Australian Government
Attorney-General's Department
Legal Services and Native Title

03/6943

1 September 2003

MRA
Productivity Commission
PO Box 80
Belconnen ACT 2616

Dear Sir/Ms

I refer to the Productivity Commission 2003, *Evaluation of the Mutual Recognition Schemes*, Draft Research Report, Canberra that was circulated for comment in June 2003 (the draft report).

The Terms of Reference for the inquiry require the Productivity Commission to examine the exemptions and exclusions from the Mutual Recognition Schemes and make recommendations about whether they should be retained. The Draft Report makes comments on the permanent exemption from the Mutual Recognition Agreement (MRA) and *Mutual Recognition Act 1992* (MR Act) and the Trans Tasman Mutual Recognition Arrangement (TTMRA) and the *Trans Tasman Mutual Recognition Act 1997* (TTMR Act) for 'pornographic material' and makes two preliminary findings relevant to this exemption (preliminary findings 7.4 and 7.5).

The discussion of the pornographic material exemption in the draft report contains an incomplete account of the manner in which the MRA, TTMRA and the Australian Classification Scheme interact. We consider that the discussion in the draft report might be clarified as discussed below.

Application of the MRA and TTMRA to Classification of Publications, Films and Computer Games

As a preliminary issue, it is suggested that the language used in the draft report could be revised for consistency. It is noted that the report uses the terms "pornographic material" and "indecent" material interchangeably. There are sensitivities regarding the differences between these terms and you may wish to consider Chapter 3 of the Report of the Joint Select Committee on Video Material (1988) in this regard.

Further, as discussed below, the exemptions apply with respect to all classified products and prohibited imports, not just to those which are "pornographic" or "indecent".

The sale, hire and advertising of publications, films and computer games are exempted from the operation of the MRA in two ways:

- goods that are 'pornographic material' are listed in Schedule 1 as a permanent exemption to the scheme. As a consequence Part 2 of the MR Act does not apply to such goods, and

- a number of State and Territory laws relevant to the sale, hire or advertising of 'pornographic material' are listed in Schedule 2 as a permanent exemption to the Scheme.[1] As a result Part 2 of the MR Act does not affect the operation of those laws.

The Schedule 1 exemption exempts all pornographic material and extends beyond just pornographic publications, films and computer games which are classifiable under the Commonwealth, State and Territory cooperative classification scheme. The schedule 2 exemption exempts the entirety of regulation under the listed legislation. This extends beyond pornographic and indecent material and has the effect that the sale, hire or advertising of all publications, films and computer games in Australia must comply with Australian classification legislation.

Similarly, publications, films and computer games are exempted from the operation of the TTMRA in two ways:

- Section 44 and Schedule 1 of the TTMR Act provide that the TTMRA does not affect the Customs (Prohibited Imports) Regulations. As a result objectionable goods from New Zealand are not permitted to be imported unless permission in writing has been granted by the Commonwealth Attorney-General (currently delegated to the Director of the Australian Classification Board), and

- Section 45 and Schedule 2 of the TTMR Act operate so that the provisions of the State and Territory legislation specified in the Schedule are not affected by the TTMR Act. As a result it remains an offence to sell or display any classifiable goods (not just indecent material) that do not meet Australian classification standards.

The definition of 'objectionable goods' under the Customs (Prohibited Imports) Regulations extends to many things other than pornographic material, such as 'publications and any other goods that describe…matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be imported…'[2].

We consider that the draft report should more accurately reflect the operation of the exemptions by referring to relevant exemptions as 'classification requirements' rather than somewhat misleadingly referring only to pornographic or indecent material.

With respect to preliminary findings 7.4 and 7.5 we make the comments below.

Preliminary Finding 7.4: The restrictions in Australia on the sale of pornographic material are ineffective. Changes are needed, in the absence of harmonisation across jurisdictions, for implementation of a realistic national approach. Consideration could then be given to retaining or removing the permanent exemption for the MRS for pornographic material.

We have two concerns with the comments that underpin preliminary findings. Firstly, at page 110 the draft report states 'As the ultimate test of any law is its effectiveness in achieving a desired social outcome (controlling the viewing of X-rated videos in this case) then the argument for maintaining the permanent exemption is difficult to make. It would appear that the regulatory costs

[1] Subsection 14(3) of the MRA states that 'Unless otherwise stated in Schedule 2, a law described in that Schedule includes any amendment or replacement of that law, but only to the extent that the amendment or replacement deals with the same subject matter.'

[2] Regulation 4A(1A)(a) Customs (Prohibited Imports) Regulations 1956

involved provide little social benefit'. (underlining added). This is not a correct summary of the outcome of the cooperative legislation scheme on classification.

Under the Classification Scheme, classification decisions are made by the Classification Board, an independent statutory body established under the *Classification (Publications, Films and Computer Games) Act 1995* (the Commonwealth Act). The State and Territory classification legislation deals solely with enforcement matters – the public exhibition, sale, hire and advertising of publications, films and computer games of various classifications.

In the States and Territories (other than the ACT and NT), the law does not prohibit X-rated films being possessed for personal use only, although it does prohibit public exhibition or display of such films. Importantly, the legislation does not purport to control the viewing of X-rated material as stated in the draft report. The laws are targeted at the manner of sale, hire and advertising of the relevant goods. The exception for the State and Territory laws relating to classification in Schedule 2 is entirely consistent with the other exceptions in Schedule 2.

Secondly, the objective of the MRA is to promote competitiveness and integration of the State and Territory economies by reducing industry costs in meeting standards by ensuring that if goods can be legally sold in one jurisdiction then they may be sold in any other jurisdiction within Australia.

State and Territory legislation adopts, in enforcement laws, the classification decisions made under the *Commonwealth (Publications, Films and Computer Games) Act 1995*. It also deals with the consequences, in the respective jurisdictions, of the different classifications given by the Classification Board established under the Act.

In agreeing to the development of the cooperative national classification scheme, States and Territories agreed to the Commonwealth having power to make classification decisions provided that it was within the power of States and Territories to decide what material was available in their own jurisdictions. Although this had potential to create significant differences in the availability of material between jurisdictions, and thereby undermine the effectiveness of the national classification scheme, this has not occurred in practice.

Uniform availability of classified publications, films and computer games has been achieved with two exceptions:

1. It is legal to sell X-rated material in the ACT and the NT but is not legal in other jurisdictions, and

2. The sale of restricted publications is permitted in all jurisdictions other than Queensland.

These two differences occur in relation to the category of material that is most controversial – that which is not strong enough to be refused classification (banned) but is higher level material than some jurisdictions are comfortable to have available for sale or viewing (even to an over eighteen audience).

The permanent exemption for Classification Acts in Schedule 2 of the *Mutual Recognition Act 1992* (Cth) should be retained as jurisdictions have agreed that it is important for each jurisdiction to be able to regulate the availability of this type of material in accordance with the wishes of the people of those jurisdictions. Indeed, the issue is so sensitive that any suggestion that State and Territory powers to regulate availability of classified products within their jurisdiction should be withdrawn risks compromising both the national classification scheme and mutual recognition.

It is misleading for preliminary finding 7.4 to state that restrictions on the sale of pornographic material are ineffective due to the absence of harmonisation across jurisdictions. There has in fact been significant harmonisation, and the remaining very small number of discrepancies do not (considering the entire classification system and the volume of publications, films and computer games that come within this system), significantly detract from the objective of the MRA in facilitating trade between States and Territories and reducing compliance costs on industry.

It should also be noted that State legislation establishes an enforcement regime which includes inspectorial powers and substantial penalties related to the sale, hire, exhibition and advertising of films classified X. Any concerns regarding illegal trading in such products can be dealt through State enforcement activities.

In conclusion, removal of the exemption is not supported as it is appropriate for States and Territories to continue to determine the availability of classified products within their jurisdiction.

Preliminary Finding 7.5: The TTMRA permanent exemption for pornographic material should be retained pending any development in relation to the MRA exemption.

We consider it inappropriate for findings about the operation of the MRA and the TTMRA to be linked in the way that preliminary findings 7.4 and 7.5 are linked. We consider that there is a separate and substantive rationale for exemption of classified products and prohibited imports from the TTMRA. This rationale is independent of any issues regarding the effectiveness or extent of harmonisation of the classification scheme across Australian jurisdictions.

As is the case for the MRA, the specific exemption under the TTMRA exempts all classified products and prohibited imports from the TTMRA provisions. The objective of the TTRMA is to promote competitiveness and integration of the Australian and New Zealand economies by reducing industry costs in meeting standards. Exemptions to this scheme are put in place where mutual recognition would otherwise erode justified regulatory differences. In the case of the publication, film and computer game industry, there are regulatory differences which justified the exception of publications, films and computer games from the mutual recognition arrangements.

The regulatory difference that justifies exemption of classification from the TTRMA is the fact that classification decisions in both Australia and New Zealand reflect the community standards of Australians, in the case of the Australian Classification Board, and New Zealanders, in the case of the New Zealand Classification Board. It would be naïve to consider that Australian and New Zealand community standards around what types of films, computer games and publications are acceptable for children and adults to view or read are the same.

There are numerous examples of different classification decisions by the Australian and New Zealand classification bodies and it would be unacceptable to Australian communities if the TTMRA applied. If TTMRA were to apply to the classification system this could have the effect that where the Australian and New Zealand Classification Boards gave a movie a different classification, that movie might be freely available to children under 15 in Australia because of its New Zealand classification, when the Australian Classification Board had classified the film MA15+ (which means that it is restricted to viewing or hiring by persons over the age of 15 unless accompanied by an adult).

We also consider that removing the exemption would have no net benefits considering the significant sensitivity of classification issues. Further we consider that there are no significant counterveiling arguments for mutual recognition against the argument for exemption on the basis of

different and justified community standards. The Australian classification system does not represent a non-tariff barrier to trade, nor does it unfairly protect local industry.

Therefore, we consider the exception to the TTMRA for the Customs and Classification Acts should be retained on the basis of different and justified community standards.

We very much appreciate the extension of time provided to make these comments but regret that, within the timeframe, although we have consulted with the Commonwealth Office of Film and Literature Classification, we have not had the opportunity to discuss this response with the States and Territories that are our partners in the national classification scheme. Commonwealth, State and Territory censorship officials will be meeting in September 2003 and we will include this matter on the agenda for the meeting.

If you have any queries or would like to clarify any of this points we have made, we would be pleased to meet with you. Please contact Fiona Jolly on 6250 6234 if you have any queries.

Yours sincerely

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