
6 Temporary exemptions

Key points

- Individual jurisdictions can temporarily exempt a good from the MRA and/or TTMRA, provided it is on health, safety or environmental grounds. This triggers a review process that, within 12 months, has to lead to one of three outcomes — harmonised standards, a permanent exemption, or a return to mutual recognition.
- Jurisdictions often ban a good without also invoking a temporary exemption from mutual recognition, despite this making a ban unenforceable on goods sourced from another jurisdiction in Australia or New Zealand. This has not caused major problems to date, possibly because goods suppliers are unaware of their rights under mutual recognition, or are reluctant to exercise those rights.
- Australian jurisdictions recently agreed to implement a new regulatory regime that will essentially lead to a national system for consumer product bans and standards.
- Australia's new regulatory regime for consumer product safety should include provisions to ensure that it is closely integrated with the temporary exemption processes under the MRA and TTMRA:
 - when an interim product ban is imposed on a good under Australia's new consumer product safety regime, the MRA should not apply to that good until the ban is resolved by a Commonwealth decision or lapses, in order to avoid duplication and inconsistency between the product safety regime and the temporary exemption process under the MRA
 - when a product ban is imposed by an Australian jurisdiction, the temporary exemption process under the TTMRA should be automatically invoked
 - if and when an interim product ban within Australia is resolved by a national permanent ban, a national temporary exemption under the TTMRA should be automatically invoked for Australia.
- The combination of the new Australian consumer-protection regime and abovementioned reforms would largely address concerns about:
 - governments banning products without also invoking a temporary exemption from mutual recognition
 - ineffective procedures for resolving temporary exemptions
 - the lack of a joint Australian approach to initiating TTMRA temporary exemptions.

Individual jurisdictions can temporarily exempt a good from the MRA and/or TTMRA, provided it is on health, safety or environmental grounds. Within

12 months, the relevant COAG Ministerial Council must make a decision on whether the temporary exemption will be resolved by harmonising standards, creating a permanent exemption, or reverting to mutual recognition (COAG and New Zealand Government 2006). If no action is taken, the temporary exemption lapses after 12 months and mutual recognition resumes by default.

This chapter considers potential reforms to enhance the efficiency and effectiveness of administrative procedures associated with temporary exemptions. The most significant issue in this regard is whether changes are required to harmonise temporary exemption procedures with Australia's foreshadowed new national consumer product safety regime.

6.1 Procedures for resolving temporary exemptions

In 2003, the Commission found that there were grounds for considering options to streamline how the issues underpinning temporary exemptions were resolved (PC 2003). Guidelines were subsequently developed requiring COAG Ministerial Councils to decide 'within approximately' the first eight months of a temporary exemption whether it would be resolved by mutual recognition, harmonisation, or a permanent exemption (COAG 2006c, p. 2). The guidelines also note that there is a presumption that Ministerial Council decisions can be implemented in most cases within the 12-month period allowed for a temporary exemption.

However, participants in this study expressed concerns about how rapidly the issues underpinning temporary exemptions are resolved. A commonly cited example was fruit and confectionery flavoured cigarettes. In 2006, the SA Government amended its tobacco regulations to enable such cigarettes to be banned, on the grounds that they lure young people into smoking.¹ In order to prevent their supply from other jurisdictions under mutual recognition, the SA Government also invoked a temporary exemption under the MRA and TTMRA.² This triggered procedures for the relevant COAG Ministerial Council to consider whether there should be a permanent exemption in all jurisdictions. In May 2007, the Ministerial Council on Drug Strategy (MCDS 2007) agreed to a permanent exemption, but it was not implemented.

¹ *Tobacco Products Regulation (Prohibited Tobacco Products) Amendment Act 2006* (SA), which came into operation on 31 October 2006.

² *Mutual Recognition (South Australia) (Temporary Exemptions) Variation Regulations 2006*, and *Trans-Tasman Mutual Recognition (South Australia) Variation Regulations 2006*, both gazetted on 9 November 2006.

The SA Government's temporary exemption for fruit and confectionery flavoured cigarettes lapsed without resolution in November 2007 after the maximum allowed period of 12 months. To address its concerns, the SA Government subsequently imposed conditions on the manner of sale of cigarettes, which is outside the scope of the MRA and TTMRA. In particular, it banned the retail display of fruit and confectionery flavoured cigarettes, including price boards and price tickets.³ Shortly after this measure came into effect, all Australian states and territories agreed to ban the sale of fruit and confectionery flavoured cigarettes by December 2009 (MCDS 2008). This avoids the need to obtain a permanent exemption from the MRA, since fruit and confectionery flavoured cigarettes will no longer be able to be lawfully sold in any Australian jurisdiction. To avoid the need for a permanent exemption from the TTMRA, the Australian Government has agreed to investigate banning the importation of such cigarettes.

The Tasmanian Government had a similar experience to the SA Government, and this led it to argue that a longer time period should be allowed to resolve the issues underpinning a temporary exemption:

... it is Tasmania's view that the time period for which [temporary] exemptions can be granted needs to be extended. Tasmania was recently confronted with the same situation as in South Australia regarding the prohibition of the sale of fruit and confectionery flavoured cigarettes. As a result, additional legislation was required to assist in achieving the objective of the bans, which resulted in additional administrative and implementation costs being borne by the State. It is considered that a two-year extension period under both the MRA and TTMRA would be more feasible and would also overcome the issues around trying to obtain an extension under the TTMRA, which is a very time consuming and cost prohibitive process. (Tasmanian Department of Treasury and Finance, sub. 34, p. 2)

The Commission is not convinced that the example of fruit and confectionery flavoured cigarettes demonstrates that there is a case for lengthening the duration of temporary exemptions. The relevant COAG Ministerial Council made a decision within about six months, which could have been implemented within the 12-month time limit despite the cross-jurisdiction coordination required to enact a new permanent exemption. It appears that the necessary coordination did not occur because some governments were unwilling to act in a timely manner, reflecting their view that fruit and confectionery flavoured cigarettes were not yet creating concerns in their jurisdiction. This coordination problem is not unique to mutual recognition. It could also hinder efforts to implement the foreshadowed national ban on the sale of fruit and confectionery flavoured cigarettes by December 2009.

³ Tobacco Products Variation Regulations 2008, gazetted on 10 April 2008.

Allowing a longer time period for temporary exemptions would give jurisdictions more time to coordinate their actions, but it would also reduce the pressure on governments to implement agreements they have made about temporary exemptions in a timely manner. Moreover, a longer time limit for temporary exemptions would be inconsistent with Australia's foreshadowed new national consumer product safety regime, which will effectively resolve differences between Australian jurisdictions in less than the 12 months permitted for resolving temporary exemptions (detailed in the following section).

The Commission understands that another factor preventing the implementation of the agreed permanent exemption for fruit and confectionery flavoured cigarettes was a reluctance by some parties to set a precedent. To date, the temporary exemption process has not led to a permanent exemption being enacted for any good. This appears unfortunate in the case of fruit and confectionery flavoured cigarettes, given that all jurisdictions agreed on health grounds that the product should not be sold, and have since reconfirmed this in their commitment to a national sales ban. There are sound reasons for having hurdles to getting a permanent exemption (such as the required regulatory impact analysis) to prevent a proliferation of unjustified trade barriers, but these hurdles should not prevent permanent exemptions that are justified in the sense that they would make the community better off.

6.2 Interaction with Australia's product safety regime

As the Commission noted in its 2003 review, individual jurisdictions can impose product bans and safety standards to remove goods from the market that are deemed unsafe, or to impose requirements on goods before they may be sold. In Australia, both the Commonwealth and individual states and territories can impose product bans and safety standards. In New Zealand, bans and standards are imposed at a national level only.

However, goods regulated under product bans or safety standards continue to be subject to the MRA and TTMRA, unless the regulating jurisdiction also invokes a temporary exemption under the mutual recognition schemes. A temporary exemption is not automatically created as a result of a jurisdiction imposing a ban or standard. To invoke a temporary exemption under the MRA or TTMRA, a jurisdiction must gazette a temporary exemption regulation under its own Mutual Recognition Act or Trans-Tasman Mutual Recognition Act. Alternatively, it can do so under its legislation relating to the area for which the exemption is being sought (COAG and New Zealand Government 2006).

Failure to invoke a temporary exemption under mutual recognition legislation means that the goods that the jurisdiction has sought to ban or restrict may still be lawfully sold in that jurisdiction under the mutual recognition principle if they are lawfully sold in another participating jurisdiction (PC 2003). If the regulating jurisdiction is an Australian state or territory, it must take out a temporary exemption under both the MRA and TTMRA, to render the ban or standard legally effective.

As observed in the Commission's 2003 review, however, jurisdictions often impose product bans and safety standards without also invoking a temporary exemption under mutual recognition. It appeared that these bans are often practically effective — despite not being legally effective — as manufacturers and importers tend not to make use of the mutual recognition defence. This may be due to either reluctance to pursue the matter or a lack of awareness of mutual recognition (PC 2003).

There is evidence to suggest that this is continuing to occur, resulting in ban orders and safety standards that are inconsistent across jurisdictions, despite the existence of mutual recognition. For example, the Coles Group (sub. 46) reported that New South Wales, Victoria and Western Australia currently have in place inconsistent ban orders applying to the sale of candleholders, while other Australian jurisdictions do not have similar restrictions. The Coles Group also cited the example of 'monkey bikes' (scaled-down motorcycles), which were banned in Victoria in 2005 unless they complied with five specified safety requirements. Similar bans were introduced in South Australia, Queensland and Tasmania in 2006, and in New South Wales in 2007.

The imposition of product bans and standards by individual jurisdictions without the concurrent use of the temporary exemption process has the potential to undermine both the operation of mutual recognition and consumer product safety laws. Recognising this, the Commission's 2003 review supported the introduction of procedures to integrate processes for product bans and temporary exemptions. In particular, the Commission advocated that when a jurisdiction imposes a product ban, it should have the effect of automatically activating a temporary exemption under the MRA and TTMRA (PC 2003). In its response to the Commission's review, the Cross-Jurisdictional Review Forum (CJRF 2004) recommended that the Ministerial Council on Consumer Affairs (MCCA) report to COAG on the feasibility of integrating the banning and temporary exemption processes.

In its 2006 review of Australia's product safety regime, the Commission reiterated the concern that jurisdictions were 'rarely' seeking temporary exemptions under mutual recognition, instead using unilateral bans and standards to effectively restrict products (PC 2006b, p. 313). As a result, inconsistent mandatory product standards and bans were taking hold, despite the existence of the mutual recognition schemes.

To combat this, the Commission made a series of recommendations for the establishment of a new Australian consumer product safety system, under which permanent bans and standards could only be imposed at a national level (PC 2006b).

A new national consumer product safety regime is currently being developed for Australia, broadly based on the recommendations in the Commission's 2006 review. Under the new regime, announced by the MCCA in May 2008:

- the Commonwealth will assume responsibility for making permanent product bans and standards
- Australian states and territories will retain their power to issue interim product bans. However, these interim bans will apply for 60 days only, unless extended (by 30 days and then for a further 30 days, making a total of 120 days maximum) by approval of the Commonwealth Minister for Consumer Affairs
- jurisdictions wishing to propose a permanent ban or standard would, under the new system, refer the matter to the Australian Competition and Consumer Commission (ACCC), which would make a recommendation to the Commonwealth Minister and to the MCCA
- the ACCC and the state and territory regulators will share responsibility for enforcement of product safety regulations (MCCA 2008a).

This proposed product safety regime comes in the context of a new national approach to consumer policy in Australia, as recommended by the Commission in its 2008 review of Australia's consumer policy framework (PC 2008e) and broadly supported by the Australian Government (MCCA 2008a). This new national framework has been foreshadowed to include a nationally harmonised, generic consumer law to apply in all Australian jurisdictions, and to be jointly enforced by the ACCC and state and territory consumer regulators (MCCA 2008a).

The reforms are expected to be fully implemented by the middle of 2010, following endorsement by COAG at its July 2008 meeting (MCCA 2008b). Full details of the new product safety regime are yet to be determined. It appears that the broad structure of the new arrangements will be developed first, as part of an intergovernmental agreement between the Commonwealth and the Australian states and territories.

New Zealand has welcomed Australia's foreshadowed new product safety regime (MCCA 2008a), which, if it has the effect of reducing differences in standards between Australian jurisdictions, would be likely to lead to reduced compliance costs for New Zealand exporters to Australia. The New Zealand Government has

not committed to joining the new regime, but the New Zealand Ministry of Economic Development noted that:

... New Zealand is an active participant in Australasian product safety policy development through its membership of the MCCA and its supporting officials committees. Both the New Zealand consumer regulator (the Ministry of Consumer Affairs) and its enforcement agency the New Zealand Commerce Commission (NZCC) are participants in these fora. The NZCC has also signed [a general cooperation agreement with the ACCC (the agency largely responsible for administering Australia's new arrangements), designed to facilitate coordination between the two bodies] (ACCC 2008). These deep levels of interaction should support [continuing trans-Tasman cooperation after the new Australian product safety regime is implemented]. (sub. DR89, p. 11)

Two possible tensions between Australia's foreshadowed new product safety regime and the mutual recognition schemes are worth noting. First, under the MRA and TTMRA, temporary exemptions must be resolved within 12 months by harmonising standards, creating a permanent exemption, or reverting to mutual recognition. As noted in section 6.1, the COAG guidelines for resolving temporary exemptions state that a decision should be made 'within approximately' the first eight months so as to allow time to implement the decision (COAG 2006c, p. 2). In contrast, Australia's foreshadowed new product safety regime will require a decision to be made on whether there will be a permanent ban or new mandatory standard within a maximum of 120 days.

Second, under the MRA and TTMRA, the decision to resolve a temporary exemption must be made by the relevant COAG Ministerial Council. A temporary exemption is resolved by imposing a permanent exemption, introducing a new standard or other form of harmonisation, or by requiring mutual recognition to apply. A two-thirds majority of the relevant Ministerial Council must agree for the decision to be binding. Under Australia's new product safety regime, the decision to create a permanent ban or mandatory standard will be made by the Commonwealth Minister (Commonwealth Treasury, Canberra, pers. comm., 21 August 2008).

The two differences above imply that the Commonwealth Minister would make a decision on how to resolve an interim ban well in advance of a Ministerial Council determination on any related temporary exemption. This is assuming a temporary exemption has been taken out to give legal effect to the product ban. A potential advantage of this is that the product safety system would enable differences in standards between jurisdictions — at least, within Australia — to be resolved more quickly than would occur under mutual recognition.

However, duplication and inconsistency could potentially arise. Once the Commonwealth Minister has made a decision to resolve an interim product ban, it

would be unnecessary and duplicative for the same issue to go through Ministerial Council consideration under the temporary exemption process, as far as the MRA (but not the TTMRA) is concerned. Further, as Ministerial Councils comprise representatives from all participating jurisdictions, and not the Commonwealth alone, a Ministerial Council determination under the MRA could conflict with, and thus undermine, the earlier Commonwealth decision.

This analysis suggests that the MRA temporary exemption process may be unnecessary, and even counterproductive, for goods subject to interim bans under the proposed new Australian consumer product safety system. To prevent duplication and inconsistency, the Commission supports the close integration of the temporary exemption process under the MRA with the new Australian consumer product safety regime. Specifically, the MRA temporary exemption process should not be used when a good is made subject to an interim product ban under the new product safety regime, so as to prevent duplication and inconsistency.

One way to achieve this would be to include a provision in the Commonwealth legislation for the new product safety regime that states that, from the time an interim ban is imposed by an Australian jurisdiction until the time it is either resolved by Commonwealth decision or lapses, the MRA should not apply to that good.⁴ This would have the effect of exempting the good from the MRA for the period of the interim ban, without invoking the MRA temporary exemption process. As a result, the possibility of duplication or a conflict between a Commonwealth Ministerial decision and a Ministerial Council determination would be avoided.

However, the TTMRA temporary exemption process would still be relevant under the new Australian product safety regime. This is because decisions made under the Australian product safety system to resolve interim bans by harmonisation or a permanent ban would not apply to New Zealand, and so would not prevent non-compliant goods being lawfully sold in Australia under the TTMRA.

To ensure the TTMRA temporary exemption process is used every time a product ban is imposed, the Commission supports an ‘automatic trigger’ as suggested in previous reviews (PC 2003, 2006b). It is equally important to ensure that a TTMRA temporary exemption is revoked — and mutual recognition reinstated — if an interim product ban that triggered the exemption lapses without the creation of a permanent national ban or new mandatory standard. These two objectives could be

⁴ The recommendation here is to integrate the revised temporary exemption process with the new Australian consumer product safety regime. Integration could also be achieved by making suitable changes to the mutual recognition legislation. However, as the consumer product safety regime is still being developed, there is legislative risk in anticipating the outcome of the new regime by requiring all jurisdictions to make changes to the existing mutual recognition legislation.

achieved by a provision in the Commonwealth legislation for the new product safety regime that explicitly refers to the TTMRA temporary exemption process. The provision should state that any notice declaring an interim product ban must also:

- invoke a TTMRA temporary exemption
- include a ‘sunset clause’ stating that when the interim product ban ends, the related TTMRA temporary exemption should also end.

New Zealand could create a similar automatic trigger (and sunset clause, if relevant) for product bans it imposes by amending its own consumer product legislation.

Finally, if an interim ban imposed by an Australian jurisdiction under the proposed new regime is resolved by a national permanent ban, the Commonwealth would need to invoke a national temporary exemption to prevent non-compliant goods being sold in Australia under the TTMRA. To ensure this occurs, Australia’s new product safety legislation should require that a regulation imposing a national ban also invoke an Australian national temporary exemption under the TTMRA. The resultant temporary exemption could then be resolved in the usual way.

The New Zealand Ministry of Economic Development was concerned that the new system of Australian product bans, combined with the Commission’s proposed ‘automatic trigger’ for TTMRA temporary exemptions, have the potential to create new product standards that are inconsistent with the principle of mutual recognition. Consequently, it cautioned that the proposed automatic trigger would require further consideration once details of Australia’s new consumer product safety regime are determined:

The consequences of automatic invocation of [a] temporary exemption under the TTMRA need to be carefully explored in relation to the development of both permanent bans and product safety standards, bearing in mind the importance of ensuring that the application of the mutual recognition principle remains as comprehensive as possible. (Ministry of Economic Development, sub. DR89, p. 4)

Having the temporary exemption process automatically activated under the TTMRA does, however, have the advantage that it makes New Zealand a participant in discussions to resolve an interim product ban. This advantage is not necessarily shared with alternative means of exempting a banned product from the TTMRA, such as through customs or import bans.

At the roundtables for this study, some participants expressed a concern that the proposed harmonisation of MRA and TTMRA temporary exemption processes with Australia’s foreshadowed national consumer product safety regime would not apply to goods regulated under separate product-specific legislation. This includes food,

electrical goods and therapeutic products. In such cases, Australian and New Zealand Governments will need to remain cognisant of their mutual recognition obligations when considering product bans or new standards.

Despite the distinct regulatory regime for food, the Australian Quarantine and Inspection Service (AQIS) noted that there was a possibility that Australia's foreshadowed new consumer product safety regime may have unintended consequences for food regulation:

The envisaged consumer product safety regime and its dovetailing with the (proposed) changes to the TTMRA and its legislation may have some unforeseen difficulties in the case of food regulation. Unless there [are] rigorous criteria for promulgating a ban, it may be possible for a jurisdiction, under (say) strong political pressure, to ban a product, or class of products, such as GM [genetically modified] food, for which enforcement of the ban is difficult if not impossible. We assume the criteria for invoking a ban will be determined by the consumer product safety regime.

A further complication is that banning food products from entering the country is not legally enforceable under the Commonwealth *Imported Food Control Act 1992*. AQIS has no legal power to prevent banned products from entering Australia from New Zealand or anywhere else. To implement a ban at the border, options other than relying on the *Imported Food Control Act* may need to be in place.

There may be other regulatory areas where national import controls do not allow implementation of bans. (AQIS, sub. DR83, p. 3)

These issues are broader than mutual recognition. They should be considered by governments as part of their current efforts to design the foreshadowed new consumer product safety regime.

RECOMMENDATION 6.1

The foreshadowed new Australian consumer product safety regime should include provisions to ensure it is closely integrated with the temporary exemption processes under the MRA and TTMRA. In particular, the new consumer law should ensure that:

- when an interim product ban is imposed on a good under Australia's new consumer product safety regime, the MRA does not apply to that good until the ban is either resolved by a Commonwealth decision or lapses — in order to avoid duplication and inconsistency between the product safety regime and the temporary exemption process under the MRA***
- when an interim product ban is imposed by any Australian jurisdiction, the temporary exemption process under the TTMRA is automatically invoked and the resultant temporary exemption for the relevant jurisdiction is automatically revoked when the interim product ban ends***

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- *if and when an interim product ban within Australia is resolved by a national permanent ban, a national temporary exemption under the TTMRA is automatically invoked for Australia.*

6.3 TTMRA option of an implementation period

Unlike the MRA, a temporary exemption under the TTMRA can be extended for up to an additional 12 months. This can only be granted for the purpose of providing sufficient time to implement a ministerial council's decision on how a good will be treated once a temporary exemption expires.

For it to have effect, such an implementation period requires the support of two-thirds of the jurisdictions.⁵ It is invoked by a regulation made under the Commonwealth and New Zealand TTMRA Acts (COAG and New Zealand Government 2006).

In principle, this inconsistency between the MRA and TTMRA is undesirable because it could lead to diverging approaches to the treatment of goods. Few participants commented on this issue. The NSW Government (sub. 55) expressed a preference for consistency, suggesting that the optional 12-month implementation period apply to both the MRA and TTMRA. The New Zealand Government noted that the administrative process for obtaining approval for an implementation period could be onerous because the decision has to be made within seven months of a temporary exemption being invoked:

While the TTMRA provides a process for extending temporary exemptions for a further 12 months, the process may be unnecessarily administratively onerous and time consuming, requiring consideration by a Ministerial Council and approval by Heads of Government. The requirements of this process mean that the decision to extend a temporary exemption practically needs to be taken within the first 6-7 months of it coming into effect. (sub. 53, p. 12)

But this timing is broadly in line with the guidelines for resolving temporary exemptions, which require ministerial councils to decide 'within approximately' the first eight months of a temporary exemption whether it would be resolved by mutual recognition, harmonisation, or a permanent exemption (COAG 2006c, p. 2). This, combined with the limited use of the implementation option under the TTMRA, has led the Commission to conclude that changes are not warranted.

⁵ *Trans-Tasman Mutual Recognition Act 1997* (Cwlth), s. 47(7) and *Trans-Tasman Mutual Recognition Act 1997* (NZ), s. 87(2)(b).

The Commission understands that a temporary exemption under the TTMRA for electric water heaters is the only example of the implementation-period option being used. The exemption was initiated by New Zealand and reflected differences in the Minimum Energy Performance Standards adopted by Australia and New Zealand (PC 2003). The New Zealand Government invoked the exemption in February 2003 and it was extended for a further 12 months, ending in February 2005. The extension was used to allow the two countries sufficient time to align their regulatory regimes. This was achieved by late 2005, when a joint Australia–New Zealand standard for electric heaters was implemented (Standards Australia and Standards New Zealand 2005).

6.4 Joint Australian approach to initiating TTMRA temporary exemptions

The TTMRA does not have a formal mechanism for Australian states and territories to jointly initiate temporary exemptions on goods imported from New Zealand. As a result, when a New Zealand good is of concern to all states and territories, they each have to invoke their own temporary exemption.⁶ This imposes unnecessary administrative costs on each jurisdiction and will tend to take longer to implement than a single national temporary exemption, increasing the time period for which the goods of concern may lawfully be sold in Australia under the TTMRA.

This issue was addressed in the Commission’s 2003 review with respect to ‘niche market’ opportunities the TTMRA provides for food products:

Where one country takes a more conservative risk-management approach, the TTMRA obligations provide scope to develop a niche market for the country with the less restrictive standards as its manufacturers and exporters may continue to sell in the other market while local manufacturers and importers are prohibited from doing so. Particular issues have arisen with dietary supplements, maximum residue limits, hemp seed oil and country of origin labelling ... (PC 2003, p. 137)

Niche markets have developed because, although food standards are set by a trans-Tasman agency (FSANZ), not all of the standards apply to both Australia and New Zealand. When all Australian states and territories want to invoke a temporary exemption on health, safety or environmental grounds to prevent a niche market developing for food imported from New Zealand, they each have to invoke their own temporary exemptions. This is because the states and territories, rather than FSANZ or a national Australian regulator, are responsible for enforcing food standards.

⁶ This is not the case if the relevant regulatory requirements for the good are administered by the Australian Government, which can invoke temporary exemptions that apply nationally.

AQIS noted that niche market opportunities continue to exist for food exported from New Zealand to Australia, such as in the Red Bull ‘sport’ drink case:

The Red Bull issue was created because the Australian standards deemed the product illegal, but in New Zealand Red Bull was legal under the dietary supplements regulations. As the product was not considered high risk in Australia it was subject to the TTMRA and able to be imported from New Zealand without any valid regulatory action by Australian jurisdictions, but could not be made in, or directly imported into Australia.

Although the countries have a joint food standard setting system, New Zealand, under the Joint Food Standards Treaty, can opt out of any one of the standards if it chooses. There are many instances where food standards differ between the countries. In addition to variation in food standards between the countries, the New Zealand Dietary Supplements legislation deems many products legal in New Zealand that are considered illegal in Australia.

So, similar situations to that which created the Red Bull case continue. (sub. DR83, p. 2)

The New Zealand Government observed that the TTMRA also enables Australians to export niche products (pet foods and animal feeds) to New Zealand:

There are a number of product groups in the agricultural, horticulture and livestock production areas that are ... traded in significant quantities under the provision of the TTMRA. These include animal feeds, pet foods and fertilisers. There are risk-management issues associated with this trade, particularly because of the differing laws governing the manufacture, quality, labelling, acceptable claims, across New Zealand, the Commonwealth, and the states and territories. This was highlighted last year when it became clear that pet foods and animal feeds that could be sold in Australia would not meet New Zealand requirements ... but were legally able to be sold in New Zealand under the TTMRA. (sub. 53, p. 10)

In 2003, the Commission found it would be simpler to obtain temporary exemptions for food products under the TTMRA if states and territories allowed FSANZ to jointly obtain them on their behalf (PC 2003). Governments rejected this on the grounds that FSANZ is a standards-setting body, rather than a regulator (CJRF 2004). The governments also noted that the Australia New Zealand Food Regulation Ministerial Council could consider cases where foods pose a health risk and recommend a temporary exemption, if necessary.

No participants in the current review expressed concerns about the lack of a mechanism for Australian jurisdictions to jointly initiate temporary exemptions on goods imported from New Zealand. However, two participants — Cadbury Schweppes (sub. 2) and the Complementary Healthcare Council of Australia (sub. 33) — claimed that Australian industry is disadvantaged by the presence of niche markets for food-type dietary supplements. Both expressed concern that such products, which do not conform to Australian standards, can be sold in Australia by

New Zealand manufacturers but not manufactured in Australia for domestic sale, putting Australian industry at a disadvantage relative to its New Zealand counterparts.

Proposed reforms to New Zealand dietary supplements regulations will mean that food-type dietary supplements will be regulated separately from therapeutic-type supplements under a new Supplemented Food Standard (chapter 7). The Commission understands that the long-term objective is for food-type dietary supplements to be regulated under the Australia New Zealand Food Standards Code. If this results in the application of uniform standards to both Australian and New Zealand producers, any unlevel playing field would be removed. In the interim, where differences in standards raise public health and safety concerns in relation to some products, jurisdictions could consider obtaining a temporary exemption from the TTMRA.

To some extent, the Commission's abovementioned recommendation to harmonise processes for temporary exemptions and consumer product bans, will address concerns about the lack of a mechanism for Australian jurisdictions to jointly initiate temporary exemptions. This is because Australia's foreshadowed new consumer product safety regime will involve a coordinated national system for product bans. However, as also noted above, the new product safety regime will not directly affect food or therapeutic products, as they are regulated under product-specific regimes. As a result, the lack of a joint Australian approach to temporary exemptions will remain for these goods. In its 2003 review, the Commission suggested a solution to this problem for food was for the states and territories to permit FSANZ to obtain temporary exemptions on their behalf. However, this suggestion was not taken up and so it appears that Australian jurisdictions concluded that concerns about the lack of a joint temporary exemption process for food are not sufficient to warrant changes.