

**2017**

**THE LEGISLATIVE ASSEMBLY FOR  
THE AUSTRALIAN CAPITAL TERRITORY**

**WASTE MANAGEMENT AND RESOURCE RECOVERY AMENDMENT**

**BILL 2017**

**(Container Deposit Scheme)**

**EXPLANATORY STATEMENT**

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# WASTE MANAGEMENT AND RESOURCE RECOVERY AMENDMENT BILL 2017

## Introduction

This explanatory statement relates to the *Waste Management and Resource Recovery Amendment Bill 2017* (the Bill) as presented to the Legislative Assembly. It has been prepared to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the ACT Legislative Assembly.

This explanatory statement must be read in conjunction with the Bill. It is not, and is not intended to be, a comprehensive description of the Bill. What is written about a provision is not to be taken as an authoritative statement of the meaning of a provision, this being a responsibility of the Courts.

## Overview of the Bill

The purpose of the Bill is to recognise that the beverage industry shares responsibility with the community for reducing and dealing with waste and litter generated by beverage product packaging. Beverage containers make up a significant portion of the litter stream and are manufactured from readily recycled materials.

The Bill proposes to establish a cost effective container deposit scheme (**CDS**) in the Territory to assist the beverage industry to discharge that responsibility and promote the recovery and recycling of empty beverage containers. It will also help the community to reduce litter and promote a cleaner environment.

In addition, local schools, charities, sporting groups and community groups can also benefit by collecting empty cans, bottles and other eligible containers and returning them to a designated collection point to obtain a 10 cent refund.

The Bill has been developed to align the CDS with the existing schemes in South Australia and the Northern Territory. It has been developed in consultation with NSW which has a similar scheme due to commence in December 2017. Given the geographic location of the Territory, the CDS has been designed to closely align with the NSW CDS to enable the community to access refunds for eligible containers across the two jurisdictions seamlessly.

The CDS directly supports the achievement of the resource recovery objectives in the *ACT Waste Management Strategy 2011-2025* in particular by encouraging improved resource recovery, reducing litter and requiring extended producer responsibility for beverage container waste. The Strategy is the principal ACT Government policy statement outlining resource recovery aspirations and future directions.

The CDS framework established by the Bill will require the beverage industry and suppliers to ensure a system is in place to collect and recover empty beverage containers and provide for a refund payment to beverage consumers.

The Bill provides for the following features of the CDS:

- a) The establishment of a Scheme Coordinator with overall responsibility for administration, marketing and financial management of the CDS;
- b) The establishment of a Network Operator(s) to provide infrastructure such as container collection points, counting systems and payment of refunds;
- c) Setting out which containers are eligible to be included in the CDS, the refund marking required on those containers, and the refund amount – initially proposed to be 10 cents per container;
- d) The implementation of a cost recovery scheme under which beverage suppliers are required to make contributions towards the cost of paying refunds on eligible empty beverage containers and the administration of the scheme;
- e) Requirements for beverage suppliers to register eligible containers for inclusion in the CDS;
- f) Setting out a range of offences and penalties to guard against fraud. These offences include: suppliers supplying unapproved beverages, not making the required contributions to the scheme, or for persons or collection operators, making false claims for refunds.

The Bill also makes minor amendments to the definitions and waste licensing and registration provisions in the Act which have been identified as being required to enhance its operation since commencement on 1 July 2017.

### **Human rights implications—presumption of innocence**

The Bill includes a number of provisions that contain offences of strict liability.

Offences of strict liability engage the right to be presumed innocent under section 22(1) of the *Human Rights Act 2004*, as they 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.

Section 28(1) of the Human Rights Act provides that human rights are subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. Section 28(2) of the Act then provides that, in deciding whether a limit on a human right is reasonable, all relevant factors must be considered. Section 28(2) further provides five factors that must be considered when determining whether a limit on human rights is considered justified.

The limit that this Bill places on the right to the presumption of innocence in section 22(1) of the Human Rights Act is considered reasonable and justifiable in a free and democratic society, 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 offences are regulatory in nature, and target regulatory requirements that are central to the effective operation of a CDS:

For a beverage supplier:

- failing to gain a container approval and supply arrangement prior to supply their beverage in the Territory;
- failing to comply with a condition of a container approval;
- failing to place the required refund marking on their container.

For a network or collection point operator:

- failing to pay a refund for an eligible container returned;
- making a false claim for costs for returned containers.

For a member of the public

- making a false claim for a refund (eg. by presenting ineligible containers or claiming duplicate refunds).

**(b) The importance of the purpose of the limitation**

The purpose of providing a reverse onus of proof through the proposed strict liability offences is to ensure the effective enforcement of and compliance with key requirements of the CDS. 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.

**(c) The nature and extent of the limitation**

The strict liability offences engage the right to be presumed innocent by shifting the onus of proof from the prosecution onto a defendant. The offences generally apply to a person who is a participant in the CDS or a supplier in the beverage industry, and can be considered to be regulatory offences.

The penalties are considered proportionate and not unduly harsh for offences of 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 offences. 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 strict liability offences for the CDS is appropriate because the offences mainly apply to people who choose to engage in a regulated activity. They are on notice that they must abide by the laws that govern the activity. They place themselves in a relationship of responsibility with the community.

In relation to members of the public, the scheme rules governing eligible containers, claiming refunds and collection points will be required under the Bill to be widely publicised by the Scheme Coordinator. Any member of the public who makes refund claims will be on notice of the rules governing the scheme and it is therefore appropriate that any fraudulent activities be dealt with by offences of strict liability.

The ACT Government believes that the use of strict liability offences contained in this Bill is relevant to the policy objectives of for reducing and dealing with waste and litter generated by beverage product packaging, both of which are demonstrably justifiable and reasonable.

## OUTLINE OF PROVISIONS OF THE BILL

### LONG TITLE

The long title states that this is a Bill for an Act “to amend the *Waste Management and Resource Recovery Act 2016*.”

Many of the provisions of this Bill relate directly to the establishment of a container deposit scheme in the Territory to assist the beverage industry and the community to and promote the recovery and recycling of empty beverage containers and the reduction of litter.

### PART 1 PRELIMINARY

#### Clause 1. Name of Act

This clause provides the name of the Act, the *Waste Management and Resource Recovery Amendment Act 2017*.

#### Clause 2. Commencement

This clause states that the Act commences on a day fixed by the Minister by written notice.

Section 79 of the *Legislation Act 2001* provides that, if a provision of the Act has not commenced within 6 months after the Act’s notification day, the provision automatically commences on the first day after that period.

Subclause 2(3) states that section 79 of the Legislation Act does not apply to this Act.

Subclause 2(2) states that if this Act has not commenced within 12 months of its notification day, it commences on the first day after that period.

#### Clause 3. Legislation amended

This clause states that this Act amends the *Waste Management and Resource Recovery Act 2016*.

#### Clause 4. Meaning of *waste management business*

This clause amends the definition of *waste management business* in the Act by omitting the word ***dominant***. This is designed to capture all business that deal with waste under the licensing and registration scheme established under the Act, not just those whose dominant business purpose is waste management. This is necessary to ensure industry sector wide coverage in the waste regulatory scheme established under the Act.

#### Clause 5. Decision about application for licence – Section 22(2)

This clause removes duplicate language from the provision.

**Clause 6. Term of licence – Section 29 (b) (iii)**

This clause makes it clearer that the waste manager may prescribe a term for a licence, and that a licence will end if the relevant licence fee is not paid.

**Clause 7. Decision about application for registration – Section 34 (1) (a)**

This clause removes the ability of registration conditions to be prescribed by regulation and in concert with Clause 8, allows for the waste manager to make a waste transporter registration subject to conditions.

**Clause 8. New section 34A**

This clause allows for the waste manager to make a waste transporter registration subject to conditions, similar to the existing power to make conditions on waste facility licences in section 23 of the Act.

**Clause 9. Term of registration – Section 42 (b) (iii)**

This clause makes it clearer that the waste manager may prescribe a term for a waste transporter registration, and that a registration will end if the relevant licence fee is not paid.

**Clause 10. New part 10A**

This clause makes provision for the introduction of a Container Deposit Scheme in the Territory.

**PART 10A CONTAINER DEPOSIT SCHEME**

**64A Objects – part 10A**

This section sets out the objects of this part: to establish a cost effective container deposit scheme (**CDS**) to assist the beverage industry in reducing and dealing with waste beverage product packaging and, to promote the recovery, reuse and recycling of empty beverage containers.

**64B Definitions**

This section sets out the specific definitions required for a CDS including what constitutes a container, a beverage, the scheme participants, the refund marking and amount, and the identity of scheme participants.

#### **64D Meaning of collection point**

This section sets out the meaning of *collection point* for the CDS

#### **64E Meaning of container**

This section sets out the meaning of *container* for the CDS

#### **64F Meaning of refund amount**

This section sets out the meaning of *refund amount* which is to be prescribed by regulation in the CDS. It is to be set initially at 10 cents to align with existing CDS in other states.

#### **64G Meaning of refund marking**

This section sets out the meaning of *refund marking* for the CDS which is to be prescribed by regulation. The marking on eligible containers is to be set, at least initially, to align with existing CDS refund marking in other states.

#### **64H Scheme administration agreements**

This section authorises the Minister to invite applications and enter into scheme administration agreements with suitable persons. These agreements may be the Scheme Coordinator Agreement or Network Operator Agreement. The Minister may only enter into such agreements if satisfied the person is suitable and likely to comply with the requirements of the Act. Suitability requirements are to be specified by regulation.

#### **64I Amending and ending scheme administration agreements**

This section sets out the process by which the Minister can amend or end scheme administration agreements, in particular where a scheme participant has failed to meet a performance target under in the agreement. In such circumstances, the scheme participant is not entitled to any compensation.

#### **64J Content of scheme coordinator agreement**

This section sets out what the scheme coordinator agreement must include. In particular, the section requires the scheme coordinator enter into arrangements with suppliers of beverages to pay contributions towards the cost of administering the scheme and arrangements with a network operator to provide for the collection of eligible containers and the payment of refunds.

#### **64K Approval of network arrangements**

Requires the scheme coordinator to apply to the waste manager for approval of the arrangements for collection of containers and payment of refunds. This ensures the Territory is able to oversight and approve the collection and refund payment arrangements proposed by the scheme coordinator to ensure they best serve the community.

#### **64L Payment of refund amounts to material recovery facility operators**

This section requires the scheme coordinator to pay material recovery facilities the refund amount for any eligible containers collected through the domestic recycling collection service (yellow bin). This provision is to ensure that the CDS does not prejudice the existing recycling system by ensuring payment of refunds for containers in that waste stream. This means that the existing recycling system is a valid way of recycling eligible containers. Any windfall gain of refunds by a material recovery facility will be required to be subject to a revenue sharing arrangement with the Territory. The details of such an arrangement will be specified by regulation.

#### **64M Term of scheme coordinator agreement**

This section provides that the scheme coordinator agreement must not be for longer than seven years and cannot be extended for three years more than twice. In aggregate the agreement must not be extended beyond 13 years.

#### **64N Content of network operator agreements**

This section sets out what network operator agreements must contain. In particular, these agreements must establish a network of container collection points and require the operator to pay refund amounts for returned eligible containers. Performance targets may also be specified.

#### **64O Approval of collection point arrangements**

This section requires the network operator to apply to the waste manager for approval of the arrangements for collection of containers and payment of refunds. This ensures the Territory is able to oversight and approve the collection point arrangements to ensure they best serve the community.

#### **64P Inconsistent provisions void**

This provision is to ensure scheme agreements cannot be made so as to invalidate the CDS legislation.

#### **64Q Penalties for contravention**

This section allows for scheme administration agreements to provide for civil penalties payable to the Territory where a scheme coordinator or network operator fails to abide by a provision of the agreement (eg. meeting a performance target).

#### **64R Monitoring and enforcement of compliance**

This section provides for monitoring, reporting and audit arrangements to be included in scheme arrangements and for an authorised person to exercise investigation, compliance and enforcement functions set out in part 13 of the Act for the purpose of monitoring scheme compliance. This ensures the Territory is able to oversight the CDS scheme arrangements by using these powers and functions already in the Act.

#### **64S Performance Audit**

This section gives the Minister power to direct the waste manager to conduct a performance audit of the activities of the scheme coordinator providing

assurance about whether the scheme coordinator is performing its functions and obligations under the scheme administration agreements.

#### **64T Register of approved containers and collection points**

This section requires the scheme coordinator to keep a public and searchable register of all eligible CDS containers and collection points in the Territory. This is to enable the public to quickly and simply check the eligibility of their empty container for a refund, and get the details of the most convenient collection point to obtain that refund.

#### **64U Reports by scheme coordinator**

This section requires the scheme coordinator to provide the Minister with a written report each financial year about the performance of the CDS including whether or not performance targets were met and the amounts charged to beverage suppliers. The Minister must present this report to the Legislative Assembly.

#### **64V Container approvals**

This section provides for the Territory (via the waste manager) to approve containers which are to be included in the CDS. It also provides for an offence for failing to comply with the conditions of any container approval.

#### **64W Requirement for supply arrangement with scheme coordinator and container approval**

This section requires beverage suppliers to have in force (i) a supply arrangement with the scheme coordinator for beverages they propose to supply in the Territory, including provision of a payment towards the costs of the scheme, as well as (ii) a container approval from the Territory. Failure to have these two arrangements in place is to be an offence. This provision forces anyone who wishes to supply a beverage in an eligible container into the Territory to participate in the CDS, preventing free riders.

#### **64X Requirement for refund markings on containers**

This section requires suppliers of CDS eligible beverages to supply them with a refund marking on the container which indicates to consumers that the container is part of the CDS and eligible for a refund. It will be an offence to fail to include a refund marking on an eligible container. The refund marking is to be prescribed by regulation and will be consistent across the CDS jurisdictions.

#### **64Y Refund amounts payable by collection point operators**

This section requires collection point operators to provide container refunds on presentation of eligible containers.

#### **64Z Refund declarations and proof of identity**

This section allows collection point operators to request proof of identity or a refund declaration from persons claiming container refunds, particularly where large number of containers are presented for refund. This provision is designed to guard against fraudulent refund claims.

### **64ZA Offence – claiming refund for containers not subject to scheme**

This section makes it an offence for a person to claim a refund for a container which is not CDS eligible, or where the container refund has already been paid. It also creates an offence for a scheme participant, such as a collection point operator, network operator or materials recovery facility to fraudulently claim refund amounts from the scheme coordinator. This provision is designed to guard against fraudulent refund claims in the CDS.

### **64ZB Authorisations for Competition and Consumer Act 2010 (Cwlth)**

This section authorises the Territory CDS under the *Competition and Consumer Act 2010* (Cwlth).

### **64ZC Review of part**

This section requires the Minister to review the operation of the CDS after five years of operation and present a report to the Legislative Assembly.

### **Clause 11. Direction to stop contravening Act etc – Section 70**

This clause extends the power of the waste manager to issue a direction to comply with the Act, condition or requirement to a person who is reasonably suspected of failing to comply with a requirement of a scheme administration agreement. This is designed to ensure regulatory oversight of scheme administration agreements by the Territory, in addition to normal contractual provisions in the agreement.

### **Clause 12. Regulation making power – Section 128**

This clause extends the regulation making powers of the executive under section 128 of the Act to include the power to make regulations for the container deposit scheme.

### **Clauses 13-14. Reviewable decisions – Schedule 1**

These clauses extend the reviewable decisions listed in Schedule 1 of the Act to include the new decision powers proposed to be given to the waste manager in the Bill which are to: impose conditions on a registration; refuse to grant a container approval; impose conditions on a container approval; and suspend or revoke a container approval.

### **Clauses 15-17. Dictionary**

These clauses insert the new definitions proposed in the Bill to support the CDS into the dictionary to the Act.