

**Department Of Foreign Affairs and Trade Submission to the
Standing Committee on Environment and Heritage Inquiry into
Plumbing Product Quality**

**TERM OF REFERENCE 3: TRADE IMPLICATIONS FOR
CONTROLLING PLUMBING PRODUCT QUALITY**

Introduction

Australia has trade obligations relevant to the regulation of plumbing product quality under the World Trade Organization (WTO) Agreements and our Free Trade Agreements (FTAs).

The following instruments contain trade obligations that may be relevant to any new Government measures to regulate plumbing product quality:

- the WTO General Agreement on Tariffs and Trade 1994 (GATT)
- the WTO Agreement on Technical Barriers to Trade (TBT)
- the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA);
- the Australia-United States Free Trade Agreement (AUSFTA);
- the Singapore-Australia Free Trade Agreement (SAFTA); and
- the Thailand-Australia Free Trade Agreement (TAFTA)

This paper outlines the basic elements underpinning Australia's trade obligations which may need to be considered if a new regulatory regime relating to plumbing product quality is developed. It also identifies notification requirements that may be relevant.

It is important to note that Australia's trade obligations will continue to apply, even if new measures relating to plumbing product quality are industry self-regulated.

Assessment of the compliance of any new regulatory scheme with Australia's trade obligations is only possible once the regulatory framework is developed and details of the framework are available. The Department of Foreign Affairs and Trade is able to provide further advice in relation to Australia's trade obligations if more detailed proposals are developed.

Basic Principles

General Most-Favoured-Nation Treatment Principle (MFN) (Article I, GATT):

This principle requires that any advantage, favour, privilege or immunity granted by one WTO Member to another country for any product, must be granted unconditionally and immediately to all like products for all other Members.

In line with the MFN principle, plumbing products imported from one trading partner must be treated no less favourably than such products imported from any other trading partner. As such, any regulatory measures that directly affect imports of plumbing products from one trading partner must apply to the imports of plumbing products from all other trading partners.

WTO rules do allow more favourable treatment for an FTA partner in respect of some matters, in particular tariffs. However, it is untested whether more favourable treatment in relation to measures regulating plumbing product quality from an FTA partner could be justified under WTO rules.

National Treatment on Internal Taxation and Regulation (Article III, GATT):

The National Treatment principle is fundamental to most trade agreements. Its objective is to avoid protectionism in the application of internal tax and regulation measures. As a rule, WTO Member countries are obliged to provide equality of competitive conditions once imported products have been cleared through customs.

The National Treatment principle includes an obligation requiring that Australia give no less favourable treatment to imported products than to domestically-produced 'like' products¹. Factors which would need to be taken into account in determining whether products are 'like' products include:

- (i) the properties, nature and quality of the products;
- (ii) the end-uses of the products;
- (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and
- (iv) the tariff classification of the products².

Therefore, under this principle plumbing products imported into Australia should be treated no less favourably than the same or 'like' plumbing products produced in Australia. "No less favourable" treatment does not necessarily mean that the plumbing products have to receive precisely identical treatment. Rather, the imported plumbing product has to be accorded equality in its competitive relationship with the 'like' domestically-produced product.

Agreement on Technical Barriers to Trade (TBT)

Definition of "technical regulations" and "standards"

Any new regulations or standards for plumbing product quality in Australia may need to comply with TBT Agreement requirements if these "regulations" or "standards" fall within the definitions of a "technical regulation" or a "standard" under the TBT Agreement³.

¹ Article III.4, GATT

² EC – Measures Affecting Asbestos and Asbestos-Containing Products, Appellate Body, WT/DS135/AB/R, paras 101-103

³ Set out in Article 2.1 of the TBT Agreement

A document is a “technical regulation” if it applies to an identifiable product or group of products, and sets forth product characteristics, including terminology, symbols, packaging, marking or labelling requirements with which compliance is mandatory⁴. A document is a “standard” if it provides, for repeated and common use, rules, guidelines or characteristics for products with which compliance is not mandatory.

Production processes and production methods which relate to product characteristics may also fall within the TBT Agreement definition of a “technical regulation” and a “standard”. As such, any changes to regulations or standards for plumbing product production processes or methods may also be covered by the TBT Agreement.

The TBT Agreement includes an MFN obligation and a national treatment obligation in respect to both “technical regulations” and “standards” as these terms are defined in the TBT Agreement⁵.

If a measure is found to be a “technical regulation” or “standard” within the meaning of the TBT Agreement, the necessity test applies.

The Necessity Test

The necessity test is found in the TBT Agreement as well as the GATT and a variety of other trade agreements. The test states that Australia can adopt measures to pursue a legitimate public policy objective if the measures are necessary to achieve that objective.

To determine whether a measure or group of measures is necessary, several factors must be weighed and considered, including:

- a) The importance of the objective being pursued;
- b) The contribution of the measures to realising the objective;
- c) The trade restrictiveness of the measures.

A comparison must also be made between the proposed measure and any reasonably available alternatives. Measures are not reasonably available where they would impose an undue burden, or if the WTO Member is incapable of taking them.

Australia’s essential obligation in this context is to ensure that “technical regulations” or “standards” as defined under the TBT Agreement are not used to create unnecessary obstacles to international trade. Australia may adopt new or modified “technical regulations” or “standards” to plumbing product quality if the measures would allow Australia to fulfil its policy objective without being unduly trade restrictive.

⁴ Annex 1, TBT; *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body, WT/DS135/AB/R, paras 67-70

⁵ Article 2.1, TBT. Please refer to above discussion in the GATT context.

Notification Requirements

Transparency in relation to proposed new measures or changes to existing measures is an important objective attached to trade agreements. Transparency involves providing trading partners with the opportunity to comment on proposed new or changed measures, particularly where compliance will be mandatory. Australia would also be required to notify proposed mandatory measures to WTO and FTA partners in certain circumstances, such as where an international standard was not followed.

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