BAKER & McKENZIE

Memorandum

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Date	22 November 2006
To	Mr Dave West, Boomerang Alliance
From	Andrew Beatty / Ashley Stafford
Ref #	461089-v4\ASV
Re	Advice – Mutual Recognition Constraints on Extended Producer Responsibility or Container Deposit Legislation

Dear Dave,

You have asked that we advise whether section 92 of the *Commonwealth of Australia Constitution Act* (the "**Constitution**") or the *Mutual Recognition Act 1992* (Cth) and its State counterparts ("**Mutual Recognition Legislation**") limit or constrain the introduction of a container deposit legislation ("**CDL**") scheme similar to the one established by Part 8 Division 2 of the *Environment Protection Act 1993* (SA) (formerly the *Beverage Container Act 1975* (SA)) or extended producer responsibility ("**EPR**"), particularly in Western Australia or New South Wales.

1. Summary

How an EPR or CDL scheme could be lawfully implemented

1.1 In our view an EPR or CDL scheme could be introduced that is lawful under section 92 of the Constitution and effective notwithstanding the Mutual Recognition Legislation. This is achievable under a variety of different frameworks for EPR or CDL provided that:

(a) the scheme either:

(i) applies equally in both form and effect to trade in containers or goods from other States, compared with how it applies to trade in containers or goods within the State where the scheme is introduced; and/or

(ii) is appropriate and adapted to achieve its environmental objectives and any burden imposed on interstate trade is incidental and not disproportionate to achieving those objectives; and

(b) in addition:

(i) the scheme does not oblige compliance with requirements, including restrictions or conditions, so the containers or goods can be sold in the State (for example, this can be avoided by not requiring labelling or in-store notices to sell goods; or by not requiring packaging to be approved; or by allowing products to

be sold regardless of whether or not a deposit is paid, but then making retailers pay a fee for every container sold regardless of origin that would be used to fund refunds, provided that this does not have the effect of restricting the sale of the goods – the fee could accrue as a debt to the State and not be enforced by preventing the retailer from selling goods nor by criminal sanctions); or

(ii) if the scheme does oblige compliance with requirements so the containers or goods can be sold in the State (or has that effect), then those requirements:

(A) apply equally to containers or goods produced in and imported into the State (both in form and in effect); and

(B) concern the "handling" of containers or goods within the State (with "handling" defined in reasonable terms, including "disposal", by analogy with dangerous goods); and

(C) are directed at preventing, minimising or regulating environmental pollution in that State.

(such as by requiring that information be provided on how containers should be disposed of by return to designated depots).

1.2 There are other legitimate ways to impose environmental requirements for containers or goods to be sold other than the approach in paragraph (b)(ii). This might even extend to making take-back requirements a condition of types of contracts for the sale of goods (provided that this does not have the effect of unnecessarily restricting the sale of particular goods). However, the approach in paragraph (b)(ii) appears to have the broadest potential to be applied in the context of CDL schemes, should it be necessary to impose requirements that certain packaging can be sold only if it meets requirements connected with its appropriate disposal.

1.3 For example, we consider that legislation imposing a refund for return of packaging could be structured, having regard to the considerations above, to be lawful and effective.

1.4 There is also a process by which NSW or WA could seek to exempt any EPR or CDL scheme from the Mutual Recognition Legislation, with agreement of the Commonwealth, State and Territory Heads of Government, and so put any question of the effect of the Mutual Recognition Legislation beyond doubt.

Outline of legal position

1.5 The Constitution and Mutual Recognition Legislation set certain boundaries on the way in which EPR or CDL schemes could be implemented. Those

boundaries would not, in our view, prevent some form of effective EPR or CDL being introduced. If these boundaries are not observed, the scheme could be:

(a) invalid for inconsistency with section 92 of the Constitution; or

(b) unenforceable or invalid by operation of the Mutual Recognition Legislation.

1.6 Firstly, if the EPR or CDL scheme applies differently to trade in containers or goods from another State, compared with how it applies to trade in containers or goods within the State (even if the scheme is not drafted to suggest such a difference, but if it has that effect), the scheme will contravene section 92 of the Constitution if this discrimination is of a "protectionist" kind. A law for environmental purposes will generally not be "protectionist" provided that it is appropriate and adapted to achieve its environmental objectives and that the burden imposed on interstate trade is incidental and not disproportionate to achieving those objectives. In effect, this is no real impediment to EPR or CDL assuming that any scheme would only impose so much of a burden as is incidentally necessary to achieve its environmental objectives.

1.7 Secondly, if goods may be lawfully sold in the State in which they were produced or into which they were imported, any provisions of an EPR or CDL scheme in another State that oblige compliance with certain additional requirements for the goods to be sold in that other State are unenforceable by virtue of the Mutual Recognition Legislation. Those additional requirements that do not need to be complied with include standards relating to the goods themselves (such as production, composition, quality or performance), any standards relating to the way goods are presented (such as packaging or labelling), requirements that goods be inspected, local content requirements, or any other sale requirement that would prevent or restrict the sale of the goods (or have that effect). This does not prevent laws from being enforced that apply equally to goods produced in or imported into the State and which relate to:

(a) the manner of sale or the manner in which sellers conduct their business (for example, licences, persons to whom goods may be sold or the circumstances in which goods may be sold);

(b) the transport, storage or handling of goods directed to matters affecting health and safety of persons or regulating environmental pollution; or

(c) inspection requirements that are not a prerequisite to the sale of the goods directed to matters affecting health and safety of persons or regulating environmental pollution in that state.

1.8 The exceptions to the Mutual Recognition Legislation appear broader than they really are. For example, arguably a State restriction relating to the "manner of sale" cannot be exempt if it relates only to the manner of packaging because otherwise any standard or restriction on packaging would be exempt from the Mutual Recognition Legislation.

1.9 However, there are many ways in which EPR measures or CDL can be implemented that do not impose requirements on goods themselves or on packaging, and that do not otherwise restrict the sale of goods that could be lawfully sold in their State of origin. Even if it is essential to impose such requirements, there is a sound basis on which a Court could construe the "handling" exception in paragraph 1.7(b) above to apply to measures aimed at the appropriate disposal of packaging (including, in our view, its return to depots).

2. Background to CDL and EPR

2.1 EPR is a term that applies to schemes which assign responsibilities for environmental impacts across the life cycle of a product to participants in that cycle. Typically, these schemes are aimed at transferring the environmental and economic costs of goods after they are used or consumed (which would otherwise fall on local communities and authorities) back to the producers of the goods. However, some schemes are aimed at spreading these costs along the life cycle chain.

2.2 The CDL scheme that applies in South Australia is now in the *Environment Protection Act 1993 (SA)*. That legislation applies a deposit to the purchase price of certain packaged beverages which is refunded when the empty container is taken to certain collection locations. This scheme has effect by:

(a) prohibiting supply to a retailer, and prohibiting retailers from selling, beverages in containers that have not been categorised (as either “A” or “B”) for the purpose of the scheme and have not been marked with an approved label that indicates the refund amount for the container;

(b) requiring retailers to pay refunds of the deposited amount to persons delivering empty "Category A" containers to the retailer (if they sell containers of that kind, whether or not they actually sold the physical containers that are being returned). This Category is not common because retailers are reluctant to take on this responsibility;

(c) only permitting retailers to sell "Category B" containers if the retailer is within a collection area for a collection depot, which depots are required to pay refunds of deposits on "Category B" containers that are delivered empty to them. This is the more common category of container; and

(d) as a matter of policy (rather than being prescribed by the legislation), approval being granted to the categorisation and label for a container, as in (a) above, only if arrangements are in place for the containers to be collected and aggregated for reuse or recycling (that is, effectively at the producer's expense, whether via a depot or retailer).

2.3 Although this scheme of deposits and refunds is the way in which the South Australian CDL operates, there are many other forms of EPR Systems. For example:

(a) **take-back requirements** require producers or retailers to take back a product or packaging after it has been used (elements of which are in the South Australian system);

(b) manufacturers having **continued ownership** of products;

(c) **levies** can be imposed on products reflecting the cost to the State to dispose of them;

(d) **taxes** can be imposed on:

(i) the materials comprising products or packaging based on either their capacity to pollute or their capacity to harm the environment, all based on the expense required to dispose of products at the end of their life cycle; or

(ii) the producers of goods, rather than their customers, to seek to encourage producers to use materials and designs that will minimise the tax;

(e) **imposing performance standards** on packaging; and

(f) **requiring labels** that convey the negative or positive environmental performance of a product.

3. How EPR or CDL schemes can restrict trade in goods between States

3.1 If a State acts unilaterally to introduce an EPR or CDL scheme, by somehow imposing a burden on the producers of goods with the aim of increasing the environmental soundness of goods (whether in materials used, energy consumption, production, transport, use, recycling or disposal), the scheme will invariably have some effect on interstate trading in those goods for certain manufacturers. This effect can also apply to more than just certain manufacturers, operating to restrict entire classes of goods being traded across that State's border.

3.2 By way of example:

(a) a manufacturer "X" that produces goods in Victoria and sells very few of its goods in NSW or WA might find that the cost of complying with EPR obligations imposed on its goods by NSW or WA is large compared with the number of sales it makes in those States. It might be unprofitable for "X" to continue to sell its products in NSW or WA;

(b) a manufacturer "Y" that produces the same goods as "X" but does so in WA, and sells very few of its goods into Victoria and most of its goods into WA, might find that EPR obligations imposed on its goods in WA will make it more competitive against "X" in WA. However, if the EPR obligations increase its costs of manufacture in WA, then "X" might

have to charge more for its product than "Y" and so be less competitive than "Y" in the Victorian market;

(c) the manufacturers of a particular version of a product might be concentrated in one or a number of States. If burdens are imposed in WA or NSW that affect that product (whether in manufacture, distribution or sales) but not other versions of that product, the manufacturers in the relevant States where the burdened product is most produced could be disadvantaged compared with the manufacturers in other States;

(d) a manufacturer “Z” that produces goods in Queensland and has a strong distribution network throughout NSW and WA might have operational offices in WA but no such offices in NSW (given the relative distances from NSW and WA to Queensland). If burdens imposed on "Z" as a result of an EPR scheme cannot be complied with at the distribution level and further tasks must be undertaken locally to comply with the scheme then "Z" might have existing capacity to comply with the scheme if it were imposed in WA (assuming the existing offices could undertake the task) but not if it were implemented in NSW. The cost of establishing additional operations or engaging a contractor to carry out necessary tasks in NSW could make it unviable to continue to sell products to that State.

3.3 The effects in (a), (c) and (d) can be particularly pronounced if the markets for the goods in those examples are such that the disadvantage applies to a number of manufacturers in other States or to a large percentage of the goods of that type imported from other States.

4. Constitutional guarantee of free trade between States

4.1 Section 92 of the Constitution provides that trade, commerce and intercourse among the States shall be absolutely free. This provision has not been interpreted by the High Court to mean that States cannot impose any burdens on interstate trade and commerce, but rather that such laws must not discriminate in a "protectionist" sense: ***Cole v Whitfield and Anor*** (1998) 165 CLR 360 at 408.

4.2 Protectionism in a general sense is where States implement laws or policies to seek to protect domestic businesses and industries from competition from cross-border businesses and industries. In a legal sense (and in the context of the Constitution), the High Court has developed tests to decide which burdens on interstate trade and commerce are "protectionist" and which burdens are a legitimate exercise of the State's power to enact legislation for the well being of its people.

4.3 Laws which are appropriate and adapted to resolve specific problems will not contravene section 92 by discriminating in a protectionist sense so long as any burden imposed on interstate trade is "incidental and not disproportionate to" resolving those problems: ***Castlemaine Tooheys Limited and Ors v South Australia*** (1990) 169 CLR 436 at 472-4 ("***Bond Case***").

4.4 So, rather than preventing laws aimed at protecting the environment that also happen to restrict trade between States, section 92 of the Constitution allows this provided that the burden is an incidental or ancillary consequence of protecting the environment and the restriction is not out of proportion with what is required to achieve those objects.

4.5 If there is a reasonable alternative way to achieve the object that does not discriminate between States, or a less aggressive form of the same measures could be implemented with a lesser burden on interstate trade but that would achieve the same result, then this might suggest that the intention is not to achieve a legitimate environmental objective, but rather that it is an illegal restriction on free trade: *Bond Case* at 471-2.

4.6 To this end, we consider that any EPR or CDL scheme will be less susceptible to a successful challenge provided that careful consideration is paid to:

(a) what the alternatives are to achieve the change in behaviour in the product life-cycle sought;

(b) if the alternatives in (a) are equally effective, considering whether the options that are least restrictive on interstate trade would be reasonable (for example, an alternative might not be reasonable if the costs are much higher than an option that is more restrictive on interstate trade); and

(c) ensuring that any measures implemented as part of the option that is selected, if those measures have the effect of restricting interstate trade, only go so far as is necessary to achieve their environmental objectives (for example, fees or penalties that are higher than necessary to procure compliance with the environmental objectives might be presumed to be protectionist if they disadvantage interstate traders).

4.7 We recommend that the way in which any EPR or CDL scheme responds to the Court's tests by applying the considerations in 4.6 should be evident in both the legislation and any explanatory memoranda, with the aim of deterring Court challenges.

4.8 In the ***Bond Case***, Justices Gaudron and McHugh went further than the majority of the Court and suggested that even if a burden imposed on interstate trade is "incidental and not disproportionate" to achieving the environmental objectives sought, it could still be protectionist if a law operates by reference to a distinction that is irrelevant to the legitimate environmental objective. So, for example, consider a product "A" produced in a State, and a product "B" produced in other States that is substitutable for product "A" but different. Both product "A" and product "B" have a negative environmental impact, although product "A" has a lesser impact than product "B". If a law is introduced that operates to disadvantage product "B" but not product "A", or disadvantages product "B" more than product "A" but does so out of proportion to the relative environmental impacts of product "B" and "A", then it might still be protectionist

even if the burden imposed on product "B" is incidental and not disproportionate to reduce the environmental impacts of product "B".

4.9 Although it is not yet clear whether this stricter test (that was not adopted by the majority of the Court) will apply in interpreting section 92 of the constitution as it applies to any EPR or CDL legislation in the future, it may be prudent to ensure that a series of products that are substitutable for each other are each treated fairly by any EPR or CDL legislation even if they are treated differently.

5. Background to the Mutual Recognition Legislation

How the mutual recognition scheme was implemented

5.1 On 11 May 1992 the Prime Minister, Premiers and Chief Ministers of the Australian Commonwealth, States and Territories agreed to sign a mutual recognition agreement ("**Intergovernmental Agreement**"), the relevant objective of which was to facilitate the sale of goods in a State or Territory if the goods could be sold lawfully in another state or territory. The draft legislation to effect this, substantially as it was ultimately proposed for enactment, was attached to this agreement.

5.2 The States referred the power to enact this legislation to the Commonwealth under paragraph xxxvii of section 51 of the Constitution (which power it would not have but for this referral): for example, *Mutual Recognition (New South Wales) 1992 (NSW)*. Following enactment of the Mutual Recognition Legislation at the Federal level in 1992, it prevails over any State legislation to the extent of any inconsistency and makes the State law invalid to the extent of any inconsistency: s 109 of the Commonwealth Constitution.

How the Mutual Recognition Legislation works

5.3 The Mutual Recognition Legislation was explained by the Federal Minister for Science and Technology, Lindsay Free, in the second reading speech on 3 November 1992 in the following terms:

"It was not so long ago that it was virtually impossible to market cooking margarine nationally in one package. Western Australia required margarine to be packed in cube tops, whereas the familiar round top was acceptable everywhere else. Under mutual recognition, producers in Australia will have to ensure that their products comply with the laws only in the place of production. If they do so, they will then be free to distribute and sell their products throughout Australia without being subjected to further testing or assessment of their product."

5.4 The effect of the *Mutual Recognition Act 1992 (Cth)* ("**Commonwealth MR Act**") is that goods produced in or imported into a State in which they may be lawfully sold, can then be sold in another State, without the necessity for compliance with ***further*** requirements in the State of sale (ss 8-10) that:

(a) the goods satisfy standards relating to the goods themselves, including requirements relating to their production, composition, quality or performance;

(b) the goods satisfy standards relating to the way the goods are presented, including requirements relating to their packaging, labelling, date stamping or age;

(c) the goods be inspected, passed or the like;

(d) a step in the production of the goods must occur within that State; or

(e) any other requirements relating to sale that would prevent or restrict, or would have the effect of preventing or restricting, the sale of the goods.

5.5 This mechanism, known as the "Mutual Recognition Principle", operates only if the goods comply with the requirements imposed by the law of the State in which the goods are produced or imported into Australia. Because the Mutual Recognition Legislation exempts compliance with "further requirements" in the State of sale, it appears that it does not necessarily make those laws invalid to the extent that they apply to goods produced in other States (in the sense of striking out such legislation because it is inconsistent), but merely exempts goods from interstate complying to the extent that the obligations are more onerous.

5.6 The "requirements" that can be caught by the legislation are broad, meaning requirements, prohibitions, restrictions or conditions. Further, the circumstances that can amount to "selling" goods are also broad, including by wholesale or retail, distributing for sale, exposing or offering for sale or having in possession for sale or agreeing to sell, bartering, or suppling by way of exchange, lease, hire or hire-purchase.

Exceptions to the mutual recognition framework

5.7 The Mutual Recognition Principle is subject to a number of exceptions, most of which are very narrow, where the laws apply equally to goods produced in the State or those brought into the State, including laws:

(a) that regulate the manner in which goods are sold or the manner in which sellers conduct or are required to conduct their business (including, for example, relating to contracting to sell goods, the registration of sellers, the requirement for business franchise licenses, the persons to whom goods may be sold and circumstances in which goods may be sold) (the "**Manner Exception**");

(b) regarding the transportation, storage or handling of goods within that State that are directed to minimise, prevent or regulate environmental pollution (including air, water, noise or soil pollution) in that State or directed at matters affecting the health and safety of persons in that State (the "**Handling Exception**");

(c) for the inspection of goods within the State so long as it is not a prerequisite to the sale of goods in that State and those laws are directed at (relevantly) preventing, minimising or regulating environmental pollution (including air, water, noise or soil pollution) in that State: section 11 of the Mutual Recognition Legislation; or

(d) that are (relevantly) substantially for the purpose of preventing, minimising or regulating environmental pollution and which laws declare they are subject to a temporary exemption of up to 12 months under section 15 of the Mutual Recognition Legislation.

5.8 The exemption in (d) was intended to allow time so that any laws imposing environmental standards or requirements to goods could be referred to a Ministerial Council under the Intergovernmental Agreement for consideration as to whether national uniform standards should be applied to those goods: Part V of the Intergovernmental Agreement and Second Reading Speech for the Commonwealth MR Act. Any question of whether national uniform standards could be appropriate can be referred to a Ministerial Council under the Intergovernmental Agreement whether or not legislation has already been passed relying on the temporary environmental exemption.

5.9 It is also possible to exempt goods or laws permanently from the operation of the Mutual Recognition Legislation by:

(a) unanimous consent of the Heads of Government under the Intergovernmental Agreement (Part VI); and

(b) adding the goods to Schedule 1, or adding the State laws to Schedule 2, of the Commonwealth MR Act (Section 14).

5.10 The South Australian CDL legislation is Scheduled in this way, as is a series of other legislation, including for all States and Territories:

(a) ozone protection legislation; and

(b) censorship or film classification legislation.

6. How Mutual Recognition Legislation applies in the context of EPR and CDL

Tension between unrestricted sale of goods that are lawful in other States and the legitimate regulation of "manner of sale" or "handling"

6.1 There is a clear tension in the Mutual Recognition Legislation between the types of standards that are sought to be avoided (paragraph 5.4 above) and the exceptions which seek to allow legitimate regulation of the manner in which goods are sold or handled (the Manner Exception and Handling Exception, in paragraphs 5.7(a) and (b) above).

6.2 While the exceptions cover a number of circumstances, the terms of those exceptions are not so broad that any requirements relating to sale, that aim to

protect the environment, are excepted from the Mutual Recognition Legislation. The most relevant exceptions (the Manner Exception and Handling Exception) relate only to the manner of sale or handling of goods, and the latter (relevantly) only to transport, storage or handling laws that limit environmental pollution (and not for other environmental protection purposes).

6.3 State requirements relating to the quality or composition of goods, or the way in which the goods are presented including their packaging, or that have the effect of preventing or restricting the sale of goods, are expressly prescribed in section 10 of the Commonwealth MR Act as a "further requirement" which need not be complied with.

6.4 However, if in reliance on the Manner Exception or the Handling Exception a State passes CDL or EPR regulations that have the effect of preventing or restricting the sale of goods (such as if the obligation to pay a handling fee, deposit or refund makes it unviable to sell goods) or impact on the composition of goods or their packaging (such as because the required manner of sale or handling discourages a particular composition or quality, favours a particular type of packaging, or requires labelling), will that legislation be rendered ineffective by the Mutual Recognition Legislation?

6.5 Any requirement relating to sale that would prevent or restrict, or have the effect of preventing or restricting, the sale of the goods will be at risk of being rendered ineffective by the Mutual Recognition Legislation unless it:

(a) falls within the strict terms of an exception; and

(b) in having the effect of restricting the sale of goods, also has the purpose of attaining the objectives of that exception (rather than ancillary purposes).

6.6 As a consequence, we consider a law that imposes deposit or refund obligations in such a way as to have the effect of dissuading wholesalers or retailers from selling goods will only escape the Mutual Recognition Legislation, in its application to goods from interstate, if it comes within one of the exceptions and that dissuasion is necessary to achieve the objectives of the exception. The South Australian CDL scheme is a good example of this because it imposes onerous obligations on retailers that stock the category "A" containers (those that have not been approved for collection at depots), which dissuades retailers from stocking such containers. As it would be possible to structure a scheme to encourage return of containers that does not dissuade retailers from stocking particular goods, this effective restriction is not necessary and so would likely not be for the purpose of attaining the objectives of any exception on which a CDL scheme relies. Such an effective restriction represents an additional requirement on goods that the Mutual Recognition Legislation was intended to avoid.

6.7 Similarly, if the regulation effectively imposes de-facto standards on the composition or quality of goods, or favours or requires a particular type or

standard of packaging or labelling, without having the purpose of achieving the objects of the exceptions, there has to be a real risk that such EPR or CDL legislation will be rendered ineffective for interstate goods by operation of the Mutual Recognition Legislation.

Regulation of packaging or labelling does not necessarily relate to the "manner of sale" or "handling"

6.8 On one view, it would be environmentally short-sighted to construe packaging as a mere form of presentation and not as the vehicle that goods take to be transported, stored, handled and sold. In this sense, one might assume too easily that EPR or CDL schemes that apply environmental obligations to packaging will all be excepted from the operation of the Mutual Recognition Legislation on the basis that:

(a) such schemes regulate the "manner of sale"; or

(b) regulate environmental pollution connected with transport, storage or handing.

6.9 However, this is in fact not the case for the Manner Exception, because if regulations on packaging related to the "manner of sale" then the Mutual Recognition Legislation would have no work to do in connection with any packaging (there is nothing in the Manner Exception that would distinguish CDL labelling from any other labelling, for example). Further, for the Handling Exception, the terms "transport, storage and handling" are not defined and so it is not possible to assume that "handling" was intended to include regulation relating to the packaging of the goods without considering the meaning of "handling" in the context of the goods being sold and the specific terms of the exception.

6.10 We doubt whether, in exempting standards relating to the "manner of sale" or of the transport and handling of goods, the intention was to regard packaging or presentation as being ordinarily an aspect relating to the "manner of sale" or the handing of goods. Section 10 refers to both the goods and their manner of presentation, and "goods" are defined in section 4(1) to include also packaging containing goods and labelling. Consequently, we consider the purpose was to regard the sale of goods with their packaging as a product, which product should not be subject to "further requirements" in a State into which it is brought for sale **unless** those standards genuinely relate to the "manner of sale" or handling of the packaging or goods so as to fall within the relevant exceptions.

6.11 So, for example, a law that merely requires margarine to be packaged in round containers and is not separately related to the "manner of sale" will be rendered ineffective by the Mutual Recognition Legislation, whereas a law that requires labelling (which includes any means by which information is displayed in relation to goods without being attached to them: section 4(1)) indicating that a product can only be sold to persons over a particular age would likely fall within the scope and purposes of the Manner Exception and so be effective.

6.12 Similarly, a law that requires specific labelling or packaging for dangerous chemicals, and that is directed to the manner in which the goods are transported, stored or handled would almost certainly fall within the Handling Exception. However, a law that requires the fat content of a food to be displayed on packages or in-store, although it might relate to health and safety, would likely not relate to transporting, storage or handling and so not fall within the Handling Exception.

6.13 Applying this reasoning to the ways in which a CDL or EPR scheme could impact on packaging or labelling is not as simple because:

(a) unlike dangerous goods, it is the packaging itself (after the contents have been separated to be used or consumed) that is the focus of the threat to environmental pollution and not the contents, so it is unclear whether regulations aiming to achieve the return, disposal or recycling of packaging post-consumption is a law relating to "handling"; and

(b) unlike labelling or signage that draws to the attention of potential customers the age restrictions on persons to whom goods can be sold, for the reasons in paragraph 6.10 above it is more difficult to imagine a scheme that has as its ultimate objective a reduction in litter and waste (by way of return post-use or post-consumption) that genuinely relates to the "manner of sale" or the manner in which sellers conduct their business.

Applying the Manner Exception in the context of CDL or EPR

6.14 By extending the example in paragraph 6.13(b), if the CDL scheme were structured with a requirement that sellers may not supply goods to buyers who do not provide a deposit or do not agree to return the packaging to the retailer (similar in form to a requirement not to sell cigarettes to persons over 18), we would expect a Court to take the view that while the scheme restricts the sale of goods (attracting the Mutual Recognition Legislation) it does not fall within the Manner Exception because the ultimate objective is to encourage return of the packaging and has nothing to do with limiting the persons to whom goods may be sold or limiting the circumstances in which goods may be sold. Anyone can pay the deposit and take the goods, regardless of who they are or the circumstances of sale.

6.15 A law which makes it a condition in certain contracts for sale of goods that the retailer will collect packaging following sale, or even collect goods once their life has ended (provided this does not have the effect of unnecessarily discouraging retailers from selling these goods), will attract the operation of the Mutual Recognition Legislation, but is more likely to fall within the Manner Exception because it relates to the contractual aspects of sale and the way in which the retailer conducts its business. If the measure discouraged retailers from selling the goods unnecessarily, including interstate goods, a Court would be more likely to consider that the regulation crosses the line of legitimately regulating desirable contractual obligations and business practices, to impose

additional restrictions on the sale of goods (explained in paragraphs 6.5 and 6.6 above).

6.16 There is some risk associated with attempting to make a CDL scheme relate to the "manner of sale" in the hope of falling within the Manner Exception, such as in these examples, to the detriment of other measures to avoid the risk of restricting the sale of goods altogether.

6.17 For this reason, we are more optimistic about a CDL or EPR scheme being structured either so as to avoid the Mutual Recognition Legislation altogether (by not having any relationship to the sale of goods or make-up of the goods or packaging) or to rely on the Handling Exception.

Applying the Handling Exception in the context of CDL or EPR

6.18 The effectiveness of the Handling Exception comes down to whether CDL or EPR laws imposed on the sale of goods (such as labelling or deposit requirements as a condition of sale) are regulations regarding "handling of goods within the State". Goods are defined broadly to include a package containing goods or a label attached to goods. The effectiveness of the Handling Exception depends on the meaning of "handling", as "transport" and "storage" less clearly relate to any obligation to return or dispose of goods or packaging appropriately.

6.19 "Handling" is undefined in the Mutual Recognition Legislation, but the Macquarie Dictionary defines the verb "handle" broadly to mean:

> "***8.*** *to touch or feel with the hand; use the hands on, as in picking up.*
> ***9.*** *to manage in use with the hands; manipulate: to handle the reins.*
> ***10.*** *to wield, employ, or use: to handle one's fists well in a fight.*
> ***11.*** *to manage, direct, or control: to handle troops.*
> ***12.*** *to deal with or treat, as a matter or subject.*
> ***13.*** *to deal with or treat in a particular way: to handle a person with tact.*
> ***…15.*** *to deal or trade in (goods, etc.).*"

6.20 There is also some legislation in Australia that defines handling of goods broadly. For example, the *Occupational Health and Safety Act 2000* (NSW) provides in s 135A:

> ***handling****, in relation to dangerous goods, includes conveying, manufacturing, processing, possessing, using, preparing for use, treating, dispensing, packing, selling, offering for sale, supplying, transferring, loading and unloading, rendering harmless, abandoning, destroying and disposing of dangerous goods.*

6.21 We have added emphasis to those words that would suggest that regulations with post-consumption objectives (or even relating to use or manufacture) that are imposed on the sale of goods (for example, labelling or restrictive point-of-sale deposit or refund obligations) and directed to reduce environmental pollution, could be caught by the Handling Exception.

6.22 However, there are also many examples of "handling" being defined more narrowly to only activities such as loading, unloading, stacking, stowing, transport and storage. In Schedule 1 we set out examples of statutory definitions of handling.

6.23 To this end, if "handling" under the Mutual Recognition Legislation, having regard to the purpose and objectives of that scheme, were intended to have a broad application and extend to "disposal" and "rendering harmless" of the potential environmental pollution caused by packaging, then CDL or EPR legislation could rely on this exception.

6.24 There are a number of reasons why "handling" might have been intended to have a narrow application:

(a) the Mutual Recognition Legislation's stated principle purpose is "promoting the goal of freedom of movement of goods and service providers in a national market in Australia" and there is no principle or objective to the effect that significant health and safety or environmental regulation in the sale of goods context should be maintained. To the contrary, the provisions that refer to the environment are merely exceptions and the relevant exception is limited only to laws regarding transport, storage and handling;

(b) there is a mechanism by which to impose standards by exemption, if they do not fall within the automatic exceptions, so if there is considerable doubt as to whether an exception should be construed to apply, it might have been intended that the mechanism for applying standards by agreement and exemption should apply;

(c) the Second Reading speech (extracted in Schedule 2) suggests that for the purpose of regulating the sale of goods, matters concerning public health and safety and the environment are generally intended to be subject to uniform national standards in accordance with the specific mechanisms implement those standards. Although no reference is made to the Handling Exception, the speech indicates that uniform standards were to be agreed by the end of 2003 for occupational health and safety and dangerous goods. As the Handling Exception mirrors terms that are typical in occupational health and safety or dangerous goods legislation, this exception was likely a stop-gap measure to allow occupational health and safety and dangerous goods standards to continue until national standards were agreed. Although this does not deprive the Handling Exception of its effect, as it has not been repealed and there are no exceptions for materials that harm the environment or health (other than ozone protection), it could be taken to suggest (with (b)) that the exception was intended to be construed narrowly.

6.25 Subject to these reservations as to how a Court could limit the Handling Exception, we consider that regulations impacting on the sale of goods regarding the "rendering harmless" or disposal" of containers are likely caught by the

Handling Exception by analogy with hazardous substances or dangerous goods. As the Mutual Recognition Legislation was intended to enable regulation in connection with the sale of goods to mitigate environmental pollution from hazardous substances, likely including their "rendering harmless" or "disposal", then in our view the Handling Exception might also apply by analogy to the "rendering harmless" or "disposal" of packaging that causes environmental pollution by way of a CDL scheme.

6.26 As indicated above, "goods" are also defined so they can be "a package containing goods" under the Mutual Recognition Legislation. We cannot see any material distinction between an obligation imposed on the sale of hazardous goods connected with their disposal and directed at minimising environmental pollution, on the one hand, and an obligation imposed on the sale of "a package containing goods" connected with its disposal and directed at minimising environmental pollution. The argument might be made that a package from which the goods have been used is no longer a "package containing goods" and so regulations connected to the return of the packaging do not relate to the handling of "goods". However, as the package does contain goods at the time of sale, when the regulation seeking to rely on the Handling Exception has effect, the "goods" that can be the subject of sale regulations relating to their disposal must include "packaging". This must have also been intended in the context of dangerous goods, as otherwise laws could not require suppliers to provide information as to how containers that held dangerous goods should be rendered safe and disposed of.

6.27 There is little doubt that the Handling Exception could enable regulations requiring a label to the effect that a hazardous substance should be disposed of in a particular way, requiring suppliers of dangerous goods to provide a material safety data sheet, or requiring a person to pay a fee at the point of sale of hazardous substances to contribute towards dangerous goods inspections. On this reasoning, we consider that for the purpose of minimising environmental pollution suppliers of packaging containing goods could be required, for example, to:

(a) label the containers to indicate the way in which it should be disposed of or rendered harmless;

(b) provide information in-store on how to dispose of the containers; or

(c) pay a fee at the point of sale to contribute towards disposal or rendering harmless of the containers (although this would need to be carefully "directed at" preventing, minimising or regulating environmental pollution).

6.28 While there is always the prospect that a Court could take a different view, we consider this view of the Mutual Recognition Legislation would be strongly arguable (and in our view successful). Any EPR or CDL scheme should take account of all other limitations imposed by the Mutual Recognition Legislation

and discussed above, as a failure to do so would be more readily challengeable in Court.

Mutual Recognition Legislation does not prevent EPR or CDL

6.29 A variety of EPR or CDL schemes could be developed that avoid the Mutual Recognition Legislation. For example, we consider that the following circumstances, properly structured, would not be affected by the Mutual Recognition Legislation:

(a) a law which makes it an obligation in certain contracts for sale of goods that the retailer (or producer, where that person has a contractual relationship with the end-user) will collect packaging following sale, or even collect goods once their life has ended (provided this does not have the effect of restricting the sale of these goods);

(b) a deposit-refund scheme that does not have as its objective a change in the composition of packaging or goods, or to restrict the sale of goods, but rather is aimed at the return of the packaging or goods to the manufacturer or retailer. Such a scheme might only come into conflict with the Mutual Recognition Legislation if it went beyond requiring the return of packaging or goods to achieve legitimate environmental ends, by treating types of packaging or goods differently so as to discourage them and amount to a de facto standard on goods or packaging;

(c) a law which has the purpose of (and is not disproportionate to) limiting waste arising from the manner of sale of, or transport and handling of, a product, but has the effect of changing the composition or presentation of a product, might nonetheless fall within the Manner Exception or Handling Exception;

(d) a requirement that the packaging of goods be labelled in a particular way (or that information be provided at the point of sale), where that labelling is for the purpose of, and incidental to, other "manner of sale" or handling obligations. Arguably, changes in labelling for the purpose of a deposit-refund scheme could be incidental to "manner of sale" requirements associated with taking the deposit, but the better view is probably that this labelling is intended to alert consumers to the possibility of claiming the refund after consumption and so it is not exempted as being related to the "manner of sale". However, the Handling Exception can provide more flexibility in the way explained in clause 5.35 above;

(e) a law that continues to vest ownership in the producer or seller of packaging after packaged goods are sold to a customer; or

(f) a law that imposes environmental responsibilities on producers or sellers at stages in the life-cycle other than at sale and that does not have the

effect of preventing or restricting the sale of goods or otherwise apply standards to those goods.

6.30 For each of the examples above it would be necessary to ensure that the proposal was structured to avoid the intended operation of the Mutual Recognition Legislation. Take a deposit-refund scheme for bulky goods packaging, for example. A scheme could be structured simply so that furniture and whitegoods retailers are required to pay a sum to customers for return of packaging (without reference to a deposit at the point of sale). Even if the obligation to pay for the returned packaging is sufficiently "related to sale" (s 10(e)) to attract the operation of the Mutual Recognition Legislation and even if the obligation somehow has the effect of restricting the sale of interstate goods in that State, arguably that requirement is sufficiently directed to regulate the manner in which retailers are required to conduct their business that it would be exempt.

We note that there would of course be many laws that need to be complied with when implementing an EPR or CDL scheme, depending on the model proposed. For example, if a State imposes some form of licensing system with charges that aim to recover costs associated with the environmental consequences of waste from goods, it must not amount to an excise within the meaning of section 90 of the Constitution. An excise is an inland tax on a step in the production, manufacture, sale or distribution of goods, whether the goods are of foreign or domestic origin, which is so substantial that it cannot be characterised as a mere licence fee: ***Ha and Anor v New South Wales and Ors*** (1997) 189 CLR 465. The issues discussed in this letter are, however, those that are most particular to EDL or CDL schemes.

Please contact us should you wish to discuss this advice or if you would like us to consider a specific model of EPR or CDL scheme.

Yours faithfully

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Schedule 1

Examples of definitions of "handling" in Australia

Emphasis (by way of underlining) is added below in definitions that suggest "handling" is more than mere conduct in the course of delivery or storage – some definitions suggest handling includes labelling, presentation and disposal. Those definitions without underlining are more narrow and appear to apply to matters incidental to transport or storage.

Explosives Act 1961 (CTH) s 5

> *handling includes loading, unloading, discharging, stacking, stowing, storing, transporting and any operation incidental to, or arising out of, any of those operations.*

Industrial Chemicals (Notification and Assessment) Act 1989 (CTH) s 5

> *handling, in relation to a chemical, includes transporting the chemical.*

Narcotic Drugs Act 1967 (CTH) s 4(1)

> *handling includes stacking, stowing, storing, transporting, loading, unloading and any operation incidental to, or arising out of, any of those operations.*

Aviation Transport Security Regulations 2005 (CTH) reg 4.40(1)

> ***handling** of cargo includes its receipt, collection, transport and storage.*

Occupational Health and Safety Act 2000 (NSW) s 135A

> ***handling**, in relation to dangerous goods, includes conveying, manufacturing, processing, possessing, using, preparing for use, treating, dispensing, packing, selling, offering for sale, supplying, transferring, loading and unloading, rendering harmless, abandoning, destroying and disposing of dangerous goods.*

Explosives Act 2003 (NSW) s 3(1)

> ***handling** includes the activities of conveying, manufacturing, processing, possessing, using, preparing for use, treating, dispensing, storing, packing, selling, supplying, importing into the State from another country, rendering harmless, abandoning, destroying and disposing.*

Dangerous Goods Act 1998 (NT) s 3

> *"handling", in relation to dangerous goods, includes preparing, packaging, manufacturing, storing, using, loading, unloading, supplying, selling, purchasing, receiving, processing, treating, labelling, marking, dispensing, transferring, rendering harmless, placarding, destroying, disposing of, conveying and transporting of the dangerous goods;*

Dangerous Goods Safety Management Act 2001 (QLD) Sch 2 Dictionary

handling *includes—*

(a) conveying, manufacturing, processing, using, treating, dispensing, packing, selling, transferring, rendering harmless, destroying and disposing; and

(b) for a pipeline, conveying within the pipeline.

Dangerous Goods Act 1998 (TAS) s 3

"handling" includes –

(a) in the case of any dangerous goods – manufacturing, packing, marking, transporting, storing, selling, supplying and using those dangerous goods and any incidental activities; and

(b) in the case of dangerous goods in the form of a liquid or gas – discharging and pumping those dangerous goods and any incidental activities;

Food Acts in NSW, ACT, NT, SA, Tas, Qld, Vic (terms identical, but punctuation and formatting differ – this version taken from s 4(1) in NSW)

handling of food *includes the making, manufacturing, producing, collecting, extracting, processing, storing, transporting, delivering, preparing, treating, preserving, packing, cooking, thawing, serving or displaying of food.*

Schedule 2

Comments of The Hon. Ross Free, Minister for Science and Technology on Second Reading, 3 November 1992

Our emphasis is added:

"In areas where national uniformity may be appropriate, particularly public health and safety and the environment, the intergovernmental agreement provides for a concerned State or Territory to refer a matter relating to a particular good or occupation to the appropriate ministerial council for a decision on whether or not to develop and apply a uniform standard.

…

In the area of occupational health and safety, heads of government, in the context of mutual recognition, have directed relevant Ministers to achieve uniform occupational health and safety standards and uniform standards in relation to dangerous goods by the end of 1993."