

Introduction

NSW Container Deposit Scheme

The NSW Government's Container Deposit Scheme will commence on 1 December 2017. The Scheme will be the largest litter reduction initiative introduced by the State, and will help meet the Premier's goal of reducing the volume of litter in NSW by 40 per cent by 2020. Beverage container litter currently makes up around 44 per cent of all litter in the State. A network of Collection Points will be established across NSW to receive the eligible containers and provide the refund amount to consumers. Under the Scheme, empty 150 millilitre to 3 litre beverage containers will be eligible for a 10 cent refund when presented to an approved Collection Point in NSW. Container materials that may be eligible for a refund include:

- PET
- HDPE
- glass
- aluminium
- steel
- liquid paperboard.

Supplier obligations for first supplies

Under the *Waste Avoidance and Resource Recovery Act 2001* (as amended by the *Waste Avoidance and Resource Recovery Amendment (Container Deposit Scheme) Act 2016*) ('the Act'), a supplier must not supply, or offer to supply, a beverage in a container to any person unless the following conditions are satisfied:

- a Supply Arrangement is in force between the supplier and the Scheme Coordinator. in respect of a class of containers to which the container belongs; and
- a container approval is in force in respect of that class of containers.

This prohibition is limited in its application to the first supply in NSW of a beverage in a container.

'Supply' means supply by sale or otherwise in the course of carrying on a business. So, a business giving away beverages in containers as part of a promotion will also be taken to be supplying beverages in a container for the purposes of the Scheme.

Container approvals

Beverage suppliers may apply to the EPA for the necessary container approvals in a form approved by the EPA and an application fee will apply. The EPA may determine an application for a container approval by granting the container approval to the supplier. The EPA may also refuse to grant a container approval for the reasons contained in the Act or on any grounds prescribed by the regulations.

A supplier who makes the first supply of beverages in a container only needs to ensure that a container approval is in force that applies to the relevant container. The required approval can be held by the supplier or by another supplier.

Supply Arrangements

The Scheme Coordinator will enter into, and give effect to, a standard form Supply Arrangement with each supplier (who undertakes the first supply in NSW of a beverage in a container) requiring the supplier to:

- report on the volume of its own first supplies of beverages in containers in NSW, by material type; and

- pay contributions towards the cost of the management, administration and operation of the Scheme, 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.

Existing suppliers will need to enter into Supply Arrangements by 1 October 2017 to meet the November invoicing deadlines.

Supplier obligations for all supplies

Suppliers will also be prohibited from supplying beverages in containers that do not bear appropriate refund marking. This prohibition applies to all supplies, not just the first supply, of beverages in containers in NSW and will come into effect 24 months after the refund marking is published in the Waste Avoidance and Resource Recovery (Container Deposit Scheme) Regulation 2017 ('the Regulation'). The refund marking is expected to be published in late 2017. The EPA's powers include being able to seize containers have been first supplied in NSW in contravention of the legislation.

Approach to First Supply

For the purposes of applying the requirements of the Act, "first supply in the State" is an expression that is used in the Act. As set out above, "supply" is defined in the Act as meaning supply by way of sale or otherwise, in the course of carrying on a business. The Macquarie Dictionary relevantly defines "supply" as "to furnish or provide (something wanting or requisite): *to supply electricity to a community.*"

The EPA is adopting a functional approach to this concept and taking the view that the supply of a container occurs in the location where the supplier makes the container available to the recipient. This may depend upon the particular arrangements in place between suppliers and recipients. Where the recipient collects containers from the supplier's premises, the supply will have occurred at the supplier's premises. Where the supplier delivers (or organises the delivery of) the containers to the recipient's premises, the supply will take place at the recipient's premises.

If any stock subsequently moves out of NSW, the First Supplier will be entitled to seek to have its reported supplied volumes (which are used to determine its market share and accordingly its contribution to scheme costs) adjusted by the amount of this stock. Any First Supplier seeking to avail itself of this adjustment will be required to specifically identify all supplied stock the subject of its reports and all such stock that is exported from NSW.

Entities captured under this approach

It is anticipated that the following types of entities could be captured under the First Supply arrangements:

- Manufacturers within NSW who supply to distributors, retailers or consumers in NSW
- Any entity within NSW that supplies into NSW or any entity outside NSW that exports to NSW. This may encompass:
 - manufacturers
 - distributors
 - wholesalers
 - retailers.

Logistics and transport companies that physically move a container into or within NSW on behalf of a manufacturer or importer (and do not own the container) do not undertake the supply of the container under this approach.

The legislation does not treat corporate groups as a single entity. Accordingly, each separate company within a corporate group may potentially be a first supplier in its own right. This means that a supply by one company within a corporate group to another company within the same corporate group will be a supply for the purposes of the legislation and could potentially be a first supply. However internal deliveries within a company (for example a delivery from the manufacturing division to the distribution division) will not be supplies.

The following section provides examples of how the first supply approach will be interpreted under various scenarios.

Examples to demonstrate first supply approach

The following illustrative scenarios demonstrate the First Supply approach. The scenarios provided are not intended to be exhaustive.

The First Supply approach is intended to apply consistently to the physical product regardless of the manufacturing arrangements such as brand owner, private label or contract manufacturing, or contract packing arrangements.

Category	Scenario	First supply point	First Supplier
Manufactured in NSW	Manufactured* in NSW, supplied to a distributor/retailer** in NSW	Supply from manufacturer to distributor/retailer	Manufacturer
	Manufactured/bottled in NSW, supplied by delivery to a distributor/retailer outside NSW	None (as no supply in NSW)	None (as no supply in NSW)
	Manufactured/bottled in NSW, supplied to an airline or cruise ship catering in NSW	Supply from manufacturer to distributor/retailer	Manufacturer
Manufactured outside NSW	Manufactured outside NSW, supplied by delivery to a distributor/retailer in NSW	Supply from manufacturer to distributor / retailer	Manufacturer
	Manufactured outside NSW, supplied to a distributor outside NSW, distributor supplies by delivery to retailer in NSW	Supply from distributor to retailer	Distributor
	Manufactured/bottled outside NSW, supplied to a retailer outside NSW, retailer transports containers to NSW and sells them in NSW	Supply from retailer to consumer	Retailer
	Manufactured outside NSW, sold to retailer outside of NSW, retailer sells to consumer in NSW (via online, etc.)	Supply from retailer to consumer	Retailer

* Manufacturing includes bottling or any other beverage production

** Retailer also may include community groups, not-for-profits or organisations running promotions

Applying the First Supply approach to the INCO Terms published by the International Chamber of Commerce gives the outcomes set out in the following table. In each case, if the supply point indicated in the third column is in NSW, the seller:

- has made a supply in NSW, and
- will have made a first supply in NSW if that supply is first in the supply chain that occurs in NSW.:

Category	Description	Supply Point
EXW	Seller makes goods available for collection at its premises and buyer pays all transportation costs and bears the risks of bringing the goods to their final destination	Seller's premises
FCA	Seller hands over the goods into the disposal of the first carrier at the named place. Seller pays for carriage to the named point of delivery and	Named Place

	risk passes when the goods are handed over to the first carrier	
CPT	Seller pays for carriage but risk transfers to the buyer upon handing the goods over to the first carrier	Point at which goods are handed over to the first carrier
CIP	Seller pays for carriage and insurance to named destination point but risk passes when the goods are handed over to the first carrier	Point at which goods are handed over to the first carrier
DAT	Seller pays for carriage to the terminal except for costs related to import clearance and assumes all risks up to the point that the goods are unloaded at the terminal	Terminal
DAP	Seller pays for carriage to the named place except for costs related to import clearance and assumes all risks prior to the point that the goods are ready for unloading by the buyer	Named Place
DDP	Seller is responsible for delivering the goods to the named place in the country of the buyer and pays all costs in bringing the goods to the destination including import duties and taxes.	Named Place in the country of the buyer
FOB	Seller delivers the goods on board the vessel nominated by the buyer at the named port of shipment or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel, and the buyer bears all costs from that moment onwards.	The vessel to which the goods are delivered. The location of the supply is the location of the vessel when the goods are delivered to it. It is irrelevant that the seller may pay for the freight.
CFR	Seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. the seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination	The vessel to which the goods are delivered. The location of the supply is the location of the vessel when the goods are delivered to it.
CIF	Seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. The seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination. 'The seller also contracts for insurance cover against the buyer's risk of loss of or damage to the goods during the carriage. The buyer should note that under CIF the seller is required to obtain insurance only on minimum cover. Should the buyer wish to have more insurance protection, it will need either to agree as much expressly with the seller or to make its own extra insurance arrangements.	The vessel to which the goods are delivered. The location of the supply is the location of the vessel when the goods are delivered to it. It is irrelevant that the seller pays for the freight and insurance because the risk has passed to the buyer and hence the buyer in effect has possession and the goods have been supplied to the buyer.
FAS	Seller delivers when the goods are placed alongside the vessel (e.g., on a quay or a barge) nominated by the buyer at the named port of shipment. The risk of loss of or damage to the goods passes when the goods are alongside the ship, and the buyer bears all costs from that moment onwards.	Alongside the vessel (wherever that is).

An overseas manufacturer either needs to enter into a supply arrangement or structure its commercial arrangements with its Australian distributors so that the supply to the distributors takes place outside of New South Wales. In that case the distributors are likely to be First Suppliers. If an overseas manufacturer is the first supplier in NSW without having entered into a supply arrangement in contravention of the legislation, the EPA's powers include being able to seize the containers have been first supplied in NSW by that manufacturer in contravention of the legislation.