

# MAINE STATE LEGISLATURE

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STATE OF MAINE  
DEPARTMENT OF THE ATTORNEY GENERAL  
6 STATE HOUSE STATION  
AUGUSTA, MAINE 04333-0006

February 29, 1996

Representative Harry G. True  
House Chair, Joint Standing Committee  
on Legal and Veterans' Affairs  
115 State House Station  
Augusta, ME 04333-0115

Dear Representative True:

I am writing in response to your letter of February 21, 1996, inquiring into the constitutionality of a provision of legislation currently pending before your Committee which would authorize the Bureau of Alcoholic Beverages and Lottery Operations (the "Bureau") to establish the so-called "markup" of all spirits and fortified wine to be sold in Maine. For the reasons which follow, it is the Opinion of this Department that the provision at issue would be constitutional.

The provision about which you inquire is proposed 28-A M.R.S.A. § 1651-A(1), which appears in Section A-38 of Legislative Document 1706, "AN ACT to Implement the Recommendations of the Task Force on Alcohol Beverage Sales." The provision, in its entirety, is as follows:

1. Amount of tax. The alcohol bureau shall determine the amount of markup and set a wholesale price for all spirits and fortified wine that the alcohol bureau determines will produce an amount of revenue to be transferred to the General Fund that substantially equals the amount transferred in fiscal year 1994-95. The alcohol bureau may adjust the amount of markup and wholesale prices as necessary to produce the required revenue.

Essentially, you ask whether this provision would violate Article IX, Section 9 of the Maine Constitution, which provides that "the Legislature shall never, in any manner, suspend or surrender the power of taxation."<sup>1</sup>

In interpreting Article IX, Section 9 of the Maine Constitution, the Supreme Judicial Court has made it clear that simply because the amount of a tax is fixed by an entity outside of the Legislature does not mean that the tax is necessarily unconstitutional. In Maine Milk Producers, Inc. v. Commissioner of Agriculture, Food and Rural Resources, 483 A.2d 1213, 1220 (Me. 1984), the Court held that it is not a violation of Article IX, Section 9 if the Legislature establishes a taxing scheme where the tax is fixed by an administrative agency on the basis of an event of "independent significance." Thus, so long as the agency has no discretion in determining the amount of the tax, but rather is confined to simply calculating the amount based upon other events over which it has no control, the vesting of the power to determine the amount of tax in the agency will not violate the clause.

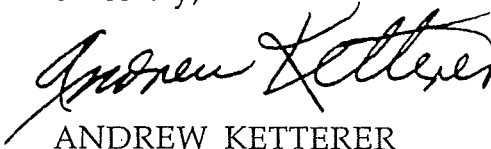
With regard to proposed 28-A M.R.S.A. § 1651(1), this Department does not believe that the proposal would vest any unconstitutional discretion in the Bureau. Under the proposal, the Bureau would be empowered to establish the amount of the "markup" (or tax) to be imposed upon the sale of all spirits and fortified wine in the State, but the Legislature has determined that the amount of the markup would be no more or no less than that required to generate an amount of money equal to the amount transferred to the General Fund by the Bureau in fiscal year 1994-95. To accomplish this task, the Bureau would have to estimate the volume of spirits and fortified wine that would be sold in a particular fiscal year, and use that figure to establish the percentage by which the price of each bottle should be increased in order to raise the amount of money which the Legislature has determined must be generated. This process does not involve the exercise of any discretion by the Bureau; it is simply required to make a good faith estimate of the amount of sales, after which the calculation of the markup (or tax) becomes mechanical. Consequently, the proposal does not violate Article IX, Section 9 of the Maine Constitution.

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<sup>1</sup>In your letter, you also ask whether the provision would violate Article I, Section 22 of the Maine Constitution which provides: "No tax or duty shall be imposed without the consent of the people or of their representatives in the Legislature." Since the tax in question here would have been enacted by the Legislature, this Department can see no difficulty with this particular provision of the Maine Constitution. The principal question, discussed in the body of this Opinion, is whether the Legislature, having enacted the tax, has unconstitutionally delegated the manner of its establishment to an administrative agency in violation of Article IX, Section 9 of the Maine Constitution.

I hope the foregoing adequately answers your inquiry. Please feel free to reinquire if further clarification is necessary.

Sincerely,



ANDREW KETTERER  
Attorney General

AK:sw

cc: Senator Norman K. Ferguson, Jr.  
Senate Chair, Joint Standing Committee  
on Legal and Veterans' Affairs  
Senator Michael H. Michaud  
Representative Eleanor M. Murphy  
Members, Joint Standing Committee  
on Legal and Veterans' Affairs  
Representative Nancy L. Chizmar  
Sponsor, Legislative Document 1706  
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