Hawkless Consulting Pty Ltd

3 September 2003

Mr Tony Hinton
Commissioner
Productivity Commission
Level 3, Nature Conservation House
Cnr Emu Bank & Benjamin Way
BELCONNEN ACT 2617

Dear Commissioner,

Submission

Review of Mutual Recognition

This document is a submission to the Productivity Commission in respect of that component of the Review associated with the Chemicals Cooperation Program of the Trans-Tasman Mutual Recognition Arrangement (TTMRA) and is made by Hawkless Consulting Pty Ltd. This submission is made in light of the matters contained in the Commission's Draft Report titled "Evaluation of the Mutual Recognition Schemes" dated 27 June 2003.

By way of introduction, it is mentioned that in 2002 Hawkless Consulting was commissioned by the National Occupational Health and Safety Commission (NOHSC) to prepare a Regulatory Impact Statement (RIS) of the Chemicals Cooperation Program. The draft of this RIS dated 7 July 2002 is a public document and has been published by NOHSC on its website at: (http://www.nohsc.gov.au/PDF/Miscellaneous/TTMRADraftRIS1Aug2002.pdf).

The RIS found that with the exception of Material Safety Data Sheets (MSDS's), the temporary exemption of the other components of the Chemicals Cooperation Program should be continued.

It is not our intention to replicate the findings of the RIS here but to enlarge on certain aspects of those findings that relate to the Commission's Draft Report and with particular reference to the TTMRA Chemicals Cooperation Program.

1. The Draft Report Section 8

In general terms we agree with the commentary and findings of Section 8 of the Report and they are consistent with our findings presented in the Regulatory Impact Statement referred to above. We comment on the following specific matters in Section 8 where there is some divergence between ourselves and the Draft Report.

1.1 The Complex Structure for Regulating Chemicals in Australia

1.1.1 Complexity of Responsibilities

The Figure numbered 8.1 on page 131 of the Draft Report accurately depicts the complex and often over-lapping responsibilities for matters associated with regulating chemicals in Australia. Not shown in the Figure is another dimension of the complexity where, for example, in some jurisdictions the management of chemicals defined as 'dangerous goods' may rest with a transport agency and chemicals defined as 'hazardous substances' with an occupational health and safety agency.

The implications of this complexity are manifold, intersecting not only with the operation of the TTMRA (and the MRA) but also with Australia's ability to quickly and appropriately grasp the opportunities presented by the impending world-wide adoption of the Globally Harmonised System for the classification and labelling of chemicals (the GHS).

The complexity shown in Figure 8.1 of the Draft Report can be contrasted with the single agency approach adopted recently in New Zealand through the creation of the Environmental Risk Management Agency (ERMA). Given the relationship between the States and Territories on the one hand and the Commonwealth on the other as enshrined in the Australian Constitution, there is no quick fix to this problem. The search for a fix will continue to be difficult while the Constitution remains in its present form and made even more difficult while a 'States rights' attitude remains at the official and political level in the States and Territories. One can point to many areas where joint problems have been solved by close cooperation between the two levels of government but in our experience an attitude of 'States rights' remains pervasive despite more than 100 years having passed since federation.

RECOMMENDATION: A single coordinating agency be created to develop policy and oversee the implementation of such policy by other Commonwealth, State and Territory agencies in regard to **all** aspects of the management of **all** chemicals in Australia, including classification, labelling, transport, storage, packaging, use and importantly, environmental impacts. The legal authority of this agency should parallel the roles, authorities and responsibilities of ERMA New Zealand to the extent that the Australian Constitution permits this.

1.1.2 Classification of Chemicals

As the Draft Report states, there are fundamental structural differences between the Australian and New Zealand approaches to the way in which chemicals are classified, labelled and otherwise dealt with, that prevents mutual recognition now and which may prevent harmonisation in the future. There are many examples of this but one fundamental example is that Australia is bound by its legislation (the Industrial Chemicals (Notification and Assessment) Act 1989 – ICNA Act) to classify a substance on the basis of its characteristics as a "chemical" whereas in New Zealand such classification is based on the characteristics of a chemical only if it is used in a pure form, but otherwise on the characteristics of a "substance" where a chemical is mixed with other chemicals or other materials.

Thus to a large extent, the Australian approach does not consider the likely synergistic or ameliorating effects that may occur when chemicals are mixed together to form "substances".. These effects may in some cases enhance the hazard of the chemical in the mixture or in other cases ameliorate the hazard significantly. The concentration of such chemicals in mixtures can also affect the hazard with chemicals that would otherwise be very dangerous being rendered relatively innocuous when present in small concentrations (as occurs for example in toiletries, cosmetics and other like products). In sum, it is our professional opinion that the New Zealand approach to classifying "substances" has greater merit than the Australian approach of classifying "chemicals".

Given also our assertion that if chemicals are present in small concentrations the hazard to health and environment may be not significant, then a chemical threshold concentration could be set below which classification of the substance is not required. This also accords with the current New Zealand approach (and the NOHSC approach in regard to the adoption of a threshold concentration when chemicals are present in mixtures in the workplace).

RECOMMENDATION: The ICNA Act be amended to permit the classification of chemicals to be on the basis of "substances", with a threshold concentration of a chemical in a substance below which classification would not be required.

1.2 The Implications for the GHS

We strongly support the comments in the Draft Report page 134 regarding the need for Australia to maximise the benefits of the GHS in terms of trade and safety. The comments are worth repeating here:

> … if Australia is to maximise the potential benefits of the GHS in terms of both trade and safety…(then)…further alignment is required as the GHS envisages uniform regulations for all packaging and labelling of all chemicals, including agricultural and veterinary products and explosives, for all uses and in all situations, including storage and transportation. In terms of this review, unless Australia eventually embraces the GHS, it will be out of step with most of its trading partners, its trade will be impaired, and progress over reconciling differences across the Tasman will be permanently constrained.

The Draft Report is disappointing only to the extent that it offers no recommendations among its preliminary findings as to how this risk is to be managed. We disagree with Preliminary Finding 8.6 which states, *inter alia*:

> A major work program to harmonise classifications of chemicals between Australia and New Zealand would not be warranted, except in relation to Material Safety Data Sheets (MSDS's) and inner labelling, until the Globally Harmonised System for the Classification and Labelling of Chemicals (GHS) is completed and international trends on its implementation can be identified.

Given the complexity of the jurisdictional responsibilities in regard to chemicals management vividly described in the Draft Report, (and that the GHS requires consideration of environmental impacts – 'eco-toxicity' – an area where, we understand, very little work has been done in Australia) we suggest that the 'work program' should commence now under the

umbrella of a single chemical agency, the creation of which is recommended under 1.1.1 above.

1.3 The Particular Problem of Explosives

1.3.1 Jurisdiction-Based Legislation

Australian legislation regulating explosives is State, Territory and Commonwealth based and under this legislation, it is an offence to import an unauthorised explosive without approval. The Commonwealth legislates for Commonwealth-owned explosives.

Legislative requirements include:

- Explosives must be classified in accordance with the recommendations of the UN Committee of Experts on the Transport of Dangerous Goods.
- Importers must have a legitimate use for the explosive, and
- Importers must address such issues as the safety of fireworks.

The process of authorisation to use an explosive is not legislatively connected to the UN Model Regulations, although it is understood that these can be closely aligned.

1.3.2 Authorisation of Explosives

Explosives are unlawful unless they are 'authorised' and authorisation refers to the legislative instrument within each jurisdiction that makes lawful the storage, transport, handling and use of an explosive substance or article. It is the instrument that allows the jurisdiction to place conditions on the use, handling, storage and transport. The conditions in the authorisation are 'use' related and may thus be different for the one explosive type between different jurisdictions if the uses to which the explosive is to be put are different in those jurisdictions.

1.3.3 Australian Explosives Code

As background, it is also noted that the Department of Transport & Regional Services published the Australian Explosives Code in 1991. This Code sets out the requirements for transport of explosives by road and rail in Australia and is adopted under explosives legislation in most States and Territories. The second edition of the code was published in March 2000 and will bring Australian requirements up to date with the 11th edition of the UN Recommendations on the Transport of Dangerous Goods.

This Code will be adopted under explosives legislation in each State and Territory Consultation with some jurisdictions representatives during the preparation of the Regulatory Impact Statement revealed differences in opinion as to the degree of acceptability of the current 'mutual recognition' between the Australian jurisdictions. While it has been the view of some that, indeed, 'harmonisation' exists, others have stated that while they may accept assessments and TTMRA classifications undertaken in other jurisdictions, **authorisation for use** will not automatically occur in all cases without examining and testing an explosive themselves.

1.3.4 Feasibility of Harmonisation or Mutual Recognition of Explosives

In this circumstance, the question of harmonisation or mutual recognition between Australia and New Zealand seems out of the question. One could hardly expect New Zealand to accept explosives assessed and classified by one Australian state or territory when such assessment and classification does not automatically lead to authorisation for use in another.

In terms of costs, such repetitive examination and authorisation must result in additional costs for government agencies and it is likely that industry will bear additional costs in making multiple applications and from the opportunity costs of delay while waiting on the results of, perhaps, multiple assessments and classifications but certainly multiple authorisations before the material can be put into use.

The question remains open as to whether such multiple authorisations result in greater safety to the workplace and the community. One can only assume that instances have occurred where safety would have been compromised if the jurisdictions with concern had not, themselves, repeated an authorisation given by another jurisdiction. The problem appears to be one of variations in the perceived need for technical depth or rigour in the assessment process itself between technical officers themselves and thus the additional examination or testing could be considered as an insurance policy to ensure that dangerous incidents do not occur.

1.3.5 The Problem is a Technical One Not Legal

The lack of mutual recognition among the jurisdictions appears to be essentially a technical one and is not created directly by any significant differences among the various state and territory bodies of legislation. The solution does not, therefore, lend itself to solution by legislative amendment. Rather it must be resolved by increased confidence being created between the jurisdictions in the depth and rigour of assessment and classification and this could only be achieved by the development of a standardised technical assessment and resulting approval protocol. Once agreed, this protocol would need to be signed off at government level in each jurisdiction. To be then acceptable to New Zealand it would need COAG endorsement. The costs of this would seem to be small. There are already regular meetings under the auspices of the Australasian Conference of Chief Inspectors of Explosives and any technical standards would need to be firstly agreed at this technical level. Once agreed here and documented in sufficient detail then the endorsements of governments can follow.

The benefits to industry would flow from simplified and consistent approval procedures that would result in faster approvals. As a benchmark in terms of speed of approvals, consultation with explosives manufacturers have indicated that the time to get approval for the use of a new explosive in all Australian jurisdictions currently takes from 6 – 8 weeks.

1.3.6 Mutual Recognition with New Zealand

With harmonisation between the Australian jurisdictions achieved then consideration of mutual recognition with New Zealand can be countenanced. However, the situation in New Zealand remains somewhat unclear. While New Zealand is working towards international

harmonisation generally, the development of assessment processes appears to be continuing in accordance with the HSNO Act that has recently been proclaimed to commence.

These processes appear to be time-consuming compared to the Australian situation. One explosive manufacturer has estimated that the time to obtain approval for a new explosive in New Zealand will be six months. One might assume, therefore, that New Zealand would be cautious about mutual recognition or harmonisation with Australia when Australian processes take only one-third of that time.

RECOMMENDATION: A standardised technical assessment and resulting approval protocol for the use of explosives be developed and signed at government level in each jurisdiction with COAG endorsement.

1.4 Extension of the Special Exemption: Preliminary Finding 8.7

We record that we particularly support Preliminary Finding 8.7 that states:

> "The special exemption on hazardous substances, industrial chemicals and dangerous goods should be extended, without annual roll overs, until 2008, when the GHS is expected to be implemented world wide. The scope of the exemption could be reduced as alignment occurs with the emerging GHS and between the States and Territories, the Federal Government and the New Zealand Government. Annual reports on progress could be submitted to the Ministerial Council on Workplace Relations and COAG."

This will reduce the costs at officer level of assessing and recommending each year the annual exemption. However, there is a risk, of course, that with the elimination of the discipline of requiring the annual justification of continuance of the special exemption and without an imposed discipline of managing the GHS implementation, the whole question will be placed in the 'too hard' basket until closer to 2008. This risk could be eliminated by the immediate creation of a single agency to oversee chemicals management as suggested in 1.1.1 above.

2. Efficiency and Effectiveness of the TTMRA

No arguments or analysis that are persuasive to us are presented in the Draft Report that would indicate beyond reasonable doubt that the benefits of the TTMRA are less than its costs. We suggest that it is not good public policy to continue with a scheme that is expensive to manage both in terms of direct financial costs and the opportunity costs of staff time (both in the public and private sectors) where the outcomes are so uncertain and based only on anecdotal evidence.

As the Draft Report states:

> "… assessments of the effectiveness of the schemes, especially in relation to goods, are frustrated by the lack of relevant data and, just as importantly, by limited information of what may have occurred in the absence of the schemes. It has not been possible to confirm statistically the generally accepted view that there is a significant

> link between mutual recognition and mobility of goods. This reflects an absence of data for analysis of inter-jurisdictional trade within Australia and the swamping of most impacts associated with the TTMRA by other domestic and international developments".

RECOMMENDATION: Action be taken to obtain adequate quantitative data to enable the TTMRA to be evaluated using established public sector program evaluation techniques.

Yours sincerely

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