B Legal advice

The Commission sought legal advice from: the Australian Government Solicitor (AGS) in relation to the Mutual Recognition Act 1992 (Cwlth) *and the Trans-Tasman Mutual Recognition Act 1997* (Cwlth); *and from New Zealand Crown Law (Crown Law)*[1] *in relation to the Mutual Recognition Act 1992* (NZ). *The Commission asked a series of questions related to issues raised by participants. The advice was requested for the purposes of this review only and is not intended to contribute advice about particular circumstances or for particular stakeholders. It is also important to note that lawyers may give advice on the interpretation of statutes, but the court is the final arbitrator of what legislation means and how it applies in particular circumstances.*

Part 1 of this appendix includes the questions asked by the Commission and the advice given by the AGS. Part 2 includes the advice from Crown Law.

Part 1 — AGS response to request for advice on intra-Commonwealth and trans-Tasman mutual recognition schemes

1. Thank you for your letter of 2 September 2008 seeking advice concerning the operation of the intra-Commonwealth and trans-Tasman mutual recognition regimes as established under the *Mutual Recognition Act 1992* ('MRA') and the *Trans-Tasman Mutual Recognition Act 1997* ('TTMRA') (collectively, 'the mutual recognition scheme').
2. We note that the questions annexed to your letter of 2 September were revised in the document attached to your email of 3 September 2008. The question numbers and questions to which we refer below are derived from the latter document.

[1] The New Zealand Ministry of Economic Development and Ministry of Foreign Affairs and Trade coordinated the request for legal advice in New Zealand.

3. To avoid repetition, references are made to the relevant provisions of the MRA, with the relevant provision of the TTMRA cited in a footnote where necessary.

Background

4. The following background is derived from the section headed 'Background' in the document attached to your email of 3 September.

5. The MRA is the Commonwealth legislation that implements the *Agreement between the Commonwealth of Australia, the State of New South Wales, the State of Victoria, the State of Western Australia, the State of South Australia, the State of Tasmania, the Australian Capital Territory, and the Northern Territory of Australia, Relating to Mutual Recognition* ('MR Agreement'). As parties to the MR Agreement, each State enacted legislation referring powers to the Commonwealth Parliament under s 51(xxxvii) of the Constitution to enact the MRA.

6. The TTMRA is the Commonwealth legislation that implements the *Arrangement between the Australian Parties: the Commonwealth of Australia; the State of New South Wales; the State of Victoria; the State of Western Australia; the State of South Australia; the State of Tasmania; the Australian Capital Territory; the Northern Territory of Australia; and New Zealand, Relating to Trans-Tasman Mutual Recognition* ('TTMR Arrangement'). As for the MRA, the States enacted legislation referring powers to the Commonwealth Parliament under s 51(xxxvii) of the Constitution to enact the TTMRA. New Zealand has its own *Trans-Tasman Mutual Recognition Act 1997* ('NZ TTMRA').

7. The legislation and agreements that make up the mutual recognition arrangements being reviewed by the Productivity Commission include:
   - the MR Agreement
   - the legislation that implements the MR Agreement including the MRA and each State and Territory Mutual Recognition Act
   - the TTMR Arrangement
   - the TTMRA, the NZ TTMRA and each State and Territory Trans-Tasman Mutual Recognition Act.

8. The first review of the scheme was carried out in 1998 as provided for in Part VII the MR Agreement. Part XII of the TTMR Arrangement subsequently established five yearly reviews of both the MRA and the TTMRA schemes.

The Productivity Commission was commissioned to do the 2003 review and is now undertaking a further review.

9. The two previous reviews and the initial findings of the current review suggest that parts of the MRA, the NZ TTMRA and the TTMRA need to be clarified, either by legislative change or by better information about the interpretation of the Acts. The parts of these Acts that are of greatest concern to submitters and regulators are reflected in the questions below.

Questions and short answers

10. Your questions, and our short answers, are as follows:

Q3 *Does the 'registration' required by or under legislation for a particular occupation mean that there must also be a legislative requirement for a formal register or list of persons authorised to carry out the occupation?*

A3 No.

Q4 *Under what circumstances can new legislative regimes for goods that represent health and safety risks or that harmonise business licences give rise to new occupations that fall under the MRA and TTMRA?*

A4 In our view, wherever a legislative regime requires persons to hold a qualification as a condition of doing some kind of work, that regime would generate an occupation capable of falling within the mutual recognition principle, providing that the work is capable of being regarded as an 'occupation, trade, profession or calling'.

Q5(a) *Are issues of local or specialist knowledge or language requirements able to be included as conditions?*

A5(a) Probably not, although the Acts are ambiguous. In our view, legislative amendment to eliminate this ambiguity should be considered.

Q5(c) *Is the second jurisdiction allowed to re-check or audit whether the applicant actually met the requirements in the first jurisdiction?*

A5(c) Yes, but failure to meet such a requirement is not itself a valid basis for refusing to register a person in the second jurisdiction.

Q5(d) *If a person who is being investigated gives undertakings to the first jurisdiction where he or she is registered, may the undertakings be imposed as conditions on registration in a second jurisdiction?*

A5(d) Yes, provided the undertakings are legally enforceable.

Q6 *Clarification is sought in relation to on-going requirements that may be imposed on persons registered under mutual recognition. In particular, are on-going conditions or requirements for further study and upgrading of professional skills allowed?*

A6 Probably not, although the Acts are ambiguous.

Q8 *What characteristics take 'business' licences outside the mutual recognition schemes as they relate to occupations? Note the TTMRA uses the term in Schedule 1(1)(c) and (5) but the exclusion relates only to taxes and duties and the NZ Act does not refer to business licences.*

A8(a) A licensing regime under which licences to perform work may be granted to individuals according to conditions at least one of which relates to 'the attainment or possession of some qualification' gives rise to an 'occupation', even where the other licence conditions relate to 'business' matters.

Q8(c) *Are there models of co-regulation of occupations that will be registered occupations under the MRA and TTMRA? For example, could an occupation be a registered occupation for the purposes of the Acts if legislation required that individuals must be members of a statutory body before being authorised to carry out an occupation (for example as a Chartered Accountant or Registered Engineer)?*

A8(c) Yes.

Q8(d) *Could an occupation be a registered occupation for the purposes of the MRA and TTMRA if legislation required that individuals must be members of a professional body before being authorised to carry out an occupation, but the professional body is not a statutory body?*

A8(d) Yes.

Reasons for advice

Question 3 — Does the ‘registration’ required by or under legislation for a particular occupation mean that there must also be a legislative requirement for a formal register or list of persons authorised to carry out the occupation?

11. The mutual recognition principle for occupations entitles a person who is ‘registered’ in one jurisdiction (‘the first jurisdiction’) in respect of a particular occupation to be registered in another jurisdiction (‘the second jurisdiction’) for the equivalent occupation, provided the person notifies the local registration authority of the second jurisdiction of certain prescribed matters.[2]

12. ‘Registration’ is defined in the MRA and the TTMRA[3] as follows:

> ***registration*** includes the licensing, approval, admission, certification (including by way of practising certificates), or any other form of authorisation, of a person required by or under legislation for carrying on an occupation.

13. The essence of this very broad definition is the notion of legal authorisation to carry on a particular occupation. Hence, to be ‘registered’ for the purposes of the mutual recognition scheme is to be authorised to carry on an occupation.

14. Such authorisation need not, in our view, entail the operation of a formal register containing the names of all authorised persons, although it probably does require the keeping or issuing of a record of the authorisation. The requirement for a record would be satisfied by the issue of a licence by the registration authority, and probably also by the stamping of a document to be held by the authorised person. It is unlikely, however, that there could be a registration in the relevant sense without the creation of any record of the authority’s decision to authorise. Accordingly, provided there is a record of the authorisation, a person who is authorised to carry on an occupation in a participating jurisdiction is entitled to the benefit of the mutual recognition principle under the MRA and the TTMRA even if no register of authorised practitioners of that occupation is kept in that jurisdiction.

***Question 4** — Under what circumstances can new legislative regimes for goods that represent health and safety risks or that harmonise business licences give rise to new occupations that fall under the MR Act and TTMR Act?*

Context — Some business licences include separate requirements for qualifications for employees or persons carrying out activities related to the licence. Note also that MR Act section 18(2) and TTMR Act section 17(2) relate to registration within other registration regimes. As an Australian example, State liquor licences require

[2] MRA, s 17; TTMRA, s 16.

[3] MRA and TTMRA, s 4.

employees (and all other individuals) who sell alcohol to obtain a Responsible Sale of Alcohol (RSA) certificate. Although these people are registered and approved under legislation to sell alcohol, the approvals are not widely recognised between jurisdictions. The regulations related to the RSA may form a useful example for focussing your advice. The relevant regulations are regulations 39-44 in the New South Wales Liquor Regulations 2008 and regulations 14AD and 14AG in the Western Australia Liquor Control Regulations 1989.

15. ‘Occupation’ is defined in the MRA and the TTMRA[4] as follows:

> ***occupation*** means an occupation, trade, profession or calling of any kind that may be carried on only by registered persons, where registration is wholly or partly dependent on the attainment or possession of some qualification (for example, training, education, examination, experience, character or being fit and proper), and includes a specialisation in any of the above in which registration may be granted.

16. This definition extends beyond the traditional professions to include ‘an occupation … or calling of any kind’ carried on by ‘registered persons’ for which some form of qualification is required. As noted above, the definition of registration encompasses any form of legal authorisation.

17. While work cannot be an ‘occupation’ unless it is subject to legal authorisation, work does not constitute an occupation unless it otherwise constitutes ‘an occupation, trade, profession or calling’. The dictionary meaning of ‘occupation’ is ‘one’s habitual employment; business, trade or calling’.[5] The expressions ‘trade’, ‘profession’ or ‘calling’ also connote work performed on an ongoing or habitual basis. It does not matter whether or not the work fits into a pre-existing and recognised category (such as ‘doctor’ or ‘electrician’), although the reference in the definition to ‘an occupation … or calling’ suggests that there must at least be some particular function or category by reference to which registration is granted. It also does not matter that the work is described in general terms, such as ‘food handler’.

18. However, the performance of a discrete individual task, such as signing a certificate or activating a machine, may not be an occupation in the relevant sense, particularly if the activity is performed irregularly.

19. Health and safety legislation or business licence legislation may well impose an authorisation requirement on an activity that is otherwise an ‘occupation, trade, profession or calling’, and make that activity an ‘occupation’ within the meaning of the MRA and TTMRA. However, if the activity is in the nature of a discrete task it may not be an occupation, even if it cannot be performed

[4] MRA and TTMRA, s 4.

[5] Macquarie Dictionary, online edition.

without a legal authorisation. If an individual task is required to be performed regularly, it may become difficult to tell whether it should be treated as an occupation rather than a series of tasks. It would be necessary to consider the facts in each case. By way of example, a Justice of the Peace who occasionally witnesses or certifies the execution of documents is probably not carrying on an occupation in doing so. On the other hand, a Notary Public, a substantial proportion of whose daily work consists of witnessing or certifying documents, probably would. Similarly, where the authorisation relates only to the activation of a machine, it is unlikely to constitute an occupation, unless the person authorised actually spends the bulk of his or her working time activating machines. To take the example of a forklift driver, if the driver's authorisation relates only to switching on the forklift, then there is no occupation in the relevant sense, because the switching on of the forklift comprises only a small part of driver's work. If the authorisation includes switching on the forklift along with the other activities that comprise the driver's work, then in our view there would be an occupation.

20. Accordingly, we consider that, wherever a legislative regime requires a person to hold a qualification as a condition of doing some kind of work, and that work constitutes 'an occupation, trade, profession or calling', then the work would amount to an 'occupation' for the purposes of the mutual recognition scheme.

21. In the 'context' part of this question you raise the case of a person required under State regulations to hold a Responsible Sale of Alcohol ('RSA') certificate. To take the NSW example, the *Liquor Regulation 2008* (NSW) ('the Liquor Regulation') (reg 41) provides:

> A staff member of licensed premises must not sell, supply or serve liquor by retail on the premises unless the staff member holds a recognised RSA certificate.

22. In our view, work consisting of the sale, supply or service of liquor constitutes an 'occupation, trade, profession or calling'. There is a legislative requirement (i.e. the Liquor Regulation) that this work may only be carried on by registered persons (i.e. those who hold RSA certificates). Accordingly, we consider that people engaged in the sale, supply or service of liquor in NSW are carrying on an occupation for the purposes of the mutual recognition regime. The relevant 'local registration authority' in this case is the NSW Casino, Liquor and Gaming Control Authority ('the Authority'). 'Local registration authority' is defined in the MRA[6] as follows:

[6] In s 4; TTMRA, s 4.

> ***local registration authority*** of a State for an occupation means the person or authority in the State having the function conferred by legislation of registering persons in connection with their carrying on that occupation in the State.

23. Regulation 39 of the Liquor Regulation states that RSA certificates are granted ‘by an approved training provider, on behalf of the Authority’. Accordingly, the Authority has the function of registering persons to carry on the occupation in NSW.

Question 5(a) *— Are issues of local or specialist knowledge or language requirements able to be included as conditions for registration?*

Context — There are some professions that have recognised that the TTMR Act does not allow the registration of a person to be conditional on additional qualifications. Examples of this in New Zealand include: the legal profession recognises that even though New Zealand and Australian laws are different mutual recognition applies; Australian engineers/architects practice in New Zealand without additional requirements relating to New Zealand being more earthquake prone than Australia. It would be useful if your advice on this question considers at least one specific example of what might be specialist knowledge to assist your discussion. The MR Act and TTMR Act Users’ Guide (Users Guide) includes an example on page 12 that may be useful.

24. The local registration authority in the second jurisdiction may impose the following types of conditions on the registration of a person under the mutual recognition scheme:
    - conditions that apply to the person’s registration in the first jurisdiction (MRA, s 20(5); TTMRA, s 19(5));
    - conditions necessary to achieve equivalence between occupations in the two jurisdictions (MRA, ss 20(5) and 29(2); TTMRA, ss 19(5) and 28(2)) (‘occupational equivalence conditions’); and
    - other conditions, provided they are not more onerous than would be imposed in similar circumstances (having regard to the applicant’s qualifications and experience) if registration were effected other than under the mutual recognition scheme (MRA, s 20(5); TTMRA, s 19(5)) (‘general conditions’).

25. Conditions that apply to the person’s registration in the first jurisdiction have no bearing on the present question. The extent to which the other types of conditions allow for the imposition of requirements relating to local or specialist knowledge or language proficiency is considered below.

Occupational equivalence conditions

26. Can a registration authority impose an occupational equivalence condition that requires a person to demonstrate local or specialist knowledge or language proficiency ('a local or specialist knowledge requirement')? In our view, although there is a reasonable contrary argument, the authorities suggest that such a condition could not be imposed.

27. The mutual recognition principle only operates where registration is sought 'for the equivalent occupation'. Section 29 of the MRA[7] sets out the general principles for determining whether occupations are equivalent. In substance, it provides that equivalence is to be determined by reference to the 'activities authorised to be carried out under the registration'. If the authorised activities are substantially the same, there is equivalence. If they are not substantially the same, s 29(2) of the MRA[8] provides that conditions may be imposed 'so as to achieve equivalence between occupations'. A condition imposed in order to achieve equivalence between occupations is logically anterior to the existence of an equivalent occupation. Accordingly, such a condition is not subject either to the mutual recognition principle or to the exception to that principle.[9]

28. If the occupation in the second jurisdiction encompasses more authorised activities than the occupation in the first jurisdiction, then, theoretically, the imposition of conditions may address this difference in either of two ways. First, the conditions may restrict the range of activities that an applicant may undertake in the second jurisdiction so that they conform to the activities for which the applicant has authorisation under his or her registration in the first jurisdiction. In our view, conditions of this sort may be validly imposed under s 29(2) of the MRA.

29. Alternatively, equivalence could be achieved by imposing conditions that make registration in the second jurisdiction contingent on the applicant possessing qualifications or experience that demonstrate competence in the relevant additional activities. To take the example of pest controllers to which you refer in the 'context' part of this question, equivalence could be achieved by imposing a requirement on applicants from States with cooler climates to show that they have qualifications in, or experience with, the use of chemicals that control termites.

30. The words of s 29(2) are, *prima facie*, broad enough to encompass this approach. However, the case law suggests that the power to impose conditions

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[7] TTMRA, s 28.

[8] TTMRA, s 28(2).

[9] MRA, s 17(2); TTMRA, s 16(2).

of equivalence is a power to specify the activities that may be carried out under the registration.[10] AGS has generally taken the view that a condition relating to qualifications or experience probably cannot be described as a condition specifying the activities that may carried out under the registration, and, therefore, that such a condition would appear to be precluded by the authorities. Nevertheless, given the open-ended wording of s 29(2), we consider that there remains at least a reasonable argument that conditions of this sort may be imposed. Should that argument be accepted, conditions imposing a local or specialist knowledge requirement could be imposed provided they are directed towards achieving equivalence between occupations.

31. In light of the discussion above, we consider that the proper scope of the power to impose occupational equivalence conditions under s 29 of the MRA[11] remains unclear, although on the present state of the authorities a narrower construction (that would preclude the imposition of local or specialist knowledge requirements) should probably be preferred. In the absence of a clear pronouncement by an appellate court, this ambiguity can only be resolved by amending the legislation. In our view, legislative amendment should be considered.

General conditions

32. Can a registration authority impose a general condition imposing a local or specialist knowledge requirement? In our view, the Acts provide no clear answer to this question, although the better view is probably that such a condition could not be validly imposed.

33. As noted above, the mutual recognition principle in s 17(1) of the MRA[12] entitles a person who is 'registered' in the first jurisdiction in respect of a particular occupation to be registered in the second jurisdiction for the equivalent occupation, provided the person notifies the local registration authority of the second jurisdiction of certain prescribed matters. On the other hand, s 20(5) of the MRA[13] allows the local registration authority to impose general conditions on registration, provided that they are not 'more onerous than would be imposed in similar circumstances (having regard to relevant

[10] *Re Rowe and New South Wales Police Service* (1997) 47 ALD 442 at 444; *Board of Examiners under the Mines Safety & Inspection Act 1994 (WA) v Lawrence* (2000) 100 FCR 255 at 275-6 per French J.

[11] TTMRA, s 28.

[12] TTMRA, s 16(1).

[13] TTMRA, s 19(5).

qualifications and experience)' if registration were effected other than under the mutual recognition scheme.[14] Both provisions are in Part 3 of the MRA/TTMRA and are expressed to the 'subject to this Part'.[15] It is, therefore, unclear which provision was intended to be paramount.

34. If a local or specialist knowledge requirement is a condition of registration for all persons carrying on the relevant occupation in the second jurisdiction, then the imposition of a condition requiring an applicant from another jurisdiction to meet that requirement would not be 'more onerous than would be imposed in similar circumstances ... if it were registration effected apart from this Part'. It could be argued, therefore, that s 20(5) operates as an exception to the mutual recognition principle that authorises the imposition of such a condition. Certainly, there is nothing in the wording of s 20(5) itself to suggest that the power to impose conditions is limited other than by the prohibition on discriminatory conditions.

35. Alternatively, it may be argued that the power to impose conditions is subject to the mutual recognition principle and its exceptions. Subsection 17(2) of the MRA[16] provides that laws regulating the manner of carrying on an occupation in the second jurisdiction apply, so long as those laws 'are not based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation'. Similar provision is included in s 20(4) in relation to continuance of registration in the second jurisdiction. Also, s 20(1) provides that a person is entitled to be registered in the second jurisdiction 'as if the law of [the second jurisdiction] expressly provided that registration in [the first jurisdiction] is a sufficient ground of entitlement to registration'. It can reasonably be argued that these provisions indicate that s 20(5) does not authorise the imposition of conditions which require a person to comply with any requirements that are additional to the requirements for registration in the first jurisdiction.

36. Assuming that ss 17(2), 20(4) and 20(1) do not have the effect of limiting the scope of s 20(5) in this way, there is a reasonable argument that the general principles of statutory interpretation would have that effect. A provision must be interpreted in its legislative context, and a construction that would promote the purpose or object underlying the Act must be preferred to a construction

[14] MRA, s 20(5); TTMRA, s 19(5).

[15] MRA, s 17(1) (mutual recognition principle) and s 20(6) (power to impose conditions); TTMRA, s 16(1) (mutual recognition principle) and s 19(6) (power to impose conditions).

[16] TTMRA, s 16(2).

that would not promote that purpose or object.[17] Further, a statutory power must be exercised for the purpose for which it is conferred.

37. Section 3 of the MRA sets out the principal purpose of the Act, which is to enact legislation 'for the purpose of promoting the goal of freedom of movement of goods and service providers in a national market in Australia. Section 3 of the TTMRA provides that the Act's principal purpose is to enact legislation 'for the purpose of recognising within Australia regulatory standards adopted in NZ regarding goods and occupations'. These purposes are also reflected in the long titles of the MRA: 'An Act to provide for the recognition within each State and Territory of the Commonwealth of regulatory standards adopted elsewhere in Australia regarding goods and occupations'; and the TTMRA: 'an Act to provide for the recognition within Australia of regulatory standards adopted in New Zealand regarding goods and occupations'.

38. The effect of mutual recognition schemes in general was described by French J in *Board of Examiners under the Mines Safety & Inspection Act 1994 (WA) v Lawrence* (2000) 100 FCR 255 at 257 ('*Lawrence*'), in these terms:

> ... mutual recognition schemes ... involve an effective transfer, at least in part, of regulatory authority from one jurisdiction, the home, to another, the host. The recognition they require is of the equivalence or compatibility or, at least acceptability, of the home jurisdiction's regulatory system. Mutuality mandates reciprocal and simultaneous reallocation of authority. Mutual recognition schemes involve the reconciliation of trade and regulatory objectives ...

39. In light of the above, a more restrictive construction of the power to impose conditions under s 20(5) is arguably more consistent with the purposes of the mutual recognition scheme.

40. However, although this construction is probably more likely to be accepted by a court, the Acts' failure to state clearly whether the power to impose conditions is subject to the mutual recognition principle, or vice versa, makes it difficult to express a firm conclusion. This is clearly a matter with potentially significant implications for the operation of the mutual recognition scheme. In our view, consideration ought to be given to amending the MRA and the TTMRA to eliminate this ambiguity.

***Question 5(c)** — Is the second jurisdiction allowed to re-check or audit whether the applicant actually met the requirements in the first jurisdiction?*

Context — Although some jurisdictions recognise that they cannot impose additional requirements on applicants for registration under the TTMR Act, they

[17] See *Acts Interpretation Act 1901*, s 15AA.

would like to be able to be able to verify for themselves those things that the first jurisdiction required for registration. In particular, some jurisdictions have requirements that the person has no criminal convictions but they accept a self declaration as evidence. A second jurisdiction may want to confirm the requirement by doing a police check.

41. The mutual recognition regime places no restrictions on the ability of the second jurisdiction to *check or investigate* whether an applicant has met the requirements of registration in the first jurisdiction.[18] However, should the registration authority of the second jurisdiction reach the view that an applicant has not met the requirements of registration in the first jurisdiction, then, unless the non-compliance goes to the accuracy of one of the matters to be dealt with in the notice under s 19(2)[19] (and hence to the grounds on which the authority may refuse registration under s 23(1)[20]), the non-compliance cannot be relied on as a basis for refusing to grant registration to that person in the second jurisdiction.

42. The second jurisdiction's inability to 'look behind' the first jurisdiction's registration was confirmed by French J in *Lawrence* (at 281-2):

> It is registration for an occupation in the State of original qualification that is the subject of recognition, not examination for that occupation. The objective of mutual recognition is to allow the legal entitlement to carry on an occupation in one State to be recognised and the like legal entitlement for an equivalent occupation conferred in the second State. To say this is to simply restate the effect of the mutual recognition principle in s 17:
>
> > " ... a person who is registered in the first State for an occupation is, by this Act, entitled after notifying the local registration authority of the second State for the equivalent occupation:
> >
> > (a) to be registered in the second State for the equivalent occupation;
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> …
>
> It is perhaps useful to refer back to the Second Reading Speech which stated the guiding principle in relation to mutual recognition of occupational qualifications thus:
>
> > "If someone is assessed to be good enough to practise a profession or occupation in one State or Territory, then they should be able to do so

[18] Indeed, s 19(h) of the MRA provides that an applicant must give consent to:

> the making of inquiries [sic] of, and the exchange of information with, the authorities of any [participating jurisdiction] regarding the person's activities in the relevant occupation or otherwise regarding matters relevant to the notice.

[19] TTMRA, s 18(2).

[20] TTMRA, s 22(1).

> anywhere in Australia." (Australia, House of Representatives, *Debates* (1992), p 2433)

For occupations which are substantially the same it was said:

> "Local registration authorities will be required to accept the judgment of their interstate counterparts of a person's educational qualifications, experience, character or fitness to practice." (Australia, House of Representatives, *Debates* (1992), p 2433).

The underlying premise, it was acknowledged, is that "the existing regulatory arrangements of each State or Territory generally provide a satisfactory set of standards" (at 2433).

43. It follows that it is an essential feature of the mutual recognition regime that the second jurisdiction must accept the first jurisdiction's judgment that a person has satisfied the requirements for carrying on the relevant occupation. Neither the MRA nor the TTMRA provides any recourse if the second jurisdiction considers that the first jurisdiction 'got it wrong'.

***Question 5(d)** — If a person who is being investigated gives undertakings to the first jurisdiction where he or she is registered, may the undertakings be imposed as conditions on registration in a second jurisdiction?*

Context — The MR Act and TTMR Act allow conditions imposed on a person in the first jurisdiction to be included in the second jurisdiction's registration. However, when a person is being investigated, some jurisdictions require undertakings from the person in relation to what activities can be carried out during the investigation. There are two types of questions that arise: one is about whether undertakings can be considered 'conditions'; and the other is about whether the undertakings or conditions from the registration in the first jurisdiction can be imposed by the second jurisdiction after the person is already registered in the second jurisdiction.

44. This question raises two issues: (a) whether undertakings given by a person being investigated constitute 'conditions' for the purposes of the mutual recognition scheme; and (b) whether undertakings/conditions connected with a person's registration in the first jurisdiction can be imposed by the second jurisdiction after the person has already been registered in the second jurisdiction.

45. We assume that a person 'being investigated' is either the subject of disciplinary (or criminal or civil) proceedings or that the investigation is made in anticipation of such proceedings.

Do undertakings given by a person being investigated constitute ‘conditions’ for the purposes of the mutual recognition scheme?

46. Section 33 of the MRA (s 32 of the TTMRA) relevantly provides:

> (1) If a person’s registration in an occupation in a State:
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> (a) is cancelled or suspended; or
>
> (b) is subject to a condition;
>
> on disciplinary grounds, or as a result of or in anticipation of criminal, civil or disciplinary proceedings, then the person’s registration in the equivalent occupation in another State is affected in the same way.
>
> …
>
> (4) This section has effect despite any other provisions of this Part.

47. ‘Conditions’ are defined in the MRA and the TTMRA[21] as follows:

> ***conditions***, when used in relation to occupations, means conditions, limitations or restrictions.

48. Where a person registered in respect of an occupation in a jurisdiction gives *binding* undertakings (we assume to the registration authority in that jurisdiction), and those undertakings limit or restrict any aspect of the person’s entitlement to carry on the occupation in that jurisdiction, then, in our view, those undertakings constitute ‘conditions’ for the purposes of the mutual recognition scheme.

49. Accordingly, where a person gives binding undertakings ‘in anticipation of criminal, civil or disciplinary proceedings’, then that person’s registration in the relevant jurisdiction is ‘subject to a condition’ for the purposes of s 33(1) of the MRA and s 32(1) of the TTMRA. This means that the person’s registration in the second jurisdiction is ‘affected in the same way’, i.e. subject to the same undertakings.

50. Where the undertakings are *not binding*, in the sense that they are not legally enforceable, we consider that they are unlikely to constitute conditions. This is because, in our view, a ‘limitation’ or ‘restriction’ involves a legally enforceable curtailment of a person’s scope for action.

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[21] MRA and TTMRA, s 4.

Can undertakings/conditions connected with a person's registration in the first jurisdiction be imposed by the second jurisdiction after the person has already been registered in the second jurisdiction?

51. The mutual recognition regime appears to draw a distinction between the initial registration of a person in the second jurisdiction, which may be the subject of conditions, and the continuance of that registration, which is subject to the law of the second jurisdiction.

52. Section 20 of the MRA (s 19 of the TTMRA) relevantly provides:

    (3) Once a person is registered on that ground [i.e. registration in the first jurisdiction], the entitlement to registration continues, whether or not registration (including any renewal of registration) ceases in the first State.

    (4) Continuance of registration is otherwise subject to the laws of the second State, to the extent to which those laws:

    (a) apply equally to all persons carrying on or seeking to carry on the occupation under the law of the second State; and

    (b) are not based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation.

53. The effect of this provision is, in our view, to place the terms on which a person *continues to be registered* in the second jurisdiction (as distinguished from the terms on which the person is registered *in the first place*) within the ambit of the laws of the second jurisdiction concerning the relevant occupation. This conclusion is consistent with the Explanatory Memorandum for the Mutual Recognition Bill,[22] which relevantly states:

    Clause 20 - Entitlement to registration and continued registration

    21. The clause provides that once a person lodges a notice under clause 19 in the second State the person is entitled to be registered in the equivalent occupation and the entitlement continues (even if the registration in the first State ceases) so as to enable renewal of registration in the second State. *Continuance of registration is otherwise subject to the law of the second State.*

    (Emphasis added)

54. Subject to our observations below, the registration authority of the second jurisdiction loses the capacity to impose conditions on a person once registration in that jurisdiction has been granted. Any further restrictions or limitations on a person's entitlement to carry on the relevant occupation is a matter for the relevant law in that jurisdiction.

[22] The Explanatory Memorandum for the Trans-Tasman Mutual Recognition Bill is in the same terms.

55. However, s 33 of the MRA[23] is expressly stated to have effect ‘despite any other provisions of this Part’. ‘This Part’ is Part 3, which also includes s 20 of the MRA.[24] In our view, this means that s 33 operates as an exception to the general rule that continuance of a person’s registration is subject to the law of the second jurisdiction. This conclusion is consistent with the Explanatory Memorandum for the Mutual Recognition Bill,[25] which relevantly states:

> **Clause 33 - Disciplinary action**
>
> 38. The clause provides that if a person’s registration in an occupation in a State is cancelled or suspended, or subject to a condition, on disciplinary grounds or as a result of or in anticipation of criminal, civil or disciplinary proceedings, the person’s registration in an equivalent occupation in another State is affected in the same way (whether or not the registration in the other State was effected under the proposed Act). The local registration authority of the other State may in such cases reinstate the registration or waive conditions if it thinks it appropriate.

56. It is also consistent with paragraph 5.2.3 of the TTMR Arrangement, which states:

> 5.2.3 — The Local Registration Authority may suspend or terminate Registration if it becomes aware that a person has had his or her Registration suspended or terminated in any jurisdiction or is otherwise personally prohibited from practising as a result of criminal, civil or disciplinary proceedings in any jurisdiction.

57. Although paragraph 5.2.3 talks of a person being prohibited from practising as a result of proceedings (as opposed to having given undertakings in anticipation of such proceedings), it is clear that the local registration authority may take such action *after* the relevant person has been registered in that jurisdiction.

58. The effect of the s 33 of the MRA was considered in *Schulz v Medical Board of Queensland* [2001] FCA 1771. Kiefel J held that s 33(1) of the MRA provides for the automatic imposition of the same condition, or other disciplinary action, where a person’s registration has been rendered subject to that condition in another State. Clearly, this includes circumstances where the condition is imposed after registration in the second State.

59. Accordingly, we consider that binding undertakings given ‘in anticipation of criminal, civil or disciplinary proceedings’ in the first jurisdiction

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[23] TTMRA, s 32.

[24] TTMRA, s 19.

[25] The Explanatory Memorandum for the Trans-Tasman Mutual Recognition Bill is in the same terms.

automatically apply to the person's registration in the second jurisdiction even where that person has already been registered in the second jurisdiction.

***Question 6** — Clarification is sought in relation to on-going requirements that may be imposed on persons registered under mutual recognition. In particular, are on-going conditions or requirements for further study and upgrading of professional skills allowed?*

Context — MR Act section 20 and TTMR Act section 19 may limit on-going requirements for training and further experience. Some jurisdictions question whether they can require persons registered under mutual recognition to accumulate further qualifications even if they require all other registered person to do so.

60. In our view, a registration authority may only impose conditions at the time of registration. We base this conclusion on the words of s 20(5),[26] which speaks of a registration authority imposing conditions 'on registration', and also on s 20(4),[27] which provides that 'continuance of registration is otherwise subject to the laws of the second' jurisdiction. The effect of these provisions, taken together with the balance of s 20, is to establish a distinction between initial registration in the second jurisdiction (at which point conditions may be applied by the registration authority) and the continuation of registration in the second jurisdiction (which is governed by the laws of that jurisdiction).

61. This means that if a registration authority wanted to impose ongoing conditions, including conditions relating to further study or upgrading of professional skills, it could only do so at the time of registration. Such a condition need not entail an immediate obligation to do something. For example, it could simply take the form of a requirement to comply with the continuing education requirements prescribed by the relevant professional body from time to time.

62. However, in our view, such a condition would be problematic for the same reasons described in our answer to question 5(a) above concerning local or specialist knowledge requirements. In particular, a condition of this sort would be vulnerable to the argument that it constitutes a requirement 'based on the attainment or possession or some qualification or experience relating to fitness to carry on the occupation' as per s 17(2)(b)[28]. Moreover, even if such a requirement were imposed by a law of the second jurisdiction rather than under a condition, that requirement would be vulnerable to the same argument,

[26] TTMRA, s 19(5).

[27] TTMRA, s 19(4).

[28] TTMRA, s 16(2)(b).

albeit based on the prohibition in s 20(4)(b).[29] Accordingly, we consider that there is a substantial risk that an ongoing requirement of the sort contemplated by your question would be invalid, whether imposed under a condition or by a law of the second jurisdiction.

Question 8(a) *— What characteristics take 'business' licences outside the mutual recognition schemes as they relate to occupations?*

Context — It is common practice that if a licence or registration is called or considered a 'business licence', it is not considered to be a registered occupation that falls under the mutual recognition regime. Some legislative authorisations will authorise corporations and firms as well as individuals to carry out certain activities. Other legislative authorisations are intended to regulate the manner of carrying out the activities. Your advice is sought on whether either or both of these elements are decisive in determining if the activities licensed can be considered a registered occupation? If registration to carry on activities can authorise both individuals and businesses, does this mean the individuals registered to carry on the activities do not fall under the Acts simply because there are also businesses registered?

Consider a hypothetical example where one jurisdiction requires an individual to obtain a particular training certificate to be licensed as an electrician (electrician licence). This type of licence is widely understood to be a registered occupation. In this example there is another type of licence relevant. A licensed electrician who wants to contract with a client and work on his or her own behalf on a commercial building doing electrical work valued at over $50,000 must have a contractor licence in the jurisdiction where the work is taking place (contractor licence). Some of the contractor licence requirements relate to manner of carrying out the activities and some relate to qualifications such as a project management course. This type of licence is commonly understood to be a business licence and therefore exempt from mutual recognition. Your advice is sought on several issues related to this example.

Assume in the first case, that the legislation was such that the licence was only related to and required for individuals, would the contractor's licence be a registered occupation under the TTMR Act?

Assume in the second case, that the legislation changed to also require a contractor licence for businesses entities as well as for individuals. The licence requirement for project management training in the case of a business would relate to the person managing the work on behalf of the business. Does the fact that the requirement for a licence extends to both individuals and firms mean that an individual with a contractor licence is not covered under the TTMR Act?

[29] TTMRA, s 19(4)(b).

63. We have framed our answer to this question by reference to the two scenarios described in the 'context' part of the question.

Scenario 1

64. It is an essential element of the definition of 'occupation' that registration to carry on the relevant type of work is 'wholly or partly dependent on the attainment or possession of some qualification'. In our view, where licences to perform work may be granted to individuals according to conditions at least one of which relates to 'the attainment or possession of some qualification' then that work, providing it amounts to an 'occupation, trade, profession or calling' would constitute an occupation for the purposes of the mutual recognition regime, even where the other licence conditions do not relate to 'the attainment or possession of some qualification'.

65. In the present scenario, the contractor's licensing regime imposes various conditions on the granting of a licence to perform electrical work valued at over a certain amount. In our view, the performance of such work is 'an occupation, trade profession or calling' of some kind. One of those conditions requires applicants to have completed a project management course. This means that the granting of a licence (i.e. 'registration') to carry on 'an occupation, trade profession or calling' is partly dependent on the attainment or possession of some qualification (i.e. the project management course). Accordingly, we consider that such a licensing regime would relate to work that constitutes an occupation for the purposes of the mutual recognition scheme.

Scenario 2

66. In our view, the fact that a licensing regime applies to both individuals and corporations does not place it beyond the scope of the mutual recognition scheme. The starting point for any analysis must be whether there is an 'occupation' that can be carried on by an individual. If so, an individual registered to carry on that occupation is entitled to the benefit of the mutual recognition principle, regardless of whether or not corporations may also be registered to carry on the relevant occupation.[30]

Question 8(c) *— Are there models of co-regulation of occupations that will be registered occupations under the MR Act and TTMR Act? For example, could an occupation be a registered occupation for the purposes of the Acts if legislation*

[30] This is implicit in the Administrative Appeals Tribunal's decision in *Re Stott and Police Service (NSW)* (2005) 41 AAR 464.

required that individuals must be members of a statutory body before being authorised to carry out an occupation (for example as a Chartered Accountant or Registered Engineer)?

Context — Assume a statutory body acts as the registration authority that approves individuals for membership based on qualifications and other legislative criteria. There is a New Zealand example related to accountants and auditors. The references to the legislation are for your information only, in case you are interested in seeing the provisions. The Institute of Chartered Accountants of New Zealand Act 1996 (ICANZ Act) establishes ICANZ as a statutory body. To describe him/herself as an accountant or auditor in New Zealand, a person must meet minimum criteria as set out in legislation. To be chartered accountant, an accountant or auditor must be approved as a member of ICANZ. For the purposes of this example, assume this means ICANZ is the registration authority for chartered accountants and that chartered accountancy is a registered occupation.

In addition, New Zealand also has requirements under legislation that authorise only certain people to act as 'auditors' for companies and for issuers of securities. One category of persons qualified to be auditors is chartered accountants (i.e. member of ICANZ). The Registrar of Companies and the Securities Commission are therefore the regulators related to auditors for companies and issuers but they rely on ICANZ to ensure the auditors (i.e. chartered accountants) meet the criteria. Does a 'co-regulation' model such as this affect whether 'auditor' is a registered occupation?

67. An occupation entails the doing of some activity that 'may only be carried on by registered persons'. The definition of 'registration' includes 'any … form of authorisation … required by or under legislation for carrying on an occupation'. The definition does not stipulate that authorisation may only be granted by a particular entity or by one entity alone. In our view, the definition is broad enough to include a situation where registration to carry on an occupation involves authorisation by one body, and the granting of an authorisation by that body is partly or wholly conditional on authorisation by another body. In these circumstances registration is still required to carry on the occupation. The involvement of multiple entities in the process of authorisation does not alter this.

68. However, the definition of registration implies that there be some positive approval or authorisation (and a record of such). Legislation merely prohibiting a person from performing some activity unless they possess a particular qualification is probably insufficient to constitute 'authorisation … required by or under legislation' in the relevant sense.

69. In the example you give, the fact that the Registrar of Companies and the Securities Commission rely on the Institute of Chartered Accountants to

determine whether a person is a chartered accountant (and, therefore, possesses the qualifications necessary to be an auditor) does not detract from the need for authorisation in order to carry on the occupation of auditor. Provided an entity is required under statute actively to approve or authorise a person to perform the activity (as opposed merely to being able to prevent a person performing the activity if the person has not met a qualification requirement), we can see no reason why a 'co-regulation' model such as this would prevent an activity from constituting an occupation under the mutual recognition scheme.

***Question 8(d)** — Could an occupation be a registered occupation for the purposes of the MR Act and TTMR Act if legislation required that individuals must be members of a professional body before being authorised to carry out an occupation, but the professional body is not a statutory body?*

Context — In the case of the professional body that is not established under legislation, assume the professional body approves members based on qualifications and other criteria. For example, assume that ICANZ was not a statutory body but that the NZ Companies Act and Securities Act still allowed members to qualify as auditors.

As noted above, the definition of 'registration' includes 'any … form of authorisation … required *by or under legislation* for carrying on an occupation'. In other words, authorisation must be required by statute, not authorisation by a statutory body. We can see no reason, therefore, why a professional body not established by legislation could not perform the authorisation. Moreover, such an arrangement is consistent with the definition of 'local registration body', which is 'the person or authority in the [jurisdiction] having the function *conferred by legislation* or registering persons in connection with their carrying on that occupation in the [jurisdiction]'. Any entity, whether created by statute or not, may be a registration authority, provided its function is 'conferred by legislation'.

Part 2 — Crown Law response to request for advice on trans-Tasman mutual recognition schemes

Introduction

1. You have sought Crown Law advice on matters pertaining to interpretation issues that arise from the Trans-Tasman Mutual Recognition Act 1997 ("TTMRA"). This advice was sought in connection with a request from the Australian Productivity Commission. Crown Law's advice of 3 November 2008 in response to your request was published in the Productivity Commission's draft report. As a result of feedback to the Commission and to MED about the issues in the draft report, you asked me to review Crown Law's advice in relation to the question set out as paragraph 2.4 below. I have done so and provide you with this consolidated opinion that includes the revisions to our response to that question.

2. Specifically, you have asked that I address the questions set out below. I have also summarised, in brief, my answers to each of the specific questions. My detailed reasoning follows in the body of this advice.

   2.1 Does the "registration" required by or under legislation for a particular occupation mean that there must also be a legislative requirement for a formal register or list of persons authorised to carry out the occupation?

   No, this is not required by the TTMRA, although the practical reality is that a formal register or list of persons will probably exist in most cases.

   (see paragraphs 13 to 16 below)

   2.2 Can legislative regimes that require authorisations to carry out activities related to the manner of sale, or the manner of carrying out a business related to a particular type of good give rise to new occupations that fall under the TTMRA, and if so, in what circumstances?

   Yes, if the activity constitutes a calling, occupation, profession or trade, subject to registration that is dependent on the attainment or possession of some qualification.

   (see paragraphs 17 to 26 below)

   2.3 What conditions can be included to achieve equivalence in occupations?

   2.3.1 Are issues of local or specialist knowledge or English language requirements able to be included as conditions?

   Probably not, although the legislation is not entirely clear.

   (see paragraphs 34 to 40 below)

2.3.2 Is the second jurisdiction allowed to re-check or audit whether the applicant actually met the requirements in the first jurisdiction?

Yes.

(see paragraphs 41 to 46 below)

2.3.3 If a person who is being investigated gives undertakings to the first jurisdiction where he or she is registered, may the undertakings be imposed as conditions on registration in a second jurisdiction?

Yes, if that undertaking restricts or limits the person's ability to carry out an authorised activity.

(see paragraphs 47 to 54 below)

2.4 Clarification is sought in relation to on-going requirements that may be imposed on persons registered under mutual recognition. In particular, are on-going conditions or requirements for further study and upgrading of professional skills allowed as long as this is a requirement for all registered persons?

The answer of a New Zealand court to this question will depend on the precise nature of the ongoing requirement and the particular factual context of the case before it. A court would be influenced, crucially, by the alignment of the requirement with the objectives of the TTMRA as well as by the nature of the public purpose it may have.

(see paragraphs 55 to 69 below)

2.5 The review is considering whether to recommend that the mutual recognition schemes be expanded in scope. Clarification is sought on whether the TTMRA now covers such things as business licences and occupations under co-regulation models. I note at the outset that my advice is premised on the basis that the focus of the TTMRA is on the individual and not on businesses (albeit this is not stated expressly in the legislation). That being so, I consider that any desire to expand the scope of the TTMRA to unequivocally cover business licences (should this be what is desired) will require legislative amendment.

2.6 In response to your particular queries:

2.6.1 What characteristics take 'business' licences outside the mutual recognition schemes as they relate to occupations?

Licences will fall outside the TTMRA if the requirements for the licence do not meet the definitions of "occupation", "registration", and "qualification" in the legislation.

(see paragraphs 71 to 92 below)

2.6.2 Are there models of co-regulation of occupations that will be registered occupations under the TTMRA?

Yes. The fact that a process for regulation of a particular occupation is governed by two entities does not mean that the mutual recognition principles relating to occupation in the TTMRA do not apply.

(see paragraphs 93 to 98 below)

2.6.3 In a different kind of co-regulation model, could an application be a registered occupation for the purposes of the TTMRA if legislation required that individuals be members of a professional body (recognised but not created under statute) before being authorised to carry out an occupation?

Yes. It does not matter if the professional body is not itself created by statute, if the statute requires authorisation to be given by that professional body.

(see paragraphs 99 to 101 below)

Background

3. This advice is sought by you in connection with interpretation issues that arise from the TTMRA and the Review of Mutual Recognition Schemes ("Review") that is currently being undertaken by the Australian Productivity Commission ("Commission").

4. The TTMRA is the New Zealand legislation that implements the Arrangement between the Australian Parties: the Commonwealth of Australia; the State of New South Wales; the State of Victoria; the State of Western Australia; the State of South Australia; the State of Tasmania; the Australian Capital Territory; the Northern Territory of Australia; and New Zealand, relating to Trans-Tasman Mutual Recognition ("the Arrangement").

5. The Commission is reviewing not only the New Zealand TTMRA, but also all the legislation and agreements making up the mutual recognition schemes within Australia.

6. Clause 12.1.1 of Part XII of the Arrangement called for regular reviews of the operation of the Arrangements and its related legislation. I understand that the first review of the mutual recognition schemes implementing the Arrangement was carried out in 1998. Part XII of the Arrangement requires five yearly reviews to be carried out of the mutual recognition schemes. The Commission was tasked with undertaking the 2003 review and is now carrying out the present review.

7. The two previous reviews, and the initial findings of the current review, suggest that parts of all the legislative schemes implementing the Arrangement need to be clarified, either by legislative change or the provision of better information about the interpretation of the TTMRA and other Australian legislation.

8. Your questions as set out above reflect those parts of the Acts that are of greatest concern to submitters to the review and to regulators.

Trans-Tasman Mutual Recognition Act

9. I note at the outset that it is my task in this opinion to advise you on what the statute provides. If the legislation does not adequately reflect what was intended by the policy behind the Arrangement, then that is a matter for legislative amendment. Treaties and other instruments of international law, like the Arrangement, can only have force in domestic law to the extent they are incorporated in legislation: New Zealand Airline Pilots' Association Inc v Attorney-General [1997] 3 NZLR 269(CA); Ashby v Minister of Immigration [1981] 1 NZLR 222 (CA).

10. The Arrangement came into effect on 1 May 1998 and is a non-treaty arrangement between the Commonwealth, State and Territory Governments of Australia and the Government of New Zealand. The Arrangement is described on the Ministry of Economic Development's website as the cornerstone of a single economic market between the two countries, a powerful driver of regulatory co-ordination and integration, and as the key instrument for developing an integrated Trans-Tasman economy and a seamless market place as envisioned by the Australia and New Zealand Closer Economic Relations Trade Agreement signed in 1983.

11. The Arrangement is implemented in New Zealand via the TTMRA. Some key (broad) features of the TTMRA are:

    11.1 Every law in New Zealand must, unless it or the TTMRA expressly provides otherwise, be read subject to the TTMRA (s 5(1)).

    11.2 The Trans-Tasman mutual recognition principle in relation to goods, the Trans-Tasman mutual recognition principle in relation to occupations, and the provisions of the TTMRA may be taken into consideration in proceedings of any kind and for any purpose (s 5(2)).

    11.3 The TTMRA implements the Trans-Tasman mutual recognition principle in relation to goods, namely that, subject to the TTMRA, goods produced in or imported into an Australian jurisdiction, that may be lawfully sold in the Australian jurisdiction either generally or in particular circumstances, may be sold in New Zealand, either generally or in particular circumstances, without the necessity for compliance with any of the requirements relating to sale that are imposed by the law of New Zealand (s 10(1)).

    11.4 The TTMRA implements the Trans-Tasman mutual recognition principle in relation to occupations, namely that, subject to the TTMRA, an individual who is registered in an Australian jurisdiction for an occupation is entitled,

after giving notice to the local registration authority for the equivalent occupation:

11.4.1 to be registered in New Zealand for the equivalent occupation; and

11.4.2 pending such registration, to carry on the equivalent occupation in New Zealand.

(s 15(1))

12. I note here that there have only been a handful of New Zealand cases that have referred to the TTMRA, and those that have were not of relevance to your queries.

Answers to specific queries

Formal register required?

13. This question is concerned with the requirements for registration. Section 4(1) of the Act provides:

> "In this Act, registration means the admission, approval, certification (including, without limitation, the issue of practising certificates), licensing, registration, or any other form of authorisation, of an individual required by or under law for carrying on an occupation. "

14. The meaning of registration in the Act is broad and goes beyond its ordinary meaning. The term registration is referred to within the definition itself. In my opinion the ordinary meaning of registration does imply the keeping of a list or register. Black's law Dictionary (8th ed) defines registration as: "the act of recording or enrolling".

15. However, as noted above, registration as defined at s 4 extends the ordinary meaning and includes terms such as "approval" and "any other form of authorisation" which may not necessarily require the keeping of a register at all, never mind one that is formal in the sense that it has legal status.

16. Accordingly, I do not believe that registration under the Act requires there to be a formal register of persons authorised to carry out an occupation. In my opinion, all that is required in order to meet the definition of registration under the Act is a legislative-based authority to carry out the occupation. As a matter of practicality, however, it is likely that even if not required to do so as a matter of law, a body responsible for approving registration will keep a record of those persons it had granted authorisation to.

New occupations

17. This question is concerned with whether legislative regimes giving authorisation to carry out certain activities, can create new occupations for the purposes of the Act.

18. The meaning of occupation is provided for at s 2 of the Act:

> "Occupation –
>
> (a) Means a calling, occupation, profession, or trade of any kind that may be carried on only by individuals subject to registration, if registration is wholly or partly dependent on the attainment or possession of some qualification;
>
> …

19. It is thus tied back into the definitions of "registration" and "qualification".

20. Qualification is defined at s 2 of the Act:

> Qualification means –
>
> (a) A specific course of education or training;
>
> (b) A specific examination;
>
> (c) A suitable character (including, without limitation, being a fit and proper person); or
>
> (d) A specific qualification, other than a qualification referred to in any of paragraphs (a) to (d), relating to fitness to carry on an occupation

21. All occupations will be covered by the Act, unless specifically exempt (s 84). Currently, the only occupation that is exempt under the Act is medical practitioners (Schedule 4).

22. Given the broad definition of occupation and qualification at s 2, I believe there will be situations where the carrying out of a particular type of activity (one that does not fit within a traditionally recognised occupation) will be an occupation for the purposes of the Act.

23. This can be seen by considering the hypothetical example you give in relation to this question, in respect of the retail sale, supply and service of liquor by a staff member of a licensed premises.

24. Under r 41 of the Liquor Regulations 2008 a staff member must not sell alcohol unless he or she holds a recognised Responsible Sale of Alcohol ("RSA") certificate. An RSA certificate is a certificate granted by a training provider approved by the licensing authority (r 39). Regulation 44 provides that a licensee must keep a register of all holders of a RSA certificate.

25. In my opinion, the retail sale, supply and service of liquor would meet the definition of occupation as defined by the Act. The activity of selling, supplying or serving liquor by the staff member would constitute an occupation (being his or her temporary or regular employment). The occupation is subject to registration (it has legislative authority for its certification, being the RSA certificate provided for at r 41) and registration of the occupation is dependent on attaining a qualification (the completion of the approved training course at r 39).

26. Accordingly, my answer to question 2 is yes, an activity will be an occupation for the purposes of the Act, so long as the activity constitutes a "calling, occupation, profession of any kind" and is subject to registration that is dependent on the attainment of a qualification.

Conditions to achieve equivalence

27. The TTMRA allows a second jurisdiction (i.e. New Zealand) to impose conditions on the registration (whether it be deemed or substantive) of an applicant from the first jurisdiction (an Australian jurisdiction) in order to achieve equivalence in occupations between the jurisdictions (s 14(2)(a), s 20(3)(a) & s 25(2)(a)).

28. "Conditions" is defined by s 2 of the Act to, in relation to occupation, mean conditions, limitations or restrictions.

29. "Equivalent occupation" is defined by s 14 of the Act:

> (1) For the purposes of this Act, and subject to subsection (2), an occupation for which individuals may be registered in an Australian jurisdiction is taken to be an equivalent occupation to an occupation for which individuals may be registered in New Zealand if the activities authorised to be carried out under each registration are substantially the same.
>
> (2) Subsection (1) is subject to –
>
> (a) The fact that equivalence of occupations between New Zealand and an Australian jurisdiction may be achieved by the imposition of conditions on deemed registration or registration; and
>
> (b) Any declaration made and in force under section 30 or section 31.

30. Also relevant is s 15, which sets out the Trans-Tasman mutual recognition principle in relation to occupations.

31. In order to determine equivalence of occupations then, one must compare the activities authorised to be carried out under each occupation. If the occupations are not considered to be equivalent, then conditions on registration (whether it be deemed or substantive) can be imposed in order to achieve equivalence.

32. For example, if the occupation in the second jurisdiction carries out a narrower range of authorised activities than that of the first jurisdiction, conditions can be imposed by the second jurisdiction to restrict the activities carried out by the individual from the first jurisdiction, in order to achieve equivalence between the jurisdictions.

33. In light of s 14 of the Act (the meaning of equivalent occupations) and s 15 of the Act (the principle in relation to occupations) it is my view that any condition that is imposed by the second jurisdiction can only limit or restrict the carrying out of an authorised activity, and cannot have wider application. By this I mean that if the second jurisdiction registration covers more activities than the first jurisdiction registration, the registering authority in the second jurisdiction can only impose conditions to limit the applicant to carrying out only those activities covered by registration in the first jurisdiction. In other words, the registering authority could not add conditions related to additional requirements that the applicant would need to obtain in order to undertake the "extra" activities in the second jurisdiction.

Local or specialist knowledge or English language requirements

34. The long title of the TTMRA states it is an Act to provide for the recognition in New Zealand of regulatory standards adopted in Australia regarding goods and occupations. The Arrangement states its purpose and objectives at page 2. Its purpose is to give effect to a scheme implementing mutual recognition principles between the Parties relating to the sale of goods and the registration of occupations, consistent with the protection of public health and safety and the environment. The objective of the Arrangement is to remove regulatory barriers to the movement of goods and service providers between Australia and New Zealand, and to thereby facilitate trade between the two countries. This is intended to enhance the international competitiveness of Australian and New Zealand enterprises, increase the level of transparency in trading arrangements, encourage innovation and rescue compliance costs for business.

35. Whether or not the legislation allows conditions as to local or specialist knowledge or English language requirements to be imposed is not clear. However, bearing in mind the context and purpose of the Act as set out above, I believe a more restricted approach to the imposition of conditions is mandated by the legislation.

36. It is clear that the TTMRA does not require jurisdictional requirements for registration in respect of a particular occupation to be the same. This can be seen from s 15(2) of the Act, which states that a New Zealand law that requires an individual seeking to carry on an occupation to have a particular qualification, does not apply to an individual from an Australian jurisdiction seeking registration in New Zealand. Likewise, s 16 (b) of the Act states that no law of New Zealand can require an applicant to have any particular qualification before carrying on or seeking to carry on that occupation. Furthermore, at s 20(4) and s 25(3), no condition imposed by a second jurisdiction may be more onerous than a condition that the first jurisdiction would impose in similar circumstances, having regard to relevant qualifications.

37. I have examined the extent to which such extra special requirements could conceivably come within the definition of "qualification" in s 2 of the TTMRA (see

above at paragraph 20). If such requirements could be said to be "qualifications" then the effect of s 15(2) is that such special requirements could not be included as a condition to registration (outside of the limited circumstances set out in s 20(3)). I do consider that such requirements would likely fall within the s 2 definition of "qualification", which is quite broad. That being so, s 15(2) prevents such requirements being imposed as conditions.

38. Further, the s 15 mutual recognition principle in relation to occupations is expressly stated in s 16 of the TTMRA not to affect the operation of any laws of New Zealand "that regulate the manner of carrying on an occupation in New Zealand" so long as those laws:

    38.1 Apply equally to all individuals carrying on or seeking to carry on the occupation under New Zealand law; and

    38.2 Do not require an individual carrying on or seeking to carry on that occupation under the laws of New Zealand to have any particular qualification before doing so.

39. Given my view then that specialist requirements would constitute "qualifications" under s 2, I consider that it is more than likely that s 16(b) also precludes the imposition of special requirements (to the extent, of course, that such requirements are imposed by New Zealand law). Such requirements would also be likely to be in breach of s 20(4) and s 25(3).

40. For the above reasons, it is probable that local or specialist knowledge, or an English language requirement, would not be able to included as conditions, although the legislation is not entirely clear.

Re-check and audit of requirements

41. My answer to question 2.3.2 above is yes, a local registration authority can re-check or audit whether the applicant actually met the requirements of the first jurisdiction.

42. Section 19 (2)(i) provides that an applicant seeking registration must give written notification to the local registration authority and one of the requirements of the notification is that the applicant must give his or her consent to the making of inquiries of, and the exchange of information with, the authorities of any participating jurisdiction regarding the applicant's activities in the relevant occupation or occupations or otherwise regarding matters relevant to the notice.

43. I believe the authority provided for in s 19(2)(i) is broad enough to allow the second jurisdiction to re-check whether the applicant actually met the registration requirements of the first jurisdiction. The legislation is not, however, entirely clear as to what the second jurisdiction is then able to do if it discovers that the applicant is registered in the first jurisdiction by means of mistake or fraud. Because the TTMRA proceeds on the basis that registration in the first jurisdiction entitles an applicant to registration in the second jurisdiction for an equivalent occupation (s 15(1)) then, in my view, the registering authority in the second jurisdiction cannot refuse registration

on the grounds that registration in the first jurisdiction was wrongly obtained. One option to deal with this situation would be some kind of liaison between the registering authorities in the two jurisdictions in an attempt to have the first jurisdiction impose conditions on the registration while it was investigated.

44. I also note the provisions of the TTMRA relating to information exchange between the relevant registering authorities, which may be of assistance in dealing with this situation. In this regard, I draw your attention to:

44.1 Section 19(2)(i) which allows an applicant to give consent to the making of inquiries of, and the exchange of information with, the authorities of any participating jurisdiction regarding the applicant's activities in the relevant occupation or otherwise regarding matters relevant to the notice to the registering authority; and

44.2 Section 33 which provides that the local registering authority must provide information to the equivalent authority if there is "actual or possible disciplinary action against the individual."

45. Finally, I note that at the time of registration the local registering authority is given discretion to postpone or refuse registration if there are statements or information in the notice from an applicant that is false or misleading (see sections 21 and 22 TTMRA).

46. I note for completeness that if a re-check or audit by the second jurisdiction revealed that the applicant did **not** actually have registration at all in the first jurisdiction, then of course the second jurisdiction could refuse to register the applicant.

Undertakings

47. You have broken down question 2.3.3 above into the following parts:

47.1.1 Whether undertakings can be considered conditions?

47.1.2 Whether the undertakings or conditions from the registration in the first jurisdiction can be imposed by the second jurisdiction after the person is already registered in the second jurisdiction?

48. "Condition" in relation to occupation, at s 2 of the Act means conditions, limitations or restrictions. In addition, the Oxford Concise Dictionary (9th ed) provides the following definitions:

> Condition: 1. a. stipulation; something upon the fulfilment of which something else depends. 5. conditional clause.
>
> Limitation: 1. the act or instance of limiting; the process of being limited. 3. a limiting rule or circumstances.
>
> Restrictions: 1. the act or an instance of restricting; the state of being restricted. 3. a limitation placed on action.

49. "Undertaking" is defined in the Oxford Concise Dictionary as "a pledge or promise and in Blackman's Law Dictionary as "a promise, pledge, or engagement."

50. In my opinion, if the undertaking given by an individual restricts or limits his or her ability to carry out an authorised activity, it will be a condition for the purposes of the TTMRA.

51. Section 32 of the Act provides:

> 32 Disciplinary action
>
> (1) If an individual's deemed registration or registration for an occupation in an Australian jurisdiction –
>
> (a) Is cancelled or suspended; or
>
> (b) Is subject to a condition –
>
> On disciplinary grounds, or as a result of or in anticipation of criminal, civil, or disciplinary proceedings, then the individual's deemed registration or registration for the equivalent occupation in New Zealand is affected in the same way.
>
> (2) Despite subsection (1), the local registration authority may reinstate any cancelled or suspended deemed registration or registration or waive any such condition if it thinks it appropriate to do so in the circumstances.
>
> (3) This section extends to registration effected apart from this Act.
>
> (4) This section has effect despite any other provisions of this Act.

52. Therefore in accordance with s 32(1) if an individual subject to disciplinary action gives an undertaking to the first jurisdiction where he or she is registered, and that undertaking restricts or limits his or her ability to carry out an authorised activity, the undertaking will be a condition that is automatically imposed by virtue of s 32(1).

53. I believe the wording of s 32 is broad enough to allow the condition to be imposed after registration has been granted, whether that be deemed registration or substantive registration.

54. Section 32 does not use restrictive language that limits the imposition of conditions to only being allowed either before or on registration. More particularly, at subsection (2) the provision refers to the reinstatement of cancelled or suspended

registration, which must mean the individual has already been registered by the second jurisdiction.

On-going requirements on persons registered

55. Under this heading, you seek clarification in relation to on-going requirements that may be imposed on persons registered under mutual recognition. In particular, you ask whether on-going conditions or requirements for further study and upgrading of professional skills are allowed as long as this is a requirement for all registered persons.

56. You state that the context for this query is that s 17(2)(c) of the TTMRA may limit on-going requirements for training and further experience, and some jurisdictions have questioned whether they can require persons already registered under TTMRA to accumulate further qualifications or training if they require all other registered persons to do so.

57. The scheme and purpose of the TTMRA is important in assessing how a New Zealand court would view the imposition of ongoing requirements. I understand, from discussion with officials at the Ministry of Economic Development and the Ministry of Foreign Affairs and Trade, that officials' understanding of the policy intention of the Arrangement, and the legislation at the time it was passed, militated against the power to impose ongoing requirements.

58. The TTMRA implements the underlying Arrangement which has, as its objective:

> "to remove regulatory barriers to the movement of goods and service providers between Australia and New Zealand, and to thereby facilitate trade between the two countries. This is intended to enhance the international competitiveness of Australian and New Zealand enterprises, increase the level of transparency in trading arrangements, encourage innovation and reduce compliance costs for business."

59. As stated, the Trans-Tasman mutual recognition principle in relation to occupations is that, subject to the TTMRA, an individual who is registered in an Australian jurisdiction for an occupation is entitled, after giving notice to the local registration authority for the equivalent occupation, to be registered in New Zealand for the equivalent occupation and, pending such registration, to carry on the equivalent occupation in New Zealand (s 15(1)).[31]

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[31] Note that "local registration authority" is defined in s 2 of the TTMRA as:

"(a) Except in relation to barristers and solicitors, -
  (i) Means the person in New Zealand having the function conferred by law of registering individuals in connection with their carrying on of a particular occupation in New Zealand; and
  (ii) If more than 1 person has the function described in subparagraph (i) in relation to a particular occupation, including each such person; and

(b) In relation to barristers and solicitors, means -

59.1 Thus:

59.1.1 For the purposes of the TTMRA, an occupation for which individuals may be registered in an Australian jurisdiction is taken to be an equivalent occupation for which individuals may be registered in New Zealand if the activities authorised to be carried out under each registration are substantially the same (s 14(1)).

59.1.2 The Trans-Tasman mutual recognition principle in relation to occupations means that no law in New Zealand requiring an individual seeking to carry on that occupation to have any particular qualification before doing so applies to any individual who is registered in an Australian jurisdiction for an occupation and who gives proper notice to the local registration authority for the equivalent occupation (s15 (2)).

60. Section 14(2) provides that subsection (1) is subject to:

60.1 the fact that equivalence of occupations between New Zealand and an Australian jurisdiction may be achieved by the imposition of conditions on deemed registration or registration; and

60.2 any declaration made and in force under s 30 or s 31.

61. Section 16 provides that s 15(2) (the mutual recognition principle in relation to occupations) does not, however, affect the operation of any laws of New Zealand that regulate the manner of carrying on an occupation in New Zealand, so long as those laws:

61.1 apply equally to all individuals carrying on or seeking to carry on the occupation under the law of New Zealand; and

61.2 do not require an individual carrying on or seeking to carry on that occupation under the law of New Zealand to have any particular qualification before doing so.

62. The Trans-Tasman mutual recognition principle in relation to occupations, as set out in s 15(1), could be argued to be undermined if a registering authority could impose conditions on an applicant once they had achieved Trans-Tasman mutual recognition in New Zealand. This interpretation is supported by s 17(2), which sets out the consequences of attaining registration:

62.1 The person is entitled to renewal of registration in accordance with the law dealing with registration of that kind.

(i) In relation to admission as a barrister and solicitor, a Registrar or Deputy Registrar of the High Court; and

(ii) In relation to the issue of a practising certificate, the New Zealand Law Society."

62.2 The person is not disentitled to registration or renewal of registration solelybecause the person ceases to be registered in an equivalent occupation in an Australian jurisdiction.

62.3 The person keeps or loses the entitlement to registration or renewal of registration in accordance with any law dealing with registration of that kind, to the extent that any such law:

62.3.1 applies equally to all individuals carrying on or seeking to carry on the occupation under the law of New Zealand; and

62.3.2 does not require an individual carrying on or seeking to carry on that occupation under the law of New Zealand **to have any particular qualification before doing so** (my emphasis).

63. Further, s 32(1) provides that if a person's deemed registration or registration for an occupation in an Australian jurisdiction is cancelled or suspended, or is subject to a condition on disciplinary grounds, then the person's deemed registration or registration for the equivalent occupation in New Zealand is affected in the same way.[32]

64. As discussed above, a local registration authority is empowered, by s 20(3), to grant registration with conditions:

64.1 for the purpose of achieving equivalence of occupations; or

64.2 for the purpose of imposing on the applicant's registration in New Zealand a condition that applies to the applicant's registration in an Australian jurisdiction; or

64.3 for any other purpose relating to the implementation of the Trans-Tasman mutual recognition principle in relation to occupations.

65. The focus at all times is on promoting mutual recognition. Section 20(4), for example, precludes the local registration authority from imposing the third type of condition above, if the condition imposed may be more onerous than a condition that the local registration authority would impose in similar circumstances, having regard to relevant qualifications, if the registration occurred in another manner than under the TTMRA.

66. Likewise, s 36(1) which provides that it is the duty of each local registration authority to facilitate the operation of the occupations part of the TTMRA in relation to every occupation for which the authority is responsible and, in particular, to make use of its powers to impose conditions in such a way as to promote the Trans-Tasman mutual recognition principle in relation to occupations.

[32] Note that even in this scenario, s 32(2) allows the local registration authority to reinstate any cancelled or suspended deemed registration or registration or waive any condition if it thinks it appropriate to do so in the circumstances.

67. So, if an ongoing requirement comprising "further study and the upgrading of professional skills" (as per your question) is sought to be imposed, the Crown can argue consistent with officials' understanding of the original policy intent, and a New Zealand court may find, that those requirements are likely to meet the definition of "qualification" in s 2, and therefore cannot be imposed for the reasons discussed above.

68. However, I consider that there are circumstances where a New Zealand court would accept that ongoing requirements can be imposed under the TTRMA. Section 16 of the Act could be argued to mean that ongoing requirements on persons registered under the TTMRA *can* be imposed by the registering authority if those requirements apply to all persons registered to carry out that occupation (unless, of course, they are imposed as **conditions** of registration). The proviso in s 16(b) refers to the law not requiring an individual carrying on or seeking to carry on an occupation under the law of New Zealand to have any particular qualification **before doing so.** The use of the word *before* suggests that imposing requirements *after* registration is not precluded (subject of course to the requirements being imposed on all registered persons).

69. In my opinion, the decision of a New Zealand court is likely to depend on the precise nature of the ongoing requirement and the particular factual context of the case before it. This appears to be consistent with the conclusion of the Australian Government Solicitor in his opinion of 17 October 2008, published in the draft Productivity Commission report, on a similar question in relation to the Australian legislation.

70. In my opinion, a New Zealand court would be influenced, crucially, by the alignment of the requirement with the objectives of the TTMRA as well as by the nature of the public purpose it may have. An ongoing requirement that appears to be designed to circumvent the purpose of the TTMRA in entitling practitioners from one jurisdiction to practice in another without undue compliance costs, and that has weak public policy purposes, is likely to be decided by a court to be prohibited. An ongoing requirement that applies to all persons registered to carry out an occupation, that is in the interests of public safety and that does not impose significant compliance costs on practitioners would be likely to be decided by a court not to be prohibited.

Scope of TTMRA

71. Under the heading "scope of TTMRA", you advise that the review is considering whether to recommend that the mutual recognition schemes be expanded in scope. Clarification is therefore sought on whether the TTMRA now covers such things as business licences and occupations under co-regulation models.

72. I note that in the 2003 review, the recommendations of the Productivity Commission were that:

    72.1 Business licences should not be brought into the scope of the mutual recognition schemes as the additional complexity and conflict from mutually recognising licences were likely to outweigh the gains. It was

recognised that there are valid policy reasons to retain some hybrid business licences. However, where possible, it was recommended that occupational registration requirements should be removed from business licence requirements, especially where they represent indirect barriers to the movement of skilled people; and

72.2 Consideration needed to be given to whether co-regulation should be covered by mutual recognition.

73. I note at the outset that my advice is premised on the basis that the focus of the TTMRA is on the individual and not on businesses (albeit this is not stated expressly in the legislation). That being so, I consider that any desire to expand the scope of the TTMRA to unequivocally cover business licences (should this be what is desired) will require legislative amendment.

74. As you note, the TTMRA does not refer to business licences. You advise that there is a common assumption that if a licence or registration is called or considered a "business licence" it is not considered to be an occupation that falls under the mutual recognition regime. You state that there may be several reasons for this assumption because business licences may relate to areas that the TTMRA does not cover. Some legislative authorisations will authorise corporations and firms *as well as individuals* to carry out certain activities (see s 15, TTMRA). Other legislative authorisations are intended to regulate *the manner of carrying out* the activities (see s 16, TTMRA). You seek advice on whether either of both of these elements are decisive in determining if the activities licensed can be considered an occupation.

75. It appears that this interpretation of the TTMRA, excluding "business licences", has arisen due to the focus in the TTMRA (and in the Arrangement itself) on the "individual" (for example, see the definition of "occupation" in s 2(1), set out above at paragraph 18.

76. Likewise, s 4 has a similar focus on the individual, in its definition of "registration", set out above at paragraph 13.

77. I note that "individual" is not defined in the TTMRA, and there is nothing in the legislation that expressly states that "individuals" is intended to exclude businesses.

78. Arguably then, the general meaning of individual, could be taken to apply[33] meaning that, on the face of the statute, "business licences" are not excluded from the TTMRA. However, I do not consider this to be a strong argument and I point to those provisions in the TTMRA which do 'distinguish between "individuals" and "bodies corporate", suggesting that the latter is not intended to be included in the references to the former. For instance, s 8(1) sets out different requirements for service of a notice upon individuals and bodies corporate. I also note that the Arrangement itself, which the TTMRA implements, refers to "person."

[33] Under the canon of interpretation known as "generalia verba sunt generaliter intelligenda" or "general words are to be understood generally": see Bennion, Statutory Interpretation 15th ed), p 1168.

79. In this regard, I note that s 29 of the Interpretation Act 1999 provides that, in the absence of a statement to the contrary in a particular piece of legislation, "person" includes "a corporation sole, a body corporate and an unincorporated body." However, taking a contextual view of both the TTMRA and the Arrangement itself, it was not in my view intended that the scheme as originally set up would apply to businesses.

80. For those reasons, on balance, I do not consider it likely that the TTMRA could be interpreted to include "business licences" (and by business, I mean either a body corporate or a non-corporate business, such as a partnership).

81. To be absolutely clear one way or the other however (depending on what is desired) I recommend that the TTMRA be amended to specify whether or not "business licences" are included within the ambit of the legislation.

82. With those preliminary conclusions in mind, I now turn to consider your specific queries and examples.

Your hypothetical examples

83. The hypothetical example you give in relation to this issue is where one jurisdiction issues two kinds of licences related to electrical work.

84. The first licence requires an individual to obtain a particular training certificate to be licensed as an electrician. This certificate allows the person to do certain domestic electrical work up to a certain threshold value and is widely understood to be a registered occupation for the purposes of the TTMRA.

85. In other situations, where the value of the electrical work is greater than the threshold value, or in a commercial environment, the individual can do electrical work as an employee of an individual or firm that has the *second* type of licence.

86. The second type of licence is an electrical contractor's licence, which allows the person holding the licence to undertake higher value commercial work. This type of licence is widely understood to be a business licence and is therefore exempt from mutual recognition, in the way the TTMRA has been applied.

First assumption

87. You have asked me to assume that the requirements for the second contractor's licence includes such requirements as a fee, a certain level of indemnity insurance, a secure financial position, successful completion of a project management course and an obligation to ensure all electrical work is done by a person with an electrical licence. I have interpreted your query here as being whether the requirements for obtaining the contractor's licence mean that the occupation to which the licence relates is a registered occupation for the purposes of the TTMRA even though it is a mixture of 'qualification' related requirements and 'manner of carrying on the activities' requirements.

88. In my view, this licence would fall within the TTMRA **but only when held by an individual, not by a business.** This is due to the definition of "occupation" in s 2(1) as outlined above. Subpart (a) of that definition refers to a calling, occupation, profession, or trade that may be carried on only by individuals subject to registration, if registration is **wholly or partly** dependent on the attainment or possession of some qualification.

89. In the scenario you outline, one of the requirements for registration as an electrical contractor is successful completion of a project management course. Thus registration is **partly** dependent on the possession of a qualification, and therefore it comes within the definition of "occupation" and therefore the legislation.

Second assumption

90. You have asked me to assume that the answer to the first assumption is yes (which I have concluded is so, when the licence is held by an individual, not by a business). You then ask me to assume that the circumstances change so that the legislation in question also requires a contractor licence for businesses such as partnerships and companies (as well as individuals) that want to undertake large scale commercial electrical work. The licence requirement for project management training in the case of a *business* would relate to the person managing the work on behalf of the business.

91. You ask whether the fact that the licence is required for both individuals and firms means that an individual with a contractor licence is not covered by the TTMRA.

92. In my view, just because a licence is required for both individuals and firms, does not mean the TTMRA is excluded from application for individuals. The answer starts and ends with the definitions of "occupation" and "registration" in ss 2(1) and 4 (see points above at paragraph 88). If the individual meets those definitions, it matters not that the business is also required to obtain the licence (although not again that of course the business will not be covered by the TTMRA).

Co-regulation

93. You ask whether there are models of co-regulation of occupations that will be occupations under the TTMRA. For example, you ask whether an occupation could be an occupation for the purposes of the TTMRA if legislation required that individuals must be members of a statutory body before being authorised to carry out an occupation.

94. The context for this question assumes that a statutory body acts as the registration authority that approves individuals for membership based on qualifications and other legislative criteria (for example, accountants and auditors under the Institute of Chartered Accountants of New Zealand Act 1996).

95. To be described as an accountant or auditor in New Zealand, a person must meet minimum criteria as set out in provisions of the above Act, including approval as a member of the Institute. In addition, both the Companies Act and the Securities Act

have requirements related to auditors of companies and issuers. The Registrar of Companies and the Securities Commission are the regulators related to companies and issuers, but they rely on the Institute to ensure the auditors meet the criteria. You ask whether "co-regulation" like this would mean "auditor" is a registered occupation under the TTMRA.

96. Again, the starting and ending point for this question is the statute. In my view, the fact that a process for registration of a particular occupation is governed by two entities, does not mean that the mutual recognition principles relating to occupation in the TTMRA do not apply.

97. The reason for this is the definition of "registration" set out in s 4(1) and discussed above. That definition sets out a number of specific types of registration (admission, approval, certification, licensing, registration) before the catch all "any other form of authorisation". The key part of the definition comes next, ie "required by or under law for carrying out an occupation".

98. In other words, the key focus of the definition is on the legal requirements for authorisation, and not on the number of bodies who may be involved in that authorisation.

Different type of co-regulation model

99. Finally, you ask, in a different kind of co-regulation model, whether an occupation could be an occupation for the purposes of the TTMRA if legislation required that individuals be members of a professional body (recognised but not created under statute) before being authorised to carry out an occupation. You advise that although the professional body is not created under statute, it is given power under statute to approve and regulate its own members.

100. The context for this question is an assumption that the professional body approves members based on qualifications and other criteria. In the scenario discussed above, you ask me to assume that the Institute is not a statutory body with its own Act, but rather a professional body, and the Companies Act and Securities Act still recognise the Institute as an approved body and one of the groups of persons that qualify to be auditors are members of the Institute.

101. Again, because the focus in the definition of "registration" in s 4(1) is on what is required by law, in my view it does not matter if the professional body is not itself created by statute, if the statute requires authorisation to be given by that professional body.

Conclusion

102. My conclusions are set out at paragraph 2 above.