Discussion paper

National Competition Policy Review of the Trade Standards Act 1979 *- Final Report*

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Government of South Australia

Office of Consumer and Business Affairs

NATIONAL COMPETITION POLICY REVIEW
OF THE
TRADE STANDARDS ACT 1979

FINAL REPORT

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EXECUTIVE SUMMARY

On 11 April 1995 the Council of Australian Governments ("CoAG") entered into three inter-governmental agreements to facilitate the implementation of national competition policy ("NCP") objectives.

One of these agreements was the Competition Principles Agreement ("the Agreement"). As part of the obligations under the Agreement, State and Territory Governments gave an undertaking to review all existing legislation that restricts competition. The Office of Consumer and Business Affairs is reviewing the *Trade Standards Act 1979* ("the Act") as part of this process.

Product standards have been regulated in South Australia since the early part of last century. The Act was introduced partly to rationalise a number of industry-protectionist Acts which regulated in particular the furniture, textile products, clothing and footwear industries. Apart from the *Flammable Clothing Act 1973 (repealed)*, which was directed at ensuring consumer safety, the legislation which the Act replaced largely regulated information and quality standards in relation to goods.

In 1974 the *Trade Practices Act 1974 (Cth)* came into operation. The consumer protection regime set out in Part V of the *Trade Practices Act* includes provisions for the regulation of product safety and information standards and regulations have been prescribed under that Act applying to certain products. The enactment of the *Trade Standards Act* closed the gap in regulation of those manufacturers and suppliers that are not corporations and fell outside the scope of the *Trade Practices Act.*

It is important to note that while the *Trade Standards Act* facilitates the regulation of product standards by providing for the prescription of mandatory product standards, it is the regulations under the Act which in fact contain the restrictions on market conduct. This is illustrated by the fact that, although the Act provides for the regulation of quality and packaging standards, no such standards have ever been prescribed under the Act. Therefore, the restrictions on competition represented by the quality and packaging standards provisions of the Act are theoretical only.

The *Trade Standards Regulations* were recently reviewed by the Office of Consumer and Business Affairs (OCBA) in conjunction with a national review of product standard regulations as part of the process of implementing the Trans-Tasman Mutual Recognition Arrangement (TTMRA). The object of this State review was to examine the continued necessity for existing mandatory consumer product safety standards and to identify those product groups for which national standards should apply.

These reviews led to a decrease in unnecessary regulation and increased national uniformity of regulation, culminating in the replacement of the 1985 regulations with the *Trade Standards Regulations 2000,* which came into operation on 11 June 2000. The TTMRA review was conducted in accordance with Competition Policy principles. It was therefore deemed unnecessary to review the Regulations again specifically under the auspices of National Competition Policy. This review is therefore restricted to the Act only.

It is noted that, while the Act potentially affects the broad market for the manufacture and supply of goods and services within South Australia, by operation of the Regulations, it is a

limited number of markets for the manufacture and supply of specific products or product types which is actually regulated under the Act. Examples of these markets include opals, footwear, cots, flammable clothing and pedal cycles.

A number of safety and information standards were revoked as a result of the TTMRA review process because they were no longer relevant or appropriate. The Review Panel considers that the fact that the review of the Regulations concluded that it was necessary to retain certain safety and information standards prescribed under the Act is *prima facie* justification for retention of the ability to regulate product standards under the Act.

The object of the Act as identified by the Review Panel is the protection of consumers from the risk of death, injury, impairment to health or financial loss arising from the consumption of goods or services. The Act provides for the regulation of four types of standards in relation to goods and services:

- safety standards;
- quality standards;
- information standards; and
- packaging standards.

Generally, the Act responds to the problem of the disparity between the information about goods and services which is in the possession of suppliers as opposed to consumers. The prescription of **safety standards**, as well as the **product banning** and **mandatory product recall** provisions of the Act, aim to protect consumer health and safety from the risks posed by hazardous or defective goods and services. The Review Panel considers that this objective remains appropriate in the current market and, therefore, that there remains continuing justification for the regulation of safety standards in relation to goods and services.

Quality standards are designed to minimise consumer loss arising from goods and services which are not fit for purpose. An initial object of the regulation would appear to have been continued protection of local industries, particularly the furniture and footwear industries, from inferior imported products to facilitate repeal of industry-protectionist legislation including the *Sale of Furniture Act 1904-1975 (repealed)* and *Footwear Regulation Act 1969-1972 (repealed)*. While information standards have been prescribed with respect to footwear and furniture, no quality standards have been prescribed under the Act. The Review Panel considers that the provisions in the *Consumer Transaction Act 1972*, *Sale of Goods Act 1895* and *Trade Practices Act 1975* dealing with implied warranties may in most cases be viable alternatives to quality standards under the Act. However, the Review Panel has ultimately concluded that there may be circumstances where this more general legislation may not be a satisfactory alternative to a prescribed quality standard which specifies the quality requirements of a product or class of products, for example, the composition of petrol.

On this basis, and on the basis that the quality standards provisions do not currently constitute any restriction on competition, the Review Panel has concluded that the provisions should be retained. However, the Review Panel points out that any proposed regulation to prescribe a quality standard would be required to be justified as complying with the requirements of the Competition Principles Agreement.

The object of **information standards** is to ensure that consumers are provided with certain minimum information with respect to goods and services. In certain circumstances, the costs

to consumers of obtaining the relevant information in relation to particular goods or services are prohibitive, such that regulation is justified. There is further justification for information standards where the information to be provided relates to consumers' health, as is the case with cosmetic products. The Review Panel has considered the less restrictive alternative of reliance on the prohibitions in existing legislation against false or misleading representations in relation to goods and services but considers that this is not a satisfactory alternative to the mandatory information standards provisions in the Act which allow the prescription of minimum, *specified* information. In light of this and the results of the TTMRA review of the Regulations, the Review Panel considers that the ability to regulate information standards continues to be a justified restriction on competition.

It was originally intended that **packaging standards** be prescribed under the Act to minimise consumer detriment from deceptive packaging and to facilitate repeal of the *Packages Act 1967 (repealed)*. The *Packages Act* was part of a national uniform scheme for the regulation of packaging of goods. Ultimately, the *Packages Act* was instead repealed and replaced by the Trade Measurement legislation, including the *Trade Measurement Act 1993* and *Trade Measurement (Pre-packed Articles) Regulations 1993* which prescribe labelling requirements for packaging and pre-packaged articles. The Review Panel considers that the regulations under the *Trade Measurement Act 1993*, together with the misleading and deceptive conduct provisions of the *Fair Trading Act 1987* and *Trade Practices Act 1974 (Cth)* may in most circumstances provide satisfactory alternative protection to consumers against deceptive packaging of goods. However, on the basis that the power to prescribe packaging standards does not actually restrict competition in the absence of any prescribed packaging standards, the Review Panel has ultimately concluded that it is not necessary that the power be removed. The Review Panel again emphasises that any regulation proposed to prescribe a packaging standard would be required to be justified in accordance with Competition Policy principles.

PART 1: INTRODUCTION

1.1 WHY IS THE ACT BEING REVIEWED?

Economic and social imperatives, not only in Australia but also globally, have in recent times required the imposition of more rigorous market conditions on every sector of the economy. This process has affected the agricultural, mining, manufacturing and utilities sectors of the economy, and is ever increasingly impacting on the occupational and professional fields.

Formal governmental recognition of this process came at the Council of Australian Governments meeting on 11 April 1995 with the adoption by the Commonwealth and all State and Territory Governments of the National Competition Policy package.

The package comprised three separate agreements aimed at facilitating the implementation of National Competition Policy objectives.:-

- The **Competition Principles Agreement** consisting of six distinct areas of competition reform:-
    - Legislative review;
    - Process oversight for government business;
    - Structural reform of public monopolies;
    - Competitive neutrality;
    - Access to essential infrastructure; and
    - Application of competition principles to local government.

- The **Conduct Code Agreement** committing all governments to implementation of uniform competition laws as set out in the schedule version of Part IV of the *Trade Practices Act 1974*. Under this code all persons, including governmental bodies and professional and occupational bodies, are now subject to competition laws.

- The **Agreement to Implement Competition Policy and Related Reforms** committing all signatories to a reform timetable. The Commonwealth is also committed to making payments to State and Territory Governments subject to their meeting the necessary reform timetables.

It is the legislative review element of the Competition Principles Agreement which forms the basis for this review. In this context it must be borne in mind that legislative reviews, such as this review of the *Trade Standards Act 1979*, do not occur in isolation but rather form a part of a fully comprehensive economy-wide policy agreed to by all Australian governments.

The legislative review process extends not only to existing legislation, but also to new legislation. Further, the concept of "legislation" encompasses all Acts, Regulations, Rules, Proclamations, Notices, Amendments and By-Laws. The reform timetable contained in the Agreement to Implement Competition Policy and Related

Reforms requires the legislative review process to be completed by the end of June 2002.

While competition is a notoriously difficult term to define globally, it may perhaps be most simply considered as a process of rivalrous behaviour by suppliers in a market that has many actual and potential buyers. National Competition Policy aims to make better use of competitive forces as a means to enhance overall material living standards, to improve Australia's social and environmental outcomes, and to extend the productivity enhancing effects of competition to virtually all sectors of the economy.

It has been said that National Competition Policy is about:-

> *"ensuring that the way markets work serves the whole community, rather than resulting in back-room deals which benefit a few. It is about improving efficiency of the public sector to provide better services at lower prices. And it is about ensuring that legal protections from competition genuinely promote the welfare of all Australians, rather than the narrow interests of the businesses protected. The policy doesn't prevent governments guaranteeing desirable social objectives."*[1]

Underlying National Competition Policy is the notion that greater competition will create incentives for producers:-

- to use their resources better, resulting in higher productivity;
- to increase their efforts to constrain costs and therefore lower prices; and
- to be more responsive to users' demands in terms of improved quality.

It is important to acknowledge at the outset that many laws restrict competition. It is also important to acknowledge that often these restrictions are essential to achieve a significant community benefit. However, National Competition Policy requires that all laws restricting competition be identified, so that the community benefits they provide and the necessity for the restriction can be reviewed in an objective fashion.

In this sense, National Competition Policy embraces competition as a means, not an end in itself. Any increase in competition in a sector of the economy can therefore only be justified under Competition Policy Principles insofar as it provides an increase in net public benefit.

That said, any National Competition Policy review must start with the presumption that any identified restriction on competition should be repealed unless it can be demonstrated that a net public benefit arises from its existence. In line with Competition Policy Principles, those who wish to maintain a legislative restriction on competition bear the onus of proving that there is such a net public benefit.

This presumption arises from the text of the Competition Principles Agreement, which states at clause 5(1):

> *The Guiding Principle is that legislation (including Acts, enactments, ordinances or regulations) should not restrict competition unless it can be demonstrated that:*

[1] G. Samuel, President, National Competition Council, *Australian Financial Review*, 22 June 1998, p 20.

a) the benefits of the restriction to the community as a whole outweigh the costs;

and

b) the objectives of the legislation can only be achieved by restricting competition.

Therefore, the only restrictions on competition permitted under the Competition Principles Agreement are those that are demonstrably in the public interest. However, clause 5(1)(b) further requires that those restrictions, which are so justified, must also be the most appropriate way of meeting the legislation's objectives.

To put matters another way, while a public interest defence is a necessary step for retention of a legislative restriction, it is not in itself a sufficient one; if the policy objectives can be achieved by other means, then the legislative restriction must be removed, even if they are in the public interest, and replaced by the less restrictive alternative.

The process of determining whether a restriction is in the public interest is known as the "public benefit test". Clause 5(1)(c) of the Competition Principles Agreement requires that competition and associated economic impacts be assessed under this test.

The Review Panel notes that in this regard clause 1(3) provides guidelines on the content of public benefits tests such that, without purporting to limit what may be considered, the following matters must be taken into account where relevant:

(a) *government legislation and policies relating to ecologically sustainable development;*

(b) *social welfare and equity considerations, including community service obligations;*

(c) *government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;*

(d) *economic and regional development and investment growth;*

(e) *the interests of consumers generally or a class of consumers;*

(f) *the competitiveness of Australian businesses; and*

(g) *the efficient allocation of resources.*

These criteria contain a clear expectation that social, environmental and regional concerns will be considered alongside the more narrow economic criteria in arriving at an assessment of overall benefits and costs. However, it should also be appreciated that, where relevant, matters beyond those set out in the Competition Principles Agreement, including rural issues, have been considered by the Review Panel.

1.2 WHAT IS BEING REVIEWED?

Generally, the Agreement requires that all existing legislation (including Acts, enactments, ordinances or regulations) be reviewed. However, the regulations under the *Trade Standards Act 1979* were recently reviewed on the basis that they were due to expire on 1 September 2000[2] and as part of the implementation process of the Trans-Tasman Mutual Recognition Agreement. [3] That review, resulting in the introduction of the *Trade Standards Regulations 2000* (the Regulations),[4] was conducted in accordance with Competition Policy principles and as such it is not necessary that the Regulations be reviewed again at this time.

Accordingly, this Review applies to the *Trade Standards Act 1979* ("the Act") only.

References have been made to other legislation where appropriate. However, the scope of this review is limited to the *Trade Standards Act 1979*. Issues relating to competitive restrictions in other legislation are beyond the scope of this review and are not considered in this Report.

1.3 THE REVIEW PANEL

The review was conducted by a Review Panel consisting of the following persons:-

- Ms Judy Hughes, *Deputy Commissioner - Policy and Legal, Office of Consumer and Business Affairs*;
- Mr Adam Wilson, *Senior Policy Officer (Competition Policy), Office of Consumer and Business Affairs*; and
- Ms Gillian Schach, *Legal Officer, Policy and Legislation Section, Attorney-General's Department.*

This Review Panel was appointed by the Minster for Consumer Affairs in accordance with the Department of Premier and Cabinet's guidelines for the conduct of legislative reviews under the Council of Australian Governments Competition Principles Agreement.[5]

1.4 CLASSIFICATIONS OF RESTRICTIONS ON COMPETITION

Restrictions on competition identified in the Act will not be of uniform effect, with varying degrees of impact on competition inherent in each particular restriction. Therefore, the Review Panel has adopted the process of categorising potential restrictions on competition as **trivial**, **intermediate** or **serious** in order to assist in deciding on the depth of analysis to be given in each case.

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[2] Under the terms of the *Subordinate Legislation Act 1978.*

[3] Entered into on 9 July 1996 between the Commonwealth, New Zealand and the States and Territories of Australia. In force 1 May 1998: *Trans-Tasman Mutual Recognition Act 1997 (Cth).*

[4] Came into operation 11 June 2000.

[5] *Guidelines Paper for Agencies conducting a Legislation Review under the CoAG Competition Principles Agreement*, Department of Premier and Cabinet, February 1998, Part E, p 19 et seq.

The categorisations attributed by the Review Panel to the various restrictions are derived following a consideration of various factors including the height of barriers to entry and the impediments to rivalry in all dimensions of the price-product-service packages offered to consumers by market participants given the nature of the market.

1.5 THE REVIEW PROCESS

The Review Panel has conducted an analysis of the restrictions contained in the *Trade Standards Act 1979* in accordance with Competition Policy principles. The terms of reference for this review are located at Appendix 2.

The purpose of the Final Report is to present to the Minister for Consumer Affairs the conclusions and recommendations of the Review Panel. A summary of the conclusions and recommendations of the Review Panel is located at Appendix 1.

A Draft Report setting out the restrictions identified by the Review Panel and a number of discussion points on issues arising out of the Review was released for a four week period of public consultation in October 2000. A list of stakeholders to whom Draft Reports were distributed and from whom submissions were received is located at Appendix 3.

This Final Report has now been prepared based on the Draft Report and information provided in submissions.

PART 2: OVERVIEW OF THE LEGISLATION

2.1 HISTORY AND OBJECTIVES OF THE ACT

The Act was introduced in 1979. Prior to the amendment of the Act on 1 October 2000, the long title of the Act stated the purpose of the Act to be:[6]

> *"to prescribe standards for and regulate the safety and quality standards of goods and services, the provision of information in respect of goods and services and the packaging of goods; to repeal the Sale of Furniture Act 1904-1975; the Goods (Trade Descriptions) Act 1935-1969; the Textile Products Description Act 1953-1972; the Packages Act 1967-1972; the Footwear Regulation Act 1969-1972; the Flammable Clothing Act 1973; and for other purposes."*

Although the long title has been amended to read:

> *"An Act to prescribe standards for and to regulate the safety and quality of goods, the provision of information in respect of goods and services and the packaging of goods; and for other purposes"*

The former long title is illustrative of the original intention of the Government in enacting the Act.

The legislation replaced by the Act was of an industry-protectionist nature which suggests that a further object of the Act at the time of introduction was the protection of local manufacturers from the supply of imported goods of inferior quality.

The Act seeks to prevent the risk of injury and death from the use of hazardous goods or services by providing for the prescription of safety standards for goods and services which must be complied with by manufacturers and suppliers.

The Act also intends to regulate the quality of goods and services by enabling the prescription of quality standards in relation to certain goods and services to ensure that they are fit for purpose.

The prescription of information standards under the Act is designed to ensure that a minimum level of information about certain goods or services is provided to consumers.

The Act also allows for the prescription of packaging standards which was aimed at maintaining a scheme of national uniform packaging legislation, allowing for the repeal of the *Packages Act*. The intention of prescribed packaging standards is to prevent deceptive packaging of goods.

The Act was amended in 1988 to incorporate provisions relating to temporary bans on dangerous goods, defect notices, product recall and compensation for loss resulting from the failure to comply with standards prescribed under the Act. These amendments brought the Act further in line with the *Trade Practices Act*. These additional provisions added to the regime of protection of consumers from the risk of injury as a result of dangerous products.

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[6] Amended by Statutes Amendment (Consumer Affairs-Portfolio) Act 2000.

The safety and information standards provisions, as well as the temporary ban and product recall provisions mirror those contained in the *Trade Practices Act 1974* and fill a gap in consumer protection by regulating any suppliers or manufacturers who are not corporations and therefore not within the scope of the *Trade Practices Act.*

No submissions which disagreed with the objectives as set out by the Review Panel were received in relation to the Draft Report. However, the Review Panel has altered the wording of the objectives of the Act to emphasise that it is not the Act itself which prescribes product standards, rather the Act confers power to prescribe such standards.

The ongoing relevance of each of the objectives of the Act identified by the Review Panel is addressed individually in Part 4 of this Report.

2.1.1 Conclusion

CONCLUSION 1

The Act has the following objectives:

1.1 to ensure that the safety and health of the community is not put at risk by enabling the prescription and enforcement of safety standards with respect to goods and services as well as the temporary and permanent prohibition and recall of goods and services.

1.2 to ensure that goods and services are fit for purpose by enabling the prescription and enforcement of quality standards with respect to goods and services.

1.3 to ensure that consumers are provided with a minimum amount of information with respect to goods and services to enable them to make informed choices between goods and services by enabling the prescription and enforcement of information standards with respect to goods and services.

1.4 to prevent consumers suffering loss as a result of deceptive packing by enabling the prescription and enforcement of packaging standards.

2.2 CURRENT OPERATION OF THE ACT

2.2.1 The relevant market

In general terms, a market is a collection of buyers and sellers that interact, resulting in the possibility of exchange.[7] Buyers include consumers who purchase goods and services, and sellers include firms and individuals who sell their goods and services.

[7] Pindyck R.S. and Rubinfeld D.L., *Microeconomics* (Second Edition), MacMillan, USA, 1992, p 11

The structure of a market is characterised by a number of factors including the number and size of competitors, the barriers to entry into the market and the ability for different products to be substituted.

The market which the Act seeks to regulate is a very broad market comprised of manufacturers, wholesalers and retailers of goods, and suppliers of services, generally within South Australia. "Goods" are defined in the Act as any tangible personal property. "Services" are defined to include the conferring of any right or privilege.[8] Within this market, certain goods and services, such as food or building services, are specifically regulated under other legislation. The broader market can also be viewed as a number of distinct markets for different types of product types, such as bicycle helmets, sunglasses and footwear.

The structure of the broader market is such that there are virtually no barriers to entry, that is, virtually any manufacturer and supplier may operate to manufacture and supply the types of goods and services which may be regulated under the Act. There is also generally a very high degree of substitutability between goods and services which may potentially be regulated.

This Act, therefore, potentially has a very wide application to the market for the manufacture and supply of goods and the supply of services generally within South Australia.

It is important to distinguish the operation of the Act from the operation of the Regulations under the Act, which Regulations are outside the scope of this review. The Act may be regarded as a facilitator of regulation of the market, rather than a source of regulation per se. The Act in fact imposes only minimal restrictions on the market by its own operation. This is to be borne in mind in assessing the Act under Competition Policy principles.

2.2.2 Mutual recognition

Under mutual recognition legislation, goods manufactured or imported into a State ("the first State") which may be lawfully sold in the first State may be sold in a second State without the need to comply with further requirements, including the requirement to comply with standards of the second State relating to the production, composition, quality or performance of the goods.[9] This means that, while manufacturers and importers within South Australia may be prohibited from manufacturing or importing goods which do not comply with a standard prescribed under the Act, goods lawfully manufactured or first imported into a State or Territory where no such standard applies may be lawfully supplied within South Australia.

This principle now also extends to goods manufactured and imported into New Zealand by application of the Trans-Tasman Mutual Recognition Agreement (TTMRA).[10]

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[8] Section 5.

[9] *Mutual Recognition Act (South Australia) Act 1993;* Sections 9, 10, *Mutual Recognition Act 1992 (Cth).*

[10] *Trans-Tasman Mutual Recognition (South Australia) Act 1999; Trans-Tasman Mutual Recognition Act 1997(Cth).*

It should be noted that under Mutual Recognition legislation, temporary and permanent exemptions may be granted with respect to certain goods if the exemption is for the purposes of protecting public health and safety. As part of a TTRMA Cooperation programme, various products have been the subject of exemptions while jurisdictions have reviewed their product regulations with the aim of harmonising or permanently exempting standards or determining that mutual recognition is to apply. This review process in itself has led to increased uniformity of product standards legislation, which in turn reduces compliance costs for businesses.

2.2.3 Regulation of the market

The Act contains mechanisms by which manufacturers and suppliers may be regulated by providing that the following types of standards may be prescribed by regulation and must be complied with by persons who manufacture and/or supply the regulated goods or services:

- safety standards (Part 3 of the Act);
- quality standards (Part 4);
- information standards (Part 5); and
- packaging standards (Part 6).

The Act sets out the way or manner in which each of the prescribed standards may operate. It also contains provisions enabling dangerous goods or services to be temporarily or permanently banned and to require suppliers to recall and repair, replace or refund the purchase price of dangerous goods or goods which do not comply with an applicable safety standard.

2.2.2.1 Safety standards

Under Part 3 of the Act, regulations may be prescribed which do any of the following:

- regulate the design, construction, composition, materials, contents, finish, performance or other characteristics of any kind of goods;
- regulate the nature and quality of services of any kind and the manner in which they are to be performed;
- prohibit the supply of particular kinds of goods or services to persons of less than a specified age;
- prescribe precautions to be taken in relation to the supply of particular kinds of goods or services (either generally or when they are supplied to particular classes of persons);
- prohibit the supply of particular kinds of goods unless instructions are supplied, or adequate instruction is given, in their installation, alteration or use;
- make any other reasonable provision that is desirable to prevent or minimise risk of injury or impairment of health.

In addition to complying with prescribed standards, persons are prohibited from manufacturing or supplying goods or services declared by the Minister under the Act to be dangerous goods or services.

Safety standards have been prescribed in relation to a number of goods since the inception of the Act. Currently, following review of the Regulations, safety standards are prescribed in relation to only 16 product types, including, for example, children's folding chairs, bicycle helmets and disposable lighters.

2.2.2.2 Temporary bans

The Act allows for the placing of temporary bans (up to three months without extension) on the manufacture or supply of goods or services which appear to be dangerous.

2.2.2.3 Defect notices

Under Part 3A of the Act defect notices may be issued to suppliers of goods which require suppliers to recall and repair, replace or refund the purchase price of goods which are dangerous, fail to comply with an applicable safety standard or which may cause injury in circumstances where it appears that insufficient action (such as voluntary recall) has been taken to avert danger to consumers. Alternatively, a defect notice may require suppliers to disclose details relating to the defect in or dangerous characteristics of the goods. Where a supplier voluntarily recalls goods because the goods may cause injury the Act requires the supplier to notify the Minister of the relevant details.

No defect notices have to date been issued under the Act.

2.2.2.4 Quality standards

Under Part 4 the Act, regulations may be prescribed which do any of the following:

- regulate the design, construction, composition, materials, contents, finish, performance or other characteristics of goods;
- regulate the nature and quality of services and the manner in which they are to be supplied;
- make any other provision relating to the quality of goods or services.

However, no quality standards have been prescribed since the Act came into operation.

2.2.2.5 Information standards

Under Part 5 the Act, regulations may be prescribed which do any of the following:

- prescribe or regulate the content of information in respect of goods or services or the manner or form in which information is to be provided in respect of goods or services;
- provide that information of a specified kind is not to be provided in respect of goods or services or that information in respect of goods or services is not to be provided in a specified manner or form;

- require the provision of specified information in respect of goods or services and prescribe the manner and form in which it is to be provided;
- assign a meaning to information of a specified kind in respect of goods or services;
- prohibit the alteration or variation of, or any interference with, any information provided in compliance with any regulation; and
- provide for and prescribe penalties not exceeding, in each case, one thousand dollars for breach of, or non-compliance with the regulations.

Various information standards have been prescribed under the Act and, after the recent review of the Regulations, information standards currently apply to six types of goods, including, for example, footwear, opals and textile products.

2.2.2.6 Packaging standards

Under Part 6 the Act, regulations may be prescribed which do any of the following:

- prescribe or regulate the composition, shape, size, dimensions or thickness of the covering or containers in which goods are packaged;
- provide that the covering or containers in which goods are packaged shall not have any unoccupied space or more than a specified amount of unoccupied space;
- provide that the covering or containers in which goods are packaged shall not have any cavities or recesses or cavities or recesses of a specified kind;
- prescribe or regulate the mass or measure in which goods are to be packaged; and
- prescribe or regulate any other matter relating to the packaging of goods.

No packaging standards have been prescribed under the Act to date.

PART 3: THE NEED FOR REGULATION - THRESHOLD ANALYSIS

3.1 INTRODUCTION

Any review of legislation in line with competition policy principles must commence from a basis that no regulation is required. The case must then be made for regulation, and that regulation should be in the least restrictive form to meet the identified objectives.

It is therefore necessary to identify whether there is a need for any regulation of product standards.

Many economists argue that competitive market forces deliver greater choice and benefits to consumers. Where suppliers compete openly with each other, the forces of supply and demand operate to promote community welfare by ensuring that:

- resources are allocated to those goods and services for which there is the greatest consumer demand;
- limited resources are better allocated by forcing out of the market all but the most efficient/lower cost suppliers of a given standard of good or service;
- there is incentive for technical innovation as manufacturers and suppliers compete for market share by developing new or improved quality products.[11]

If a manufacturer or supplier is able to exercise significant power within its market, it has no incentive to offer new products to consumers, and consumers themselves may pay more for the product than it is worth. Vigorous competition between suppliers encourages them to attract consumers to the business with targeted service provision and/or reduced prices.

However, unrestricted competition may not provide the best or most appropriate economic or social outcomes. It has been observed that:

> *"government intervention in a competitive market is not always a bad thing. Government - and the society it represents - might have other objectives besides economic efficiency. In addition, there are situations in which government intervention can improve economic efficiency. This includes externalities and cases of market failure."*[12]

It is therefore argued that where the potential for market failure exists, a basis for government intervention can be established.

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[11] Victoria, Competition Policy Task Force, *National Competition Policy: Guidelines for the review of legislative restrictions on competition,* Melbourne, 1996, p 34.

[12] Pindyck R.S. and Rubinfeld D.L., *Microeconomics* (Second Edition), MacMillan, USA, 1992, p 320.

3.2 EFFECT OF REGULATION OF PRODUCT AND SERVICE STANDARDS ON COMPETITION[13]

3.2.1. Costs of regulation

Regulation results in costs to the community. Apart from the direct costs to the community of administering and enforcing the regulation and the compliance costs to business, there are costs associated with any detrimental effects of regulation on competition in the market. The detrimental effects can manifest themselves in higher prices as a result of reduced price rivalry between competing suppliers as well as reduced incentive for innovation and misallocation of resources.

There are various forms of restriction on market competition, including:

- barriers to entry;
- restrictions on business structure, form or ownership;
- conduct restrictions; and
- quality restrictions.

For the purposes of reviewing this Act, the relevant forms of restriction are conduct and quality restrictions.

3.2.2. Conduct restrictions

Restrictions on particular forms of conduct, for example, prohibitions on supplying certain goods which do not comply with an applicable product standard, may operate against consumers by restricting the range of products available to them, particularly lower priced and imported goods. The resulting reduction in competition and associated price rivalry may result in consumers paying higher prices for goods and services.

3.2.3. Quality restrictions

Prescription of product and service standards may result in increased production costs as well as increased quality control and other compliance costs, including record keeping costs, which will ultimately be passed on to consumers. Further, prohibiting lower quality goods and services may lead to a sub-optimal consumption of some goods and services and welfare costs on consumers who drop out of the market because they are unwilling or unable to meet the higher price of the statutory minimum standard.

Prescription of particular input and output requirements can also lead to the stifling of innovation, reducing the incentive to develop new production techniques which could have delivered improved, lower cost goods and services.

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[13] Victoria, Competition Policy Task Force, *National Competition Policy: Guidelines for the review of legislative restrictions on competition,* Melbourne 1996, pp 44, 45, 60-63.

3.3 MARKET FAILURE

Competition assumes a market that is perfect, ie:-

- where maximum satisfaction and profit are sought;
- where there are no hidden transaction costs;
- where all parties are completely informed (ie no information asymmetry); and
- where there are no costs to other parties (externalities).

From the consumer's viewpoint, inefficient market outcomes may result where there are high transaction costs, information asymmetry or externalities. Such situations indicate market failure and may justify regulatory intervention.[14]

3.3.1 Transaction costs

Transaction costs are costs incurred in doing business with a supplier and can include the costs of ensuring that the terms of an agreement are fulfilled, including resort to legal advice and court action.

Market failure may occur where consumers would incur significant transaction costs in selecting the optimum goods and services desired. Significant transaction costs will be incurred where a high degree of technical expertise is required to test aspects of quality or safety with respect to goods, particularly where these aspects relate to the composition, as opposed to the outwardly visible design or construction, of goods. The cost of obtaining the necessary information may be such that consumers abandon the search for the goods or service or make a suboptimal choice.

Regulation of product safety and quality standards reduces the transaction costs to consumers and reduces the likelihood of disputes between consumers and suppliers regarding defective or unfit goods and services. This in turn results in a decrease in costs associated with consumer complaint handling and legal advice and litigation, including product liability litigation.

The Act provides that consumers are entitled to compensation for any damage suffered as a consequence of a dangerous characteristic of goods or services or the failure to comply with a safety standard.[15] The entitlement to compensation extends to damage suffered as a consequence of the failure of a manufacturer or supplier to comply with any provision of the Act.[16] This means that consumers suing a manufacturer or supplier for injury or illness are not required to prove negligence, which in turn should decrease the costs of litigation. The Review Panel has taken into account this benefit in assessing the justification of continued regulation.

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[14] Victoria, Competition Policy Task Force, *National Competition Policy: Guidelines for the review of legislative restrictions on competition*, Melbourne, 1996, pp 38, 39.

[15] Section 26.

[16] Section 44.

3.3.2 Information asymmetry

Information asymmetry occurs where there is a disparity between the information in relation to goods and services at the disposal of the manufacturer or supplier as opposed to the consumer. Consumers are often unable to make an assessment of quality or potential risks of certain goods or services until after purchase. This is a more prevalent problem where it is the composition of the goods rather than some observable design feature which renders the product unfit or dangerous.

As a consequence of information asymmetry, lower quality/less safe goods may drive higher quality/safer goods out of the market as consumers are not able to make informed choices as to the optimum price/quality/safety combination.

3.3.3 Externalities

Externalities are 'spillover' costs to parties not directly involved in a transaction. The costs to the general community of treating injuries resulting from unsafe goods or services, or the costs to parties injured by goods purchased by another party, would comprise spillover costs.

Market failure occurs where these external costs are not borne by a party to the sale transaction and will therefore not be accounted for in arriving at the optimum price/quality/safety combination in accordance with the forces of supply and demand.

3.4 CONSIDERATION OF LESS REGULATORY ALTERNATIVES

Clause 5 of the Agreement requires that the Review Panel considers less regulatory alternatives to the current system of regulation.

3.4.1 Reliance on market forces

The Government could remove the current legislation and simply rely on market forces to control product standards. This presupposes that the market will operate to remove substandard and hazardous goods and services and incompetent or uncompetitive manufacturers and suppliers from the market and relies on consumers exercising their legal rights where suppliers and manufacturers supply defective or substandard products.

The costs of exercising legal rights (considered to be transaction costs) are significant, particularly for the average consumer. More importantly, there is the unacceptable risk to consumers of death, injury or impairment of health from dangerous or substandard goods and services. Placing consumers at this kind of risk is undesirable both from a social and from an economic perspective. This alone may provide sufficient justification for continuing regulation of product standards.

3.4.2 Reliance on existing laws of general application

Consumers of goods and services have a range of laws that they may call on during a dispute.

Manufacturers of goods and suppliers of goods and services may be liable to their customers for any damage caused by their negligence in circumstances where a duty of care to the customer exists and is breached, resulting in loss or damage that can be attributed to that breach.

There are also a number of laws dealing with the advertising of goods and services. At common law, misrepresentations regarding the quality of goods or services may give a consumer legal rights to void the contract or, in certain circumstances, claim damages.

The Review Panel notes at the outset that although the consumer protection laws tend to operate reactively (i.e. they are only available to the consumer once injury has occurred or a substandard product consumed), they still offer some protection to consumers. In addition, they have some deterrent effect, because manufacturers and suppliers know that they may face legal action.

However, ultimately, the fact that the common law will not operate in many cases to prevent harm such as injury or impairment to health occurring means that it is not a satisfactory alternative to specific product standards.

3.4.2.1 Fair Trading Act

The *Fair Trading Act 1987* (SA) prohibits misleading and deceptive advertising and other conduct. In particular, the following sections are of relevance:-

- section 56 Misleading or deceptive conduct
- section 57 Unconscionable conduct
- section 58 False or misleading representations
- section 63 Misleading conduct in relation to goods
- section 64 Misleading conduct in relation to services
- section 69 Harassment and coercion.

The provisions of the *Fair Trading Act* may act as a deterrent against suppliers misrepresenting the quality or safety attributes of products. However, they will not operate to ensure that a minimum amount of information is provided to consumers to enable them to make informed choices between products. This is unacceptable in cases where that information is necessary to ensure that goods are used in a particular manner such as not to constitute a safety hazard.

Further, the provisions of the *Fair Trading Act* will not operate to prevent the risk of injury and, where no representation is made regarding the safety of a particular good or service, there may be no remedy available to consumers who have suffered injury or other loss.

3.4.2.2 Trade Practices Act, Consumer Transactions Act, Sale of Goods and Manufacturers Warranties Act

The statutory warranties provisions in the *Trade Practices Act 1974 (Cth), Consumer Transactions Act 1972 (SA), Sale of Goods Act 1895 (SA) and Manufacturers Warranties Act 1974 (SA)* provide consumers with remedies against manufacturers and suppliers of goods and services which do not correspond with their description, are not "fit for purpose" or "of merchantable quality".[17] Consumers will have a remedy in contract for breach of these statutory warranties.

The Review Panel recognises that the consumer protection offered by these Acts is reactive in nature, that is, the protection is afforded to consumers only after the inferior quality goods and services have been manufactured and/or supplied, while the prescription of quality standards is directed at ensuring that inferior quality goods and services never reach consumers. However, the general consumer protection Acts have a deterrent effect on manufacturers and suppliers who know they may face legal action for breach of statutory warranties.

Again, however, reactive protection and a deterrent effect do not offer adequate protection for consumers from the risk of death, injury or impairment to health as a result of substandard goods and services or inappropriate use of goods.

3.4.2.2 Trade Practices Act

Part V Division 1A of the *Trade Practices Act 1974 (Cth)* regulates product safety and standards. Due to constitutional limitations, however, the *Trade Practices Act 1974* does not in general extend to govern transactions between unincorporated manufacturers and suppliers and consumers. The mirror safety and information standards provisions in the *Trade Standards Act* fill the resulting gap in regulation.

3.4.3 Secondary markets for information provision

The Review Panel has considered reliance on existing secondary markets for information as an alternative to product standards, particularly quality and information standards. Consumers' association magazine publications such as "Choice" magazine provide information in relation to goods and services, publishing comparative reviews of ranges of products against specified performance criteria. Some more specific associations with a consumer focus, such as "Kidsafe", may produce information regarding, for example, children's toys and clothing. However, the Review Panel is not aware of industry associations or consumer associations which provide information regarding all the product types currently or potentially regulated under the Act, which include products ranging from bean bags to disposable cigarette lighters.

[17] Sections 13, 14, *Sale of Goods Act 1895;* Sections 70, 71, 74, *Trade Practices Act 1975* (Cth); Sections 6, 7, *Consumer Transactions Act 1972;* Section 4, *Manufacturers' Warranties Act 1974* (SA).

The Review Panel considers that, while secondary markets for information may be a viable alternative in some cases to mandatory quality and information standards, they are not a viable alternative to safety standards and information standards directed at reducing the risk of injury or impairment of health to consumers. There is no systematic provision of information regarding all products which may constitute a safety risk. Nor is there any guarantee that a consumer would seek out safety information prior to purchase, even if it existed, regarding everyday, inexpensive products such as disposable cigarette lighters.

3.5 CONCLUSION - CONTINUING REGULATION

No submissions were received by the Review Panel which argued that product standards should cease to be regulated under the Act.

There is a role for Government regulation of product standards to address the problem of information asymmetry, particularly where high transaction costs are also involved. Regulation is further justified because there is a clear public benefit in ensuring that consumers are protected from the risk of injury or impairment to health by regulating the safety of goods and services and ensuring that consumers are provided with minimum information in relation to certain goods and services.

The Review Panel has concluded that justification is made out for the continuing regulation of product standards as the potential benefits to the wider community outweigh the identified costs of regulation.

CONCLUSION 2

The continued regulation of product standards is justified as the potential benefits to the wider community outweigh the costs and there is no viable, less regulatory alternative.

PART 4: ANALYSIS OF RESTRICTIONS

4.1 INTRODUCTION

Part 4 of the Report discusses the individual areas of restriction on competition within the Act identified by the Review Panel.

While the Act provides the framework under which the market conduct of suppliers and/or manufacturers of a potentially broad range of goods and services may be restricted, it is the Regulations which actually impose the restrictions on competition.

Recently, the Regulations prescribed under the Act were reviewed in conjunction with a national review of product standards undertaken by the Consumer Products Advisory Committee (CPAC) as part of the process of implementing the Trans-Tasman Mutual Recognition Arrangement (TTMRA). When the former regulations were due to expire on 1 September 2000, it was recommended that they be remade taking into account the results of the CPAC and local reviews ("the TTMRA reviews"). The object of the TTMRA reviews was to:

1. determine whether the regulations were still appropriate and required in the marketplace;
2. assess whether the regulations should be amended to be consistent with similar regulations in other jurisdictions; and
3. recommend retention, deletion or amendment of the mandatory requirements according to the conclusions reached in the first two stages of the review.

As part of the review process each of the South Australian regulations contained in the *Trade Standards Regulations 1985 (repealed)* were examined to:

1. assess the need for the standard in the current marketplace;
2. where necessary, identify minimum performance criteria necessary to address any hazards or risks associated with the product;
3. recommend retention, deletion or amendment of the mandatory requirements, according to the conclusions reached in the first two stages.

The TTMRA reviews included an extensive consultation phase and resulted in the introduction of the *Trade Standards Regulations 2000*.

The restrictions identified as contained in the Act will be considered in the context of the recent TTMRA reviews.

4.2 SAFETY STANDARDS

4.2.1 Objectives relevant or appropriate?

The Act provides that it is an offence to manufacture or supply goods or supply services that do not comply with a safety standard applicable to the goods or service or to supply goods or services in contravention of an applicable safety standard.[18] This is a potential quality restriction because manufacturers may be required to manufacture goods in a certain way, to a certain design, with certain material and/or with certain performance or other characteristics. Safety standards are also a potential restriction on market conduct because they restrict manufacturers and suppliers in the types of goods and services which they may manufacture or supply and, potentially, who they may supply them to. The Review Panel considers that these restrictions are **serious restrictions** on competition**.**

Having identified that safety standards impose restrictions, the continuing appropriateness as well as the costs and benefits of the restrictions must be considered.

The object of these restrictions is to prevent the risk of injury or death from the use of certain goods or services. During the course of reviewing the Regulations, it was identified that certain goods, for example, particular erasers, apparel treated with a particular chemical, and car seat covers with metal hooks are no longer manufactured in such a way that they remain a safety risk. The TTMRA reviews also applied a threshold test for retaining regulations on the basis that four or more jurisdictions regulated the product type. Accordingly, the regulations prescribing safety standards for seven product types have now been revoked.

It was also recommended following industry and consumer consultation that regulations prescribing safety standards for 12 product types be remade in a format consistent with safety standards prescribed under the *Trade Practices Act 1974* (Cth). The Regulations now adopt safety standards prescribed under the *Trade Practices Act*. [19]

This increased uniformity of legislation will lead to decreased compliance costs for manufacturers and suppliers who need only comply with one standard.

Notwithstanding that South Australia is the only jurisdiction to regulate the manufacture and supply of children's folding chairs, this regulation was retained. After considering industry submissions that the safety standard for children's folding chairs discriminates against South Australian-based manufacturers because there is no equivalent safety standard in other jurisdictions, it was nevertheless decided to retain the safety standard on the basis of injury statistics indicating that there is a continuing safety risk to children associated with folding chair mechanisms.

In conclusion, the recent TTMRA review of the Regulations and the fact that the decision was made to continue to regulate the supply and/or manufacture of certain goods by imposing safety standards and to cease regulating others has identified that the objectives of the Act continue to be relevant and appropriate. That is, it has been identified that certain

[18] Section 22. The restriction applies to manufacture or supply in the course of a trade or business.
[19] *TSR* Sch 2.

goods continue to pose a safety risk to the public such that regulation of their manufacture and/or supply continues to be appropriate.

By identifying products which were previously regulated but which it appears are no longer manufactured or not manufactured in a way which poses a safety risk, the TTMRA reviews demonstrated that the prescription of safety standards achieves the objective of preventing risk of injury to consumers by removing hazardous products from the market.

4.2.2 Assessment of costs and benefits

The benefits of compulsory safety standards are that the risk of death, injury or impairment of health of consumers as a whole or particular classes of consumers, such as children, is prevented or reduced. The costs to consumers and the community as a whole of treating injuries caused by unsafe products are also thereby avoided or reduced. Further, by mandating safety standards, the costs to manufacturers and suppliers as well as to the community as a whole of dealing with consumer complaints and of product liability litigation may be reduced. These public benefits should also be taken into account in a cost/ benefit analysis of the restrictions contained in the Act.

Compulsory safety standards can have the effect of increasing manufacturing costs for manufacturers of regulated products and increasing the compliance costs of manufacturers and suppliers. Increased manufacturing costs may arise from the need to modify or improve the existing design, composition or labelling of a regulated product. Increased compliance costs are associated with the need for manufacturers and suppliers to test products for self-compliance and collect and provide information relevant to applicable safety standards for provision to suppliers, standards officers[20] or the Minister.[21]

An increase in production or compliance costs will ultimately be passed on to the consumer. Further, compulsory safety standards may have the effect of restricting certain manufacturers and suppliers of regulated goods from participating in the market.

The resulting reduction in price rivalry has an adverse effect on competition as local manufacturers of regulated products may have less incentive to maximise efficiency and minimise price where such restrictions operate to remove lower cost, non-compliant goods from the market.

Given that there are only 16 safety standards currently prescribed under the Act, restriction of manufacture and supply is specifically targeted and only encompasses a small percentage of product types available for consumption. The Regulations were recently reviewed resulting in a move towards greater national and trans-Tasman uniformity of regulation with attendant decreases in compliance costs for manufacturers and suppliers. Costs associated with compulsory safety standards are therefore limited. The Review Panel considers that the benefits of restricting the manufacture and supply of certain products and services outweigh the costs. The benefit to consumers and the community of preventing and

[20] Standards officers are appointed pursuant to section 14 of the Act and have the powers, including the power to require production of plans, specifications, books, papers or other documents, conferred by section 15.

[21] The Minister may require production of information necessary to determine compliance with the Act: section 16.

reducing the risk of injury and death is great and there are flow-on benefits to the community such as reduced injury treatment costs.

4.2.3 Alternatives to current regulation

In the absence of regulation, it would be difficult for consumers to discern which products may pose safety risks. In an unregulated market, this problem of information asymmetry could result in the higher priced/safer products being driven out of the market in favour of lower cost/lower quality and potentially less safe products because the consumer is unable to make an informed choice based on price and performance (or safety) of a product.

The costs to consumers of testing and obtaining information relevant to the safety of goods and services is likely to be greater if each consumer performs this task, given that in some instances a large amount of technical knowledge may be required. Assessment of product safety by a centralised agency as occurs under the Act generates economies of scale, thereby avoiding the problem of market failure which can occur as a result of high transaction costs.

As discussed above, the Review Panel does not accept that existing consumer protection legislation, which is reactive in nature and would not operate to prevent injury to consumers, offers a viable alternative to mandatory safety standards.

Compulsory safety standards may potentially apply to a disparate range of products. Current safety standards apply to products ranging from bean bags to sunglasses to vehicle trolley jacks. The Review Panel does not consider that it would be feasible to encourage each of the industry associations relating to each of these product types to voluntarily comply with industry-generated safety standards or that the object of preventing the risk of injury would necessarily be achieved by a system of voluntary industry standards. There is no guarantee, for example, that manufacturers will adopt standards developed by Standards Australia.

The Review Panel has considered the prescription of mandatory information standards as a further alternative to the prescription of safety standards in reducing the risk of injury from certain goods and services. While information standards may be appropriate in cases where it is the **use** of a product which can result in the hazard to consumers, the Review Panel does not consider information standards to be a viable alternative for safety standards where, for example, it is the material used in constructing the goods which poses a health risk (for example, the lead content in erasers which were previously regulated under the Act) or where goods are otherwise inherently hazardous. The Review Panel has therefore come to the conclusion that there is no viable less regulatory alternative to mandatory safety standards.

CONCLUSION 3

The ability to prescribe mandatory safety standards under the Act should be retained as the current regulation confers a net benefit to the community and no less regulatory alternative exists.

4.3 PERMANENT BANS OF DANGEROUS GOODS

4.3.1 Objectives relevant or appropriate?

The Act prohibits the manufacture or supply of dangerous goods.[22] The Minister has the power to declare specified goods or services to be dangerous where satisfied that the declaration is necessary to avert the risk of injury and it is not appropriate to deal with the matter by the prescription of safety standards.[23] For example, a ban would be required where the hazard is related to some feature of a product which cannot be modified without defeating the intended function of the product.

Bans on the manufacture or supply of dangerous goods are an obvious restriction on market conduct. The Review Panel considers this to be a **serious restriction** on competition, although the Review Panel recognises that in practice only a limited number of products are currently permanently banned.

This restriction was designed to prevent a very serious risk of death and injury from goods and services so inherently dangerous that it is deemed consumers should not have any access to them and where no safety standards could feasibly be prescribed to prevent the risk of injury.

Most other States and Territories have equivalent provisions in their legislation, as does the Commonwealth under the *Trade Practices Act.*[24]

Examples of goods which have previously been the subject of bans under the Act include a particular model of children's roller skates containing a fault in the fastening of the wheel assembly, a brand of aerosol hair colour which had a weakness in the seam of the can with a high probability of the seam rupturing and a model of cap gun with an open barrel which allowed emission of projectiles. The cap gun continues to be banned, as do, for example, plastic toys which expand in water or gastric juices, a model of infant cushion loosely filled with plastic beads and a floating swimming pool safety alarm.

In 1998, as part of the TTMRA review process, 15 bans were revoked in South Australia.[25] Generally, the bans were revoked because the product is no longer manufactured, or no longer manufactured in such a way as to pose a risk to consumers or because a prescribed safety standard now applies to the product. For example, neither the particular model of roller skates nor the aerosol hair colour product mentioned above is now produced. When the bans were reviewed, the goods which remain the subject of permanent bans were still available and there were no safety standards applicable to them. As at the date of publishing this report, there are 10 products which are the subject of permanent bans under the Act.

Part of the rational for revoking the bans on certain products was the availability of more flexible alternative means of regulating goods and services under the Act. It was considered that the temporary ban, defect notices and voluntary recall provisions introduced into the

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[22] Section 24.

[23] Section 25.

[24] Section 65C(7), *Trade Practices Act 1974* (Cth) (permanent ban may be declared after goods declared "unsafe goods" for 18 months and where there is no applicable prescribed safety standard. Opportunity of conference regarding proposed ban must first be afforded to supplier: section 65J.)

[25] Government Gazette, 28 May 1998 p 2281.

Act in 1988 could be utilised to re-regulate the products in relation to which bans were revoked should it be identified that the dangerous products were again being manufactured or supplied. This demonstrates the flexibility of the Act, whereby restrictions on competition are specifically targeted and only a relatively small number of goods (and, therefore, only a small number of manufacturers and suppliers) are in fact actively regulated by the Act. Provided that the declarations made under the Act permanently banning dangerous goods are periodically reviewed, regulation should continue to be relevant and appropriate.

4.3.2 Assessment of costs and benefits

The very significant benefits of this restriction are the obvious public benefit of averting death and injury and the avoidance of the associated treatment costs to the community. The costs of the bans on dangerous goods and services include the actual costs of lost sales revenue to manufacturers and suppliers, and in certain cases, the costs of removing goods from warehouses or retail store shelves as well as the opportunity costs of loss of future sales.

Effectively removing certain manufacturers or suppliers from the market by banning their product, thereby reducing supply where demand remains static, may lead to higher prices for consumers of competing products. However, the potential for safety standards and bans to be imposed under the Act may have the effect of stimulating rather than hindering innovation as manufacturers are concerned to improve production methods to avoid producing potentially hazardous products.

The costs of banning dangerous goods and services are limited in practice given that only ten products are currently banned under the Act. Bearing in mind the importance of the objective of the Act in protecting consumer safety, the Review Panel has reached the conclusion that the benefits of permanent bans outweigh the costs.

4.3.3 Alternatives to current regulation

The same arguments with respect to the additional benefits of the restriction and the lack of any viable less restrictive alternative to regulation set out above in relation to safety standards apply to permanent bans on the manufacture and supply of dangerous goods. Bans are only to be applied where removing goods or services from the market completely is necessary to avert the risk of injury or impairment of health and the prescription of safety standards is not a viable alternative. It would not be acceptable to rely on manufacturers and suppliers to voluntarily and immediately cease production and supply of dangerous goods and services where the risk of injury exists.

The Act allows for the prescription of temporary bans on dangerous goods and services. In practice, since the temporary ban provisions were introduced these are adopted as the first course of action in preventing risk of injury of dangerous products, with permanent bans only implemented where there is still no viable alternative, such as a safety standard or voluntary cessation or modification of production or supply by the manufacturer or supplier of the goods or service.

CONCLUSION 4

The power to permanently ban dangerous goods and services should be retained as the benefits of the restriction exceed the costs and there are no viable less regulatory alternatives to the ability to permanently ban dangerous goods or services under the Act.

4.4 TEMPORARY BANS OF DANGEROUS GOODS

4.4.1 Objectives relevant or appropriate?

On the advice of the Trade Standards Advisory Council ("TSAC"), the Minister may place a ban of up to three months at first instance on the manufacture or supply of goods, or the supply of services, where it appears the goods or services may be dangerous.[26] The purpose of this provision is to enable the risk of injury to be averted while the good or service is investigated to see whether it should be declared dangerous. A temporary ban may be extended to a maximum period of six months.

Most other States and Territories have equivalent provisions in their legislation, as does the Commonwealth under the *Trade Practices Act.*[27]

Temporary bans on the manufacture and/or supply of goods and services are an obvious restriction on market conduct with the same resulting costs as permanent bans discussed at 4.3.1 above. The Review Panel considers temporary bans on the manufacture and supply of goods and services to be a **serious restriction** on competition, although the Review Panel notes that the restriction has a limited effect on the market, being limited to the manufacture and supply of a small number of products only. At the time of writing this Report, no temporary bans are in place under the Act.

The temporary ban provision incorporates further flexibility into the Act, enabling the regulating authority to act quickly to prevent risk of injury to consumers from a good or service which it appears is likely to cause injury. However, if after investigating the good or service it is determined that it does not constitute a danger or a permanent ban is not required, for example, a safety standard has been prescribed in relation to the product, the product fault has been remedied by a manufacturer or production ceased during this period and the product has been voluntarily recalled, the temporary ban would lapse without unnecessary regulation remaining in place.

[26] Section 26A.

[27] Section 65C(5), *Trade Practices Act 1974* (Cth) ("unsafe goods" declaration remains in force for 18 months unless revoked before: section 65C(6). Opportunity of conference regarding proposed ban must first be afforded to supplier: section 65J.)

4.4.2 Benefits exceed costs?

For the reasons discussed above in relation to permanent bans, the Review Panel has preliminarily concluded that the benefits of the power to temporarily ban the manufacture and supply of dangerous goods and services outweigh the costs.

4.4.3 Alternatives to current regulation?

The same arguments with respect to the lack of any viable alternative to the current regulation set out above in relation to safety standards and permanent bans apply to temporary bans on dangerous goods and services.

CONCLUSION 5

The power to temporarily ban dangerous goods and services should be retained as it confers a net benefit to the community and there is no viable less-regulatory alternative.

4.5 DEFECT NOTICES

4.5.1 Objectives relevant or appropriate?

The Act provides that defect notices may be issued on a supplier or a particular class of suppliers which requires suppliers to do one or more of the following where goods are dangerous, do not comply with an applicable safety standard or the goods are such as may cause injury:

- recall and repair, replace or refund the purchase price of the goods;
- disclose to the public the nature of the defect or dangerous characteristic of the goods, the circumstances in which the use of the goods is dangerous and, where appropriate, procedures for disposing of the goods; or
- to inform the public that the supplier undertakes to repair, replace or refund the purchase price of the goods.[28]

The provisions are to be applied where it appears that a supplier has taken insufficient voluntary action to avert danger to consumers to whom the goods have been supplied.

Where it is proposed that a defect notice be issued, a notice must first be published both in the *Government Gazette* and in a newspaper containing a draft of the proposed defect notice, setting out reasons for the proposed publication of the notice and an invitation to any person who supplies or proposes to supply the relevant goods to hold a conference with TSAC in relation to the proposed publication of the notice.[29] Following a conference TSAC must recommend whether a defect notice should be published.

[28] Section 27A.
[29] Section 27B.

The defect notice provisions constitute restrictions on market conduct. While the restrictions on conduct contained in the defect notice provisions could potentially be a **serious restriction** on competition, in practice it has not been necessary to impose the restrictions to date. It is apparent that the restrictions will be imposed only in the most drastic of situations, where a supplier has not acted responsibly in voluntarily recalling dangerous goods or goods which fail to comply with an applicable safety standards.

Further, the restrictions on conduct after the initial recalling of the relevant goods do not impose significantly greater liability on suppliers than already exists under statutory warranty provisions in general consumer protection legislation.

These provisions were enacted to mirror the compulsory product recall provisions in the *Trade Practices Act* and to close the gap in consumer protection with respect to products provided by suppliers other than corporations. Their objective is complementary to the banning provisions and seeks to prevent the risk of harm to consumers from goods which are already in consumers' possession. The risk of injury to consumers is even more imminent in this situation and, therefore, the justification for regulation is more obvious.

No defect notices have ever been issued under the Act. While this could suggest that the restriction is not necessary, the Review Panel considers that the existence of the defect notice provisions have a demonstrated deterrent effect on suppliers. Suppliers have demonstrated a preparedness to voluntarily recall products which are found to be dangerous.

4.5.2 Benefits exceed costs?

The costs of the restriction are potentially significant. A compulsory recall of a product would involve the costs to suppliers of that product of placing notices in newspapers circulating throughout the State, to notify consumers of the recall as well as the costs of replacing, repairing or refunding the purchase price of the product and any expenses, such as transportation costs, incurred by a consumer in returning the goods.

However, apart from the costs associated with publishing the recall notice or otherwise informing the public of the defect in the goods or services, the supplier could arguably be liable for the above outlined costs in any event under general consumer protection laws on the basis that the defective goods are not "fit for purpose" or "of merchantable quality".

The *Sale of Goods Act 1985* (SA), *Trade Practices Act 1975* (Cth), *Consumer Transactions Act 1972* (SA) and *Manufacturers Warranties Act 1974* (SA) each contain statutory warranty provisions that imply into contracts for sale that goods must be fit for purpose and of merchantable quality.[30] If goods are defective to the extent of constituting a safety risk then a supplier will arguably be in breach of these implied warranties and therefore liable to pay damages to the consumer. While the payment of damages by a supplier of defective goods would depend on a consumer taking action against the supplier, the supplier's liability in terms of replacing, repairing or refunding the goods is still arguably no greater as a result of the

[30] Section 14, *Sale of Goods Act 1895;* Sections 70, 71, *Trade Practices Act 1975* (Cth); Section 6 *Consumer Transactions Act 1972;* Section 4, *Manufacturers' Warranties Act 1974* (SA). The statutory warranties also apply to services: Section 74, *Trade Practices Act 1975* (Cth); Section 7, *Consumer Transactions Act 1972.*

compulsory recall provisions in the Act. In fact, the costs associated with court proceedings to recover damages will be avoided.

The costs of handling consumer complaints regarding defective goods, both to suppliers and the community at large, will be reduced by removing defective goods from consumers' possession. Also, the considerable costs of litigating breach of contract and product liability actions will be avoided where a product is recalled and injury or loss prevented. These potential cost savings should also be factored into the cost/benefit analysis of the restriction.

Bearing in mind the significant public benefit of reducing the risks death, injury or impairment of health as a result of defective products, the Review Panel considers that the potential benefits of the defect notice provisions outweigh the potential costs.

4.5.3 Alternatives to current regulation?

Alternatives to the defect notice provisions could include reliance on suppliers to voluntarily recall goods which are shown to pose a risk of injury or impairment to health. The threat of product liability litigation should act as an incentive to suppliers to take voluntary action. However, the defect notice provisions are intended to apply to regulate the conduct of suppliers who have failed to act voluntarily and with satisfactory haste. Accordingly, it is considered that this is not a satisfactory alternative to the defect notices provisions.

CONCLUSION 6

The power to issue defect notices for the compulsory recall of goods should be retained as the benefits of the restriction outweigh the potential costs and there is no viable less regulatory alternative.

4.6 NOTIFICATION OF VOLUNTARY RECALL

4.6.1 Objectives relevant or appropriate?

Where a supplier voluntarily takes action to recall goods because the goods will or may cause injury, the supplier must notify the Minister in writing setting out the nature of the defect, or the dangerous characteristic of, the goods and the action the supplier intends to take on the recall.[31]

In the Draft Report, the Review Panel assessed the costs of notifying the Minister in compliance with this provision as a **trivial restriction** on competition.

The Australian Competition and Consumer Commission (ACCC) made a submission to the Draft Report arguing that the requirement was an unnecessary duplication of regulation given the requirement under the *Trade Practices Act* to notify the federal Minister of a voluntary recall and the existence of the national recall system administered by the Consumer Affairs Division of the Commonwealth Treasury.

[31] Section 27C.

The Review Panel agrees that the possibility that a supplier would be required to concurrently notify (and negotiate regarding the recall action to be taken) with several authorities in several different jurisdictions may result in the unnecessary imposition of costs on those suppliers. This is likely to be further compounded where the notification requirements are different in different jurisdictions, which is currently the case.

The Review Panel is aware that a report is currently being prepared under the auspices of the Standing Committee of Officials on Consumer Affairs (SCOCA) regarding the effectiveness of the product recall powers and procedures throughout Australia and New Zealand and to consider measures to increase national and trans-Tasman uniformity in this area.

Although the Review Panel notes that any increase in uniformity in the regulation of product recalls would be positive in competition policy terms by decreasing suppliers' compliance costs, national uniformity is not an issue for the purposes of this review.
Due to the constitutional limitations of the *Trade Practices Act,* there would be a gap in regulation of suppliers (ie the TPA does not apply to unincorporated traders) without the mirror notification requirement contained in the *Trade Standards Act.*

The Review Panel has considered an alternative to the current notification requirement , being to amend the Act to provide that it is sufficient compliance with the notification requirement if a copy of a notice given under section 65R of the *Trade Practices Act* is given to the Minister. This would reduce compliance costs for corporations which are required also to comply with the notification requirement under the *Trade Practices Act.*

However, ultimately, given that the recall and notification procedures and provisions are currently the subject of review by SCOCA, the Review Panel considers that it is appropriate that any recommendations for change to these provisions are made in accordance with that more specific review.

Overall, the Review Panel has concluded that the notification requirement is justified by the benefit to the community in terms of awareness of the risk associated with a product so that injury may be avoided and action by a supplier monitored to ensure the risk to consumers is satisfactorily addressed.

4.6.2 Conclusion

CONCLUSION 7

The requirement to notify the Minister of a voluntary recall of goods is justified by a net public benefit.

4.7 QUALITY STANDARDS

4.7.1 Objectives relevant or appropriate?

The Act prohibits the manufacture or supply of goods, and the supply of services, which do not comply with a quality standard prescribed under the Act in relation to those goods or services.[32] Regulations may be prescribed which regulate, for example, the design, construction, composition, materials, contents, finish, performance or other characteristics of goods. Regulations may also be prescribed which regulate the nature and quality of services and the manner in which they are to be supplied.

Quality standards are a potential restriction on market conduct because they require manufacturers to produce goods in a certain manner and using certain materials or prohibit them from manufacturing certain goods which do not comply with a quality standard. They also potentially restrict the conduct of suppliers by prohibiting them from supplying certain goods or services which do not comply with quality standards. Suppliers of services may also be required to modify the manner in which they deliver a service.

The Review Panel considers that mandatory quality standards are a **potentially serious restriction** on competition, although in practice there is no restriction on the market because no quality standards have been prescribed under the Act.

The Act states that quality standards are directed at ensuring that goods and services are reasonably fit for the purpose for which the goods are ordinarily used or the services are ordinarily supplied. However, it is apparent that provision for the prescription of quality standards was "a measure primarily designed to protect the interests of local manufacturers".[33] At the time of enactment, it appears the Government had in mind the protection of two industries in particular, the footwear and furniture industries, which were previously regulated by the *Footwear Regulation Act 1969-1972 (repealed)* and *Sale of Furniture Act 1904-1975 (repealed)*, respectively.

The introduction of the quality standards provision was also justified as addressing the problem of information asymmetry, whereby consumers are often not in a position to assess for themselves the quality of goods or services prior to purchase and use.

Given, however, that it has not been considered necessary to prescribe any quality standards since the Act came into operation, the Review Panel considers that regulation of quality standards under the Act is no longer a relevant or appropriate restriction on competition.

4.7.2 Benefits outweigh costs?

The potential costs to manufacturers and suppliers of mandatory quality standards include additional production costs to meet the designated standard, the costs associated with enhanced quality control systems as well as other costs of compliance, including record-keeping. This is in addition to the costs to the community of administrating the regulation, including testing costs.

[32] Section 29. The restriction applies to manufacture or supply in the course of a trade or business.
[33] Second Reading Speech, Hon D H L Banfield, 7 February 1979.

The potential benefits to consumers arise from a reduction in the availability of poorer quality goods. However, this would not necessarily represent a benefit to all consumers as in any given market there are likely to be consumers prepared to accept goods and services at the lower end of the quality spectrum for a correspondingly lower price.

As in many cases consumers are unable to assess the quality of goods prior to consumption, the problem of information asymmetry would result in consumers being unable to make informed decisions as to the optimum price/quality combination.

A further benefit of quality standards would be a reduction in transaction costs for consumers and costs to business also in the sense that expensive litigation could be avoided. Whereas "fitness for purpose" and "merchantable quality" are concepts which may only be determined with respect to a particular product as a result of litigation under existing consumer protection legislation, it would arguably be easier for a manufacturer to comply with a specific standard of which it can be certain at the time of manufacture.

There are not the same compelling arguments of public benefit in relation to quality standards as there are with safety standards and banning of dangerous goods and services. While the costs of testing the quality of goods and services may be relatively high for consumers compared to the costs of a centralised government agency, in many instances consumers will be in a better position to gauge the quality of goods by examining them prior to purchase than they are to gauge any potential safety risks.

However, in those situation where it would be impossible and relatively far more expensive for consumers to test products for quality and where the potential loss to be suffered by consumers is significant, it may be possible to justify the prescription of mandatory quality standards.

4.7.3 Alternatives to current regulation?

There are more viable alternatives to regulation in the case of quality standards than there are for other standards which may be prescribed under the Act. The first of such alternatives is existing secondary markets in information provision, including magazines such as "Choice" which publish reviews of ranges of products against specified performance criteria, or other magazines which concentrate on certain products such as photographic or musical equipment, as well as television programmes, particularly "lifestyle" programmes which occasionally compare or provide advice regarding goods and services.

Secondly, some manufacturers offer manufacturer's warranties, which can operate as a guarantee of quality while effectively insuring the goods against poor quality.

Thirdly, general consumer protection legislation offers a viable alternative to quality standards. The statutory warranties provisions in the *Sale of Goods Act*, *Trade Practices Act, Consumer Transactions Act* and *Manufacturer's Warranties Act* protect consumers against manufacturers and suppliers of goods and services which do not correspond with their

description, are not "fit for purpose" or "of merchantable quality".[34] Consumers will have a remedy in contract for breach of these statutory warranties.

The Review Panel recognises that the consumer protection offered by these Acts is reactive in nature, that is, the protection is afforded to consumers only after the inferior quality goods and services have been manufactured and/or supplied, while the prescription of quality standards is directed at ensuring that inferior quality goods and services never reach consumers. However, the general consumer protection Acts have a deterrent effect on manufacturers and suppliers who know they may face legal action for breach of statutory warranties.

Finally, the alternative of prescribing information standards as opposed to quality standards has been considered in assessing whether regulation of quality standards should be retained. As discussed above, when the Act was introduced, there was an intention to replace the *Sale of Furniture Act*, and the *Footwear Regulation Act* with quality and information standards to be prescribed under the Act. However, only information standards were ultimately prescribed in relation to both furniture and footwear. The information standard applicable to footwear provides that footwear must be labelled with information regarding the materials used to produce the footwear, for example, whether or not the sole and upper of the show are constructed entirely of leather.[35]

The footwear information standard is an example of an alternative method of addressing the information asymmetry problem and ensuring consumers have sufficient information to make informed choices on the price/quality spectrum.

In most cases, the costs to manufacturers of labelling goods will be less than the costs of using higher quality materials in the production of goods as may be prescribed in a quality standard. Also, the costs of compliance will be reduced, given that testing, for example, of materials composition, would not be required. Overall, the costs associated with mandatory information standards are less than those of mandatory quality standards, which means that information standards should be preferred over quality standards where they are a viable alternative.

However, there are certain cases or product types in relation to which an information standard may not be appropriate.

Since preparing the Draft Report the Review Committee has been made aware of a national approach to Standards Australia to develop minimum requirements for fuel, following recent problems with unacceptable levels of additives, such as poleuline, being added to fuel and causing damage to vehicle engines. In such a case, an information standard may not be appropriate to ensure that consumers do not suffer loss as a result of poor quality fuel. The Review Panel considers that such a situation may be an example of where a prescribed quality standard may be justified.

[34] Sections 13, 14, *Sale of Goods Act 1895;* Sections 70, 71, 74, *Trade Practices Act 1975* (Cth); Sections 6, 7, *Consumer Transactions Act 1972;* Section 4, *Manufacturers' Warranties Act 1974* (SA).

[35] Schedule 3, Part 1, *Trade Standards Regulations 2000.*

4.7.4 Conclusion

Ultimately, given that the power to prescribe quality standards does not constitute an actual restriction on competition in the absence of any prescribed quality standards, the Review Panel has concluded that it is not necessary to make a conclusive determination as to the justification of the quality standards provisions in Competition Policy terms. In light of the above argument concerning fuel additives that there may be certain instances where the prescription of quality standards may be justified, the Review Panel recommends that the power be retained under the Act.

However, the Review Panel would emphasise that any new regulation made under the Act to prescribe a standard would need to comply with the Competition Principles Agreement and be justified according to the guidelines contained in that agreement.

CONCLUSION 8

The Review Panel has concluded that, as the power to prescribe quality standards under the Act is not an actual restriction on competition in itself, and because the Review Panel concedes that there may be instances where a quality standard may be justified in competition policy terms, the power should be retained.

However, the Review Panel emphasises that any new regulation under the Act prescribing a quality standard would need to meet the requirements of the Competition Principles Agreement.

4.8 INFORMATION STANDARDS

4.8.1 Objectives relevant or appropriate?

The Act provides that it is an offence to provide, or fail to provide, information in respect of any goods or services in breach of an applicable information standard.[36] Regulations may be made which, for example, require the provision of specified information and prescribe the manner and form in which it is to be provided, prohibit the provision of information of a specified kind or in a specified manner and form and to assign a meaning to information of a specified kind in respect of goods and services. Mandatory information standards therefore constitute a restriction on market conduct.

The degree of restriction on market conduct depends on the nature of the information standard prescribed. In some cases, information standards require certain information to be printed on goods or attached by way of a label. In may cases, for example, in relation to footwear, manufacturers or importers are likely to label or otherwise mark goods with an identifying brand name in any event and the inclusion of additional information, such as the material composition of the footwear, should not involve significant additional cost. The Review Panel therefore considers that mandatory information standards constitute an

[36] Section 32. The restriction applies to a person acting in the course of a trade or business.

intermediate restriction on competition, which restriction is limited by the fact that only six product types are currently regulated by information standards.

One of the objects of mandatory information standards is to ensure that minimum information in relation to goods and services is provided to consumers to enable them to make informed choices between competing products and to ensure that information provided is accurate and non-deceptive. Another object is to prevent the risk of injury or impairment of health. In certain cases, goods and services may not be inherently hazardous, but may pose a risk of injury or impairment to health if used incorrectly. In such cases, information standards may be prescribed under the Act which require directions or instructions as to proper use to be provided to consumers with goods.

The information to be prescribed is to relate to objectively verifiable facts and the regulation therefore differs from general legislation prohibiting misleading representation and advertising. It was considered that such general legislation would not be effective in ensuring that a specific item of information is provided in relation to goods or services and that general misleading representation law tends to be concerned with the overall impression created by advertising, for example, with the use of ambiguous language or superlatives in describing goods or services rather than the provision of certain minimum information.[37]

Various information standards have previously been prescribed under the Act relating to, for example, silos and water storage tanks,[38] child carrying seats for bicycles[39] and leather goods.[40] Historically, information standards have been prescribed which were directed to safety, for example, by stipulating that certain information be provided relating to safe use of a product, while other information standards have been directed at avoiding deception of consumers or the provision of minimum information to enable consumers to make informed choices between competing products. The move towards greater national and trans-Tasman uniformity of standards has resulted in a move away from separate information standards where information relates to safety, favouring instead the prescription of safety standards in this situation.

Following the TTMRA reviews of the Regulations, conducted in accordance with Competition Policy principles, a number of information standards were revoked and some remade as safety standards. While this process identified that some prescribed information standards were no longer appropriate, for example, because four or more States and Territories did not have an equivalent information standard, because the product is no longer manufactured or because the standard has been superseded by other legislation,[41] the reviews also identified that certain information standards prescribed under the Act remain appropriate. The results of the review therefore demonstrate the continued appropriateness of mandatory information standards in achieving their objective.

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[37] Second Reading Speech, Hon D H L Banfield, 7 February 1979.

[38] Since repealed - stipulated that information as to external dimensions and capacity be provided.

[39] Since repealed - stipulated that a warning and instructions on how to safely install the seat be provided.

[40] Since repealed - stipulated that information regarding the type of leather or artificial leather be provided.

[41] The information standard applicable to motor fuel has been superseded by the *Fair Trading Act*, under which advertising of petrol prices is monitored.

The provision for mandatory information standards fills the gap in consumer protection legislation in relation to manufacturers and suppliers which are not corporations and do not come within the information standards provisions of the *Trade Practices Act.*[42]

The Review Panel considers that the objectives of mandatory information standards continue to be appropriate and achieve the objective of ensuring the provision of minimum information regarding certain goods and services.

4.8.2 Benefits outweigh costs?

The costs of mandatory information standards include increased production costs to produce and affix labels as well as compliance costs, including testing, for example, of textile composition, and record keeping. The costs of administering the provisions, including testing in some cases, should also be considered.

In many cases, manufacturers or importers of goods will label or otherwise mark goods with brand identifying information and the inclusion of further information, such as material composition, should not involve significant additional cost. Information such as material composition should be in the possession of manufacturers and costs associated with gathering the information to be provided should therefore be limited.

Further, compliance costs for business are minimised by the movement towards national and trans-Tasman uniformity of information standards.

Mandatory information standards address the problem of information asymmetry. This is evident on consideration of the types of goods in relation to which information standards have been prescribed, for example, clothing and textile products and cosmetic products. Testing the composition of these goods would involve high information acquisition costs for consumers which are reduced by centralised testing by the administering agency. However, information asymmetry alone is not necessarily sufficient justification for government intervention. It is where the risks to the public resulting from that information asymmetry are great that regulation is most likely to be justified.

For consumers who suffer allergic reactions to certain textiles or certain ingredients in cosmetic products, there are important benefits in labelling such products so consumers may make informed decisions to avoid products to which they may be allergic.

On balance, the Review Panel has formed the view that the benefits of the power to prescribe information standards outweigh the costs. However, the Review Panel points out that information standards with objectives directed more towards industry protection, which arguably standard relating to furniture is, may not be justified in accordance with competition policy principles.

[42] Section 65D, *Trade Practices Act 1975* (Cth).

4.8.3 Alternatives to current regulation?

The Review Panel considered reliance on general consumer protection legislation prohibiting misleading representation as an alternative to mandatory information standards. However, the consumer protection provisions in the *Trade Practices Act* and *Fair Trading Act*[43] are reactive, offering a remedy to consumers only after they have suffered loss as a result of deceptive suppliers. Also, these general provisions will not offer protection to consumers where no representation has been made in relation to goods, for example, where a consumer has assumed an article of clothing to have been produced with 100% cotton, in the absence of provision of any information regarding the fibre content.

While secondary markets for information, such as consumer magazines, may offer a viable alternative to mandatory information standards in some cases, there are many cases in which these would not be a satisfactory alternative to information standards. For example, magazines or other secondary markets for information provision could not provide consumers with information as to the fibre content of all textile products or items of footwear, nor would a consumer necessarily be able to distinguish between classes of opals on the basis of secondary information not relating directly to the item the consumer is contemplating purchasing.

CONCLUSION 9

The power to prescribe mandatory information standards is justified and should be retained.

4.9 PACKAGING STANDARDS

4.9.1 Objectives relevant or appropriate?

The Act provides that it is an offence to package any goods, or supply any packaged goods that have been packaged, in breach of any applicable packaging standard.[44] This is a potential restriction on market conduct because it may require producers to package goods in a certain way, using certain materials or to modify their packaging methods. Packaging standards which are in the form of labelling requirements may in practice constitute only a **trivial to intermediate restriction** on competition, given that manufacturers are likely to label goods to identify the brand name in any event and the inclusion of additional information on a label should not involve significant additional cost. However, the Review Panel recognises that mandatory packaging standards prescribing *how* goods are to be packaged, for example, the dimensions or thickness of covering or containers, are potentially a **serious restriction** on the conduct of manufacturers and suppliers**.**

[43] Sections 52, 53, 55A, *Trade Practices Act 1974;* Sections 56, 57, 58, 63, 64, *Fair Trading Act 1987.*

[44] Section 34. The restriction applies to packaging or supply in the course of a trade or business.

The Act sets out that the object of these restrictions is to prevent deceptive packaging of goods and to ensure that goods are packaged for the reasonable convenience of persons to whom they may be supplied.[45]

However, no packaging standards have been prescribed under the Act to date.

It was intended that prescribed packaging standards under the Act would replace the uniform national packaging legislation.[46] However, the provision in the Act repealing the *Packages Act 1967* was never proclaimed and that Act was eventually repealed instead in 1993 by the *Trade Measurement Administration Act 1993.*

The *Trade Measurement Administration Act 1993* and *Trade Measurement Act 1993* were enacted as part of a uniform national scheme of trade measurement legislation designed to standardise trade measurement, however it is clear that the trade measurement legislation also has a consumer protection objective in terms of preventing deceptive packaging.[47]

Whereas the provisions in the *Trade Standards Act* generally refer to the prescription of regulations which regulate how goods are packaged, for example, the thickness of packaging material or a prohibition against cavities or unoccupied space in packaging containers, the emphasis in the *Trade Measurement Act* is on regulation of information provided on packaging and in relation to pre-packaged goods. Regulations under the *Trade Measurement Act* may also prescribe the quantities in which goods may be sold as pre-packed articles and specify in certain circumstances the mass or measure in which certain goods are to be packaged.[48] Further, the *Trade Measurement Act* makes it an offence to package or sell goods if the actual measurement of the quantity of a pre-packed article is less than the measurement marked on the package.[49]

The *Trade Standards Act* set out to prevent deceptive packaging in a different manner, by providing that the composition and manner of packaging may be regulated. However, the Review Panel considers that the *Trade Measurement Act,* with its provisions aimed at regulating, primarily, minimum information provision in relation to packaging, may in fact meet at least part of the consumer protection objectives of the packaging provisions in the *Trade Standards Act.*

However, the Review Panel again emphasises that the provisions in the Act do not of themselves restrict competition. In view of the above arguments regarding the packaging provisions, the Review Panel has serious doubts that any regulations which were ultimately to be prescribed under those provisions would meet the Competition Principles criteria. However, ultimately, the Review Panel has arrived at the view that it cannot rule out the possibility that at some time in the

[45] Section 35.
[46] Second Reading Speech, Hon D H L Banfield, 7 February 1979.
[47] Preamble, *Trade Measurement Act 1993* (SA).
[48] Section 28(30)(a), *Trade Measurement Act*; Reg 27, *Trade Measurement (Pre-packed Articles) Regulations 1993.*
[49] Section 32, *Trade Measurement Act.*

4.9.2 Benefits outweigh costs?

The potential costs of packaging standards primarily consist of increased production costs of packaging goods to meet an applicable standard as well as increased compliance costs, including compliance costs incurred by the administering agency.

The potential benefits to consumers are protection from deceptive packaging, enabling potential purchasers to make informed decisions as to value for money and to readily compare goods for value for money. However, the information asymmetry argument is not as strong in relation to packaging standards, particularly those which aim to regulate package composition and thickness or unoccupied space in packaging containers, as these are aspects of packaging which consumers are arguably in a reasonable position to gauge for themselves upon careful examination of packaged goods.

It is in relation to information as to mass and volume of packaged goods which consumers are more likely to be at a significant disadvantage to producers and suppliers and this problem is arguably more appropriately addressed by information standards of the kind which may be prescribed under the *Trade Measurement Act.* The costs to producers and suppliers of labelling requirements in relation to packaging will be less than those of requirements regarding composition of covering or containers as, in many instances, a packaging standard directed at provision of information will involve merely including information as to the mass, quantity or volume of packaged goods on a label already printed to provide the brand name and producer's details.

4.9.3 Alternatives to current regulation

The Review Panel considers the prescription of regulations in relation to packaged goods under the *Trade Measurement Act* together with the misleading and deceptive conduct prohibitions in the *Trade Practices Act 1974 (Cth)* and *Fair Trading Act 1987* may be a viable and less restrictive form of regulation to meet the objectives of the packaging standards provisions. However, the Review Panel does not rule out the possibility that these alternatives may prove to be unsatisfactory in relation to a problem with deceptive packaging which may arise in the future.

4.9.4 Conclusion

In the Draft Report, the Review Panel raised the issue of whether the packaging standards provisions should be repealed. There were no submissions received by consumers or consumer groups opposing that suggestion. However, the Review Panel has ultimately concluded that because the provisions themselves, in the absence of any prescribed standards, do not result in any restriction on competition, it is not necessary that they be repealed at this time.

However, the Review Panel emphasises that any regulations made under those provisions to prescribe packaging standards would be required to be justified as complying with the Competition Principles Agreement. For the reasons set out in the arguments above, the Review Panel has reservations that any proposed packaging standards could be so justified,

however, the Review Panel is not in a position at this point in time to completely rule out that possibility.

CONCLUSION 10

The Review Panel has concluded that, as the power to prescribe packaging standards under the Act is not an actual restriction on competition in itself, and because the Review Panel concedes that it is possible that a future proposed packaging standard may be able to be justified in competition policy terms, the power should be retained.

However, the Review Panel emphasises that any new regulation under the Act prescribing a packaging standard would need to comply with the requirements of the Competition Principles Agreement.

4.10 MISCELLANEOUS

4.10.1 Requirement to provide information

Under the Act, a person may be required to furnish any information reasonably necessary for the purpose of determining whether or not any provision of the Act is being or has been complied with, whether any goods or services should be declared dangerous or whether a standard should be prescribed under the Act.[50]

The requirement to provide information represents a potential restriction on market conduct. The Review Panel considers, however, that the restriction is a **trivial restriction** as the information should be within the knowledge or possession of a manufacturer or supplier in any event and its provisions should involve no significant additional expense.

The Review Panel considers that this restriction is necessary for the effective enforcement of the Act and that it is a justified restriction on competition.

No submissions were received in relation to this issue.

4.10.2 Conclusion

CONCLUSION 11

The requirement to provide information is a trivial restriction on competition necessary for the effective enforcement of the Act and should therefore be retained.

[50] Section 16.

4.10.2 Recovery of costs of testing

Where goods or services are declared to be dangerous or found not to comply with an applicable safety standard, the Act provides that the costs of examining or testing the goods or services which led to the declaration or finding may be recovered as a debt from the manufacturer or supplier. The costs of examining or testing goods or services to ascertain the accuracy of information provided in relation to the goods and services is also recoverable where materially inaccurate information is provided in contravention of the Act.[51]

As the costs of testing may in some cases be considerable, the Review Panel had identified this to be an **intermediate restriction** on competition. However, the costs of testing by the enforcing agency would ultimately be borne by the community in any event. In light of this and noting that there will be no added restriction on market conduct where a manufacturer or supplier complies with the Act, the Review Panel considers the benefits of the restriction outweigh the costs and are justified.

CONCLUSION 12

The ability to recover the costs of testing is a justified restriction on competition and should be retained.

[51] Section 18.

Appendix 1 - Conclusions

CONCLUSION 1

The Act has the following objectives:

1.1 to ensure that the safety and health of the community is not put at risk by enabling the prescription and enforcement of safety standards with respect to goods and services as well as the temporary and permanent prohibition and recall of goods and services.

1.2 to ensure that goods and services are fit for purpose by enabling the prescription and enforcement of quality standards with respect to goods and services.

1.3 to ensure that consumers are provided with a minimum amount of information with respect to goods and services to enable them to make informed choices between goods and services by enabling the prescription and enforcement of information standards with respect to goods and services.

1.4 to prevent consumers suffering loss as a result of deceptive packing by enabling the prescription and enforcement of packaging standards.

CONCLUSION 2

The continued regulation of product standards is justified as the potential benefits to the wider community outweigh the costs and there is no viable, less regulatory alternative.

CONCLUSION 3

The ability to prescribe mandatory safety standards under the Act should be retained as the current regulation confers a net benefit to the community and no less regulatory alternative exists.

CONCLUSION 4

The power to permanently ban dangerous goods and services should be retained as the benefits of the restriction exceed the costs and there are no viable less regulatory alternatives to the ability to permanently ban dangerous goods or services under the Act.

CONCLUSION 5

The power to temporarily ban dangerous goods and services should be retained as it confers a net benefit to the community and there is no viable less-regulatory alternative.

CONCLUSION 6

The power to issue defect notices for the compulsory recall of goods should be retained as the benefits of the restriction outweigh the potential costs and there is no viable less regulatory alternative.

CONCLUSION 7

The requirement to notify the Minister of a voluntary recall of goods is justified by a net public benefit.

CONCLUSION 8

The Review Panel has concluded that, as the power to prescribe quality standards under the Act is not an actual restriction on competition in itself, and because the Review Panel concedes that there may be instances where a quality standard may be justified in competition policy terms, the power should be retained.

However, the Review Panel emphasises that any new regulation under the Act prescribing a quality standard would need to meet the requirements of the Competition Principles Agreement.

CONCLUSION 9

The power to prescribe mandatory information standards is justified and should be retained.

CONCLUSION 10

The Review Panel has concluded that, as the power to prescribe packaging standards under the Act is not an actual restriction on competition in itself, and because the Review Panel concedes that it is possible that a future proposed packaging standard may be able to be justified in competition policy terms, the power should be retained.

However, the Review Panel emphasises that any new regulation under the Act prescribing a packaging standard would need to comply with the requirements of the Competition Principles Agreement.

CONCLUSION 11

The requirement to provide information is a trivial restriction on competition necessary for the effective enforcement of the Act and should therefore be retained.

CONCLUSION 12

The ability to recover the costs of testing is a justified restriction on competition and should be retained.

Appendix 2 - Terms of reference

The *Trade Standards Act 1979* is referred by the Minister for Consumer Affairs to the Office of Consumer and Business Affairs for evaluation and report by August 2000. The review is to focus on those parts of the legislation which restrict competition or which impose costs or confer benefits on business.

Consistent with the Competition Principles Agreement, the review should assess whether any restrictions on competitive conduct contained in the *Trade Standards Act* are justified in the public interest by:

- identifying the nature and magnitude of the social, economic or other problems that the Act seeks to address;
- identifying the objectives of the Act;
- identifying the extent to which the Act restricts competition;
- identifying relevant alternatives to the Act, including less intrusive forms of regulation or alternatives to regulation;
- identifying which groups benefit from the Act and which groups pay the direct and indirect costs which flow from its operation; and
- determining whether the benefits of the Act's operation outweigh the costs.

1. METHODOLOGY AND TIMETABLE FOR REVIEW

The review should adopt the following procedures **(in accordance with the indicated timetable)**:

- Preparation and release of consultation draft report for comment **(by end October 2000)**
- Preparation of final report to Minister for Cabinet **(by mid December 2000)**
- Release of final report **(by January 2001)**

2. CONSULTATION

A consultation draft report will be released for public comment. There will be a four week consultation period commencing on the date of release of the draft report. At the end of the consultation period, submissions will be considered and comments incorporated into the final report to submitted to the Minister for Cabinet.

3. THE REVIEW PANEL

The review will be conducted by a review panel consisting of the following persons:

- Ms Judy Hughes, *Deputy Commissioner, Policy and Legal, Office of Consumer and Business Affairs;*

- Mr Adam Wilson, *Senior Policy Officer (Competition Policy), Office of Consumer and Business Affairs*;

- Ms Gillian Schach, *Legal Officer, Policy and Legislation Section, Attorney-General's Department*.

4. CONTACT OFFICER

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Appendix 3 - Consultation List and Submissions Received

Consultation List

- Australian Competition & Consumer Commission
- Australian Fine Leathers Pty Ltd
- Australian Institute of Export (SA) Ltd
- Australian International Overseas Trade Co
- Australian Opal Worldwide Gems Pty Ltd
- Australian Small Business Association Ltd
- Babes on Parade
- Baby Co
- Big W
- Cheap as Chips
- Child Health Research Institute
- Child's Play Children's Wear
- Clarks Children's Shoes
- Coles Myer Ltd
- Consumers Association of SA Inc
- Council for International trade & Commerce
- Cunningham's Warehouse Sales
- David Jones Limited
- Foodland Supermarkets
- Hardware Association of SA Inc
- Harris Scarfe Ltd
- Importers Association of SA Inc
- Jewellers Association of Australia Ltd
- Joinery Manufacturers Association
- Just Kidding
- K Mart Stores
- Kidsafe
- National Safety Council of Australia
- Newsagents Association of SA Ltd
- Office of State Ombudsman - Health Complaints Commission
- Packaging Council of Australia SA Div Inc
- Playgroup Association of SA
- Playsafe (Australia) Pty Ltd
- Qualtest c/- Woolworths (SA) Ltd
- Retail Traders Association of SA Inc
- Robyn & Jeff Enterprises
- Rossi Boots
- Salvation Army
- Sheet metal Manufacturers Assoc of SA Inc
- South Western Manufacturing
- St Vincent De Paul Society
- Sudden Infant Death Syndrome Association of SA
- Target Australia Pty Ltd
- The Australian Chamber of Manufacturers
- The Smith Family

- Toyworld - Associated Retailers Ltd

- It should also be noted that a public advertisement was published in the Advertiser advising of the release of the Draft Report.

Submissions Received

- Jarret Warren and Associates
- Argosy Hire and Sales
- Australian Competition and Consumer Commission
- Ministry of Fair Trading WA
- Commonwealth Treasury
- Department of Fair Trading NSW
- Rehabilitation Equipment Services Pty Ltd