



ICRC

independent competition and regulatory commission

Issues paper

Container Deposit Scheme

Price Monitoring

Report 4 of 2018, July 2018

The Independent Competition and Regulatory Commission is a Territory Authority established under the *Independent Competition and Regulatory Commission Act 1997* (the ICRC Act). The Commission is constituted under the ICRC Act by one or more standing commissioners and any associated commissioners appointed for particular purposes. Commissioners are statutory appointments. Joe Dimasi is the current Senior Commissioner who constitutes the Commission and takes direct responsibility for delivery of the outcomes of the Commission.

We have responsibilities for a broad range of regulatory and utility administrative matters. We have responsibility under the ICRC Act for regulating and advising government about pricing and other matters for monopoly, near-monopoly and ministerially declared regulated industries, and providing advice on competitive neutrality complaints and government-regulated activities. We also have responsibility for arbitrating infrastructure access disputes under the ICRC Act. In discharging our objectives and functions, we provide independent robust analysis and advice.

Our objectives are set out in section 7 and 19L of the ICRC Act and section 3 of the *Utilities Act 2000*.

Correspondence or other inquiries may be directed to the Commission at the following addresses:

Independent Competition and Regulatory Commission
PO Box 161
Civic Square ACT 2608

Level 8
221 London Circuit
Canberra ACT 2601

The Commission may be contacted at the above addresses, by telephone on (02) 6205 0799, or by fax on (02) 6207 5887. Our website is at www.icrc.act.gov.au and our email address is icrc@act.gov.au.

Foreword

On 4 April 2018 the Commission received a reference from the Australian Capital Territory (ACT) Government to monitor and report on the impact on ACT beverage prices and competition in the ACT beverage industry of the introduction of the ACT Container Deposit Scheme (CDS) from 30 June 2018. The Commission will monitor the impact of the CDS from 1 June 2018 to 30 June 2019.

The Commission's monitoring and reporting will focus on:

- the effect of the CDS on prices of beverages supplied in specified types of containers in the ACT;
- the performance and conduct of beverage suppliers in the ACT before and after the implementation of the Scheme; and
- any other market impacts from the implementation of the Scheme.

This issues paper presents the Commission's proposed approach for monitoring and reporting. The Commission encourages submissions from consumers and other stakeholders on the proposed approach, as well as on issues relating to pricing, competition, supplier conduct and any other impacts of the CDS. Feedback from consumers, beverage suppliers and other stakeholders is crucial to informing the Commission's monitoring and reporting.

The process for making submissions is set out in section 4 of this issues paper. Submissions on the issues paper close on Friday 17 August 2018.

Joe Dimasi

Senior Commissioner

5 July 2018

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1 What has the Commission been asked to do?

On 4 April 2018 the Commission received a reference from the ACT Government to monitor and report on the impact on ACT beverage prices and competition in the beverage industry of the introduction of the Container Deposit Scheme (CDS).

1.1 Purpose of issues paper

This issues paper outlines the Commission's proposed approach to price and competition monitoring in relation to the CDS and identifies key issues for feedback. The Commission is seeking public and stakeholder comments and suggestions on its proposed approach.

The issues paper is an early opportunity for interested parties to contribute to the investigation and for the Commission to gain a better understanding of the ACT beverage market and any concerns of ACT consumers and industry participants.

Submissions will inform the Commission's assessment of beverage pricing and competition impacts. Competition impacts might include changes to supplier behaviours as a result of the introduction of the CDS.

Interested parties are invited to make submissions in response to the issues paper by 5pm, Friday 17 August 2018.

1.2 Background to this investigation

The ACT Government has passed legislation to introduce a CDS from 30 June 2018. The objectives of the CDS are to reduce litter, recover eligible containers, increase the recycling rates of used beverage containers and help engage the community in active and positive recycling behaviours.¹

The ACT Government has asked the Commission to monitor price and competition impacts. The Minister for Transport and City Services provided an industry reference (Disallowable instrument 2018-69) to the Commission on 4 April 2018 with a Terms of Reference for the investigation. The Terms of Reference asked the Commission to monitor and report on the price and competition effects of the introduction of the CDS.

¹ ACT Government, 2018a.

1.3 The Commission's role and powers

The Commission is an independent commission within the ACT Government. The Commission's purpose is to regulate pricing, access and other matters for relevant industries. The Commission is governed by the *Independent Competition and Regulatory Commission Act 1997* (the ICRC Act).

The Terms of Reference for the investigation were issued under section 16 of the ICRC Act. In accordance with Section 17 of the ICRC Act, in undertaking industry reference investigations the Commission will issue a draft report and will request submissions from the public or specified persons. The Commission may conduct public hearings for the purpose of conducting an investigation.

The Commission may seek information from persons if there is reason to believe that information will assist with the monitoring and reporting of prices and competition. Section 41 of the ICRC Act provides for the Commission to require by written notice persons to give information or documents that may assist it in exercising its functions.

1.4 Terms of Reference

The Terms of Reference for the price and competition monitoring were received by the Commission on 4 April 2018 (DI 2018-69).

The Terms of Reference request the Commission to monitor:

- 4(1)a. the effect of the Scheme on prices of beverages supplied in a container in the Territory;*
- 4(1)b. the performance and conduct of beverage suppliers in relation to beverage pricing in the Territory before and after the implementation of the Scheme; and*
- 4(1)c. any other market impacts on consumers that arise from the implementation of the Scheme, for the period from 1 June 2018 to 30 June 2019 (monitoring period).*

When monitoring, the Terms of Reference ask the Commission to have regard to several areas in particular:

- 4(3)a. any changes in prices of beverages before or after 1 June 2018 that purport to be in response to the Scheme;*
- 4(3)b. any information provided by Scheme participants and consumers;*
- 4(3)c. the behaviour of suppliers and major retailers before and after 1 June 2018 including whether beverage prices have increased beyond the amount suppliers are charged by the Scheme Coordinator;*
- 4(3)d. the manner in which beverage suppliers are recovering the costs imposed on them by the Scheme; and*

4(3)e. any impacts on beverage prices in the Territory which could be attributed to the commencement of the NSW Container Deposit Scheme on 1 December 2017; and

4(3)f. any impacts on the cross border movement of beverage containers which could be attributed to the commencement of the Scheme and its interaction with the NSW Container Deposit Scheme; and

4(3)g. any other associated matters the Commission considers relevant.

The Terms of Reference request the Commission to report on:

4(2)a. the effect of the Scheme on prices of beverages supplied in a container in the Territory for the period from 1 June 2018 to 30 June 2019;

4(2)b. the framework for monitoring the Scheme including the behaviour of suppliers;

4(2)c. the effect of the Scheme on suppliers; and

4(2)d. any recommendations for actions by government to address any adverse effects or behaviours arising from the operation of the Scheme.

This issues paper outlines the Commission’s proposed framework for monitoring and reporting. Chapter 3 describe the proposed framework and approach in greater detail.

1.5 The Commission’s investigation process

The timing and nature of the Commission’s investigation process are guided by the Terms of Reference and the ICRC Act. The Terms of Reference sets out the monitoring period and reporting requirements. The ICRC Act provides that all hearings must be open to the public and that the Commission must invite public submissions.

The Commission’s expected investigation program is shown in Table 1.1.

Table 1.1 Expected investigation program

Report or Activity	Date
Issues paper	July 2018
Issues paper submissions close	17 August 2018
Progress report	February 2019
Progress report submissions close	March 2019
Public hearing	March 2019
Final report	July 2019

The Commission's monitoring period is 1 June 2018 to 30 June 2019, as established in the Terms of Reference. The monitoring activities will inform the reports and the public hearing.

The Commission will release a progress report in February 2019, as required by the Terms of Reference. The progress report will satisfy the requirement for the Commission to publish a draft report under Section 18 of the ICRC Act.

The draft framework for the review and the report on the first months of the CDS will be included in the progress report. The progress report may also include draft recommendations on potential improvements to the scheme that the Commission considers may be necessary to address any adverse effects of the scheme on competition in the beverage industry and/or impacts on consumers or beverage suppliers. The Commission will seek submissions on its initial findings and any draft recommendations included in the progress report.

A public hearing is expected to be held in March 2019. The public hearing will follow the release of the progress report.

The final report is to be released in July 2019 in accordance with the Terms of Reference. The final report will set out the Commission's findings from its price and competition monitoring over the period from 1 June 2018 to 30 June 2019 and any final recommendations on improvements to the scheme.

At any time during the monitoring period, the Commission may investigate and report on unfair or unjustified behaviours or market outcomes in accordance with the Terms of Reference.

1.6 Structure of issues paper

This issues paper outlines the CDS and the Commission's proposed approach to price monitoring and reporting. The issues paper is structured as follows:

- Chapter 2 describes the ACT CDS including the eligible container types, scheme operation and financial arrangements, and roles and responsibilities for scheme administration. This chapter also outlines the differences between the ACT and New South Wales (NSW) CDS and the initial price and competition impacts experienced in NSW identified by the Independent Pricing and Regulatory Tribunal (IPART).
- Chapter 3 describes the Commission's proposed approach to monitoring. This chapter describes the proposed monitoring activities, together with possible data sources and indicators for price and competition impacts.
- Chapter 4 provides a consolidated summary of questions on which the Commission is seeking stakeholder input.

The Terms of Reference for the Commission's investigation are in Appendix 1.

2 What is the ACT CDS?

2.1 How the ACT CDS works

Under the CDS, beverage manufacturers and suppliers contribute funds to finance the collection and recycling of empty beverage containers. The coordination of the CDS and administration of the funds are undertaken by the Scheme Coordinator. The physical collection of eligible beverage containers and payment of refunds are managed by the Network Operator.

The CDS applies to certain types of beverage containers supplied in the ACT. The eligible containers are described in 2.2. The roles and responsibilities of the Scheme Coordinator and the Network Operator are outlined in 2.3.

2.2 Eligible beverages and containers

Beverage containers of certain size and materials are eligible containers for the CDS. Eligible beverage containers are between 150mL and 3L in size. The container material must be glass, plastic (PET and HDPE), aluminium, steel or liquid paperboard.

Some beverage containers are excluded from the CDS². The eligibility of an empty beverage container depends on both the original beverage and the container. The criteria are summarised in Table 2.1.

Table 2.1 Beverage container eligibility for CDS at 30 June 2018

	Original beverage	Container volume	Container material
Eligible	Any beverage	Between 150mL and 3L	Glass, plastic (PET and HDPE), aluminium, steel or liquid paperboard
Ineligible	Plain milk	Any volume	Any material
	Flavoured milk	Above 1L	Any material
	Cordial, fruit or vegetable juice concentrate	Any volume	Any material
	Fruit or vegetable juice (>90 per cent juice)	Above 1L	Any material
	Registered health tonics	Any volume	Any material
	Wine	Any volume	Glass
	Wine	Above 250mL	Plastic or foil or both
	Wine or wine based beverage	Above 1L	Cardboard and plastic, cardboard and foil, or cardboard
	Spirit	Any volume	Glass
Water	Above 1L	Cardboard and plastic, cardboard and foil, or cardboard	

² ACT CDS Regulations:
<http://www.legislation.act.gov.au/sl/2018-9/20180630-68997/pdf/2018-9.pdf>

The ACT CDS will accept crushed or misshapen containers as long as they are able to be recognised as eligible.

Container type approvals granted under the NSW, South Australia and Northern Territory CDSs will generally be recognised in the ACT CDS. This means that a beverage supplier does not need to seek approval for its containers in the ACT if it has already registered its container types in another state or territory.

2.3 CDS participants and financial operation

The core roles of the CDS are performed by the Scheme Coordinator and Network Operator.

Scheme Coordinator

The Scheme Coordinator is responsible for administering the scheme payments account - the central funding mechanism for the CDS. This account receives funds from beverage suppliers and uses them to cover all costs incurred in running the scheme. The Scheme Coordinator invoices beverage suppliers on a monthly basis.

In addition to administering the scheme payments account, the Scheme Coordinator is responsible for forecasting container supply and return volumes, as well as the prevention, monitoring and reporting of fraud.

The Scheme Coordinator in the ACT is Exchange for Change (ACT) Pty Ltd. Exchange for Change is a consortium with joint ownership by Asahi, Coca-Cola Amatil, Coopers, Carlton & United Breweries and Lion.

Exchange for Change is also the Scheme Coordinator for the NSW CDS. There are separate payments accounts in the ACT and NSW and separate forecasting and invoicing cycles. Suppliers to both jurisdictions will receive separate invoices for the ACT and NSW.

Network Operator

The Network Operator is responsible for the establishment, administration and operation of a network of collection points. At collection points, people return empty containers and receive a refund in cash or through electronic transfer to bank accounts, or donate their refund to charity. The Scheme Coordinator pays the Network Operator for container handling, administration, and container return refunds.

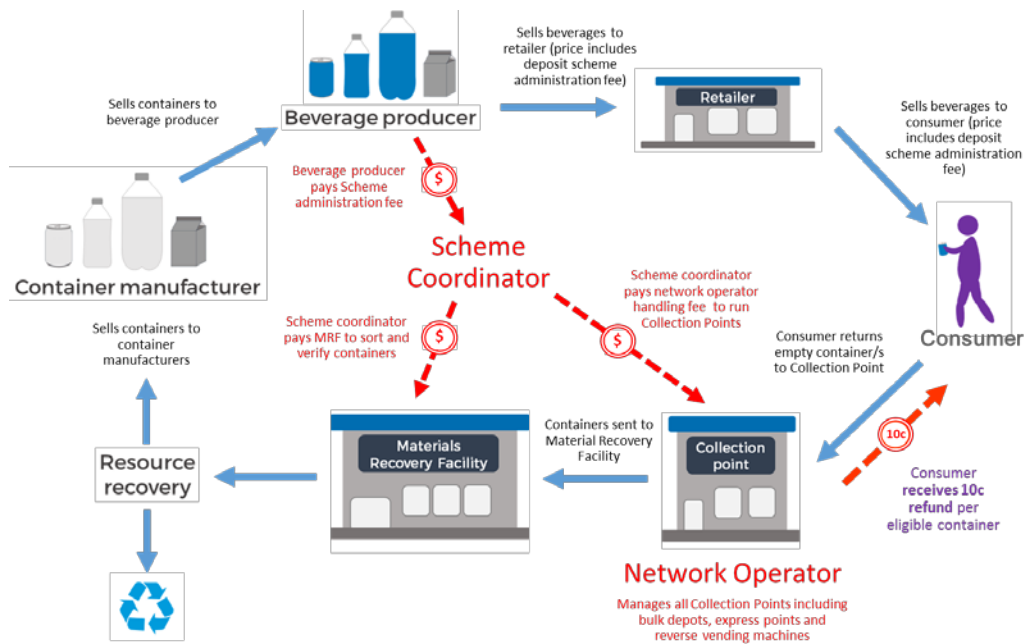
The Network Operator is Re.Turn It (Canberra) Pty Ltd, a subsidiary of Re.Group. Re.Group is an Australian recycling and waste management company that operates the Material Recycling Facility (MRF) at Hume, ACT.

Collection points can be operated by the Network Operator or approved third parties. The Network Operator makes payments to third party operators for container handling

fees and refund amounts paid to persons returning containers. As of June 2018 the third party operators of collection points are St Vincent de Paul and the Salvation Army.

Figure 2.1 shows the administration and container flows of the ACT CDS.

Figure 2.1 ACT CDS administration and container flows



Source: ACT Government (2018c).

After counting and payment of refunds, the Network Operator transfers the collected containers to the MRF at Hume for material recovery and recycling. Once containers are received by the MRF, no further refund payments are made.

The MRF also receives eligible containers through kerbside collection from municipal services in the ACT and surrounding four NSW councils (Queanbeyan-Palerang Regional Council, Yass Valley Council, Snowy Monaro Regional Council and Snowy Valleys Council). Containers that are returned through kerbside recycling are eligible for a 10c refund under the ACT CDS.

The MRF operator can receive the 10c refund for eligible containers it processes from kerbside recycling. Containers returns through the MRF do not receive a container handling fee, unlike container returns through collection points.

The MRF operator is required by the ACT Government to enter into a refund sharing agreement with the ACT Government and surrounding NSW councils if it wishes to claim the 10c refund for eligible containers it processes through kerbside recycling. These agreements will reimburse the ACT Government and the four surrounding NSW councils for a portion of the refund value of the eligible containers returned through kerbside recycling.

Beverage Suppliers

The first beverage supplier into the ACT pays the scheme cost on a per container basis. The first beverage supplier is either the beverage manufacturer (if located in the ACT) or the beverage distributor or retailer (if importing beverages from other jurisdictions, such as NSW).

The Scheme Coordinator identifies beverage suppliers to the ACT and ensures they participate in the scheme. First beverage suppliers sign a supply agreement with the Scheme Coordinator and pay supply contributions according to the scheme cost per supplied container and the forecast volume of containers supplied.

Subsequent beverage industry participants, such as distributors and retailers, are not charged by the Scheme Coordinator. The Scheme Coordinator only charges the first suppliers.

2.4 ACT CDS costs

As discussed above, the CDS costs are recovered through charges paid by beverage suppliers. First beverage suppliers are charged per container supplied. The CDS costs recovered from beverage suppliers are comprised of:

- The Scheme Coordinator Fee: the costs of the Scheme Coordinator charges to administer the CDS.
- The Scheme Compliance Fee: the costs of the ACT Government charges to regulate the CDS.
- The forecast monthly network fee: the costs of the Network Operator for administering collection points and handling containers, based on a forecast container volume at collection points.
- The forecast monthly refund amount: the forecast 10c refunds for returned containers through collection points.
- The forecast processing refund amounts: the forecast 10c refunds for returned containers through the MRF.
- Interest pass through amounts: the return of interest earned on the CDS funds that may reduce scheme costs.
- Recovery amounts: the Scheme Coordinator's costs of recovering late payments from suppliers.
- Bad debts amounts: the unpaid debts from suppliers when written off by the Scheme Coordinator.

The scheme costs are forecast in advance by the Scheme Coordinator. A forecast is required because:

- The volume of containers supplied will change over time. Container volumes are estimated a month in advance, using existing sales data that suppliers provide the Scheme Coordinator.
- The rate of recovery for containers through the CDS will change over time. A higher recovery rate will increase scheme costs because the amount of refunds paid will be higher. Recovery rates are expected to increase over time as more collection points are established and consumers divert more containers from litter and non-recyclable waste streams into recycling through the CDS.
- The route of container recovery through the CDS may change over time. Containers returned through collection points incur a handling fee whereas containers returned through the MRF do not. For a given level of total container return volumes, increases in the share of returns through collection points will increase scheme costs.

Suppliers are invoiced in the month of supply, before actual supply is known. For the first three months of the CDS the scheme costs charged per supplied container are fixed. The forecast recovery rates and scheme costs per container are shown in Table 2.2.

Table 2.2 Forecast recovery rates and scheme costs per supplied container for first three months of the CDS

Scheme month Invoice Date	July 2018 1 July 2018	August 2018 1 August 2018	September 2018 1 September 2018
Forecast material recovery			
Overall rate (per cent)	70	71	72
From MRF and kerbside collection (per cent)	39	38	37
From collection points (per cent)	31	33	35
Scheme costs (cents per container, ex GST)			
All materials: Aluminium, glass, HDPE, PET, liquid paper board, steel, other plastics, other materials	9.940	10.192	10.445

Source: Exchange for Change (2018).

Container supply volumes are forecast for each supplier and in total. The total forecast container supply is used to calculate the scheme costs per supplied container.

The design of the CDS includes a true up mechanism so that suppliers pay only actual costs. There will be differences between forecast scheme costs, which are calculated and paid in advance, and actual scheme costs, which are calculated in arrears once data is available. The true up adjustments are made in arrears and any differences are added to, or deducted from, the scheme costs charged to suppliers in later months. No true ups are included in the first three months of scheme costs shown in Table 2.2.

2.5 Comparison with the NSW CDS

NSW introduced a CDS in December 2017. The design of the ACT CDS was informed by the design of the NSW CDS and so the two schemes are similar in many respects. The NSW and ACT CDS have the same eligible container beverage specifications, have similar Scheme Coordinator and Network Operator roles and responsibilities, and invoice beverage suppliers on a monthly basis.

However, the ACT CDS is different to the NSW CDS in a number of ways:

- Beverage suppliers in the ACT are invoiced for forecast supplies in the month of supply, whereas beverage suppliers in NSW are invoiced a month in advance of supply. The ACT approach results in a shorter period between payment of the CDS charges and the true-up, which may reduce the cash flow impact on beverage suppliers.
- The ACT Network Operator will partner with social and disability enterprises to run collection points, whereas the NSW Network Operator has a mix of staffed and non-staffed (reverse vending machine) collection points. The difference in collection point operation may generate a different return rate for the ACT CDS compared with the NSW CDS.
- Larger commercial container returns in the ACT must go through a bulk depot collection point to receive the refund, whereas commercial container returns in NSW can go through a MRF to receive the refund. This may increase the ACT CDS costs as collection points incur a handling fees unlike returns through the MRFs.
- Because the ACT CDS uses manually operated collection points, the ACT collection point operators can accept eligible but damaged containers, whereas NSW collection points only accept undamaged containers after electronic scanning. This could result in a higher return rate for the ACT CDS compared with the NSW CDS, which could result in higher scheme costs (due to higher refund payments).
- The ACT CDS assumes a 70 per cent container return rate in the first few months, whereas the NSW CDS assumed a higher return rate. Combined with later supplier invoicing, the lower expected initial return rate may place a lower initial cashflow burden on suppliers.
- The ACT Government can approve containers eligible for the ACT CDS, but container approvals in any other state or territory CDS will be recognised under the ACT CDS. This may reduce administrative costs on beverage suppliers and the ACT Government.
- The ACT CDS has the same scheme costs for all container material types, whereas the NSW CDS adopts different scheme costs for each container material type. This may influence supplier container choice selection in NSW, and may reduce administration costs in the ACT.

IPART is monitoring the price and competition effects of the NSW CDS in its first year of operation. In April 2018 IPART released a progress report.³ IPART's preliminary findings and recommendations are reproduced in Box 1.

Box 1 NSW CDS: IPART's Preliminary Findings and Recommendations

Preliminary findings on container beverage prices

1. On average, the retail prices of container beverages in NSW have increased in line with or by less than the estimated direct costs of the scheme.
2. For non-alcoholic container beverages, most of the estimated direct costs of the scheme appear to have been passed through to consumers on average:
 - Soft drinks and water prices were around 10 to 14 cents per container higher as a result of the CDS in December to February.
 - Fruit juice prices were around six cents per container higher in January and February as a result of the CDS.
3. For alcoholic container beverages, less than half of the estimated direct costs of the scheme appear to have been passed through to consumers on average:
 - Beer prices were around two to three cents per container higher as a result of the CDS in December 2017 and January 2018, increasing to around six cents per container higher in February 2018.
 - Cider prices were up to seven cents per container higher as a result of the CDS in February 2018.
4. The estimated direct costs of the scheme for non-alcoholic and alcoholic beverages have been around 12 to 15 cents per container (including GST) over the period December 2017 to February 2018.

Preliminary findings on competition

5. It is too early to conclude whether the CDS has had a material impact on competition by examining market outcomes.
6. There is potential for the costs of entering the market, or remaining in the market, to have a detrimental impact on competition where those costs disproportionately affect particular types of supplier or particular locations.
7. The NSW Environment Protection Authority's (EPA) regulatory compliance costs and fees charged to first suppliers per container approval should reflect the efficient costs.

Preliminary draft recommendations

1. Exchange for Change publish the following information prior to issuing its June invoice and all subsequent invoices:
 - forecast container volumes for the next three months for both Network Operator volumes and MRF volumes
 - a description of how container volumes were estimated
 - forecast costs per container for the next three months
 - costs per container for previous months based on actual container volumes recovered via the Network Operator and MRFs (once known) (ie, what the costs would have been if forecasts were 100 per cent accurate).

³ IPART, 2018b.

2. The EPA and Exchange for Change amend the payment terms for first supplier contributions to the CDS from seven days to 30 days, consistent with the payment term requirements for NSW Government agencies.
3. That the EPA publish a contract summary for each of the agreements with the Scheme Coordinator and the Network Operator.

Source: IPART, 2018b: 7-8.

Due to the differences between the design of the ACT and NSW CDS, and other factors such as potential differences in beverage supplier behaviours in the ACT and NSW, the price and competition impacts of the ACT CDS may not necessarily be the same as, or similar to, the initial impacts experienced in NSW.

3 What is the Commission's proposed approach to monitoring?

3.1 Proposed monitoring framework

This section explains the Commission's proposed framework for price and competition monitoring.

Defining the relevant markets

In accordance with the Terms of Reference, the ACT's beverage industry will be the primary focus of the Commission's investigation. The beverage industry is composed of many products, manufacturers, suppliers, distributors and retailers.

Identifying and defining the relevant beverage markets is a critical step to identifying the beverage industry participants whose behaviour and conduct is impacted by the ACT CDS. The relevant market includes those products or services actually or potentially supplied within the geographic region.

The Commission will draw on established regulatory practice⁴ when defining the relevant markets. This will involve identifying products in eligible containers and closely substitutable products in containers that are not eligible under the CDS. There are several important dimensions to market definition that the Commission consider in this process:

- The product characteristics: how the product is supplied or consumed and whether there will be substitution by other products in response to a small price increase. For example, if the price of a carton of craft beer increased, what other beverage types might consumers choose instead?
- The geographic area: the range that consumers will travel to switch supply in response to a small price increase in the product. For example, if the price of craft beer increased in the ACT, would ACT consumers travel to Queanbeyan to buy craft beer instead? If this is the case then cross border impacts are likely to be important for the ACT CDS.
- The industry structure: where in the supply chain competition may occur. For example, will competition in beverage distribution be impacted in a different way to competition in beverage retail?
- The time period: the timeframe over which markets impacts should be assessed. For example, should market impacts be assessed over the monitoring period, or over a longer period?

⁴ ACCC, 2017.

The Commission will investigate the structure and composition of the ACT beverage industry to define the relevant beverage markets. This is particularly important as the ACT beverage market may or may not be distinct from the NSW market, with separate supply chain and pricing of products.

The Commission seeks stakeholder comments and information on beverage supply and pricing practices for the ACT, including whether the ACT is treated as a separate market to NSW and whether pricing and supply practices differ between the ACT and NSW.

Understanding the impacts and interaction with the NSW CDS will be important for the Commission's investigation. The Terms of Reference request the Commission to have regard to the impacts of the introduction of the NSW CDS. For relevant markets the Commission will seek information and price data from before the NSW CDS commenced to see if prices in the ACT may have been affected.

Identifying the impacts of the ACT CDS on prices and competition

Beverage prices can change for a variety of reasons, such as increases in production costs, increased excise for alcoholic beverages, discounting practices (sometimes related to seasonal events), and retailer pricing practices such as cafes increasing prices by 'round' amounts like 50 cents.

In order to identify the impacts of the CDS the Commission will need to analyse the impacts of the other factors that may affect the beverage market.

To identify such potential factors, the Commission will compare price changes in a number of beverage markets and seek evidence from stakeholder submissions. The Commission will compare beverage markets that are affected by scheme costs with those that are not affected by scheme costs. Changes in prices in both markets would indicate common factors affecting beverage prices that are not the result of the CDS. For example, if beer and wine prices both increase but only beer containers are eligible under the CDS, then it is likely that the driver of beer price changes is not the CDS but other factors (such as changes in input costs for both beer and wine). Evidence from stakeholders will be critical to identifying factors affecting beverage prices.

Impacts on competition

When last reviewed by the Australian Competition and Consumer Commission (ACCC), the Australian retail grocery market was found to be 'workably competitive'.⁵ The Harper Review found that, although Australia's grocery market is concentrated, competition has intensified in recent years and noted few concerns with supermarket pricing.⁶ In a 'workably competitive' market, prices are more likely to reflect costs.

⁵ ACCC, 2008.

⁶ Harper et al, 2015: 283.

The Commission will examine the indicators of competition in beverage markets affected by the CDS and seek stakeholder feedback to identify any changes in competition in those markets that may be attributed to the introduction of the CDS. The ACT beverage market may or may not show changes in competition following the introduction of the CDS. Indicators could include changes in beverage prices and beverage supplier profit margins, market share and beverage product variety.

The Terms of Reference identify a number of potential measures of price and competition impacts the Commission must monitor. The Commission’s proposed monitoring approach addresses these Terms of Reference requirements, as indicated in Table 3.1.

Table 3.1 Proposed measures of price and competition impacts

Terms of Reference	Proposed measure
4(3)a. Changes in prices of beverages before or after 1 June 2018 that purport to be in response to the Scheme	How have beverage prices changed in different beverage markets? Are there any price differences between eligible and ineligible container beverages?
4(3)b. Any information provided by Scheme participants and consumers	What does the information provided to the Commission reveal about price changes and beverage supplier behaviours and changes in response to the introduction of the ACT CDS?
4(3)c. The behaviour of suppliers and major retailers before and after 1 June 2018 including whether beverage prices have increased beyond the amount suppliers are charged by the Scheme Coordinator	How have suppliers and major retailers responded to the ACT CDS? How have beverage prices changed as a result of the introduction of the ACT CDS?
4(3)d. The manner in which beverage suppliers are recovering the costs imposed on them by the Scheme	How have beverage manufacturers and distributors passed costs on to the rest of the industry? How much of these costs have been passed on?
4(3)e. Any impacts on beverage prices in the Territory which could be attributed to the commencement of the NSW Container Deposit Scheme on 1 December 2017	How have ACT and NSW beverage prices changed since 1 December 2017? Was there an observed change in ACT prices following the introduction of the NSW CDS?
4(3)f. Any impacts on the cross border movement of beverage containers which could be attributed to the commencement of the Scheme and its interaction with the NSW Container Deposit Scheme	How has the pattern of beverage purchases and container flows between ACT and NSW changed following the introduction of the NSW CDS and subsequent introduction of the ACT CDS?
4(3)g. Any other associated matters the Commission considers relevant	What additional issues have emerged or have been identified by stakeholders and consumers?

Unfair or unjust behaviour

The Terms of Reference ask the Commission to investigate and report on unfair or unjustified behaviours or market outcomes. Unfair or unjustified behaviours include such things as:

- False or misleading claims, where a business makes a statement that is incorrect or likely to create a false impression.⁷
- Unfair contract terms, when small businesses contract with large.⁸
- Unconscionable conduct, when conduct is harsh or oppressive.⁹

At any time during the monitoring period, if the minister or the Commission considers that any behaviour or market outcomes have arisen that appear unfair or unjustified on consumers or scheme participants, the Commission is to investigate the matter immediately at its own discretion, or on request from the minister, and provide an interim report to the minister as soon as practicable.

When investigating and reporting on potential unfair or unjustified behaviours or market outcomes, the Commission will undertake a preliminary identification of the issues and assess whether it would be appropriate to refer the matter to another ACT agency or Australian Government regulator with responsibility for such issues. The Commission does not have compliance and enforcement powers under Australian Consumer Law.

3.2 Proposed price monitoring methodology

The introduction of the CDS will affect prices for some but not all container beverage products, as not all beverage types and containers are eligible for the CDS. In order to determine the retail price impact of the introduction of the CDS, the Commission will monitor prices for container beverage products that are both eligible and ineligible for the CDS. The Commission will adopt, where possible, a quantitative analysis of price changes, informed by feedback provided by industry participants.

The Commission will focus on retail prices. The variety of contract terms and pricing structures between manufacturers, distributors and retailers means that comparison of wholesale prices between industry participants is not a reliable measure.

The Commission will consider the scheme costs charged to suppliers in order to assess the costs that may be passed on to consumers through changes in retail prices. If the resulting changes in costs charged to suppliers differ substantially from the changes in retail prices charged to consumers, once the impact of other cost changes have been accounted for, then this may be evidence of higher than justified price increases, or alternatively, cost absorption by the beverage industry.

⁷ For ACCC information on false and misleading claims see: <https://www.accc.gov.au/consumers/misleading-claims-advertising/false-or-misleading-claims>

⁸ For ACCC information on unfair contract terms see: <https://www.accc.gov.au/business/business-rights-protections/unfair-contract-terms>

⁹ For ACCC information on anticompetitive behaviours see: <https://www.accc.gov.au/business/anti-competitive-behaviour/unconscionable-conduct>

The Commission proposes to use Australian Bureau of Statistics (ABS) consumer price indices data (catalogue number 6401.0) and other available data to monitor changes in beverage prices in the ACT. The ABS price index data is a measure of price changes across a mix of products within an expenditure class. An expenditure class is a grouping of similar items and is the lowest level for which the ABS publishes indices.¹⁰

The Commission proposes to use the expenditure classes shown in Table 3.2 to monitor price changes associated with the CDS. The price impacts of the CDS will be evaluated by comparing price changes in expenditure classes subject to the CDS (such as beer and soft drinks) to those not subject to the CDS (such as milk and spirits, as well as beer and soft drinks in other capital cities).

Table 3.2 Proposed beverage markets and ABS expenditure class for price monitoring

Beverage market	Containers subject to scheme costs	ABS expenditure class
Beer	Most containers	Beer
Cider	Most containers	Wine
Water	Most containers	Waters, soft drinks and juices
Fruit juice	Some containers	Waters, soft drinks and juices
Soft drinks	Most containers	Waters, soft drinks and juices
Plain milk	Not eligible	Milk
Wine	Some containers	Wine
Spirits	Some containers	Spirits

The Terms of Reference ask the Commission to examine the impact of the NSW CDS on ACT consumer prices. The Commission will use ABS price index data to compare the price changes in Sydney and Canberra before and following the introduction of the NSW CDS. The price monitoring reports and analysis of the NSW CDS by IPART may provide additional information on the price impacts experienced in NSW, and provide a useful basis for comparing price changes in the ACT and NSW. The Commission is seeking supplier feedback on pricing practices for products sold in both ACT and NSW, and how supplier prices have changed as a result of the NSW CDS.

Prices in the beverage supply chain can change at any time. As a result, the full impact of any price effects of the ACT or NSW CDS may not be observed in the month of introduction. The Commission proposes to examine prices prior to the commencement of the monitoring period to understand pricing practices in the industry and price levels prior to the introduction of the ACT CDS.

The Commission recognises that the ABS price indices have limitations for the purpose of assessing price impacts of the ACT CDS. The products within each expenditure class do not fully align with container eligibility and as a result, the changes in index

¹⁰ ABS, 2017.

values may not precisely reflect price impacts of the ACT CDS. For example, the ABS expenditure class for beer includes beer served from a keg (tap) as well as a bottle. Changes in the index value for the beer expenditure class may not reflect changes in the bottled beer price only.

The Commission will therefore consider other pricing data that can help inform the Commission's price monitoring, and is seeking submissions from stakeholders on appropriate data sources. Such sources could include supplier price lists, retailer prices, consumer expenditure records, or research.

While the Commission may use commercially sensitive data, such as detailed pricing information, in undertaking its analysis, it will ensure that the confidentiality of such information is maintained.

Stakeholders may wish to comment on:

1. How has the introduction of the ACT CDS affected ACT retail prices?
2. What impact, if any, has the introduction of the NSW CDS had on ACT retail prices?
3. Do distributors and retailers treat the ACT and NSW, or the ACT and neighbouring regions of NSW, as the same or separate markets?
4. Are the data sources identified by the Commission appropriate for monitoring the impacts of the introduction of the ACT CDS? What additional consumer price data could the Commission use to examine the effects of the ACT CDS on retail beverage prices?

3.3 Proposed methodology for monitoring supplier performance and conduct

The Terms of Reference ask the Commission to examine supplier performance and conduct in relation to beverage pricing as a result of the introduction of the ACT CDS.

The Commission's monitoring of supplier performance and conduct may include examples of:

- Pricing practices around changing wholesale beverage prices, including the frequency and amounts of price changes.
- How first suppliers notify customers of scheme costs for eligible beverages and how those costs are passed through.

The CDS may have impacts on the beverage industry that have the effect of reducing or inhibiting competition. The Commission will examine supplier performance and conduct by using standard indicators of competition. The proposed indicators are shown in Table 3.3.

Table 3.3 Proposed indicators for competition monitoring

Indicator	How the Commission will consider	Potential data sources
Market structure or share	Are there changes in market structure or market shares as a result of the ACT CDS? Are firms entering or exiting the ACT market following the ACT CDS?	ACT CDS data Market reports Beverage industry information Consumer and stakeholder submissions
Barriers to entry	Are there increased barriers to entry as a result of the ACT CDS?	Beverage industry information Consumer and stakeholder submissions Review of ACT CDS requirements
Supplier behaviours	Are there changes in the behaviours for suppliers, distributors or retailers as a result of the ACT CDS?	Beverage industry information Consumer and stakeholder submissions Review of ACT CDS requirements
Consumer choice	Are consumers disadvantaged by reductions in the beverage options available due to the ACT CDS?	Beverage industry information Consumer and stakeholder submissions
Consumer behaviours	Are consumers changing consumption behaviour as a result of the ACT CDS?	Beverage industry information Consumer and stakeholder submissions
Cross border impacts on supply and pricing	Are consumers and suppliers changing beverage purchasing, supply and pricing behaviours as a result of differences between ACT and NSW CDS?	Beverage industry information Consumer and stakeholder submissions
Cross border container movements	What transfers of full and empty containers occurred before and after the introduction of the ACT CDS?	Beverage industry information Consumer and stakeholder submissions Reports from ACT and NSW Scheme Coordinators

IPART’s Progress Report primarily used market share changes as the indicator of competition effects of the NSW CDS.¹¹ IPART measured market share by supply of container beverages by first suppliers, which it found to be highly variable between months. The Commission will seek similar commercial-in-confidence data from the ACT Scheme Coordinator, but recognises that market share variability may also be present in the ACT CDS data. Market share variability may mask changes in market share in the short term, as it might take some time before a sustained change is apparent. The Commission will seek information from the beverage industry to understand the changes in market share that may or may not be caused by the introduction of the ACT CDS.

Cross border impacts are likely to be significant in the ACT. The ACT’s small size and location within NSW means that the ACT will likely be impacted by events across the border in NSW. For example, ACT retailers close to the border may compete with retailers in NSW and may be impacted by changes in NSW beverage industry practices and prices.

While the introduction of the ACT CDS may reduce any price differential between the ACT and NSW that resulted from the introduction of the NSW CDS, some cross

¹¹ IPART, 2018b.

border impacts may continue to have pricing or competition impacts. Cross border impacts could include:

- Container movements across the border due to differences in scheme design or pricing.
- Different cross border impacts for small businesses compared to large businesses due to differences in scheme design.

The Commission is seeking submissions from stakeholders to help identify and assess the impacts of the ACT and NSW CDS on ACT businesses and consumers.

Stakeholders may wish to comment on:

5. How has the introduction of the ACT CDS affected the behaviour of beverage suppliers and competition in the beverage industry? Has the CDS had different impacts on different types of beverage suppliers? For example, have there been different effects on small suppliers compared to larger suppliers?
6. Are the beverage markets shown in Table 3.2 suitable for analysing beverage supplier performance and conduct? Are there any other markets the Commission should monitor? If so, please explain why.
7. Are the indicators shown in Table 3.3 appropriate for monitoring supplier performance and conduct? Are there other indicators that the Commission should monitor; if so, please explain how these indicators would be useful.
8. Are the data sources identified by the Commission appropriate for monitoring the impacts of the introduction of the ACT CDS? What other data sources are available to monitor beverage industry performance?
9. Are there other market impacts you expect the ACT CDS could have? Please explain how the ACT CDS could result in these market impacts and provide any suggestions you have for data or other relevant information the Commission could use to assess these potential impacts.

3.4 Feedback on the proposed approach

The preceding sections detail the Commission's proposed approach and framework for price and competition monitoring.

Stakeholders may wish to comment on:

10. Do you have any comments or suggestions on the Commission's proposed approach to price and competition monitoring?

4 Making a submission

4.1 Consolidated questions for consultation

The preceding chapters identified a number of questions on which the Commission is seeking feedback. The list is consolidated in this section.

This list is not exhaustive and submissions may address other issues that relate to the Terms of Reference. Submissions do not have to address all the questions set out by the Commission.

1. How has the introduction of the ACT CDS affected ACT retail prices?
2. What impact, if any, has the introduction of the NSW CDS had on ACT retail prices?
3. Do distributors and retailers treat the ACT and NSW, or the ACT and neighbouring regions of NSW, as the same or separate markets?
4. Are the data sources identified by the Commission appropriate for monitoring the impacts of the introduction of the ACT CDS? What additional consumer price data could the Commission use to examine the effects of the ACT CDS on retail beverage prices?
5. How has the introduction of the ACT CDS affected the behaviour of beverage suppliers and competition in the beverage industry? Has the CDS had different impacts of different types of beverage suppliers? For example, have there been different effects on small suppliers compared to larger suppliers?
6. Are the beverage markets shown in Table 3.2 appropriate to analyse the supplier performance and conduct? Are there other markets the Commission should monitor? If so, please explain why.
7. Are the indicators shown in Table 3.3 appropriate for monitoring supplier performance and conduct? Are there other indicators that the Commission should monitor; if so, please explain how these indicators would be useful.
8. Are the data sources identified by the Commission appropriate for monitoring the impacts of the introduction of the ACT CDS? What other data sources are available to monitor beverage industry performance?
9. Are there other market impacts you expect the ACT CDS could have? Please explain how the ACT CDS could result in these market impacts and provide any suggestions you have for data or other relevant information the Commission could use to assess these potential impacts.
10. Do you have any comments or suggestions on the Commission's approach to price and competition monitoring?

4.2 How to make a submission

The Commission is seeking public and stakeholder feedback on its proposed approach to price and competition monitoring and reporting on the price and competition effects of the introduction of the ACT CDS.

Submissions can be made online through the form on the Commission's website:
www.icrc.act.gov.au

Alternatively, submissions may be emailed to the Commission at icrc@act.gov.au. The Commission encourages interested parties to make submissions in either Microsoft Word format or PDF (OCR readable text format – that is, they should be direct conversions from the word-processing program, rather than scanned copies in which the text cannot be searched).

Submissions may be mailed to the Commission at:

Independent Competition and Regulatory Commission
PO Box 161
Civic Square ACT 2608

The Commission is guided by and believes strongly in the principles of openness, transparency, consistency, and accountability. Public consultation is a crucial element of the Commission's processes. It is the Commission's preference that all submissions it receives be treated as public and be published on the Commission's website unless the author of the submission indicates clearly that all or part of the submission is confidential and not to be made available publicly. Where confidential material is submitted, the Commission prefers that this be under a separate cover and clearly marked 'In Confidence'. The Commission will assess the author's confidentiality claim and discuss appropriate steps to ensure that confidential material is protected while maintaining the principles of openness, transparency, consistency and accountability.

The Commission secretariat may be contacted at the above addresses, by telephone on (02) 6205 0799 or by fax on (02) 6207 5887. The Commission's website is at www.icrc.act.gov.au.

Submissions on the issues paper are due with the Commission by 5pm Friday 17 August 2018.

Appendix 1 Terms of Reference

Australian Capital Territory

Independent Competition and Regulatory Commission (Inquiry into beverage price impacts relating to the ACT Container Deposit Scheme) Terms of Reference Determination 2018*

Disallowable Instrument DI2018-69

Made under the *Independent Competition and Regulatory Commission Act 1997*, section 15 (nature of industry references) and section 16 (terms of industry reference)

1 Name of instrument

This instrument is the *Independent Competition and Regulatory Commission (Inquiry into beverage price impacts relating to the ACT Container Deposit Scheme) Terms of Reference Determination 2018*

2 Commencement

This instrument commences on the day after it is notified.

3 Industry reference for investigation (Section 15)

I, Meegan Fitzharris, Minister for Transport and City Services, pursuant to Section 15(1)(e) of the *Independent Competition and Regulatory Commission Act 1997*, provide an industry reference to the Independent Competition and Regulatory Commission to investigate the impact on beverage prices and Competition in the beverage industry of the ACT Container Deposit Scheme ("Scheme") to be established under Part 10A of the *Waste Management and Resource Recovery Act 2016*.

4 Terms of reference (Section 16)

I request that the Commission monitor and report on the impact on beverage prices and competition in the beverage industry of the Scheme in accordance with these terms.

(1) I request the Commission monitor:

- a. the effect of the Scheme on prices of beverages supplied in a container in the Territory;

- b. the performance and conduct of beverage suppliers in relation to beverage pricing in the Territory before and after the implementation of the Scheme; and
- c. any other market impacts on consumers that arise from the implementation of the Scheme, for the period from 1 June 2018 to 30 June 2019 (monitoring period).

(2) The Commission is to provide a report to the Minister for Transport and City Services regarding:

- a. the effect of the Scheme on prices of beverages supplied in a container in the Territory for the period from 1 June 2018 to 30 June 2019;
- b. the framework for monitoring the Scheme including the behaviour of suppliers;
- c. the effect of the Scheme on suppliers; and
- d. any recommendations for actions by government to address any adverse effects or behaviours arising from the operation of the Scheme.

(3) In undertaking the monitoring, the Commission should have regard to:

- a. any changes in prices of beverages before or after 1 June 2018 that purport to be in response to the Scheme;
- b. any information provided by Scheme participants and consumers;
- c. the behaviour of suppliers and major retailers before and after 1 June 2018 including whether beverage prices have increased beyond the amount suppliers are charged by the Scheme Coordinator;
- d. the manner in which beverage suppliers are recovering the costs imposed on them by the Scheme; and
- e. any impacts on beverage prices in the Territory which could be attributed to the commencement of the NSW Container Deposit Scheme on 1 December 2017; and
- f. any impacts on the cross border movement of beverage containers which could be attributed to the commencement of the Scheme and its interaction with the NSW Container Deposit Scheme; and
- g. any other associated matters the Commission considers relevant.

The Commission should undertake public consultation. The Commission is requested to release a progress report in February 2019 which provides a draft framework for the review and reports on the first three months of the ACT Container Deposit Scheme.

The Commission is to provide a final report to the Minister for Transport Canberra and City Services in July 2019. The final report is to also recommend whether any further monitoring of beverage prices or any other monitoring of the impact of the container deposit scheme not included in these terms of reference is considered necessary.

At any time during the monitoring period, if the Minister or the Commission considers that any behaviour or market outcomes have arisen that appear unfair or unjustified on consumers or Scheme participants, the Commission is to:

1. Investigate the matter immediately at its own discretion or, on request from the Minister, and
2. Provide an interim report to the Minister as soon as practicable.

Definitions

Act means the *Waste Management and Resource Recovery Act 2016*.

Beverage, Container, Scheme Coordinator, Scheme participant, Supply

Arrangement all have their meaning given by the Act

Container Deposit Scheme means the scheme established by Part 10A of the Act.

Supplier means a supplier, as defined in the Act, who is required under the Act to enter into a supply arrangement with the Scheme Coordinator.

Meegan Fitzharris MLA

Minister for Transport and City Services

Minister administering the *Waste Management and Resource Recovery Act 2016*

4/4/2018

Abbreviations and acronyms

ACCC	Australia Competition and Consumer Commission
ACT	Australian Capital Territory
CDS	Container Deposit Scheme
Commission	Independent Competition and Regulatory Commission
EPA	Environmental Protection Agency (NSW)
GST	Goods and Services Tax
ICRC	Independent Competition and Regulatory Commission
IPART	Independent Pricing and Regulatory Tribunal
HDPE	High-density polyethylene
MRF	Material Recovery Facility
NT	Northern Territory
NSW	New South Wales
PET	Polyethylene terephthalate
SA	South Australia

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