ATTORNEY-
GENERAL'S
DEPARTMENT

[redacted]

Office of International Law

03/9196

- 8 SEP 2003

5 September 2003

A.M. Hinton
Commissioner
Productivity Commission
PO Box 80
Belconnen ACT 2616

Dear Commissioner

THE TRANS-TASMAN MUTUAL RECOGNITION ARRANGEMENT
REVIEW - LEGAL ADVICE

I refer to your letter dated 1 August 2003 addressed to Mr Jon Shepphard of the Department of Foreign Affairs and Trade seeking advice on issues arising from the review of the Trans-Tasman Mutual Recognition Arrangement (TTMRA). This request for advice was handed to us on 19 August on the basis that our expertise was better suited to considering these matters.

Your questions and my short answers are as follows:

Relationship between the Treaty and the TTMRA

Ql. What is the effect of Article 7 and Annex D of the *Agreement between the Government of Australia and the Government of New Zealand concerning a Joint Food Standards System (* 'the Treaty') on the *substantiality test* under Article 4.2.1 of the TTMRA?

A1. There is no effect. Article 7 of the Treaty clearly states that the intention of the Parties to the Treaty is that the provisions of the TTMRA apply to food, subject to any exemptions provided for in the Arrangement. Annex D is not relevant to the 'substantiality test' in Article 4.2.1 of the TTMRA.

Q2. How does this view impact on the four situations outlined in the Annex attached to the request for advice (i.e. dietary supplements, maximum residue limits, hemp seed oil, and country of origin labelling)?

A2. In each case, it is the 'substantiality test' under the TTMRA that needs to be satisfied if an exemption is to be sought. It would appear that only the dietary supplements and maximum residue limits would meet the 'substantiality test' and could be exempted under the TTMRA.

Q3. How does this view impact on the use of the temporary and permanent exemptions?

A3. Temporary and permanent exemptions are provided for under the TTMRA and do not conflict with the Treaty. The operation of temporary and permanent exemptions in accordance with the TTMRA does not come within the definition of a trade barrier.

Reasons

Article 2 of the Treaty sets out its objectives which include adopting a joint system for the development and promulgation of food standards, and providing for the timely development, adoption, and review of food standards appropriate for both Australia and New Zealand. Article 3 lists the matters that fall within the scope of the Australia New Zealand Food Standards System. These include the method of sampling and testing the food to determine its composition and safety; any information about food including labelling, promotion and advertising; and such other matters affecting food as may affect the health of persons consuming food.

Article 4(7) states that the 'obligation of New Zealand to implement food standards is subject to the principles and procedures attached as Annex D of this Agreement' (emphasis added). Annex D (2)-(5) is concerned with the situation where New Zealand is seeking to vary from a standard on the basis that it is inappropriate for New Zealand. The test for a standard being inappropriate for New Zealand is based on exceptional health, safety, third country, environmental, or cultural grounds. A New Zealand variation must not create a barrier to trade unless exceptional health, safety and environmental concerns exist. In the event that New Zealand intends to vary from a food standard in accordance with Annex D (2)-(5), then that food standard will only be applicable to Australia.

Therefore, the 'exceptionality test' only applies in circumstances where New Zealand is seeking to vary from a food standard and is thus required to meet this higher test threshold. It is not a test that Australia is required to satisfy.

Article 7 of the Treaty clearly describes the relationship between the Treaty and the TTMRA as one where the provisions of the TTMRA apply to food, subject to any necessary exemptions determined in accordance with the procedures laid down in that Arrangement.

For our purposes, the TTMRA is concerned with the movement of Goods. Its objective in respect of Goods is to remove regulatory barriers to the movement of Goods between Australia and New Zealand and to thereby facilitate trade between the two countries. The basic principle is that a Good that may legally be sold in Australia can be sold in New Zealand, and a Good that may legally be sold in New Zealand can be sold in Australia. This basic principle is subject to certain exemptions for the protection of public health and safety, and the environment. Article 4.2.1 sets out the grounds on which a Party can temporarily exempt a Good, that is, where such exemptions are 'substantially for the purpose of protecting health and safety of persons or preventing, minimising or regulating environmental pollution.' Such temporary exemptions must not exceed 12 months. Prior to the expiration of the 12 months, a standard may be determined for the temporarily exempt Good or a permanent exemption may be granted.

The 'substantiality test' therefore needs to be satisfied in order to obtain an exemption under the

TTMRA which results in a temporary or permanent halt to the free movement of the exempted Goods under that Arrangement.

The 'exceptionality test' and the 'substantiality test' are thus quite distinct in their objectives and do not impact on each other in the way suggested in your letter dated 1 August.

Other Issues

Q1. Is it correct to conclude that before a permanent exemption could be made by regulation under the Commonwealth *Trans-Tasman Mutual Recognition Act 1997* for food standards that apply to Australia only (i.e. Standards that have been made under Part III of the Joint Food Code or caused by New Zealand 'opting out' of a joint standard under Annex D to the Treaty), the TTMRA and/or the Treaty would need to be amended?

Al. No, based on the conclusions reached in this advice there is no conflict between the TTMRA and the Treaty.

Q2. What are the merits or difficulties from a legal perspective of a DOHA proposal for the legislative and decision-making structures for creating exemptions for food to be contained exclusively within the Joint Food Standard System?

A2. We understand this question as addressing the implications (if any) of a single body functioning in both an executive and legislative capacity. From an international law perspective we see no difficulty with this merging of functions. However, we suggest that the advice of the Australian Government Solicitor be sought on any broader implications.

Q3. Are there any implications for Australia in relation to MFN obligations if the *Imported Food Control Act 1992* was removed from the list of exclusions from the TTMRA? AQIS, FSANZ and the Department of Health and Ageing have suggested that the permanent exemption for the *Imported Food Control Act 1992* could be removed provided certain conditions are met.

A3. Based on the conclusions reached in this advice, there would be no need to remove the *Imported Food Control Act 1992* from the list of exclusions from the TTRMA.

Please feel free to contact me if you wish to discuss this matter further.

Yours sincerely

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