Mr CHANDLER: … I received indicates the proposed legislation would not contravene freedom of interstate trade and commerce, because all traders dealing with beverages in containers are required to comply with the container deposit scheme. However, my understanding is it would, in fact, contravene the mutual recognition principles under the Mutual Recognition Act 1992, as the proposed provisions include Territory-specific requirements as to the packaging and labelling of goods.

For the record, the mutual recognition principles relating to goods is that goods produced in one state - and that includes the ACT and the Northern Territory - may lawfully be sold in that state, and in a second state, without the necessity for compliance with further requirements. One of the further requirements is that the goods satisfy standards of the second state relating to the way the goods are packaged or labelled.

It needs to be acknowledged that the South Australian Beverage Container Act 1975 is one of the acts relating to the goods that is permanently exempted in Schedule 2 of the Mutual Recognition Act 1992. As indicated, the South Australian act was in place before the Mutual Recognition Act 1992. There are, of course, administrative processes to correct this anomaly; that is, to either seek an amendment by the Commonwealth to Schedule 2 of the Mutual Recognition Act, or to seek a temporary exemption. Of course, the second course of action can only be sustained for 12 months. My question to the minister and this government is: what course of action have you taken to ensure your proposed legislation does not clash with Commonwealth legislation?

Madam Speaker, it should be noted that the above process …

Dr Burns: Where did you get this legal advice?

Mr CHANDLER: If you listen, you will find out.

It should be noted, while the above process may sound simple, I need to explain the Northern Territory government could seek an amendment by the Commonwealth government to Schedule 2 of the Mutual Recognition Act 1992 by adding the new Northern Territory legislation to the list of exempt laws. I also understand that the government was made aware of these issues previously, but am advised they were comfortable with their legal position on this legislation.

Reading through the procedural framework, I note that Schedule 2 may be amended by the Governor-General making a regulation to that effect. However, the Governor-General may only make such a regulation after each Governor of each state and the executive head of each territory has published a
notice in the Gazette of the jurisdictions setting out the terms of the proposed regulation, and requesting that to be made.

I need to ask the minister: where are we at? Which of your interstate colleagues have you spoken to, including heads of state? Who do you have agreement with and are willing to sign off and publish in their respective government Gazettes so the Governor-General can make the appropriate amendment? Or have you taken the route of requesting a temporary exemption? The minister can request this under section 15, but the exemption can only operate for a maximum of 12 months. After that, the only alternative is to seek permanent amendment.

I truly hope the minister can provide some insight into these important issues in summing up, or we may as well stop right here. We cannot go any further unless the minister can assure this House he is managing this; he has it all in order and has anticipated this challenge to his legislation. I am sure he has. I raise the issue to demonstrate some of the challenges this government must have faced to date given, I am certain, they have worked tirelessly to cover all the issues before introducing this legislation - or at least I hope so.

Dr BURNS

You raised constitutional issues in relation to section 92 of the Commonwealth Constitution and the Mutual Recognition Act 1992, as did the member for Port Darwin. I will read the briefing notes I have been given into the Parliamentary Record:

Government has received highly credentialed legal advice that the scheme in this bill successfully avoids being a tax, nor does it conflict with section 92 of the Australian Constitution or section 49 of the Northern Territory (Self-Government) Act 1978, regarding discrimination against interstate trade.

The member for Port Darwin asked us to table the legal advice. I do not have the legal advice here, but I would be very reticent and advise the minister against tabling any legal advice. The member for Port Darwin said himself the beverage industry is red hot on this. If there was some sort of legal battle, why would you telegraph your detailed position and advice to them and give them a leg up? I do not think, as a government, we should be doing that. It is not a very wise tactical move; it is a bit like a football coach sending his game plan to the opposition. That is something I advise against, but I can assure the House we have received highly credentialed legal advice to that effect.

The member for Brennan raised the issue, as did the member for Port Darwin, about the mutual recognition legislation. The member for Port Darwin gave some of the background of that legislation. Once again, I will read the advice I have been given. Basically, it is not correct that it will contravene the legislation:

The bill has been designed to conform to the statutory exemptions available under the mutual recognition legislation. But, to put it beyond doubt, government will be seeking a specific exemption through COAG.

That specific exemption, as I understand it, has been secured for the South Australian CDL scheme.

If, by chance, that specific exemption is not approved, the view of government is that the bill is safe anyway through the general statutory exemptions in the mutual recognition legislation itself.

That is the advice we have had and I do not think it is advice we will be tabling. We have a great deal of confidence, and I challenge the beverage industry to make a legal battle out of this. I challenge
Kate Carnell and all the heavies of the beverage industry to get into court and see how far they get with the Australian public, because we know this is a very popular measure. The beverage industry should be thinking very carefully about where they stand with the Australian public. They do not want to be labelled, like the tobacco industry, as being absolutely recalcitrant, only looking at their bottom line, flying in the face of a public opinion, and using all sorts of lobbying techniques to save their bottom line. It would be a decision for the beverage industry, but they also have to think about their public face. I do not think it will be a good look for them to be challenging this legislation. But, then, who knows?

That is the legal advice. The member went on at quite some length about the *Mutual Recognition Act 1992*, but I have encapsulated the legal advice we have had access to.

**Mr Hampton (Natural Resources, Environment and Heritage)**

Another question members raised was about the legal issues, which I will touch on now. The member for Port Darwin had some questions about CDL contravening the mutual recognition legislation, and the government needing the approval of COAG in other states. The advice is that these types of bills go through a fairly rigorous process, not only through Parliamentary Counsel but through Cabinet submissions, the Department of Justice, and NRETAS’s own legal advice. This is the advice I am referring to:

> The bill has been designed to conform to the statutory exemptions available under the mutual recognition legislation. To put it beyond doubt, government will be seeking a specific exemption through COAG, as has been secured for the South Australian CDL scheme. It is not clear that sections 9 and 10 of the *Mutual Recognition Act* would apply to CDL. That is not a given. The South Australia legislation did predate the Mutual Recognition Act. One consequence is that the question of whether the South Australian legislation complies with the *Mutual Recognition Act* has never had to be determined.

I will say that again:

*One consequence is that the question of whether the South Australian legislation complies with the *Mutual Recognition Act* has never had to be determined.*

In other words, it should not be taken that just because South Australia has an exemption, that we need one or that, if we were refused an exemption, that this bill is invalid.

Also regarding this question:

> If by chance that specific exemption is not approved, the view of government is that this bill is safe anyway through the general statutory exemptions in the mutual recognition legislation itself.

In the design of the scheme, from the outset, the government has indicated any CDL scheme has to be legally, regionally, and financially viable. There are three types of CDL models around the world. There is the one run by the beverage industry, the independently-run CDL schemes, and the government-run scheme. Government has looked at all these types of models, and advice from one of the most senior constitutional law experts in Australia is that neither the independent- nor the government-run models will satisfactorily avoid the issue of taxation. Since the Territory, under our Constitution, cannot make a tax, these two models are not viable. The beverage industry-run model is legally viable and is the most successfully run model in South Australia for 35 years.