ACT DEPARTMENT OF JUSTICE
& COMMUNITY SAFETY

POLICY & REGULATORY DIVISION

20 AUG 2003

Mr Tony Hinton
Productivity Commission
PO Box 80
BELCONNEN ACT 2616

Dear Mr Hinton

Further to the roundtable discussion concerning the Productivity Commission's review of mutual recognition schemes on 11 August 2003, I submit the following comments and observations on the Draft Research Report *"Evaluation of Mutual Recognition Schemes"*.

Temporary exemptions
It has been suggested that the temporary exemption provision under section 15 of the Commonwealth Act may be one option for resolving the tension between mutual recognition and product safety banning orders. We submit that this solution is not feasible, as use of temporary exemptions to ban dangerous goods is administratively burdensome and ineffective in the longer term. In the ACT, for example, the Minister for Economic Development, Business and Tourism has to pass a regulation under the *Mutual Recognition (Australian Capital Territory) Act 1992* (the Act) exempting the goods from the operation of the Act before the Attorney-General can make a consumer product safety order banning those goods under the *Fair Trading (Consumer Affairs) Act 1973.* Even in those jurisdictions where the responsibility for administering the relevant legislation lies with the same Minister, the need to draft a regulation before issuing a banning order is time wasting and exposes the community to a high level of unacceptable risk.

The process under section 15 is cumbersome and inefficient and unless the trader voluntarily agrees to remove the goods from sale, a dangerous product can legally be sold until such time as this process is completed. The Act limits the temporary exemption to a period of no more than 12 months, with the result that a dangerous product could re-appear on the market leaving no provision for the ACT to ban the product again.

I also note that the draft research report, at page 90, refers to the temporary exemption process established under the Mutual Recognition Agreement (the Agreement). This process on its own will not resolve the problem identified by the ACT. A separate banning order will still need to be made once the exemption is granted under Part 5 of the Agreement. As with the exemption under section 15 of the Act, this exemption merely has the effect of removing the

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application of the mutual recognition principle to a particular product or law. Additionally, the exemption process under the Agreement is a lengthy and time-consuming one that is not compatible with the need for swift and efficient action that arises when a dangerous product appears in the marketplace.

Potential for abuse

I note that the draft research report makes a reference at page 93 to the "potential abuse of the ban option", but does not provide any discussion of this point, nor does the report point to any evidence that this has occurred. I find it concerning that the Productivity Commission believes that there is potential for abuse of this power to ban dangerous goods. In the ACT, for example, the Minister would only exercise the power to ban a product where there is a clear and demonstrable danger to the health and safety of the citizens of the ACT.

Labelling Defence

It has also been suggested that the provisions of section 12 of the Commonwealth Act, which provides a defence against a prosecution, may present a solution as its wording implies that a ban will be effective where a trader has not followed the labelling requirements laid down by the section.

The availability of the defence does not alleviate the concerns of the ACT; indeed, the availability of the defence further compounds the problem by sanctioning the right of a trader to sell a banned dangerous product with impunity. Basically, this section allows a trader to sell a banned product, without fear of a successful prosecution, as long as they append a label to the product that states the product was made in, or imported into, another jurisdiction.

The defence available to the trader undermines the integrity of product safety laws in Australia by allowing the continuing trade in dangerous unsafe products. The labelling requirement does not alter the unsafe nature of the dangerous product, and does not give the consumer any additional information or warning. A banning order is ineffective while dangerous products labelled as coming from another jurisdiction can continue to be sold in the jurisdiction issuing the ban.

Proposed solution

To resolve the tension between mutual recognition and product safety banning orders, the ACT proposes that the relevant consumer product safety banning order provisions of the fair trading legislation of the States and Territories should be added to Schedule 2 of the Commonwealth Act as a permanent exemption. This would allow a jurisdiction to act swiftly when a dangerous product appears in the marketplace threatening the health and safety of consumers without having to first make a temporary exemption regulation (which can only last 12 months anyway) under the Mutual Recognition legislation. A permanent exemption will guarantee the integrity of product safety legislation Australia wide.

Should you require further clarification on any of the above comments please contact Ms Janice Boyle on (02) 6207 0524 or email: janice.boyle@act.gov.au.

Yours sincerely



Elizabeth Kelly
Commissioner for Fair Trading
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