Environmental Defender's Office
Western Australia (Inc)

Telephone (08) 9221 3030 Facsimile (08) 9221 3070
Level 2 Kings Office Tower, 533 Hay St, Perth WA 6000
email: edowa@edowa.org.au www.edowa.org.au
Freecall for non-metropolitan callers: 1800 175 542

28 September 2006

Mr Dave West
National Campaign Coordinator
The Boomerang Alliance
By email to westd@iprimus.com.au

Dear Dave

ADVICE RE: LEGAL IMPEDIMENTS TO CONTAINER DEPOSIT LEGISLATION

Introduction

1. The Boomerang Alliance has sought advice concerning potential legal impediments to a State's ability to implement Container Deposit Legislation ("CDL"), in the context of the draft Western Australian Waste Avoidance and Resource Recovery Bill ("WARR Bill") currently undergoing public consultation, which contains the head powers expected to facilitate the implementation of a CDL framework in Western Australia.

2. There are numerous different CDL models, both in effect in jurisdictions around the world, and postulated by various stakeholder groups. The only working example in Australia is that in effect in South Australia as currently set out in the *Environmental Protection Act 1993* (SA) Part 8 Division 2 ("the South Australian CDL Scheme").

3. We are instructed to address the following matters:

   3.1. An overview of provisions and principles in legislation designed to promote competition and fair trading within Australia (the "Free Market Legislation") – which include the *Commonwealth of Australia Constitution Act 1901* ("the Constitution"), Mutual Recognition legislation, and the *Trade Practices Act 1974 (Cth)* – relevant to the implementation of CDL in Western Australia;

   3.2. The types of CDL approaches which might be likely to conflict with the Free Market Legislation;

   3.3. Specific aspects of the Boomerang CDL model concerning:

3.3.1. Imposing handling fees, the amount of which would be dependant on the container's material type (recyclability and recycled content);

3.3.2. Incentives to encourage reprocessing to take place in Western Australia;

3.4. Whether CDL could realistically be introduced in Western Australia under the Draft WARR Bill, and the limitations and/or advantages of doing so.

3.5. This advice is accordingly organised along those lines and divided into sections as follows:

A. Overview Of The Free Market Legislation And Principles Relevant To Implementation Of CDL In Western Australia

The Constitution

4. State law is invalid to the extent that it is incompatible with the Constitution or with valid Commonwealth laws[1].

Free Trade Provision: s92

5. Section 92 of the Constitution requires that trade and commerce between States be free; this is interpreted by the courts to mean only that interstate trade and commerce shall be free of discriminatory burdens of a protectionist kind (ie protecting local commerce from interstate competition)[2].

6. The modern test to determine whether a State law falls foul of s92 is to consider whether, on the facts, the practical effect of a State law is protectionist. If it is, but any burden imposed on interstate trade is incidental and proportionate[3] to the legitimate object sought to be achieved by the Act, then the State law does not contravene s92[4].

7. This approach takes into account the fundamental consideration, in determining what is relevantly discriminatory, that, subject to the Constitution, the legislature of a State has power to enact legislation for the well-being of the people of that State.

8. In *Castlemaine Tooheys Limited v South Australia* (1990) 169 CLR 436 (the Bond Case), the Court considered whether provisions of the Beverage Container Act 1975 (S.A.), as amended, and Regulations made under that Act ("South Australia 1986 CDL"), were contrary to s92 of the Constitution, and found that although the CDL system itself was valid, aspects of it were not.

9. In particular, South Australia 1986 CDL imposed a 4c deposit on refillable bottles and a 15c deposit on non-refillables, in the context of a local market which used predominantly refillable bottles. The Bond brewing companies, which had been increasing their market share in South Australia, did not produce its beer in refillable bottles and it would be uneconomical to do so. As a result, the imposed price differential between beer sold by the Bond brewing companies in South Australia, and beer sold by its South Australian competitors, made the Bond brewing companies' product non-competitive.

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[1] S109 *Commonwealth of Australia Constitution Act 1901*

[2] *Cole v. Whitfield* (1988) 165 CLR 360; *Castlemaine Tooheys Limited v South Australia* (1990) 169 CLR 436; *Barley Marketing Board (N.S.W.) v Norman* (1990) 171 CLR 182 F.C. 90/047; *Sportodds Systems Pty Limited v State of New South Wales* [2003] FCAFC 237; *Cross v Barnes Towing And Salvage (Qld) Pty Ltd & Ors* [2005] NSWCA 273

[3] Note that there is significant resistance to the introduction of a reasonable proportionality test into Australian jurisprudence. Instead, an examination of the proportionality of the measures imposed is relevant here to determining the true objects of the legislation, rather than a yardstick against which legislation should be measured. See, eg, *Castlemaine Tooheys Limited v South Australia* (1990) 169 CLR 436; *Cunliffe And Another v Commonwealth Of Australia* (1994) 124 ALR 120; *Cross v Barnes Towing And Salvage (Qld) Pty Ltd & Ors* [2005] NSWCA 273. For present purposes the distinction is of little importance.

[4] Ibid at 2.

10. Accordingly, the factual effect of the South Australia 1986 CDL was discriminatory and protectionist[5].

11. The court then considered whether the discriminatory burden was incidental and proportionate to the objects sought to be achieved by the South Australia 1986 CDL. Those objects, which were legitimate in that they were aimed at protecting the well-being of the people of South Australia, were stated to be:

    11.1. to promote litter control by forcing non-glass containers and non-refillable bottles into a return system by encouraging return; and

    11.2. to promote energy and resource conservation by discouraging the use of non-refillable containers by imposing a higher deposit and by requiring acceptance of returns at the point of sale (thus discouraging retailers from handling them).

12. It was common ground between the parties in the Bond case that a refund of 6 cents per non-refillable bottle for twelve months and thereafter a refund of 4 cents per non-refillable bottle would have been sufficient to ensure the return of non-refillable bottles at the same rate as refillable bottles. Accordingly the 15c deposit burden was disproportionate to achieving the litter control object.

13. As regards the energy and resource conservation object, the court found that the Bond brewing companies manufactured their bottles outside South Australia and accordingly the fact that they used non-refillable bottles was not relevant to the conservation of South Australian energy and resources. The fact that refillable bottles would conserve energy and resources elsewhere than in South Australia was irrelevant since South Australian legislation was under scrutiny; clearly the South Australian legislature cannot legislate other than for South Australia.

14. The South Australian CDL scheme was subsequently revised[6] to remove the distinction between refillable and non-refillable containers and is considered, in its present form, not to offend s92 of the Constitution[7].

15. Subsequent cases[8] have continued to apply the principles refined in the Bond case, which should be taken into account in establishing CDL in Western Australia as follows:

    15.1. The effect of CDL must be carefully scrutinized to establish whether it has a protectionist outcome (intentionally or unintentionally).

    15.2. If a protectionist outcome is established, then the CDL risks falling foul of s92 of the Constitution, and steps must be taken to ensure that the burden or advantage is proportionate to the object to be achieved.

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[5] Note: the discriminatory and protectionist burden came about because the refillable bottle market was already developed in South Australia, giving local brewing companies the competitive edge in the context of the South Australian 1986 CDL. In present day Western Australia the same legislation would not be protectionist since the local refillable bottle market is not developed; accordingly, no competitive edge would be afforded to local brewers over out-of-State brewers.

[6] The current SA CDL scheme is governed by the *Environmental Protection Act 1993 (SA)* Part 8 Div 2 and the *EPA (Beverage Container) Regulations 1995 (SA)*

[7] COAG, *Mutual Recognition Agreement Legislation Review*, 1998, at 6.8.2

[8] *Barley Marketing Board (N.S.W.) v Norman* (1990) 171 CLR 182 F.C. 90/047; *Sportodds Systems Pty Limited v State of New South Wales* [2003] FCAFC 237; *Cross v Barnes Towing And Salvage (Qld) Pty Ltd & Ors* [2005] NSWCA 273

15.2.1. Apart from not overly exceeding the minimum measures necessary to achieve the object, steps which could be taken include establishing a complaints mechanism whereby interstate traders could have allegedly protectionist measures reviewed[9].

15.3. When establishing the object of CDL in Western Australia, regard must be had to the fact that the Western Australian legislature cannot legislate to protect the welfare or environment of people in other States.

15.3.1. It would not be a legitimate object of Western Australian CDL, for example, to target containers manufactured in other States with a view to reducing energy and resource consumption in those States.

15.3.2. The objects in s5 of the WARR Bill must be considered in light of this principle (see below in Section 4).

16. In summary, CDL established within a single State is not unconstitutional as contrary to s92 *per se*, but care must be taken to ensure that any measures within the CDL framework which may have the effect of imposing a protectionist burden on interstate commerce are proportionate to the legitimate outcomes sought to be achieved.

Customs and Excise Provisions: s90

17. By Section 90 of the Constitution, the power to impose duties of customs and excise is expressly reserved to the Commonwealth Government – State laws purporting to establish customs or excise tax would be invalid.

18. This is not an issue in the South Australian CDL Scheme since that scheme does not establish, administer, handle or collect funds arising from deposits or handling fees, leaving such matters unregulated and in the hands of industry.

19. Customs is defined as a monetary fee imposed on imported or, less commonly, exported goods by the government as a condition of their importation or exportation[10]. CDL is unlikely to infringe upon the Commonwealth's customs power since CDL would be unlikely to impose a handling fee or deposit on containers on importation into Western Australia, but rather on the sale of the goods (in respect of imported containers, presumably at the point of sale to the local distributor).

20. Excise is defined as a tax on goods levied at some point in their production or distribution which has the effect of increasing the price of the goods supplied to the customer[11].

21. There is accordingly a risk that a handling fee or deposit, if characterized as a tax, could offend s90 of the Constitution by virtue of being an excise, since it would be levied at

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[9] See judicial comment in *Commonwealth v. Tasmania (The Tasmanian Dam Case)* 1983 158 CLR 1 and *Marcus Clarke & Co. Ltd. v. The Commonwealth* (1952), 87 CLR 177, at pp. 215-216 and 256

[10] *Commonwealth v South Australia* (1926) 38 CLR 408 ; [1926] ALR 40

[11] *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* (1993) 173 CLR 561 ; 118 ALR 1

some point in production or distribution of goods and would inevitably increase the price of the goods.

22. The fact that a payment is not paid into the Consolidated Revenue Fund has no bearing on whether the payment is a tax or not[12].

23. The traditional definition of a tax is that it is "a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for the provision of services rendered"[13].

24. That traditional definition has been substantially qualified by the High Court in a series of cases since 1988[14]. Significantly:

    24.1. "...it is not essential to the concept of a tax that the exaction should be by a public authority... a levy imposed for public purposes by a non-public authority acting pursuant to a statutory authority may be a tax"[15].

    24.2. "... there is no reason in principle why a tax should not take a form other than the exaction of money or why the compulsory exaction of money under statutory powers could not be properly seen as taxation notwithstanding that it was by a non-public authority or for purposes which could not properly be described as public"[16].

    24.3. a "complex problem of public importance is of necessity a public purpose"[17].

25. In fact, the present position may be that "any requirement that a levy must be paid to a public authority and raised for a public purpose (in the strict sense of those expressions) has been rejected in favour of a test which implies what has been described as "a single general notion, namely that a levy be a compulsory exaction of money under law" - at least where the levy has been imposed in the public interest, as a solution to a problem of public importance."[18]

26. CDL schemes by their nature involve a compulsory exaction of money (both in relation to deposit and handling fee, if any) enforceable by law for a public purpose, and accordingly risk being characterised as a tax.

27. Accordingly, CDL schemes must ensure that they fall within the negative attribute ascribed by the traditional definition of a tax ("not a payment for the provision of services rendered") to avoid being characterised as a tax and risk offending s90 of the Constitution as an excise.

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[12] *Australian Tape Manufacturers Assn Ltd v Commonwealth* (1993) 176 CLR 480 (inter alia)
[13] Latham CJ in *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 ; [1938] ALR 370
[14] *Air Caledonie International & Ors v The Commonwealth of Australia* (1988) 165 CLR 462; *Australian Tape Manufacturers Assn Ltd v Commonwealth* (1993) 176 CLR 480; *Workcover Corporation Of South Australia v Olifent* (1997) BC9702316; *United Energy Ltd v Federal Commissioner of Taxation* (1997) 157 ALR 589
[15] *Australian Tape Manufacturers Assn Ltd v Commonwealth* (1993) 176 CLR 480 at 501
[16] *Air Caledonie International & Ors v The Commonwealth of Australia* (1988) 165 CLR 462
[17] *Australian Tape Manufacturers Assn Ltd v Commonwealth* (1993) 176 CLR 480 at 505
[18] Johnston, P. *A Taxing Time: The High Court and the Tax Provisions of the Constitution*, The University of Western Australia Law Review (1993), 23(2) pp 362-371, quoted with approval by Olsson J in *Workcover Corporation Of South Australia v Olifent* (1997) BC9702316 at 12.

28. This negative attribute has been expanded upon, and is well summarised in the following passage by the full bench of the High Court in *Air Caledonie International & Ors v The Commonwealth of Australia* (1988) 165 CLR 462:

> "...the negative attribute – 'not a payment for services rendered' – should be seen as intended to be *but an example of various special types of exaction which may not be taxes* [emphasis added] even though the positive attributes mentioned by Latham CJ [in the traditional definition] are all present.
>
> Thus, a charge for the acquisition or use of property, a fee for a privilege and a fine or penalty imposed for criminal conduct or breach of statutory obligation are other examples of special types of exactions of money which are unlikely to be properly characterised as a tax notwithstanding that they exhibit those positive attributes. On the other hand, a compulsory and enforceable exaction of money by a public authority for public purposes will not necessarily be precluded from being properly seen as a tax merely because it is described as a "fee for services".
>
> If the person required to pay the exaction is given no choice about whether or not he acquires the services and the amount of the exaction has no discernible relationship with the value of what is acquired, the circumstances may be such that the exaction is, at least to the extent that it exceeds that value, properly to be seen as a tax."

29. It seems to us that the deposit component of a CDL scheme would be a payment which is unlikely to be properly characterised as a tax notwithstanding that it may appear to exhibit the positive attributes of a tax in the traditional definition, not least because a deposit is redeemable, indicating to us that it would properly be an example of one of the "various special types of exaction which may not be taxes".

30. There is, however, some risk that the handling fee, which forms part of many CDL models, may be a tax since it shows the positive attributes of a tax and is revenue used to administer a CDL scheme in the public interest. Care needs to be taken to ensure that handling fees are properly a "payment for services rendered".

31. In the case of *Australian Tape Manufacturers Assn Ltd v Commonwealth* (1993) 176 CLR 480 ("the Blank Tape Case"), a full bench of the High Court had to consider a statutory regime which compelled vendors of blank tapes to pay a fee for each blank tape into a fund administered by a collecting society, approved by the Attorney-General, for distribution to its membership of copyright owners or agents. This scheme was in recognition of the fact that blank tapes are often used to unlawfully infringe copyright, and in an attempt to compensating the owners of copyrights for the private or domestic taping of sound recordings.

32. The majority decision was that the fee was not a royalty but a tax, because it was a compulsory payment imposed for public purposes by a non-public authority under statutory authority. Importantly, the fee did not fall into the "fee for services" class because the payment did not confer any right to copy sound recordings but was only intended to compensate the owners of copyright.

33. In the South Australian case of *Workcover Corporation Of South Australia v Olifent* (1997) BC9702316, the full bench of the Supreme Court had to consider whether the

provisions of the *Workers Rehabilitation and Compensation Act* 1986 (SA), which required that employers make monthly payments into a central workers compensation fund administered by a public authority, was a tax.

34. The State argued that the arrangement was not a tax because the fund provided a service to employers in that it was established to deal with employees' compensation claims on behalf of employers and accordingly belonged in the category of a "fee for services".

35. The court ruled that the connection between the monthly payment and the service rendered was insufficiently particular to avoid being characterised as a tax, quoting the statement in *Air Caledonie International & Ors v The Commonwealth of Australia* (1988) 165 CLR 462 that the "fee for services" exception refers to "a fee or charge exacted for particular identified services provided or rendered individually to, or at the request or direction of, the particular person required to make the payment". The compulsory requirement to pay into the fund, administered to deal with workers' compensation claims on behalf of employers, was a tax.

36. There are three principles to be drawn from the above in relation to those models of CDL which include a statutory handling fee:

    36.1. The CDL framework should clearly create and define the responsibility, on the part of manufacturers/ distributors of relevant containers, to pay for the recovery and recycling of those containers and the administration of that system. This is in order to create a liability which a handling fee fund can then provide a service in relation to;

    36.2. The amount of the handling fee should be calibrated to ensure that it bears a close relationship to the cost of dealing with the liability so created;

    36.3. The handling fee fund must be quarantined to ensure that it is only used to deal with the liability so created.

<u>Mutual Recognition Act 1992 (Cth); Mutual Recognition (Western Australia) Act 2001</u>

Overview

37. The Commonwealth *Mutual Recognition Act 1992* (the "MR Act") is presently adopted in Western Australia as a schedule to the *Mutual Recognition (Western Australia) Act 2001* (and prior to that, through the *Mutual Recognition (Western Australia) Act 1995*), which expires in 2011.

38. The Committee on Regulatory Reform Review Group of the Council of Australian Governments ("COAG"), in its *Mutual Recognition Agreement Legislation Review (1998)*, describes the rationale behind the introduction of the MR Act as flowing from:

> "the realisation that the existence of multiple regulatory environments across the States and Territories was impeding freedom of trade, and compromising the ability of the nation to compete in the international economy.
> ...

The effect of mutual recognition legislation is that *goods which are legally saleable in one jurisdiction are satisfactory for sale throughout the country*, and people who work in a registered occupation in one jurisdiction can freely enter an equivalent occupation in other jurisdictions" (emphasis added).[19]

39. Part 2 of the MR Act deals with the application of the mutual recognition principle to goods (defined as "goods of any kind, and includes… a package containing goods; or… a label attached to goods"[20]) produced in or imported into a State ("the first State") and their sale in another State ("the second State")[21].

40. The mutual recognition principle is, essentially, that goods which may be lawfully sold in the first State may equally be lawfully sold in the second State without the need for compliance with additional requirements (such as production, composition, quality or performance standards[22] and presentation (including packaging and labelling)[23]).

41. Accordingly, CDL schemes – which would inevitably impose packaging, labelling and possibly composition requirements on goods additional to requirements imposed in States without CDL – would appear *prima facie* to violate the mutual recognition principle. This is particularly so due to the inclusion of labelling and packaging in the definition of goods.

42. There are however exceptions to the mutual recognition principle, set out in s11 of the MR Act. The relevant exceptions permit the second State to regulate:

    42.1. The manner of the sale of goods in the second State or the manner in which sellers conduct their business (for example, laws governing the circumstances in which goods may or may not be sold) – so long as those laws apply equally to goods produced in or imported into the second State ("the s11(2) exception"); and

    42.2. Transportation, storage or handling of goods, so long as such regulation applies equally to goods produced within the State and is directed at health and safety or preventing, minimising or regulating environmental pollution in the second State ("the s11(3) exception", together with the s11(2) exception called collectively "the s11 exceptions").

43. In addition to the exceptions set out in s11, the MR Act also allows for permanent[24] and temporary[25] exemptions from the operation of the MR Act.

    43.1. In accordance with Part VI of the Mutual Recognition Agreement 1992, the unanimous consent of the Heads of government of *all* the participating parties is required to obtain a permanent exemption.

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[19] COAG, *Mutual Recognition Agreement Legislation Review*, 1998, Executive Summary
[20] *Mutual Recognition Act 1992 (Cth)*, s4
[21] *Mutual Recognition Act 1992 (Cth)*, s8
[22] *Mutual Recognition Act 1992 (Cth)*, s10(a)
[23] *Mutual Recognition Act 1992 (Cth)*, s10(b)
[24] *Mutual Recognition Act 1992 (Cth)*, s14
[25] *Mutual Recognition Act 1992 (Cth)*, s15

43.2. Temporary exemptions (for no more than 12 months) may be made by law or regulation for the purpose of protecting the health or safety of the local community or controlling environmental pollution.

44. South Australia's CDL scheme is permanently exempted from the MR Act.

The s11 Exceptions

45. While there is a body of case law which considers the operation of the MR Act in relation to professions, we were unable to find any case law specifically dealing with the provisions relating to goods and the s11 exceptions. We note that the Productivity Commission has had the same difficulty[26].

46. There is accordingly no certainty as to how a court might interpret those exceptions, and the extrapolation of the principles to CDL mechanisms.

47. On an initial reading, CDL mechanisms appear likely to fall within the s11 exceptions:

47.1. As regards the s11(2) exception – regulating the manner of sale of goods - CDL schemes deal with the manner of sale of beverages, governing the circumstances in which beverages may or may not be sold;

47.2. As regards the s11(3) exception – regulating transport, storage and handling of goods – CDL schemes would need to introduce labelling requirements to facilitate the handling of the empty containers in accordance with the scheme, directed at regulating environmental pollution[27].

48. It is of course necessary, however, to consider the s11 exceptions in more detail.

49. The s11(2) exception is followed in the Act by specific examples of what is meant by "manner of sale", which is the essence of the exception. Those examples, most of which are not usefully on point in the context of CDL, include (at 11(2)(e):

49.1. The circumstances in which goods may or may not be sold.

Accepted instances[28] which fall within the category of this example include the requirement that pornographic material be placed above a certain shelf height to prevent children from accessing it, and the requirement that perishable goods not be stored in a window front for health reasons.

Of the five "manner of sale" examples in the MR Act which excuse laws from the operation of the mutual recognition principle by the s11(2) exception, this

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[26] Productivity Commission, *Evaluation of the Mutual Recognition Schemes*, 2003, Chapter 9.1

[27] Note, in this regard, the definition of "pollution" given by the Full Court of the Supreme Court of Western Australia per Malcolm CJ in *Palos Verdes Estates Pty Ltd v Carbon (1991)* 72 LGRA 414 at p 428 where his Honour held that the ordinary meaning of pollution is to "make physically impure, foul or filthy". See also the statement of Mason CJ, in *Castlemaine Tooheys v South Australia (1986)* 161 CLR 148 at 155 where his Honour referred to the South Australian 1986 CDL as "a legislative scheme which is designed to protect the environment from pollution by litter".

[28] Productivity Commission, *Evaluation of the Mutual Recognition Schemes*, 2003, Chapter 9.1, and COAG, *Mutual Recognition Agreement Legislation Review*, 1998, Chapter 6.10.1

> example is the widest and the one in which CDL might best fit. The circumstances in which containers (or the contents of the containers) "may be sold" would be within the framework of the CDL requirements, such as a requirement on the seller to levy a deposit and to account for that deposit to a central authority. The circumstances in which the container "may not be sold" would then be where the seller does not levy a deposit and account to a central authority.

50. It is in any event not necessary to attempt to fit CDL within the statutory s11(2) exception examples because they are not an exhaustive list[29]. The clear principle is that it is permissible for jurisdictions to regulate the *manner* in which goods are sold, rather than the issue of whether the goods are *satisfactory* to be sold.

51. We are accordingly of the opinion that the s11(2) exception will apply in the case of those approaches to CDL which impose deposit requirements on the sale of goods in containers (ie addressing the manner in which those goods may be sold), but will not apply in relation to CDL approaches which seek to ban the sale of particular containers (which purport to rule on whether particular containers are or are not satisfactory to be sold).

52. The s11(3) exception, which allows laws dealing with transport, storage and handling to be exempt from the mutual recognition principle, has predominantly been used in the context of regulations relating to transport, storage and handling of chemicals and explosives which present a hazard to people or the environment, where there is very little standardization across the various Australian jurisdictions[30].

53. Without the s11(3) exception, the application of the mutual recognition scheme would mean that a hazardous chemical labelled in accordance with the safety regulations in force in the first State, would not need to be labelled in accordance with the safety regulations in the second State in order to be lawfully sold. That would have led to confusion and danger to public health and the environment. The exception operates to avoid risk to health and the environment.

54. In the case of CDL schemes, labelling requirements would be necessary in order to ensure that the container is handled in accordance with the strictures of the CDL scheme once the goods in the container have been consumed. Those handling requirements would be directed at facilitating the implementation of CDL, being a system directed at (among other things) "regulating environmental pollution"[31].

55. COAG, *Mutual Recognition Agreement Legislation Review*, 1998, at Chapter 6.11.2 states:

> "However, there is a grey area in relation to circumstances in which there is a conjunction between requirements which fall under the mutual recognition principle (e.g. labelling requirements), and requirements which fall under an exception to the mutual recognition principle (e.g. storage and handling requirements).

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[29] s11(2) itself states that "manner of sale" laws are excepted "*including* laws set out in the examples below" (emphasis added); "...these are examples only, mutual recognition also does not apply to all other manner of sale requirements" - Productivity Commission, *Evaluation of the Mutual Recognition Schemes*, 2003, Chapter 9.1

[30] Productivity Commission, *Evaluation of the Mutual Recognition Schemes*, 2003, Chapter 9.1; COAG, *Mutual Recognition Agreement Legislation Review*, 1998, Chapter 6.11

[31] See above at note 27, and our comments in section D concerning the objects of the WARR Bill.

For example, a jurisdiction may require a person to label their goods to include information on storage and handling requirements. It is not clear which section of the Act would prevail."

56. The Productivity Commission report *Evaluation of the Mutual Recognition Schemes*, 2003, flags those concerns but does not address them.

57. In our view those concerns have no legal basis and may be disregarded. The apparent conflict is not a real one on proper construction of the MR Act. Section 11(1) of the MR Act specifically states that the mutual recognition principle is subject to exceptions. The nature of a principle and exception mechanism is that exceptions operate to exclude something which would otherwise fall within the general principle. Accordingly there is no conflict between s10(b), which states that interstate goods need not comply with presentation requirements, and s11(3) which allows the operation of laws regulating transport, storage and handling – as long as those laws apply equally to goods produced within the State and are directed at health and safety or preventing, minimising or regulating environmental pollution in the second State. That is the nature of an exception.

58. We are of the opinion that the s11(3) exception would facilitate components of CDL dealing with labelling requirements as part of a scheme directed at regulating environmental pollution by regulating the handling and storage of goods subject to CDL.

59. We are aware of a great deal of anecdotal uncertainty as to whether the s11 exceptions would be effective to facilitate the operation of CDL, or whether CDL is doomed to failure by virtue of the bite of the mutual recognition principle. In our opinion it is essential to return to and focus on the principles underlying the MR Act:

    59.1. The mutual recognition scheme as it pertains to goods focuses on the goods themselves, to ensure that "...goods which are legally saleable in one jurisdiction are satisfactory for sale throughout the country..."[32].

    59.2. The mutual recognition scheme *does not* target the States' regulation of the manner or circumstances in which goods may be sold or by whom or to whom they may be sold, as long as local and out-of-state goods are treated equally. The intention was that "...the parties to the agreement sought to preserve each jurisdictions' power to regulate in these areas, while preventing such laws acting in a discriminatory way against imports."[33]

60. With that in mind, CDL which does not prevent containers capable of being sold in one jurisdiction from being sold in another does not offend against the MR Act.

61. Taking the example of a soft drink, the soft drink in the container remains as satisfactory to be sold in the second State as in the first State even if CDL is in effect in the second State. Similarly, there is no reason why CDL need have the effect of changing the satisfactory nature for sale of the container in which the soft drink is sold.

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[32] COAG, *Mutual Recognition Agreement Legislation Review*, 1998, Executive Summary
[33] Productivity Commission, *Evaluation of the Mutual Recognition Schemes*, 2003, Chapter 9.1

62. The satisfactory nature of the goods themselves in a CDL scheme remains constant and the mutual recognition principle is not offended against. The CDL scheme would simply be a system aimed at regulatory matters within the competency of the jurisdiction.

63. The mutual recognition principle would however be breached by a CDL model which dictates the material composition of containers. That is because containers are goods (as defined in s4 of the MR Act) and that would be tantamount to saying that some containers, although satisfactory to be sold in other jurisdictions, are not satisfactory to be sold in the CDL jurisdiction.

Permanent Exemption

64. Our view is that, in its present form, the South Australian CDL scheme would be contrary to the mutual recognition principle and would not be saved by the s11(2) exception. That is because:

    64.1. The South Australian CDL scheme requires that application be made for approval of a container before a container may be sold.

        64.1.1. That would be acceptable if the approval process simply resulted in the categorisation of the container. The reality, however, is that the approval application may result in a decision that the container is not acceptable for classification at all.

        64.1.2. In other words, there is an inherent power within the South Australian CDL scheme to determine that a container, which may be considered satisfactory for sale in another Australian jurisdiction, is not satisfactory for sale in South Australia. That falls outside the limits of the s11(2) "manner of sale" exception.

    64.2. s72 of the *Environment Protection Act 1993 (South Australia)* specifically prohibits the sale of certain types of container, such as those with a detachable ring-pull. That is, prohibited containers are not suitable to be sold subject to "manner of sale" requirements. They are not suitable for sale at all.

65. Accordingly, the permanent exemption is in our view necessary to the continued application of the South Australia CDL scheme in its present form.

66. Although a CDL scheme for Western Australia could be created to ensure that the scheme is protected from the mutual recognition principle by the s11 exceptions, it would be prudent to attempt to obtain a permanent exemption for CDL in Western Australia. A permanent exemption status simply puts the matter beyond doubt and challenge.

67. s47 of the MR Act allows the Governor-General to make regulations amending the Schedules (ie including Schedules 1 and 2 setting out permanent exemptions) only if the designated person for each participating jurisdiction has published a notice in the official gazette of that jurisdiction setting out the terms of the amendment and requesting it be made. In other words, establishing a permanent exemption requires the co-operation of each participating jurisdiction – at present, all States and Territories.

68. Successfully obtaining a permanent exemption would be dependant not only on political will in Western Australia but also the degree of political opposition created by industry groups adverse to the introduction of CDL in other States and Territories.

69. We mention in this regard that in September 1997 the ACT legislated to prohibit the sale in the ACT of eggs produced under the battery cage system, and to provide for labelling of eggs produced under the battery cage system[34](the "Battery Hen legislation"). Those amendments were contrary to the mutual recognition principle and did not escape the operation of that principle through the operation of the s11 exceptions, because the effect was to make battery-laid eggs, satisfactory to be sold in other States, unsatisfactory to be sold in the ACT.

70. The ACT therefore had to seek the agreement of the other jurisdictions to obtain a permanent exemption for the Battery Hen legislation from the operation of the MR Act. Both Victoria and South Australia (at least) refused to give that consent and accordingly the legislation failed.

71. We suggest that Western Australia has significantly greater political cross-jurisdictional clout than the ACT. We also note that the beverage industry lobby has significantly greater clout than the battery hen industry lobby.

72. Whether a permanent exemption can be successfully negotiated is beyond the competence of this advice. Nevertheless we venture the following points:

    72.1. We reiterate that, in our opinion, in view of the s11 exceptions the mutual recognition principle is not a bar to the implementation of compliant CDL; a permanent exemption would only serve to put the matter beyond legal challenge (with the associated expense and uncertainty). That view should be stressed as the start point in negotiation with the other jurisdictions to obtain the permanent exemption.

    72.2. When CDL is introduced, a temporary exemption (for a period of not more than 12 months, under s15 of the MR Act) could be unilaterally established by regulation to enable CDL operation to get underway (without the prospect of MR Act challenge) in parallel with permanent exemption negotiations. This might allow the CDL scheme to take hold and hopefully become entrenched, so that if ultimately a permanent exemption is not successfully negotiated, beverage industry will already have had to make any capital investment needed to continue to trade in Western Australia under the CDL scheme, reducing the incentive to challenge the scheme. 12 months should hopefully also prove a sufficient length of time to win the hearts and minds of the Western Australian electorate, and provide data substantiating any environmental and economic advantages generated by the system.

    Again, however, care must be taken to send the correct signal in establishing a temporary exemption – that it would simply be a precautionary measure aimed at avoiding unnecessary uncertainty and cost associated with spurious legal challenge, rather than an indication that an exemption would otherwise be required to allow CDL to operate in the context of the MR Act.

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[34] Amendments to the *Animal Welfare Act 1992(ACT)* and *Food Act 1992 (ACT)*

National Competition Policy

73. We are aware of a view expressed by some parties with an interest in CDL that CDL would be contrary to National Competition Policy ("NCP"); it is accordingly appropriate to briefly examine that assertion.

74. On 11 April 1995 Western Australia, along with the other Australian States and Territories, became a signatory to the *Competition Principles Agreement 1995* (along with the *Conduct Code Agreement 1995* and the *Agreement to Implement the NCP and Related Reforms 1995*, together referred to as "the NCP Agreements") in furtherance of the National Competition Policy.

75. The *Competition Principles Agreement*'s guiding principle is set out in Clause 5(1) and obliges governments to ensure legislation does not restrict competition unless it can be demonstrated that the benefits of the restriction to the community as a whole outweigh the costs (specifically taking ecological matters into account in determining benefit[35]), and the objectives of the legislation cannot otherwise be achieved.

76. In order to achieve the guiding principle, the signatory governments are required to review and if appropriate amend their stock of legislation to eliminate competition restrictions[36], and to ensure that all new legislation (ie including CDL) is accompanied by evidence that it does not offend against the guiding principle[37].

77. The *Conduct Code Agreement* concerns the enactment in each signatory jurisdiction of what is called "the schedule version" of the *Trade Practices Act 1974* (Cth) ("TPA"). The schedule version of the TPA is identical to the TPA except that it encompasses individuals (a device to overcome the problem that the Commonwealth can regulate corporations but not individuals). Accordingly, the implementation of the *Conduct Code Agreement* ensured that the operation of the TPA encompasses both corporations and individuals.

78. The *Agreement to Implement the NCP and Related Reforms* set up a scheme by which the Commonwealth Government makes payments to the States and Territories against satisfactory progress with implementation of the National Competition Policy (that is, the review and amendment of laws which would restrict competition).

79. We are of the view that the National Competition Policy and the NCP Agreements are no bar to the implementation of CDL. That is because:

    79.1. CDL models need not be formulated to restrict competition; indeed:

        79.1.1. in order to protect against offending the free trade provisions of the Constitution, care should already have been taken in the formulation of the CDL model to avoid discriminatory burdens of a protectionist kind (see above); and

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[35] Clause 1(3) of the *Competition Principles Agreement 1995*
[36] Clause 5(3) of the *Competition Principles Agreement 1995*
[37] Clause 5(5) of the *Competition Principles Agreement 1995*

79.1.2. in order to ensure that the CDL model implemented falls within the exceptions to the mutual recognition principle set out in s11 of the MR Act, the model should have been formulated to apply equally to goods produced within the State as those produced out of state (again, see above).

79.2. If a CDL model implemented did restrict competition, that might well be justified by the caveat to the competition principle that the benefits of the restriction to the community as a whole outweigh the costs and the objectives of the legislation cannot otherwise be achieved[38].

79.3. Finally, and fundamentally, the NCP Agreements are exactly that – agreements – and "undertakings between governments which are purely an exercise of political power are not justiciable."[39]

80. It is worth noting COAG's opinion that "The Permanent Exemption of the beverage container legislation in SA [from the operation of the MR Act] does not offend competition policy."[40]

The *Trade Practices Act 1974* (Cth)

81. We include a very brief comment on the TPA for the sake of completeness.

82. The most relevant sections of the TPA (s45 *et seq*) are concerned with contracts, arrangements or understandings likely to have the effect of substantially lessening competition.

83. CDL is not a contract, an arrangement, or an understanding, but legislation. An enacted system of CDL is accordingly not capable of challenge under the TPA.

84. In any event, the operation of s45DD(3) of the TPA excludes conduct the dominant purpose for which is substantially related to environmental protection.

85. It is of course still the case that agreements between parties involved in the CDL industry must not be contrary to the TPA, as is proper and applicable in every sector of industry.

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[38] See, in this regard, the Productivity Commission's evaluation of that cost/ benefit analysis in the South Australian context: Productivity Commission, *Evaluation of the Mutual Recognition Schemes*, 2003, Chapter 7

[39] *South Australia v Commonwealth (Railways Standardisation Case)* (1962) 108 CLR 130 at 140; *Commonwealth Aluminium Corp Ltd v A-G (Qld)* [1976] Qd R 231 at 261

[40] COAG, *Mutual Recognition Agreement Legislation Review*, 1998, Chapter 6.8.5

B. CDL Approaches Which Might Be Likely To Conflict With The Free Market Legislation

86. There are numerous different CDL models; it is accordingly not feasible to examine each approach to express a view as to which would offend the Free Market Legislation. We consider it preferable to summarise the relevant principles against which CDL approaches should be examined, to assist in broadly identifying those inappropriate to Western Australia.

87. In order to ensure that a Western Australian CDL model does not contravene the s92 Free Trade provisions of the Constitution, any measures within the CDL framework which may have the effect of imposing a protectionist burden on interstate commerce must be proportionate to the legitimate outcomes sought to be achieved.

    87.1. Every single aspect of the system must be considered against the question: will this give the local industry an advantage over their interstate competitors?

    87.2. If so, is that edge proportionate to achieving the stated aim of the CDL? Are there are other ways the aims could be achieved which would not give local industry an advantage, or give a lesser advantage?

    87.3. It would be prudent to include a mechanism giving out-of-state interests a forum in which allegations of discrimination and protectionism can be aired and considered with the real prospect of adjustments to the system if the allegations are justified.

88. To avoid being characterized as an excise contrary to s90 of the Constitution, a CDL model which includes a statutory handling fee should take care to ensure that the handling fee is properly a "fee for services" not a tax, by:

    88.1. Expressly establishing that manufacturers/ distributors of relevant containers are liable for the cost of recovery and recycling of those containers and the administration of that system;

    88.2. Ensuring the amount of the handling fee bears a commercial relationship to the actual cost of meeting that liability; and

    88.3. Quarantining the handling fee fund to keep it separate from a deposit fund.

89. To avoid a breach of the Mutual Recognition provisions, the CDL scheme may not target the suitability of containers or their contents to be sold, but only the manner of their sale, and must apply equally to local and out of state goods; in relation to labelling or other handling and storage provisions, these must in addition be expressly stated to be directed at preventing, minimising or regulating environmental pollution.

90. This precludes the establishing of a CDL scheme which dictates that containers must have a specified percentage of recycled material, for example, because that would be to say that containers with no recycled material (which are suitable to be sold in other States) are not suitable to be sold in Western Australia – contrary to the mutual recognition principle and not within the s11 exceptions.

C. Specific Aspects Of The Boomerang Model

91. We are instructed to specifically consider two aspects of the CDL model advocated by the Boomerang Alliance in the light of the principles which we have identified above:

Handling Fees Dependant On Material Type (Recyclability And Recycled Content)

92. As previously noted[41], care must be taken in relation to handling fees to ensure that they are not characterized as an excise and accordingly in contravention of s90 of the Constitution.

93. One of the considerations we have mentioned in this regard is the necessary close relationship between the amount of the handling fee, and the cost of providing container collection, recovery, and administration services ("the recycling service") to the manufacturers/ distributors of containers.

94. Failure to maintain a commercial relationship between the handling fee and the cost of providing the service might cause a court to find that the fee is insufficiently particular to the service, accordingly that the handling fee is not really a charge for a service rendered, but a tax.

95. While it may well be justifiable to state that the inherent recyclability of the material used in a container would mean that the cost of the recycling service would be lower and that therefore the handling fee is lower, that may not give the degree of flexibility which the Boomerang Alliance system seeks to achieve.

96. In addition, we doubt that it is correct to say that the recycling service for containers with a greater content of recycled material would justify a lower handling fee.

97. Nevertheless, there may be several means by which the object can be achieved without breaking the connection between the handling fee and the cost of providing the recycling service, thereby avoiding the risk of characterization as an excise.

98. For example, it might be permissible to provide incentives for the use of recycled material and material more easily recycled by applying unredeemed deposits in subsidizing the handling fee payable by the manufacturers/ distributors of containers with recycled content. That is, the handling fee itself would not change, but would be subsidised as an incentive. This involves a mere shift of emphasis; rather than refer to different handling fees, the CDL model would refer to different levels of subsidy based on recyclability and content.

99. Note, however, that such incentives might fall foul of s92 of the Constitution if introduced at a stage when local manufacturers already use significantly more recycled material than out of State manufacturers, since that would be effectively protectionist, if the amount of the incentive were considered disproportionate to the CDL aims.

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[41] In section A of this advice

Incentives To Encourage Reprocessing To Take Place In Western Australia

100. In relation to this aspect of the Boomerang Alliance model and a potential conflict with s92 of the Constitution (the Free Trade provision, in respect of which see the discussion above), we consider that if incentives are as freely available and accessible to entities based in other States as those based in Western Australia, then such incentives would likely not be considered to have the practical effect of a discriminatory and protectionist burden[42] on the out of State reprocessing industry.

101. The emphasis would accordingly be on providing incentives based on geographical positioning of the reprocessing facilities rather than the Western Australian character of the re-processor.

102. In the event that circumstances arise where such incentives do operate in a protectionist manner, it is our opinion that the incentives could be kept proportionate to the CDL aims. This is particularly the case since the environmental detriment through greenhouse emissions associated with long distances between collection point and reprocessing point is likely to be highlighted as an area of concern by industry groups opposed to CDL. That will assist in making the case for proportionality between protectionist effect, if any, and the environmental aims of CDL advocating incentives to local processing.

103. It would be prudent however to establish incentives based on distance from collection point rather than simply whether the reprocessing facility is in Western Australia. That would reduce potential difficulties in situations such as where, hypothetically, the collection point is close to the South Australian border and a reprocessing facility in South Australia. In such a situation a protectionist effect would arise and would be disproportionate to CDL's aims if the CDL were to operate so as to provide an incentive for the containers to travel further to be reprocessed elsewhere in Western Australia.

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[42] In this regard, consider *Cross v Barnes Towing And Salvage (Qld) Pty Ltd & Ors* [2005] NSWCA 273, in which the NSW Court of Appeal held that a requirement that towing companies obtain a NSW towing licence before providing towing services in NSW was not discriminatory because out of state companies could apply for such licences and the evidence showed that companies which did so apply were unlikely to be refused them – ie the right to undertake towing services in NSW was as freely available and accessible to entities based in other States as those based in NSW.

D. Whether CDL Could Realistically Be Introduced In Western Australia Under The Draft WARR Bill, And The Limitations And/Or Advantages Of Doing So

Relevant Provisions Overview

104. The objects of the Waste Avoidance and Resource Recovery Bill ("WARR Bill") are set out in section 5 as follows:

> "The primary objects of this Act are to contribute towards sustainability in Western Australia and a transition to a waste-free society by –
>
> (a) promoting the most efficient use of resources and reducing environmental harm in accordance with the principles of ecologically sustainable development; and
>
> (b) the consideration of resource management options against the following hierarchy –
>
> (i) avoidance of unnecessary resource consumption;
> (ii) resource recovery (including reuse, reprocessing, recycling and energy recovery);
> (iii) disposal."

105. The mechanisms for recognition of Product Stewardship schemes and the establishment of Extended Producer Responsibility ("EPR") schemes under the WARR Bill are contained in Part 5 (sections 43 – 45).

106. In accordance with section 43, a producer or group of producers may submit a Product Stewardship Agreement ("PSA") to the CEO (of the Department of Environment and Conservation) including targets and timescales for avoidance, reduction, reuse or recycling and information gathering and publication. The CEO "must" register the agreement if (s)he is satisfied that the proposed PSA meets those requirements.

107. Section 44 provides that before making regulations for implementation of EPR Schemes, the Minister "must have regard to" the nature of the product proposed to be dealt with and whether there is an "effective approved" PSA, or a similar national agreement "that is able to achieve the desired outcomes and is being actively implemented, monitored and reported on". The Minister must also have regard to whether there is an Australian national scheme "which adequately deals with the product proposed to be dealt with".

108. The intention of the link between PSAs and EPR in s43 and s44 is presumably to encourage industry to voluntarily self-regulate areas of Waste Authority concern, and to recognise such valid approaches as an acceptable alternative to government regulation.

109. Section 45 sets out that the Waste Authority must advertise and invite submissions on an annual EPR Priority Statement[43] and that the results of that consultation must be

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[43] Section 45(1), *Waste Avoidance and Resource Recovery Bill 2006*

taken into account in deciding whether to recommend the introduction of appropriate EPR schemes (such as CDL)[44]. Section 45(2) excuses the Waste Authority from preparing and publishing an EPR Priority Statement in its first year of office.

110. The intention behind s45 is to allow the Waste Authority to flag to industry the areas of prime concern and give a clear warning that unless industry adequately self-regulates those areas of concern, mandatory EPR schemes will be formulated and put in place (following consultation).

111. Regulations made under the EPR head powers are expected to establish CDL. Section 87 governs the making of Regulations, which may be made as "necessary or convenient" for carrying out the Act.

112. Schedule 3 sets out specific matters in respect of which Regulations may be made and Schedule 3 Paragraph 12 specifies that Regulations may be made for "regulating the implementation and operation of extended producer responsibility schemes".

113. Schedule 3 Paragraphs 14 to 16 are specifically relevant to CDL and (although unnecessary in terms of creating the powers to pass appropriate Regulations since the power is already specified in Schedule 3 Para 12) map out the terrain in which CDL may be implemented. These paragraphs may be considered expressions of political will more than anything else.

    113.1. Para 14 includes that manufacturers, distributors and retailers may be required to operate collection facilities for their products and by-products and accept the product or by-product for disposal from consumers;

    113.2. Para 15 concerns the regulation of the imposition, amounts, and collection of deposits or bonds in relation to products;

    113.3. Para 16 deals with the control and management of fees, deposits or bonds paid under the Regulations.

    113.4. Para 17 concerns the establishment and regulation of collection facilities for products and their by-products.

<u>Matters Arising In Relation To The Objects Of The Bill In s5</u>

114. In the event that CDL, introduced under the WARR Bill, is challenged under s92 of the Constitution and a court determines that a discriminatory burden of a protectionist kind is indeed imposed, the incidental and proportionate nature of the burden would fall to be considered in light of the legitimate objects set out in s5.

115. We have mentioned that in the Bond Case, the court found that the measures complained of were disproportionate to the object of reducing litter (since a lower deposit on refillable bottles would have achieved a similar reduction in litter) and that the other object (to reduce energy and resource consumption) was not legitimate to the extent that it sought to reduce resource consumption outside of South Australia where the non-refillable bottles were manufactured.

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[44] Section 45(5), *Waste Avoidance and Resource Recovery Bill 2006*

116. Considering the relevant objects in s5 of the WARR Bill, they are:

116.1. To contribute towards sustainability in Western Australia (promoting the most efficient use of resources and reducing environmental harm in accordance with the principles of ecologically sustainable development).

We are of the opinion that containers manufactured outside Western Australia would have no bearing upon this object, and accordingly any protectionist measures designed to achieve this object would be necessarily disproportionate as regards such containers.

116.2. To contribute towards the transition to a waste-free society (considering resource management options against the hierarchy of avoidance, resource recovery, and disposal).

This object is relevant as regards waste and resources regardless of their origin, whether in Western Australia or from out of State. CDL measures which have a protectionist effect would be considered in light of whether less discriminatory burdens would achieve a similar rate of waste avoidance or resource recovery.

117. In view of 116.2 in particular, we are of the opinion that the objects of the WARR Bill are a sufficient basis for the introduction of CDL in Western Australia and to facilitate an "incidental and proportionate" defence to a constitutional challenge of protectionism, if appropriate.

118. It would nevertheless be prudent – in view of the requirement that laws be directed at regulating environmental pollution to fall within the s11(3) exception to the mutual recognition principle (see the discussion in Section A above) – to amend s5(a) to include words such as "(including pollution through litter)" after "…environmental harm".

Matters Arising From s43 and s44: The National Packaging Covenant and the NEPM-UPM

119. Signatories to the National Packaging Covenant ("the Covenant") presumably could and will request that the CEO register their Covenant plans as PSAs under s43. If those Covenant plans specify the matters set out in s43(2), which include targets and timescales for avoidance, reduction, reuse or recycling and information gathering and publication, the CEO has no discretion but must register those Covenant plans as PSAs.

120. Additionally, the National Environmental Protection Measure on Unused Packaging Materials ("NEPM-UPM"), which underpins the Covenant by in theory providing a regulatory safety net to catch free-riders not signed up to the Covenant, is an Australian national scheme which deals with packaging.

121. Together, the Covenant and the NEPM-UPM are designed to address the problem of waste and resource recovery arising from all packaging (including but not limited to containers).

122. Accordingly, before regulations are made to implement CDL, the Minister will be required to have regard to whether the Covenant is "effective" in dealing with the issues which CDL is designed to address, and whether the NEPM-UPM "adequately deals" with containers.

123. We are aware that the effectiveness and adequacy of the Covenant and the NEPM-UPM is a matter of some debate and that opinions on the issue are polarised along the lines of the pro- and anti- CDL advocates. Nevertheless, the WARR Bill merely requires that the Minister have regard to that question.

124. It is beyond the scope of this advice to set out or to explore the administrative law considerations of ministerial decision-making in any detail. It is sufficient to flag the fact that an exercise of ministerial determination as to "effectiveness" and "adequacy" may be reviewable if the decision made is "manifestly unreasonable"[45], "devoid of any plausible justification"[46] or "perverse"[47]. Please let us know if you would like more advice on this matter.

125. All that is required of the Minister is to be able to demonstrate that (s)he had regard to the effectiveness and adequacy of the Covenant and the NEPM-UPM and concluded that those measures are neither effective (as regards the former) nor adequate (as regards the latter).

126. The situation is however complicated somewhat by virtue of the status in Western Australia of the NEPM-UPM.

127. It is appropriate to very briefly summarise the character of NEPMs.

    127.1. The *National Environment Protection Council (Western Australia) Act 1996* recognised the creation of and assignment of power to the National Environment Protection Council ("NEPC"), an outcome of an Intergovernmental Agreement on the Environment (IGAE), which was reached at a Special Premiers Conference in October 1990 and came into effect in May 1992. Membership of NEPC includes environment ministers from the Australian Government and each state and territory. The Australian Government Minister for the Environment and Heritage chairs NEPC. Each NEPC minister has equal voting power. Decisions of NEPC can only be made with a two-thirds majority of ministers.

    127.2. The NEPC achieves its objectives by introducing National Environmental Protection Measures ("NEPM") which the Commonwealth, State and Territory governments are obliged to enact laws to implement.

    127.3. NEPMs are accordingly environmental protection measures created by a 75% majority of the States and Territories through negotiation and representation at the highest level of government.

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[45] Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at CLR 41; Street CJ in *Parramatta City Council v Hale* (1982) 47 LGRA 319 at 335

[46] e.g. *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 65 ALR 549 at 561 per Wilcox J

[47] e.g. *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379

128. The agreement to implement the NEPM-UPM was signed and activated on 27 August 1999 but the regulations enacting it into Western Australian law (the *Environmental Protection (NEPM–UPM) Regulations 2003*) only came into force in 2003 and expired on 26 August 2004. Following notification that Ministers had agreed to extend the National Packaging Covenant and NEPM– UPM for a sixth year to the 14 July 2005, the process to amend the Western Australian regulations for a second time did not get further than the drafting stage. There has been a subsequent variation to the NEPM-UPM on 1 July 2005 but there appears to have been no attempt to date to comply with the obligation to enact the NEPM-UPM in Western Australia at all[48].

129. The result is that opponents of CDL in Western Australia may be able to challenge a Ministerial decision to introduce CDL on the basis that it is not possible for the Minister to have had proper regard to whether the NEPM-UPM "adequately deals with the product proposed to be dealt with" since the NEPM-UPM was never truly implemented in Western Australia despite an obligation on the Western Australian Government to do so.

130. That line of argument would presumably be met by Ministerial counter that the NEPM-UPM was not implemented because it was not considered to adequately deal with the problem; hence the development of the WARR Bill and CDL. Such a statement might however prove inconsistent with conduct and representations made in the National Environmental Protection Council, particularly in view of Western Australian affirmations of intention to implement the NEPM-UPM and to undertake an evaluation of the effectiveness or otherwise of those measures in 2008.

131. In light of the above it is recommended that the Minister undertake an analysis of the NEPM-UPM and submit findings and, if appropriate, a verdict of inadequacy to the National Environmental Protection Council at the earliest opportunity.

Matters Arising From s45: The EPR Priority Statement

132. The mechanism which requires the Waste Authority to publish an annual EPR Priority Statement, and to invite and consider submissions on those matters before recommending the implementation of EPR schemes, is designed to ensure adequate consultation prior to introduction of EPR and to allow industry to address those priorities voluntarily, to avoid government regulation.

133. A cursory reading the effect of s45(2) – which provides that the Waste Authority is excused from its obligation to publish a Priority Statement in the first year after commencement of the section – may appear to create an expectation that no EPR Schemes would be introduced during the first year.

134. On a more careful analysis, however, the requirements on the Waste Authority to take and consider submissions flowing from the publication of the annual EPR Priority Statement fall away if the Statement need not be formulated or published. In other words, Section 45(2) actually permits the introduction of EPR schemes during the first year after commencement without the need to comply with the Section 45 process.

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[48] Hon. Dr. Judy Edwards MLA, Minister for the Environment in her report to the NEPC on implementation of the NEPM-UPM for the reporting year ended 30 June 2005

135. This is particularly the case in the context of CDL, in respect of which a great deal of groundwork has already been done and is underway, which would have the effect of negating any allegations of impropriety in introducing CDL without first signalling the intention to do so in an EPR Priority Statement, including:

    135.1. The mapping out of the terrain which a CDL framework would inhabit[49];

    135.2. Public consultation on the WARR Bill in which that CDL terrain is set out;

    135.3. Repeated expressions of political intention to introduce CDL over a long time period;

    135.4. A Stakeholder Advisory Group, chaired by John Hyde MLA, currently undertaking a detailed review of the various CDL models in order to determine the best model for Western Australia, which is expected to conclude around the same period that the WARR Bill is expected to be introduced to Parliament.

Summary

136. In summary, it is our opinion that CDL can realistically be introduced in Western Australia through the WARR Bill and that it can be swiftly implemented following enactment of the Bill into law.

Conclusion

137. We are of the view that as long as the mechanics of the CDL model sought to be introduced in Western Australia do not violate the principles extracted from a consideration of the Free Market Legislation and set out in section B of this advice, CDL can be introduced and implemented in Western Australia and that the machinery set up by the provisions of the WARR Bill is sufficient to achieve that.

138. We trust that our advice adequately addresses the matters raised in your instructions to us to your satisfaction and that our retainer is now discharged. Should you require us to carry out any further work on your behalf we would be pleased to discuss that with you.

Yours sincerely,

Cameron Poustie
Principal Solicitor

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[49] Schedule 3, *Waste Avoidance and Resource Recovery Bill 2006*