

Submissions in response to Recyclers SA's Application for Authorisation

1. Marine Stores Pty Ltd (**Marine Stores**) objects to the Application for Authorisation lodged by Recycling South Australia Incorporated (**Recyclers SA**) dated 7 March 2018 (**Application**) for Recyclers SA to negotiate on behalf of its "Participating Members" to negotiate collectively and to provide its Participating Members with advice (**collective bargaining**).

The Relevant Test

2. As applicant for authorisation the onus is on Recyclers SA to satisfy the ACCC:
 - 2.1 that there is sufficiently substantial public benefit to outweigh the detriment and so justify the authorisation; or
 - 2.2 that the conduct is not likely to substantially lessen competition.
3. There has been no proper attempt on the part of Recyclers SA in the Application to maintain that the proposed collective bargaining is not likely to substantially lessen competition. The focus is therefore on the likely future public benefits and detriments of the proposed collective bargaining.
4. In applying this test a comparison needs to be drawn between the state of competition and the public benefits and detriments likely to arise in the future with and without the relevant conduct.

Application does not meet applicable standards

5. The Application does not discharge the onus of establishing there are sufficiently substantial public benefits that are likely to flow from allowing the collective bargaining sought.
6. The Application also fails to recognise a number of detriments that are likely to flow from the proposed collective bargaining. Some of those detriments are obvious. Others are only appreciated once the full facts, matters and circumstances of the Application, and the full history of negotiations between the key bodies in this industry is understood.

Relevant Background about the Collection Industry

7. The Application recognizes that there are 110 collectors in South Australian, of whom 84 are members of Recyclers SA and there are approximately 132 collection depots in South Australia. Some collectors run more than one depot.
8. In Marine Stores' experience the collection industry is and has been a stable and profitable one. This is evidenced by:
 - 8.1 the fact that relatively few collectors leave the industry;
 - 8.2 collection businesses are commonly passed from one generation of a family to the next;
 - 8.3 there are new entrants to the industry including substantial organisations namely the Surf Life Saving Association, Cleanaway and Simsmetal;
 - 8.4 Marine Stores is aware of one longstanding industry participant making a recent investment of approximately \$1.5M in its collection business; and

- 8.5 Marine Stores is only aware of one recent closure of a depot, which was for personal health reasons, and a new depot is shortly expected to open in the same geographic area as that recently closed depot.
9. The collection industry in South Australia has remained viable and profitable in the absence of collective bargaining.
10. The current industry is competitive in that consumers have a choice of which collection depot to take their empty containers. There is also competition between the three approved super collectors Marine Stores, Flagcan Distributors Pty Ltd (**Flagcan**) and Can Recycling (SA) Pty Ltd trading as "Statewide Recycling" (**Statewide**).

Relevant Background of the Applicant

11. The members of the executive of the Applicant are as follows:
- 11.1 John Lester – CEO
 - 11.2 Neville Rawlings – President
 - 11.3 Philip Martin – Vice President
 - 11.4 Trevor Hockley - consultant
12. Those members of the executive are also directors of the following companies:
- 12.1 Central Recyclers (Aust) Pty Ltd;
 - 12.2 Flaglass Pty Ltd (glass contractor to all collection depots in Australia)
 - 12.3 Southern Recyclers (SA) Pty Ltd (in the case of Messrs Rawlings and Martin)
 - 12.4 Auto Sort Technology Australia Pty Ltd (in the case of Messrs Hockley, Lester, Martin and Rawlings)

ASIC searches of the above companies are annexed to this submission.

13. Container Deposit Systems is a joint venture vehicle between Southern Recyclers (SA) Pty Ltd and Auto Sort Technology Australia Pty Ltd. Its website states "*Through changes in workflows, materials handling, logistic processes, facility layout and design, customer interaction and data acquisition and management, Container Deposit Systems seeks to evolve recycling facilities into efficient, modern service facilities.*"
14. With the exception of Flagcan and Central Recyclers (Aust) Pty Ltd , and the details of some other directorships outlined at paragraph 7 (i) (page 16) of the Application the above relevant directorships of the members of the executive of the Applicant directors was not set out in the Application.

Grounds of Objection

15. The utility or need for the Application to be granted has not been sufficiently established. The Application states, without evidence, that if collective bargaining is not permitted, a number of participants are likely to leave the industry and consumers will be unable to recycle their containers.

16. It is stated at paragraph 18 (d) of the Application that the intended purpose of the collective bargaining is to maximise the likelihood of Participating Members meaningfully negotiating changes to and successfully enforcing their contractual relations with super collectors. It has however not been established that allowing collective bargaining through the involvement of Recyclers SA will in fact lead to meaningful negotiations or what public benefit would result in such "meaningful negotiations".
17. This is particularly questionable in circumstances where, on behalf of its members, Recyclers SA has been involved in a number of previous rounds of unfruitful contractual negotiations with Marine Stores as outlined below.

Innovation in Contracts negotiated with non Recyclers SA Members

18. It is not at all clear that the stated aim of the Application cannot be achieved by the negotiation of individual contracts. In fact, and contrary to Recyclers SA's submissions, there has been considerable innovation and improvements in contracts which were negotiated with non Recyclers SA members. For example, Marine Stores has negotiated specific terms outside of the agreements with Participating Members to suit collectors' individual circumstances such as
 - 18.1 country depots which have been paid on declared numbers (accompanied by a statutory declaration);
 - 18.2 Marine Stores has entered into agreements with regional collectors that permit the results of representative audits, from like depots, to be applied, rather than for a fresh audit to be conducted each time. This has resulted in considerable time and costs savings for both the relevant collectors and Marine Stores as it removes audit costs and management time;
 - 18.3 Marine Stores entered into an agreement with a collector who was not a Recyclers SA member to combine cans with other super collectors, with a view to increasing efficiency and reducing costs; and
 - 18.4 some depots have been permitted to bale cans (which has resulted in reduced costs).

Involvement of Recyclers SA an Impediment

19. By contrast, the involvement of Recyclers SA has been a direct impediment to market innovations and efficiencies occurring in that Marine Stores has since 2006 submitted various versions of the agreement to Recyclers SA and it is the understanding of Marine Stores that Recyclers SA refused to negotiate unless Marine Stores agreed to a number of issues.
20. For example, the stance advocated for by Recyclers SA on behalf of members in 2004 resulted in there being no agreement to reduce handling costs if the practice of bulking of cans was introduced. Bulking of cans would remove the need for collectors to sort cans by brand. The sorting of cans by brand is a significant and time consuming undertaking given that there are approximately 2100 brands in the case of Statewide and 1165 brands in the case of Marine Stores. If bulking of cans had been introduced, there would have been far less handling requirements. This in turn would lead to overall efficiency, and costs savings, and a reduction in handling fees. The practice of bulking of cans already takes place in the Northern Territory. Marine Stores' position in the negotiation was that it would be prepared to accept bulking of cans in South Australia provided there was a reduction in the handling fees charged by collectors commensurate to the reduced handling performed. Recyclers SA was not prepared to accept such a reduction, and as a result bulking of cans did not eventuate. In

Marine Stores' view, this unfortunate outcome would be much less likely to occur if there was individual as opposed to collective bargaining. In support of this view (as referred to above) Marine Stores has entered into an agreement with a collector that is not a member of Recyclers SA which provides for the bulking of cans and which also involves the collector accepting a cut to the handling fee.

Claimed Public Benefits not Sustainable

21. At paragraph 18 of the Application, the applicant acknowledges that the benefits it lists in the application are private benefits but claims that the public benefits involved are as follows:
- 21.1 *the existence of a significant body of collection depots benefits the South Australian public, as one is necessary for the legislative scheme to effectively operate;*
- 21.2 *the operation of the legislative scheme benefits the South Australian public as it contributes to the State's economy and reduces waste and litter in the State;*
- 21.3 *the intended purpose of the proposed conduct is to maximise the likelihood of Participating Members meaningfully negotiating changes to and successfully enforcing their contractual relations with super collectors. This outcome maintains the incentives for collection depots to participate in the scheme, being remuneration in the form of a refund amount and handling fee per container;*
- 21.4 *by maintaining the incentives for collection depots to participate in the scheme, the proposed conduct benefits the public by promoting the maintenance of a significant body of collection depots.*
22. In essence, these purported benefits rely upon an argument along the lines that without collective bargaining the industry would be at risk. There is no evidence to support this. To the contrary, the industry is in good health irrespective of the fact that the current agreements have not been collectively bargained, and the expiry dates of many of the agreements occurred more than 10 years ago.
23. There is insufficient basis for the asserted public benefits flowing from the collective bargaining in that:
- 23.1 there will not be any efficiency savings for super collectors in their contractual negotiations with collectors, as the commercial terms will still need to be negotiated in each case.
- 23.2 There is no "streamlining" of the process as the heavy lifting work of commercial negotiation, namely negotiation of price, will still need to occur.
- 23.3 Marine Stores is disappointed by the applicant resorting to hyperbole in support of its case rather than actualities. For example, in paragraph 16(a), reference is made to 'hundreds of agreements' when in fact there are only 84 Participating Members and therefore, a maximum of 84 agreements that might need to be negotiated;
- 23.4 The advent of collective bargaining will not arrest a decline in the industry, as no such decline has been experienced. To the contrary, Marine Stores view is that if anything the industry is expanding. This undermines the claim at paragraph 17 (d) of the Application that "current market conditions" mean that it is difficult for Recyclers SA members to each meaningfully negotiate with super collectors and enforce

compliance with their existing agreements. There is therefore no risk in the continuation of the status quo.

Public Detriment

24. There has been an understatement of likely public detriment:

- 24.1 One probable consequence of collective bargaining is that it could result in a one size fits all contract that favours the interests of some but not all industry participants. An example is the introduction of contractual provisions regarding the introduction of new machines to facilitate the counting of containers rather than the weighing of containers. Marine Stores is in favour of the introduction of technologies that may make processes of collection, counting, weighing and audit more efficient, however it is wary that allowing a small number of Recyclers SA executives to negotiate contracts on behalf of the entire industry could have a number of undesirable consequences:
- (a) Recyclers SA has a number of directors who hold directorships in companies with interests in counting technology that might not necessarily align with the interests of rank and file members of Recyclers SA;
 - (b) it may unduly favour some participants who are more ready for the introduction of new technology which will be sought to be recovered by an increase in handling fees. However, by allowing collective bargaining Recyclers SA will occupy a position of maximum influence with regard to the negotiation of terms that govern those processes;
 - (c) there is potential for an increase in audits if an agreement about the implementation of counting machinery is not reached, which will increase the cost to both the collectors and Marine Stores. This is likely ultimately to result in an increase in cost to the consumers;
 - (d) there are apparent conflicts of interest which arise as a result of key members of the Recyclers SA committee being directors and/or shareholders of the companies comprising the joint venture called Container Deposit Systems;
- 24.2 Under the statutory scheme, manufacturers must have agreements with super collectors and the super collectors must have agreements with collectors. Through collective bargaining Recyclers SA could structure collectors' agreements so that they are not commercially attractive to Marine Stores but may be commercially acceptable to Flagcan, of which a majority of the executive members of Recyclers SA are directors but which are less advantageous to the beverage manufacturers which in turn could lead to an increase in costs to consumers.
- 24.3 If all members of Recyclers SA are subject to the same contract with super collectors then this may have a tendency to discourage individual innovation with respect to individual members' contracts and the conduct of their businesses.
- 24.4 Industry problems such as those involving potential double-counting of containers, or potential refund of handling fees where deposits have not been paid are unlikely to be addressed in contractual negotiation if collective bargaining is permitted. Marine Stores has tried to address these issues through the inclusion of appropriate contractual provisions, which have historically been resisted by Recyclers SA. If collective bargaining was allowed to occur here then the risk is that reforms that are

needed for the industry to maintain its systems integrity will not occur. This in turn will prevent costs reduction, reduce the efficiency of the industry, undermine public confidence in the statutory regime and stifle progress for the industry and increase in costs to consumers.

- 24.5 Recyclers SA states that they will not be negotiating handling fees as a prime justification for the authorisation to be granted. This claim is illusory given that there are numerous other terms that it may seek to negotiate on a collective basis, such as audit arrangements and sorting arrangements which will have a direct impact on the amount of the handling fees. To some extent Recyclers SA admits this on page 27, paragraph 17(f) when it refers to the proposed conduct expressly excluding any direct negotiation of or advice in relation to the handling fee.
25. It is likely that collective bargaining on contractual terms could also extend to issues such as the ownership of aluminium and glass. If ownership changes were pressed by collectors, there is a distinct risk of higher handling fees. The higher handling fees could result from two causes:
- 25.1 first, there is a possibility that collectors could push the ownership of glass onto Marine Stores which would have a negative impact on the handling fees Marine Stores may be obliged to pass on, given that a tonne of glass costs \$110 and a tonne of aluminium costs approximately \$1750. Before 2001, the ownership of glass was in the hands of Marine Stores, however it is now owned by Flaglass. If handling fees are passed on in full without reduction, the ultimate costs will be worn by the consumer; and
- 25.2 second, there is a possibility that collectors could require, as part of a negotiation, that the ownership of aluminium moves to the collectors. This would have a negative impact on Marine Stores in that it would no longer have the income from aluminium, and there is a risk that collectors would not pass on the savings in the form of reduced handling fees, again with ultimate impact on the consumer.
26. Every can or bottle is like currency until it has absolutely been removed from the system and it cannot be part of a circular economy. It is worth 10 cents until it has been crushed. Marine Stores believes that there are a number of undesirable practices in the industry. For example, it believes it has been required to pay handling fees in respect of containers on which deposits have not been paid. Given that it is in the interests of some collectors that there be no measures to attempt to investigate and eliminate undesirable practices in the terms of the collection agreements it is Marine Stores belief that the result of collective bargaining would be to reduce the likelihood of reform. If however reforms were implemented they would likely result in a reduction in costs to Marine Stores and a likely reduction in costs to consumers.
27. The container deposit scheme is a legislative requirement, and there is an inherent cost borne by the consumer. Marine Stores has a specific focus on running an effective low-cost scheme that minimises the costs to the consumer. The collective bargaining process on the other hand is on behalf of members who do not have an inherent interest to reduce costs borne by consumer.
28. In relation to references in the Application to a template agreement being produced by Marine Stores, this is not regarded by Marine Stores in any way as denying the ability to vary the terms of the template in individual negotiations with any particular collector, and as outlined above such variations can and do occur. The submissions relied upon by the applicant in this regard are, with respect, confusing. On the one hand, at paragraph 19 (e) of the Application there is an acknowledgement that contractual arrangements are already standard form

agreements. On the other hand, at paragraphs 7 (t) and (u) it is stated that the smaller size of some collectors is a barrier to them individually obtaining legal advice.

29. If, contrary to Marine Stores' objection, the ACCC is minded to grant an authorisation, the period of 10 years is far too long a time. The default position is 5 years and insufficient grounds have been put forward to justify such a long authorisation. This is particularly so in an industry where authorisation has not previously been granted. In light of the risks of detriment identified, Marine Stores submits that the maximum period of any authorisation should be 2 years.
30. Marine Stores submits that the proposed collective bargaining will not result in the public benefits claimed, and will instead result in a number of undesirable and detrimental consequences outlined above.