

Submission on draft NSW Container Deposit Scheme Regulation 2016

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Introduction

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing NSW general-purpose councils, and associate members including special purpose councils and the NSW Aboriginal Land Council. LGNSW facilitates the development of an effective community based system of local government in the State.

LGNSW welcomes the opportunity to provide a submission concerning the draft Regulation for a NSW Container Deposit Scheme (CDS) as detailed in the public consultation documentation. LGNSW has sought feedback from a number of councils' waste staff and Regional Waste Group coordinators, and their feedback informed this submission.

Opening

LGNSW supports the introduction of a NSW Container Deposit Scheme that provides an incentive refund on return of containers, including for those remaining in kerbside collection.

The introduction of this scheme is arguably the largest single government decision made affecting recycling operations in NSW. The local government sector in NSW is the largest sector assuming responsibility for the collection and recycling of containers identified in the Act and draft Regulation as part of the Scheme. The local government sector is also the largest sector assuming responsibility for litter reduction and prevention programs in NSW.

LGNSW supports an effective Container Deposit Scheme in NSW that:

- includes a financial incentive for the return of each container,
- is consistent with existing schemes in South Australia and the Northern Territory,
- places the responsibility for the scheme (both financial and physical) on the producer and the consumer of beverage containers,
- offers the least number of exemptions in regards to container size and product type,
- delivers reasonable access across NSW by a variety of redemption points,
- makes eligible any in-scope containers presented through kerbside systems, and
- allows for an independent, non-profit body to coordinate the scheme.

The proposed scheme includes or addresses each of these criteria. The draft Regulation provides a 10-cents refund for each eligible beverage container returned under the Scheme.

LGNSW will make high level comment on each element of the draft Regulation and related matters in turn.

LGNSW wishes to draw the attention of the NSW Environment Protection Authority (EPA) to the comments in the section on payment of refund value to material recovery facility operators. The local government sector in NSW will be an essential element in the success of a Container Deposit Scheme by:

- continuing to provide kerbside collection services, which includes redeemable containers under the scheme; and
- supporting the network of collection points where the public can return beverage containers in order to obtain a refund. This support can be either by direct participation in setting up collection points on community land, partnering with other organisations to set up collection points on community land, or development approvals relating to the setting up of collection points on public or private land.

Response

Part 2 Division 1 - Scheme administration arrangements

The administrative structure of the CDS will include a NSW Scheme Coordinator contracted by the Minister for the Environment with the responsibility to deliver a cost-effective CDS in NSW, together with a number of Network Operators beneath the Coordinator who will be responsible for delivery of the CDS in up to seven discrete regional zones within the state. Six of the regional zones will be serviced by a single Network Operator, with a proposed “metro zone” (including Sydney, Wollongong and Newcastle and environs) serviced by at least three Network Operators.

The draft Regulation does not set out the performance targets to be met by the Scheme Coordinator or Network Operators as part of operational delivery of the CDS. LGNSW understands that performance targets would include:

- the geographic coverage obligation for community access to collection points (hereafter “coverage”) within each region of the scheme, and
- the setting of resource recovery and secondary coverage targets across areas of the state using boundaries for metropolitan, regional and remote classifications derived from ABS-defined standards for ‘remoteness areas’.

The draft Regulation proposes in a consultation note to Part 2 Division 1 that additional (unspecified) provisions for performance targets (including coverage and resource recovery) are to be included in any final Regulation. The earlier public consultation draft for the Container Deposit Scheme Bill noted that the Regulation would contain a requirement for including coverage targets in the Scheme administration arrangements. This requirement is not yet evident in the draft Regulation.

Based on the contents of draft Regulation it appears that that the criteria setting out the performance targets will only be included in the Expression of Interest or any Tender documentation for the Scheme Administrator and Network Operators. LGNSW appreciates that not defining the performance targets within the draft Regulation may provide some measure of flexibility in the engagement of a Scheme Coordinator and Network Operators. However, the absence of any performance target in the draft Regulation has elevated concerns from many regional councils that the CDS will not equitably apply in regional areas. LGNSW asks that the EPA make public the details of proposed coverage and resource recovery performance targets, and includes within the Regulation powers to enforce those targets.

To date, the only information directed to councils regarding the proposed coverage criteria (including the relationship between town size and number of collection points to count as coverage, and minimum opening hours) has been provided in the limited briefings prior to the release of the draft Regulation. Coverage issues are of high importance to regional councils and their communities, and coverage directly impacts community expectations relating to the scheme (see “Additional comment” about community expectations at the end of this submission). LGNSW wishes to draw the attention of the EPA to the issue that councils who may be considering the possible use of their community facilities, such as council-run community recycling centres or transfer stations, require greater information and communication than that provided so far concerning the intended operation and coverage for the CDS.

Of particular concern for some regional councils is the coverage criteria described in previous EPA briefings whereby a collection point under the scheme can be deemed to provide coverage for another town if it is within 30 kilometres (for regional areas) or 50 kilometres (for

remote areas). However the Regulation does not provide details for how these criteria are to be measured, such as the appropriate centre point for determining that radius. For instance, if the centre of the 30km radius is measured from the collection point location, this may lead to the collection points being set up at the extremities of town boundaries in order to have a radius just reaching the outer boundary of another township. This may not be the intention of the coverage target, and will likely result in one community having convenient access to a collection point and the other missing out, despite their town centre distance being greater than 30 or 50 kilometres apart. Coverage should be a guide only and LGNSW recommends that final approval to cover more than one township should be reserved to the EPA, rather than rest with the Network Operator. This power of approval should be included within the Regulation.

Regional councils have endured systemic shortcomings relating to previous extended producer responsibility schemes such as the National TV and Computer Recycling Scheme, which under-delivered scheme coverage in their areas.

The councils within the potential “metro zone” coverage area also expressed concern to LGNSW in feedback sessions that the nomination of “priority precincts” (specific “high-traffic” locations that must have collection points provided by all Network Operators servicing the metro zone) within their areas would require localised knowledge for effective precincts to be established.

LGNSW calls on the EPA to provide transparency by full disclosure of the criteria for geographic coverage of the CDS, including location and nature of “priority precincts”, at the earliest possible date.

With regard to the “fit and proper persons” criteria set out in this section of the draft Regulation, LGNSW has no specific comment. LGNSW notes the need for safeguards given the potential for abuse of a financially-based scheme that requires full participation in recycling to succeed. LGNSW supports the strict examination by the EPA of persons seeking to enter scheme administration agreements, to ensure the most satisfactory level of performance of the scheme and the highest level of environmental protection.

Part 2 Division 2 - Collection point arrangements

LGNSW notes that the determination of a collection point arrangement application contains a possible confusion over sequence and timing of development approvals by a council and the EPA’s potential refusal. This issue was also raised by several councils during consultation over the draft Regulation.

Clause 12(2)(c) states that the EPA may consider in its determination of an application to operate a collection point whether any necessary development consent has been obtained (or is likely to be obtained). At clauses 12(4) and 12(5), the EPA may then refuse an application in writing and refund any collection point arrangement application fee.

This proposed order of processing by the EPA for a collection point application may generate three key issues:

- A local authority may not be prepared to consider a development application (DA) for a collection point in the absence of approval to operate by the EPA;
- If a DA for a collection point has been given consent by the council as a local authority, the EPA might be considered to be in conflict with the powers relating to local government development consent; and
- If refunds of fees are paid out by the EPA as noted in the draft Regulation clause 12(5) after refusing an application which was successful in obtaining DA consent, the council may be exposed to the risk of legal action by the development applicant to refund development application fees.

LGNSW notes that a successful DA may be transferable from the original applicant. The applicant to the EPA for a collection point arrangement who holds consent for a DA may not be the same applicant who initiated the DA with council.

In addition, councils may be unwilling to provide consent for a received DA until the EPA has made its determination. The EPA states at clause 12(6) that they have 42 days to make their determination before an application can be assumed as refused. This is the same period for a DA to be assumed as refused. This would likely lead to DAs being lodged and refusal assumed in the majority of cases. It is very difficult to process a DA following an assumed refusal.

LGNSW submits that clause 12(2)(c) be removed or else re-written in such manner as only the “likelihood” of success of a DA forms a consideration for approval of a collection point arrangement. Any DA relating to this likelihood should only be drawn up as draft and not lodged with a council for consideration.

LGNSW requests that the Regulation stipulates that any operator seeking to operate a collection point must first obtain a determination from the EPA for the collection point arrangement, and only thereafter seek consent from council for a development application. The EPA-approval can then form part of the development application supporting documentation.

LGNSW further notes the classification of a collection point must be included in a definition of a waste management facility under the *Environmental Planning and Assessment Act 1979*, or else be defined specifically and separately within that Act, for an applicant to be able to obtain consent to operate in particular land zonings. Councils have noted that under the current classification of a waste management facility, collection points may be challenged, if not excluded, from consent within the majority of land zonings where it would be preferable to locate such facilities. Such consideration of the definition of a collection point will also apply to complying development processes.

Part 2 Division 3 - Payment of refund amounts to material recovery facility operators

This Division relates to the arrangements to redeem the value of eligible containers remaining in kerbside recycling after the CDS commences (assumed on 1 July 2017). The draft Regulation Clause 19(1) allows for material recovery facility (MRF) operators to claim refunds for those remaining eligible containers directly from the Scheme Coordinator, subject to the containers subsequently being sent for recycling and in the approved manner.

(a) Refund sharing and retrospective agreement

LGNSW welcomes the arrangement that MRFs will only receive ‘processing refunds’ for containers remaining in kerbside if they share the value of those containers by specific arrangement with the originating council (called “agreement” hereafter), or the council deems it reasonable not to enter such an arrangement (called “waiver” hereafter). The latter waiver addresses the concerns of councils who have special kerbside recycling arrangements, such as where they may choose to not claim the refund so as to support social enterprises running the MRF in their community.

LGNSW understands the intent of the draft Regulation is to make transparent that the refund sharing arrangement is solely between the MRF and the council supplying kerbside collected containers. Clause 18(2) notes that processing refunds relate only to “...containers that have been collected in a local council’s area during the course of domestic waste management services...” subject to the agreement or waiver being in place. This indicates that the refund value sharing is not related to the council holding a direct agreement for processing with the

MRF, or that assigning recycling materials to a collector by contract prior to delivery to a MRF has any bearing on the refund sharing arrangement.

LGNSW notes with concern that the effect of the existing draft Regulation under Clause 18(4) is that MRFs can claim that full processing refund for the initial period of 12 months after the commencement of the scheme without regard to either an agreement or waiver from the supply-originating council.

LGNSW has previously raised the need for refund sharing arrangements with MRFs to be made retrospective to the commencement of the CDS. The draft Regulation does not yet capture this requirement that will ensure fair dealing for councils.

LGNSW strongly recommends that any container value sharing arrangements relying on council agreement under clause 18(2)(b) must require retrospective payment of the refund share to councils for the period from commencement of the CDS to the agreement date, and that the Regulation clearly stipulates this requirement.

In the absence of any retrospective criteria for an agreement being set out in the Regulation, the MRF can still receive the full refund value from the commencement of the scheme, and there is a financial incentive for the MRF to defer finalising any value-sharing agreement with a council until near the end of the 12-month limitation to this arrangement.

Furthermore, if not included within the Regulation, the onus to seek a retrospective agreement for refund value sharing will fall to individual councils. This places councils into an adverse and unequal negotiation with its MRF that is in full possession of processing data needed to understand the value of redeemable containers. LGNSW's further concern is that many councils have a contract guaranteeing exclusive supply of recycling to the same MRF with who the refund value of that recycling is to be negotiated. This would mean a council may have limited or no leverage in any refund sharing negotiation. The Regulation must not inadvertently disadvantage any party to a commercial agreement.

LGNSW also recommends that the draft Regulation makes provision for the retention of records by the MRF operator in relation to refunds claimed and the results of any protocol audits and determinations of refund value contained within mixed loads of recycling material. This retention of records should be required for at least 5 years. Councils as party to any refund sharing agreement where refunds are determined by processing refund protocols must have access to this information.

(b) Disputes over refund sharing

LGNSW suggests that mechanisms to adequately deal with any disputes between individual councils and MRFs over value-sharing of containers in kerbside be included in the final Regulation.

As noted prior, there will be common situations where a council is negotiating for refund sharing while holding a direct contract with a MRF that stipulates exclusive supply of that council's recycling to the MRF. Councils may feel compelled to accept low value refund sharing arrangements in order to continue to uphold the supply of all recycling to a MRF, because to dispute or alter that arrangement may trigger a dispute clause within the existing contract.

Similarly, councils raised concerns in consultation that if there is a dispute over the value-sharing arrangement that extends beyond the 12-month period, that there will be a period where refunds on containers are not allowed to be claimed. LGNSW's preference is to have the claim period for refunds continue after the 12-month limitation if the reason for delay is a dispute over refund arrangement that is then resolved later.

LGNSW urges that any dispute mechanism must stipulate an independent mediation approach, and nominate the Scheme Coordinator or some part of the NSW Government as the body for mediation.

(c) Term of value-sharing agreement

There is no indication within the draft Regulation as to the term of any refund-sharing arrangement between council and MRF. The MRF entitlement to obtain processing refunds is open-ended under the scheme. LGNSW suggests that any refund sharing agreement under clause 18(2)(b) should only continue until altered by circumstances such as the council entering a direct agreement with the MRF or subject to termination after a period of notice. The term of any refund sharing agreement should at a maximum be limited to the period up until the 5-year review of the regulatory framework under the *Container Deposit Scheme Act 2016*.

(d) Proof of recycling

At clauses 19(4) and (5) there is a requirement that to obtain a processing refund, containers must be recycled or delivered to a recycling facility or "...consigned for transport to a recycling facility in a foreign country..."

The levels of recycling material exported are significant for NSW, and the strongest assurances including verification from abroad must be included in the Regulation. The EPA should consider reserving the power to remove from consideration the criterion that consignment to a foreign country is allowed, particularly where recycling at the destination facility does not meet acceptable minimum standards that would apply in Australia.

(e) MRFs relying on manual separation of containers

The draft Regulation is silent on the specific application of the provisions of Division 3 to those MRFs that carry out manual separation of containers. Manual-separation MRFs can obtain refunds for eligible containers remaining in kerbside by delivering those containers to a Network Operator's collection point.

LGNSW understands that the EPA's intent is that only those MRFs using the protocol approved by the EPA (yet to be gazetted) can make claims for refunds with the Scheme Coordinator. LGNSW understands that the intent of the protocol is to use audits of recycling and throughput data to calculate a deemed refund value for a recycling load (likely in value per tonne of specific material).

The drafting of clauses 18(2) to (5) has caused some confusion as they can be interpreted to mean that any and all MRFs - in order to receive processing refunds of any type - must achieve the waiver or agreement requirements in the draft Regulation to continue receiving refunds after 12 months. There appears to be no distinction between protocol-using and manual-sorting MRFs given that the agreement relates only to a MRF and council "...in respect of containers that have been collected in a local council's area during the course of domestic waste management services..." There is also no definition of "processing refunds" (as the MRF-specific refund claim is referred to) in either the Act or the draft Regulation.

LGNSW notes that it is only within the definition of "refund sharing agreement" in clause 18(5) that the refund to be shared is restricted to the "amounts paid ... to the [MRF] operator by the Scheme Coordinator". LGNSW understands that in order to lodge a claim with the Scheme Coordinator (clauses 19(2) and (3)), the MRF operator must provide a declaration that the processing refund protocol was applied correctly. This appears to be limiting refund agreements solely to protocol-using MRFs and there is no similar imposition for refund sharing agreements on MRFs that rely on manual-sorting to obtain a refund value.

LGNSW believes all eligible containers remaining in kerbside should be the subject of refund sharing agreements between the MRF and the originating council, regardless of the means of obtaining that refund value by the MRF. LGNSW seeks to have amended within the Regulation the definition of “refund sharing agreement” and other clauses which limit refund sharing to only those amounts paid by the Scheme Coordinator.

(f) Transparency

The operation of refund sharing is critically dependent on the value assigned to any tonne of recycling material using the EPA’s proposed processing refund protocol. For transparency to the councils who will be party to the refund sharing, the results of any audits and other protocol results must be made available to both parties in a refund sharing agreement.

LGNSW seeks to have this requirement given effect in the Regulation rather than negotiated as part of any refund sharing agreement.

Similarly, a number of councils have noted that their delivered recycling material is aggregated at a regional delivery level prior to delivery to a MRF as defined under the draft Regulation.

LGNSW seeks to have the protocol or the Regulation address how aggregated levels of recycling will have refund sharing amounts deemed and paid to councils in a refund sharing agreement.

LGNSW further suggests that larger MRFs be asked by the EPA to hold roundtable discussion with all councils supplying a MRF, such that the transparent and equitable basis for arrangements with councils can be understood, rather than one council achieving favourable terms at the expense of other councils' agreements through lack of disclosure.

(g) Cross impacts of refund sharing agreements with terms of council contracts

LGNSW notes concerns raised by its members that the process of negotiating the refund sharing agreements with MRFs may have a detrimental impact on any direct contracts or agreements in place.

While the draft Regulation assumes that any refund sharing agreement relates to the payment of a proportion of refund amounts paid to a MRF, any direct recycling processing agreement between a MRF and council will have other considerations that will be impacted by the introduction of a CDS. These include:

- **Contamination penalties** - As the number of containers migrating from kerbside collection to individual redemption by the community increases, any unrecyclable material (contamination) in the recycling stream will likely increase in proportion. This may trigger contamination penalties as contract thresholds are breached. LGNSW asks that the Regulation require refund sharing agreements to include revised positions on contamination thresholds for any party associated with the council’s recycling material.

This issue extends to those councils who have contracts with collection service providers that hand the contamination threshold arrangements and costs over to those collectors. Any refund sharing agreement struck by a council that then exposes a third party such as collection service providers to additional penalties will certainly trigger a contractual dispute or claim, undermining the potential value to councils of a CDS.

- **Aggregation of recycling from multiple councils** - A high number of regional councils export to a MRF via an intermediate MRF “transfer station”. At this intermediate MRF, council materials are aggregated and individual contributions to the recycling stream become problematic to allocate. These aggregation arrangements may require renegotiation

to more accurately allocate refund sharing agreements "...in respect of containers that have been collected in a local council's area..."

- **Cross-border transfer of legitimate recycling** – LGNSW accepts that the Regulation cannot address refunds on material where processing is carried out at an interstate MRF. This issue does affect a number of councils in the Riverina and elsewhere near the Murray River delivering to Victoria, and Canberra region councils who have material processed in the ACT. The effect of these cross-border contracts, which have to date supported those communities to recycle, may now disadvantage kerbside recycling in those areas as material migrates away (impacting on contamination levels and supply).

LGNSW urges the EPA to continue to cooperate with other jurisdictions that are considering the introduction of a CDS, and to provide reciprocal refund value agreements at the earliest opportunity.

Other sections of the draft Regulation

LGNSW has no specific comment on clauses relating to Part 3 Supply and collection of containers. The clauses in this section largely meet the expectations of what is needed to establish a NSW Container Deposit Scheme.

Enforcement powers for councils

LGNSW notes that neither the Act nor the draft Regulation provide enforcement powers to assist councils to deter individuals from removing eligible containers from kerbside recycling bins. Councils are concerned that this omission may lead to illegitimate business models which steal refundable containers from kerbside recycling bins, and increase litter from spilled contents. The setting out of such powers to assist councils to simply and effectively penalise this activity should be a priority for the NSW Government, and if not in the CDS Act and Regulation the EPA should refer the need for these powers to another appropriate agency for inclusion in other legislation.

Additional comment on CDS - community expectation and education

LGNSW consulted widely with regional and metro councils in preparing this submission.

The most significant concern across all councils was that community expectations are not yet being managed by industry or EPA regarding the operations and likely initial outcomes of the Container Deposit Scheme. There is strong concern that the community expects a full state-wide scheme of convenience at the outset.

With only six months until the CDS commences, the concerns include

- Community expectations may be that the council is responsible for the operation of the scheme and the management of scheme collection points. LGNSW is concerned that any community frustration over lack of access to the scheme or perceived 'delays' in providing convenient collection points will be incorrectly directed at councils. LGNSW requests that the EPA and Scheme Coordinator develop a clear community communication campaign outlining how the scheme works and that the Scheme Coordinator on behalf of industry is the organisation responsible for management of the scheme.
- Council expectations that refund sharing agreements between themselves and MRFs are separable from any claims by recycling collection contractors in whom councils may have vested ownership of recycling material. A high number of councils have struck agreements with collection contractors and hold no direct contract with MRFs. LGNSW seeks an assurance for councils that the draft Regulation can provide for an agreement process that

steps outside the transfer of material ownership set up in existing kerbside collection contracts.

- There is no clear understanding as to whether litter reduction or resource recovery messages will form the core of community education programs by the Scheme Coordinator. LGNSW requests that communication highlights to the community that kerbside recycling will be supported and not disadvantaged under the scheme.
- Councils are concerned that the promotion of redeemable value in kerbside recycling will lead to confused or misleading messaging to the community. The biggest concern is outright statements that the community can expect reduced rates or waste charges as a result of a CDS. While local government's firm intention is to relay any benefits from kerbside container refunds back to the community, this may take several forms and is dependent on the refund sharing agreement struck with the MRF. LGNSW requests that any communications about the benefits of the CDS do not make explicit statements about the mechanism by which councils return the refund value from kerbside recycling to the community.

Conclusion

LGNSW acknowledges the short timeframes for establishing the CDS for NSW by 1 July 2017, and appreciates the opportunity to comment on the draft Regulation. We have raised some critical matters that need to be addressed in the final Regulation, and would be happy to provide further information or assistance to ensure this occurs.

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