scheme Coordinator Agreement not been terminated;

5. Miscellaneous

5.1 Governing law

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

5.2 Jurisdiction

Each party irrevocably:

- (a) submits to the non-exclusive jurisdiction of the courts of New South Wales, and the courts competent to determine appeals from those courts, with respect to any proceedings which may be brought at any time relating to this deed; and
- (b) waives any objection it may now or in the future have to the venue of any proceedings, and any Claim it may now or in the future have that any proceedings have been brought in an inconvenient forum, if that venue falls within clause 5.2(a).

5.3 Waiver

- (a) Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power or remedy provided by law or under this deed by a party does not preclude, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided by law or under this deed.
- (b) A waiver or consent given by a party under this deed is only effective and binding on that party if it is given or confirmed in writing by that party.

5.4 Further acts and documents

The Supplier must promptly do all further acts and execute and deliver all further documents (in form and content reasonably satisfactory to the Scheme Coordinator) required by law or reasonably requested by the Scheme Coordinator to give effect to this deed.

5.5 Expenses

Each party must pay its own costs and expenses in connection with negotiating, preparing, executing and performing this deed.

5.6 Stamp duties

The Supplier:

- (a) must pay all stamp duties and any related fines and penalties in respect of this deed, the performance of this deed and each transaction effected by or made under this deed;
- (b) indemnify the other parties against any Loss suffered or incurred by it arising out of, or in connection with that Suppliers' failure to comply with clause 5.6(a); and

- (c) is authorised to apply for and retain the proceeds of any refund due in respect of stamp duty paid by the Suppliers under this clause.

5.7 Entire agreement

To the extent permitted by law, in relation to its subject matter, this deed:

- (a) embodies the entire understanding of the parties, and constitutes the entire terms agreed by the parties; and
- (b) supersedes any prior written or other agreement of the parties.

5.8 Corporate power and authority

Each party represents and warrants to the others that it has full power to enter into and perform its obligations under this deed and that when executed it will constitute legal, valid and binding obligations in accordance with its terms.

5.9 Inconsistency with Act

The parties acknowledge section 29 of the Act.

5.10 Severability

If any provision contained in this deed is voidable, illegal or unenforceable or if this deed would, if a particular provision were not omitted be voidable, illegal or unenforceable, that provision will be severed from this deed which shall then be construed and given effect to for all purposes as if the provision had never formed a part of it.

5.11 Prompt performance

If this deed specifies when the party agrees to perform an obligation, the party agrees to perform it by the time specified. Each party agrees to perform all other obligations promptly.

5.12 Counterparts

- (a) This deed may consist of a number of copies, each signed by one or more parties to this deed. If so, the signed copies are treated as making up the one document.
- (b) A party may sign electronically a soft copy of this deed through DocuSign, and bind itself accordingly. That will satisfy any statutory or other requirements for it to be in writing and signed by that party. Any soft copy so signed will constitute an executed original counterpart. In addition, it is intended to print it out when so signed, so that the relevant signatures will appear in the printout, and any print-out will also be an executed original counterpart.

6. GST and taxation

- (a) Unless the context requires otherwise, words used in this clause that have a specific meaning in the GST law (as defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth)) shall have the same meaning in this clause.
- (b) Notwithstanding any other provision of this Agreement, any amount payable for a supply made under this Agreement which is calculated by reference to a cost, expense or other amount paid or incurred by a party will be reduced by an amount equal to any input tax credits which that party is entitled to in respect of that cost, expense or other amount.

- (c) If GST is payable on any supply made by a party (**GST Supplier**) under or in connection with this Agreement:
- (i) any amount payable or consideration to be provided under any other provision of this Agreement for that supply (**Agreed Amount**) is exclusive of GST;
 - (ii) an additional amount will be payable by the party providing consideration for that supply (**Recipient**), equal to the amount of GST payable on that supply as calculated by the GST Supplier in accordance with the GST Legislation and payable at the same time and in the same manner as for the Agreed Amount;
 - (iii) the GST Supplier will provide a tax invoice (or equivalent documentation which complies with the GST Legislation) to the Recipient in respect of that supply, either at the time expressly set out in any other provision of this Agreement or no later than the time at which the Agreed Amount for that supply is to be provided under this Agreement; and
 - (iv) if the Supplier does not provide a tax invoice in accordance with the timing set out in clause 6(c)(iii), the additional amount payable by the Recipient under clause 6(c)(ii) is payable within 5 Business Days of the receipt of a tax invoice.
- (d) If for any reason, the GST payable by the GST Supplier in respect of a supply it makes under this Agreement (incorporating any increasing adjustments or decreasing adjustments relating to that supply) varies from the additional amount it receives from the Recipient under clause 6(c) in respect of that supply, the GST Supplier will provide a refund or credit to or will be entitled to receive the amount of this variation from the Recipient (as appropriate). Where an adjustment event occurs in relation to a supply, the GST Supplier will issue an adjustment note to the Recipient in respect of that supply within 10 Business Days after becoming aware of that adjustment event occurring.
- (e) If the Recipient is dissatisfied with any calculation to be made by the GST Supplier under this clause 6, the Recipient may, at its own expense and after notifying the GST Supplier accordingly, refer the matter to an independent expert nominated by the President of the Institute of Chartered Accountants for expert determination, which will be final and binding on all parties (absent manifest error). The expert will act as an expert and not as an arbitrator and will take into account the terms of this Agreement, the matters required to be taken into account by the GST Supplier under this clause 6 and any other matter considered by the expert to be relevant to the determination. The parties must release the expert from any liability in acting as an expert, except in the case of fraud on the part of the expert.
- (f) Each party agrees to do all things, including providing tax invoices and other documentation, that may be necessary or desirable to enable or assist the other party in determining its GST payable on any supply made by that other party under or in connection with this Agreement or any input tax credits, adjustments or refunds in relation to any amount of GST paid or payable in respect of any supply made under or in connection with this Agreement.
- (g) Despite any other provision of this Agreement, this clause 6 will survive the termination of this Agreement.
- (h) A reference to GST payable by a party includes any corresponding GST payable by the representative member of any GST group of which that party is a member, and a reference to an input tax credit entitlement of a party includes any corresponding input tax credit entitlement of the representative member of any GST group of which that party is a member.

- (i) Any reference in this Agreement to fees, value, sales, revenue or a similar amount (**Revenue**) is a reference to that Revenue exclusive of GST.
- (j) Any reference in this Agreement to a cost, expense or other similar amount (**Cost**) is a reference to that Cost exclusive of GST.

7. Notices

Each communication (including each notice, consent, approval, request and demand) under or in connection with this deed:

- (a) must be in writing;
- (b) must be addressed as follows (or as otherwise notified by that party to each other party from time to time):
 - (i) The State
Name: NSW Environment Protection Authority
Address: Level 14, 59 Goulburn Street, Sydney NSW 2000
Email: Alex.Young@epa.nsw.gov.au
For the attention of: State Representative
 - (ii) The Scheme Coordinator
Name: Exchange for Change (NSW) Pty Ltd
Address: Level 4, 126 -130 Phillip Street
Sydney NSW 2000
Email: legal@exchangeforchange.com.au
For the attention of: Commercial Manager – Exchange for Change
 - (iii) Supplier
Name: []
Address: []
Email: []
For the attention of: []
- (c) must be delivered or posted by prepaid post to the address, or sent by email to the email address, of the addressee, in accordance with clause (b); and
- (d) is taken to be received by the addressee:
 - (i) (in the case of prepaid post) on the third working day after the date of posting to an address within Australia, and on the fifth working day after the date of posting by airmail to an address outside Australia;
 - (ii) (in the case of email) when it is dispatched by the sender to each of the email addresses specified by the recipient; and
 - (iii) (in the case of delivery by hand) on delivery,

but if the communication is taken to be received on a day which is not a Business Day or after 5.00 pm, it is taken to be received at 9.00 am on the next Business Day.

Executed by the parties as a deed

State

Executed by the Honourable Gabrielle Cecelia Upton MP, Minister for the Environment for and on behalf of the Crown in right of the State of New South Wales in the presence of:

Signature of witness

The Honourable Gabrielle Cecelia Upton MP,
Minister for the Environment

Full name of witness

Office held

Scheme Coordinator

Executed by Exchange for Change (NSW) Pty Ltd ACN 620 512 469 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

Supplier

Executed by [*] 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