National Competition Policy Review of the Commerce (Trade Descriptions) Act 1905 Commerce (Imports) Regulations 1940

Final Report

July 2002

August 2002

Senator the Hon Chris Ellison
Minister for Justice and Customs
Parliament House
CANBERRA ACT 2600

Dear Minister

We are pleased to present the final report of the National Competition Policy review of the *Commerce (Trade Descriptions) Act 1905* and the *Commerce (Imports) Regulations 1940*. The review was conducted by a Committee of Officials in accordance with the requirements of the National Competition Principles Agreement for assessment of all Australian legislation which may restrict competition.

You will recall that you approved terms of reference for the review in August 2001, and that the terms of reference required the review committee to report by 28 February 2002. During the initial phase of consultation relatively few stakeholders made input to the review. Consequently, the Committee agreed to seek further information through direct approaches to individual government agencies, consumer groups and industry representatives, and the reporting date was extended to allow completion of this process and full consideration of stakeholder views.

The report recommends that the *Commerce (Trade Descriptions) Act 1905* be retained with some revision to address identified current needs. The report recommends repeal of the *Commerce (Imports) Regulations 1940* on the grounds that these regulations are discriminatory. The committee recognises that some companies and industry bodies are likely to continue to lobby for retention of the Commerce (Imports) Regulations because they are perceived to confer a competitive advantage on certain sectors of Australian industry.

The Committee acknowledges the contribution of David Ward who provided valuable assistance and advice to the review, and wishes to record its thanks to him and to the Committee Secretary, Kevin Abbey.

Yours sincerely

Alan McCulloch	Colleen Kempster	Ziv Gavrilovich	John Wunsch
Chairman	Member	Member	Member

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CHAPTER 1 - INTRODUCTION

Background and objectives of the review

This review examines the *Commerce (Trade Descriptions) Act 1905* (CTD Act) and the subordinate *Commerce (Imports) Regulations 1940* (the Regulations). It was conducted in accordance with the requirements of the Competition Principles Agreement (CPA) for assessment of all Australian legislation that restricts competition.

In common with all reviews under the Commonwealth legislation review schedule, the primary aims of the review were to identify the nature of the restriction on competition, analyse the likely effect of the restriction on competition and on the economy generally, and assess and balance the costs and benefits of the legislation. In particular, the review was required to examine the effects of the legislation on business and other stakeholders, and to identify possible alternatives to the legislation.

All Commonwealth legislation required to be reviewed under the CPA is listed on the Commonwealth legislation review schedule. In this report, 'the legislation' refers to the CTD Act and the associated Regulations, unless the context requires otherwise.

The Review Process

The review was undertaken by a Committee of Officials in accordance with Terms of Reference (at Appendix A), endorsed by the Minister for Justice and Customs on 19 August 2001. The members of the Review Committee are listed in Appendix B.

The review commenced in September 2001 with national advertising and the publication of an information paper about the review, the legislation and possible issues. Open public forums were held in Sydney and Melbourne in November 2001 and several interested parties were also given, and took up, the opportunity to have individual consultations with the Committee.

During the period of public consultation, the review process was delayed by the collapse of Ansett Australia Airlines and the November 2001 Federal Election. Both these events may have diverted public interest from the review and affected the number of submissions received.

Towards the end of the public consultation process, the Committee became concerned that a considerable number of organisations potentially affected by any changes to the legislation had not had any input to the review. In the interests of presenting conclusions based on a comprehensive assessment of the effects of the legislation, and possible alternatives, the Committee sought additional written information from government agencies, consumer groups and industry. Additional invited consultation was also undertaken in Adelaide, Brisbane, Melbourne, Perth and Hobart.

The Allen Consulting Group was contracted to provide advice to the Committee in relation to the economic impact of the legislation and possible alternatives. A representative of Allen Consulting attended each of the public forums in Sydney and Melbourne. In March 2002 Allen Consulting provided advice by way of a report '*The Commerce (Trade Descriptions) Act 1905 – A Supporting Analysis for the National Competition Principles Review*' which is available on the Customs website or from the review secretariat.

National Competition Policy and the Competition Test

The Commonwealth, State and Territory governments entered into the Competition Principles Agreement (CPA) in April 1995. This Agreement established reform principles in relation to possible areas where government policy and business may affect competition. The CPA requires the review of legislation and regulation to assess restrictions on competition and, where appropriate, to recommend changes.

Under the CPA, the Commonwealth, State and Territory governments agreed to adopt the guiding principle that legislation should not restrict competition unless it can be demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation can only be achieved by restricting competition.

The CPA provides that, in assessing the costs and benefits of a restriction on competition, any relevant issue may be considered and the following matters must be taken into account where they are relevant:

- government legislation and policies relating to ecologically sustainable development; social welfare and equity considerations, including community service obligations;
- government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
- economic and regional development, including employment and investment growth;
- the interests of consumers generally or of a class of consumers;
- the competitiveness of Australian businesses; and
- the efficient allocation of resources.

The CPA also requires that each legislation review must:

- clarify the objectives of the legislation;
- identify the nature of the restriction on competition;
- analyse the likely effect of the restriction on competition and on the economy generally;
- assess and balance the costs and benefits of the restriction; and
- consider alternative means for achieving the same result, including non-legislative approaches.

History and Objectives of the Act & Regulations

The CTD Act was introduced in 1905. It sought to address concerns at the time about consumer protection, especially the adulteration of processed foodstuffs, latent defects in consumer goods, such as footwear, and a failure to label drugs and medicines correctly. There had also been some concern about poor quality exports to Britain damaging the overall reputation of Australian products.

The Act was modelled on the British *Merchandise Marks Act 1887*, and subsequent case law. It was enacted to satisfy three major objectives, namely to:

- protect legitimate traders from competitors who would mark or label their goods in a misleading manner;
- protect the Australian public health and public interest by requiring importers of manufactured goods to disclose an accurate description of their goods and the components or ingredients therein; and
- preserve the reputation of Australian industries by ensuring that inferior quality goods shall not be represented as something of a higher quality than is the case.

As it currently operates, the CTD Act regulates the description of goods on labels or other markings applied to goods imported into or exported from Australia. The Act grants the Governor-General power to make regulations requiring a trade description to be attached to goods or classes of goods specified in the regulations. Import and export of these goods is then prohibited unless they comply with the regulations. The Act also prohibits the import or export of goods that are falsely labelled. A trade description is considered false if anything contained in or omitted from it renders it false or is likely to mislead in a material respect.

A principal intention of the Act is to ensure that importers are not able to compete unfairly on the domestic market by misrepresenting the characteristics of imported goods. The Act is comprehensive in scope, in that it applies to 'any description, statement, indication, or suggestion, direct or indirect, about the nature, number, quantity, quality, purity, class, grade, measure, gauge, size, weight, origin, …..manufacture, selection or packaging of goods'. It also extends to statements about the origin and composition of materials from which goods are constituted, and actual or implied claims about intellectual property relating to the goods.

The principal sanctions of the legislation are:

- a fine of $10 000 for importing or exporting goods with a false trade description; and
- a penalty of $40 for importing any goods that are not correctly marked with a trade description as prescribed in the Regulations.

The Regulations define terms used and clarify issues raised in the Act. The main purposes of the Regulations are to:

- identify specific goods that require a trade description, including articles defined as pre-packed articles;
- characterise the attributes of a pre-packed article;
- identify goods that are not considered to be a pre-packed article; and
- specify the form, prominence and language of the label.

A wide range of diverse products was listed in the Regulations, when first made in 1940, often with highly prescriptive labelling requirements. The Committee has found no evidence of any economic analysis to support the inclusion of the listed goods.

The Regulations have been amended on several occasions and were last reviewed in 1997 to remove those considered obsolete. Minor amendments to the Regulations were also made in 1998 and 1999. The amendments did not change the categories of goods requiring labelling at that time, but removed the highly prescriptive requirements for most specific categories of goods.
While regulations are in force in regard to a range of imported goods, no regulations have been made in relation to exports.

CHAPTER 2 - THE CURRENT CONTEXT OF THE LEGISLATION

Background to the current objectives

Over the years since the enactment of the legislation, the relative importance of the original objectives has changed. Aspects of the original objectives remain valid. The Review Committee's assessment of the objectives in their current context is discussed below.

Protection of legitimate traders

The CTD Act was introduced at a time of strong protectionist tendencies. Some criticism has been levelled at the CTD Act suggesting that it restricts competition in favour of domestic manufacturers. The current environment is less protectionist and consequently the role of restriction of all kinds of imports in protecting legitimate traders has diminished. While government regulation and enforcement, including the CTD Act, and laws permitting private legal actions remain important to the protection of domestic markets from unfair competition, the principal sanctions against unfair competition are now provided by the Trade Practices Act (TPA).

Consumer Protection

The technical complexity of many goods is greater today than was the case in 1905. Changes in consumer expectations and the volume, variety and standard of products over the past 96 years have increased the importance of consumer protection. The growth in the importance of consumer protection as both an economic and political force is due to changes including:

- growth in monopoly and oligopoly market power has reduced consumer power and resulted in a distortion of market signals;
- mass produced goods have increased in complexity resulting in consumers having to increasingly rely on the claims made by manufacturers because of their inability to assess the safety or reliability of the product; and
- changes in retail marketing resulted in goods being packaged in such a way as to prevent comprehensive inspection by consumers before purchase.

Market failures resulting from the above changes have led to the rise, since the 1960s, of consumer movements that sought better protection of consumer rights. These movements led to legislative reform that increased the rights of consumers.

Government intervention has taken two forms:

1. legislation such as the Trade Practices Act, aimed at promoting competition and providing consumers with avenues for legal redress; and
2. establishment of specialist agencies tasked with regulation of areas of specific concern.

Efforts to empower consumers by ensuring that suppliers provide information that is both truthful and sufficient are consequences of the consumer movement. Consumers in general prefer to have access to as much information as possible on the goods they purchase and surveys indicate that product information is a major factor in purchasing decisions.

Interaction between the CTD Act and Other Legislation

The CTD Act creates a general prohibition on the import or export of falsely labelled goods and empowers the CEO of Customs to act to enforce these provisions. However a number of other pieces of legislation contain provisions which duplicate or complement CTD Act provisions relating to origin marking and false labelling.

Trade Practices Act

The objective of the TPA is to enhance the welfare of Australians through the promotion of fair competition and to provide for consumer protection. These objectives are similar to those set out in the CTD Act. The Acts, along with a range of other measures, achieve the objective of providing consumer protection in relation to false labelling of products, and intersect with each other in two specific areas.

1. *Origin labelling*: The TPA prohibits businesses from making a false or misleading representation concerning the place of origin of goods. The TPA defines a set of defences, or safe harbours, based on two tests of origin. The two tests, both of which must be met, are the substantial transformation test and the 50% or more cost of production or manufacture test. The provisions clarify the steps that firms may take to ensure that their country of origin labelling or promotions do not breach the TPA.

   The TPA does not mandate labelling of country of origin on any goods. However where the supplier of a good into the domestic market does make a claim about its country of origin, it will be subject to the TPA provisions relating to labelling. The only general power to require the labelling of imported goods is contained in the CTD Act.

2. *Misleading and deceptive conduct*: The TPA prohibits misleading and deceptive conduct in the course of trade or commerce. (Similar State fair trading Acts also prohibit this behaviour). Individuals who suffer damage from conduct that is found to be misleading or deceptive can take legal action against the perpetrator. Where there is a broad public interest involved, the ACCC can prosecute a supplier who has engaged in misleading or deceptive conduct.

   The CTD Act prohibits the import or export of falsely labelled goods and empowers Customs to seize such goods and prosecute the importer. False or misleading labelling of goods sold in the domestic market is prohibited by the TPA and other legislation without discrimination between domestic and imported goods. Where an imported good is found in the Australian market with a false trade description it also contravenes the CTD Act. In practice Customs does not pursue seizures once goods have been released into home consumption.

Food Standards Australia New Zealand (FSANZ) Requirements

FSANZ is responsible for administering the provisions of the Australia and New Zealand Food Standards Code. The Code sets out the required labelling on all food sold at the consumer level in Australia and New Zealand. While FSANZ is responsible for the Code itself, the Food Standards Code only becomes law through its incorporation in State, Territory and NZ legislation and its provisions are generally enforced by State, Territory and NZ health authorities as well as AQIS.

At present, under the FSANZ Code, food must be labelled with both ingredients and country of origin. The Code regulates country of origin labelling for all packaged goods and some unpackaged goods in the Australian market irrespective of their source. Imported foods must also comply with Reg 7(1)(a) of the CTD Act that requires a true description of the goods and the country in which the goods were made or produced on articles used for food or drink by man, or from which food or drink for use by man is manufactured or prepared.

While the Australia New Zealand Food Standards Code is a comprehensive system of regulation of food standards, it appears that certain unpackaged produce remains outside its labelling regime. The CTD Act is the only legislation that requires that these goods be labelled on import into the country. Enforcement of the provisions of the Food Code also appears to be fragmented.

Currently, the country of origin labelling requirements of the Code are under review and it is unclear what the outcome of that review will be. FSANZ has advised that stakeholders are evenly divided between those who want a mandatory system of country of origin labelling and those who want to rely on the provisions of the TPA and State fair trading laws. This issue has been referred to the Australia New Zealand Food Standards Council (ANZFSC) which is the Ministerial Council representing all jurisdictions, including New Zealand, for a decision that is not expected until late 2002.

Imported Food Control Act 1992 (IFCA)

This Act regulates the importation of foods into Australia and is administered by the Australian Quarantine Inspection Service (AQIS). The Act deals with matters relating to food safety by ensuring that imported food complies with the requirements of the Australian Food Standards Code (FSC) at the border. AQIS also has the responsibility at the border for administering the *Quarantine Act 1908*. AQIS has advised that identifying the country of origin is a key piece of information that is required to effectively monitor imported food for food safety purposes. The IFCA requires the importer to declare the country of origin to AQIS when lodging an application for a Food Control Certificate (FCC), (lodging an electronic entry in COMPILE is taken to be making an application for an FCC). The IFCA requires that imported food comply with the requirements of the FSC and the FSC requires that the country of origin be identified on the label. AQIS does not rely on the CTD Act to ensure that goods are appropriately labelled but rather relies on the country of origin requirements in the FSC, incorporated by reference into the IFCA.

Therapeutic Goods Act 1989

The Therapeutic Goods Administration (TGA), a business unit of the Department of Health and Ageing administers the *Therapeutic Goods Act 1989* (TG Act) and is responsible for the pre-market approval and post-market monitoring of therapeutic goods supplied, manufactured, imported into or exported from Australia. The TGA's role is to establish the safety, quality and efficacy of such goods. However there are a number of exemptions in the TG Act that allow therapeutic goods to be imported into Australia without the need for those goods to be assessed for safety, quality or efficacy. Goods that may be exempted include therapeutic goods imported for personal use, for use in clinical trials, or goods imported under the special access scheme. There is no requirement under the TG Act for such goods to carry labels that indicate these goods have been manufactured overseas, or that they have not been assessed for quality or safety under the TG Act.

Control of therapeutic goods includes the making of Therapeutic Goods Orders (TGOs) which set standards for therapeutic goods imported into, manufactured in or exported from Australia. TGO 69 sets out labelling requirements for all goods that are subject to the TG Act. The information required to be included in labels of goods supplied in or exported from Australia is extensive, but TGO 69 does not require any country of origin labelling.

The regulations under the CTD Act control labelling of medicines or medicinal preparations for internal or external use under Regulation 7(1)(b). It requires that the label contains a true description of the goods and the country in which the goods were made or produced and be affixed to the product or its packaging. These requirements continue to provide useful information to consumers about the origins of therapeutic goods, and whether these have been manufactured in Australia. This information may be particularly relevant where problems may, from time to time, occur with some products that are manufactured overseas and the goods are not amenable to recovery procedures under the TG Act.

State Labelling Requirements

State legislation imposes a range of labelling requirements on various goods. These are largely included in the relevant Trade Measurement legislation and include requirements for the name and address of the domestic supplier, truthful packaging requirements along with the correct trade measurements.

There is limited duplication of provisions between the CTD Act and the Trade Measurement Acts. The CTD Act requires that where a package is labelled with its weight it further specifies whether the measurement is net or gross. Otherwise, enforcement of measurement labelling requirements is solely the responsibility of the relevant State authorities.

IP Legislation

The Trade Marks Act 1995 and the Copyright Act 1968 both contain border measures protecting those forms of intellectual property (IP) from infringing importations. These Acts provide protection for intellectual property rights owners by granting them rights of action through the courts. Both Acts also allow intellectual property owners to make a written request to the CEO of Customs to seize imported goods that allegedly infringe on their IP rights. Where goods are seized by Customs, civil legal action is the responsibility of the intellectual property owner. Where no civil legal action is undertaken within a specified period, Customs returns the seized goods to the importer. The IP legislation contains no border measures for exported goods.

The CTD Act prohibits the import or export of goods that carry a false trade description. The definition of false trade description covers both pirate copyright and counterfeit trademark goods. Customs may seize goods that are falsely labelled, and may also prosecute breaches of the Act. Customs may take these actions under existing legislative authority.

The CTD Act also empowers the CEO of Customs to act to enforce the general prohibition on the import or export of falsely labelled goods. The intellectual property laws provide IP owners with avenues for private redress that include requesting assistance from the CEO of Customs.

Customs Act 1901

Section 2 of the CTD Act states that "the Act shall be incorporated and read as one with the *Customs Act 1901*". Seizure of goods that breach the provisions of the CTD Act must be undertaken under the Customs Act. This requires a Customs Officer to apply to a magistrate for a warrant to seize goods forfeited to the crown under the CTD Act. The Customs Act sets out the legislative framework for the procedures that must be followed once goods have been seized, and the rights of the importer.

Voluntary Codes

There is currently no mechanism for a single voluntary code to cover all the industries affected by the legislation. While it is government policy to promote self-regulatory schemes as a method of promoting efficient market outcomes without government intervention, there are limitations to their effectiveness.

Self-regulation operates most effectively where there:

- are clearly defined problems but no high risk of serious or widespread harm to consumers;
- is a single market with industry cohesiveness and an active industry association with extensive coverage; and

- is no need for government sanctions.

The CTD Act covers a wide range of products from different industries. While some of these industries have well organised associations with extensive industry coverage, eg clothing and footwear, or therapeutic goods, other industries do not. There is no single association capable of maintaining a voluntary code in relation to all matters covered by the Act.

International Treaty Obligations

Trade Related Aspects of Intellectual Property Rights

Australia is a signatory to the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) under which there is a general obligation on signatory states to provide enforcement measures for intellectual property rights (including geographical indications). Australia also has specific obligations under Article 10 of the Paris Convention to provide for the seizure upon import, or prohibition of the import of, goods bearing a false indication of source used with intent to defraud. Australia also has obligations under Article 9 of the Paris Convention (incorporated in the TRIPS Agreement) to provide for the seizure of goods unlawfully bearing a mark or trade name.

In general, Australia's trading partners are likely to have an expectation that Australia will maintain effective measures for enforcement of intellectual property rights. During negotiation of the TRIPS Agreement there was general recognition that border control mechanisms are indispensable to the enforcement of intellectual property rights. The CTD Act is not primarily intended to give effect to Article 10 of the Paris Convention in Australian law. However in practice the CTD Act partially meets Australia's obligations in this respect. Australia's obligations under this Article in relation to goods bearing a counterfeit trademark and pirated copyright goods are covered by provisions of the *Trade Marks Act 1995* and *the Copyright Act 1968*. Change to the CTD Act provisions prohibiting importation of falsely marked goods could lead to a call for an alternative legislative control for such goods as they would not be subject to Customs seizure. Changes to the CTD Act may be opposed by IP owners wanting Customs to retain powers additional to those under copyright and trade marks law.

Agreement on Technical Barriers to Trade

The WTO Agreement on Technical Barriers to Trade (TBT Agreement), to which Australia is a signatory, seeks to ensure that technical regulations and standards, including marking or labelling requirements that apply to any product, do not create unnecessary obstacles to trade.
The TBT Agreement recognises that countries have the right to impose appropriate protective measures for a range of purposes. These include protection for human, animal or plant life, health, the environment, or the prevention of deceptive practices. The Agreement also recognises that such measures must not be applied in a manner that would constitute arbitrary or unjustifiable discrimination between countries or a disguised restriction on international trade.

Article 2 of the TBT Agreement requires that, subject to the above exceptions, imported products shall not be treated less favourably than like products 'of national origin' (ie domestically sourced).

CHAPTER 3 - STAKEHOLDER VIEWS

Level of Stakeholder Interest

Initially, the Committee received eighteen written submissions from various government and private sector organisations on the CTD Act review. Approximately thirty people attended each of the public consultations held in Melbourne and Sydney during November 2001. Representation at the consultations and in the submissions was limited to a small number of interested industries and related to their particular sectoral interests. There was no representation from consumer organisations, nor did they respond to follow-up requests for a written submission.

The small number of submissions and the limited number of representatives at the public consultations has been interpreted by the Review Committee as reflecting a low level of community interest in the legislation. In order to address concerns that key stakeholder views may not have been conveyed to the Committee, it invited the participation of specific State and Territory regulators in additional consultations in Hobart, Melbourne, Brisbane, Adelaide and Perth.

The lack of input from consumers or consumer representatives is of some concern to the Committee as it has not been possible to fully account for the impact on consumers of possible changes to the legislation. Industry submissions have focused largely on the impact of the CTD Act on their members. With few exceptions they have made little attempt to assess the overall impact of the CTD Act or its removal on the community as a whole.

A summary of views put in submissions and consultations is at Appendix C. The Committee is conscious that a summary of the submissions is unlikely to constitute a totally balanced view of the benefits and costs of the Act. Rather it is likely to over-represent the interests of particular sectors of business.

Effects on Cost and Competition

The views about cost burdens associated with CTD Act compliance expressed in submissions varied greatly. Generally, where importers commented on this issue, there was consensus that the mandatory labelling requirements impose an unfair burden on importers and ultimately the consumer. Regulatory and Fair Trading/Consumer agencies, on the other hand feel that the costs are marginal, or that the absence of CTD Act requirements would impose a greater burden on other regulatory bodies, such as AQIS and State regulatory bodies.

Interaction With Other Regulation

Views about interaction of the CTD Act with other legislative instruments were varied. Importers and retailers feel that the selective nature of the list of goods requiring trade descriptions might discriminate in favour of those goods for which there are no prescribed requirements. Regulatory agencies point to the value of the CTD Act as part of a complementary web of consumer protection legislation. Some submissions commented on specific industries or other legislation.

Trade Practices Act 1974

Several submissions stated that it is unnecessary to maintain the provisions of the CTD Act in relation to both deceptive and misleading labelling and country of origin labelling on the basis that the TPA and State/Territory fair trading agencies offer sufficient protection to consumers.

The ACCC is the body responsible for administration of the TPA. In its submission the Commission stated that it considers continued border protection powers mandating labelling requirements are necessary to prevent a gap in consumer protection. The ACCC is concerned about its ability to protect consumers in relation to labelling and origin claims on imported products in the absence of the CTD Act. The ACCC would only support removal of the CTD Act if acceptable provisions with similar effect were included in the Customs Act.

The ACCC argues that the combination of the CTD Act and the TPA provides a more effective system of consumer protection than either Act is capable of providing alone.

Intellectual Property

Few submissions/consultations commented on intellectual property issues. Of these, all agree that the IP rights should be enforced at the border. One submission stated a belief that trademark and copyright infringements are best dealt with under the IP legislation. Submissions support the view that the Trade Marks Act and the Copyright Act provide adequate border enforcement powers for imports, but note that there are no corresponding powers in relation to exports.

Technical Barriers to Trade

No submissions or consultations suggested that the CTD Act prohibition on falsely described goods results in discrimination between domestic and imported goods.

Most criticism of the CTD Act related to the inconsistency between the labelling requirements for imported and domestically supplied goods. While there are inconsistencies in labelling requirements for some products, for others there are similar labelling regimes for imports and domestically produced goods that produce non-discriminatory outcomes. Submissions from paper importers allege that country of origin labelling is anti-competitive whereas domestic paper producers argue that labelling requirements promote legitimate competition.

Marks of Origin Requirements of the GATT

Some submissions argued that, in relation to products of the European Union (EU), Australia's current requirement for labelling with the country in which the goods were made or produced causes difficulties and inconveniences of a type referred to in Article IX of GATT. Products now made and sold within the EU are required by EU regulations to be labelled "Made in EU". Re-labelling to meet the CTD Act requirements imposes an additional cost on some manufacturers or importers. However, changing the CTD Act to permit labelling in accordance with EU regulations would not remove the additional cost because the TPA requires a *country* to be specified where any origin claim is made.

Food and Drink

Food is the product that attracted most interest from both industry and government regulators making submissions to the Committee. The Australian Food and Grocery Council considers that the benefits of the CTD Act outweigh the costs, and considers that control at the border is most cost effective.

The Distilled Spirits Industry Council of Australia (DSICA) supports retention of the CTD Act and seeks strengthening of the framework of labelling regulation to include appropriately enforced export provisions. The DSICA also feels that there is a need to modernise and simplify the legislation.

Submissions from food industry groups are divided on whether the Act and/or its Regulations should remain. Criticism focuses on the apparently comprehensive nature of the Food Code to argue that the regulation of food and drink by the CTD Act is no longer required and that removal would reduce duplication and improve efficiency.

Generally, industry associations support the continuation of the CTD Act provisions on misleading labelling. These provisions are seen by some as a means to improve consumer confidence in the authenticity of goods on the market . Where there is support for the continuation of the Act and its Regulations, submissions and forum participants recognise the need to clarify provisions and remove those that are irrelevant or duplicated.

Government agencies are reluctant to see the removal of the current powers under the CTD Act without their replacement by similar powers in alternative legislation. They are primarily concerned that other regimes are not as comprehensive or as effective as may have been suggested by industry submissions. Submissions suggested that removal of the CTD Act would leave a gap in protection of consumers.

Medicines

The Australian Pharmaceutical Manufacturers Association (APMA) and Australian Self-Medication Industry Inc both argue that the industry sectors they represent are sufficiently regulated by the Therapeutic Goods Administration (TGA). The TGA currently requires all therapeutic goods sold in Australia to go through a registration process, which includes registration of the manufacturing sites for each good as well as the content, safety and efficacy of the products.

Industry associations' submissions argue the CTD Act currently imposes a labelling requirement on the importers of these goods that is additional to the TGA requirements. Pharmaceuticals are often manufactured in several countries and the same product, or individual ingredients may be sourced from several different plants in different countries. This requires unique labelling for product from each international location, preventing economies of scale in label runs and increasing the complexity of label inventories. As the TGA is aware of the source country and consumers do not normally get to choose their prescription drug, the APMA argues that prescription drugs should not be subject to the country of origin provisions of the CTD Act. Some smaller pharmaceutical manufacturers do not share this concern.

Submissions from industry associations are primarily concerned with the increased cost and complexity involved in labelling goods with country of origin requirements. These submissions argue that medicines should be removed from the ambit of the CTD Act.

The exemptions in the TG Act allow for the importation of a small proportion of medicines that are outside of the full controls of the Therapeutic Goods legislation and consequential labelling requirements. The TGA expressed concern that the removal of therapeutic goods from the CTD Act may potentially result in a reduction in existing controls on importation of therapeutic goods which could lead to an increase in importation of counterfeit drugs that may increase risks to individual and community health.

Consumer Protection

Organisations making submissions and taking part in consultations are divided in their views of the consumer protection benefits of the legislation. Several submissions suggest that the original reasons for the Act are no longer valid and that adequate consumer protection is provided under other legislation, such as the TPA and the TG Act. Other submissions argued that the CTD Act labelling requirements provide information on which consumers may make informed decisions, address health and safety concerns and provide a back-up to the TPA and State/Territory fair trading legislation. Some submissions also made specific reference to the value of the CTD Act labelling provisions in improving the outcome of safety related product recalls.

Most submissions are principally interested in the mandatory labelling requirements contained in the Regulations. Submissions that specifically address the false labelling provisions support their continuation to provide protection to legitimate traders and consumers.

Enforcement, Effectiveness, and Other Issues

Enforcement

Several industry submissions suggest that border protection is the most efficient and cost effective method for the Commonwealth Government to regulate imported consumer goods. Once products enter the market, locating and removing falsely labelled product becomes much more expensive and time consuming. Removal of border protection would mean that:

- there is a possibility of less protection for consumers from products that are falsely labelled; and
- the task of controlling falsely labelled goods could only be pursued through the more expensive method of market surveillance and removal of goods.

Several submissions from the public raised issues about the enforcement of legislation. Suggestions for amendments included:

- simplify enforcement procedures to make them more effective; and
- incorporate offences and enforcement procedures in a single piece of legislation.

There is recognition in submissions that the complicated enforcement procedures resulted in only major breaches of the legislation being acted upon by Customs. Some submissions seek increased prosecutions under the Act. There are allegations that importation of non-compliant goods in some industries has impacted adversely on the domestic market position of legitimate suppliers.

Customs suggests that the Act be repealed, with some provisions retained in other legislation, such as the Trade Practices Act. Customs recognises that the requirement to obtain a seizure warrant approved by a Magistrate is a disincentive to the interception of many small consignments. Procedural difficulties such as this result in a low priority being accorded to enforcement of the Act. If the Act were to remain, Customs would prefer the introduction of administrative penalties and a major overhaul of the Act to provide for more efficient and effective administration of the provisions.

Pre-packed Paper

Submissions from paper industry representatives present opposing views on labelling requirements for pre-packed paper. Importers seek to have requirements relaxed, while local producers would prefer more stringent labelling requirements.

Export Controls

Very few submissions comment on the export provisions of the CTD Act. The Distilled Spirits Council of Australia calls for the enactment of export provisions, with more severe penalties. Views were also expressed that the reputation of Australian goods will be enhanced if they are correctly labelled. One submission suggested that IP infringements in relation to exports should be dealt with under IP legislation, not the CTD Act.

CHAPTER 4 – KEY ISSUES AND EFFECTS ON BUSINESS, CONSUMERS AND GOVERNMENT

This chapter sets out the Committee's assessments of key issues for the review and the effects of the legislation. In fulfilling its obligation to focus on those parts of the legislation that restricts competition, or impose costs or confer benefits on business, the Committee considered information available from submissions and other consultations.

Effects on Cost and Competition

Mandatory Labelling Requirements

The mandatory labelling provisions of the CTD Act may restrict competition by imposing requirements on importers to provide specific information. The Allen Consulting report indicates that mandatory labelling denies firms the ability to decide whether or not to compete by labelling their products in a certain manner, and can also distort competition in two circumstances:

1. where some products are Australian-produced (and hence do not have mandatory trade description labelling requirements) and compete against imported products (which do have mandatory trade description labelling requirements); and
2. where competing products are imported, but some are subject to the mandatory labelling requirements of the CTD Act and others are not. This occurs where the goods are substitutes. A possible example is gas appliances (not regulated by CTD Act) and electrical appliances (which are regulated).

Several submissions indicate that the labelling requirements imposed on some products could increase the cost to the importer and ultimately the consumer. Other submissions indicate that costs of labelling are inconsequential. However, assessment of the impact on competition was constrained by a lack of data.

Firms may pursue market advantage by labelling their products in a certain manner. Mandatory labelling requirements restrict this avenue of competition. Under the CTD Act only imported goods are required to meet specified requirements. At the margin, any resultant increased cost may deter importers from entering a particular market if their product cannot be supplied at a competitive price.

It is widely recognised that it is difficult to assess the effect of labelling requirements on business costs. However the cost of mandatory labelling is likely to be negligible because:

- the majority of suppliers would voluntarily supply information due to consumer demand; and
- labelling is required in other jurisdictions into which the goods are imported.

It is therefore likely that only a small percentage of suppliers actually incur increased costs due to the CTD Act requirements. The Committee formed the view that the Allen Consulting analysis of the impacts of the CTD Act and possible alternatives may overestimate the impact of the legislation. The analysis somewhat arbitrarily suggests a large potential net benefit from abolition or modification of the legislation that is unlikely to be realised.

The Committee acknowledges that some suppliers may have to meet increased administrative costs to ensure labelling complies with the requirements of the CTD Act. Increased costs also arise from re-labelling goods that are non-compliant with CTD Act requirements at importation. The Committee believes that, in most cases, these costs are small relative to the value of the goods.

Some industry sectors indicated a belief that labelling (particularly origin labelling) has significant market effects and might influence the relative price and market share of imported and locally

produced substitutable goods. Other sectors appear to believe that labelling requirements imposed on imports have little or no effect on markets. The Committee's conclusion is that in general and for the vast majority of products the impact of mandatory labelling requirements on fair and reasonable competition is of minor commercial significance.

Falsely Labelled Goods

By prohibiting the import of falsely labelled goods, the CTD Act effectively supplements the provisions of the TPA that deal with misleading and deceptive conduct. All goods supplied into the Australian market are subject to provisions of the TPA and similar State/Territory fair trading legislation. With respect to competition, the intended effect of this prohibition is that only correctly labelled imported goods are allowed to enter the domestic market to compete with Australian products.

No submissions support the view that falsely labelled products should be allowed into the market. There are strong economic and social arguments to support the prohibition on falsely labelled goods. Permitting falsely labelled goods in the Australian market would be likely to undermine legitimate traders, increase consumer loss, distort markets and impair consumer and community safety.

The Allen Consulting Group report states in respect of the prohibition on the false trade description that "the obligation that product labels for import and export should not be false (broadly defined to include misleading) is not considered to be a restriction on competition because it applies similarly to domestic products through ss52 and 53 of the Trade Practices Act and through similar provisions in State and Territory fair trading laws."[1] As this aspect of the Act does not have an impact on competition, the Committee believes that removal of the false labelling provisions of the Act on the grounds that they impact adversely on competition cannot be justified.

Allen Consulting make an alternative argument for the removal of this prohibition in their report. They argue that the CTD Act only duplicates a role already undertaken by the TPA and State and Territory fair trading laws, and that repeal of the CTD Act prohibition on false labelling would reduce duplication of government regulation.

The prohibition assists reputable traders by preventing unfair competition from incorrectly labelled goods. It also assists market transactions generally as consumers have greater confidence in the quality of the products on sale. This reduces the transactional costs involved for both consumers and business and promotes fair and efficient operation of markets.

Interaction With Other Regulation

Trade Practices Act

The CTD Act and the TPA operate together to prohibit trade in goods that are labelled in a manner that could be deceptive or misleading for consumers. There are cost and efficiency advantages in using border protection to police imported goods. However such enforcement can never be fully effective and needs to be supplemented by the more costly and time consuming policing of goods that have already entered the market.

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[1] The Allen Consulting Group **The Commerce (Trade Descriptions) Act 1905** *A Supporting Analysis for the National Competition Principles Review* Mar. 2002, p16

FSANZ Requirements / Imported Food Control Act / Therapeutic Goods Act

The Australia New Zealand Food Standards Code regulates country of origin labelling for all packaged and some unpackaged food in the Australian market irrespective of source. The divergence in public opinion on the appropriate mechanism for ensuring origin marking on food reflects the uncertainty of outcomes if the current regimes are changed. The Committee considers that there is significant overlap between the Australia New Zealand Food Standards Code and the CTD Act, but also recognises the difficulties in the enforcement of the Code.

Imported food is also subject to control under the IFCA. The targeting of goods for examination under the IFCA is achieved by profiling each tariff classification pertaining to food in the Customs computer system COMPILE. COMPILE refers food to AQIS for inspection according to the referral rates set within each profile and some of these may have an associated declaration question that must be answered by the broker with the answer having an effect on the referral rate. The Committee formed the view that the CTD Act makes only a marginal contribution to AQIS' identification and inspection program administered under the *Imported Food Control Act 1992*.

Industry and the TGA agree that there is little value in labelling goods covered by TGO 69 with the country of manufacture. Labelling of the majority of medicines is required under the TG Act, however a small proportion is not covered by TGO 69 and only requires labelling because of the CTD Act. The Committee formed the view that the CTD Act adds little to the labelling regime for those medicines clearly covered by TGO 69. However, the CTD Act does provide consumer protection for those goods that fall outside TGA controls.

Agencies such as FSANZ and the TGA provide "product specialists" to advise and regulate individual industry sectors. The Committee is of the view that to the greatest degree possible the specialist regulatory regimes should not rely on other legislation such as the CTD Act.

State Labelling Requirements

The Committee found no evidence that the slight overlap between the CTD Act and State labelling requirements has any practical effect on competition.

IP Legislation / Trade Related Aspects of Intellectual Property Rights

The border provisions of the Trade Marks Act and the Copyright Act were amended following accession to the TRIPS Agreement, thereby meeting Australia's obligations under that Agreement. The Committee considered the alternative approaches to IP rights enforcement at the border provided by the CTD Act and IP legislation. Amendments to the Trade Marks Act and the Copyright Act to comply with TRIPS requirements reflect the Government's commitment to protecting IP rights. The Committee formed the view that ability to deal with infringing IP goods under both the CTD Act and IP legislation may cause confusion for IP rights owners, importers and Customs. The Committee also formed the view that it is not appropriate for the CTD Act to provide a second avenue for protection of private rights at the border.

Customs Act 1901

The main area of interaction between the CTD Act and the Customs Act is in effecting the seizure provisions. The effective application of CTD Act provisions relies on the ability of Customs to proceed with seizure and prosecution, which will also encourage voluntary compliance with requirements. The administrative difficulties associated with seizure action coupled with the low value of the penalties do not create an environment for fully effective enforcement.

Voluntary Codes

The objectives of the CTD Act, including public health and welfare are not matters that are generally left to industry associations to police. The risk to the community of allowing either falsely labelled goods or inadequately labelled goods in the market is high. Non-compliance with an industry code may have very severe consequences for the community in relation to at least some of the goods currently regulated.

Agreement on Technical Barriers to Trade

The Agreement on Technical Barriers to Trade requires that imported products shall not be treated less favourably than like products of 'national origin'. Discriminatory conduct is allowed in specific areas such as the prevention of deceptive practices, and protection of human health and safety. The Committee notes that Article IX of GATT specifically recognises that countries may impose country of origin marking requirements on other member countries for consumer protection purposes. These marking requirements are expected to be kept to a minimum.

The CTD Act certainly imposes additional labelling requirements on certain imports beyond those required on equivalent domestic goods. However, the requirements on imports are arguably permissible, since they are necessary for purposes permitted by the Agreement, do not discriminate between other countries, and have inconsequential cost to importers. It is therefore arguable that the CTD Act is not in contravention of this international obligation.

Trans Tasman Mutual Recognition Agreement

The Trans Tasman Mutual Recognition Agreement (TTMRA) exempts the CTD Act from its operation - ie goods exported from New Zealand to Australia are subject to the CTD Act despite the existence of the TTMRA.

Consumer Protection

Mandatory Trade Description

The then Department of Industry, Science and Resources commissioned a survey in 2000 that assessed the importance of country of origin labelling to consumers.[2]. The survey results indicated that consumers place greater importance on country of origin information for some goods, including foods.

The Committee concluded that consumers value the provision of information that will allow them to make better-informed purchasing decisions.

The range of goods available to the Australian consumer may be affected by labelling requirements if these requirements dissuade some importers from entering the Australian market. Where the cost of compliance is passed on to consumers, labelling requirements may also result in higher prices.

Arguably, contemporary consumer expectations for product information continue to be partly met by the CTD Act and Commerce (Imports) Regulations. The Regulations require a specified range of consumer goods to be labelled with a trade description and their origin. For example, Regulation 15B requires prescribed information on imported boots, shoes and sandals to inform consumers whether soles, uppers and quarter linings are made from leather. Market evidence indicates that

[2] www.industry.gov.au/labelling/consumer/research.html

domestic suppliers of footwear provide the same information on their products. However, the imposition of a mandatory labelling requirement only on imported footwear clearly discriminates against importers. The effect of repeal of this regulation is difficult to predict. In the absence of this regulation, it is unclear whether importers would continue to provide equivalent consumer information, and it is also unclear what effect this might have on consumers.

A further argument for the retention of a trade description in English is that, where goods are subject to safety related recalls, consumer protection may be enhanced. Quick and easy identification of recalled items significantly improves the outcome of product recalls. The presence of a description of country of production or manufacture may assist such product identification.

The consensus view of the Committee is that, in the majority of instances, suppliers will provide the information required by consumers regardless of whether the Regulations continue to exist. Labelling practice will be driven by consumer demand for information, efficient business practices and domestic labelling requirements.

False Trade Descriptions

The prohibition on false labelling assists consumers by ensuring that information supplied with goods is accurate. False labelling may influence consumers to purchase goods that do not meet their requirements or, in more serious cases, that are dangerous or lethal.

The primary objective of the TPA provisions and the CTD Act is to promote consumer protection by prohibiting falsely labelled consumer goods. In the view of the Committee, to achieve this objective it is both reasonable and necessary for government to use a range of strategies to ensure adequate consumer protection.

The Committee notes the ACCC's concern about its capacity to protect consumers in relation to labelling and origin claims on imported goods in the absence of the CTD Act or alternative legislation with similar effect.

The Committee considers that, in practice, the prohibition on false labelling protects consumers and promotes fair competition.

Benefits and Costs of the Commerce (Trade Descriptions) Act 1905

The Review Committee came to the view that the CTD Act confers certain public benefits that could not be readily achieved by alternative means. However, the Committee also formed the view that there is no longer any substantial justification for imposing discriminatory requirements on certain goods via the *Commerce (Imports) Regulations*.

The Committee has assessed the balance between the benefits and overall costs imposed on governments and the community by the current legislation. The primary effect of the CTD Act on government expenditure is to impose on the Commonwealth the cost of providing resources to enforce the provisions of the Act. Customs has placed a low priority on the enforcement of the Act due to procedural problems associated with seizure of many shipments. Although the legislation contains prohibitions relating to goods for export and imported goods found within Australia, these provisions are rarely enforced.

Repeal of the Act could reduce the Government's capacity to provide adequate consumer protection. The Government could rely to a greater extent on the consumer protection powers under the Trade Practices Act and the relevant state and territory laws. However, enforcement through market surveillance would be required, which is an expensive and resource intensive process. The

net effect of repeal of the CTD Act might be an increase in the costs to the Commonwealth and State governments of pursuing consumer protection.

CHAPTER 5 - CONCLUSIONS AND RECOMMENDATIONS

Overview

On the basis of the evidence available to it, the Committee formed the view that the effect of the legislation on competition is generally small. However, it is clear that the Commerce (Imports) Regulations in their current form discriminate against importers of those classes of goods specified in the Regulations. There is little justification for such discrimination. The Trade Practices Act imposes sanctions against misleading and deceptive conduct in relation to all goods sold in Australia.

The existence of the Act imposes no obvious limitations on the normal operation of competitive markets, and the Committee is of the view that its provisions should largely be left in place, as a safeguard against false labelling of imports and to enable labelling requirements to be quickly imposed on imports if this is ever necessary. The Committee concluded that the intellectual property provisions of the Act should be incorporated into the relevant intellectual property legislation, and that the effectiveness and clarity of the Act would be improved by some adjustment of its language and penalty provisions.

Should the legislation be retained?

The Terms of Reference require the Committee to determine if the legislation should be retained in its current form, or, if regulation is considered appropriate, in some alternative form.

The Allen Consulting Group has concluded, in its assessment of the economic impacts of the legislation, that the prohibition of falsely labelled goods has no effect on competition but that the mandatory labelling requirements given effect by the Regulations have a small negative impact on the ability of some importers to compete in the Australian market. The Allen Consulting Group also concluded that while it is "difficult to quantify the costs and benefits of the current Act without undertaking specific producer and consumer surveys, it is likely that both the costs and benefits of the CTD Act are relatively small, and more than likely to be negative". It is the Committee's view that this is a fair and reasonable assessment of the financial impact of the legislation, and that the overall financial impact is very small.

On balance, the Committee concluded that any restrictions on competition arising from the CTD Act are marginal and that the restrictions are both reasonable and necessary to achieve socially and economically desirable objectives. The Committee also concluded that the continued existence of the Regulations, while requiring provision of information which may benefit consumers in some instances, discriminates against importers of the classes of goods specified in the Regulations.

Recommendation 1
Retain the CTD Act with amendments as set out in Recommendation 2 to address identified problems with certain provisions, and repeal the Commerce (Imports) Regulations. [Whether the legislation remains in stand-alone form, or is incorporated in the Customs Act is a matter of legislative convenience.]

What form should regulation take?

The Commerce (Trade Descriptions) Act 1905

The Committee formed the view that there are no compelling arguments for major changes to the current Act. Its objectives in relation to regulation of falsely marked goods continue to be valid, and there is a sound case for retention of the power to make regulations in case this may be needed to meet some unanticipated future situation. The Committee identified several opportunities for amendment of the Act to improve the efficiency of its administration and align its provisions with modern practice and concluded that the intellectual property provisions can more appropriately be incorporated into intellectual property legislation.

Intellectual Property
The Copyright Act 1968 and the *Trade Marks Act 1995* reflect current Government policy for border enforcement of IP rights. Changes to Government policy may arise from the outcomes of recent independent reviews[3]. Several submissions argued that powers conferred by the trademark and copyright legislation are sufficient to deal with infringing goods.

Under IP legislation, Customs may only seize infringing goods at the border when and if an IP right owner registers an objection to infringing importations. In order to restrain further trade in the seized goods, seizure of allegedly infringing goods must be followed by either civil action from the rights owner, or voluntary forfeiture of the goods to the Crown. If neither of these actions occurs, the goods are returned to the importer. This arrangement recognises that intellectual property is a private right that is being given temporary protection subject to an obligation on the rights owner to firstly register their objection with Customs and, secondly, to initiate civil action at the appropriate time.

The CTD Act provisions that relate to intellectual property predate the current specific IP legislation and allow holders of IP rights to seek protection against infringing imports via two alternative processes. The Committee believes that retention of the provisions in the CTD Act is not appropriate. The Committee also notes that the IP legislation does not contain specific measures allowing Customs border enforcement on goods for export. The only such measures are currently contained in the CTD Act, and the Committee suggests that appropriate alternative measures be incorporated into the relevant IP legislation. Any amendment to IP legislation introducing further border protection measures should be consistent with the Government's overall approach to the protection of intellectual property, taking into consideration Australia's international obligations.

Sanctions
Sanctions currently available under the CTD Act comprise forfeiture (seizure effected under the Customs Act) and prosecution. Customs must obtain a Magistrate's warrant to effect any seizure. The Committee notes that effective enforcement of the CTD Act may place a significant administrative burden on both Customs and the judicial system. The Committee considers that reform of sanctions is an essential element in improving the effectiveness of the legislation.

The penalties for a breach of the CTD Act are inconsistent with penalty provisions for similar offences contained in other Acts. The TPA now contains penalty provisions for misleading or deceptive conduct of $1.1 million for companies and $220 000 for individuals. The maximum penalty under the CTD Act is $10 000.

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[3] *Cracking down on copycats: enforcement of copyright in Australia* – House of Representatives Standing Committee on Legal and Constitutional Affairs (2000) Review of intellectual property legislation under the Competition Principles Agreement (2000)

It is now government policy to express monetary penalties in penalty points rather than cash amounts. The dollar amount of the penalty can then be amended by adjusting regulations that specify the value of a penalty unit. Currently, a penalty unit is set at $110.00. Amending the penalties to be consistent with other legislation and expressed as penalty units will increase the effectiveness of the CTD Act.

The only enforcement action currently available to Customs is to either seize the goods or, if the contravention is not considered reckless or intentional, allow re-marking to make the labelling compliant. The Committee considers that the introduction of sanctions in addition to seizure would improve the overall effectiveness and ease of administration of the legislation.

Contraventions of the Act, particularly by repeat offenders, could be dealt with through administrative penalties or fines, with the goods released to the importer after the contravention is rectified. The value of the penalty could be variable, linked to the severity of the contravention. Assessment of the severity would take account of the size/value of the shipment and the compliance history of the importer. The sanction of seizure would be reserved for the most severe contraventions. The introduction of administrative penalties into the CTD Act would be consistent with practices of Customs, and streamline the enforcement process.

In recommending the adoption of an administrative penalty regime, the Committee recognised that provisions will also be needed to cater for situations where the importer opts not to rectify the contravention, or where the importer cannot be located to finalise the case.

Where an importer decides that rectification is not viable, the only option Customs has is to seize the offending goods, unless an alternative treatment is made available. Voluntary forfeiture of contravening goods to the Commonwealth provides a solution that would streamline the finalisation of such cases.

Abandonment provisions would allow Customs to dispose of goods where the importer cannot be located to finalise the case. Appropriate safeguards would be needed to ensure that sufficient steps are taken to locate the importer, or to give the importer an opportunity to claim the goods.

Current seizure provisions require Customs Officers to obtain a warrant from a Magistrate. While this process provides safeguards by ensuring that the seizure is defensible, the Committee feels that an alternative approach to seizure could be employed which removes the obligation to obtain a seizure warrant, but retains sufficient safeguards. Such an alternative could allow Customs to seize allegedly contravening goods, subject to an internal process that provides for a rigorous review of each case in accordance with specified rules. In the event that the owner of the goods challenges the decision of Customs, the matter would be taken before a Magistrate for review.

Recommendation 2

Amend the *Commerce (Trade Descriptions) Act 1905* as follows:

1. delete S3(f) from the definition of a trade description after import and export border protection measures are incorporated in relevant intellectual property legislation, where these measures do not already exist. [Implementation of this recommendation needs to be consistent with the Government's overall approach to the protection of intellectual property and Australia's international obligations.];

2. provide penalties for contravention of the Act consistent with similar offences in other legislation;

3. provide for administrative penalties as an alternative to seizure;

4. introduce provisions to deal with voluntary forfeiture and abandonment of goods; and

5. simplify seizure provisions to reduce the administrative and procedural burden of such action.

APPENDIX A – TERMS OF REFERENCE

Terms of Reference:

Review of Commerce (Trade Descriptions) Act 1905

1. *The Commerce (Trade Descriptions) Act 1905*, and associated regulations, (collectively "the legislation") are referred to a Committee of Officials for evaluation and report by 28 February 2002. The Committee of Officials is to focus on those parts of the legislation which restrict competition, or impose costs or confer benefits on business.

2. The Review Committee is to report on the appropriate arrangements for regulation, if any, taking into account the following:

    a) the legislation should be retained in its present form only if the benefits to the community as a whole outweigh the costs and if the objectives of the legislation cannot be achieved more efficiently through other means, including non-legislative approaches;

    b) in assessing the legislation, regard should be had, where relevant, to the effects of the legislation on welfare and equity, consumer interests, the competitiveness of business including small business, and efficient resource allocation;

    c) compliance costs and the paper work burden on business, and in particular on small business, should be reduced where feasible;

    d) Australian compliance with obligations flowing from membership of the World Trade Organisation or any other international treaties that relate to the subject matter referred to in 1 above; and

    e) promote consistency between regulatory regimes and efficient regulation through the removal of unnecessary duplication.

3. In making assessments in relation to the matters in 2 above, the Committee of Officials is to have regard to the analytical requirements for regulation assessment by the Commonwealth, including those set out in the Competition Principles Agreement. The report of the Committee of Officials should:

    a) identify the nature and magnitude of the social, environmental or other economic problem(s) that the legislation seeks to address;

    b) identify whether, and to what extent, the legislation impacts on competition;

    c) examine the effects of the legislation on business and other stakeholders, taking into account the needs and legitimate expectations of businesses in regard to government regulation;

    d) examine the relationship between the requirements of the legislation and other requirements for labelling of goods for domestic sale;

e) identify alternatives to the legislation, including non-legislative approaches, analyse and, as far as reasonably practical, quantify the benefits, costs and overall effects of the legislation and any alternatives;

f) identify groups likely to be affected by the legislation and alternatives;

g) list the individuals and groups consulted during the review and outline their views;

h) examine mechanisms for increasing the overall efficiency, including minimising the compliance costs and paper burden on small business, of the legislation and, where it differs, the preferred option; and

i) recommend a preferred course of action, in light of objectives set out in 2 above.

4. In undertaking the review, the Committee of Officials is to advertise nationally, consult with key interest groups and affected parties, and publish a report.

Within four months of receiving the Committee of Officials' report, the Government intends to announce what action is to be taken, after obtaining advice from the Minister for Justice and Customs and where appropriate, after consideration by Cabinet.

APPENDIX B – THE REVIEW COMMITTEE

The Review of the Commerce (Trade Descriptions) Act under the Competition Principles Agreement is being undertaken by a Committee of Officials. The Review Committee members are:

Alan McCulloch (Chair)	Department of Industry, Tourism and Resources
Colleen Kempster	Australian Customs Service
John Wunsch	The Treasury
Ziv Gavrilovich	Australian Competition & Consumer Commission

Secretariat

Kevin Abbey	Australian Customs Service
Postal address:	Secretariat NCP Review of the Commerce (Trade Descriptions) Act Australian Customs Service Customs House 5 Constitution Avenue CANBERRA ACT 2601
Email address:	ctdareview@customs.gov.au

APPENDIX C - SUMMARY OF PUBLIC SUBMISSIONS

List of Submissions

The Review Committee received written submissions in response to the information paper and public forums, or completed questionnaires, from the following individuals and organisations.

This summary is not intended as an exhaustive account of all issues raised by respondents. It seeks to identify significant issues that relate to the Terms of Reference for the Review.

Group/Agency	Date of Submission
APIS (Australian Paper)	21/12/01
Food Standards Australia New Zealand	18/10/01
Food Standards Australia New Zealand	21/02/02
Australian Chamber of Commerce & Industry	21/12/01
Australian Competition & Consumer Commission	26/10/01
Australian Customs Service	14/01/02
Australian Customs Service (Supplement)	14/03/02
Australian Food And Grocery Council	/10/01
Australian Pharmaceutical Manufacturers Association	29/10/01
Australian Quarantine and Inspection Service	25/02/02
Australian Retailers Association	04/03/02
Australian Self-Medication Industry	16/10/01
Coles Myer Ltd	15/10/01
Concept Amenities	19/10/01
Consumer Affairs & Fair Trading Tasmanian Government	/03/02
Department of Human Services SA Government	08/03/02
Department of Human Services VIC Government	01/03/02
Dept of Tourism, Racing and Fair Trading, Queensland Government	18/10/01
Distilled Spirits Industry Council of Australia Inc.	30/11/01
Electricity Standards and Safety TAS Government	01/03/02

Food & Beverage Importers Association	16/11/01
Independent Paper Group	25/09/01
Minter Ellison	17/10/01
National Registration Authority for Agricultural and Veterinary Chemicals	08/02/02
Office of Energy WA Government	06/03/02
Office of the Technical Regulator	08/03/02
Philip Morris Limited	05/03/02
Philips	15/10/01
Public Health Services Queensland Health QLD Government	12/03/02
Tasmanian Papermills Employee Action Committee Inc.	10/01/02
The Australian Gas Association	05/03/02
The Scotch Whisky Association	30/11/01

Summary of issues discussed in submissions

The table following this page summarises comments in the submissions received in response to the information paper.

Submission	Effects on cost and competition	Interactions with other regulation	Consumer protection	Effectiveness, enforcement and other issues
APIS (Australian Paper)		GATT recognises the right of consumers to make informed purchasing decisions.	It is important not to reward importers who are attempting to deceive consumers by either completely omitting or hiding country of origin.	Regulations should be amended to explicitly include copy paper boxes and reams.
Food Standards Australia New Zealand	Removal of CTD Act would increase regulatory cost burden on State Governments and AQIS.	AFFA and AQIS submission to FSANZ review expressed concern that if CTD Act Review and FSANZ Review both recommended removal of mandatory requirements for food labelling a significant quarantine risk would result. Wants review outcome to be consistent with the review of country of origin labelling for food. FSANZ review is proceeding on the basis that country of origin labelling should not be an artificial barrier to trade.	Labelling requirements support consumer choice and possibly health and safety issues.	FSANZ supports the prohibition on falsely labelled goods. It is more effective to control goods at the border rather than trying to recall goods.
Australian Chamber of Commerce & Industry	Differing requirements across different agencies create confusion, complexity and additional compliance costs for industry.	The interests of business and consumers are best served by having a clear and consistent legislative framework that avoids duplication and onerous or costly compliance.	The TPA, together with other legislation such as the Customs Act and Australia New Zealand Food Standards Code is an effective mechanism to protect consumers and provide clear guidance to industry.	The ACCI would not object to the CTD Act being repealed, provided that adequate border surveillance and seizure provisions are in place and properly enforced.

Submission	Effects on cost and competition	Interactions with other regulation	Consumer protection	Effectiveness, enforcement and other issues
Australian Competition & Consumer Commission		The preferred approach to enforcement is reliance on the CTD Act and other specific legislative instruments with back up through TPA provisions. ACCC would not support a total repeal of the CTD Act and the Regulations in the absence of an equivalent acceptable alternative being put into place within the Customs portfolio.	The ACCC would be concerned about its ability to protect consumers in relation to labelling and origin claims on imported products in the absence of the CTD Act.	There is no guarantee that the ACCC can give the desired enforcement priority in relation to any of the imported goods listed in the Commerce (Imports) Regulations 1940.
Australian Customs Service		CTD Act provisions create confusion and unnecessary duplication with other pieces of Commonwealth legislation. Customs would favour the transfer of provisions requiring country of origin labelling and false descriptions to the TPA. Definitions and other ambiguities should be addressed in the process. Enforcement of Intellectual Property (IP) infringements should be done under IP legislation. Relevant provisions of CTD Act should be repealed. Customs advocates a change to CTD Act and TPA origin provisions to reflect WTO harmonised non-preferential rules of origin when those rules are implemented.		Administrative penalties for commerce infringements should be introduced. Customs supports the introduction of border export provisions in the Copyright Act and Trademarks Act to satisfy international obligations.

Submission	Effects on cost and competition	Interactions with other regulation	Consumer protection	Effectiveness, enforcement and other issues
Australian Food And Grocery Council		Provisions that have been superseded by other more specific legislation should be removed from the CTD Act. AFGC wants all specific provisions examined for continuing appropriateness, that is, promotion of fair competition. AFGC considers the benefits of appropriate country of origin labelling outweigh the costs.		Enforcement powers should all be within the CTD Act. Government requirements (trade descriptions, intellectual property requirements) should be enforced by the Government. Civil action to redress the failure of Government should be a last resort.
Australian Pharmaceutical Manufacturers Association	The lack of clarity of the current requirements imposes a regulatory burden in determining what is required, and a more significant burden when goods are held up by Customs for non-compliance due to a misunderstanding of requirements.	APMA considers that labelling of medicines supplied in or exported from Australia is adequately controlled by the TGA and TG069. The CTD Act provisions for therapeutic goods are unnecessary and should be repealed.	There is no need for consumers to evaluate the quality of imported medicines as this is done through the TGA.	
Australian Quarantine and Inspection Service		Labelling requirements under the IFCA are complemented by the CTD Act. Removal would not have a significant impact on the administration of the regulation of imported food for food safety purposes under the IFCA. Similarly the *Quarantine Act 1908* provides for provision of country of origin information when goods are imported that are subject to quarantine. For consistency, it is essential if kept, that labelling requirements under the CTD Act are consistent with those set down in the Australian Food Standards Code which is administered by Food Safety Australia New Zealand (FSANZ) and enforced by the Commonwealth at the border, by AQIS and by the respective Departments of Health in the States and Territories.	The country of origin information on food labels is a critical piece of information used by AQIS in enforcing the requirements of the FSC at the border.	AQIS supports retention of the current requirements for imports. Labelling of imports assists with appropriate quarantine and imported food safety inspections, increasing the effectiveness of AQIS protection measures. Labelling information allows inspectors to verify information on import documentation with the information on the goods themselves.

Submission	Effects on cost and competition	Interactions with other regulation	Consumer protection	Effectiveness, enforcement and other issues
Australian Retailers Association	CTD Act requirements add to the cost of imported goods without benefit to the consumer. CTD Act creates a compliance burden for legitimate retailers. Wording of the CTD Act is confusing and causes anxiety amongst importers. Removal of CTD Act would streamline importation of goods and eliminate an additional compliance cost.	If labelling is required it should be applied to all products not only those in the regulations. In a general sense adequate protection exists in the form of the TPA. More specific legislation applies to particular industries such as food and chemicals. CTD Act does not allow for EU labelling.	The CTD Act and regulations should be repealed. The CTD Act is redundant as industry based schemes adequately protect consumer interests. The TPA adequately protects consumers from false and misleading labelling. Consumers are not generally interested in country of origin and those that are, make their own enquiries.	Major relevance of the CTD Act is that it is applied at the point of importation. CTD Act is not a deterrent to unscrupulous traders who import falsely marked merchandise.
Australian Self-Medication Industry		The TGA regulates quality, safety and efficacy of therapeutic goods under the Therapeutic Goods Act/Regulations and ensures appropriate labelling. The CTD Act is no longer required to deal with standards and conformity assessment and country of origin of imported medicines. The Commerce (Imports) Regulations 1940 are unclear, difficult to interpret and create uncertainty and confusion. Country of origin labelling is potentially problematic, especially for labels on small containers and products with ingredients sourced from different countries. It is sufficient to label pallets or outer packaging with trade description information.	The original reason for including medicines in the CTD Act is no longer valid.	

Submission	Effects on cost and competition	Interactions with other regulation	Consumer protection	Effectiveness, enforcement and other issues
Concept Amenities Pty Ltd			Consumers should be informed as to where hotel guest amenity products are made so that they can decide for reasons of personal choice or hygiene, whether and how they wish to use them.	
Coles Myer	Legislation should not be amended if the effect is to increase compliance costs.	Legislation in respect of imported goods should be consistent with labelling requirements for domestic goods. Coles Myer supports legislation that guards against anti-competitive behaviour. Current legislation discriminates against goods listed in Regulation 7. Legislation should be clear, concise and unambiguous. Any changes should take account of globalisation. Current legislation does not permit labelling according to EU marking requirements and requires marking which is contrary to the laws of the EU.		
Consumer Affairs & Fair Trading Tasmanian Government	Cost of labelling requirements are marginal, as most goods would comply anyway.	State regulations require labelling in English. The CTD Act complements State laws by facilitating Customs intervention at the point of entry. Removal of import prohibitions would increase duplication of workload, as each jurisdiction would have to seize goods. The CTD regulations should be reviewed in regard to barriers to trade.	Labelling provides for consumer choice and informed decision-making. Removal of CTD Act would lead to an increase in consumer complaints.	The CTD Act should be retained. Border protection is more efficient/effective than market place regulation. The Agency supports labelling requirements but wants country of origin applied to all goods.

Submission	Effects on cost and competition	Interactions with other regulation	Consumer protection	Effectiveness, enforcement and other issues
Department of Human Services SA Government		There would be little impact if the CTD Act were removed as labelling requirements for therapeutic goods are covered by the TGA. If CTD Act were removed it would be up to AQIS and State and Territory Governments to enforce country of origin requirements on food. It is imperative that the CTD Act Review and FSANZ Review are co-ordinated to ensure desired outcomes are met.	Consumers expect to be able to identify the country of origin of food they buy and should be provided with the information to allow this.	It is more efficient for compliance to be checked before product is distributed for sale. Consideration of the interaction between AQIS activities and Customs is needed to assess where import requirements should be prescribed.
Department of Human Services VIC Government		CTD Act should be redrafted to reflect current conditions. There would be no major impact on regulatory area as this is controlled by the TGA and State legislation. There is an overlap between the CTD Act and the TGA, NRA and Victorian State legislation.	The CTD Act protects the community from harm caused by using or taking products which may not be what the user thinks. Consumers can make informed decisions as to whether they wish to purchase products based upon for example, political persuasion of the country of origin or a perceived lack of controls on manufacture.	Should retain powers to prevent importation of falsely labelled or foreign language labelled goods.
Distilled Spirits Industry Council of Australia Inc.	The economic and other protective benefits conferred by the CTD Act far outweigh any costs to industry involved in compliance with the Act and Regulations.	The CTD Act and Regs should be simplified.		Existing mechanisms provided by the Act and Regs should be preserved to deal with false trade descriptions and be strengthened to improve labelling controls on spirits. Regulations relating specifically to exports should be enacted under the Act, and more severe penalties imposed re export of goods bearing false trade descriptions.

Submission	Effects on cost and competition	Interactions with other regulation	Consumer protection	Effectiveness, enforcement and other issues
Electricity Standards and Safety TAS Government	As the policing function is carried out in conjunction with other matters related to products entering Australia, the cost is low.	There is no overlap with State legislation. The CTD Act is complementary.	The CTD Act and Regulations should be retained. It is more beneficial to the community to prevent goods entering the market than having to conduct recalls after the event. Country of origin labelling assists with product recalls.	It is more efficient to deal with problems at the border. Removal of the CTD Act would reduce the effectiveness of State agencies to stop the importation of unsafe or falsely labelled electrical goods.
Food & Beverage Importers Association		There is an overlap between the food legislation and the CTD Regulations. The duplication is unnecessary and removal of the CTD Act coverage would not affect the provision of information to consumers. The FBIA requests that food and drink be removed from the list of goods the importation of which is prohibited unless they bear a trade description.		
Minter Ellison		EU labelling requirements (Product of the European Union) give rise to substantial difficulties and inconveniences of the type referred to in article IX of the GATT		
National Registration Authority for Agricultural and Veterinary Chemicals		The CTD Act does not impact on the regulation of chemicals in either a positive or negative way. The NRA system is more prescriptive and as such the CTD Act does not increase the requirements on importers of chemicals.		

Submission	Effects on cost and competition	Interactions with other regulation	Consumer protection	Effectiveness, enforcement and other issues
Office of Energy WA Government		TTMRA regulations have labelling and marketing requirements and imported goods need to meet those requirements.	Important safety information is contained on labels of electrical and gas appliances. If incorrect it could lead to serious accidents or fatalities.	Market surveillance of goods in the market is much more difficult than preventing entry to the market. Country of origin labelling assists in recall measures.
Office of the Technical Regulator	Removal of the CTD Act will impose an additional financial burden at the State level in requiring additional staff to audit the sale of imported goods without a trade description.	Country of origin labelling and true description assist in performing regulatory duties under the Electrical Products Act 2000.	The removal of the CTD Act will place consumers at some additional risk that imported non-prescribed products will be misused due to lack of suitable marking.	Marking permits the tracing of suppliers of products that are consequently found to be hazardous and require recall. The best point of application is at the border by Customs. The reputation of Australian goods will be enhanced if they are accurately labelled.
Philip Morris Limited		The Technical Barriers to Trade Agreement states that countries have the right to establish protection at levels they consider appropriate. In the case of tobacco, IP rights would be infringed/destroyed should graphic warnings be mandated by Government or required as part of the FCTC.		If Customs passes the responsibility to other departments this could impact on the effectiveness of current measures taken to control counterfeit and contraband. Should the WHO proposal to incorporate restrictions in the FCTC on the export of tobacco products to other countries be successful, then Australia would be obliged to follow suit as a signatory to FCTC.
Philips (Ray Hobson)	The cost of additional words providing proof of where goods were manufactured or the country of origin of raw materials should not increase costs to any great degree.	It would be desirable for a single piece of Commonwealth legislation covering all matters to replace the current Federal and State legislation.	There is a necessity to protect consumers both in Australia and in countries to which we export, through labelling and the quality it may indicate.	

Submission	Effects on cost and competition	Interactions with other regulation	Consumer protection	Effectiveness, enforcement and other issues
Public Health Services Queensland Health QLD Government			Falsely labelled goods can pose a risk to public health and safety. It can lead to fraud and deception and impact on those businesses that operate in an honest and open manner. Labelling provides information to enable consumers to make informed choices.	Significant resources are expended on follow up actions associated with false labelling.
Queensland Dept of Tourism Racing and Fair Trading		The legislation should be retained with modification to reduce duplication or overlap with other legislation.		
Tasmanian Papermills Employee Action Committee Inc				CTD Act should continue to be enforced in relation to country of origin, specifically in regard to Regulation 8, Trade Description requirements.
The Australian Gas Association		State and Territory regulatory systems are sufficient to ensure that gas appliances are correctly labelled and certified at point of sale.		
The Independent Paper Group	Mandatory labelling requirements for pre-packed paper increases costs to the detriment of overseas exporters, importers, consumers and consuming industries.	Country of origin labelling requirements for pre-packaged paper are primarily being used to restrict competition. IPG requests the review recommend abolition of labelling provisions for paper.		

Submission	Effects on cost and competition	Interactions with other regulation	Consumer protection	Effectiveness, enforcement and other issues
The Scotch Whisky Association			The Association has a particular interest in ensuring consumers are not deceived and legitimate traders are not disadvantaged by the use of false trade descriptions.	

APPENDIX D - ACRONYMS AND ABBREVIATIONS

ACCC	Australian Competition & Consumer Commission
ACCI	Australian Chamber of Commerce and Industry
AFGC	Australian Food and Grocery Council
FSANZ	Food Standards Australia New Zealand
APMA	Australian Pharmaceutical Manufacturers Association
AQIS	Australian Quarantine Inspection Service
CEO	Chief Executive Officer
CLRS	Commonwealth legislation review schedule
COMPILE	Customs On-Line Method of Preparing Invoices from Lodgeable Entries
CPA	Competition Principles Agreement
CTD Act	Commerce (Trade Descriptions) Act 1905
Customs	Australian Customs Service
EU	European Union
FCTC	Framework Convention on Tobacco Control
FTA	Fair Trading Acts
GATT	General Agreement on Tariffs and Trade
IFCA	Imported Food Control Act
IP	Intellectual Property
IPG	The Independent Paper Group
NRA	National Registration Authority for Agricultural and Veterinary Chemicals
Paris Convention	Paris Convention for the Protection of Industrial Property
TBT Agreement	Agreement on Technical Barriers to Trade
TG Act	Therapeutic Goods Act
TGA	Therapeutic Goods Administration
TGO	Therapeutic Goods Order
The Regulations	Commerce (Imports) Regulations 1940

APPENDIX D - ACRONYMS AND ABBREVIATIONS CONTD.

TPA	Trade Practices Act
TRIPS	Trade Related Aspects of Intellectual Property Rights
WHO	World Health Organisation
WTO	World Trade Organisation