

**Regulatory Impact Statement**

**WASTE MANAGEMENT AND RESOURCE RECOVERY (CONTAINER  
DEPOSIT SCHEME) AMENDMENT REGULATION 2018 (NO 1)**

**Subordinate Law No SL2018-9**

**Prepared in accordance with the  
*Legislation Act 2001*, section 34**

**Circulated by authority of  
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## Overview

This regulatory impact statement relates to the *Waste Management and Resource Recovery (Container Deposit Scheme) Amendment Regulation 2018 (No 1)* (the proposed law).

The proposed law is required to provide detail on the arrangements for a container deposit scheme which will start in the Territory on 30 June 2018 under the *Waste Management and Resource Recovery Amendment Act 2017*.

## Background

To combat the littering of empty beverage containers and increase opportunities for their recovery and recycling, the Territory is introducing a container deposit scheme where the community and beverage consumers can get a 10 cent refund for each empty beverage container returned through a network of collection points to be located throughout the ACT. Beverage suppliers will be required to make financial contributions to fund the scheme.

The implementation of container deposit scheme is designed to combat market failures where producers of packaged beverage products do not bear the cost of proper disposal or recycling of the packaging, or the collection costs of littered packaging. Also, beverage consumers do not have a strong financial incentive to recycle containers compared to disposing of them to landfill or litter<sup>1</sup>.

The *Waste Management and Resource Recovery Amendment Act 2017* inserts a new Part 10A into the parent Act, the *Waste Management and Resource Recovery Act 2016* to establish the container deposit scheme in Territory. The Amendment Act will commence on 30 June 2018.

## Information required by section 35 of the *Legislation Act 2001*

This regulatory impact statement complies with the requirements for a subordinate law as set out in Part 5.2 of the *Legislation Act 2001*. In particular this regulatory impact statement meets the content requirements set out in section 35 of the *Legislation Act 2001*.

### (a) The authorising law

The *Waste Management and Resource Recovery Amendment Act 2017* (“Amendment Act”) is the authorising law for the proposed law. Sections 10 and 12 of the Amendment Act provide regulation making powers for the container deposit scheme arrangements. Section 128 of the parent Act, the *Waste Management and Resource Recovery Act 2016* also provides a general Regulation making power to the Executive.

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<sup>1</sup> ACT Container Deposit Scheme – Consultation Regulatory Impact Statement – December 2017  
[http://www.tccs.act.gov.au/\\_data/assets/pdf\\_file/0004/1182568/CDS-Regulatory-Imapct-Statement.pdf](http://www.tccs.act.gov.au/_data/assets/pdf_file/0004/1182568/CDS-Regulatory-Imapct-Statement.pdf)

## **(b) Policy objectives of the proposed law**

The purpose of the proposed law is to assist in establishing a cost effective container deposit scheme to support the beverage industry and the community to reduce and better manage waste generated by beverage product packaging. The aim is to reduce littering of used beverage containers and promote their recovery by attaching the incentive of a 10 cent refund for their return to a collection point.

The need for policy intervention on littering arises because a number of the social costs associated with littering are inadequately priced by beverage producers and consumers of beverage containers; that is, they are an externality. As a consequence, the environmental costs of littering are primarily borne by society and the clean-up costs are borne by ratepayers.

The container deposit scheme aims to collect a cleaner stream of recyclable materials (beverage containers) at collection points. This will enable higher order resource recovery outcomes for those materials than had they been mixed, and contaminated with, other waste streams. The scheme also aims to engage the community in positive recycling behaviours and, as the scheme evolves, the network of collection points could evolve to capture other waste materials for recycling.

The container deposit scheme supports the achievement of the resource recovery objectives in the ACT Waste Management Strategy 2011-2025 (Strategy) which is the principal Government policy statement outlining resource recovery aspirations and future directions in waste management.

These objectives are to ensure:

1. less waste is generated,
2. full resource recovery,
3. a cleaner environment, and
4. a carbon neutral waste sector.

The regulatory framework for the container deposit scheme established by the Amendment Act outlines the broad structure and content of the agreements to be made to set up the scheme. The proposed law is intended to provide further detail to participants about how the scheme will operate.

It is necessary to create regulations to ensure the container deposit scheme will operate in an efficient way and be harmonised with container deposit schemes in other jurisdictions, particularly NSW, as it already has a scheme and is adjacent to and surrounds the ACT.

### **(c) Achieving the policy objectives**

The proposed law achieves the policy objectives by providing clear regulatory requirements about the container deposit scheme. These requirements include indicating to the beverage industry:

- i) The types of containers and beverages which are, and are not, to be included in the container deposit scheme;
- ii) The refund marking which will be required to be printed on eligible beverage containers to indicate they are part of the scheme, and
- iii) The requirement to enter into an arrangement to make contributions to fund the scheme.

The regulation will also provide regulatory requirements about the establishment of the scheme and container collection network including:

- i) The process to apply for, and be granted approvals for collection network arrangements and collection point arrangements;
- ii) The suitability requirements for the organisations appointed to run the scheme; and
- iii) The offences for failing to ensure collected containers are recycled.

The regulation will ensure the community has access to the scheme including setting requirements for:

- i) Collection points to be in convenient and accessible locations and able to accept containers and provide refunds in an efficient way;
- ii) A ramp-up over time of the minimum number of collection points, and the minimum opening hours and days to ensure they are accessible to the community;
- iii) Involvement of charities and employment opportunities for people with disabilities in delivering the scheme; and
- iv) The refund amount being set at 10 cents per eligible container returned.

### **(d) Consistency of the proposed law with the authorising law**

Section 12 of the authorising law aligns with the regulation-making power granted to the Executive under section 128 of the *Waste Management and Resource Recovery Act 2016*. The proposed law provides regulatory requirements which are consistent with those regulation making powers in section 128(2), and each regulation has been referenced to its 'parent' section in the authorising law.

### **(e) The proposed law is not inconsistent with the policy objectives of another Territory law**

The proposed law is not inconsistent with the policy objectives of any other Territory law. No other Territory law regulates container deposit schemes. Human rights implications of the proposed law are addressed at (h) below.

**(f) Reasonable alternatives to the proposed law**

There are several options for meeting the Government’s objectives in relation to the reduction of litter and improving the recycling of beverage containers.

Option 1

*No action – maintain the status quo*

<b>Benefits</b>	<b>Costs</b>
<p><u>No increased costs</u> The additional economic costs associated with the implementation of a container deposit scheme (the costs of funding a scheme to collect and recycle beverage containers and the 10 cent refund amount) would not be imposed on the beverage industry. It is expected that the industry would pass through these costs to consumers in the form of higher beverage prices, estimated at 10 cent per beverage<sup>2</sup>. This beverage price increase would be avoided with this option.</p> <p><u>No increased regulation</u> The burden on the beverage industry of complying with regulatory requirements associated with the introduction of a container deposit scheme would not be felt. These costs include cost of entering into scheme arrangements, the administrative costs associated with reporting of data, and the compliance costs of the scheme would be avoided.</p>	<p><u>Failure to meet policy objectives</u> There would likely be a failure to meet the Government’s objective of reducing littering rates and increasing the recycling of beverage containers. Litter rates in the ACT have been relatively steady for the past 3 years with beverage containers making up about one third of all litter by volume<sup>3</sup>. Without some kind of intervention, it can be expected that litter rates would not change significantly. It is estimated by the ACT Government that only 35% of beverage containers are currently captured in household recycling bins. Experience in South Australia<sup>4</sup>, which has had a container deposit scheme since 1977, indicates that container return rates are around 80% providing evidence of the effectiveness of these schemes. Litter costs the community more than \$3.1 million<sup>5</sup> a year to clean up in the ACT. This is money that could be better spent on other Government priorities.</p> <p><u>Inconsistency with NSW</u> The NSW Government introduced a container deposit scheme on 1 December 2017. This has imposed costs on NSW consumers and the beverage industry and has led to a concomitant increase in beverage prices in NSW<sup>6</sup>. As many NSW residents attend work and education in the ACT, with estimates that around 20% of the ACT population moves seamlessly across the NSW-ACT border on a daily basis, the</p>

<sup>2</sup> ACT Container Deposit Scheme – Pricing Guide -

[https://www.actcds.com.au/pdf/ACT\\_CDS\\_Pricing\\_Guide-April\\_2018.pdf](https://www.actcds.com.au/pdf/ACT_CDS_Pricing_Guide-April_2018.pdf)

<sup>3</sup> National Litter Index – NLI Reports 2013/14 – 2016/17 - <http://kab.org.au/litter-research/national-litter-index/>

<sup>4</sup> EPA South Australia - [https://www.epa.sa.gov.au/environmental\\_info/container\\_deposit#return](https://www.epa.sa.gov.au/environmental_info/container_deposit#return)

<sup>5</sup> ACT Government – Container Deposit Scheme – Consultation Regulatory Impact Statement – Dec 2017 – at [http://www.tccs.act.gov.au/\\_data/assets/pdf\\_file/0004/1182568/CDS-Regulatory-Imapct-Statement.pdf](http://www.tccs.act.gov.au/_data/assets/pdf_file/0004/1182568/CDS-Regulatory-Imapct-Statement.pdf)

<sup>6</sup> NSW Independent Pricing and Regulatory Tribunal – April 2018 -

<https://www.ipart.nsw.gov.au/Home/Industries/Special-Reviews/Reviews/Container-Deposit-Scheme/Container-Deposit-Scheme-Monitoring/24-Apr-2018-Progress-Report/Progress-Report-NSW-Container-Deposit-Scheme-April-2018>

	<p>absence of a container deposit scheme in the ACT could result in cross-border arbitrage of containers from ACT to NSW resulting in confusion for consumers and potentially fraud of the NSW scheme. It is also possible that, given the relative population size of the ACT compared to NSW, that beverage suppliers may not differentiate the ACT beverage market from that of NSW and that higher beverage prices in NSW might flow through to ACT consumers, without affording them an opportunity to reclaim the refund amount.</p>
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Maintaining the status quo will not achieve the Government’s policy objective, to introduce an effective and efficient container deposit scheme, and therefore was discounted as a viable option.

Option 2

*Implement the proposed law*

Option 2 will allow the Government to achieve its policy objectives for waste and litter reduction and increased recycling of beverage containers whilst imposing the minimum possible additional regulatory burden on business and consumers due to the close alignment of the scheme with other container deposit schemes in operation in Australia.

<b>Benefits</b>	<b>Costs</b>
<p><u>Achieves policy objectives</u> The proposed law provides the structure and detail around how a container deposit scheme would operate in the Territory including how the public would access the scheme, how the Territory would regulate the participants in the scheme and the offences for non-compliance with the regulation. It is expected that after implementation of the scheme there will be a significant reduction in beverage container litter and an increase in container recovery rates.</p> <p><u>Minimises regulatory burden on participants</u> The proposed law is drafted to align with the requirements of container deposit schemes operating in other states and territories (SA, NT and NSW) in that the containers and beverages subject to the scheme, the refund marking required to be printed on containers, and the refund amount of 10 cents are all the same. This is designed to ensure consistency for participants and minimise the additional regulatory burden on businesses in the ACT.</p>	<p><u>Increased beverage costs</u> The proposed law requires beverage suppliers to make contributions to fund the scheme. This includes the 10 cent refund amount and the handling and administrative costs of the scheme. Whilst the scheme is being designed to be as efficient as possible, it will result in additional costs of approximately 10 cents per beverage supplied into the market. It is expected beverage suppliers will pass some or all of this cost through to beverage consumers.</p> <p><u>Additional regulation</u> The proposed law will require beverage suppliers to enter into scheme arrangements, make contributions to fund the scheme and report sales data. These administrative requirements are additional to a business as usual case and will result in an increase in regulatory costs and administration for businesses.</p>

### Option 3

#### *Increased education and awareness*

The proposed law is not the only means intended to achieve the Government's objectives. While regulations are important in establishing an efficient and effective container deposit scheme, the Government could instead conduct a community education campaign with a focus on reducing littering and improving the recovery of used beverage containers.

Despite numerous anti-littering community education campaigns commencing with the "Keep Australia Beautiful" and "Tidy Towns" initiatives in the 1970's right up to present day "Dob in a dumper" and "Don't be a tosser" community education campaigns, litter remains a persistent problem. The Territory introduced anti-litter laws in 1977 which were updated in 2004, in partial recognition that education and awareness raising alone could not deal with the litter problem in the ACT.

The container deposit scheme provides a financial incentive for people to return used beverage containers. It provides a mix of anti-litter and resource recovery education messages, a financial incentive and direct regulatory provisions and is a kind of 'hybrid' litter reduction and resource recovery strategy. Experience has shown that using an educative approach alone for litter reduction will not result in the desired behaviour change across the whole of the community. There will be an element of the community who, despite educative messages to the contrary, will continue to litter.

With an estimated 217 million beverage containers consumed in the ACT each year, the introduction of a container deposit scheme opens up the opportunity of fraudulent activity to falsely claim refunds. A small portion of the community will likely seek to maximise financial returns from a CDS by importing containers from non-CDS jurisdictions, trying to salvage already refunded containers (and repeatedly claim refund amounts), or steal containers. Education strategies are unlikely to be effective against deliberate attempts to defraud the scheme.

It is therefore important to have a regulatory scheme which sets the minimum standards of conduct for participants in the container deposit scheme and enables enforcement where required. This will not only address conduct which offends the scheme, but will also reward good practice in waste management by the majority of the community and industry by ensuring scheme costs are kept to a minimum.

The introduction of a CDS will be accompanied by a specific education campaign in relation to the new legislation and will be aimed at informing the ACT community about how the scheme works, how a refund can be obtained and the minimum standards of conduct required to participate. Experience suggests that the offence provisions will apply to only a few individuals and businesses which chose to attempt to defraud the scheme.

<b>Benefits</b>	<b>Costs</b>
<p><u>Communication</u> While a public education campaign alone is not enough to compel responsible waste management behaviour in all persons, it has the capacity to create an effective compact between the Government and the public and help the community understand the Government's objectives. This approach is more likely to encourage appropriate behaviour by the majority of citizens than only imposing penalties and offences.</p> <p><u>Cost</u> A public education campaign is relatively low-cost in terms of administration.</p>	<p><u>Lack of effectiveness</u> If undertaken on a stand-alone basis a public education campaign would be unlikely to significantly change littering behaviour.</p> <p><u>Potential fraud</u> Without a clear regulatory framework some would undoubtedly endeavour to profit from the CDS by unlawfully claiming refunds, resulting in financial costs to beverage producers and consumers from scheme non-compliance, and increased administrative and compliance actions required by Government.</p>

**(g) Brief assessment of benefits and costs of the proposed law**

The proposed law is necessary to ensure the container deposit scheme has an effective regulatory underpinning but that it does not impose additional costs on participants beyond those reasonably required for an efficient scheme to be implemented.

The proposed law strikes a balance between imposing an undue regulatory burden on the beverage industry and consumers and the 'do nothing' option. By providing a refund for each used beverage container returned, the scheme will provide an economic incentive to the community to reduce litter and increase the recovery of used beverage containers. The primary strategy, the financial incentive of the 10 cent refund will then be combined with a community education message about recycling, and the scheme underpinned by an efficient regulatory structure.

Any increased costs imposed by the scheme on consumers can be largely offset by reclaiming refunds for used beverage containers at collection points leading to more effective behaviour changes in waste and recycling than is possible with using education or regulatory approaches alone.

A cost-benefit analysis<sup>7</sup> completed for the scheme concluded that for every \$1 of cost for the container deposit scheme, \$1.79 in benefits would accrue to the ACT community, giving benefit to cost ration of 1.79. Costs were mainly operating costs for the scheme to collect containers and provide 10 cent refunds, and benefits were primarily environmental, e.g. the avoided costs of littering.

<sup>7</sup> ACT Container Deposit Scheme – Consultation Regulation Impact Statement – December 2017: [http://www.tccs.act.gov.au/\\_data/assets/pdf\\_file/0004/1182568/CDS-Regulatory-Imapct-Statement.pdf](http://www.tccs.act.gov.au/_data/assets/pdf_file/0004/1182568/CDS-Regulatory-Imapct-Statement.pdf)

**(h) Brief assessment of the consistency of the proposed law with Scrutiny of Bill Committee principles**

The Standing Committee on Justice and Community Safety's (Legislative Scrutiny Role) Terms of Reference require the Committee to consider whether (among other things) a regulation:

- i. is in accord with the general objects of the Act under which it is made;
- ii. unduly trespasses on rights previously established by law;
- iii. makes rights, liberties and/or obligations unduly dependent upon non reviewable decisions; or
- iv. contains matters which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly.

An analysis of the proposed law against each of these items follows. In addition, an Explanatory Statement for the proposed law has been prepared for tabling, with the proposed law, in the Legislative Assembly.

*(i) Accordance with the general objects of the Act under which it is made*

The Regulation is made in accordance with the objects of Part 10A of the Act which are to:

- (a) establish a cost effective container deposit scheme to assist the beverage industry in reducing and dealing with waste generated by beverage product packaging; and
- (b) promote the recovery, reuse and recycling of empty beverage containers.

The parent Act provides a general regulation-making power at section 128, which provides specifically under s 128(c) that the Executive may make provision in relation to the content of scheme arrangements under Part 10A.

There are also regulation making powers given to the Executive in sections 64B, 64E, 64F, 64G, 64H, 64I, 64J, 64K, 64L, 64N, 64O, 64S, 64T, 64V, 64Y, and 64Z of the Amendment Act to provide for specific operational and offence provisions for the container deposit scheme.

All of the provisions of the proposed law are directed at establishing the container deposit scheme with the objective of reducing litter and increasing the recovery and recycling of used beverage containers. The proposed law accords with the objects and is within the scope of the Act.

*(ii) Rights previously established by law*

There are aspects in which the proposed law may be considered to trespass on previously established rights. To the extent that it does trespass, it is necessary to consider whether it does so unduly.

Strict liability offences

The proposed law creates a number of offences at section 24W for material recovery facility operators who claim a refund for a returned container which is then disposed of to landfill. As the scheme seeks to increase the recovery and recycling of containers, it is necessary to create this offence to discourage this kind of fraudulent behaviour.

An offence against section 24W(1) is a strict liability offence. This engages the right to be presumed innocent under section 22(1) of the *Human Rights Act 2004*, as such offences may reverse the onus of proof from the prosecution onto the defendant. While strict liability offences engage the presumption of innocence, they are not inherently incompatible with human rights. The limit on the right to the presumption of innocence is reasonable and justifiable in a free and democratic society, taking into account the factors enumerated in section 28(2) of the *Human Rights Act*.

Section 28(2) provides five factors that must be considered when determining whether a limit on human rights is considered justified. The limit that the proposed law places on the right to the presumption of innocence in section 22(1) of the *Human Rights Act* is considered reasonable and justifiable, taking into account the factors enumerated in section 28(2) of the *Human Rights Act*, namely:

(a) The nature of the right affected

The right to presumption of innocence before the law is a very important right that has long been recognised in common law and, in the ACT, is now codified in section 22(1) of the *Human Rights Act*. However, the right may be subject to limits, particularly when those who are subject to an offence provision would be expected to be aware of its existence. The proposed strict liability offence is regulatory in nature, and targets a regulatory requirement that is central to the effective operation of a CDS.

For a Material Recovery Facility Operator, claiming a refund for an eligible container processed when the container is disposed of to landfill defeats a central tenet of the scheme that containers collected in the scheme are to be recycled. A Material Recovery Facility Operator sorts and separates recyclable materials from waste in mixed recycling bins (ie. yellow lidded bins). Such an operator sells recyclable materials and disposes of waste created by the sorting process and has complete control over where the recyclable materials are consigned to. Participating in the container deposit scheme, by making a refund claim for recycled containers, the Operator can be expected to have a clear knowledge of the offence provision and the underlying objective of the scheme, to increase the recycling of used beverage containers.

(b) The importance of the purpose of the limitation

The purpose of providing a reverse onus of proof through the proposed strict liability offence is to ensure the effective enforcement of and compliance with this key requirement of the CDS that returned beverage containers are recycled and not disposed of in landfill. The limitation on the right to be presumed innocent in section 22(1) of the *Human Rights Act* is aimed at

ensuring the effective operation of the regulatory framework underlying the CDS as proving knowledge of the landfill disposal of any particular container by the Material Recovery Facility Operator is likely to be very difficult in practice.

(c) The nature and extent of the limitation

Strict liability offences engage the right to be presumed innocent by shifting the onus of proof from the prosecution onto a defendant. This offence applies to a Material Recovery Facility Operator who is a central participant in the CDS and should be well aware of the requirements of the regulatory scheme.

The penalty of 15 penalty units is considered proportionate and not unduly harsh for this offence, which is a regulatory nature.

(d) Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

An evidential onus, rather than a strict liability offence, would be less restrictive on the right to be presumed innocent found in section 22(1) of the *Human Rights Act*.

It would not, however, prove to be as effective in prosecuting the proposed offence. Strict liability offences provide that the defendant's act alone, rather than the reasons that the defendant acted in that way or his or her intention in so doing, should dictate the offence.

The inclusion of strict liability within an offence limits the range of defences that may be available for a person accused of the offence to which it applies; however, a number of defences remain open to the accused, depending on the particular circumstances of each case. Section 23(1)(b) of the *Criminal Code 2002* provides a specific defence to strict liability offences of mistake of fact. Section 23(3) of the Code provides that other defences may also be available for strict liability offences, including the defence of intervening conduct or event, as provided by section 39 of the Code.

The use of this strict liability offence is appropriate because the offence applies only to a Material Recovery Facility Operator who chooses to engage in a regulated activity, by actively making a claim for a refund in respect of a returned container. They are therefore on notice that they must abide by the laws that govern the activity. They place themselves in a relationship of responsibility with the community.

The ACT Government believes that the use of the strict liability offence contained in the proposed law is relevant to the policy objectives of the CDS to ensure returned containers are recycled and not littered or disposed of in landfill.

Privacy of personal information

The proposed law requires persons who return large numbers of containers to a collection point for refunds to provide proof of identity and a declaration that

those containers are the claimant's property, were lawfully obtained in the ACT or another state with a container deposit scheme, and the claimant is not aware of any refunds being previously been paid for those containers (known as a refund declaration).

The requirement to provide proof of identity and a refund declaration is designed to guard against fraudulent claims for large refund amounts. Potential fraudulent claimants will be less likely to engage in fraud given the requirement to provide this information and means they will be accountable and identifiable for any fraudulent activity. Such personal information will also assist the investigation of any alleged fraudulent refund claims.

The collection and storage of a person's identity engages the right to privacy protected under section 12 of the *Human Rights Act 2004* so that a person has a right to protection of their personal information.

To ensure such personal information is collected, stored and, when appropriate, destroyed so as to protect the right to privacy, it will be handled by collection point operators in accordance with the "Territory Privacy Principles" in the *Information Privacy Act 2014*.

To ensure this occurs, there is oversight from the Territory provided for in the proposed law. The container deposit scheme will function so that collection point operators will be contracted by a network operator to provide container collection and refund services to persons wishing to claim refunds for used beverage containers.

Those contracts will be "Collection Point Arrangements" under proposed section 64O of the Act. The Territory's waste manager, appointed under section 16 of the *Waste Management and Resource Recovery Act 2016*, administers the Act. The waste manager is responsible under section 64O of the Act and section 24T of the Regulation to approve these collection point arrangements.

Section 24T(2) of the Regulation requires the waste manager, in deciding on application for an approval of collection point arrangements, to consider whether the arrangement requires the collection point operator to adhere to the Territory Privacy Principles.

In this way the Territory's waste manager will ensure by regulatory oversight, the protection of personal information by collection point operators accords with the requirements of the Territory Privacy Principles.

*(iii) Non-reviewable decisions*

The proposed law does not create any non-reviewable decisions. The proposed law does provide for a number of reviewable decisions in the ordinary course of administration of the container deposit scheme, in sections 24K, 24L, 24M, 24T, 24U and 24V.

*(iv) Matters properly dealt with in an Act of the Legislative Assembly*

The parent Act generally, and the Amendment Act expressly allow the Executive to make regulations for the matters addressed in the proposed law. Accordingly, the proposed law is within an express power granted by the Legislative Assembly.