PROPOSED VICTORIAN BEVERAGE CONTAINER DEPOSIT SCHEME - CONSTITUTIONAL VALIDITY AND OTHER ISSUES

OPINION

THE PACKAGING STEWARDSHIP FORUM OF THE AUSTRALIAN FOOD AND GROCERY COUNCIL

Attention: Jenny Pickles, General Manager

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OPINION

Introduction and summary

1. I have been asked to provide advice in relation to the *Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2011* (Vic) (***"Amendment Bill"***), which was recently passed by the Legislative Council of Victoria. The *Amendment Bill* provides for the introduction in Victoria of a beverage container deposit scheme (**"CDS"**), by way of a series of amendments to the *Environment Protection Act 1970* (Vic) (***"EP Act"***). The proposed CDS differs in significant respects from the existing South Australian CDS and the Northern Territory CDS (which is the subject of an enactment that has yet to commence). The significant characteristics of the proposed Victorian CDS are addressed below.

2. I have been asked to provide advice as to the following specific matters:

    1. Whether the Victorian Parliament can pass such legislation to establish a CDS, including by way of a compulsory environmental levy on the sale of beverages in containers;

2. Whether the *Amendment Bill*, if enacted, would breach the mutual recognition principles applicable under the *Mutual Recognition Act 1992* (Cth) and/or the *Mutual Recognition (Victoria) Act 1998* (Vic); and

3. Whether the *Amendment Bill*, if enacted, would limit the ability of those in the beverage industry to participate in the operation of the CDS in Victoria, for example through the operation of collection depots.

3. For the reasons developed below:

a) As to question 1, the *Amendment Bill* (or alternatively those provisions of the *Amendment Bill* purporting to impose environmental levies on importers and producers of beverages in containers), if enacted, would be invalid because the environmental levy would constitute an excise. By virtue of s. 90 of the *Constitution*, the States have no power to impose duties of excise;

b) As to question 2, the *Amendment Bill*, if enacted, would be contrary to the mutual recognition principles and would be ineffective to that extent, unless a relevant exemption from the *Mutual Recognition Act 1992* (Cth) is introduced;

c) As to question 3, the *Amendment Bill*, if enacted, would not preclude those in the beverage industry from participating in the operation of the CDS.

The proposed Victorian CDS

4. The *Amendment Bill*, if enacted, will introduce a CDS with the following key characteristics:

a) A person who imports a beverage container into Victoria for the purpose of sale within Victoria or produces a beverage container in Victoria for the purpose of sale within Victoria is liable to pay a "beverage container environment levy" ("**BCE Levy**") for each beverage container: s. 52D. A "beverage container" is, broadly speaking, a container containing a beverage that is produced for sale of the beverage in a sealed form: see definition proposed to be added to s. 4 of the *EP Act*;

b) The BCE Levy must be paid by the importer or producer to the Environment Protection Authority ("**EPA**") within 14 days after the end of the month in which the beverage container was sold by the importer or producer to a wholesaler, retailer or individual: s. 52F. The amount of the BCE Levy is 10 cents for each beverage container or such higher amount as prescribed by the regulations: s. 52E;

c) A person may be granted an exemption by the EPA wholly or partly from the obligation to pay the BCE Levy under s. 52D: s. 52N;

d) A person must not sell a beverage container unless the container is labelled "X refund at an authorised collection depot when sold in

Victoria", where X is 10 cents or such higher amount as is prescribed: s. 52G. Additional labelling requirements may be prescribed: s. 52H;

e) The EPA has the function of approving premises to be an "authorised collection depot": s. 52I. It is contemplated in s. 52I(4) that, without limiting the types of collection depots that may be authorised, such places as council sites, shopping centres and centre car parks, service stations, retailers and drive through recycling centres may be authorised as collection depots;

f) The CDS is intended to operate on the basis that where a beverage container has been purchased in Victoria, a person may return the empty container to an authorised collection depot, where the person will be paid 10 cents for the container: s. 52L. The authorised collection depot is thus the first step in the chain for processing recyclable and reusable containers; and

g) The EPA has the function of approving a premises to be an "authorised transfer station": s. 52J. Authorised transfer stations are involved in, among other things, receiving and processing empty beverage containers and selling the resulting processed materials. It is specifically contemplated that "authorised transfer stations" may also be authorised as collection depots: s. 52I(b)(vii).

Question 1 – Constitutional validity of the *Amendment Bill*, if enacted

5. Pursuant to s. 16 of the *Constitution Act 1975* (Vic), the Victorian Parliament has the power to make laws in and for Victoria "in all cases whatsoever". The enactment of the *Amendment Bill* would be, *prima facie*, a valid exercise of the plenary power of the Victorian Parliament to make laws in and for Victoria. However, the powers of the Victorian Parliament are subject to the restrictions imposed by the *Commonwealth Constitution*.

6. There are two relevant limitations on the power of the Victorian Parliament arising from the *Commonwealth Constitution*. Section 90 of the *Commonwealth Constitution* provides, *inter alia*, that the Commonwealth has the exclusive power to impose duties of excise. The first question to be considered is whether the BCE Levy constitutes a duty of excise and is therefore beyond the power of the Victorian Parliament. Section 92 of the *Commonwealth Constitution* provides that "trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free". A law will infringe s. 92 if it imposes a discriminatory burden of a protectionist kind on interstate trade and commerce: *Cole v Whifield* (1988) 165 CLR 360 at 394-5. The second question to be considered is whether the *Amendment Bill*, if enacted, would impose a burden of such a kind, contrary to s. 92 of the *Commonwealth Constitution*.

Section 90 of the *Commonwealth Constitution* – Invalidity of State excise duties

7. Section 90 of the *Commonwealth Constitution* provides, *inter alia*, that the Commonwealth has the exclusive power to impose duties of excise. Accordingly, a State law that purports to impose a duty of excise is invalid to that extent.

8. An excise is a tax on goods that falls on any step in the production, manufacture, distribution or sale of goods: *Ha v New South Wales* (1997) 189 CLR 465. There are two distinct elements to be considered. The first is whether the impost in question constitutes a "tax". If the answer is yes, the second element to be considered is whether it is a tax on "any step in the production, manufacture, distribution or sale" of goods.

9. In *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 at 276, Latham CJ defined a tax as a "compulsory exaction of money by a public authority for public purposes, enforceable by law, and ... not a payment for services rendered". In *Queanbeyan City Council v ACTEW Corporation Ltd* [2011] HCA 40 at [16] the High Court, in a unanimous judgment, observed that while this definition in some respects requires further analysis and refinement it remains an appropriate guide to the identification of a "tax".

10. Pursuant to ss. 52D-52F, and subject to the granting of an exemption under s. 52N, a person who imports a beverage container into Victoria or produces a

beverage container in Victoria for the purpose of sale must, following the wholesale or retail sale of the beverage container by that person, pay the BCE to the EPA. This impost has all the characteristics of a tax. It is a compulsory exaction, imposed by force of ss. 52D-52F. It involves payment of the impost to a public authority, in the form of the EPA. This is a significant point of distinction from the impost considered by the High Court in *Vacuum Oil Co Pty Ltd v Queensland* (1934) 51 CLR 108. In *Vacuum Oil* it was argued that an obligation imposed upon sellers of petrol to purchase and pay for a specified quantity of power alcohol at a specified price was a tax. This contention was rejected by the High Court. Dixon J, at 125, noted that the payment, while compulsory, was not "a liability to the State, or to any public authority, or to any definite body or person authorised by law to demand or receive it". By contrast, ss. 52D and 52F do impose a direct liability to pay the BCE Levy to the EPA.

11. The BCE Levy is imposed for public purposes, including funding the activities of the EPA as described in s. 52C (such as providing grants or other financial incentives to encourage the use of recyclable and reusable containers and the increased use of recycled material from beverage containers: s. 52C(1)(h)). The fact that an impost is imposed with the objective of raising revenue is an indicator, albeit not a decisive one, of a tax: *Australian Capital Territory v Queanbeyan City Council* (2010) 188 FCR 541 at [53] per Keane CJ. I note in this regard that the second reading speech for the *Amendment Bill* in the Legislative Council indicates that it is intended that the BCE Levy would raise revenue for

the EPA and that the amount of revenue raised would exceed any costs incurred by the EPA in the administration of the CDS.

12. An impost which otherwise has the characteristics of a tax is not a tax if it is a "payment for services rendered". This qualification was considered by the High Court in *Air Caledonie International v Commonwealth* (1988) 165 CLR 462. In a unanimous judgment, their Honours, at 467, following the reasoning of Gibbs J in *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 63, held that "a payment for services rendered" is to be understood as a payment for services rendered to (or at the direction or request of) the person required to make the payment. Their Honours went on to observe:

> *[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.*

13. As to the nature of the "services" contemplated by the concept of a fee for services, their Honours held, at 469-470:

> *In one sense, all taxes exacted by a national government and paid into national revenue can be described as "fees for services". They are the fees which the*

resident or visitor is required to pay as the quid pro quo for the totality of benefits and services which he receives from governmental sources. It is, however, clear that the phrase "fees for services" in s.53 of the Constitution cannot be read in that general impersonal sense. Read in context, the reference to "fees for services" in s.53 should, like the reference to "payment for services rendered" in the above-quoted extract from the judgment of Latham C.J. in ***Matthews v. Chicory Marketing Board****, be read as referring 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.* (emphasis added)

14. Applying these principles, it cannot be said that the BCE Levy constitutes a "fee for services". The importers and producers of beverage containers who are obliged to pay the BCE Levy do not, in return for that payment, have provided or rendered to them individually (or at their request or direction) identified services.

15. It follows that the BCE Levy constitutes a "tax" for the purposes of the *Commonwealth Constitution*. As to the second element of the definition of excise, there is no doubt that the BCE Levy is a tax that would fall on a step in the production, manufacture, distribution or sale of goods: *Ha v New South Wales* (1997) 189 CLR 465. The liability to pay the BCE Levy arises under s. 52F in respect of each beverage container by reference to the sale of the beverage container by the importer or producer to a wholesaler, retailer or individual.

16. The BCE Levy therefore constitutes a duty of excise within the meaning of s. 90 of the *Commonwealth Constitution* and the provisions of the *Amendment Bill* which purport to impose the BCE Levy would if enacted be invalid as being contrary to s. 90. It could be argued in such circumstances that the provisions imposing the BCE Levy (ss. 52D - 52F) are severable from the balance of the *Amendment Bill*, such that certain parts of the CDS could be validly implemented. However, the apparent centrality of the BCE Levy to the CDS as introduced in the *Amendment Bill* may mean that the *Amendment Bill* in its entirety would be rendered invalid by the invalidity of the levy provisions.

Freedom of interstate trade and commerce - s. 92 of the *Commonwealth Constitution*

17. As noted above, a law will infringe the freedom of interstate trade for which s. 92 of the *Commonwealth Constitution* provides if it imposes a discriminatory burden of a protectionist kind on interstate trade and commerce: *Cole v Whifield* (1988) 165 CLR 360 at 394-5. The CDS to be introduced by the *Amendment Bill* would impose a number of related burdens on trade and commerce involving the distribution and sale of beverage containers. The obligations to apply the specified labels to beverage containers and pay the BCE Levy constitute direct burdens imposed by the legislation. The relevant question for the purposes of s. 92 of the *Commonwealth Constitution* is whether the CDS would impose a discriminatory burden of a protectionist kind.

18. On its face, the CDS does not discriminate between interstate and intrastate trade. The burdens on trade and commerce in beverage containers which flow from the CDS apply equally to interstate and intrastate traders without discrimination. However, this is not determinative of the s. 92 analysis. A law which is non-discriminatory on its face may infringe s. 92 if the practical effect of the law is such that the law can be characterised as discriminatory in a protectionist sense.

19. In *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 ("***Castlemaine Tooheys***") the High Court considered an early version of the South Australian CDS, as provided for in the *Beverage Container Act 1975* (SA) and the regulations made pursuant to that Act. The High Court held unanimously that certain provisions of the *Beverage Container Act 1975* (SA) and the regulation prescribing a particular refund amount infringed the freedom of interstate trade and commerce, because they imposed a discriminatory burden of a protectionist kind on interstate trade and commerce in bottled beer. The joint judgment of Mason CJ, Brennan, Deane, Dawson and Toohey JJ said, at 471:

> *[T]he fact that a law regulates interstate and intrastate trade evenhandedly by imposing a prohibition or requirement which takes effect without regard to considerations of whether the trade affected is interstate or intrastate suggests that the law is not protectionist. Likewise, the fact that a law, whose effects include the burdening of the trade of a particular interstate trader, does not necessarily benefit local traders, as distinct from other interstate traders, suggests that the purposes of the law are not protectionist. On the other hand,*

where a law on its face is apt to secure a legitimate object but its effect is to impose discriminatory burden upon interstate trade as against intrastate trade, the existence of reasonable non-discriminatory alternative means of securing that legitimate object suggests that the purpose of the law is not to achieve that legitimate object but rather to effect a form of prohibited discrimination. There is also some room for a comparison, if not a balancing, of means and objects in the context of s. 92. The fact that a law imposes a burden upon interstate trade and commerce that is not incidental or that is disproportionate to the attainment of the legitimate object of the law may show that the true purpose of the law is not to attain that object but to impose the impermissible burden.

20. The High Court noted that the legislation on its face treated interstate and intrastate trade even-handedly: at 472. However, the Court held that, having regard to the practical effect of the scheme and in particular the refund amounts which were prescribed under the Act, the scheme should be characterised as protectionist. This conclusion turned on the facts of the case and the differential refund amounts and return arrangements which applied at the time.

21. The facts before the High Court indicated that interstate traders predominantly used non-refillable beer bottles, whereas their competitors in South Australia used refillable beer bottles: 440. The agreed facts also indicated that there had been a recent, successful campaign by interstate traders to enter the South Australian beer market and there had been corresponding amendments to the container deposit regime which affected the treatment of non-refillable and refillable bottles: 459. From October 1986 the prescribed refund amount for non-

refillable bottles was $0.15 per container, an increase from $0.05. The prescribed refund amount for refillable beer bottles was $0.04 per container. It was agreed that beer is a price sensitive commodity and "a small increase in the price of a brand of beer will result in a disproportionately large decrease in sales of that brand": 447. It was further agreed that it would be uneconomic for interstate traders to switch to refillable bottles and the object and effect of the 1986 amendments to the scheme was to make the sale of beer in non-refillable bottles commercially disadvantageous and thus improve the competitive position of producers using refillable bottles (ie predominantly intrastate traders) in the South Australian beer market: 449.

22. It was noted in the joint judgment that the 1986 amendments disadvantaged interstate traders (to the extent that they used non-refillable bottles) in two respects. The primary disadvantage was the difference in the refund amount of $0.15, as opposed to the $0.04 for refillable bottles. The second disadvantage concerned the arrangements for return of non-refillable bottles, as opposed to refillable bottles. Retailers selling beer in non-refillable bottles were obliged to accept delivery of empty non-refillable bottles and pay the refund amount of $0.15 per bottle. Retailers who sold beer in refillable bottles were not obliged to accept delivery of empty refillable bottles or pay the refund amount applicable to such bottles. Instead, empty refillable bottles could be returned to collection depots where the refund amount could be claimed. This differential treatment meant that retailers were discouraged from stocking beer in non-refillable bottles: 476.

23. Given the practical effect of these differential arrangements and the underlying consideration that interstate traders predominantly used non-refillable bottles whereas intrastate traders predominantly used refillable bottles, the High Court was satisfied that the law did discriminate in a protectionist sense against interstate trade and commerce.

24. South Australia had argued that the differential treatment of refillable and non-refillable bottles was justified by legitimate, non-protectionist objectives, being the reduction of litter and the conservation of energy resources through the encouragement of recycling: 472. The High Court accepted that a law which is directed towards a legitimate, non-protectionist purpose and which is appropriate and adapted to that purpose will not be characterised as protectionist so long as any burden imposed on interstate trade is incidental and not disproportionate to the achievement of the non-protectionist objective: 471, 472-3. On the facts in *Castlemaine Tooheys*, South Australia's argument on this point was undermined by its concession that a refund amount of $0.06 per non-refillable bottle for twelve months, and thereafter a refund amount of $0.04 per bottle, would have been sufficient to ensure that non-refillable bottles were returned at the same rate as refillable bottles: 462, 474. Moreover, South Australia was not able to provide any non-protectionist justification for the different return arrangements which applied for non-refillable and refillable bottles: 476.

25. There is nothing in the High Court's reasoning in *Castlemaine Tooheys* to suggest that a container deposit scheme that burdens trade and commerce in beverages

necessarily contravenes the freedom of interstate trade and commerce. The High Court's conclusion that certain amendments to the scheme operating under the *Beverage Container Act 1975* (SA) were invalid turned on the differential treatment of refillable and non-refillable bottles in terms of refund amounts and return arrangements and the strong correlation which existed between interstate trade and the use of non-refillable bottles. This is reflected in the relief granted by the Court, as described in the joint judgment, at 477:

> *In the result, s.5b [which governed the procedures for exempting certain glass containers from the provisions requiring retailers to accept returns] is invalid and the regulation prescribing the refund amount of 15 cents in relation to non-refillable bottles is invalid. So too is the notice published under s.5b. That is not to say that the deposit and return system itself is invalid; ss.6 and 7 and the definitions in s.4 which were enacted by the 1986 Act are capable of standing apart from the invalid regulation. Similarly, ss.5 and 5a make provision for exemption from the Act without reference to discriminatory criteria, and are not invalid.*

26. On my present understanding of the facts, it does not appear that the Victorian CDS to be introduced by the *Amendment Bill* would discriminate against interstate trade in its practical effect. The levy imposed on importers by s. 52D applies equally to intrastate producers of beverage containers. If it could be established as a factual proposition that one or more of the regulatory procedures associated with the CDS (such as approval of collection depots) would operate in a way which discriminated against interstate traders, it may be

arguable that the practical effect of the scheme is to discriminate in a protectionist sense against interstate trade. However, I am not aware of any factual basis for such a contention or for any related argument that the Victorian CDS would discriminate against interstate trade in a protectionist sense.

27. Absent factual considerations to the contrary, there does not seem to be a proper basis for arguing that the *Amendment Bill*, if enacted, would contravene the freedom of interstate trade and commerce in s. 92 of the *Commonwealth Constitution*.

Question 2 – Applicability of mutual recognition principle

28. By s. 6 of the *Mutual Recognition (Victoria) Act 1998* (Vic), Victoria has adopted the *Mutual Recognition Act 1992* (Cth) (as originally enacted together with any amendments made to it by regulations made prior to the commencement of the *Mutual Recognition (Victoria) Act 1993* (Vic)). Accordingly, the mutual recognition principles set out in the *Mutual Recognition Act 1992* (Cth) apply in Victoria. The relevant mutual recognition principle relating to goods is set out in s. 9.

29. The mutual recognition principle is that, subject to Pt 2, goods produced in (or imported in) one State that may lawfully be sold in that State may be sold in a second State, without the necessity for compliance with "further requirements" as described in s. 10. "Goods" is defined to mean goods of any kind and includes a package containing goods: s. 4. "Requirements", when used in relation to goods, means requirements, prohibitions, restrictions or conditions: s. 4.

30. One of the "further requirements" as described in s. 10 is a requirement that the goods satisfy standards of the second State relating to the way the goods are packaged or labelled (s. 10(b)). Another of the "further requirements" is "any other requirement relating to sale that would prevent or restrict, or would have the effect of preventing or restricting, the same of the good in the second State".

31. The *Amendment Bill*, if enacted, would impose significant "further requirements" of the kind referred to in s. 10 of the *Mutual Recognition Act 1992* (Cth). The requirements as to labelling of beverage containers imposed in s. 52G (together with the possibility of additional labelling requirements by prescription as contemplated in s. 52H) are further requirements relating to goods within the meaning of s. 10. The requirement to pay the BCE Levy in respect of beverage containers also constitutes a further requirement, on the basis that such a levy would undoubtedly have the effect of restricting the sale of the goods in Victoria.

32. The mutual recognition principle in s. 9 of the *Mutual Recognition Act* as to the sale of goods is subject to the exceptions specified in s. 11. However, none of the exceptions in s. 11 is applicable in present circumstances. Prima facie, therefore, the mutual recognition principle relating to goods would mean that beverage containers produced outside Victoria may be sold in Victoria without the necessity for compliance with such "further requirements" imposed by the *Amendment Bill*, if enacted.

33. Section 14 of the *Mutual Recognition Act* provides for permanent exemptions from the operation of Part 2 of the Act, by way of the listing of goods in Schedule 1

and the listing of laws in Schedule 2. It is possible that, prior to the enactment and commencement of the *Amendment Bill*, steps could be taken to add beverage containers to the list of exempt goods in Schedule 1 of the *Mutual Recognition Act*. Alternatively, steps could be taken to add the *EP Act* (as amended by the *Amendment Bill*) to the list of exempt laws (ie laws the operation of which is not affected by the mutual recognition principles relating to goods) in Schedule 2 of the *Mutual Recognition Act*. Schedules 1 and 2 may be amended by the Governor-General making a regulation to that effect: s. 47(1). However, the Governor-General may only make such a regulation after the designated person for each of the participating jurisdictions in the mutual recognition scheme (ie the Governor of each State and the executive head of each Territory) has published a notice in the gazette of the jurisdiction setting out the terms of the proposed regulation and requesting that it be made: s. 47(2).

34. Section 15 of the *Mutual Recognition Act* provides for temporary exemptions from the operation of Part 2 of the Act. Relevantly for present purposes, such an exemption may be made if it is substantially for the purpose of preventing, minimising or regulating environmental pollution. It is possible that the Victorian government, in conjunction with passing the *Amendment Bill*, could create a temporary exemption from the mutual recognition principle as to goods by making a regulation under s. 5 of the *Mutual Recognition (Victoria) Act 1998* (Vic) declaring the *EPA Act* (as amended by the *Amendment Bill*) to be, for the purposes of s. 15 of the *Mutual Recognition Act*, a law to which that section applies. A temporary exemption created by such declaration could only be

effective for a maximum of 12 months: s. 15(3) of the *Mutual Recognition Act 1992* (Cth).

35. If the *Amendment Bill* is enacted without any such exemption being created, the effect of the mutual recognition principle as to goods would be that beverage containers produced or imported interstate that may lawfully be sold in that State could be sold in Victoria, without the necessity for compliance with the labelling and BCE Levy requirements purported imposed in Victoria.

Question 3 - Potential for industry participation in the CDS

36. Question 3 concerns the possibility that participants in the beverage industry may wish to participate in the CDS in Victoria, for example through the operation of collection depots.

37. There is nothing in the *Amendment Bill* which would preclude any person, whether a participant in the beverage industry or otherwise, from seeking authorisation to participate in the CDS by operating an authorised collection depot or authorised transfer station. The EPA has the function of granting approval for a premises to be an authorised collection depot (s. 52I(1)) or an authorised transfer station (s. 52J(1)). The EPA may enter into agreements with the operators of such premises in respect of their location, operation and functions (ss. 52I(2) and 52J(2)). Section 52I(4)(b) contains a non-exhaustive, indicative list of the kind of premises that may be authorised as collection depots. Having regard to these provisions, it would be open to an industry participant to

seek formal authorisation to participate in the CDS through the operation of an authorised collection depot and/or authorised transfer station. The prospects of authorisation being given for the operation of a collection depot may be improved if the proposed site falls within one of the examples given in s. 52I(4)(b) or bears similar characteristics.

38. I advise accordingly.

8 November 2011

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