



Independent Pricing and Regulatory Tribunal  
New South Wales

## NSW Container Deposit Scheme

**Monitoring the impacts on container beverage prices and competition**

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## Invitation for submissions

IPART invites written comment on this document and encourages all interested parties to provide submissions addressing the matters discussed.

### **Submissions are due by 13 March 2018**

We would prefer to receive them electronically via our online submission form <[www.ipart.nsw.gov.au/Home/Consumer\\_Information/Lodge\\_a\\_submission](http://www.ipart.nsw.gov.au/Home/Consumer_Information/Lodge_a_submission)>.

You can also send comments by mail to:

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# 1 Introduction

Every year, more than 160 million drink containers end up as litter in NSW – which is nearly half of the state’s total litter volume. On 1 December 2017, the NSW Government launched a Container Deposit Scheme (CDS) – known as Return and Earn – to tackle this problem and help meet the Premier’s goal to reduce the volume of litter in the state by 40% by 2020.<sup>1</sup>

Under this scheme, consumers who return empty eligible beverage containers to Return and Earn collection points receive a 10-cent refund per container. Only the containers likely to end up as litter are eligible – generally bottles, cans and cartons in sizes that are often consumed outside the home.

The businesses that supply these eligible beverage containers into NSW pay monthly fees to cover the costs of the scheme, including the 10-cent refund and the scheme’s operating costs. They can increase the prices of eligible container beverages to recover these costs.<sup>2</sup>

The Premier has asked the Independent Pricing and Regulatory Tribunal (IPART) to monitor and report on the impacts of the CDS over the first year of its operation. This paper outlines how we propose to approach this task and seeks stakeholder comments.

## 1.1 What IPART has been asked to do

The Premier has asked IPART to monitor and report on, for the period from 1 November 2017 to 1 December 2018:

1. the effect of the CDS on prices of beverages supplied in a container
2. the effect of the CDS on competition for beverages and the performance and conduct of suppliers, and
3. any other market impacts on consumers that arise from the commencement of the CDS.

If we identify adverse effects or behaviours arising from the operation of the scheme, we are to recommend actions to address them. We are also to recommend whether monitoring should continue beyond the first 12 months. In addition, we may investigate any effects on consumers or suppliers that appear to be unfair or unjustified at our own discretion, or on request from the Premier or Minister for the Environment.

In undertaking our monitoring role, our terms of reference state that we should have regard to:

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<sup>1</sup> Return and Earn, at <http://www.returnandearn.org.au/>, accessed on 1 February 2018.

<sup>2</sup> The prices suppliers and retailers charge for container beverages are not regulated, so they may increase or decrease prices at any time in response to changes in their costs, and other factors such as changes in consumer preferences or competitive pressures from other suppliers.

- ▼ any changes in prices of beverages before or after 1 November 2017 that purport to be in response to the CDS
- ▼ any information provided by CDS participants and consumers
- ▼ the behaviour of suppliers and major retailers before and after 1 November 2017 including whether beverage prices have increased beyond the amount suppliers are charged by the Scheme Coordinator
- ▼ the manner in which suppliers are recovering the costs of the CDS, and
- ▼ any other matters considered relevant.

For our full terms of reference, see Appendix A.

## 1.2 What is outside the scope of our review

The scope of IPART's role is limited to monitoring, reporting on and potentially investigating the market impacts of the CDS, as outlined above. We have *not* been asked to monitor:

- ▼ indicators of the scheme's effectiveness, such as its impact on the reduction in litter, or
- ▼ operational elements of the scheme, such as the availability or accessibility of container collection points.

## 1.3 How we will conduct the review

For this review, we will conduct a public consultation process and our own research and analysis. We will also consult individually with key stakeholders such as consumers, suppliers, small business, industry bodies and government agencies.

This Issues Paper is the first step in our public consultation for the review. It describes and seeks comment on our proposed approach for the review. We invite all interested parties to make submissions in response to this paper by 13 March 2018. Details on how to make a submission are provided on page iii at the front of the paper.

We have also started collecting information from consumers on the market impacts of the scheme through our website feedback form. In addition, we have obtained advice from the CIE on the beverage industry in NSW and options for monitoring the impacts of the CDS. A copy of the CIE's report is available on our website.

We will release a progress report in April 2018. This report will set out our draft framework for monitoring the market impacts of the CDS and our findings on these impacts over the first three months of the CDS, and invite further submissions. We will also hold at least two public forums - one in Sydney and one in a regional area - to provide stakeholders with another opportunity to comment on the review. We will provide a final report to the Premier and the Minister for the Environment in December 2018.

Table 1.1 provides an indicative timetable for the review. We will update this timetable on our website as the review progresses.

**Table 1.1 Indicative timetable for the review**

Key milestone	Proposed timing
Release Issues Paper	13 February 2018
Submissions to Issues Paper due	13 March 2018
Release Progress Report	April 2018
Submissions to Progress Report due	June 2018
Public hearings (Sydney and regional NSW)	July/August 2018
Provide Final Report to Premier and Minister	December 2018

## 1.4 How this paper is structured

The rest of this Issues Paper provides more information on the review, our proposed framework for monitoring the CDS and the key issues we will need to consider:

- ▼ Chapter 2 provides contextual information on the CDS and the beverage industry
- ▼ Chapter 3 provides an overview of our proposed framework for monitoring the impact of the CDS
- ▼ Chapters 4 and 5 discuss each part of our proposed framework in more detail and identify the issues on which we particularly seek stakeholder comment. For convenience, these issues are also listed in the section below.

## 1.5 Issues we seek comment on

1	Do you agree with our proposed approach to include in our price analysis:	24
	– the retail price of all container beverage products regardless of whether they are covered by the CDS	24
	– the period before and after the introduction of the CDS?	24
2	Do you agree with the two proposed approaches for evaluating the impact of the CDS on beverage prices:	24
	– measuring overall price changes (trends) using price indices for beverages published by the Australian Bureau of Statistics (ABS)	24
	– quantifying the extent to which the costs of the CDS are passed through to beverage prices using product level price data?	24
3	What are the relevant markets for our competition impact assessment?	27
4	Are there any further competition indicators to those listed in Table 5.1 that we should consider in making our assessment?	27
5	How has the commencement of the CDS affected competition in the container beverage industry, in particular for small and medium sized enterprises and any cross border issues?	27
6	Has the introduction of the Scheme Coordinator, Network Operator and other participant bodies in the CDS affected the competitive dynamic in the beverage market?	27

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7	Do you agree with our proposed approach to monitoring complaints from customers and other scheme participants about the performance and conduct of suppliers in the beverage market?	28
8	Do you agree with our proposed criteria in section 5.4 for deciding whether to refer any behaviour or market outcomes that appear unfair or unjustified on consumers or scheme participants to the relevant regulator?	29



## 2 CDS and its context

To monitor the market impacts of the CDS, we need to understand the details of the scheme and the context in which it operates. The sections below outline the key context, including:

- ▼ how the scheme works
- ▼ what beverage containers it covers
- ▼ the key participants and their roles and responsibilities in the scheme
- ▼ the beverage industry's regulatory and market environment, and
- ▼ the costs of the scheme.

### 2.1 How the scheme works

The CDS aims to help reduce the volume of litter in NSW by encouraging people to collect and return beverage containers for recycling. It does this by paying consumers (or others) who return empty eligible containers to an authorised Collection Point a 10-cent refund per container.

Under the scheme, the beverage industry is required to pay fees to recover the costs involved. The beverage industry can increase the price of beverages sold in eligible containers to pass these costs on to consumers.

Existing kerbside recycling programs will continue to operate, but consumers who recycle eligible beverage containers through these programs will not receive the 10-cent refund. Instead, the operators of Material Recycling Facilities (MRFs) that process containers collected by local councils can claim this amount.<sup>3</sup>

The details of the scheme and its operation are set out in the *Waste Avoidance and Resource Recovery Act 2001* (the Act).<sup>4</sup>

### 2.2 What beverage containers are covered

Most beverage containers between 150 mL and 3 L are eligible for the 10-cent refund, including those made from:

- ▼ glass
- ▼ plastic (eg, PET, HDPE)
- ▼ aluminium

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<sup>3</sup> The NSW Government requires MRFs to negotiate a sharing of the refund amount with Councils.

<sup>4</sup> As amended by the *Waste Avoidance and Resource Recovery Amendment (Container Deposit Scheme) Act 2016*.

- ▼ steel, and
- ▼ liquid paperboard (eg, certain milk and juice cartons).<sup>5</sup>

However, some beverage containers are not covered by the scheme (see Table 2.1). The beverages in these containers are generally consumed at home and so the empty containers rarely end up in the litter stream.

**Table 2.1 Beverage containers *not* eligible for a refund under the CDS**

Plain milk or milk substitutes containers	Wine and water casks greater than 1L
Flavoured milk containers greater than 1L	Wine sachets greater than 250 mL
Pure fruit and vegetable juices containers greater than 1 L	Cordials, concentrated fruit juice and vegetable juice containers
Glass wine and spirits bottles	Registered health tonic containers

Source: Return and Earn, at <http://www.returnandearn.org.au/>, accessed 1 February 2018.

## 2.3 Key participants and their roles and responsibilities

The key participants in the CDS are the NSW Environment Protection Authority (EPA), the Scheme Coordinator, the Network Operator, and the ‘first suppliers’<sup>6</sup> of eligible beverage containers in NSW.

### 2.3.1 EPA, Scheme Coordinator and Network Operator

The EPA is responsible for regulating the CDS, including designing and developing the scheme, and managing registration of all eligible beverage containers supplied in NSW. It has appointed other organisations to perform the key roles in the scheme’s day-to-day operation – that of Scheme Coordinator and Network Operator.

The Scheme Coordinator role is performed by **Exchange for Change**. It is responsible for administering the scheme, including:

- ▼ entering into Supply Arrangements with the first suppliers of eligible container beverages in NSW
- ▼ calculating and collecting fees from the first suppliers to cover the cost of the scheme
- ▼ distributing these funds to operate the scheme
- ▼ auditing and marketing the scheme.

The Network Operator role is performed by **Tomra-Cleanaway**. It is responsible for establishing and managing a network of Return and Earn collection points across NSW and managing collected containers. It can build or operate the collection points itself or contract other organisations to do so. Its role also includes contracting with recycling companies to recycle the collected containers.

<sup>5</sup> Return and Earn, at <http://returnandearn.org.au/>, accessed on 6 February 2018.

<sup>6</sup> Section 2.3.2 explains who first suppliers are.

### 2.3.2 First suppliers

The supply chain for beverages in NSW includes the following participants:

- ▼ **manufacturers**, who produce and package the beverages in NSW
- ▼ **importers**, who supply beverages produced in other states or countries to wholesalers or retailers
- ▼ **wholesalers**, who supply beverages from manufacturers or importers to retailers, and
- ▼ **retailers**, who supply beverages to consumers.

The 'first supplier' is the participant that first supplies beverages in eligible containers to the NSW market. In most cases, this is either the manufacturer or the importer.<sup>7</sup> However, because the supply chain operates differently across the beverage industry it can also be the wholesaler or retailer, as the examples in Table 2.2 show.

**Table 2.2 Examples of first suppliers**

Beverage is:	Supplied from:	First supplier in NSW is:
Manufactured in NSW	Manufacturer to wholesaler or retailer in NSW	Manufacturer
Manufactured in NSW	Manufacturer to wholesaler or retailer in another state	None (as no supply in NSW)
Manufactured outside NSW	From manufacturer to wholesaler outside NSW then to retailer in NSW	Wholesaler
Manufactured outside NSW	From manufacturer to retailer outside NSW then to that retailer's outlets in NSW	Retailer

**Source:** EPA, NSW Container Deposit Scheme Information Session, 4 August 2017, pp 20-21.

Under the CDS, first suppliers of beverages in eligible containers are required to enter into a Supply Arrangement with the Scheme Coordinator and contribute to the costs of the scheme (which includes the Network Operator's costs) under this arrangement. This Supply Arrangement requires the first supplier to:

- ▼ Register each class of eligible container it supplies with the EPA (and pay the appropriate registration fee).<sup>8</sup>
- ▼ Report on the volume of its own first supplies of beverages in each class of container in NSW.
- ▼ Pay fees to the Scheme Coordinator to contribute to the costs of the scheme. The amount of these fees is based on the volume of the supplier's first supplies as a proportion of the total volume of all eligible containers first supplied in NSW.

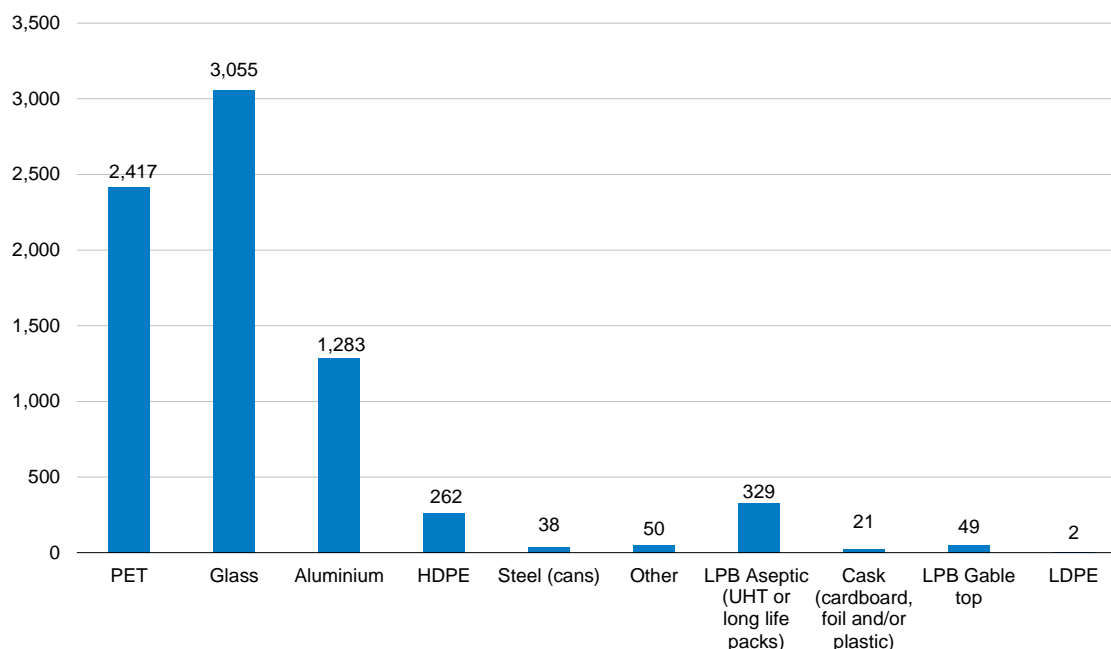
First suppliers must also ensure their containers are marked or labelled with the refund marking – *10c refund at collection depots/points in participating State/Territory of purchase* – in clear and legible characters, and the required barcode, on or before 1 December 2019.<sup>9</sup>

<sup>7</sup> Exchange for Change, Container Deposit Scheme Update for Australian Beverages, 25 August 2017.

<sup>8</sup> A registration fee of \$80 applies per class of eligible container. Individual container registrations are valid for five years.

Currently there are 537 registered first suppliers and 7,505 registered containers.<sup>10</sup> Glass, PET and aluminium make up the largest number of registered containers (Figure 2.1).

**Figure 2.1 Registered containers by material type (February 2018)**



**Note:** Polyethylene Terephthalate (PET), High-density polyethylene (HDPE) and Low-density polyethylene (LDPE) are types of plastic, LPB is liquid paperboard.

**Data source:** Information provided by EPA to IPART, February 2018.

## 2.4 Regulatory and market environment

Previous assessments of the beverage industry in NSW have either not revealed substantial concerns about competition, or have found there is ‘workable competition’ in the industry.<sup>11</sup> Workable competition means there is enough rivalry between firms so that over the long run, prices are determined by underlying costs rather than any market power. Where there is workable competition there is no need for any government intervention in relation to prices.

Accordingly, there is no price regulation in the beverage industry. All participants in the supply chain can determine how to allocate their costs and set the price of their products. However, all participants are subject to Australian Consumer Law (ACL).<sup>12</sup> This law aims to protect consumers and ensure fair trading. Under the ACL consumers have protections (known as consumer guarantees) and businesses have obligations and responsibilities. For example, businesses cannot mislead consumers about the price, value or quality of goods.

<sup>9</sup> These requirements are set out in the *Waste Avoidance and Resource Recovery (Container Deposit Scheme) Amendment (Supply and Collection) Regulation 2017*.

<sup>10</sup> Information provided by EPA to IPART, 12 February 2018.

<sup>11</sup> The CIE, *Monitoring the impacts of the NSW Container Deposit Scheme*, January 2018, p 19.

<sup>12</sup> The Australian Consumer Law is contained in Schedule 2 to the *Competition and Consumer Act 2010 (Cth)*

The Australian Consumer and Competition Commission (ACCC) and NSW Fair Trading regulate compliance with the ACL. Generally, the compliance focus for Fair Trading is on individual consumers or small business disputes and the ACCC has a broader focus on the competitive process and widespread consumer detriment.<sup>13</sup> Australian courts and tribunals (including those in NSW) can also enforce the ACL. For example, they can order that an unfair contract term is not binding.<sup>14</sup>

## 2.5 Costs of the scheme

As noted above, the Scheme Coordinator is responsible for calculating and collecting fees from first suppliers to cover the costs of running the CDS and providing the 10-cent refund per container.<sup>15</sup> These include both fixed and variable costs:

- ▼ The fixed costs (which do not change with the number of containers that are returned) include the cost of administering the scheme and EPA compliance costs).
- ▼ The variable costs (which do change with the number of containers returned) include the cost of establishing and managing the network of collection points and providing the 10-cent refund per container.

Table 2.3 describes the key cost items, and how they are recovered from first suppliers.

**Table 2.3 CDS costs**

Cost item	Description	Recovered through
Administration costs	Scheme Coordinator costs for administering the scheme - determined through a competitive tender process.	Monthly administration fee
Compliance costs	EPA costs for monitoring compliance with the scheme	Monthly compliance fee
Collection costs	Network Operator costs for paying the 10-cent refund per container returned to collection points and operating a network of Collection Points. The network fees for operating the Collection Points were determined through a competitive tender process.	Monthly network fee per container collected. This fee varies by container material type. <i>(Refund Amount (10c) + Network Fee) × Estimated monthly volume of containers recovered through Network Operator collection network</i>
Refunds to Material Recycling Facilities (MRFs)	Costs of paying the 10-cent refund per container returned by MRFs.	Monthly refund fee <i>(Refund amount (10c) × forecast volume of containers recovered through MRFs)</i>
Other	Other costs of the scheme such as interest earned on Scheme Payments accounts and recovery of bad debts	Monthly fee

**Source:** Exchange for Change, at [http://returnandearn.org.au/Assets/pdf/ReturnandEarn\\_SchemeCosts.pdf](http://returnandearn.org.au/Assets/pdf/ReturnandEarn_SchemeCosts.pdf), accessed on 6 February 2018.

<sup>13</sup> Australian Competition and Consumer Commission, 2017 ACCC Compliance and Enforcement Policy 2017, p 2, at <https://www.accc.gov.au/system/files/ACCC%20Compliance%20and%20Enforcement%20Policy%202017.pdf>, accessed on 24 January 2018.

<sup>14</sup> NSW Fair Trading website, at [http://www.fairtrading.nsw.gov.au/Consumers/Contracts/Unfair\\_contract\\_terms.html](http://www.fairtrading.nsw.gov.au/Consumers/Contracts/Unfair_contract_terms.html), accessed 2 February 2018.

<sup>15</sup> [http://www.exchangeforchange.com.au/ReturnAndEarn\\_MediaRelease.pdf](http://www.exchangeforchange.com.au/ReturnAndEarn_MediaRelease.pdf).

## 2.5.1 Total costs will depend on the number and type of containers returned and how they are collected

The Scheme Coordinator has released estimates of the total scheme costs per supplied container for the first three months of the scheme. These costs depend on:

- ▼ **Total number of containers returned under the scheme.** All else being equal, if the total number of containers returned through the scheme is higher, then the variable costs of the scheme increase and hence the total costs are higher.
- ▼ **Type of containers returned.** The Network Operator fee varies by the container material type. All else being equal, if more higher cost material types are recycled then the variable costs of the scheme increase and its total costs are higher.
- ▼ **How containers are returned.** Containers returned to Collection Points attract a higher fee than those returned through kerbside recycling/MRFs. All else being equal, if the proportion of containers recycled through Collection Points is higher, then the variable costs of the scheme increase and its total costs are higher.

Table 2.4 shows the estimated costs per container by material type and the assumptions underpinning them. The total estimated ranges of fees per container for the first three months are 10.94 cents to 13.54 cents for aluminium, 11.36 cents to 14.07 cents for glass, and 11.13 cents to 13.78 cents for PET.<sup>16</sup>

**Table 2.4 Scheme Coordinator’s estimated costs for the first three months**

Scheme cost in month	December 17	January 18	February 18
<b>Assumptions</b>			
Assumed Seasonality Index (100 = Average)	133	119	100
Assumed Recovery Rate per material type	100%	90%	80%
Assumed % of containers recovered via MRFs	50%	50%	50%
Assumed containers recovered in month (m)	389	312	232
<b>Calculations <sup>a</sup></b>			
Estimated total scheme costs for month (\$m)	\$53m	\$43m	\$32m
<b>Estimated scheme costs per container <sup>b</sup></b>			
Aluminium	13.54c	12.24c	10.94c
Glass	14.07c	12.72c	11.36c
HDPE	13.78c	12.45c	11.13c
PET	13.78c	12.45c	11.13c
Liquid Paper Board	14.42c	13.03c	11.64c
Steel	14.07c	12.72c	11.36c
Other Plastics	13.78c	12.45c	11.13c
Other Materials	13.78c	12.45c	11.13c

<sup>a</sup> These scheme costs were estimated by the Scheme Coordinator based on assumptions about the number of containers returned in a month and the relative proportions of returns made through collection points and MRFs.

<sup>b</sup> The estimated scheme costs per container exclude GST.

**Source:** Exchange for Change, at [http://returnandearn.org.au/Assets/pdf/ReturnandEarn\\_SchemeCosts.pdf](http://returnandearn.org.au/Assets/pdf/ReturnandEarn_SchemeCosts.pdf), accessed on 6 February 2018.

<sup>16</sup> Exchange for Change, at [http://returnandearn.org.au/Assets/pdf/ReturnandEarn\\_SchemeCosts.pdf](http://returnandearn.org.au/Assets/pdf/ReturnandEarn_SchemeCosts.pdf), accessed on 6 February 2018.

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The Scheme Coordinator, Exchange for Change, has estimated higher costs in the initial months of the scheme to reflect uncertainties around the extent to which consumers may stockpile eligible containers in advance of the CDS commencing. All else being equal, it expects costs to reduce over time once the impact from any stockpiling of containers has flowed through the scheme.

In estimating these costs, it also made assumptions that depend on consumer behaviour and it is unable to give a longer term forecast as to what these are. It advised that any scheme participant should form its own opinion on the future implications to their business.<sup>17</sup>

### **2.5.2 Suppliers will pay only for actual scheme costs**

The Scheme Coordinator issues monthly invoices to suppliers to cover contributions based on each supplier's market share. Monthly invoices include an *advanced contribution* based on forecasts of container volumes and scheme costs and *periodic adjustments* to 'true up' contributions for actual market shares and scheme costs. This ensures that suppliers only pay for the actual scheme costs incurred.

### **2.5.3 Suppliers can choose how to recover scheme costs from their customers**

The CDS does not place any requirements on how suppliers are to recover costs from their customers. This is different to the introduction of the GST, where the Federal Government introduced legislation introduced to prevent over-recovery of tax changes either from raising prices too high or not reducing prices sufficiently as well as requirements to identify how much GST was being charged on different products.<sup>18</sup>

As is the case for any business operating in a competitive market, suppliers may choose to pass all or some of the CDS costs onto their customers.

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<sup>17</sup> Exchange for Change, at [http://returnandearn.org.au/Assets/pdf/ReturnandEarn\\_SchemeCosts.pdf](http://returnandearn.org.au/Assets/pdf/ReturnandEarn_SchemeCosts.pdf), p 10 accessed on 6 February 2018.

<sup>18</sup> <https://www.accc.gov.au/media-release/accc-new-powers-to-stop-anticipation-of-the-gst>, accessed on 6 February 2018.



## 3 Proposed approach for monitoring and reporting

As Chapter 1 discussed, our terms of reference require us to monitor and report on three potential effects of the CDS over the first year of its operation. These are the effects on the price of container beverages, on competition in the market for container beverages (including the performance and conduct of suppliers), and on any other market impacts.

To develop our proposed approach for this task, we first considered how we would approach monitoring the scheme's impacts, and the challenges we are likely to face in analysing these impacts.

The sections below discuss our considerations of these issues, then provide an overview of our proposed approach.

### 3.1 How we propose to monitor the impacts of the CDS

The NSW Government has asked IPART to monitor the impacts of the CDS on prices and competition. In undertaking this review we propose to identify where possible any impacts resulting from the introduction of the CDS on consumers and other participants in the container beverage market in NSW, so they can be addressed early on if necessary.

As Chapter 2 discussed, previous assessments of the beverage industry in NSW have either not revealed substantial concerns about competition, or have found there is 'workable competition' in the industry. Like other regulators,<sup>19</sup> we think that this competition, together with the Competition and Consumer Act, best protects consumers. Therefore, we propose that our monitoring should focus on identifying any change or behaviour resulting from the CDS that may indicate reduced competition. For example, this may include:

- ▼ if there are any sustained increases in prices above the efficient costs of supply beyond a reasonable time
- ▼ if there are substantial increases in the costs of entering the market as a result of the CDS, or
- ▼ if there any obstacles to switching suppliers as a result of the CDS.

### 3.2 Challenges of monitoring CDS impacts

The main challenge in monitoring the impact of the CDS will be to determine whether any changes we observe in prices or market behaviour are due to the introduction of the CDS, or to some other change in the container beverage industry.

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<sup>19</sup> For example, NSW Fair Trading. See [http://www.fairtrading.nsw.gov.au/biz\\_res/ftweb/pdfs/About\\_us/Compliance\\_and\\_enforcement\\_policy.pdf](http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Compliance_and_enforcement_policy.pdf), p 2, accessed on 6 February 2018.



As in all competitive markets, participants in the container beverage supply chain can change their prices at any time. In these workably competitive markets businesses cannot sustain prices above the efficient cost of supply beyond a reasonable period, without losing customers to their competitors or new entrants. Pricing within this supply chain is complex and often not transparent. For example, supplier agreements can vary by contract and may include discounts, rebates and other incentives. Details of these arrangements are not available to third parties. This makes it difficult to determine the true cost of supply. Larger retailers generally have more bargaining power than smaller retailers, and can use this to obtain more competitive prices from suppliers and avoid the need to use wholesalers.

The nature of the container beverage industry and different pricing practices across the supply chain will pose challenges in terms of analysing the impact of the CDS on prices. For example, a key factor in determining the extent to which the costs of the CDS are passed through into retail beverage prices is the responsiveness of demand to changes in price. For products and markets where demand is highly responsive to changes in price, less than the full cost of the CDS may be passed through to consumers.

In addition, some retailers regularly offer discounted prices for container beverages, which makes it more difficult to measure average price changes due to the introduction of the CDS. Further:

- ▼ Not all retailers change their prices immediately following changes in costs. Some (like cafes and restaurants) may prefer to round prices and, for example, change their prices in 50c increments for ease of communication to customers. This means that some retailers may bear the costs of the CDS in the short term while others may increase prices to the next rounded increment and thus it appears they are more than recovering the costs of the CDS.
- ▼ Retailers may have a policy for nationally consistent prices, which means the mark ups may vary across different jurisdictions and the impact of the CDS on these prices is unclear.
- ▼ To the extent that the CDS involves fixed costs, large and small firms in the supply chain may be affected differently.

These factors suggest that it might be difficult to draw conclusions around the drivers of price changes within the supply chain. They also suggest the pass through of CDS costs into retail prices will vary by product and by retailer, depending on demand responses and bargaining power. The extent that we can measure all these impacts will also depend on the availability of pricing data.

### **3.3 Overview of our proposed approach for monitoring CDS impacts**

Given the terms of reference and the challenges outlined above, we have developed a proposed approach that involves, for the period 1 November 2017 to 1 December 2018:

- ▼ Assessing the effect of the CDS on NSW container beverage prices by monitoring and analysing the overall or average changes in prices, as well as considering information on any complaints about beverage prices at an individual supplier level.

- ▼ Assessing the effect of the CDS on competition in the NSW container beverage market by seeking feedback from stakeholders and analysing any information on changes in the performance and conduct of suppliers and market shares.

This approach should allow us to identify any systemic, ongoing effects arising from the operation of the scheme as opposed to behaviour of a one-off, transitional nature or retailers actively competing to gain customers or market share.

The findings of the above assessments would inform our recommendations on any government action required to address behaviours arising from the scheme, and whether price monitoring should continue beyond the initial one-year period. While we expect that one-off transitional effects would not require ongoing monitoring, any on-going systemic issues that we identify may require ongoing monitoring either by IPART or another regulator, such as NSW Fair Trading or the ACCC. As noted above, NSW Fair Trading's compliance and enforcement activities tend to focus on individual and small business disputes while the ACCC's are on the competitive process and widespread consumer detriment.

Table 3.1 provides an overview of what we propose to monitor, how we will monitor it and when we will report on our findings. The next chapters outline our proposed approach in more detail.

**Table 3.1 IPART’s proposed framework for monitoring the CDS**

What?	How?	When?
Effect of the CDS on the price of container beverages	<ul style="list-style-type: none"> <li>▼ Collect information from the Scheme Coordinator on monthly costs of the CDS by container material type.</li> <li>▼ Analyse changes in retail prices before and after the introduction of the CDS for all container beverage products, including those not covered by the CDS, using two approaches:               <ul style="list-style-type: none"> <li>– measuring overall price changes (trends) using price indices for beverages published by the Australian Bureau of Statistics (ABS)</li> <li>– quantifying the extent to which the costs of the CDS are passed through to beverage prices using product level price data</li> </ul> </li> <li>▼ Collect and consider reports from consumers and scheme participants on individual instances of price changes in beverages before and after the introduction of the CDS.</li> <li>▼ Use all findings to assess how the costs of the CDS have been passed through to consumers.</li> </ul>	April Progress Report and December Final Report.
Effect of the CDS on competition in the NSW container beverage market	<ul style="list-style-type: none"> <li>▼ Seek feedback from consumers, retailers, wholesalers and manufacturers on whether the CDS has resulted in:               <ul style="list-style-type: none"> <li>– changes in barriers to entry</li> <li>– instances of margin squeeze</li> <li>– systematic changes in market shares.</li> </ul> </li> <li>▼ Collect and consider reports from consumers and scheme participants on individual changes in prices, unfair or unjustified supplier behaviour.</li> <li>▼ Consider change in quantities of eligible beverage containers supplied into NSW by material type.</li> <li>▼ Consider whether the CDS has had a substantial impact on market shares using information on average spend.</li> <li>▼ Consider whether the CDS has led to consumers buying less overall or shifting consumption into non-CDS container beverages.</li> <li>▼ Use all findings to assess whether the CDS has resulted in reduced competition in the NSW container beverage market</li> </ul>	April Progress Report and December Final Report

## 4 Assessing the effects of the CDS on beverage prices

As Chapter 3 outlined, the first part of our proposed approach is to assess the effects of introducing the CDS on NSW container beverage prices by monitoring and analysing changes in beverage prices and considering information on any complaints about beverage prices at an individual supplier level.

The sections below explain this part of our approach in more detail, including:

- ▼ what time period we propose to consider in making our assessment
- ▼ which beverage products and prices we propose to include in our analysis
- ▼ two approaches we propose to adopt for evaluating the impact of the CDS on beverage prices, and
- ▼ how we propose to monitor complaints or feedback on the prices charged by individual suppliers.

### 4.1 Period we propose to consider

In line with our terms of reference, we propose to monitor prices over the period from 1 November 2017 to 1 December 2018 (the monitoring period), and also consider prices before the introduction of the CDS.

Beverage markets are unregulated and are largely competitive markets. Prices at any point in the supply chain can change at any time. This means that we may or may not observe the full impact of the CDS in the month in which it first took effect. Therefore, we also propose to examine prices prior to the monitoring period, since suppliers could have changed prices in anticipation of the introduction of the CDS.

### 4.2 Products and prices we propose to consider

We propose to consider all container beverage products in analysing price changes, including those not covered by the CDS. We also propose to analyse the changes in the retail price, rather than try to identify the change in the price charged by the first supplier.

#### 4.2.1 All container beverage products

The primary focus of our analysis is on understanding the impact of the CDS on the prices of container beverage products covered by the scheme (see section 2.2). However, the prices of products not covered by the scheme (Table 2.1) could also be impacted to the extent that:

- ▼ consumers decide to buy these products in place of eligible products, or

- ▼ suppliers who produce a range of different container beverage products decide to increase the price of those not covered by the CDS to recover the cost of the scheme for various reasons.

Hence analysis of the price impact on products not covered by the scheme could provide useful insight into the behaviour of suppliers and consumers discussed in Chapter 5. Therefore, we propose to include all container beverage products in our price analysis, including those not covered by the scheme.

#### **4.2.2 Retail prices**

The CDS requires that ‘first suppliers’ of eligible container beverages into NSW pay for the costs of the scheme. Therefore, we could try to focus on the prices charged by these first suppliers. As Section 2.3.2 discussed, due to the complexity and variability of the container beverage supply chain, first suppliers may be beverage manufacturers, importers, wholesalers or retailers.

In many cases, beverage manufacturers are likely to be first suppliers. For example, in the alcoholic beverage market, large retailers, which represent around 65% of the market,<sup>20</sup> can bypass liquor wholesalers and enter price agreements with manufacturers directly. Some beverage products are directly supplied by manufacturers to other retailers such as licensed venues including pubs and hotels. Similarly, a substantial portion of non-alcoholic beverage is supplied directly from manufacturers to large retailers and other markets including online retailers.

The retail price is directly observable, but other prices (ie, factory gate price and wholesale prices) within the supply chain are difficult to observe due to the lack of transparency. Given this, we propose focusing our analysis on the retail price in order to capture the overall impact of the CDS on beverage prices.

### **4.3 Two approaches we propose to adopt for evaluating CDS price impacts**

We propose to adopt two approaches for evaluating the impact of the CDS on beverage prices:

- ▼ measuring overall price changes using price indices for beverages published by the Australian Bureau of Statistics (ABS), and
- ▼ quantifying the extent to which the costs of the CDS are passed through to beverage prices.

#### **4.3.1 Measuring overall price changes using price indices**

To evaluate the impact of the CDS on beverage prices, we propose to measure overall price changes using price indices for beverages published by the ABS. Looking at such price indices would inform historical trends in beverage prices and help identify the overall impact of the CDS on beverage prices. This section provides details about the data source and how we propose to measure overall price changes.

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<sup>20</sup> <http://www.roymorgan.com/findings/7181-liquor-retail-australia-201703201051> accessed 22 January 2018.

## Expenditure-level price indices relevant to the CDS

In the calculation of the Consumer Price Index (CPI), the ABS has established a robust methodology for measuring changes in prices of a basket of goods and services bought by households. The ABS routinely samples a wide range of goods and services at particular points in time and aggregates their prices into a price index.

The CPI index (ie, All Groups) is divided into 11 major groups, which branch into sub-groups and expenditure classes. We propose to use price data on the non-alcoholic beverages and alcoholic beverages sub-groups, shown in Table 4.1. We propose to use the 'Waters, soft drinks and juices' and 'Beer' expenditure classes to understand the direct impact of the CDS on overall container beverage prices. We propose to consider the 'Spirits' and 'Wine' expenditure classes to examine any indirect price effect of the CDS on container beverages not covered by the CDS.<sup>21</sup> We do not intend to use the 'coffee, tea and cocoa' expenditure class as it also includes non-container beverage items (eg tea leaves and cocoa powder).<sup>22</sup>

**Table 4.1 Non-alcoholic beverages and alcoholic beverages index structure**

CPI Sub-group	Expenditure class	Item examples	Price source	Index Frequency
Non-alcoholic beverages	Coffee, tea and cocoa	Coffee including decaffeinated and instant coffee, roasted or ground; tea; cocoa and chocolate-based powder	Supermarkets, convenience stores, take away outlets	Quarterly
	Waters, soft drinks and juices	Mineral or spring waters; soft drinks; fruit and vegetable juices	Supermarkets, convenience stores, take away outlets	Quarterly
Alcoholic beverages	Spirits	Spirits and liqueurs including pre-mixed sprits purchased in a bar, club, bottle shop or restaurant	Bars, clubs, bottle shops.	Quarterly
	Wine	Wine from grapes, wine from other fruits, fortified wines and cider purchased in a bar, club, bottle shop or restaurant	Restaurants, clubs, bottle shops.	Quarterly
	Beer	All kinds of beer such as ale and lager including low-alcoholic beer purchased in a bar, club, bottle shop or restaurants	Bars, clubs, bottle shops.	Quarterly

**Source:** Australian Bureau of Statistics, *Information Paper - Consumer Price Index: Concepts, Sources and Methods Australia*, 2016, pp 58, 61.

<sup>21</sup> We acknowledge that any observed differences in price trends between different expenditure could be affected by changes in the underlying cost structure of different beverage products. We discuss this issue further in section 4.3.2.

<sup>22</sup> We note that the 'coffee, tea and cocoa' expenditure class may include some beverages covered by the CDS such as ready-to-drink coffee and tea.

## Measuring the impact of the CDS over time and across cities

The ABS collects most prices in these sub-groups on a monthly basis, but it only publishes price indices on a quarterly basis. Therefore, we propose to consider quarterly price changes following the introduction of the CDS (ie, March 2018, June 2018 and September 2018 quarters) and compare them with price changes in previous corresponding quarters. We could also consider the September 2017 and December 2017 quarters to examine whether any price changes occurred in anticipation of the implementation of the scheme.

The ABS collects price data for the eight capital cities in Australia, rather than the states. Therefore, to consider price changes in NSW relative to those in other jurisdictions that have not implemented the CDS, we propose to compare quarterly price changes in Sydney with those in Melbourne. All states and territories except for Victoria have introduced or plan to introduce a CDS. Given that beverage prices tend to be highly correlated across states, an analysis of beverage prices in the two capital cities – with and without the CDS – would allow us to identify the overall beverage prices in Sydney had the CDS not been implemented.

ABS data for the March quarter 2018 is scheduled for release on 24 April 2018. As a result, we will not be able to report on overall price changes in the first three months of the CDS.<sup>23</sup>

### 4.3.2 Quantifying the extent to which the CDS costs are passed through

ABS data poses several limitations to identifying the effect of the CDS. For example, the price index is published quarterly. In addition, it is an aggregated measure of the prices of many different beverage products. An analysis of aggregated prices may dilute the effect of the CDS on different beverage products if the CDS exerts different effects on different beverage products, and because the price index includes products not covered by the CDS.

To address these limitations, we propose to take a step further and utilise more disaggregated product level price data to quantify the average magnitude of the pass-through of the CDS costs to beverage prices. The sections below explain how we propose to conduct this analysis.

#### Monthly, promotional and non-promotional prices

Several private data providers collect and compile product level price data at different frequencies such as daily, weekly and monthly. We propose to use monthly beverage prices.

While higher frequency data such as daily and weekly would produce more observations for statistical robustness, it is more likely to be affected by temporary fluctuations in prices. Since we are interested in understanding the effect of the CDS over a relatively long period, we consider the monthly price frequency to be more appropriate to our analysis.

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<sup>23</sup> The CPI is compiled quarterly for quarters ending on 31 March, 30 June, 30 September, and 31 December each year. The quarterly index numbers are usually published between three and four weeks after the end of each quarter. Australian Bureau of Statistics, *Information Paper - Consumer Price Index: Concepts, Sources and Methods Australia*, 2016, p 1.



We intend to focus primarily on non-promotional prices. Promotional prices could be affected by seasonal events (eg, Father’s Day, Easter, Christmas) or particular marketing strategies (eg, buy two items for a certain fixed price, buy one and get one free, etc). Identifying the impact of the CDS on beverage products at the product level requires tracking the prices of the same product over time. Promotional prices such as those captured from daily catalogues would not meet such criteria, as products on promotion tend to vary from day to day.

Nonetheless, we acknowledge that certain products may be frequently on promotion. In such cases, we propose to consider how to appropriately account for such promotional prices in our analysis.

### Difference-in-differences approach

We propose to use a difference-in-differences approach to quantify the dollar change in average beverage prices that is due to the CDS. Difference-in-differences is a statistical technique commonly used to evaluate a policy impact. The base case is where outcomes are observed for two groups over two time periods – one group is exposed to a treatment in the second period but not in the first period (ie, treatment group) while the other group is not exposed to the same treatment during either period (ie, control group).

The difference-in-differences method compares the changes in outcomes between the treatment group and the control group over time. By taking the difference of the differences, the method eliminates biases in the difference between the treatment and control group in the second period (ie, treatment period) that could be driven by permanent differences (that do not change over time) between those groups, as well as biases from changes over time in the treatment group that could be due to trends.

In the context of our review, the treatment is the introduction of the CDS, and the difference-in-differences method will identify the average change in beverage prices in NSW that is due to the CDS, by:

1. calculating the change in beverage prices in NSW before and after the CDS,
2. calculating the change in beverage prices in a **comparison group** over the same period, and
3. calculating the difference between 1 and 2.

We consider Victoria to be an appropriate comparison group for our difference-in-difference analysis. While price movements across different states for non-alcoholic beverages tend to move together,<sup>24</sup> Victoria does not plan to introduce a CDS and is comparable to NSW in terms of market size.

An important assumption of the difference-in-differences method is that the comparison group must accurately represent changes in beverage prices that would have been experienced by NSW in the absence of the CDS. To test the validity of our assumption, we intend to compare beverage price trends in NSW and Victoria before the introduction of the CDS. If the price trends between NSW and Victoria were similar prior to the CDS, we would gain confidence that prices would have continued to move in tandem had the CDS not been introduced in NSW.

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<sup>24</sup> The CIE, *Monitoring the impacts of the NSW Container Deposit Scheme*, January 2018, p 37.

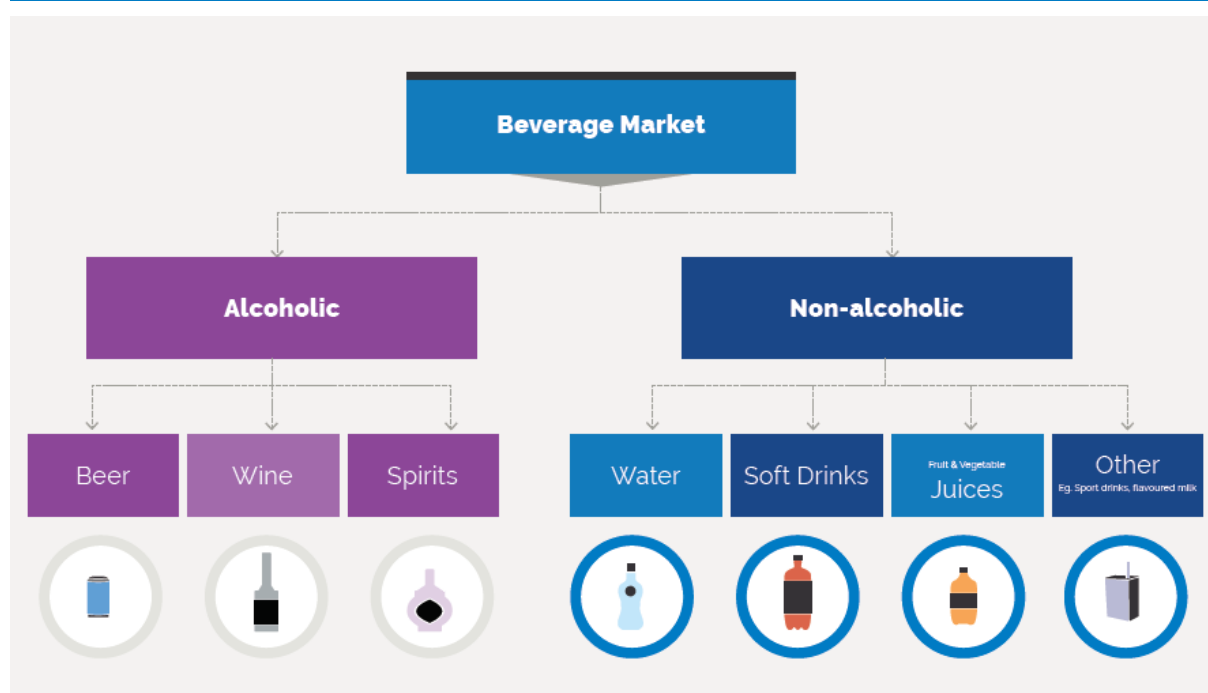


We do not consider beverages that are not subject to the CDS (eg, wine, spirits, plain milk) to be a suitable comparison group. Consumers may be substituting beverages covered by the CDS for those that are not. In this case, changes in prices of beverages not covered by the CDS may reflect the impact of the CDS. In addition, beverages across different categories are not directly comparable (eg, beer and wine) as they are associated with different underlying costs.

### Price changes by beverage type

We propose to estimate price changes by beverage category shown in Figure 4.1.

**Figure 4.1 Beverage market categories**



The price elasticities of demand and supply are also an important determinant of the extent to which indirect taxes are passed through to prices.<sup>25</sup> While the CDS is not a traditional tax, the price elasticities of demand and supply could have a similar impact on the extent to which the CDS costs are passed through in beverage prices. Previous studies find that the price elasticity of demand differs across beverage types.<sup>26</sup> Evaluating the price impact of the CDS by beverage type would help us better identify possible differing impacts of the CDS on the extent of the pass-through of the CDS costs.

In addition, different beverage products have different underlying production costs, which may or may not be directly observable, and this may have an impact on the extent to which the cost of the CDS could be passed through. From an econometric perspective, running separate regressions for different beverage types allows us to control for the potential effect that differing underlying costs can have on the price impact of the CDS.

<sup>25</sup> More details are provided in the CIE report.

<sup>26</sup> Powell, L.M, Chriqui, J. F., Khan, T., Wada, R., and Chaloupka, F.J, *Assessing the Potential Effectiveness of Food and Beverage Taxes and Subsidies for Improving Public Health: A Systematic Review of Prices, Demand and Body Weight Outcomes*, Obesity Reviews, February 2013, 14(2), pp 110-128

For each beverage category, our proposed econometric models would generally take the form shown in Box 4.1.

**Box 4.1 General model for quantifying the impact of the CDS on beverage prices**

$$P_{it} = \beta_0 + \beta_1 \times NSW + \beta_2 \times TIME + \beta_3 \times NSW \times TIME + \gamma X_{it} + \varepsilon_{it}$$

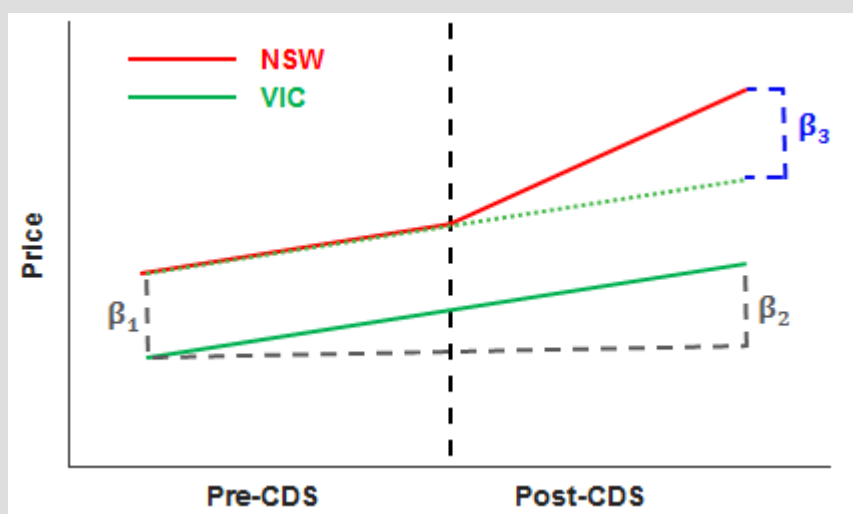
where

- ▼  $P_{it}$  is the price of product  $i$  in month  $t$ , expressed in \$ per container.
- ▼  $NSW$  equals 1 if product  $i$  is sold in NSW, and 0 otherwise.
- ▼  $TIME$  equals 1 if month  $t$  is from December 2017 to November 2018 (ie, treatment period in which the CDS is in place), and 0 otherwise.
- ▼  $NSW \times TIME$  equals 1 if  $NSW = 1$  and  $TIME = 1$ .
- ▼  $X_{it}$  comprises a set of variables that are likely to affect beverage prices. Beverage prices may vary across different sizes, package types, manufacturers, etc. Also, they are likely to vary over time or across region. We aim to include these factors as control variables to isolate the impacts of these confounding variables on beverage prices, which are captured in the coefficient(s),  $\gamma$ , and
- ▼  $\varepsilon_{it}$  is the error term.

For illustrative purposes only, Figure 4.2 provides a graphical explanation of the model above, where NSW beverage prices form the treatment group and VIC beverage prices form the control group.

- ▼  $\beta_1$  captures possible differences in beverage prices between NSW and VIC prior to the introduction of the CDS (ie, pre-treatment period)
- ▼  $\beta_2$  captures possible differences in beverage prices between pre- and post-CDS periods in VIC (ie, changes in beverage prices in absence of the CDS), and
- ▼  $\beta_3$  is the difference-in-differences estimate, which is the difference between the change in prices between the two periods in NSW and the change in prices between the two periods in VIC. This is the variable of our interest and captures the average change in beverage prices in NSW that is due to the CDS.

**Figure 4.2 Difference-in-differences estimation – graphical explanation**



**Note:** For illustrative purposes only.

Under this model, the coefficient,  $\beta_3$  represents the average price change due to the introduction of the CDS. This general model could be easily modified, for example, to estimate the average price change for each month. Since beverage prices can change at any time, suppliers can pass through the cost of the scheme, to the retail price at any time. Therefore, analysing monthly impacts would help us identify when significant price changes take place in the beverage market as a result of the CDS.

In terms of interpreting the results, we could compare the coefficient,  $\beta_3$  with the cost of the CDS. If  $\beta_3$  is equal to the cost of the CDS for a beverage category, this would mean the full cost of the CDS has been passed through to the prices of products in that beverage category on average. If  $\beta_3$  is less (greater) than the cost of the CDS, this would mean less (more) than full pass through of the cost to the retail price on average. Any difference between the average price change and the cost of the CDS needs to be considered in the context of beverage pricing policies, supply and demand elasticities and competition in the beverage market (see Chapter 5).

It is also important to note that a direct comparison of the estimated price change and the cost of the CDS is likely to be problematic. This is because while the material type for individual beverage products is often not easily classifiable from available data sources, the costs of the CDS vary by material type (see Table 2.4). One way to address this issue could be to infer material type from beverage size to compare costs. For example, 600ml soft drinks are typically supplied in PET bottles, whereas 375ml soft drinks are typically supplied in aluminium cans. We could compare the estimated coefficient for the former with the CDS costs for PET, and the latter with those for aluminium.

#### **4.4 How we propose to monitor complaints or feedback on price increases**

In addition to assessing the impact of the CDS on beverage prices by monitoring and analysing average changes in beverage prices, we also propose to monitor any changes in individual beverage prices using complaints and other feedback from consumers and other market participants. This would allow us to identify individual instances of price changes that are difficult to detect using the average changes outlined above. Consumers and other scheme participants can report any incidents of individual price changes on our website. We will also monitor price complaints about the CDS to other regulators including NSW Fair Trading, the ACCC and the NSW Small Business Commissioner.

In the retail markets for alcoholic and non-alcoholic beverages there is currently a high level of price monitoring by the industry of both regular and promotional prices. For example, there are a number of companies that collect and monitor beverage prices in NSW (prices on websites or scanned by retailers). The larger retailers of beverage products generally monitor the pricing of their competitors for the same or similar products.

We do not propose to replicate this type of price monitoring that is already occurring across both CDS and non-CDS products in the beverage market. However, by monitoring complaints and feedback we can identify whether there are any emerging, systemic issues in the market.

This monitoring would also assist us in identifying any behaviour or market outcomes – pricing or otherwise – that appear unfair or unjustified on consumers or scheme participants.

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Our terms of reference allow for us to identify and investigate matters at our own discretion or on request from the Premier or the Minister for the Environment. Chapter 5 contains further information on our proposed approach to this task.

**IPART seeks comment on the following**

- 1 Do you agree with our proposed approach to include in our price analysis:
  - the retail price of all container beverage products regardless of whether they are covered by the CDS
  - the period before and after the introduction of the CDS?
- 2 Do you agree with the two proposed approaches for evaluating the impact of the CDS on beverage prices:
  - measuring overall price changes (trends) using price indices for beverages published by the Australian Bureau of Statistics (ABS)
  - quantifying the extent to which the costs of the CDS are passed through to beverage prices using product level price data?

## 5 Assessing the effects of the CDS on competition

The second part of our proposed approach is to assess the effects of introducing the CDS on competition in the NSW container beverage market. The competitiveness of a market affects outcomes for consumers. More competition generally leads to better prices, service standards and innovation.

For this reason, governments generally require the competition impacts of a regulatory proposal to be assessed as part of the Regulatory Impact Statement (RIS) prepared to inform their decisions on implementing the proposal. The EPA prepared a RIS on the CDS before the scheme commenced. It found that the scheme would not restrict competition in the market for container beverages.<sup>27</sup>

In line with the well-established procedures and guidelines for assessing the impact of regulatory proposals on competition, our proposed approach aims to identify whether the CDS is likely to restrict competition (see Box 5.1) and therefore negatively affect consumers. The sections below explain our approach in more detail, including:

- ▼ defining the relevant market
- ▼ selecting the indicators of competition to consider
- ▼ monitoring complaints or feedback on the performance and conduct of suppliers, and
- ▼ investigating unfair or unjustified behaviour or market outcomes if we decide this is warranted or are requested to do so by government.

### Box 5.1 When is there likely to be a restriction of competition?

Regulatory proposals that restrict competition include those that:

- ▼ directly or indirectly limit the number or types of suppliers (for example, through awarding exclusive rights to a business, requiring authorisations, or substantially raising the costs of entering or exiting a market), or
- ▼ limit the ability of suppliers to compete (for example, through influencing the price that may be charged or the characteristics including quality of the product supplied, limiting the ability for businesses to market their products or limiting the production process), or
- ▼ reduce the incentive for suppliers to compete (for example, through restricting the ability or willingness of customers to choose different suppliers), or
- ▼ limit choices and information available to consumers.

**Source:** Competition and Markets Authority UK, *Competition impact assessment - Part 2 guidelines*, September 2015, Chapters 3 to 6.

<sup>27</sup> NSW EPA, *Consultation Regulation Impact Statement – New South Wales Container Deposit Scheme*, May 2017, p 32, at <https://www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/waste/container-deposit/container-deposit-scheme-consultation-regulation-impact-statement-170224.pdf?la=en>, accessed 7 February 2018.

## 5.1 Defining the relevant markets

The first step in any competition assessment is to define the relevant markets. It is important to distinguish between separate markets as the level of competition may differ between them.

The beverage industry comprises a number of separate markets, where a market relates to a product that consumers/buyers regard as close substitutes when relative prices change. For example, relevant product markets may include beer, pre-mixed spirits, soft drinks, bottled water, and fruit juices. Markets also have a geographic dimension, which might be local, state or national. As a first supplier could include a business across any part of the beverage supply chain, the relevant markets for our assessment could be primary, wholesale or retail markets.

The process of defining markets often involves the 'hypothetical monopolist test'. This test involves establishing the smallest product group and geographical area that a hypothetical monopolist could sustain prices above competitive levels. The temporal aspect of this analysis is important, as the aim is to identify whether market power is temporary or extends beyond a reasonable period. In practice, defining markets requires substantial judgement, and balancing various sources of information. If a competition impact assessment is not largely affected by the market definition, it may not be necessary for us to uniquely define markets.

## 5.2 Considering a number of competition indicators

Once the relevant markets have been defined, the next step is to gather information on various indicators related to competition. These will help us to form a view on whether there has been a restriction of competition due to the CDS. Potential indicators are summarised in the table below.

**Table 5.1 Potential indicators for assessing competition in the container beverage market**

Indicator	Approach (possible data sources)
Market structure / market share	Is there any evidence of an increase in market concentration, firms exiting the market, or reduction in new entry? (Market reports eg IBIS World).
Availability of information to consumers	Is there less information available to consumers or has it become more complex? (Review of market information, websites etc)
Barriers to entry and exit	Is there a substantial increase in the cost of entering the market as a result of the CDS? Are these fixed or variable costs? Are firms exiting the market, or not entering the market as a result and affecting the competitive dynamic? Is the impact disproportionate on smaller firms? (CDS cost estimates, market reports, stakeholder submissions)
Consumer behaviour	Are there any obstacles to switching suppliers as a result of the CDS? Is there any evidence of consumers buying more non-CDS beverages? (Stakeholder submissions)
Supplier behaviour	How have the costs of the CDS been passed through to consumers? Is there any evidence of less innovation or rivalry between firms? Have there been any changes to the performance and conduct of suppliers?

After considering the specific requirements that the CDS imposes on first suppliers (section 2.3), our preliminary view is that it is unlikely the CDS would restrict competition through a reduction in the incentives for suppliers to compete or through limiting choices for consumers. The CDS also does not directly influence the price that can be charged for container beverages, nor the quality requirements of these products.

During consultation before the CDS commenced, some stakeholders were concerned about the costs of the CDS falling disproportionately on small and medium sized enterprises (SMEs). Another common theme was cross-border issues; including where businesses located close to the NSW border are affected by consumers choosing to purchase beverages across the border to avoid the costs of the CDS, and also bringing in containers supplied outside NSW to be redeemed for a refund in NSW.

We are interested in stakeholder views on these issues. We are also interested in views from stakeholders on how the introduction of organisations involved in the CDS (scheme coordinator, network operators, retailers providing collection facilities including reverse vending machines, etc) has affected the competitive dynamic.

**IPART seeks comments on the following**

- 3 What are the relevant markets for our competition impact assessment?
- 4 Are there any further competition indicators to those listed in Table 5.1 that we should consider in making our assessment?
- 5 How has the commencement of the CDS affected competition in the container beverage industry, in particular for small and medium sized enterprises and any cross border issues?
- 6 Has the introduction of the Scheme Coordinator, Network Operator and other participant bodies in the CDS affected the competitive dynamic in the beverage market?



### 5.3 Monitoring the performance and conduct of suppliers

We propose monitoring complaints from customers and suppliers about the pricing response and market impacts of the scheme. We will consider all feedback and complaints made on our websites as well as complaints about the CDS to other regulators including NSW Fair Trading, the ACCC and the NSW Small Business Commissioner. These complaints could relate to pricing or misleading and deceptive conduct. For example, there have been reports of consumers being told that the scheme has caused a price increase, when the relevant containers aren't eligible for a refund.<sup>28</sup> We will also consider any information provided in submissions to this Issues Paper and our April Progress Report.

IPART seeks comments on the following

- 7 Do you agree with our proposed approach to monitoring complaints from customers and other scheme participants about the performance and conduct of suppliers in the beverage market?

### 5.4 Investigating unfair or unjustified behaviour or market outcomes

In addition to monitoring and reporting on supplier performance and behaviour, the Terms of Reference provide for us to investigate any behaviour or market outcomes that appear unfair or unjustified on consumers or scheme participants. We can identify and investigate matters at our own discretion or on request from the Premier or the Minister for the Environment. If IPART investigates a matter, then it is to provide an interim report to the Premier and the Minister as soon as practicable.

Our preliminary view is that our role would involve early identification of any issues for possible referral to NSW Fair Trading or the ACCC for further investigation. NSW Fair Trading and the ACCC undertake compliance and enforcement activities for unfair business practices in NSW.<sup>29</sup> As IPART does not have a compliance or enforcement role under the Australian Consumer Law, we are not able to take action on unfair business practices or competition issues that arise in the beverage market as a result of the introduction of the CDS. Further, we would not want to compromise any potential investigation and action by the relevant regulator.

The ACCC provides guidance to business where practices could be considered to be unfair.<sup>30</sup> Some examples include:

- ▼ Misleading or deceptive conduct: Where a business creates a misleading overall impression about (for example) the price, value or quality of consumer goods or services.
- ▼ False or misleading representations about goods or services when supplying, offering to supply, or promoting those goods or services.
- ▼ Unfair contract terms. This is where unequal bargaining power in the supply chain may allow a supplier to negotiate unfair contract terms.<sup>31</sup>

<sup>28</sup> <https://www.finance.nsw.gov.au/about-us/media-releases/price-increases-watch-list-container-deposit-scheme-starts>, accessed on 6 February 2018.

<sup>29</sup> The exception is that only a court or Tribunal can decide whether a contract term is unfair.

<sup>30</sup> Australian Competition and Consumer Commission, *Avoiding unfair business practices: a guide for business and legal practitioners*, March 2016.

<sup>31</sup> <https://www.accc.gov.au/business/business-rights-protections/unfair-contract-terms/determining-whether-a-contract-term-is-unfair>



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As noted above, we expect to be informed through our complaints and submission process, as well as receiving any information from other regulators such as NSW Fair Trading, the ACCC and the NSW Small Business Commissioner.

We propose to monitor and review this information on the behaviour and market outcomes of customers and suppliers. In deciding whether to refer a matter to the relevant regulator, we are proposing to consider the following criteria:

- ▼ The materiality of the behaviour or market outcome. For example, is this a one-off event or does it reflect systemic or on-going behaviour?
- ▼ Whether the conduct could result in significant consumer or small business detriment. For example, we may have received a number of similar complaints about the behaviour of the same supplier across different geographic regions.
- ▼ The nature of the allegations made to us or other relevant bodies about the suppliers' behaviour or market outcome.
- ▼ Whether it is more appropriate for another regulator to investigate allegations on unfair business practices or competition issues.

**IPART seeks comment on the following**

- 8 Do you agree with our proposed criteria in section 5.4 for deciding whether to refer any behaviour or market outcomes that appear unfair or unjustified on consumers or scheme participants to the relevant regulator?

## A Terms of reference



### **Terms of Reference for IPART to monitor and report on matters relating to the Container Deposit Scheme**

I, Gladys Berejiklian, Premier of New South Wales, under Section 12A of the *Independent Pricing and Regulatory Tribunal Act 1992*, request that the Independent Pricing and Regulatory Tribunal (IPART) monitor and report on the Container Deposit Scheme in accordance with these terms.

#### Task

IPART is to monitor:

1. the effect of the Container Deposit Scheme on prices of beverages supplied in a container;
2. the effect of the Container Deposit Scheme on competition for beverages supplied in a container and the performance and conduct of suppliers; and
3. any other market impacts on consumers that arise from the commencement of the Scheme, for the period from 1 November 2017 and 1 December 2018 (monitoring period)

IPART is to provide a report to the Premier and the Minister for the Environment regarding:

1. the effect of the Container Deposit Scheme on prices of beverages supplied in a container for the period from 1 November 2017 to 1 December 2018;
2. the framework for monitoring the Container Deposit Scheme including the behaviour of suppliers;
3. the effect of the Container Deposit Scheme on suppliers; and
4. any recommendations for actions by government to address any adverse effects or behaviours arising from the operation of the Scheme.

In undertaking the monitoring, IPART should have regard to:

1. any changes in prices of beverages before or after 1 November 2017 that purport to be in response to the Scheme;
2. any information provided by Scheme participants and consumers;
3. the behaviour of suppliers and major retailers before and after 1 November 2017 including whether beverage prices have increased beyond the amount suppliers are charged by the Scheme Coordinator;
4. the manner in which suppliers are recovering the costs of the Container Deposit Scheme; and
5. any other matters considered relevant.

#### Public consultation

IPART should undertake public consultation.

### Timeframe

IPART is to release a progress report in April 2018 which provides a draft framework for the review and reports on the first three months of the Container Deposit Scheme. IPART is to provide a final report to the Premier and the Minister for the Environment in December 2018. The final report is to also recommend whether subsequent monitoring is necessary.

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

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

### Definitions

Act means the *Waste Avoidance and Resource Recovery Act 2001*.

Beverage has the meaning given to the term under the Act.

Container has the meaning given to the term under the Act.

Container Deposit Scheme means the scheme established by the Act.

Scheme Coordinator has the meaning given to the term under the Act.

Scheme participant has the meaning given to the term under 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.



The Hon Gladys Berejiklian MP  
Premier

Dated at Sydney *sp/1* ..... 2018