VICTORIAN GOVERNMENT
SOLICITOR'S OFFICE

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22 June 2011

Mr Mark Payton
Solicitor
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By email: ***mark.payton@epa.vic.gov.au***
And by post

Dear Mr Payton

Environmental Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2011

Purpose

1. You have asked us to provide advice on the Environmental Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2011 (**the Bill**).

Background

2. On 1 June 2011, Ms Colleen Hartland of the Victorian Greens introduced the Bill into the Legislative Council. The Bill's second reading speech occurred on 15 June and debate was adjourned until 29 June. The Bill raises various constitutional issues, specifically in relation to:

   2.1 s 62 of Victoria's *Constitution Act 1975* (**the Victorian Constitution**); and

   2.2 s 90 of the Commonwealth's *Constitution Act* (**the Commonwealth Constitution**).

3. Accordingly, you have asked us to advise on these issues.

Summary of advice

4. A duty of excise is a tax on a step in the production, manufacture, sale or distribution of goods. In our view, the levy provided for in the Bill most likely constitutes a duty of excise in contravention of s 90 of the Commonwealth Constitution. If the Bill is passed by the State Parliament we are of the view that, if challenged, it will be held by a Court to be constitutionally invalid in breach of s 90.

5. Further, as the Bill provides for the imposition of a tax, s 62 of the Victorian Constitution requires that it originate in the Legislative Assembly, not the Legislative Council. Accordingly, unless the Bill originates from the Legislative Assembly, it should not be entertained by the Assembly.

6. This does not mean that container deposit legislation cannot be introduced by the State Parliament, merely that such a scheme should be carefully drafted in order to minimise the prospect of constitutional invalidity. Consideration should also be given to the interaction of any scheme with the proposed Commonwealth scheme.

Proposed legislation

Legislative history

7. On 1 April 2009, Ms Hartland introduced the Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009 (the **2009 Bill**) into the Legislative Council. The 2009 Bill was passed by the Legislative Council, but the Legislative Assembly refused to entertain the 2009 Bill for reasons discussed below at paragraphs 33 to 40. Apart from some minor amendments, the current Bill is the same as the 2009 Bill. Therefore, much of the Parliamentary debate and other information that relates to the 2009 Bill is also relevant to the consideration of the current Bill.

Legislative scheme

8. The Preamble to the Bill describes its purpose as being to amend the *Environment Protection Act 1970* (the **Act**) to "make further provision for environmentally sustainable uses of resources and best practices in waste management by establishing a beverage container deposit and recovery scheme to be administered by the Environment Protection Authority and for other purposes." Clause 4 of the 2011 Bill inserts a new Division (proposed ss 52-52O) in Part IX of the Act.

9. A critical element of the beverage container deposit and recovery scheme (the **Scheme**) is the imposition of a 'beverage container environment levy' (the **levy**). Section 52D provides for the imposition of the levy in the following terms:

> Unless an exemption granted under section 52N applies, 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 environmental levy payable for each beverage container in accordance with section 52F.

10. The amount of the levy is specified by s 52E to be 10 cents or a higher prescribed amount and is payable in respect of each beverage container.[1] Section 52F requires that the levy is paid to the EPA within 14 days after the end of the month in which the beverage container was sold in Victoria.

11. Section 52 provides that the Scheme is to be administered by the EPA and s 52C(1) provides that the functions of the EPA in doing so are, relevantly, to:

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[1] Pursuant to the Bill 'beverage container' means a container containing a beverage that is produced for the sale of the beverage in a sealed form to the consumer which has a capacity not exceeding 3 litres and 'beverage' includes carbonated or non carbonated soft drink, fruit juice or water, any alcoholic drink, milk and any other liquid intended for human consumption that is prescribed to be a beverage. Classes of beverages and beverage containers can be prescribed not to be included within these definitions.

(b) collect the beverage container environmental levy;

. . .

(d) authorise a premises to be an authorised collection depot;

(e) authorise a premises to be an authorised transfer station;

. . .

(g) facilitate the promotion of the Scheme;

(h) provide grants or other financial incentives to encourage the use of recyclable and reusable containers and the increased use of recycled material from beverage containers;

. . .

12. The proponents of the Scheme assume that manufacturers will recover the amount liable to be paid to the EPA by way of levy, by incorporating that cost into the price of the beverage. The report *Turning Rubbish into Community Money*[2] (the **Hartland Report**), notes that the 'deposit' (ie levy) would be incorporated into the wholesale price of the beverage and passed on to the consumer.[3] According to Ms Hartland, "the cost of a container deposit system is borne by those who create the litter - the ones who throw away the opportunity by not redeeming their 10 cent deposit."[4]

13. The 10 cent levy may be 'refunded' in exchange for the empty beverage container at 'authorised collection depots'.[5] In addition, it is proposed that 'authorised transfer stations' will act as a collection depots for large-scale redeemers and will receive containers collected by depots, process the containers and transport them to the nearest recycler.[6] Section 52L provides that an authorised collection depot or transfer station must pay a refund of the levy to a person returning a used beverage container in accordance with that section. Sections 52I and 52J provide for the EPA to approve premises to be 'authorised collection depots' and 'authorised transfer stations' respectively. Those sections provide for the EPA to enter into an agreement with an operator of an authorised collection depot or an authorised transfer station, which may include provision for the EPA to pay the relevant operator the "refund value"[7] paid by the depot or transfer station.

14. Therefore, it is contemplated that the funds raised by the levy will be used, in large part, to reimburse authorised transfer stations and collection depots for the refunds paid to consumers who return beverage containers.[8] However, according to the Hartland Report "14.4% of deposits will not be redeemed, creating a surplus of $56.3 million per

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[2] The first edition of *Turning Rubbish into Community Money* was commissioned by Ms Hartland before introducing the 2009 Bill. Ms Hartland released the 2011 edition of the report on 15 June 2011.
[3] Hartland Report, pp 1 and 11
[4] Hansard, 2009 Bill, Legislative Council, 24 June 2009, p 3260 (Ms Hartland)
[5] See the Bill's Explanatory Memorandum, Clause 4, p 3
[6] See the Bill's Explanatory Memorandum, Clause 4, p 3. Also see the Hartland Report, pp 9-11 which refers to authorised collection depots as "depots" and authorised transfer stations as "hubs."
[7] Defined as 10 cents or any prescribed higher amount.
[8] See the Bill's Explanatory Memorandum, Clause 4, p 3

annum."[9] Assuming a surplus is indeed realised, s 52(2) of the Bill sets out a number of specific purposes[10] for the use of available funds, being:

> (a) market creation and support for collected beverage containers and materials;
>
> (b) financial support for kerbside recycling services . . . ;
>
> (c) further offsetting the collection industry costs for the operation of the Scheme;
>
> (d) product development to improve the recyclability and reusability of beverage containers;
>
> (e) other activities and programs connected with recycling which the Authority considers will facilitate environmentally sustainable uses of resources and promote best practices in waste management.

Discussion

Section 90 of the Commonwealth Constitution

15. Section 90 of the Commonwealth Constitution provides:

> On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.

16. Accordingly, the States may not legislate to impose duties of customs or excise on goods. The rationale behind s 90 was to give the Commonwealth effective control over economic policy affecting the supply and price of goods within the Commonwealth and to prevent differential taxes on goods or differential bonuses on the production or export of goods diverting trade or distorting competition.[11]

17. On current authority, a **duty of excise is a tax on a step in the production, manufacture, sale or distribution of goods**, whether of foreign or domestic origin (emphasis added).[12] Thus, a tax on the production, manufacture, sale or distribution of beverage containers that was imposed by a State would risk breaching s 90 of the Constitution.

18. Ms Hartland has stated that the levy imposed by the Bill is "not an excise."[13] In order to determine the accuracy of that position, it is necessary to address two questions:

    18.1 Does the levy imposed in accordance with the proposed s 52D of the Act comprise a 'tax'?

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[9] Hartland Report, p 9. Note that the first edition of the Hartland Report estimated that 17.7% of deposits would not be refunded creating a surplus of $63.5 million.

[10] Without limiting the generality of the functions referred to in s 52C(1)(g) and (h).

[11] *Ha and Hammond v NSW* (1997) 189 CLR 465 (***Ha***), 499 per Brennan CJ, McHugh, Gummow and Kirby JJ; *Capital Duplicators v ACT (No 2)* (1993) 178 CLR 561(***Capital Duplicators***), 585-86 per Mason CJ, Brennan, Deane and McHugh JJ.

[12] *Ha,* 499 per Brennan CJ, McHugh, Gummow and Kirby JJ; *Capital Duplicators*, 589-90 per Mason CJ, Brennan, Deane and McHugh JJ.

[13] Hansard, 2009 Bill, Legislative Council, 29 July 2009, p 3596 (Ms Hartland)

18.2 If the levy is a tax, is it a tax imposed 'on' goods?

The imposition of a tax

19. A 'tax' is considered to have both positive and negative characteristics. Focussing first on those positive characteristics, an impost which is "**a compulsory exaction** of money by **a public authority for public purposes**, enforceable by law"[14] (emphasis added) is, prima facie, a tax. In our view, it is likely that the levy will meet this threshold criteria for a 'tax'.

20. In determining whether an impost is compulsory, it is enough that there is a *practical*, if not a legal, compulsion to pay the charge.[15] In this case, however, there is plainly a legal obligation to pay the levy. Section 52D imposes a civil penalty in the case of failure to pay the levy and where the breach is continuing, a cumulative penalty accrues for each day of the contravention.[16]

21. There is no strict requirement for characterisation as a tax that the impost be paid into consolidated revenue or to a public body.[17] In this case however, the levy is payable to the EPA under proposed s 52F and s 52C(1)(b), and is intended (consistently with the general functions of the EPA under s 52C) to be directed into the Environment Protection Fund.

22. Further, the Bill contemplates that the funds raised by the levy will be used for public purposes. The funds are to be applied to encourage consumers to use recycling facilities. Furthermore, it is contemplated that surplus funds will be directed to support and promote practices to protect the environment in line with the functions of the EPA under the Bill.[18]

23. It should be noted that an impost will not be a tax, even if it satisfies the description in paragraph 19 above, if it is a fee for services rendered, a charge for the acquisition or use of property (eg a royalty), a fee for a privilege (eg. a licence fee) or a fine or penalty.[19]

23.1 However, the levy would only qualify as a 'fee for services' if it correlated with the receipt of some service by producers or importers of beverage containers in Victoria. As discussed, levy funds will be used to encourage the deposit of empty beverage containers at collection points. More generally, the funds may be used to promote the Scheme and broader community and industry participation in recycling of consumer packaging. It is difficult, in our view, to identify any benefit which will flow directly to producers and importers as a consequence of the levy. We consider it unlikely that the levy could be characterised as a fee for services.

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[14] See *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263, 276 per Latham J. It is not essential that the impost be levied by a public authority or that it be levied for public purposes for it to be a tax: *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 (***Air Caledonie***), 467; *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 (***Australian Tape Manufacturers***), 501.

[15] *Air Services Australia v Canadian Airlines* (1999) 2002 CLR 133, 189.

[16] Bill, s 52D "Penalty: penalty units and in the case of a continuing offence a daily penalty of 1200 penalty units for each day the offence continues after a finding of guilt or after service by the Authority on the defendant of notice of contravention of this section."

[17] *Australian Tape Manufacturers Association* at 503.

[18] As discussed above, s 52C identifies a range of potential 'public' uses to which the EPA may direct funds available to it.

[19] *MacCormick v FCT* (1984) 158 CLR 622, 639; *Air Caledonie* at 467.

23.2 It is not possible to characterise the levy as a 'royalty' because it does not relate to the acquisition of property derived from the State.

23.3 Likewise, the levy could not on any view qualify as a fine or a fee for a penalty.

23.4 Further, we do not consider it likely that the levy would be characterised as a licence fee. Neither s 52D nor the surrounding 'implementation' provisions in ss 52E and 52F are consistent with the levy being a licence fee. The levy is not 'dressed up' as a licence fee. Most importantly, the total amount of the levy is not referrable to the costs of regulation[20] – rather, its amount is directly referrable to the number of beverage containers sold within a specified period.

A tax imposed 'on' goods

24. If the levy is a tax, as we believe it is, in order to determine whether it is a duty of excise we must consider whether "it is a tax imposed 'upon' or 'in respect of' or 'in relation to' goods or commodities (as opposed to persons, services or income).

25. It seems clear that a beverage container is a 'good': it is saleable and has a discernable value for the producers and importers identified in s 52D. It is, therefore, necessary to closely analyse s 52D (and the surrounding implementation provisions) to establish whether the levy is in respect of or in relation to the beverage container. In our view, this question must be answered affirmatively.

26. In *Anderson's Pty Ltd v Victoria*,[21] Barwick CJ confirmed that the broad meaning of an excise as a tax upon or in respect of goods at any point including the point of manufacture or production, as they pass to consumption. He described the parameters for assessing the connection between the charge and the goods in the following terms:

> ....in arriving at the conclusion that the tax is a tax upon the relevant step, consideration of many factors is necessary, factors may not be present in every case and which may have different weight or emphasis in different cases. The 'indirectness' of the tax, its immediate entry into the cost of the goods, the proximity of the transaction it taxes to the manufacture or production or movement of the goods into consumption, the form and content of the legislation imposing the tax – all are relevant considerations.

27. The character of a tax as a duty of excise is indicated most plainly when the amount of the tax is determined by reference to the quantity or value of the goods.[22] That is clearly the case here where the levy is imposed as an *ad valorum* rate that varies depending on quantity of the goods. However, in *Hematite Petroleum Pty Ltd v Victoria*,[23] Mason J said:

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[20] This may be disputed by Ms Hartland who said that the 10 cent levy "is intended to pay for the recycling scheme and bears a close relationship to the amount required to serve that purpose (Hansard, 2009 Bill, Legislative Council, 29 July 2009, p 3596). The amount of 10 cents was also chosen to provide uniformity with the SA and NT scheme (Hansard, 2009 Bill, Legislative Council, 24 July 2009, p 3263)

[21] (1964) 111 CLR 353 at 365.

[22] However, for a tax to be found to be an excise, it is not necessary that its amount be determined by reference to the quantity or value of goods: *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263, 304 per Dixon J; *Hematite Petroleum Pty Ltd v Victoria (Hematite)* (1983) 151 CLR 599, 633 per Mason J; *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation*

[23] *Hematite* (1983) 151 CLR 599.

> To justify the conclusion that the tax is upon or in respect of the goods it is enough that the tax is such that it **enters into the cost of the goods** and is therefore reflected in the prices at which the goods are subsequently sold. It is not necessary that there should be an arithmetical relationship between the tax and the quantity of value of the goods produced or sold ... still less that such a relationship should exist in specific period during which the tax is imposed. This is because there are many cases where an examination of the relevant circumstances will disclose that a tax is a duty of excise notwithstanding that it is not expressed to be in relation to the quantity or value of the goods.[24] [emphasis added]

28. In our view, the levy will most likely qualify as a tax imposed "on" goods, as it is calculated by reference to the number of containers sold. The levy is also likely to enter the cost of containers (see paragraph 12 above).

29. Accordingly, the levy is likely to be considered a duty of excise for the purposes of the prohibition in s 90 of the Commonwealth Constitution. Several factors point to real difficulties in defending the constitutional validity of the levy imposed by s 52D: the levy is a mandatory exaction of monies by statute; the levy is payable directly to a public authority for a public purpose that is in "the public interest";[25] the levy is imposed at a time directly referrable to the point of sale of a beverage container.[26] Moreover, the levy will most likely enter the cost of the beverage containers.

SA and NT's container deposit legislation

30. Both South Australia (**SA**) and the Northern Territory (**NT**) have container deposit legislation which, like the proposed Victorian legislation, provides for a scheme whereby refunds are made to consumers who deposit empty beverage containers with approved waste management operators. While we have not analysed the SA and NT legislation to determine constitutionality, we note that the Scheme proposed by the Bill in Victoria is quite different to the SA and NT container deposit schemes. The SA and NT schemes are based on an industry run arrangements. Neither scheme is funded by a levy paid to a public authority.

31. Neither the State nor any public authority receives monies under the SA scheme, other than basic regulatory fees paid to the South Australian Environment Protection Authority. Under the SA scheme beverage manufacturers pay a deposit to a supercollector who sets up a collection system and retains the manufacturer's funds until the consumer returns the used containers and redeems the deposit. The manufacturer passes the cost of the deposit and a handling fee to the consumer in the retail price. Refunds are paid to the consumer by retailers[27] and collection depots[28] depending upon the type of beverage container that is deposited. Unclaimed deposits are retained by the beverage manufacturer. The supercollector on-sells the use containers to beverage manufactures, distributors and wholesalers.[29]

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[24] *Hematite*, 632.
[25] *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263, 281 per Rich J, and *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 503.
[26] See proposed s 52F of the Act.
[27] *Environment Protection Act 1993* (SA) s 70
[28] *Environment Protection Act 1993* (SA) s 71
[29] The SA Scheme is helpfully summarised in the report of the Commonwealth's Environment, Communications, and the Arts Legislation Committee in relation to the Environment Protection (Beverage Container Deposit and Recovery Scheme) Bill 2009 (Cth)

32. NT's container deposit legislation is based on SA's scheme. Although we have not analysed these schemes to determine whether or not they impose a duty of excise in breach of s 90 of the Commonwealth Constitution, it is relevant to note the comments made during the second reading speech of Northern Territory's Environment Protection (Beverage Containers and Plastic Bags) Bill 2010, which was passed by the NT Parliament in March 2011:

> The bill establishes a container deposit scheme in which the beverage industry has a central role in the implementation. I understand some in the community believe government should run the scheme, or that it should be managed by an independent operator. **Government has looked very closely at those alternatives** and, while there are attractive elements with both, **it is quite clear that either would be at risk of being invalid under the Australian Constitution.** The provisions in the bill have, therefore, been modelled on those in the South Australian container deposit legislation.[30] [emphasis added]

Section 62 of the Victorian Constitution

33. As noted above, the 2009 Bill was passed by the Legislative Council and sent to the Legislative Assembly in 2009. However, the Legislative Assembly refused to entertain the 2009 Bill as it sought "to impose a levy, which is unlawful, being the exclusive power of the Legislative Assembly as set out in the Constitution Act".[31]

34. Section 62(1) of the Victorian Constitution provides:

> (1) **A Bill** for appropriating any part of the Consolidated Fund or **for imposing any duty, rate, tax, rent, return or impost must originate in the Assembly**. [emphasis added]

35. For the reasons discussed above at paragraphs 19 to 23, we are of the view that the levy imposed by the Bill is a tax. Therefore, s 62(1) requires that it originate in the Legislative Assembly, not in the Legislative Council (the origination rule).

36. Further, the suggestion that the Assembly's Standing Order 93 provided the Assembly with an avenue for dealing with Council Bills that fit the description of those Bills mentioned in s 62 of the Victorian Constitution[32] is not accurate. Standing Order 93 provides as follows:

> Council's powers to impose fees
>
> When any pecuniary penalty, forfeiture or fee is authorised, imposed, appropriated, regulated, varied or removed by any:
>
> (1) Bill received from the Council; or
>
> (2) Amendments to a bill returned to the House by the Council-
>
> The House does not insist on its privileges when:

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[30] Hansard, Environment Protection (Beverage Containers and Plastic Bags) Bill 2010 (NT), second reading speech (Mr Hampton), 25 November 2011

[31] Hansard, 2009 Bill, Legislative Assembly, 24 June 2009, p 2098

[32] Hansard, 2009 Bill, Legislative Council, 29 July 2009, p 3596 (Ms Hartland)

(a) The object of the pecuniary penalty or forfeiture is to secure the execution of the Act or the punishment or prevention of offences; or

(b) The fees are imposed in respect of benefit taken, or service rendered under the Act, and in order to secure the execution of the Act, and are not made payable into the Treasury, or in aid of the public revenue, and do not form the ground of public accounting by the parties receiving the same, either in respect of deficit or surplus: or

(c) The bill is a private bill for a local or personal Act.

37. According to Mr Taylor[33] in *The Constitution of Victoria,* the statement - "does not insist on its privileges" - refers to the Legislative Assembly's "general right to primacy in financial legislation supposed to be inherited from British Parliamentary practice rather than established by black letter law . . . almost all of which now seem to be covered by s 64(1)"[34] of the Victorian Constitution.[35] Section 64(1) excludes from s 62, Bills which contain provisions imposing fines or pecuniary penalties or which involve licence fees or fees for services. As Mr Taylor notes, this provision is essentially redundant as such Bills "would not normally come within the definition of taxation Bills anyway."[36]

38. In any event, Standing Orders are merely rules adopted by each House for the conduct of their own business. Standing Orders "cannot change the ordinary law of the land, as they are not statues"[37] and certainly cannot override the clear provisions of the Victorian Constitution.

39. In our view, Standing Order 93:

39.1 does not apply to the Bill (given that the Bill is a taxation Bill); and

39.2 even if it did so, could not 'trump' the clear provisions of s 62 of the Victorian Constitution.

40. Therefore, there is no escape from the clear requirement of s 62(1) of the Victorian Constitution that taxation Bills must originate in the Legislative Assembly. Given these clear constitutional requirements, the Legislative Assembly should not entertain the Bill unless it is reintroduced directly into the Legislative Assembly.

Proposed Commonwealth scheme

41. The Environment Protection (Beverage Container Deposit and Recovery Scheme) Bill 2010 (**the Commonwealth Bill**) was introduced into Federal Parliament on 30 September 2010[38] by Senator Ludlam. The Commonwealth Bill establishes the national Beverage Container Deposit and Recovery Scheme; enforces and imposes civil penalties on persons or body corporate for breaches of the scheme; provides for an annual report on the operation of the proposed Act; and contains a regulation making power.

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[33] Senior Lecturer, Faculty of Law, Monash University

[34] Greg Taylor, *The Constitution of Victoria*, The Federation Press 2006 (***The Constitution of Victoria***), p 362

[35] Order 93 predates s 64(1) of the Victorian Constitution, The Constitution of Victoria, p 362

[36] *The Constitution of Victoria*, p 362. Also refer to our discussion of the definition of a "tax".

[37] *The Constitution of Victoria*, pp 372-373. See also *Stockdale v Hansard* (1839) 112 ER 1112 at [191]

[38] *Environment Protection (Beverage Container Deposit and Recovery Scheme) Bill 2009* was introduced into the Senate and read a first and second time on 14 May 2009 and lapsed at the end of Parliament in 28 September 2010.

42. The Commonwealth Bill has not yet passed the Senate. In March 2011, in response to a question from Senator Ludlam in relation to the status of the national container deposit scheme, Senator Conroy responded that the Regulation Impact Statement (**RIS**) on packaging and litter will provide an analysis of the net community benefit of a number of possible national measures, including a national CDS, for consideration by governments.[39] On 4 November 2010 the Environment Protection and Heritage Council said that they would release a public consultation RIS by the end of 2011.[40]

43. Ms Hartland said in relation to the proposed Commonwealth Bill that the Greens would strongly support a national scheme and that "we designed the [Victorian] Bill so that one day it could become part of a national scheme."[41] Indeed, many of the provisions of the Commonwealth Bill are identical to the Victorian Green's Bill save that the Victorian Green's Bill refers to the EPA instead of a government 'department' as administrator of the Scheme and replaces the term 'beverage container environmental deposit' in the Commonwealth Bill with 'beverage container environmental levy'.

44. Section 7 of the Commonwealth Bill states that it is "not intended to exclude or limit the operation of a law of a State or Territory to the extent that the law is capable of operating concurrently with this Act." Nevertheless, if both the Commonwealth and State Bills were to become law, it would be advisable to give some consideration to the extent to which concurrent operation was possible. Section 109 of the Commonwealth Constitution may become relevant. We would be happy to advise on that question should the need arise.

Conclusion

45. The Bill to establish a beverage container deposit and recovery scheme in Victoria is likely to be considered a Bill that imposes a duty of excise contrary to the Commonwealth Constitution. Further, the Victorian Constitution requires that a taxation Bill such as the proposed Bill originate in the Legislative Assembly.

46. Should the State Parliament wish to proceed with establishing a container deposit and recovery scheme, we advise that the scheme is crafted in such a way that it minimises the prospect of constitutional invalidity.

47. We trust our advice has been of assistance. If you would like to discuss any aspect of this advice please contact Rachel Amamoo on 8684 0247 or Alison O'Brien on 8684 0416.

Yours faithfully
Victorian Government Solicitor's Office

SJ

Sue Nolen
Acting Victorian Government Solicitor

[39] Senate, Questions on Notice, National Container Deposit Scheme, Question 319, Tuesday 1 March 2011
[40] Greens press release 16 Feb 2011, 22nd Meeting of the EPHC Communiqué, 4 November 2010
[41] Hansard, 2009 Bill, Legislative Council, 24 June 2009, p 3261 (Ms Hartland)

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22 June 2011

Mr Mark Payton
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By email: ***mark.payton@epa.vic.gov.au***
And by post

Dear Mr Payton

Environmental Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2011 - *Mutual Recognition Act* issues

Purpose

1. You have asked us to provide advice on the Environmental Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2011 (**the Bill**).

Background

2. On 1 June 2011, Ms Colleen Hartland of the Victorian Greens introduced the Bill into the Legislative Council. The Bill's second reading speech occurred on 15 June and debate was adjourned until 29 June. We have provided you with separate advice on the constitutional issues raised by the Bill. You have also requested that we address any issues raised by the Bill in light of the provisions of the *Mutual Recognition Act 1992* (Cth).

Summary of advice

3. Should State Parliament wish to proceed with establishing a container deposit and recovery scheme, to ensure the integrity of any such scheme we recommend that an exemption from the Mutual Recognition Act is sought.

Discussion

Mutual Recognition Act

4. The principal purpose of the Commonwealth's Mutual Recognition Act is to promote the goal of freedom of movement of goods and service providers in a national market

in Australia. Victoria has enacted mirror legislation adopting the Mutual Recognition Act[1] as have each of the other States and the Territories.

5. The effect of ss 9 and 10 of the Mutual Recognition Act is that goods produced or imported into one State can be sold in another State without the need for compliance with certain requirements relating to sale such as:

> A requirement that the goods satisfy standards of the second State relating to . . . their packaging, labelling, date stamping or age.[2]

6. In the Bill, proposed s 52G prohibits the sale of a beverage container unless the container is labelled "X refund at an authorised collection depot when sold in Victoria," where "X" means 10c or the higher amount prescribed by s 52E. Proposed s 52H states that a person must not sell a beverage container unless the container is labelled in accordance with the prescribed labelling requirements. The provisions of the Mutual Recognition Act mean that the Bill's labelling requirements would not have to be complied with in respect of beverage containers produced or imported in another State and sold in Victoria. Such an exemption would undermine the Scheme given that it purports to apply to beverage containers imported into Victoria for the purposes of sale within Victoria (see proposed s 52D).

7. However, this anomaly can be corrected. Section 14 of the Mutual Recognition Act provides for permanent exemptions to that Act. For example, exempt legislation (which includes any amendment or replacement of the exempt law to the extent that it deals with the same subject matter) is listed in Schedule 2 and includes South Australia's *Beverage Container Act 1975*. In order to maintain the integrity of a container deposit scheme in Victoria, should such legislation be passed in Victoria, it would be necessary to seek an exemption from the Mutual Recognition Act.

8. We trust our advice has been of assistance. If you would like to discuss any aspect of this advice please contact Rachel Amamoo on 8684 0247 or Alison O'Brien on 8684 0416.

Yours faithfully
Victorian Government Solicitor's Office

Sue Nolen
Acting Victorian Government Solicitor

[1] In Victoria, the *Mutual Recognition Act* is adopted pursuant to Victoria's *Mutual Recognition (Victoria) Act 1998*.
[2] Mutual Recognition Act, s10(b)