



Draft Determination

Application for authorisation AA1000415

lodged by

Recyclers of South Australia Incorporated

in respect of

proposed collective negotiations and collective advice
regarding contracts with super collectors

Date: 22 June 2018

Authorisation number: AA1000415

Commissioners: Keogh
Rickard
Court
Featherston

Summary

The ACCC proposes to grant authorisation to Recyclers of South Australia Incorporated (Recyclers SA) to collectively negotiate on behalf of, and collectively provide advice to, members in relation to their contracts with super collectors.

The ACCC proposes to grant authorisation for 10 years.

The ACCC will seek submissions in relation to this draft determination before making its final decision.

On 16 March 2018, Recyclers SA lodged an application for authorisation to collectively negotiate on behalf of and collectively provide advice to its 84 members in relation to their contracts with super collectors for a period of 10 years (**Proposed Conduct**).

Recyclers SA represents 'collection depots' who collect beverage containers from the public in South Australia in exchange for a 10 cent refund and deliver them to 'super collectors' for reimbursement of the refund (plus a handling fee) under South Australia's legislated beverage container recovery scheme. The super collectors operate under contract from beverage suppliers for the purpose of operating a system for the recovery and recycling of beverage containers sold in South Australia.

Recyclers SA proposes to collectively negotiate on behalf of its member collection depots in relation to certain issues regarding the depots' contracts with super collectors, including how the number of containers returned by each collection depot to each super collector is calculated.

Given the large volume of containers collected (587 million in 2016-17), super collectors generally pay handling fees and container refunds under their contracts based on an estimate of the number of containers that a collection depot has received (by weight and periodical auditing) rather than by a count.

Recyclers SA also proposes to collectively negotiate in relation to establishing revised dispute resolution processes in contracts between depots and super collectors, as well as workplace health and safety matters.

The proposed collective negotiations will not address the quantum of the container refund amount or handling fees paid by the super collectors to the collection depots. The container refund amount is set by the Environment Protection Authority of South Australia and handling fees will continue to be negotiated individually by each collection depot and super collector.

Collection depots have raised concerns that the process whereby they pay the public for containers based on a count, but are paid by super collectors based on estimates of containers returns derived from weighing and auditing processes, has led to perceptions of underpayment. The ACCC understands that this perception is exacerbated if the same auditing formula used to estimate the number of containers that a collection depot has received is applied across collection depots who receive a different mix of containers (for example, different brands, sizes and weights) reflecting the consumption habits of their area.

Collection depots have also raised concerns that their contracts are generally standard form and in some cases have expired or not been recently renegotiated, and that as small businesses negotiating with a larger counterparty they face difficulties in individually negotiating changes to the contracts.

The ACCC received submissions from the two main super collectors in South Australia, Marine Stores Pty Ltd (**Marine Stores**) and Statewide Recycling (**Statewide**), who objected to the proposed collective bargaining arrangements. Marine Stores and Statewide have raised concerns that collection depots are not homogenous in size or operation and therefore not amenable to collective bargaining. They have also raised concerns that some Recyclers SA representatives may have conflicts of interest due to their office holdings in super collectors, collection depots and other entities. They submit that this will create a risk that any collective negotiations will disproportionately benefit certain collection depots and/or related entities.

The ACCC considers that there are significant differences in the ways in which collection depots operate, including in relation to size, location and processes for receiving and collecting containers for delivery to super collectors. However, the ACCC does not consider that there are significant differences between collection depots with respect to the matters that are proposed to be collectively negotiated, such as audit processes, dispute resolution processes and workplace health and safety matters.

The ACCC considers that these issues are amenable to collective negotiation and that the Proposed Conduct is likely to result in a public benefit in the form of transaction cost savings by reducing the costs that would otherwise be incurred by collection depots in negotiating individually with super collectors. Such costs include the time taken to negotiate contracts, administration costs and legal or other expert costs. Correspondingly, each super collector who elects to participate in collective bargaining is likely to do so in the expectation that it will realise transaction cost savings through reducing the scope of matters they will have to negotiate with each collection depot about individually.

The ACCC also considers the Proposed Conduct will likely result in public benefits by allowing collection depots to have more effective input into negotiations with super collectors and allowing the parties a greater opportunity to identify and achieve efficiencies that better reflect the circumstances of super collectors and collection depots.

The ACCC considers that the Proposed Conduct is likely to result in limited public detriment.

In reaching this view, the ACCC notes that participation in collective bargaining is voluntary for both collection depots and super collectors.

The ACCC also considers that while collection depots compete for customers in a variety of ways (such as where they are located, operating hours and ancillary services offered), they are not proposing to collectively negotiate in relation to these aspects of their operations and the proposed collective bargaining arrangements are unlikely to reduce collection depots incentives to compete with each other for customers.

The ACCC also notes that Recyclers SA has put processes in place to deal with the conflict of interest issues raised and to allow for the interests of all members to be represented through the collective bargaining process.

The ACCC is therefore satisfied that the likely public benefit of the Proposed Conduct will outweigh the likely public detriment.

The ACCC proposes to grant authorisation for 10 years.

Next steps

The ACCC seeks submissions in relation to this draft determination before making its final decision. Submissions are due by 13 July 2018. The ACCC expects to make a final decision in August 2018.

It is also open to Recyclers SA or interested parties to request that the ACCC hold a pre-decision conference on the draft determination.

Contents

Summary	i
Contents	iv
The application for authorisation	1
Background.....	1
Beverage container deposit scheme.....	1
How the scheme operates.....	1
How containers are sorted	3
How payment is calculated	5
Role of the EPA	6
The Applicant	6
Interrelationships between Recyclers SA and other parties.....	7
The Proposed Conduct.....	8
Composition of the negotiating team	9
Rationale for the Proposed Conduct	9
Consultation	10
ACCC assessment	11
Relevant areas of competition	11
Future with and without	12
Public benefit	12
Transaction costs savings	13
More effective input into contracts	14
Maintaining the viability of the SA Scheme.....	16
Public detriment.....	17
Reduced competition between collection depots	17
Conflicts of interest	20
Composition of the bargaining group.....	21
Balance of public benefit and detriment	23
Length of authorisation.....	23
Draft determination	25
The application.....	25
The net public benefit test.....	25
Conduct which the ACCC proposes to authorise	25
Next steps.....	26

The application for authorisation

1. On 16 March 2018, Recyclers of South Australia Incorporated (**Recyclers SA**) lodged an application for authorisation¹ (AA1000415) with the ACCC. Recyclers SA is seeking authorisation to collectively negotiate on behalf of, and collectively provide advice to, its collection depot members in relation to their contracts with super collectors for a period of 10 years (**Proposed Conduct**).
2. The Proposed Conduct does not include any collaboration in respect of the quantum of the container refund amount or handling fees paid by the super collectors to the collection depots. Additionally, the Proposed Conduct does not extend to any collective boycott of any or all of the super collectors.

Background²

Beverage container deposit scheme

How the scheme operates

3. South Australia's container deposit scheme (**SA Scheme**), pursuant to which collection depots and super collectors operate, is set out in Part 8 of Division 2 of the *Environment Protection Act 1993* (SA) (EPA Act). The SA Scheme has been in place since 1977.
4. The purpose of the SA Scheme is to reduce the volume of beverage containers that go to landfill. South Australia's recycling rate is currently 79.4 per cent³ and the industry employed approximately 800–1,000 people in 2016.⁴ In 2016–17, nearly 587 million containers were recovered by collection depots.⁵ Over the past few years, similar schemes have either been introduced or proposed in other Australian states and territories.⁶
5. The SA Scheme only applies to category A and category B containers that are comprised of glass, plastic (of most types), aluminium, liquid paperboard and cask beverage containers (depending on their size). It does not apply to glass containers made for the purpose of containing wine or spirituous liquor (which

¹ Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the Competition and Consumer Act 2010 (the **Act**). Applicants seek authorisation where they wish to engage in conduct which is at risk of breaching the Act but nonetheless consider there is an offsetting public benefit from the conduct. Detailed information about the authorisation process is available in the ACCC's Authorisation Guidelines at www.accc.gov.au/publications/authorisation-guidelines-2013.

² The information in this section is taken from: Recyclers of South Australia Incorporated submission in support of application for authorisation, dated 16 March 2018, available: [ACCC Public Register](#), except where otherwise noted.

³ EPA South Australia, 'Container Deposits' (2018), https://www.epa.sa.gov.au/environmental_info/container_deposit.

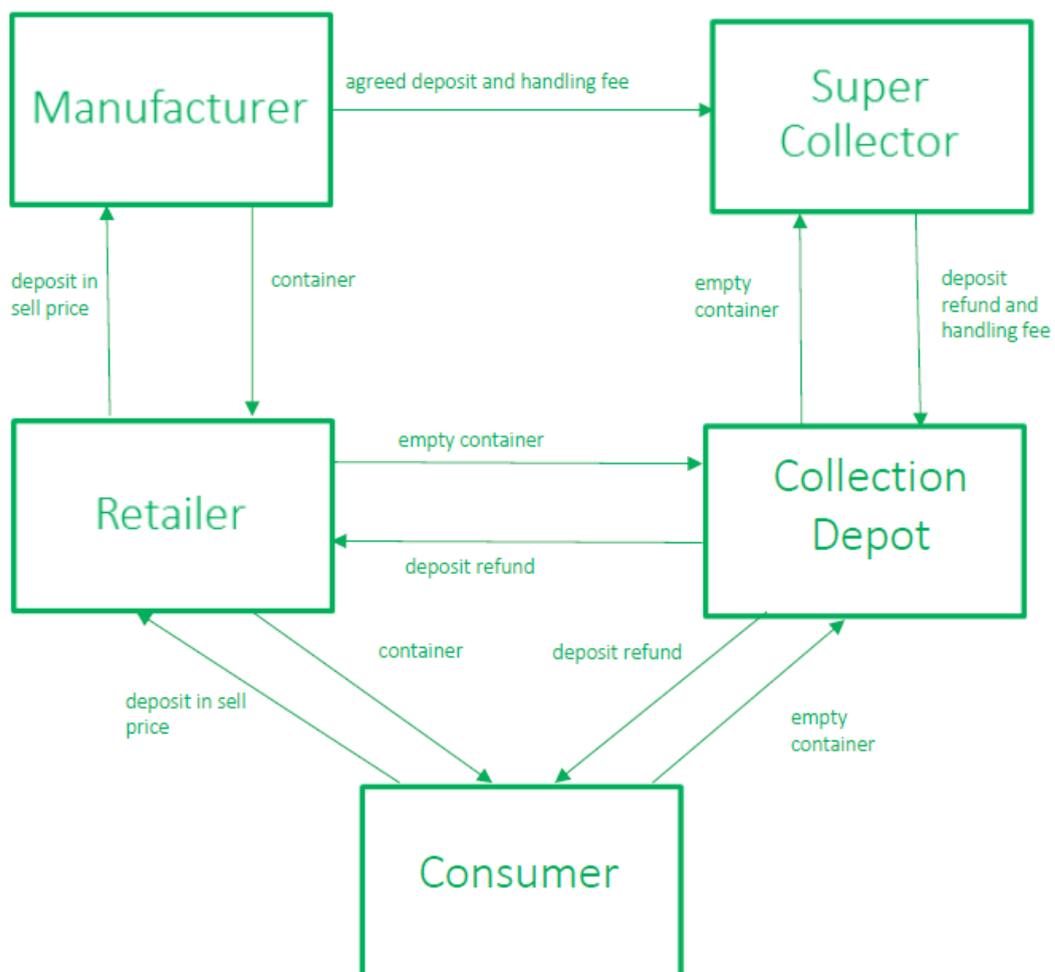
⁴ South Australia, *Questions and Answers: Container Deposit Scheme*, Legislative Council, 19 May 2016 (Ian Hunter).

⁵ EPA South Australia, 'Container Deposits' (2018), https://www.epa.sa.gov.au/environmental_info/container_deposit.

⁶ In 2011, the Northern Territory introduced a similar scheme to the SA Scheme, as did New South Wales in 2017. Queensland and the Australian Capital Territory have indicated their intention to implement similar schemes in 2018, and Western Australia in 2019.

does not include pre-mixed beverages), plain milk containers, or fruit juice and flavoured milk containers over 1 litre.

6. This application, however, relates only to category B containers, which are containers recyclable under the SA Scheme that are returnable by the public to collection depots for a refund (marked, for example, '10c refund at collection depots when sold in SA'). In contrast, category A containers are returnable directly to any retailer where that beverage is sold for a refund (marked '10c refund at points of sale when sold in SA'). Category A containers comprise less than 1% of beverages sold in South Australia.⁷ The manufacturer, distributor or retailer seeking to introduce a container for sale in South Australia decides whether to seek approval for it as either a category A container or category B container.⁸
7. The quantum of the refund amount is fixed by the *Environment Protection Regulations 2009 (SA)*. Since 2008, the refund amount has been 10 cents per container.
8. A diagram showing how the SA Scheme operates via container transfers and fee transfers between manufacturers, super collectors, collection depots, consumers and retailers is below.



⁷ EPA South Australia, 'Industry' (2018), https://www.epa.sa.gov.au/environmental_info/container_deposit/industry.

⁸ *Environment Protection Act 1993 (SA)* s 68(1).

9. The following relationships under the SA Scheme are relevant to this application:
- a. a supplier of category B beverages into South Australia must enter into an agreement with a super collector to recover their empty containers. There are currently three super collectors, Can Recycling (SA) Pty Ltd trading as Statewide Recycling (**Statewide**), Marine Stores Pty Ltd (**Marine Stores**) and Flagcan Distributors Pty Ltd (**Flagcan**)
 - b. end consumers take their empty category B containers to a collection depot for a 10 cent refund. Collection depots cannot refuse or fail to accept empty category B containers except in specific circumstances
 - c. each collection depot has a contract with each super collector for the sorting and delivery of containers, weighing and auditing procedures used to calculate the payment depots receive, and dispute resolution procedures. Pursuant to these contracts, super collectors pay collection depots a 10 cent refund and a handling fee per container. The handling fee is negotiated between the super collector and the collection depot
 - d. super collectors have agreements in place between themselves under which each is responsible for collecting a certain material (plastic, glass, aluminium, liquid paperboard), including on behalf of the other super collectors, from the collection depots (as discussed below). Super collectors then recycle or arrange for the recycling of containers
 - e. operators of collection depots and super collectors must be approved by the Environment Protection Authority of South Australia (**EPA**).

How containers are sorted

10. There are three super collectors with which Recyclers SA proposes to collectively bargain:
- a. Statewide, a wholly owned subsidiary of Coca-Cola Amatil (Aust) Pty Ltd
 - b. Marine Stores which is owned by Lion Pty Ltd (**Lion**) (through the South Australian Brewing Company Pty Ltd) (75% per cent) and Coopers Brewery Ltd (**Coopers**) (25% per cent)
 - c. Flagcan, a wholly owned subsidiary of Central Recyclers (Aust) Pty Ltd (**Central Recyclers**).
11. Recyclers SA estimates that Flagcan has agreements with beverage suppliers for approximately 3.4% of the category B containers sold into South Australia, while Marine and Statewide represent the remaining 96.6%.⁹ Recyclers SA did not provide estimates of the respective market shares of Statewide and Marine Stores.
12. Super collectors under the SA Scheme have the following arrangements in place between them in regard to control of the different category B container materials:

⁹ Recyclers of South Australia Incorporated response to ACCC request for information, dated 5 June 2018, p. 7, available: [ACCC Public Register](#).

- a. Statewide handles all plastic (Polyethylene terephthalate (**PET**) and high-density polyethylene (**HDPE**)) and liquid paperboard (**LPB**) and its own customers' aluminium cans
 - b. Marine Stores handles all glass containers and its own customers' aluminium cans
 - c. Flagcan does not handle any containers, but has arrangements in place with Statewide to handle its customers' containers.
13. Recyclers SA states that:
- a. aluminium cans represent 45.5% of all containers returned, with Marine Stores controlling 32% and Statewide 68%
 - b. glass, controlled by Marine Stores, makes up 27.4% of all container returns
 - c. plastic and LPB make up the remaining 27.1% of returns and are controlled by Statewide: PET (19.6% of all returns), LPB cartons (5.5% of all returns), and HDPE plastic containers (2% of all returns).¹⁰
14. Collection depots sort the containers they receive by material and deliver them to the relevant super collector as follows (based on the arrangements outlined at paragraph 12 above):¹¹
- a. aluminium cans are separated into beverage brands that have contracted with Statewide (which are placed into either cages, wool bales or 'blocks'), and beverage brands that have contracted with Marine Stores (which are placed into bales)
 - b. PET plastic containers and LPB cartons are placed unsorted (or 'bulked') into cages or wool bales for collection by Statewide
 - c. HDPE plastic containers are placed unsorted into wool bales for collection by Statewide
 - d. glass is separated into colours (amber, flint and green) for Marine Stores and is placed into bins, or crushed into 'glass cullet' by those depots with a crushing machine, to save storage and transport costs. Glass is then delivered to the Visy Recycling beneficiation plant.
15. Once sorted as above, collection depots do not further separate containers by size.
16. Some collection depots also:
- a. use a 'baling machine' that compresses sorted cans or plastic containers into 'blocks', to save storage and transport costs
 - b. provide a pick-up service to other collection depots or local businesses

¹⁰ Recyclers of South Australia Incorporated response to ACCC request for information, dated 5 June 2018, p. 7, available: [ACCC Public Register](#).

¹¹ Recyclers of South Australia Incorporated response to ACCC request for information, dated 5 June 2018, p. 2-3, available: [ACCC Public Register](#).

- c. offer ancillary services on-site, such as scrap metal, clothing or e-waste collection.
17. As noted above, Flagcan does not process or handle any containers itself. The ACCC understands that some beverage manufacturers may contract with Flagcan due to a reluctance to contract with a super collector owned by a competing beverage manufacturer.

How payment is calculated

18. Collection depots pay the public the refund amount by item, but are generally reimbursed the refund amount and paid a handling fee by the super collector by weight. Specifically, collection depots pay the 10 cent refund to consumers 'on count', meaning that the category B containers are counted at the depot's site to determine the total amount owing. However, given the volume of containers collected by super collectors (587 million in 2016-17), the contracts between collection depots and super collectors often provide for the overall amount paid by super collectors to collection depots (based on the refund amount and handling fee) to be determined via an estimate based on two procedures: weighing and auditing, rather than by a count.
19. This means the super collector will weigh the delivered product and apply the average number of containers per tonne to the weight to arrive at the 'number' of containers delivered, which in turn, determines the quantum of the refund deposit and handling fee payable. Less commonly, super collectors pay collection depots based on the number declared by the collection depot by way of a statutory declaration ('on declaration').¹²
20. In general, super collectors pay collection depots for:
- a. aluminium cans, PET plastic and LPB containers based on weight and sometimes on declaration
 - b. HDPE on declaration
 - c. glass on weight. Once a collection depot delivers its glass to the beneficiation plant, the beneficiation plant weighs each colour of glass and provides a weighbridge docket to Marine Stores. Marine Stores then applies the audit results set out in their contract with the collection depot to determine the number of containers and pays the collection depot accordingly.¹³ Unlike other materials which are owned by the super collectors, each collection depot owns the glass it receives and can then choose to sell it to one of four glass cullet purchasers (Flagglass Pty Ltd, Owens-Illinois, Visy Recycling or Arora Ltd), who also pays the collection depot separately for the glass cullet.¹⁴
21. The number of containers per tonne are determined by audits conducted by the relevant super collector. The frequency and location of these audits depends on the type of container and the contract:

¹² Recyclers of South Australia Incorporated response to ACCC request for information, dated 5 June 2018, p. 3, available: [ACCC Public Register](#).

¹³ Recyclers of South Australia Incorporated response to ACCC request for information, dated 5 June 2018, p. 3, available: [ACCC Public Register](#).

¹⁴ Recyclers of South Australia Incorporated response to ACCC request for information, dated 5 June 2018, p. 4, available: [ACCC Public Register](#).

- a. The ACCC understands that in general, audits of plastic containers are conducted by the relevant super collector at its premises.
 - b. Many contracts provide for aluminium cans to be audited quarterly in a laboratory.
 - c. Many contracts provide for glass audits to be conducted twice yearly by each individual collection depot at their premises.
22. The ACCC notes that where weighing and auditing systems are used, a collection depot that is returning more containers than the calculation based on the weighing and auditing system will be underpaid and if they are returning fewer they will be overpaid. The reasons underpayment or overpayment may occur are elaborated on in paragraph 39 below.

Role of the EPA

23. The Environmental Protection Authority (**EPA**) is the regulator of the SA Scheme and ensures that the refund is made available for the person returning the empty container to the collection depot and that the empty containers are collected for recycling or reuse. However, the EPA has no direct involvement in the collection of the containers or the recycling of the material, which is the responsibility of industry.¹⁵
24. The EPA's specific role is to:
- a. approve beverage containers prior to them being offered for sale in SA, by assessing the refund marking on the container (e.g. '10c refund at collection depots when sold in SA') and the waste management arrangement
 - b. approve super collectors and collection depots to operate. In doing so, the EPA must be satisfied:
 - there is an ongoing, effective and appropriate waste management arrangement in place
 - the waste management arrangement has effective processes for resolving disputes between the parties to those arrangements.¹⁶

The Applicant

25. Recyclers SA is an incorporated industry association that represents collection depots in South Australia and provides a range of services for its members.¹⁷ Recyclers SA currently has 84 members who operate 111 collection depots (with several members operating more than one depot). There are currently 132 collection depots operating in South Australia, meaning 21 of those are not Recyclers SA members.

¹⁵ EPA South Australia, *Container deposits: How does the container deposit scheme work?* http://www.epa.sa.gov.au/environmental_info/container_deposit.

¹⁶ *Environment Protection Act 1993* (SA) s 69(3).

¹⁷ Recyclers SA states that it provides the following services: (a) promotion of the law affecting the operation of members including representing the industry in discussions and committees; (b) provision of training and education services; (c) networking events; (d) advocacy for individual members upon request; (e) public relations and advertising activities; and (f) connecting members with other members.

26. In 2017, Recyclers SA member revenue varied from less than \$2 million to up to \$25 million and employee numbers varied from less than 15 to up to 50 per collection depot operator, as follows:

Table 1: Recyclers SA collection depots revenue and staff in 2017¹⁸

Annual revenue	Members
<\$2 million	73
\$2 million - \$10 million	9
\$10 million - \$25 million	2
Full time equivalent staff	Members
< 15	82
<20	2
Casual staff	Members
<15	81
<20	1
<50	2

27. The ACCC understands that amongst those collection depots with less than \$2 million in revenue, revenues vary considerably with, for example, some smaller regional depots having revenue of less than \$100,000 per annum.
28. Any collection depot approved by the EPA may become a member of Recyclers SA. Recyclers SA notes that if authorised, it intends to invite all current and future members to become a party to the collective bargaining.
29. Membership fees are based on the volume of containers a collection depot delivers to the super collectors. The fee is 0.004 cents per dozen of containers delivered and, under an agreement between the collection depots and the super collectors, the super collectors pay this fee directly to Recyclers SA from the sums payable by super collectors to the collection depots.

Interrelationships between Recyclers SA and other parties

30. Certain individuals involved in the management of Recyclers SA have a number of interrelationships with other parties involved in the SA Scheme.
31. Three directors of Recyclers SA are also on the board of super collector Flagcan and its holding company Central Recyclers. They are Neville Rawlings (President of Recyclers SA), Philip Martin (Vice President of Recyclers SA) and John Lester

¹⁸ Recyclers of South Australia Incorporated submission in support of application, dated 16 March 2018, p. 14, available: [ACCC Public Register](#).

(CEO of Recyclers SA). Trevor Hockley, who acts as a consultant to Recyclers SA, is also a director of both Flagcan and Central Recyclers.

32. These four individuals are also involved in the management of other entities with interests in the SA Scheme, including:
- a. as principals of collection depots such as Daws Road Bottle Co (Neville Rawlings) and P&T Recycling Seaford (Philip Martin)
 - b. as principal of a waste management industry consulting firm, TJH Management Services Pty Ltd (Trevor Hockley)
 - c. as directors and shareholders of Container Deposit Systems (registered as C D SA Pty Ltd) (**CDS**) (Neville Rawlings as director and indirect shareholder, Trevor Hockley as a director and Philip Martin and John Lester as indirect shareholders). CDS is a company formed to develop technology to sort and count deposit containers without reading a barcode or requiring the container to be in original condition.¹⁹

The Proposed Conduct

33. Recyclers SA seeks authorisation to:
- a. represent its participating members collectively in contractual negotiations held from time to time with the respective super collectors individually for the supply of containers in consideration for a refund and handling fee pursuant to the *Environment Protection Act 1993 (SA)* (**the Act**); and
 - b. provide advice to its participating members collectively in relation to their contractual arrangements with super collectors for the supply of containers in consideration for a refund and handling fee pursuant to the Act
- for a period of 10 years (**the Proposed Conduct**).
34. The Proposed Conduct would not address the quantum of the refund amount and/or handling fee per container or tonne of containers. The Proposed Conduct would also not extend to any collective boycott of any or all of the super collectors in connection with the proposed collective negotiations or otherwise.
35. Recyclers SA has identified the specific issues it wishes to negotiate about as including:
- a. the method of auditing
 - b. dispute resolution
 - c. workplace health and safety issues

¹⁹ Recyclers of South Australia Incorporated response to ACCC request for information, dated 5 June 2018, p. 6, available: [ACCC Public Register](#).

as well as other terms of the contracts with super collectors that are relevant to Recyclers SA members (excluding the refund amount and handling fees).²⁰

36. Recyclers SA envisages that if authorisation is granted, the collection depots will individually enter into separate contracts on identical or near identical terms with the relevant super collector.
37. Recyclers SA is seeking authorisation in relation to cartel conduct (45AF, 45AG, 45AJ and 45AK), anticompetitive agreements (section 45) and/or concerted practices (section 45) of the *Competition and Consumer Act 2010* (Cth) (**the Act**).

Composition of the negotiating team

38. To ensure that the interests of all its members are considered and directly represented, Recyclers SA proposes that:
 - a. none of the collection depot owners or members of the Recyclers SA executive who are also directors of Flagcan and/or CDS will participate actively in negotiations
 - b. Recyclers SA will hold an initial meeting to canvass the issues to be negotiated and nominate a negotiation team that will comprise three or more individuals representing specific different interests (i.e. a larger depot, a member of Recyclers SA's executive, a smaller depot, a metropolitan depot and a regional depot). If the nominations are contested, they will be subject to a vote to be conducted consistent with the nomination and appointment process used for the executive under the Recyclers SA constitution, whereby each member has one vote.²¹

Rationale for the Proposed Conduct

39. Recyclers SA submits that it is seeking to collectively bargain with the super collectors on behalf of its members because:
 - a. current contracts between collection depots and super collectors are generally standard form, and have either expired or been renewed or rolled over without being renegotiated to reflect modern circumstances
 - b. certain contractual provisions, particularly the weight auditing procedures, are unwieldy, onerous and are not being complied with by super collectors. Recyclers SA submits that the current auditing system has created widespread perceived underpayment of collection depots, stemming largely from the discrepancies that arise from collection depots paying the public per number of containers, but receiving payment from super collectors by weight.²² The ACCC understands that this perception is exacerbated by demographic differences if the same auditing formula is applied across collection depots which receive a different mix of

²⁰ Recyclers of South Australia Incorporated response to ACCC request for information, dated 12 June 2018, p. 1, available: [ACCC Public Register](#).

²¹ Recyclers of South Australia Incorporated response to ACCC request for information, dated 12 June 2018, p. 1, available: [ACCC Public Register](#).

²² Recyclers of South Australia Incorporated response to ACCC request for information, dated 5 June 2018, p. 5, available: [ACCC Public Register](#).

containers (for example, different brands, sizes and weights) reflecting the consumption habits of their area²³

- c. due to their small size, individual collection depots have little ability to access legal advice relating to the negotiation, compliance or enforcement of their contracts with super collectors.
40. Recyclers SA therefore considers that the Proposed Conduct seeks to minimise the power disparity between its member collection depots and super collectors, create circumstances in which collection depots are more likely to successfully negotiate streamlined and transparent procedures, and empower collection depots to better enforce their contractual arrangements.

Consultation

41. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process.
42. The ACCC invited submissions from a range of potentially interested parties including the three target super collectors, non-member collection depots, industry associations, beverage manufacturers, state government departments including the South Australian EPA, and environmental organisations.²⁴
43. The ACCC received five submissions opposed to the application. The submissions are from two out of the three targets (super collectors) and related entities:
- a. Marine Stores and its related beverage manufacturers Coopers and Lion
 - b. Statewide, and
 - c. an industry association, the Brewers Association of Australia (Brewers Association).
44. The third super collector, Flagcan, has expressed its support for the Proposed Conduct in a letter attached to the initial application.
45. The submissions opposed to the application have raised concerns that the Proposed Conduct is unnecessary, submitting that collection depots are not homogenous in size or operation and therefore not amenable to collective bargaining. Submissions also suggest that the conflicts of interest held by some Recyclers SA representatives due to their office holdings in super collectors, collection depots and other entities, mean that any negotiations risk disproportionately benefiting the large collection depots and/or entities such as CDS, which is developing its own beverage counting technology.
46. The submissions by Recyclers SA and interested parties are considered as part of the ACCC's assessment of the application for authorisation below.
47. These submissions, any further public submissions received by the ACCC as this matter progresses and further information in relation to the application for re-

²³ Recyclers of South Australia Incorporated subsequent submission, dated 1 May 2018, p. 4, available: [ACCC Public Register](#).

²⁴ A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

authorisation may be obtained from the ACCC's website:

<https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register>.

ACCC assessment

48. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
49. The Recyclers SA has sought authorisation for the Proposed Conduct as it may contain a cartel provision or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
50. Pursuant to subsections 90(7) and 90(8) of the Act, in broad terms, the ACCC may grant authorisation if it is satisfied in all the circumstances that the likely benefit to the public from the Proposed Conduct would outweigh the likely detriment to the public.

Relevant areas of competition

51. Recyclers SA submits that the relevant area of competition is the collection, handling, supply and recycling of beverage containers pursuant to the SA Scheme in South Australia. Recyclers SA further submits that the Proposed Conduct will impact one aspect of this area of competition, being the supply of category B containers from collection depots to super collectors pursuant to the SA Scheme.²⁵
52. The ACCC considers that although it is not necessary to precisely identify the relevant areas of competition in assessing this application, the relevant areas of competition likely to be affected by the Proposed Conduct include:
 - a. the receipt and collection of category B containers by collection depots in South Australia from the public (consumers and businesses), and
 - b. the supply of category B containers from collection depots to super collectors.
53. In relation to these areas of competition, the ACCC notes that:
 - a. the price paid by collection depots to customers in return for category B containers (the 10 cent refund) is set by the *Environmental Protection Regulations 2009* (SA)
 - b. competition between collection depots for customers is primarily based on service levels and convenience. Location of the collection depot is a key consideration for many customers. Other factors influencing a customer's choice of collection depot include operating hours, facilities and processes for accepting containers and ancillary services offered, such as also accepting cardboard, scrap metal, e-waste and other recyclable products

²⁵ Recyclers of South Australia Incorporated submission in support of application, dated 16 March 2018, p. 19, available: [ACCC Public Register](#)

- c. generally, once a collection depot accepts a category B container from a customer they are faced with a monopsony buyer. The type and brand of the container dictates which super collector it is sent to in exchange for reimbursement of the 10 cent refund and a handling fee, with the handling fee negotiated between the collection depot and the super collector
- d. beverage manufacturers in South Australia must enter into an agreement with a super collector to recover their empty containers. In effect, this means that while collection depots are faced with a monopsony buyer in respect of each type and brand of container, the buyer is obliged to take their containers, and
- e. as noted, collection depots pay refunds to the public based on numbers of containers received but are generally paid by the collection depots based on formulas used to estimate the number of containers they have received.

Future with and without

- 54. To assist in its assessment of the Proposed Conduct against the authorisation tests, the ACCC compares the benefits and detriments likely to arise in the future with the conduct for which authorisation is sought against those in the future without the conduct the subject of the authorisation.
- 55. The ACCC considers that without the Proposed Conduct, collection depots will individually negotiate new contracts with super collectors or will continue under their existing contracts. Recyclers SA submits that this will mean that the perception of underpayment among members will continue, leading to a deterioration of relations between super collectors and collection depots, and that this will be a disincentive for collection depots' continued engagement in the market. Recyclers SA argue that as a result, the number of collection depots in operation is likely to decrease, reducing competition between the remainder.²⁶ This is discussed further in the ACCC's assessment of the public benefits and public detriments likely to result from the Proposed Conduct below.
- 56. The ACCC also considers that absent the Proposed Conduct, Recyclers SA will continue to play their advocacy role, which includes supporting individual members in disputes with super collectors, and representing the industry in discussions and committees involving issues affecting the operations of its members, but not in contractual matters.

Public benefit

- 57. The Act does not define what constitutes a public benefit and the ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (**Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.²⁷

²⁶ Recyclers of South Australia Incorporated submission in support of application, dated 16 March 2018, p. 25, available: [ACCC Public Register](#)

²⁷ *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

58. Having regard to the submissions of Recyclers SA and interested parties and information available to the ACCC, the ACCC has considered three claimed public benefits of the Proposed Conduct:
- a. transaction costs savings
 - b. more effective input into contracts, and
 - c. maintaining the viability of the SA Scheme
59. The ACCC's assessment of the likely public benefits from the Proposed Conduct follows.

Transaction costs savings

60. Recyclers SA submits that the Proposed Conduct is likely to result in transaction costs savings. Recyclers SA submits that the negotiation, execution and administration of individual agreements with collection depots involves considerable time and resources for each super collector and individual collection depots. Recyclers SA submits that authorisation for members to collectively negotiate with super collectors through Recyclers SA will streamline the negotiation process, which will save time and costs for super collectors and individual collection depots.²⁸
61. Marine Stores, Lion and Statewide submit that the Proposed Conduct will not result in a streamlined, more cost effective process. These parties submit that arrangements between collection depots and super collectors vary depending on the size of the collection depot and its operations. They submit that as the collection depots are not a homogenous group and because Recyclers SA does not propose to negotiate with respect to refunds or handling fees, the super collectors will still need to negotiate with individual collection depots, including in relation to price and other terms that are specific to the individual depot.²⁹
62. Marine Stores states that it has previously attempted to introduce new contracts to Recyclers SA members but has not been able to do so largely as a result of advocacy of Recyclers SA against such contracts.³⁰
63. In addition, Statewide considers that collective negotiation may increase transaction costs for smaller collection depots who have to contribute to the negotiation costs of larger depots with more complex commercial requirements. Further, Statewide submits that because the arrangements between collection depots and Statewide vary depending on the depot, disputes have historically involved issues unique to the specific collection depot, and therefore would not benefit from collective bargaining or joint advice.³¹
64. The ACCC considers that the Proposed Conduct is likely to result in a public benefit in the form of transaction cost savings.
65. The ACCC accepts that each Recyclers SA member individually negotiating with each super collector will incur transaction costs, such as the time taken to

²⁸ Recyclers of South Australia Incorporated submission in support of application, dated 16 March 2018, p. 26, available: [ACCC Public Register](#).

²⁹ Statewide submission, dated 27 April 2018, p.7, available: [ACCC Public Register](#), Marine Stores Pty Ltd submission, dated 13 April 2018, p.4, available: [ACCC Public Register](#), Lion Pty Ltd submission, dated 13 April 2018, p. 4, available [ACCC Public Register](#).

³⁰ Marine Stores Pty Ltd submission, dated 8 June 2018, p.3, available: [ACCC Public Register](#).

³¹ Statewide submission, dated 27 April 2018, p.10, available: [ACCC Public Register](#).

negotiate, administration costs and legal or other expert costs. Correspondingly, each super collector will also incur transaction costs in negotiating with multiple individual collection depots.

66. The ACCC also accepts that there are significant differences in the ways in which collection depots operate, including in relation to size, location and processes for receiving and collecting containers for delivery to super collectors. However, the ACCC does not consider that there are significant differences between collection depots with respect to the matters on which they wish to collectively bargain, such as audit processes, workplace health and safety matters and dispute resolution processes.
67. In this respect, the ACCC understands that standard form contracts are generally the starting point for negotiations between a super collector and collection depots. Marine Stores submits that it intends to propose a new form of contract to collection depots in the near future.³² The ACCC considers that there is likely to be transaction costs savings in collective negotiation about the terms of this new form of contract.
68. The ACCC notes the concerns raised by Marine Stores, Lion and Statewide about the collective negotiation process not accommodating for the differentiation between depots, and the varied services they offer. The ACCC accepts that the super collectors will still be required to negotiate with individual depots in relation to handling fees and other commercial terms specific to individual depots, and that transaction costs will be incurred as a result of these negotiations. However as noted, the ACCC considers that there is a range of issues Recyclers SA is seeking to collectively negotiate which are common to its members, and transaction cost savings are likely to be derived from collective negotiation in relation to these common issues.
69. With respect to the concerns raised by Statewide that collective negotiation may increase transaction costs for smaller collection depots which have to contribute to the negotiation costs of larger depots with more complex commercial requirements, the ACCC notes that the proposed arrangements are voluntary for all parties. Further, as discussed at paragraph 38, Recyclers SA intends that the negotiating team be representative of all types of collection depots. In addition, the ACCC also expects that any more complex commercial requirements specific to some larger depots would most likely be the subject of individual negotiation, in addition to, or instead of, any collectively negotiated agreement, as the super collectors have submitted should be the case.

More effective input into contracts

70. Recyclers SA submits that the Proposed Conduct will create circumstances in which collection depots can negotiate with super collectors in a meaningful way, resulting in more effective input into contracts.³³ Recyclers SA submits that some collection depots are operating under standard form contracts with super collectors that are substantially similar to standard form contracts entered into since 2000, and it considers it prudent that these contracts be reviewed and renegotiated to reflect modern circumstances. Recyclers SA consider the

³² Marine Stores Pty Ltd submission, dated 8 June 2018, p.3, available: [ACCC Public Register](#).

³³ Recyclers of South Australia Incorporated submission in support of application, dated 16 March 2018, p. 26, available: [ACCC Public Register](#).

Proposed Conduct is necessary to produce robust and meaningful negotiations with each of the super collectors.³⁴

71. Marine Stores submits that collective bargaining will not result in more effective input into contracts because it considers the involvement of Recyclers SA to be an impediment to market innovations and efficiencies. In its submission, Marine Stores states that since 2006 it has proposed various versions of an agreement with collection depots to Recyclers SA, however Recyclers SA refused to negotiate unless Marine Stores agreed to a number of issues, for example no change to handling fees if the practice of bulking cans (which would have reduced costs) was introduced. Marine Stores also notes that the expiry dates of many of the agreements occurred more than 10 years ago. Marine Stores considers it likely that outcomes that were beneficial to all parties would have resulted from individual as opposed to collective bargaining.³⁵
72. Statewide submits that the Proposed Conduct will not improve efficiencies because the substantive terms of the agreements between super collectors and collection depots are commercially sensitive and depot specific, and will not form part of the negotiations.³⁶
73. As discussed above in relation to transaction cost savings, the ACCC considers that although super collectors may still be required to individually negotiate with collection depots in relation to certain commercial terms specific to the individual depot, the Proposed Conduct will provide an opportunity to facilitate collective negotiation in relation to the specified issues common amongst the bargaining group. The ACCC considers that this is likely to result in a public benefit by facilitating more effective input into contracts by collection depots.
74. The majority of Recyclers SA's members are small businesses. The ACCC accepts that, when negotiating with larger counterparties, small businesses can be at a disadvantage in terms of resources and experience of negotiating. One way in which small businesses can seek to redress such disadvantage is to bargain collectively.
75. It is apparent that individual bargaining has not always been an effective method by which agreements between super collectors and collection depots, benefiting from effective input from both collection depots and super collectors, have been agreed. This is evidenced by the fact that in some cases collection depots are operating under contracts that expired more than 10 years ago.
76. The ACCC considers that the Proposed Conduct may allow for more effective negotiation, allowing negotiating parties a greater opportunity to identify and achieve efficiencies that better reflect the circumstances of super collectors and collection depots. The ACCC also considers that collective bargaining is likely to enable collection depots to become better informed of relevant market conditions and options available to them, such as developments in counting technology, which is likely to improve their input into contractual negotiations with super collectors to achieve more efficient outcomes.

³⁴ Recyclers of South Australia Incorporated submission, dated 7 May 2018, p. (2), available: ACCC Public Register.

³⁵ Marine Stores Pty Ltd submission, dated 13 April 2018, p.3, available: [ACCC Public Register](#).

³⁶ Statewide submission, dated 27 April 2018, p.9, available: [ACCC Public Register](#).

77. Further, resource constrained collection depots with relatively minor concerns may choose not to take individual action because of the time and cost of doing so. However, these concerns could be raised with super collectors as part of a collective bargaining group.
78. Accordingly, the ACCC considers the Proposed Conduct will likely result in public benefits from facilitating collection depots having more effective input into negotiations with super collectors, which will lead to agreements that better reflect the needs of members than the terms of their existing contracts.

Maintaining the viability of the SA Scheme

79. Recyclers SA submits that absent the ability to collectively negotiate, the perception by its members of widespread underpayment will continue. Recyclers SA contends that this will in turn likely deteriorate relations between super collectors and its members and be a disincentive for collection depots' continued engagement in the market. Recyclers SA argues that as a result, it is likely that over time the number of collection depots will decrease, reducing competition between remaining depots and negatively impacting public access to collection depots and participation in the SA Scheme.³⁷ Recyclers SA submits that through collective bargaining, collection depots will be able to better ensure that payment they receive from super collectors is an accurate reflection of the services provided to the public.³⁸
80. Marine Stores, Lion and Statewide submit that there is no evidence that the viability of collection depots' operations is in question and, in fact, if anything the industry is expanding. They submit that they do not consider that the current scheme fails to adequately reflect the value of collection depot services. In particular, they state that there is no evidence that collection depots are exiting, or are likely to exit, the market due to an inability to operate profitably and that there is no evidence that the ongoing, effective and appropriate waste management arrangements under the SA Scheme are at risk.³⁹
81. Statewide further submits that the SA Scheme has had long standing operation and has shown increased efficiencies and an ability to achieve environmental benefits without collective bargaining by the collection depots. Statewide argues that market forces have been able to efficiently reward and incentivise entry and competition between collection depots. Statewide argues that to the extent the incentives for participating in the SA Scheme are in question, this is more a matter for the legislature to consider after detailed analysis and consideration.⁴⁰
82. The ACCC considers that the SA Scheme plays an important role in reducing beverage container litter and promoting the recovery and recycling of beverage containers in South Australia and thereby generates a public benefit. As discussed above, the ACCC also considers that any arrangements which improve the efficiency and effectiveness of the SA Scheme, for example through reducing transaction costs for collection depots and super collectors or facilitating more effective input into contracts by collection depots, also generate a public benefit.

³⁷ Recyclers of South Australia Incorporated submission in support of application for authorisation, dated 16 March 2018, p.25, available: [ACCC Public Register](#).

³⁸ Recyclers of South Australia Incorporated submission in support of application for authorisation, dated 16 March 2018, p.27, available: [ACCC Public Register](#).

³⁹ Lion submission, dated 13 April 2018, p.6, Marine Stores submission, dated 13 April 2018, p.4, Statewide submission, dated 27 April 2018, p.9, available: [ACCC Public Register](#).

⁴⁰ Statewide submission, dated 27 April 2018, p.9, available: [ACCC Public Register](#).

83. However, the ACCC does not consider that whether or not Recyclers SA members are able to collectively bargain with super collectors will significantly impact the viability of the SA Scheme. The SA Scheme has been operating successfully for 40 years and the ACCC does not currently have any evidence before it to suggest that the viability of the scheme is uncertain. The ACCC invites Recyclers SA to provide further information about this issue.
84. Accordingly, while the ACCC considers that continued operation of the SA Scheme results in a public benefit, based on the information currently before it, the ACCC does not consider that realisation of this public benefit is likely to be dependent on the Proposed Conduct.

Public detriment

85. The Act does not define what constitutes a public detriment and the ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁴¹

86. Having regard to the submissions of Recyclers SA and interested parties and other information available to the ACCC, the ACCC has considered the following claimed public detriments of the Proposed Conduct:
- a. reduced competition between collection depots
 - b. conflicts of interest amongst some bargaining group members, which could lead to distorted outcomes favouring those members or provide them with access to commercially sensitive information about their competitors, and
 - c. the bargaining group will not be representative of all Recyclers SA members, which could lead to contracts that favour the interests of some collection depots over others.
87. The ACCC's assessment of the likely public detriments from the Proposed Conduct follows.

Reduced competition between collection depots

88. Recyclers SA submits that although it is possible that the Proposed Conduct will reduce competition between members in their supply of category B containers to super collectors, this possibility is remote and any effect on competition would be minimal because:
- a. the container refund amount is prescribed by regulation
 - b. the number of category B containers in the market is determined by manufacturers, and the negotiation of more streamlined and transparent

⁴¹ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

procedures will not affect the number of containers supplied under the SA Scheme, to which the refund and handling fee applies⁴²

- c. the contractual arrangements are already standard form documents
 - d. there are very few points by which a collection depot and/or super collector can differentiate its service to achieve a competitive advantage, and
 - e. the Proposed Conduct will not address the quantum of the handling fee.⁴³
89. Statewide submits that the Proposed Conduct has the potential to mute the existing competitive dynamics between collection depots, which compete to:
- a. attract customers by extending opening hours, decreasing service time and providing pick-up, sorting, commercial clean out and recycling services for additional materials
 - b. improve the operational costs for collecting, counting, and delivering containers to super collectors (including through the investment in lower cost equipment, or the variation to operating size)
 - c. provide services to super collectors, including delivery services and bundling services.⁴⁴
90. Statewide further submits that the Proposed Conduct will necessarily require collection depots to share information and arrive at a common understanding and approach to interactions with super collectors. Statewide submits that there is a real risk that collection depots may coordinate their conduct more broadly, in terms of services offered or business operations, above and beyond their interactions with super collectors. Statewide further submits that collective bargaining may result in a reluctance for participating collection depots to break away or negotiate individually to obtain better or more suitable terms.⁴⁵
91. Lion similarly notes that collective negotiations will deny collection depots the opportunity to directly negotiate agreements with super collectors that could ensure their businesses' profitability by improving collection services or reducing costs or achieving efficiencies, and instead risk focusing on ways to increase the handling fee.⁴⁶
92. Statewide also submits that standardising processes between depots may also reduce the scope for competitive differentiation or advantage, such as more efficient internal processes.⁴⁷ Marine Stores likewise submits that collective bargaining could result in a one size fits all contract that favours the interests of

⁴² Recyclers of South Australia Incorporated subsequent submission, dated 1 May 2018, p. (x), available: [ACCC Public Register](#).

⁴³ Recyclers of South Australia Incorporated submission in support of application for authorisation, dated 16 March 2018, p. 29-30, available: [ACCC Public Register](#).

⁴⁴ Statewide submission, dated 27 April 2018, p.13, available: [ACCC Public Register](#).

⁴⁵ Statewide submission, dated 27 April 2018, p.11, available: [ACCC Public Register](#).

⁴⁶ Lion Pty Ltd submission, dated 13 April 2018, p. 4, available [ACCC Public Register](#).

⁴⁷ Statewide submission, dated 27 April 2018, p.13, available: [ACCC Public Register](#).

some industry participants, which may discourage individual innovation with respect to individual members' contracts and the conduct of their businesses.⁴⁸

93. In response, Recyclers SA submitted that the Proposed Conduct does not contemplate the wholesale sharing of information between collection depots, and any sharing of information outside the scope of any authorisation granted would risk breaching the CCA.⁴⁹ Recyclers SA also notes that its members would not be bound by any agreement collectively negotiated and that participants would be able to withdraw if they wished.
94. Recyclers SA also responded that it is aware of very few negotiations between individual members and any of the super collectors that have sought to substantially vary the standard form agreements. Recyclers SA states that where variations have been permitted, they have not materially altered the systems and processes of the standard form agreements, including the basis of the audit system.⁵⁰
95. As noted in paragraph 38 above, Recyclers SA has also stated that it intends to assemble a negotiation team with representation from collection depots of various sizes.
96. The ACCC considers that the Proposed Conduct is unlikely to significantly reduce competition between depots due to various mitigating factors.
97. While collection depots compete for customers through a variety of aspects of their service offering, such as those identified by Statewide at paragraph 89, they are not proposing to collectively negotiate in relation to these aspects of their operations. The ACCC does not consider that the Proposed Conduct will reduce collection depots' incentives to compete in relation to these aspects of their service offering.
98. Further, authorisation provides statutory protection from legal action for conduct that might otherwise breach certain provisions of the Act. In this case, collective negotiation with super collectors and the provision of expert advice in relation to collection depots' contractual arrangements with super collectors. Authorisation would not protect parties for any broader coordination in terms of services offered or business operations. The ACCC considers that this also limits the likelihood of any anticompetitive detriment arising from the coordinated conduct that is proposed to be authorised.
99. With respect to the matters about which the collection depots are proposing to collectively bargain, the ACCC understands that the majority of contracts between collection depots and super collectors are already standard form. Nevertheless, the ACCC considers that the Proposed Conduct would not prevent individual collection depots from seeking to individually introduce efficient processes or innovations into their businesses, or individually approaching super collectors regarding their contracts.
100. The arrangements are voluntary for both collection depots and super collectors. Each collection depot will individually weigh the perceived benefits of participating

⁴⁸ Marine submission, dated 13 April 2018, p. 5, available: [ACCC Public Register](#).

⁴⁹ Recyclers of South Australia Incorporated subsequent submission, dated 1 May 2018, p. 3, available: [ACCC Public Register](#).

⁵⁰ Recyclers of South Australia Incorporated subsequent submission, dated 7 May 2018, p. 2, available: [ACCC Public Register](#).

in the collective bargaining process against those of individual negotiation and choose the option that they consider will deliver them the best or most suitable terms. Similarly, super collectors are free to choose not to engage in collective negotiations, and/or supplement collective negotiation with one on one negotiation with any collection depot where they consider that doing so is likely to deliver better terms.

101. Accordingly, the ACCC considers that the Proposed Conduct is unlikely to result in significant public detriment through any impact on competition between collection depots.

Conflicts of interest

102. Marine Stores and Statewide submit that there are apparent conflicts of interest which arise as a result of Recyclers SA senior office holders' involvement in other related entities across the recycling industry.

103. As outlined in paragraphs 31-32, the ACCC notes that:

- a. a number of senior office holders of Recyclers SA are also directors and/or indirect shareholders of technology company, CDS
- b. a number of senior office holders of Recyclers SA are also directors of super collector, Flagcan, and its parent company Central Recyclers, and
- c. a number of senior office holders of Recyclers SA also own and operate recycling depots.

104. As described above, CDS is a company formed to develop 'counting technology' which has the ability to sort and count deposit containers.⁵¹ Marine Stores and Statewide submit that they are concerned that due to some of the directors of Recyclers SA operating some of the largest depots and holding directorships in CDS, these individuals may use collective bargaining as a vehicle for introducing their own 'counting technology' across the industry. Marine Stores expressed concern that this may not align with the needs of 'rank and file' Recyclers SA members and may unduly favour some members who are better resourced and more ready to introduce this technology.⁵² Statewide further submits that because collection depots vary significantly in size and scope of operations, the use of such technology, or the investment in such equipment, may be inefficient or increase costs for certain depots.⁵³

105. In addition, Lion submits that if Recyclers SA were to collectively negotiate with super collectors on behalf of its members, Recyclers SA members, including those members with an interest in Flagcan, are likely to become privy to commercially sensitive information about these super collectors. Lion is concerned that this information sharing is likely to place Marine Stores and Statewide at a significant competitive disadvantage to Flagcan, both in any collective negotiation and more generally. Lion also submits that there is a risk that negotiations between Recyclers SA and Flagcan may be resolved on terms

⁵¹ Recyclers of South Australia Incorporated response to ACCC request for information, dated 5 June 2018, p. 6, available: [ACCC Public Register](#).

⁵² Recyclers of South Australia Incorporated submission in support of application, dated 16 March 2018, p. 17, available: [ACCC Public Register](#).

⁵³ Statewide submission, dated 27 April 2018, p.10, available: [ACCC Public Register](#).

more favourable to Flagcan than other super collectors, due to these individuals' involvement in any collective negotiations and their interest in Flagcan.⁵⁴

106. In response, Recyclers SA submits that it will ensure that any Recyclers SA members who are directors of Flagcan and/or CDS will recuse themselves from any discussions, negotiations or advice in relation to Recyclers SA collectively negotiating with any super collectors save to the extent that they, as depot owners/operators will be informed of the outcome of such discussions, negotiations and advice. The recusal of directors in these circumstances will be recorded in the minutes of any meeting in which these matters are discussed. Any record or minutes of discussions or advice will be kept confidential from the directors of Flagcan and CDS, and if minutes are circulated, only redacted versions will be sent to those directors.⁵⁵
107. Recyclers SA further submits that participants in the negotiations or discussions will be educated as to the confidentiality required and will provide an undertaking not to disclose the information to any director of Flagcan or CDS, except to the extent that it is general disclosure to all depot owners about the outcomes of the negotiation.⁵⁶
108. The ACCC considers that permitting executives of Recyclers SA who have interests in other interested parties to participate in contract negotiations with super collectors would raise conflict of interest issues. However, the ACCC considers that the arrangements proposed by Recyclers SA should limit the potential conflicts of interest and prevent them affecting the public benefits from the Proposed Conduct. The ACCC invites interested parties to comment on the approach to addressing potential conflicts of interest proposed by Recyclers SA.
109. Further, with respect to concerns that the collective bargaining process may be used to negotiate terms which are favourable to CDS and/or some larger collection depots at the expense of smaller collection depots, or terms more favourable to Flagcan at the expense of Marine Stores and Statewide, the ACCC notes that the proposed collective bargaining arrangements are voluntary. Contracts with Marine Stores or Statewide cannot be negotiated without the agreement of Marine Stores or Statewide respectively, and Flagcan could agree contracts with individual collection depots without the authorisation.
110. With respect to any directors of Flagcan who are also depot owners becoming privy to commercially sensitive information about the other super collectors, provided the information they are given is limited to the outcomes of negotiations as proposed by Recyclers SA, they will be privy to similar information to that which they currently receive as depot owners individually negotiating with Marine Stores and Statewide.

Composition of the bargaining group

111. Statewide and Marine Stores submit that collective bargaining could result in a 'one size fits all' contract that favours the interests of some but not all industry

⁵⁴ Marine Stores Pty Ltd submission, dated 13 April 2018, p.6, available: [ACCC Public Register](#).

⁵⁵ Recyclers of South Australia Incorporated response to ACCC request for information, dated 5 June 2018, p. 6, available: [ACCC Public Register](#).

⁵⁶ Recyclers of South Australia Incorporated response to ACCC request for information, dated 5 June 2018, p. 6, available: [ACCC Public Register](#).

participants, noting that collection depots are not homogenous in size or operations.⁵⁷

112. Statewide notes that some of the biggest collection depots are operated by directors of Recyclers SA, who are likely to have the controlling vote and therefore significant influence over smaller collection depots. It submits that the largest collection depots would also be the largest benefactors of any change, because the SA Scheme operates on a unit-based system and they represent the largest volume of the units. As discussed above, Statewide is also concerned that members of Recyclers SA who have interests in related companies across the industry could use the collective bargaining process to further their own interests, to the likely detriment of other industry stakeholders.⁵⁸

113. In response, Recyclers SA stated that it is conscious that there are members that vary in size, location and operation. In order to ensure that the bargaining group participating in any collective negotiation is representative of all members, Recyclers SA proposes the following arrangement:

- a. as stated above, none of the collection depot owners or members of Recyclers SA Executive who are also directors of Flagcan will be involved in the negotiations
- b. following authorisation, Recyclers SA would hold an initial meeting to canvas the issues to be negotiated and assemble a negotiation team
- c. the negotiation team will be assembled to include members which represent the following:
 - a larger depot (or operator of a number of depots)
 - a member of the current Recyclers SA executive
 - a smaller depot
 - a metropolitan depot and
 - a regional depot.

The negotiation team will include at least three representatives, with some of the above categories being represented by the same member. For example, there may be an operator of a number of depots in the metropolitan area.

- d. the negotiation team will be appointed by nomination at the initial meeting and if the nominations are contested, will be subject to a vote to be conducted consistent with the nomination and appointment process used for the Executive under the Recyclers SA constitution, with each member having one vote.⁵⁹

114. The ACCC notes the arrangements proposed by Recyclers SA to deal with the conflicts of interest issues and to allow for the interests of all members to be considered and represented.

⁵⁷ Marine Stores Pty Ltd submission, dated 13 April 2018, p.6, available: [ACCC Public Register](#).

⁵⁸ Statewide submission, dated 27 April 2018, p.10, available: [ACCC Public Register](#).

⁵⁹ Recyclers of South Australia Incorporated response to further question, dated 12 June 2018, p. 2, available: [ACCC Public Register](#).

115. Further, the ACCC notes that it is open to any Recyclers SA member who does not consider that their interests are being appropriately represented by the negotiating team to not participate in the negotiation.

Balance of public benefit and detriment

116. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the Proposed Conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.

117. The ACCC considers the Proposed Conduct is likely to result in public benefits in the form of transaction cost savings and facilitating collection depots having more effective input into negotiations with super collectors.

118. Conversely, the ACCC does not consider that the Proposed Conduct is likely to result in significant public detriment given that:

- a. the Proposed Conduct is voluntary for collection depots and super collectors
- b. competition between collection depots regarding the matters they propose to collectively bargain about is currently limited and collectively bargaining in relation to these issues is unlikely to limit competition between collection depots to provide services more broadly, and
- c. the issues raised about conflicts have been addressed.

119. For the reasons outlined in this draft determination the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit that would outweigh the likely public detriment, including detriment constituted by any lessening of competition that would be likely to result.

120. Accordingly, the ACCC proposes to grant authorisation.

Length of authorisation

121. The Act allows the ACCC to grant authorisation for a limited period of time.⁶⁰ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

122. In this instance, Recyclers SA seeks authorisation for 10 years. Recyclers SA submits that this takes into account the long term nature of contractual relations between most super collectors and its members and is sufficient time to consult with its members, negotiate with super collectors and make and give effect to a new set of contracts.⁶¹ Recyclers SA submits that longer term contacts will provide certainty of operations for collection depots. Recyclers SA also states that some collection depots have not had their agreements renegotiated for more than 20 years and the period for which they are seeking authorisation is significantly

⁶⁰ Subsection 91(1).

⁶¹ Recyclers of South Australia Incorporated submission in support of application for authorisation, dated 16 March 2018, p.18, available: [ACCC Public Register](#).

less than the period for which current contracts have been left in place without renegotiation.⁶²

123. Marine Stores considers that the 10 year period of authorisation sought is too long in an industry in which authorisation has not previously been granted and in light of the public detriment it considers will result from the Proposed Conduct. Marine Stores states that if authorisation is granted, it should be for two years.⁶³
124. The ACCC notes that although it is unclear to what extent collective bargaining will occur in practice, one of the primary objectives of the proposed collective bargaining arrangement is to negotiate amendments to processes used, or new processes, to determine the number of containers delivered by collection depots to super collectors. This could potentially represent a significant change from current arrangements.
125. However, the ACCC also understands that contracts between collection depots and super collectors are generally long term in nature and, often, continue in perpetuity at expiration unless renegotiated. In this respect, Marine Stores submits that the expiry dates of many of the agreements occurred more than 10 years ago.⁶⁴
126. The ACCC also notes that the proposed collective bargaining arrangements are voluntary such that different arrangements to those currently adopted will only be implemented if both participating collection depots and the super collectors consider it mutually beneficial to do so, and only on mutually agreed terms. Further, any concerns about locking in new arrangements for an extended period can also be addressed through negotiation. This can include providing scope in contracts negotiated to revisit, and potentially renegotiate, arrangements during the term of contracts.
127. Accordingly, having regard to the long term nature of contracts between collection depots and super collectors, the voluntary nature of the proposed collective bargaining and the ACCC's conclusions that the arrangements are likely to result in public benefits and no significant public detriments, the ACCC proposes to grant authorisation for 10 years.
128. The ACCC invites submissions about the proposed period of authorisation.

⁶² Recyclers of South Australia Incorporated response to ACCC request for information, dated 5 June 2018, p.10, available: [ACCC Public Register](#).

⁶³ Marine Stores submission, dated 13 April 2018, p.7, available: [ACCC Public Register](#).

⁶⁴ Marine Stores submission, dated 13 April 2018, p.4, available: [ACCC Public Register](#).

Draft determination

The application

129. On 16 March 2018 Recyclers of South Australia Incorporated (**Recyclers SA**) lodged application AA1000415, seeking authorisation under subsection 88(1) of the *Competition and Consumer Act 2010* (**the Act**).
130. Recyclers SA seeks authorisation to:
- a. represent its participating members collectively in contractual negotiations held from time to time with the respective super collectors individually for the supply of containers in consideration for a refund and handling fee pursuant to the *Environment Protection Act 1993* (SA) (**EPA Act**); and
 - b. provide advice to its participating members collectively in relation to their contractual arrangements with super collectors for the supply of containers in consideration for a refund and handling fee pursuant to the EPA Act
- for a period of 10 years (**the Proposed Conduct**).
131. The Proposed Conduct does not include any collaboration in respect of the quantum of the refund amount and/or handling fee per container or tonne of containers. The Proposed Conduct would also not extend to any collective boycott of any or all of the super collectors in connection with the proposed collective negotiations or otherwise.
132. Recyclers SA seeks authorisation for the Proposed Conduct as it may contain a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
133. Subsection 90A(1) of the Act requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

134. For the reasons outlined in this determination, the ACCC is satisfied, pursuant to subsections 90(7) and 90(8) of the Act, that in all the circumstances the Proposed Conduct for which authorisation is sought would result or be likely to result in a public benefit that would outweigh any detriment to the public that would result or be likely to result from the Proposed Conduct.

Conduct which the ACCC proposes to authorise

135. The ACCC proposes to grant authorisation AA1000415 to Recyclers SA to:
- a. represent its participating members collectively in contractual negotiations held from time to time with the respective super collectors for the supply of containers in consideration for a refund and handling fee pursuant to the EPA Act; and

- b. provide advice to its participating members collectively in relation to their contractual arrangements with super collectors for the supply of containers in consideration for a refund and handling fee pursuant to the EPA Act.
136. The authorised conduct may contain a cartel provision within the meaning of Division 1 of Part IV of the Act or may substantially lessen competition within the meaning of section 45 of the Act.
137. The proposed authorisation does not extend to collective negotiations about the refund amount and/or handling fees paid by super collectors to collection depots. The proposed authorisation does not extend to any collective boycott.
138. The ACCC proposes to grant authorisation AA1000415 for 10 years.
139. This draft determination is made on 22 June 2018.

Next steps

140. The ACCC now seeks submissions in response to this draft determination. In addition, consistent with section 90A of the Act, Recyclers SA or an interested party may request that the ACCC hold a conference to discuss the draft determination.