
8 Scope of mutual recognition — goods

Key points

- Permanent exemptions are appropriate in cases where it is not feasible or cost effective to apply mutual recognition. However, there is scope to remove or reduce the coverage of the permanent exemptions for risk-categorised foods and ozone protection.
 - The permanent exemption for risk-categorised foods could be narrowed, subject to further efforts to achieve equivalence of import-control systems and third-country certification arrangements.
 - The permanent exemption for ozone-protection legislation could be removed in light of recent amendments to Australia’s regulations for ozone protection and synthetic greenhouse gas management.
- The exceptions enable jurisdictions to respond to specific risks to health, safety and the environment arising from the way in which goods are sold, transported, stored and handled.
 - Inconsistencies in regulation across jurisdictions have the potential to contribute to unnecessary compliance burden, particularly for national operators.
 - These issues could be addressed through avenues other than mutual recognition, such as negotiation with regulators on a case-by-case basis, and greater coordination between jurisdictions in regulatory design and implementation.
- Indirect barriers to the sale of goods, such as use of goods requirements, are not adequately addressed in the Acts.
 - Use of goods requirements, insofar as they restrict the sale of goods, could be explicitly brought into the scope of mutual recognition, with constraints addressing health, safety and environmental concerns.
- Effective and accessible dispute resolution and appeals mechanisms for goods should be available for sellers, regulators and other interested parties. Such mechanisms would also facilitate a body of guidance material on the application of the legislation to specific questions relating to goods.

The terms of reference of this review ask the Commission to assess the coverage of the Mutual Recognition Agreement (MRA) and the Trans-Tasman Mutual

Recognition Arrangement (TTMRA). The Commission has interpreted this as requiring an assessment of the permanent exemptions, exceptions and exclusions under the mutual recognition schemes. Together, these provisions restrict the reach of mutual recognition to certain goods, activities, occupations and laws. That reach is further restricted by the fact that the schemes are silent on some areas of economic activity (for example, trade in services). Consistent with the objectives of the Australian model of mutual recognition, the coverage of mutual recognition should not be unnecessarily limited. Therefore, in this chapter, the Commission has examined each of the permanent exemptions, exceptions and exclusions, based on an assessment of their rationale and the potential benefits from amending, narrowing or deleting some provisions. It has also examined some areas on which the schemes are silent.

In addition, the Commission has considered options for improved dispute resolution mechanisms to apply to goods-related matters in general.

8.1 Permanent exemptions

Permanent exemptions have been applied, in both the MRA and TTMRA, to goods and activities (or laws relating to them) for which mutual recognition would undermine individual jurisdictions' sovereignty, including in matters of public standards, protection of the local environment and giving precedence to the preferences of local citizens. Permanent exemptions are contained in Schedules 1 and 2 of the *Mutual Recognition Act 1992* (Cwlth) (MR Act). There are four permanent exemptions for goods under Schedule 1 — firearms/weapons, fireworks, gaming machines and pornographic material. The permanent exemptions under Schedule 2 cover a number of legal instruments relating to quarantine laws, environment protection, ozone protection, weapons, fireworks, indecent publications, container deposit requirements and Tasmanian laws relating to the possession, sale or capture of abalone, crayfish and scallops (figure 2.2). The permanent exemptions under the *Trans-Tasman Mutual Recognition Act 1997* (Cwlth) (TTMR Act (Cwlth)) cover the same goods as those under the MR Act, with the addition of several other categories of goods, including agricultural and veterinary chemicals and risk-categorised foods (figure 2.3). Similar provisions are contained in the permanent exemptions and exclusions Schedules under the *Trans-Tasman Mutual Recognition Act 1997* (NZ) (TTMR Act (NZ)).

A review of the permanent exemptions is undertaken in this section, covering the rationale for each exemption, the views expressed by study participants and the potential for removing exemptions.

Import food control Act (risk-categorised food)

Within Australia, food standards are developed by Food Standards Australia New Zealand (FSANZ) under the *Food Standards Australia New Zealand Act 1991* (Cwlth). The food standards are meant to be uniformly adopted by all states and territories under the Food Regulation Agreement of 2000. Therefore, the MRA does not play a major role in regards to food traded across jurisdictional borders within Australia. The only permanent exemption relating to food is that for Tasmanian laws relating to the possession, sale or capture of abalone, crayfish and scallops.

As a result of the TTMR, Australia and New Zealand agreed to relax border controls for food traded across the Tasman. The only food products from New Zealand subject to inspection and certification arrangements upon entry to Australia under the Import Food Inspection Scheme (formerly the Imported Foods Program) are those on a jointly agreed list of foods that are considered to have the potential to pose a risk to public health — so-called ‘risk-categorised’ food.

As set out under Schedule 2, part 2, of the TTMR Act (Cwlth), the operation of Australia’s *Imported Food Control Act 1992* (Cwlth) (IFC Act), to the extent that it deals with risk-categorised food, is subject to a permanent exemption. Food is determined to be risk categorised where it has the potential to pose a high or medium risk to public health. Inspection of imported foods is carried out by the Australian Quarantine and Inspection Service (AQIS), with the frequency of inspection depending on the risk category assigned to the food and, in some cases, the compliance records of exporters. An amendment to the Imported Food Control Order 2001 in April 2007 simplified the risk categorisation of imported foods from three to two categories, as recommended in a review of the IFC Act (DAFF 2007). The two inspection categories — risk and surveillance foods — are determined by FSANZ. Over time, a number of food products have been moved from the risk foods to the surveillance foods category. The exclusions under Schedule 1 of the TTMR Act (NZ) include laws relating to customs and tariffs to the extent that they prohibit or restrict imports. This includes prescribed foods (high-risk foods) under the *Food Act 1981* (NZ), which are subject to import procedures and requirements determined by the New Zealand Food Safety Authority (NZFSA).

In 2003, the Commission found that the IFC Act could be removed from the list of TTMR permanent exemptions only when:

- there was reciprocal treatment of Australian food imported into New Zealand
- there were effective procedures in place for maintaining the high-risk food list
- existing and projected third-country issues were dealt with effectively.

In its report to the Council of Australian Governments (COAG) in 2004, the Cross Jurisdictional Review Forum (CJRF) supported the Commission's finding and noted that work on these issues was being progressed by a trans-Tasman working group comprising the NZFSA, FSANZ and AQIS (CJRF 2004).

Harmonisation of risk-food lists

The working group has developed and agreed to criteria for assessing risk food. Based on these criteria, FSANZ and NZFSA agreed to review each category of risk food and its corresponding hazard to determine whether it is a medium or high risk for imported-food purposes.¹ A review of Australia's imported-food risk list, completed by FSANZ in 2007, confirmed the appropriateness of most existing tests for high-risk foods. This was based on evidence of contamination with particular hazards and, in most cases, evidence that these hazards caused illness in humans. Key considerations in reviewing the risk-food list were the existence of post-import mitigation strategies and whether inclusion in the risk list would be an effective strategy to manage risk. The NZFSA is currently finalising its review of the New Zealand risk-food lists.

FSANZ advised the Commission that Australia and New Zealand's lists of high-risk products have been harmonised to the extent possible, with the exception of one microbiological test for a dairy product (Salter, M., pers. comm., 1 August 2008). The New Zealand Government argued that:

Both countries will need to maintain exempt risk lists for imported foods exempted for third-country purposes, but these lists should be limited to those foods where there are substantial differences in the import standards, rather than all foods currently captured by the general risk category. (sub. 53, p. 8)

This would effectively require the creation of a separate trans-Tasman list for those risk-food products for which harmonisation remains unachievable. The TTMRA permanent exemption for these products should remain. The risk-foods subject to either permanent or special exemption would not include those foods for which agreement has already been reached on equivalence of domestic systems and third-country arrangements.

¹ Risks associated with food include disease-causing microbiological and chemical contamination, for example, salmonella or *E.coli*. Because of the nature of the food or the processing conditions, some foods are more predisposed to contamination and represent a higher risk to human health.

Equivalence of import-control systems and third-country arrangements

There has been limited progress towards equivalence of import-control systems for some products. Australia and New Zealand have agreed on equivalence of their export-dairy systems, which will eliminate the certification requirements for soft cheese exports to New Zealand (DAFF 2007). The New Zealand Ministry of Economic Development (sub. DR89) advised that there are foods for which equivalence of domestic systems has been agreed, or it is anticipated will be agreed in the near future, including dairy, peanuts and shellfish. In practice, some foods are already subject to mutual recognition. However, for other risk foods, there are still significant differences in import policies which hinder achieving equivalence of Australian and New Zealand import-control systems. A problematic area is the difference between the import-control measures adopted by both countries for Bovine Spongiform Encephalopathy (BSE) in beef and beef products.

In 2003, concerns were raised that Australia's import controls for some risk foods from third countries could be bypassed where New Zealand does not routinely inspect all foods other than those regarded as high risk. AQIS (sub. DR83) commented that there may be impacts on food inspection functions as an indirect consequence of more comprehensive two-way trade arrangements with third countries. Imported food inspection arrangements for trade between Australia and New Zealand should be taken into account when developing broad trade arrangements with third countries. Therefore, consideration of these implications is required at the ministerial or policy level.

The trans-Tasman working group has yet to overcome a number of problems before equivalence of import-control systems and resolution of third-country issues can be achieved. Ongoing efforts would be likely to have greater impetus if progressed through a cooperation program under a special exemption, with participation at both the policy and regulatory level. This could provide further opportunities for stakeholders on either side of the Tasman to develop confidence in both countries' approaches — both at the border and prior to export — to managing risks associated with imported risk food, including from third countries.

RECOMMENDATION 8.1

Consideration should be given to narrowing the permanent exemption for risk-foods from the TTMRA to include only those for which harmonisation of risk-food lists and equivalence of import-control measures are not achievable in the long term. Other risk-foods should be reclassified as a special exemption. Efforts should be made to achieve equivalence of import-control systems and third-country arrangements through a cooperation program, undertaken by a trans-Tasman working group, consisting of regulatory bodies and policy officials.

Country of Origin Labelling

While not currently subject to exemption from mutual recognition, there exists areas of non-alignment of food standards, with potential implications for the coverage of the schemes. A number of aspects of the Food Standards Code are not followed by New Zealand, for example, food safety, wine production, primary production and processing standards and Country of Origin Labelling. This is permitted under Annex D of the agreement between Australia and New Zealand (the Food Standards Code) which allows for New Zealand to vary food standards adopted across Australia, based on specific geographical, environmental, trade or cultural grounds.

Country of Origin Labelling (CoOL) is an area where frequent concerns have been raised about New Zealand opting out of Australian standards. Currently there is a temporary arrangement in place for mandatory CoOL to apply in Australia. According to the Australian Government, this requirement is designed to enable consumers to make informed choices (DOHA 2008). In New Zealand, there has been a long-standing provision under fair trading legislation for voluntary CoOL. Mandatory CoOL is not supported by New Zealand, as it is not seen as relevant to the issue of food safety and is potentially trade restrictive — to the extent that it is considered inconsistent with international obligations under the WTO Agreement on Technical Barriers to Trade (NZFSA 2005). In 2003, the Commission noted that tracing the origins of imported food can be difficult and costly, particularly for New Zealand, because it cannot produce the range of ingredients that Australia does and must import more ingredients for processed food (PC 2003). Until recently, only packaged foods in Australia were required to display CoOL. In 2006, a mandated standard to apply to unpackaged food (requiring the display of a label) was introduced despite a regulation impact statement (RIS) indicating that there were substantial costs which outweighed the consumer benefit (PC 2008a). In its response to the report of the Regulation Taskforce in 2006, the Australian Government agreed to a review of CoOL requirements, including a full cost–benefit analysis within three years of implementation.

At present, Australia and New Zealand continue to maintain different positions towards this aspect of food regulation. By virtue of the TTMRA, New Zealand products can enter the market without complying with the Australian CoOL standard. Some participants — Cadbury Schweppes (sub. 2) and the Coles Group (sub. 46) raised concerns related to CoOL as an area of inconsistency in product regulation. Permanent exemption of CoOL requirements from the TTMRA would remove the differential treatment of Australian and New Zealand producers. Such a proposal should be subject to a cost–benefit test as part of a separate RIS process. Given Australian Ministers’ policy justification for mandatory CoOL, a permanent exemption could not be sought on public health and safety grounds. Moreover,

exempting mandatory CoOL standards from the TTMRA would be contrary to the provisions of the Food Standards Code, which allows New Zealand to opt out of specific Australian standards and, therefore, is not likely to be supported. Based on this, the Commission does not consider that there is scope to omit CoOL from the coverage of the TTMRA.

Cadbury Schweppes (sub. DR61) suggested that a common label could be permitted for the same product manufactured in both countries, with a declaration that the good is ‘made in Australia and/or New Zealand’. This would be similar to EU common labelling requirements. Cadbury Schweppes argued that, because its product labelling includes the company name and consumer contact details, product traceability is not a problem. The Commission considers that this proposal could provide a means to overcome the inconsistency in product regulation. However, examination of this proposal should weigh up the costs and benefits, particularly in light of the failure of mandatory CoOL to pass a cost–benefit test in Australia.

Ozone protection

In 1989, Australia ratified the 1987 Montreal Protocol which aims to promote international cooperation in developing and implementing specific measures to control the consumption and production of ozone-depleting substances (ODS). The *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cwlth) controls the manufacture, import and export of all ODS and their synthetic greenhouse gas replacements (SGG). This includes the purchase, sale, handling, storage and disposal of these substances. Under the Act, all licences to import or export ODS are conditional on the licensee only importing or exporting substances from a country that has ratified the Montreal Protocol and subsequent amendments (DEWHA 2008).

New Zealand is also a signatory to the Montreal Protocol and meets its obligations to phase out chemicals that deplete the ozone layer through the *Ozone Layer Protection Act 1996* (NZ) and associated regulations. As New Zealand does not produce ODS, it meets its obligations through import controls.

In 2003, the Commission found that there was scope for Australia to develop uniform national standards for ozone protection, consistent with international standards. This would enable removal of the exemptions for ozone-protection legislation from the MRA and TTMRA.² The CJRF accepted the Commission’s finding, but noted that scope to remove the exemption would be constrained by the

² Ozone-protection legislation is included in Schedule 2 (permanent exemptions) of the TTMR Act (Cwlth) and in the list of category 3 exclusions under the TTMR Act (NZ).

requirement for both countries to fulfil their respective international commitments under ozone treaties (CJRF 2004). To this end, it was suggested that Australia and New Zealand hold annual consultations on the possibility of achieving consistent national standards and arrangements.

The Ozone Protection and Synthetic Greenhouse Gas Management Regulations 1995 (Cwlth) (as amended in 2003 and 2005) allow the Australian Government to implement uniform national end-use controls for ODS and SGG to meet environmental objectives. This includes use of these substances in the refrigeration and air-conditioning and fire-protection industries, for control of methyl bromide as a feedstock to create other chemicals and use as a fumigant for quarantine, pre-shipment and approved critical uses. These end-use controls were formerly subject to different state and territory controls. The regulations may also extend to other end uses of these substances including the aerosol, solvents and foams sectors, currently regulated by state and territory governments. The regulations replace state and territory ozone-protection legislation and a number of states intend to repeal their ozone-protection regulations (DEWHA 2008).

To administer the regulations, the Australian Government has appointed industry associations to establish and operate systems for handling licences and trading authorisations in the refrigeration and fire-protection industries, which are the major users of ODS and SGG. The regulations govern licensing requirements only to the extent that they are intended to meet environmental objectives under the Act by minimising emissions. The end-use controls set minimum skill standards for technicians who handle these substances and are, in the main, aligned with trade qualifications.

However, the work of technicians, where it does not involve handling of ODS and SGGs, is not regulated under the national system. Some state and territory registration bodies will continue to regulate other aspects of occupational licensing in the air-conditioning, refrigeration, mechanical services and fire-protection industries (chapter 5). Requirements for supervisor or contractor licences and occupational health and safety, for example, would remain subject to mutual recognition.

The Tasmanian Department of Treasury and Finance (sub. 34) noted that, as responsibility for ozone-protection regulation has been transferred from the states and territories to the Australian Government, the need for the permanent exemption should be reviewed by the Australian Government.

The NSW Government (sub. 55) had no in-principle objection to the removal of the permanent exemption from the MRA, subject to the Australian Government broadening its regulation to include areas currently regulated by the states and

territories. It considered that the permanent exemption under the TTMRA should remain in place until such time as Australia and New Zealand's regulatory regimes could be demonstrated to be equally effective.

The Australian Department of Environment, Water, Heritage and the Arts (sub. DR85) gave in-principle support for removing the exemption from the MRA and the TTMRA, subject to both countries aligning their respective regulatory systems. However, it commented that Australia and New Zealand have different approaches to meeting obligations under the Montreal Protocol, including timeframes for phasing out the use of ODS. It is expected that Australia will cease importing hydrochlorofluorocarbons (HCFCs) for use in Australia some years before New Zealand. Further, the Department was not aware of significant impediments to labour or trade flows that arise from differences in Australia and New Zealand's regulatory regimes for ozone protection.

The Air Conditioning and Mechanical Contractors Association of Australia favoured retaining the permanent exemption:

[The Association] does not believe there are any factors that would lead to the view that the situation should alter. New Zealand may have slightly different requirements. If they do, then the permanent [exemption] must remain. However, given that the release of synthetic greenhouse gases is a global issue it is likely that New Zealand will agree with the current Australian approach. (sub. 30, p. 3)

In its submission to the draft report (sub. DR89), the New Zealand Ministry of Economic Development raised concerns that removing the permanent exemption for ozone-protection legislation under the TTMRA would appear to be in conflict with the Commission's recommendation to move the hazardous substances special exemption to a permanent exemption. If ozone-protection legislation were to be brought within the scope of the TTMRA, products sold across the Tasman which contain ODS or SGGS would only be required to meet one country's requirements relating to end-use controls on these substances — but only to the extent that these requirements are intended to meet environmental objectives consistent with commitments under the Montreal Protocol. However, some products may still be subject to both countries' laws relating to hazardous substances, which are subject to special exemption under the TTMRA. For example, New Zealand manufacturers of aerosol cans are required to comply with regulations relating to compressed gases.

Notwithstanding this, the New Zealand Government (sub. 53) indicated that it supports moves to resolve matters underpinning the need for the TTMRA permanent exemption for ozone-depleting gases. However, it considered that the permanent exemption should remain until regulators in both countries have aligned

the necessary regulatory processes, which is being facilitated by ongoing cooperative efforts.

RECOMMENDATION 8.2

The permanent exemption for ozone-protection legislation should be removed from the MRA. Governments should also consider removing the ozone-protection exemption from the TTMRA, subject to both countries aligning their respective regulatory systems while ensuring consistency with international obligations.

Other permanent exemptions

There is no strong justification for changing the other permanent exemptions. However, in some cases, there has been progress towards developing consistent regulation. The views of study participants are noted in the following discussion.

Agricultural and veterinary chemicals

Agricultural and veterinary (agvet) chemicals (and products) are subject to a permanent exemption from the TTMRA.³ In 2003, the Commission found that governments should consider adding agvet chemicals to the special exemption for hazardous substances, industrial chemicals and dangerous goods (rather than keeping the existing permanent exemption). A report was subsequently prepared by a working group for the COAG Primary Industries Ministerial Council, which concluded that the permanent exemption should remain due to significant differences between Australia and New Zealand in their environments, agricultural production systems, and what constitutes ‘good agricultural practice’. The report did, however, lead to a memorandum of understanding between the relevant Australian and New Zealand regulators, and an associated work program to harmonise their assessment procedures and share information.⁴ The New Zealand Government noted that this has been beneficial:

Significant savings to the veterinary pharmaceutical industry have been achieved via mutual recognition of Australian and New Zealand compliance programs governing veterinary pharmaceutical manufacture, creating benefits for manufacturers in both countries and reducing redundant auditing for companies manufacturing product for both countries. Significant savings are about to be achieved via registration of certain

3 Schedule 2, part 2 of the TTMR Act (Cwlth) permanently exempts application of that Act to the Agricultural and Veterinary Chemicals Act 1994 (Cwlth) and Agricultural and Veterinary Chemicals Code Act 1994 (Cwlth).

4 The relevant regulators are the Australian Pesticides and Veterinary Medicines Authority, the New Zealand Food Safety Authority and the Environmental Risk Management Authority in New Zealand.

veterinary medicine products on the basis of regulatory assessment reports and registration decisions for the same by APVMA. This will make a greater range of products available to the New Zealand public and the livestock industry. Final details are being worked out to provide a secure and efficient pathway for the transfer of assessment reports and decisions. Furthermore, registration information requirements are currently being compared to eliminate unnecessary differences in order to facilitate complementary applications for registration. (sub. 53, p. 9)

The New Zealand Government (sub. 53) supported the retention of the exemption for agvet chemicals, given the different conditions in Australia and New Zealand. However, it considered that there is opportunity to work towards narrowing the scope of the exemption through implementation of the Globally Harmonised System for the Classification and Labelling of Chemicals (GHS). Australia is currently considering the application of the GHS to agvet chemicals as part of proposed changes to its workplace regulations and arrangements for scheduling domestic poisons (APVMA 2008; NICNAS 2008). However, the Commission recently recommended in a study of Australia's chemical regulations that Australia delay GHS implementation until there is wider adoption by its major trading partners and a RIS demonstrates the potential for net benefits (PC 2008b).

The Commission supports the retention of the permanent exemption for agvet chemicals, and the efforts of Australian and New Zealand regulators to harmonise their assessment procedures and share information. There are grounds, given substantial differences between Australian and New Zealand environments and agricultural production systems, for retaining the permanent exemption for agvet chemicals under the TTMRA. This should not, however, prevent the regulators from continuing to explore ways to harmonise their processes and share information.

Quarantine

The permanent exemption under Schedule 2 of the MR Act covers laws where the following applies:

- the law regulates or prohibits the importation of specific goods into a state or defined area of the state
- the state or area is substantially free of a particular disease, organism, variety of a species or genetic disorder
- it is reasonably likely that the good could carry or introduce into that area a disease, organism, variety of a species or genetic disorder
- it would have a long-term and substantially detrimental effect on the whole or any part of the state (in reference to a state or territory of Australia).

Laws relating to quarantine are also subject to permanent exemption under Schedule 2 of the TTMR Acts.

In 2003, the Commission found that the MRA permanent exemption for quarantine laws was justified as quarantine requirements need to be implemented at the jurisdictional level to be effective. The equivalent TTMR permanent exemption was justified on the basis that risk variations between Australia and New Zealand warranted different regulation.

There are significant negative externalities that can result from ineffective quarantine policy. A justification for exempting quarantine from mutual recognition arrangements is that the nature of quarantine requirements can vary significantly between regions and jurisdictions. On the other hand, multiple quarantine risk-management regimes can unnecessarily impede agricultural trade where control measures are not commensurate with actual levels of risk or hazard types. Moreover, jurisdictional border controls may not accord with variation in biosecurity risks across regions.

The New Zealand Government (sub. 53) observed that Australia and New Zealand maintain a collaborative relationship on quarantine matters that extends beyond development of joint food standards to include production and processing standards. Meat products derived from cattle, sheep and deer, for example, do not require import permits to enter Australia if the meat is fit for human consumption. There are no quarantine certificates required for exports of these products (of Australian or New Zealand origin) in either direction. The New Zealand Government considered that, given the trust and history of cooperation on standards development between the two countries, there is scope to agree on equivalence of food-processing measures which would effectively manage biosecurity risks:

New Zealand would welcome the Commission's views on whether a working group should be established to examine the quarantine exemptions and assess whether the production and processing regimes in both countries are of a standard that any quarantine risks associated with selected animal products are, for instance, sufficiently removed at the point of production and would support forgoing quarantine clearance into the other country. For pests and diseases where both countries have the same health status no quarantine measures are necessary. (sub. 53, p. 10)

Previous quarantine reviews have suggested that new techniques for food preservation and processing can provide import-control measures that are more effective in verifying product safety than traditional end-product inspection and testing (DAFF 1998). These issues were examined as part of the Beale Review of quarantine and biosecurity matters, commissioned by the Australian Government in 2008. The review encompassed pre-border, border and post-border measures for managing biosecurity risks.

The Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) protocol includes a commitment of both countries to work towards advancing the harmonisation of quarantine standards and procedures and adoption of common inspection standards and procedures. Under ANZCERTA principles, both countries can impose quarantine requirements provided they are not used as a means of arbitrary or unjustified discrimination, or a disguised restriction on trade.

The Commission understands that there is ongoing collaboration between Australia and New Zealand on quarantine procedures via consultative groups under ANZCERTA. The Consultative Group on Biosecurity Cooperation (CGBC), comprises three technical working groups in the areas of animal and plant health, and operations. AQIS (sub. DR83) considered that the CGBC, given its established procedures, would be a suitable forum for resolving technical differences that impede harmonisation of quarantine requirements. This forum might provide opportunities for removing the quarantine exemption under the TTMRA in the future. The Commission, therefore, sees no need for an additional body, such as suggested by the New Zealand Government, to be created.

Fireworks, gaming machines, pornographic materials and classification of publications, films and computer games

In 2003, the Commission found that different preferences across jurisdictions provided grounds for retaining the MRA and TTMRA permanent exemption for the sale of fireworks and gaming machines. In contrast, the Commission found there was a case for harmonising laws that would enable removal of all or part of the MRA permanent exemption for pornographic material and classification of publications, films and computer games. However, it recommended that the permanent exemption should be retained if harmonisation could not be achieved between the various Australian jurisdictions. The Commission also found that, on the grounds of sovereignty and differences in approaches between Australia and New Zealand, the TTMRA permanent exemption for pornographic material and classified publications, films and computer games should be retained.

No participants in the current review advocated removing these permanent exemptions, and the Commission is not aware of any moves towards harmonisation since 2003 in these areas. However, the New Zealand Government favoured relabelling the exemptions for gaming machines and indecent and pornographic material:

New Zealand supports the continuation of these exemptions but with some minor wording changes to clarify the exemptions. In relation to the ‘gaming machine’ exemption, we would suggest that the exemption be reclassified as ‘gambling equipment’ ... equipment that is a gaming machine in one jurisdiction is not necessarily

deemed to be a gaming machine in others. It is also partly because New Zealand currently has a Gambling Amendment Bill underway that would narrow the formerly very wide gaming definition ... New Zealand suggests the exemption [for indecent or pornographic material] be reclassified as ‘any material that is subject to or potentially subject to restrictions or prohibition on availability under censorship legislation’. (sub. 53, p. 11)

The coverage of the permanent exemptions is defined by the provisions of the laws exempted under the TTMRA rather than by the broad classification of goods assigned to the exemption category. Generally, the gaming machine acts and regulations in each jurisdiction define gaming machines broadly to include both ‘gaming machines’ and ‘gaming equipment’. In a practical sense, any amendments to clarify the exemption categories should be undertaken as part of the broad package of regulatory amendments recommended as part of this review.

South Australian container deposit legislation

South Australia’s container deposit scheme operates under provisions of the *Environment Protection Act 1993* (SA), which is exempted from both the MRA and the TTMRA.⁵ Under the scheme, consumers are charged a deposit when they purchase a particular item, which is partly refunded when the item is returned to a specified waste collection or treatment facility. To comply with the scheme, all beverage sellers who wish to sell beverages in South Australia must incur additional labelling costs. The inclusion of South Australia’s container deposit legislation in mutual recognition schemes would undermine the operation of the container deposit scheme because invoking mutual recognition would mean that beverage manufacturers avoid relabelling their products and compliance with the scheme.

In 2003, the Commission found that, in view of the strong support for the scheme by both the SA Government and community, it was unlikely that the permanent exemption for the container deposit legislation in the MRA could be removed. There has been recent debate regarding the merits of deposit-funded schemes. The PC (2006c) found that container deposit schemes were a very costly mechanism for recovering beverage resources and reducing litter. Nonetheless, the WA Government recently indicated its intention to introduce container deposit legislation, and other states have commissioned studies on the potential for introducing such schemes. In addition, a national container deposit legislation scheme was discussed at a meeting of Australian environment ministers in April 2008 (comprising Commonwealth, state and territory ministers). An agreement was made to investigate options for reducing container waste (PC 2008a). At this stage,

⁵ The *Beverage Container Act 1975* (SA) was repealed by Schedule 2 of the *Environment Protection Act 1993* (SA) in 1995.

given the continued support for the legislation in South Australia and differing preferences for such schemes in other jurisdictions, it remains unlikely that the permanent exemption could be removed. However, if national legislation were to be developed, this may provide scope to consider removing the exemption in the future.

To ensure that amendments to South Australia's container deposit legislation are reflected in the MRA, the list of permanent exemptions under Schedule 2 of the MR Act should be updated to replace the *Beverage Container Act 1975* (SA) with the *Environment Protection Act 1993* (SA), part 8, division 3 (relating to beverage containers).⁶

The remaining areas of permanent exemptions are:

- firearms and other prohibited weapons
- endangered species
- Tasmanian laws relating to abalone, crayfish and scallops.

There have been no views in relation to these permanent exemptions expressed in submissions or through consultations. These exemptions should be retained on the grounds that protecting the environment and public safety often requires variation in state and territory laws and regulations.

Process for amending permanent exemptions

The MR Act and the TTMR Acts provide for permanently exempted laws to be amended or replaced by a participating jurisdiction, provided this does not increase the coverage of the exemption. However, the addition of new laws to the list of permanent exemptions under Schedule 2 of the Acts requires the agreement of all jurisdictions (box 8.1). To date, no additional permanent exemptions have been sought, largely because jurisdictions have found alternative ways to resolve regulatory differences. It is likely that in most cases, any new permanent exemptions will be created for laws that were previously subject to a special exemption.

Under s. 45 of the TTMR Act (Cwlth), the Governor-General of Australia may amend make regulations amending the schedule of permanent exemptions. Under s. 83 of the TTMR Act (NZ), the Governor-General of New Zealand may make

⁶ Under s. 14(3) of the MR Act, a law described in Schedule 2 includes any amendment or replacement of that law (unless otherwise stated), but only to the extent that the amendment or replacement deals with the same subject matter.

regulations amending Schedule 2, on the recommendation of the Minister, provided that no fewer than two thirds of the participating jurisdictions have endorsed the proposed regulations. The Act provides that an individual jurisdiction can unilaterally remove or reduce the coverage of a permanent exemption, as it applies to that jurisdiction.⁷ The corresponding process under the MR Act is less explicit. The Governor-General of Australia may amend the permanent exemption schedules, but only after all jurisdictions gazette the amendment and request the amendment be made.⁸ In 2003, the Commission found that the process for removing permanent exemptions from the MRA needed to be clarified and simplified. It has been clarified, to an extent, in the users' guide to the MRA and the TTMRA (COAG and New Zealand Government 2006).

Box 8.1 Requirements for adding permanent exemptions

The relevant COAG Ministerial Council needs to seek the unanimous agreement from the heads of governments for a new permanent exemption. To add a new permanent exemption, the Chair of the Ministerial Council writes to the chair of COAG (the Australian Prime Minister), applying for a permanent exemption. Heads of government agreement is achieved by each jurisdiction gazetting a notice to that effect.

Heads of government may take into account such matters as they consider relevant when considering whether or not a new permanent exemption should be granted. If a permanent exemption is sought, therefore, the jurisdiction(s) requesting the exemption need to provide a rigorous risk analysis and demonstrate that less trade-restrictive options have been considered (COAG 2008i).

Adding new permanent exemptions to the MRA or TTMRA should only be considered where all other options to protect against identifiable risks to public health and safety have been demonstrated to be less cost effective. The creation of unnecessary permanent exemptions has the capacity to undermine the objectives of mutual recognition. The requirement for unanimous agreement to introduce new permanent exemptions is therefore appropriate.⁹ In contrast, the process for removing permanent exemptions should be more flexible. Opportunities for removing or reducing the coverage of permanent exemptions should not necessarily be limited to those arising from the five-yearly reviews of the mutual recognition schemes.

⁷ Under s. 45 of the TTMR Act (Cwlth), if a regulation only omits or reduces the extent of an exempted law of a state, then the regulation need only be endorsed by that state.

⁸ Section 47(2) of the MR Act.

⁹ However, amendments to the special exemptions schedule under the TTMR Act (Cwlth) can be made with the endorsement of no less than two thirds of the participating jurisdictions (s. 48(5)).

As discussed above, the Commission considers there is scope to reclassify a subset of risk-categorised foods as a special exemption. There is currently no process stipulated in the TTMR Acts to move legislation from permanent exemptions to special exemptions where circumstances change such that mutual recognition or harmonisation of regulations may be attainable in the future. Legal advice suggests that a clause, similar to s. 48 of the TTMR Act (Cwlth), could be included in the Act, which would allow the Governor-General to make regulations to move legislation from permanent exemption to special exemption, with the endorsement of all participating jurisdictions.

RECOMMENDATION 8.3

A new provision should be included in the Trans-Tasman Mutual Recognition Acts which would allow, through regulation, exempted legislation to be moved from Schedule 2 (permanent exemptions) to Schedule 3 (special exemptions).

8.2 Exclusions

Schedule 1 of the TTMR Acts specifies laws that are excluded from mutual recognition. These laws relate indirectly to the sale of goods and would be unintentionally affected by the application of mutual recognition principles. They include laws relating to:

- customs controls and tariffs — to the extent that the laws provide for the imposition of tariffs and related measures (for example, anti-dumping and countervailing duties) and the prohibition or restriction of imports
- intellectual property — to the extent that the laws provide for the protection of intellectual rights
- taxation and business franchises — to the extent that the laws provide for the imposition of taxes on the sale of locally produced and imported goods in a non-discriminatory way (for example, business franchise and stamp duties)
- specified international obligations — to the extent that the laws implementing those obligations deal with the requirements relating to the sale of goods (as listed in Schedule 1, part 2(4) of the TTMR Acts).

There has been no scope, since the inception of the TTMRA, to remove or reduce the coverage of the exclusions. However, intellectual property is an area where there have been efforts to coordinate regulatory processes between Australia and New Zealand.

Intellectual property

Intellectual property rights (IPR) provide creators of intellectual property exclusive rights for a certain period of time to the commercial benefits that result from their creative endeavours. IPRs protect against ‘free-riding’ by way of copying or imitation. One social benefit from protecting intellectual property is to reward creative work or investment in the development of new technology, thus providing incentive to finance research and development. IPRs can be in the form of copyrights and related rights or industrial property, including patents, trademarks and designs.

Trademarks are generally territorial rights (national or regional). Therefore, individual jurisdictions maintain national or regional trademark registries. For owners of trademarks that conduct business across countries or jurisdictions, it is highly desirable that registration procedures are common to all national and regional trademark registers, as this increases the efficiency of administration processes and minimises transaction costs.

Laws relating to the protection of intellectual property were excluded from the TTMRA so as not to undermine the system by which patent rights are allocated on a regional basis (PC 2003). If mutual recognition were to apply to intellectual property rights, this would mean that, for example, a product that is subject to an IPR in Australia but not in New Zealand, could be freely sold in Australia, thus undermining the intention of the IPR. In 2003, the Commission found that the exclusion for intellectual property should be retained. At the time, patents law and practices were evolving, including in relation to international agreements.

International agreements may facilitate the development of common regulatory regimes for intellectual property. Australia and New Zealand are both signatories to multilateral intellectual property agreements, including the Paris Convention and the agreement on Trade-Related Aspects of Intellectual Property. Both countries are currently members of, or are taking steps to join, the Singapore Treaty on the Law of Trademarks and the Madrid Agreement Concerning the International Registration of Marks (WIPO 2008).

Trans-Tasman coordination on intellectual property rights

As part of efforts to promote a single trans-Tasman economic market, a joint work program was announced in 2004, between IP Australia and the New Zealand Ministry of Economic Development, to explore options for closer coordination of processes for granting and registering intellectual property rights. The work program was to fulfil the mandate in the 2000 CER (Closer Economic Relations)

Memorandum of Understanding on the coordination of business law with the objective of reducing compliance costs and regulatory barriers to doing business across the Tasman. Coordination arrangements were to encompass patents, trade marks, plant varieties and the regulation of patent and trade-mark attorneys.

The Commission understands that discussions as part of this work program have focused on coordination rather than harmonisation of patents and trademarks legislation and processes. This has included the examination of patents and trademarks applications, development of cross-jurisdiction application forms and administrative procedures for registering trademarks (where laws that determine the grounds for registration are the same). The discussions have not included consideration of mutual recognition of Australian and New Zealand intellectual property rights. Moreover, the New Zealand Ministry of Economic Development (Wardle, G., pers. comm., 13 August 2008) considered that the preference of both countries for policy independence in this area would not make removing the exclusion feasible.

The Institute of Patent and Trademark Attorneys (IPTA) (sub. 22) noted that, to achieve the most benefit from the TTMRA, the intellectual property laws of Australia and New Zealand should be harmonised to the greatest extent possible. In IPTA's view, specific provisions of New Zealand and Australian patent law adversely affect the ability of Australian patent attorney firms to conduct business in New Zealand.¹⁰ One example is provisions which prohibit mixed partnerships from acting as patent attorneys.

As part of a CER Ministerial Forum joint statement in August 2008, both the Australian and New Zealand Ministers for Trade announced a continuation of the work program under the Memorandum of Understanding on Business Law Coordination. This will encompass coordination on intellectual property issues relating to patents, including standards for patent and trademark attorneys. The intellectual property regime in New Zealand is currently undergoing change, with new patents legislation proposed in 2008 and a review of trade marks regulations nearing completion. The New Zealand Patents Bill will align rules for regulating these professions in Australia and New Zealand.

The Commission does not consider that there is scope to remove the exclusion for intellectual property from the TTMRA in the foreseeable future, because to do so would undermine both countries' intellectual property regimes, which are based on

¹⁰ In New Zealand, patent attorneys operate under the *Patents Act 1953* (NZ) and are granted registration by the Intellectual Property office of New Zealand. The requirements for registration under Australian patents law were amended by the Patents and Trademarks Amendment Legislation Regulations 2008 (Cwlth).

systems of regionally-defined rights. Moreover, there are differences between Australian and New Zealand intellectual property legislations. Progress in relation to trans-Tasman alignment of intellectual property regimes should continue under the auspices of the current consultation arrangements and in accordance with international treaties, which are continuing to evolve in this area.

8.3 Exceptions applying to goods

Mutual recognition is based on the premise that goods that meet community expectations in one jurisdiction should be acceptable in other jurisdictions. However, it was acknowledged in the design of the mutual recognition schemes that jurisdictions may wish to impose regulations related to the manner in which goods are sold, transported, stored or handled, in order to address certain environmental or social concerns within their own geographic area. Some examples include: special requirements for the storage and display of perishable items according to climatic conditions; and restrictions on the sale of alcohol in areas within jurisdictions where alcohol abuse is considered a risk.

Under the current mutual recognition framework, therefore, businesses that sell into a jurisdiction are required to comply with any laws of that jurisdiction that relate to: the manner of sale of goods; the transport, storage and handling of goods; and the inspection of those goods, subject to certain constraints. These laws, collectively referred to as ‘exceptions’, are addressed in s. 11 of the MR Act, s. 12 of the TTMR Act (Cwlth) and s. 11 of the TTMR Act (NZ).

Examples of areas of regulation relating to the manner of sale of goods contained in the Acts are:

- the contractual aspects of the sale of goods (for example, contractual arrangements between the seller and purchaser of a good)
- the registration of sellers or other persons carrying on occupations (for example, liquor licences)
- requirements for business franchise licences (for example, tobacco licences)
- the persons to whom goods may or may not be sold (for example, the sale of liquor to minors)
- the circumstances in which goods may or may not be sold (for example, health/hygiene requirements). (COAG 1998a, p. 21)

This exception under mutual recognition applies to all manner of sale laws, as long as those laws apply equally to goods produced in or imported into a jurisdiction.

The second exception covers laws relating to the transport, storage and handling of goods, as long as they apply equally to both locally produced or imported goods, and are directed at matters affecting health and safety, or protecting the environment.

The third exception deals with inspection of goods, and applies as long as: inspection is not a prerequisite to the sale of the goods; the laws apply equally to both locally produced and imported goods; and the laws are directed at matters affecting health and safety, or protecting the environment. In effect, the inspection provisions provide the regulatory machinery needed to enforce the other exceptions.

Issues with the exceptions

Manner of sale

Study participants cited a number of examples of inconsistencies across jurisdictions in requirements relating to the manner of sale of goods. Examples from the Coles Group are presented in box 8.2. The number of product classes to which specific manner of sale requirements apply is relatively limited. However, the inconsistencies can foster complexity and increase costs, particularly for national operators.

It is difficult to ascertain the relative significance of these issues in terms of compliance costs for large retailers. Nonetheless, in cases where variations in requirements are not directed at jurisdiction-specific circumstances and deliver no additional benefit to the community, compliance creates unnecessary costs. These costs are likely to be passed on to the consumer through higher prices or limited choice where product lines are dropped to minimise the compliance burden.

However, the application of mutual recognition to manner of sale regulations does not appear to offer an effective solution to the compliance cost issues raised by study participants.

If manner of sale laws were not explicitly excluded from the scope of mutual recognition, they would effectively be brought into scope by a provision in the Acts, such as s. 10(e) of the MR Act, which states that any other requirement relating to sale that would prevent or restrict the sale of a good into another jurisdiction, or have the effect of doing so, does not need to be complied with. That is, all laws relating to the manner of sale of a good in its jurisdiction of origin would have to be recognised by other jurisdictions. Moreover, the absence of such laws in the first

jurisdiction would preclude any similar law from applying to the sale of its goods in the second jurisdiction.

In practice, this would mean that retailers could face a number of sets of manner of sale requirements, depending on the origins of the goods. For example, restrictions on the sale of flavoured essence containing more than 10 per cent ethanol to consumers under the age of 18 apply in New South Wales but not in Victoria. The possibility could arise, therefore, that some Victorian flavoured essence products are sold in New South Wales according to Victorian regulations, that is, with no age restrictions. Flavoured essences originating in New South Wales, on the other hand, would have to comply with local regulations. This would render New South Wales' regulations ineffective.

Other manner of sale regulations specify the way in which certain products — such as tobacco — are displayed, advertised and promoted within an outlet. Overriding these laws via mutual recognition, according to the origin of the good, could result, for example, in certain displays and signage being permitted for some cigarettes but not others, within the one store.

These outcomes would generate greater complexity and confusion for consumers, regulators and retailers than the current exceptions under mutual recognition. It would also compromise jurisdictions' ability to regulate for location-specific risks to health, safety and the environment. In many cases, manner of sale regulations are akin to those relating to 'manner of carrying on an occupation', which are excluded from mutual recognition for similar reasons (chapter 9).

That said, there are likely to be cases where jurisdictions have imposed varying regulatory requirements, perhaps inadvertently, to address similar risks and achieve common desired outcomes. In these cases, there is scope to reduce unnecessary compliance costs for business. A possible approach is discussed below.

Box 8.2 Exceptions issues — Coles Group examples

Coles Group provided examples of situations where differences in manner of sale regulations can add to compliance costs.

- Regulations regarding the sale, supply and display of tobacco products vary in each state. Additional compliance costs are imposed as retailers must adjust kiosk design, training, store policies, and health warning signage to meet the different requirements in each state.
 - The ACT has recently prescribed that price tickets for tobacco must be in Times New Roman font, which is inconsistent with national ticketing standards.
- There are different requirements across the states relating to the sale of spray paint. Due to the added complexity of meeting different requirements, retailers may decide not to sell these products.
- As of 1 January 2009, flavoured essence with more than 10 per cent ethanol will no longer be able to be sold to consumers under 18 years of age in New South Wales. This will necessitate software changes to identify the products and prompt an age check at the point of sale. Staff training will also be required. Coles noted it would be an expensive undertaking to comply with regulations specific to one state only and for products that generally sell for under \$1.
- In New South Wales, knives are not permitted to be sold to customers under the age of 16.
- Retailers in Victoria must segregate pet food from food for human consumption in the storeroom, and ensure specific signage is displayed in stores.
- Retailers in New South Wales and Western Australia cannot easily bag fresh produce for quick sale at a reduced price. These states define this as a 'packaged product' and as such, expect full labelling compliance, including price per kilo, net weight, total price and so on. As a result of this added complexity, these products are often disposed of.

In some cases, variation in regulations across jurisdictions was such that Coles would drop a product from all stores rather than attempt to comply with each set of regulations.

Source: Coles Group (Melbourne, pers. comm., 24 October 2008).

Transport, storage and handling

In response to stakeholder concerns, jurisdictions have been taking action to address inconsistencies in transport, storage and handling regulation during recent years. In general, harmonisation has been the preferred approach. Steps towards harmonisation have been taken, with varying degrees of progress made to date. Within Australia, requirements for transporting goods by road and rail have been harmonised to a large extent. However, there are still a number of aspects for which

variation across jurisdictions remains, such as in the transportation of explosives. There are greater inconsistencies in storage and handling regulation. Progress has been made in achieving national consistency in the classification of hazardous substances and dangerous goods, and in labelling and Material Safety Data Sheet regulation. This will facilitate harmonisation of storage and handling requirements for some goods.

Regulation in these areas is often concerned with materials such as explosives and hazardous substances, which can pose serious risks to people and the environment. Due to the potential for confusion and conflict created by different requirements, as well as problems with requirements that are not compatible with local circumstances, the current treatment of transport, storage and handling regulation under the mutual recognition Acts is regarded as appropriate by the Commission. That is, they should remain as exceptions to mutual recognition, subject to the conditions that they are directed at matters of health, safety or the environment, and that they apply equally to local and imported goods.

That said, there is scope to clarify the operation of this exception, which effectively brings any transport, storage and handling requirements not in accordance with the conditions above into the scope of mutual recognition. The extent to which stakeholders in general draw on the conditions to challenge a jurisdiction's additional or varying requirements is not known. However, evidence provided by Coles about some jurisdictional inconsistencies (for example, governing the storage of pet food in Victoria) suggests that most local requirements go unchallenged (box 8.2).

The NSW Government noted, in the context of the conditions applying to the transport, storage and handling and inspections exceptions, that:

Many of the concerns about the way in which mutual recognition legislation interacts with product safety requirements could be addressed if these general [exceptions] were more clearly articulated in the legislation and better understood among regulators and industry. (sub. 55, p. 3)

It suggested that examples could be considered for these exceptions, noting that examples were provided in the legislation for manner of sale requirements.

While greater clarity concerning the types of requirements that do and do not need to be complied with under mutual recognition would improve the operation of the schemes, the inclusion of examples in the Acts has the potential to create complexity and uncertainty. Guidance would best be obtained through interpretation of the provisions. Central points of contact in Australia and New Zealand could provide an avenue for operators and other interested parties to query whether mutual recognition applies to any regulation, including whether or not a regulation meets the conditions for exceptions set out in the Acts.

The way forward

While extension of the mutual recognition legislation is not a viable solution to the problems created by variations across jurisdictions in the areas of regulation covered by the exceptions, the Commission believes that sellers and other interested parties could usefully negotiate with regulators on a case-by-case basis. Central points of contact in the Australian and New Zealand governments could be made available to facilitate this process. This would provide additional regulatory scrutiny and a further impetus for coordination amongst jurisdictions where the demand exists, without compromising the ability of each to respond to specific risks to health, safety and the environment. This service could be one of the functions of the ‘one-stop shop’ described in the context of dispute resolution mechanisms in section 8.5 and chapter 11.

These points of contact could provide valuable feedback to jurisdictions to inform better regulatory coordination. Such a function has merit over a more resource-intensive regulatory review by jurisdictions, as the market — given the prospect of a resolution — is well-placed to identify those requirements that impede trade.

In the European Union, a systematic regulatory review is underway as part of its Services Directive (appendix C), via a process of ‘mutual evaluation’. The Directive aims to remove legal and administrative barriers to achieving a single market for services. As part of the process of mutual evaluation, each member state is required to screen its own stock of regulations governing services, against the criteria established by the European Court of Justice — that requirements be non-discriminatory, justified by a general interest objective, suitable for the objective pursued, and proportionate. Regulations that do not meet these criteria will be abolished by EU countries. National reporting of the results of mutual evaluation will be subject to a ‘peer review’ by other member states and stakeholders at the end of 2009.

Such a formal process of review would not be warranted for the Australian and trans-Tasman markets for goods, given that few goods appear to be covered by local requirements. Nevertheless, jurisdictions should systematically consider the implications of their own regulation for national goods markets as a matter of good regulatory practice. Specifically, in those areas of regulation not founded on national standards or principles, jurisdictions should seek to restrict differences in regulatory requirements to where they are justified by local circumstances. Requirements should be proportionate and non-discriminatory. While jurisdictions routinely recommend cross-jurisdictional consultation as part of their guidelines for

regulation impact statements, mutual recognition could be specified as one of the factors to be taken into consideration as part of this process.

RECOMMENDATION 8.4

The exceptions for goods in the mutual recognition Acts should be retained.

Impediments to trade arising from the exceptions should be dealt with via direct negotiation with regulators on a case-by-case basis. A central point of contact should be made available to facilitate this process.

RECOMMENDATION 8.5

The implications of regulation for mutual recognition should feature as one of the factors to be taken into consideration in jurisdictions' respective regulatory guidelines.

8.4 A possible extension to the Acts

Use of goods

Under the current mutual recognition schemes, goods provisions relate only to the sale of goods. Other goods-related regulations covering the use of goods are not explicitly included within the scope of mutual recognition. That is, the law is silent in this area. For simplicity, references in this section are to part 2 of the MR Act. Identical provisions are contained in the TTMR Acts.

Use of goods regulations dictate specific conditions under which a good may or may not be used, including bans on uses of particular goods in particular circumstances. Among other things, such conditions may include requirements relating to:

- the **purpose** of the particular use (for example, a particular chemical may only be used for cleaning)
- the **context** of the use (say, in an industrial setting as opposed to a household)
- the environmental or geographic **setting** of the use (for example, certain locations may ban the use of wood heaters)
- the identity of the **user** (for example, the licensing of persons for the use of radioactive substances)
- the **time** of use (either a particular time of day or on particular dates)
- the use **in connection with other goods or activities** (for example, combinations of chemicals)

-
- the **extent** of the use (say, maximum or minimum quantities)
 - the **method** of the use (for example, aerial spraying as opposed to handheld spraying of a chemical). (PC 2003, pp. 240–41)

The relevant issue for mutual recognition is whether or not use of goods regulations dictate particular characteristics of goods in a way that prevents or restricts the sale of goods coming from other jurisdictions. Evidence from study participants suggests that there are occasions when this is the case (box 8.3).

According to one then-member of the Committee on Regulatory Reform (CRR), the Committee was mindful of the need to strike a balance between removing indirect barriers to trade and preserving certain laws needed to protect health, safety and the environment:

The Committee also spent some time working through the issue of whether mutual recognition should apply to indirect barriers to the sale of goods, that is, all those regulations relating to ‘possession’ or ‘use’ of goods which do not directly prohibit sale but can have the effect of doing so. The concern of members of the committee was to find the dividing line between those laws which had a genuine purpose — an example being Queensland laws proscribing possession of commercial fishing nets of a particular size which had been enacted for the purposes of protecting fisheries resources — and those laws which were more protectionist in nature. We came up with Section 10(e) [of the MR Act], which I am hopeful will be interpreted by the courts in the spirit of the legislation, to pick up a broad range of indirect barriers to interstate trade. Section 10(e) is something of a ‘wild card’ — it gives some uncertainty but also some scope for a jurisprudence to build up, not unlike the law generated under the Treaty of Rome. (Wilkins 1995, pp. 5–6)

Section 10(e) of the MR Act is one element of a list of ‘requirements that do not need to be complied with’ under mutual recognition and reads:

... any other requirement relating to sale that would prevent or restrict, or have the effect of preventing or restricting, the sale of the goods in the second State. (MR Act, s. 10(e)).

Box 8.3 Use of goods issues — participants' examples

No restrictions have been specified under the Mutual Recognition Agreement on the sale of gas appliances within Australia. However, there are inconsistencies related to the recognition of certification for sale, installation and use of appliances across jurisdictions. The Queensland Government referred to this issue in its submission:

All states require gas appliances to be certified or approved by a recognised body before they can be installed/used. Technically, in some states an unapproved gas appliance may be able to be sold but cannot be used until certified/approved.

The issue is that an appliance approved/certified in one jurisdiction is not automatically approved for use in another. The appliance has to be certified/approved by a body recognised by the other jurisdiction. If the first approving body is not recognised in the other jurisdiction, the appliance has to be recertified by another body acceptable in the new state. In simple terms, if an appliance can be sold in and used in one jurisdiction, then it should be able to be sold and used in all jurisdictions. (sub. 52, p. 1)

Express Coaches, a New South Wales-based supplier of buses, identified differing road use provisions across jurisdictions as a factor undermining mutual recognition:

Certain New South Wales use specifications mean that buses built for use in New South Wales are not fit for operation in other states. For example, a shipment sent to Western Australia had to have the school flashing lights (a requirement in New South Wales) removed before they could be used on the road in that jurisdiction.

Western Australia is the only jurisdiction that requires seat belts on buses (as opposed to lap belts that are required elsewhere). While the buses can legally be sold in Western Australia, they cannot be registered for use without modification. (Express Coaches, pers. comm., 14 March 2008)

Fisher & Paykel, a New Zealand-based manufacturer of home appliances, raised a use of goods issue in its submission to the 2003 review and again in its submission to this study (sub. 54). Specifically, certain products supplied by Fisher & Paykel (washers, dishwashers and fridges) are controlled on a 'connection to the plumbing basis' rather than a sale basis. That is, plumbing certification is required by local water authorities in Australia, and Australian laboratory approval is needed to obtain the certification (although Fisher & Paykel understood that US/EU certification may now be allowed under certain circumstances). Because this requirement is based on use rather than sale, it is currently outside the TTMRA.

Cadia Valley Operations provided an example to the Commission's 2007 review of regulatory burdens (PC 2007) concerning a vehicle fitted out as an ambulance and approved for use at the company's mining operation in Western Australia that was off the road for seven weeks because the NSW Roads and Traffic Authority would not accept the Western Australian compliance plate.

Despite the CRR's expectations, no body of jurisprudence has built up, and there is no evidence that the relevant sections of the MR or TTMR Acts have been tested as anticipated. This does not necessarily indicate an absence of indirect barriers to

trade, and could instead be a reflection of the limited scope for the legislation to be interpreted as anticipated. Two features of the Acts might explain this outcome:

- the legislation has been drafted in such a way that the types of requirement that should not restrict the sale of goods are confined to those ‘relating to sale’ (MR Act, s. 10(e)). It is unlikely that a legal interpretation of this provision would conclude that it covers requirements relating also to the use of goods
- the mechanism for invoking the provisions for a defence to a prosecution is largely unworkable for use of goods issues in any case, because a sale would first need to take place for a prosecution to arise in relation to the subsequent use of the good. As the user, and not the seller, of the good would face prosecution, in all likelihood, that user would not have purchased the product in the first instance. Placing the onus on the user is likely to have constrained the operation of the Acts in this respect, even if use requirements had been explicitly included.

FINDING 8.1

Use of goods requirements have the potential to unnecessarily impede the sale of goods across jurisdictions. Provisions in the Acts appear to exclude use requirements from the scope of mutual recognition.

FINDING 8.2

The Acts currently provide for mutual recognition as a defence to a prosecution in relation to the sale of goods. Even if the mutual recognition Acts had explicitly covered use of goods requirements, the existing provisions would not have provided an adequate mechanism for sellers of goods to challenge a use requirement, given that it is unlikely that a prospective user would buy the product in the first instance.

Proposed approach to use of goods issues

In the Commission’s 2003 review (PC 2003), it was suggested that central agencies collect examples of use of goods issues and that, after a couple of years, an advisory group examine these issues to determine whether they represented a barrier to trade that merited policy action. The CJRF agreed to this recommendation but it appears there has been little progress in this regard. Given the amount of time that has elapsed and the lack of progress in what would have represented only a preliminary step towards addressing this issue, a more direct course of action may be appropriate at this point.

In order to reflect more accurately the intentions of the schemes — that goods that can be sold lawfully in one jurisdiction not have their sale restricted in another jurisdiction — while addressing jurisdictions’ health, safety and environmental

concerns, the existing mutual recognition arrangements should be modified as follows:

- The ‘requirements that do not need to be complied with’ (MR Act, s. 10) should explicitly include use of goods requirements insofar as they restrict the sale of goods. This extension should be constrained in a way that addresses health, safety and environmental concerns.
- An effective process for accessing advice and resolving disputes on interpretation of the legislation should be available for both industry, regulators and any other interested parties.

A proposal for advisory and dispute resolution mechanisms is described in section 8.5. Potential approaches to constraining the application of a use of goods provision are discussed next.

Mitigation of risks to public safety and the environment

The NSW Government, in supporting an extension of the schemes to include use of goods regulations, pointed to a potential need for a mechanism to protect public safety and the environment, and referenced the EU and Canadian approaches:

The coverage of goods under the MRA and TTMRA could be broadened to also include use of goods regulations as the EU mutual recognition schemes do, but such a broadening of scope may require an ‘out’ on public benefit grounds, such as is present in the EU. The analysis of the Canadian [Agreement on Internal Trade] suggested a similar approach to the mutual recognition of use of goods regulations. (sub. 55, p. 25)

It is important that there is provision in the Acts for regulations legitimately directed at health, safety and environmental protection to continue to be enforceable. That said, consideration should be given to the criteria that constrain a regulator’s ability to enforce a particular requirement. The following principles, applied under the EU scheme (appendix C), could be considered in the new provisions. Under that regime:

[A] rule that is generally applicable to all goods, regardless of origin, will be valid if:

- it is directed at a legitimate regulatory objective (eg. public health and safety, the environment, consumer protection)
- it is proportional to that objective
- it gives effect to that objective in the manner least likely to impede the free movement of goods. (Goddard 2003, pp. 7–8)

Alternatively, guidance can be found elsewhere in the mutual recognition Acts. Section 31(2) of the MR Act deals with circumstances in which a tribunal may make a declaration concerning equivalence of occupations, including that occupational registration in one state should not entitle a registered person to operate in another state where:

The activity or class of activity, if carried out by a person not conforming to the appropriate standards, could reasonably be expected to expose persons in the other state to a real threat to their health or safety or could reasonably be expected to cause significant environmental pollution ... (MR Act, s. 31(2)(b)(ii))

In *Cleary v Nurses Board of the Northern Territory*, the Administrative Appeals Tribunal (AAT) interpreted this section of the Act as follows:

49. ... The Tribunal would need particularly strong evidence before it could be satisfied that registration in one state should not entitle registered persons to carry on a particular activity or class of activity in the other state.

50. In particular, strong evidence would be required that any activity or class of activity could reasonably be expected to expose persons in the second state to a real threat to their health or safety. This is strong language. It is not sufficient to raise the possibility of a risk. There is inherent in the use of the words ‘real threat’ a sense of imminent peril. That danger must arise directly from the fact of registration in the second State. (*Cleary v Nurses Board of the Northern Territory* 1996, N94/1199 AAT No. 10942)

The application of similar constraints for use of goods regulations could encourage scrutiny of differences in approach to similar problems across jurisdictions. The advisory opinion and dispute resolution mechanisms discussed below (section 8.5) would then support regulators and sellers in determining the reach of mutual recognition under the new provisions.

Existing exemptions mechanisms could also be utilised to mitigate concerns about risks to the public and the environment. Critical regulations that, if overridden by mutual recognition, could pose unacceptable risks to health, safety or the environment, could be identified by regulators and added as temporary exemptions in the first instance. All existing exemptions and exclusions would continue to be observed. Use of goods requirements that do not play a part in restricting the sale of the good would be out of reach of mutual recognition.

A broadening of the scope of mutual recognition in this way should also be considered in the context of the national consumer policy framework, which would need to take into account not only standards of goods issues, but also use of goods issues.

Requirements relating to the use of goods, insofar as they prevent or restrict the sale of goods, should be explicitly brought into the scope of the mutual recognition schemes.

An exception should be made where mutual recognition of use provisions could expose persons in another jurisdiction to a real threat to health or safety or cause significant harm to the environment.

8.5 Advisory and dispute resolution mechanisms

No formal appeals bodies for the sale of goods are mentioned in the mutual recognition Acts. Instead, the Acts explicitly provide for mutual recognition as a defence to a prosecution for an offence. That is, matters involving the sale of goods can be heard in the courts where a prosecution has arisen for an offence against a local law, and the defendant may claim that the mutual recognition principle applies. These provisions serve a clear purpose and should be retained. For simplicity's sake, references in this section are to s. 12 of the MR Act. Similar provisions are found in the TTMR Acts.

Current defence provisions are reactive and inadequate

As discussed, in the case of use of goods regulations, in order for a seller to invoke the defence provisions, the user of a good would need to be willing to attract a prosecution for contravening a requirement relating to the use of a product. But, under these circumstances, a prospective user would be unlikely to purchase the product in the first place. The existing defence provisions do not meet the needs of sellers or consumers facing a use of goods issue.

More generally, the defence to a prosecution mechanism offers limited scope for businesses to test the validity of any decision by a regulator to enforce a particular requirement before risking prosecution. The opportunity to find out whether mutual recognition applies arises only after a court has passed judgement on whether an offence has been committed. Obtaining a ruling on mutual recognition would depend on that seller's willingness to rely on the mutual recognition defence and risk an unfavourable judgement. It is difficult to imagine that many businesses would readily use this avenue to obtain a legal interpretation of the legislation.

Reflecting on the early operation of the MRA, one of its architects noted in relation to the use of the exceptions by regulators to exclude interstate goods:

... [W]e are dealing with small businessmen who are not in a position to mount expensive legal challenges ... Quite apart from the legal costs involved, these are small businesses whose success is determined by the continuous involvement of the entrepreneur who established them. They have no time to become involved in bureaucratic or legalistic games. (Sturgess 1994, p. 30)

Overall, there is no evidence that the defence provisions have been used and, consequently, there is no jurisprudence to provide guidance on the application of the legislation to specific questions. Although case law offers potential collective benefits, the private costs (and risks) to individual firms and consumers are likely to be too high for those benefits to be fully realised.

An advisory mechanism would be useful

Apart from legal interpretation, the current schemes lack an easy avenue for regulators and other interested parties to seek informed advice on elements of the schemes about which they might be uncertain.

The Coles Group noted the lack of a central point of contact or avenue through which to escalate issues arising from conflicting state-based regulations (pers. comm., Melbourne, 24 October 2008). Coles said that it usually seeks advice from the relevant COAG Ministerial Council or the relevant Minister or government department in the particular jurisdiction, but this can be time consuming when having to approach as many state or territory government departments as there are conflicting sets of regulations. Coles also noted that, as there is no ultimate arbiter between jurisdictions, it can be costly to pursue an issue.

In some cases, businesses may refrain from stocking a product when there is significant variation in requirements across jurisdictions. Coles Group noted, for example, that it tends to avoid carrying an item if it is not permitted in all jurisdictions (pers. comm., Melbourne, 24 October 2008).

In other cases, businesses elect to comply with multiple sets of regulations. Fisher & Paykel (sub. 54), for example, said that it chooses to obtain additional certification for installation of certain appliances.

Both the Coles Group and Fisher & Paykel outcomes appear contrary to the intentions of mutual recognition. In its submission to the Commission's 2003 review (PC 2003), the New Zealand Government questioned whether, in relation to goods matters:

... rather than simply providing for a defence to prosecution after the event, should the regime provide a mechanism for determining whether the regime applies to permit goods to be sold, in advance of such sales? (NZ Government 2003, p. 18)

The EU system offers examples of the types of response mechanisms for goods-related matters that could be established. The European Commission recently agreed on a package of reforms following a public consultation in 2006, which included the establishment of ‘Product Contact Points’ to provide information on national technical rules to businesses and to national authorities in other member states. National SOLVIT centres have been operating in member states since 2002 to provide a nonjudicial mechanism for citizens and businesses to access advice and resolve disputes relating to the application of Internal Market Law generally. In addition, operators in that market have the option of making formal complaints and using the courts to obtain a judgement (appendix C).

Improved advisory and dispute resolution mechanisms are needed

The existing mechanism for obtaining a ruling on a dispute (that is, via the courts) appears to offer little scope for obtaining guidance or simple resolution of goods matters — it is costly and not easily accessed. There is an argument for the establishment of a more effective administrative mechanism whereby sellers, other interested parties and regulators of goods can obtain advice, and escalate matters in cases where the application of mutual recognition is uncertain.

An option for a dispute resolution mechanism was put forward in the Commission’s 2003 review (PC 2003), in the form of an advisory forum made up of representatives from each jurisdiction. It was proposed that the forum would provide policy guidance on issues where the proper operation of mutual recognition with respect to goods appeared to be impeded, and make recommendations on how the issues might be resolved. The CJRF was formed following the 2003 review (chapter 11), but its role does not extend to supporting a dispute resolution mechanism.

An avenue for escalation of goods matters would preferably include the following nonjudicial and judicial features:

- Information provision — a ‘one-stop shop’, or central point of contact for sellers, regulators and other interested parties, which would provide information and general guidance on the interpretation of the MR and TTMR Acts. As a body of interpretive material builds up, answers to frequently asked questions could be published electronically.
- A liaison and mediation service — through the ‘one-stop shop’, such a service would provide for low-cost resolution of disputes that sellers (or other interested parties) and regulators have not been able to settle independently.

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- A legal avenue for dispute resolution — this would enable parties to obtain advisory opinions from a body such as the AAT. They would also have a right of appeal in response to a regulator’s formal decision to enforce a requirement. Ideally, this option would only be taken up if the matter had proven impervious to mediation.
 - Referral to a committee — unresolved or test case matters could be referred to the relevant COAG Ministerial Council to obtain a ruling.

The administrative aspects of the dispute resolution mechanism described above should, where possible, use existing governance frameworks in both Australia and New Zealand, to avoid the need to establish extensive new bureaucracy. Specifically, information provision and mediation functions related to both the MR and TTMRA schemes could be performed by ‘one-stop shops’, or dedicated units within appropriate agencies in both countries. Indeed, the New Zealand Ministry of Economic Development is already active in promoting understanding of the TTMRA by government agencies and other stakeholders, and is supportive of formalising and extending its role to include a number of the other functions proposed here:

This role has been performed for some time in New Zealand by MED, resulting in the accumulation of expertise in matters relating to [the] TTMRA. Many government agencies now refer to MED for advice or assistance in the early stages of their policy development to ensure that mutual recognition implications are well understood and factored in to their policy proposals. Australian policy proposals are also referred to MED by relevant New Zealand counterpart agencies for assessment of TTMRA implications.

... The [proposed] establishment of a TTMRA-specific enquiry point which is predominantly used by individuals seeking information to assist with registration processes has been well received by both registering authorities and individuals seeking registration. (Ministry of Economic Development (NZ Government), sub. DR89, pp. 8-9)

Potentially, the proposed ‘one-stop shops’ could provide a liaison and coordination role, taking in a range of cross-jurisdictional regulatory issues. A proposal for the Australian unit is taken up in chapter 11.

The legal aspects of the dispute resolution mechanism would be similar to that for occupations, and the mandates of the existing tribunals — the AAT and the Trans-Tasman Occupations Tribunal — could be extended to goods-related matters. The relevant tribunal could be used to provide advisory opinions on particular matters, in the first instance. Parties would then have the option to appeal a regulator’s continued enforcement of a requirement in contradiction of the advisory opinion, via the tribunal. Implementation of these options would require changes to the mutual recognition Acts (chapter 12).

Further, provision for participating parties to refer jurisdictional requirements relating to goods standards to the relevant Ministerial Council exists under the MRA and TTMRA. This avenue could be extended to include other issues of dispute relating to goods, for example, around use of goods regulations. Referrals could originate from the proposed ‘one-stop shops’, or from individual regulators. Matters referred to a Ministerial Council would more appropriately include those with broad implications for the application of mutual recognition laws.

Singly or in combination, these options would provide resolution of individual matters for businesses, individuals and regulators, and extend the range of interpretive material on goods issues. The foreseeable outcomes would be greater certainty for all interested parties, and enhanced benefits of mutual recognition in relation to the mobility of goods. An administrative advisory and mediation service would provide a low (public and private) cost mechanism for achieving these outcomes.

The avenue for appeal through a judicial body would be a more costly option. For example, it would mean that regulators would have to provide information about any decision in writing. Further, a growing body of interpretative material may also inject additional complexity into the operation of mutual recognition, which might itself be costly. However, these costs must be balanced against the cost of the current uncertainty to sellers and users which, in the Commission’s view, has undesirable consequences for the operation of a seamless market for goods.

RECOMMENDATION 8.7

An effective, accessible administrative mechanism should be made available to sellers of goods, regulators and other interested parties (including industry and consumer associations) to obtain information and guidance on the application of the mutual recognition legislation to individual cases, and to assist in the resolution of disputes.

RECOMMENDATION 8.8

A judicial mechanism should be made available for sellers of goods and other interested parties to:

- ***obtain advisory opinions from a body such as the Administrative Appeals Tribunal***
- ***appeal regulator decisions to enforce requirements where the parties believe mutual recognition should apply.***

The existing mechanism for referral of issues relating to jurisdictional requirements for goods standards to Ministerial Councils should be extended to all issues of significant dispute relating to goods.