
9 Exemptions and extensions — occupations

Key points

- Progress on the harmonisation of Australian and New Zealand competency standards for overseas-trained medical practitioners has been slow. Creation of a special exemption and cooperation program for overseas-trained registered practitioners would facilitate this process. Mutual recognition could be extended to registered practitioners who have gained their medical qualifications only in Australia or New Zealand.
- At the moment, registered workers employed in occupations in which registration is compulsory for only some practitioners cannot access mutual recognition. The schemes could be extended to people for whom registration is compulsory, provided other requirements set out in the mutual recognition Acts are met.
- Mutual recognition could be extended to some types of business registration.
- Cross-border and short-term service provision are more prevalent today than when the mutual recognition schemes were designed. In principle, individuals working in registered occupations face barriers to these forms of service provision.
- International evidence suggests that there could be major benefits to removing impediments to interjurisdictional trade in services.
- Australian jurisdictions and New Zealand could conduct a stocktake of their legislation governing aspects of service provision, to identify any major impediments to cross-border and short-term service provision.
- This stocktake could be followed, in due course, by consideration of ways to overcome existing barriers.

Chapter 5 presented suggestions for improving the operation and effectiveness of the mutual recognition schemes as they apply to occupations. Review of the schemes also suggests that they could be extended in directions consistent with the principle of mutual recognition, and with the goal of a seamless national economy. Extension options discussed in this chapter relate to: occupations in which registration is compulsory for only some practitioners; business licences; and cross-border and short-term service provision (a range of other options are

canvassed in appendix F). Consideration of the permanent exemption for medical practitioners precedes this discussion.

9.1 The permanent exemption for medical practitioners

Under the TTMRA, there is only one permanent exemption relating to occupations — that for medical practitioners. In practice, the exemption is more significant for those practitioners trained in countries other than Australia and New Zealand. Registration boards apply the same registration requirements to graduates of Australian and New Zealand medical schools who have completed internships in either country. In other words, for example, Australian graduates seeking registration in New Zealand use the same registration pathway as New Zealand graduates.¹ Registration processes for third-country trained medical practitioners are more demanding and can involve examinations, workplace-based assessment and supervision.

The permanent exemption for medical practitioners reflects Australian efforts at the time the TTMRA was designed to address oversupply in the medical workforce. Policy makers were concerned that unimpeded access to the Australian market by practitioners from New Zealand had the potential to exacerbate supply pressures. By the end of the 1990s, Australia was experiencing shortages of medical practitioners, particularly in some rural and remote areas. A less demanding registration approach was developed for overseas-trained doctors filling positions in areas of need, and the rationale for the exemption changed. As the Commission noted in the 2003 review, there were concerns:

- in New Zealand about Australian registration boards' practice of granting conditional registration (with lower requirements than full registration) to doctors filling vacancies in areas of need
- in Australia that New Zealand's criteria for recognising some medical qualifications differ from those agreed nationally in Australia (PC 2003).

It suggested that 'the Australian and New Zealand Medical Councils should work towards harmonising competency standards for overseas-trained medical practitioners, with a view to enabling the removal of this exemption at the next review' (PC 2003, p. 168).

While Australia adopted a new national process for assessing international medical graduates in 2006 (COAG 2006a), it appears that little further progress has been made on harmonising competency standards for overseas-trained medical practitioners between Australia and New Zealand.

¹ This is not to say that mutual recognition effectively exists between the two jurisdictions.

As the Department of Health and Ageing notes, ‘at present there is fairly free movement of fully registered medical practitioners across the Tasman’ (sub. DR64, p. 4). However, there is some evidence that the mobility of practitioners has been impeded. In 1999, a New Zealand hospital tried to engage an Australian ophthalmologist for a short period to address a backlog of cataract surgery. This ophthalmologist had to turn down the position offered because he was unable to find a New Zealand colleague willing to provide general oversight of his work, as required by the *Medical Practitioner Act 1996 (NZ)*. A subsequent allegation by the New Zealand Commerce Commission that a group of New Zealand doctors had come to an arrangement to hinder the entry of Australian doctors into the market for cataract surgery was upheld.² Had mutual recognition applied, the Australian ophthalmologist could have worked without oversight, provided oversight was not a condition of short-term registration in the Australian jurisdiction in which he was registered. (Oversight is not currently a registration condition for Australian and New Zealand-trained practitioners wishing to work on a short-term basis in Victoria or Queensland, for example.)

The Commission sought feedback through the draft report on a proposal that the harmonisation of competency standards for overseas-trained medical practitioners be facilitated by conversion of the permanent exemption to a special exemption. The Australian Department of Health and Ageing responded that:

While the Department has no objection to gradually moving towards mutual recognition with New Zealand for fully registered medical practitioners, any new system would need to accommodate the particular circumstances of partially regulated medical practitioners. Both Australia and New Zealand have specific provisions within their registration legislation to temporarily register international medical graduates who do not currently meet the requirements for full registration. As appropriate, these partial registrations are generally limited by location and supervision requirements. Any alteration to the current arrangements would have to exclude medical practitioners in these circumstances. (Department of Health and Ageing, sub. DR64, p. 4)

The Medical Council of New Zealand felt that the shift to a special exemption ‘would be premature given the significant level of change which is currently happening within Australian medical regulation’ (sub. DR67, p. 1). The change referred to is the creation of a national accreditation and registration scheme for medical practitioners in Australia. The Commission believes that the change in regime in Australia is not sufficient grounds to retain the permanent exemption, given:

- that the special exemption would continue to exclude from mutual recognition the key group of concern (international medical graduates)

² *The Commerce Commission v the Ophthalmological Society of New Zealand Incorporated and Ors HC WN CIV-1997-485-34 [1 March 2004]*.

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- the opportunities for dialogue about the mutual recognition implications of changes to the Australian regime that a special exemption would foster.

The Commission believes, therefore, that the status of the exemption for medical practitioners should be changed from permanent to special, and limited to third-country trained medical practitioners (that is, practitioners with primary and/or postgraduate qualifications obtained outside Australasia). Harmonisation of competency standards for this group could then be pursued through a cooperation program. The Commission sees no reason why mutual recognition should not apply to doctors who obtain all of their medical qualifications in Australia or New Zealand.

RECOMMENDATION 9.1

The permanent exemption for registered medical practitioners should become a special exemption, and be limited to third-country trained medical practitioners (that is, practitioners with primary and/or postgraduate qualifications obtained outside Australasia). Harmonisation of competency standards for overseas-trained medical practitioners could then be pursued through a cooperation program.

RECOMMENDATION 9.2

Mutual recognition should apply to registered medical practitioners who have gained their medical qualifications only within Australia or New Zealand.

9.2 Is universal registration essential to mutual recognition?

A key characteristic of the definition of an occupation for mutual recognition purposes is that it may only be carried on by registered persons. Consequently, people registered in schemes that do not require all practitioners to be registered cannot apply for mutual recognition in other jurisdictions.

This characteristic means that registration schemes that apply only to people who enter an occupation after a certain date, for example, fall outside the reach of the mutual recognition schemes. This situation applies in New South Wales, where teachers who commenced work after 30 September 2004, and those rejoining the service after a break of five or more years, are required to register. Registration is

voluntary for other teachers (NSW Government, sub. 55). The provisions of the mutual recognition schemes therefore do not apply to teachers in New South Wales.³

Limiting ‘registration’ to those cases where everyone must be registered means that mutual recognition will not apply to any new registration scheme that ‘grandfathers’ those practitioners who are already carrying out the occupation, and will not apply during any transitional period provided for existing practitioners to register under the new scheme.

If a scheme that does not cover all practitioners meets the other requirements of the mutual recognition legislation — for example, registration is required by or under legislation and an equivalent occupation exists in another jurisdiction — there does not seem to be a good reason to preclude people registered under that scheme from accessing mutual recognition. Indeed, benefiting from the mutual recognition option might encourage people to join such schemes, with benefits for the community.

FINDING 9.1

The mutual recognition legislation could be amended to ensure that mutual recognition is available to people registered under schemes in which registration is not compulsory for all practitioners, provided those schemes meet the other requirements for registration specified under the mutual recognition legislation.

9.3 Mutual recognition of business registration

A registration taxonomy

Just as individuals must be registered to carry out some occupations, businesses are usually required to obtain authorisations established by or under legislation (for example, a licence, permit, notification or approval) before they can commence operation. Many of these authorisations are granted at state or territory, or even local government, level. The Commission believes that many business licences held by sole traders fall within the coverage of the mutual recognition schemes, but other business licences do not.

In the interests of reducing business compliance costs, improving the mobility of goods and service providers and increasing competition, it appears that a broader range of business registrations could be brought within the scope of the mutual

³ New South Wales has signed bilateral mutual recognition agreements with Victoria and the Northern Territory, and recognises teachers registered in Queensland (although this arrangement is not reciprocated) (NSW Government, sub. 55, pp. 12–13).

recognition schemes. As the Commission noted in its recent benchmarking of Australian business regulation, ‘the need to obtain separate licences dealing with the same business activities in different jurisdictions can represent a significant burden’ (PC 2008e, p. 84).

A number of forms of business registration can be identified, some of which are not easily distinguished from occupational registration. The taxonomy presented at figure 9.1 illustrates one possible way of identifying the different types of registration discussed below.

Mutual recognition of sole trader licences

Registration based only on the characteristics of an individual, whether an employee or a sole trader, is classified as occupational registration. Examples include the registration requirements of nurses, teachers and sole trader real estate agents in Victoria.

Schemes that impose requirements relating to both an individual and his or her associated business might be classified as either occupational or business registration, depending on the dominant requirement for registration. A personal property agent business licence in New South Wales requires that the applicant is a ‘fit and proper’ person, has appropriate qualifications and has paid the required contribution to the Property Services Compensation Fund (OFT 2008). While the final requirement could be regarded as a requirement relating to the business, the dominant requirements are those for the individual. Regulation of pharmacies in New South Wales provides an example of business registration that includes elements related to being ‘fit and proper’ to carry on a business that are similar to requirements for occupational registration. The name and address of a pharmacy owned by an individual must be registered by the Pharmacy Board, and the Board must approve its premises. In addition, the individual must be a registered pharmacist.

While some might argue that mutual recognition does not apply to registrations of this type, legal advice from Crown Law in New Zealand and the Australian Government Solicitor (AGS) suggests that all arrangements that include personal qualifications (as broadly defined by the mutual recognition legislation) in the registration requirements of sole traders are covered by the schemes. The AGS, for example, notes that:

... 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’. (AGS advice, presented at appendix B)

This means, for example, that the requirement that a liquor licensee hold a responsible service of alcohol certificate or is otherwise a ‘fit and proper’ person is likely to bring his or her licence within the coverage of the mutual recognition schemes. Similarly, a ‘fit and proper’ requirement for the operator of a child care centre could bring his or her licence within the coverage of the schemes.

FINDING 9.2

Business licences held by sole traders, that include at least one requirement relating to an individual's ‘fitness’ to hold a licence, are likely to fall within the coverage of the mutual recognition schemes.

Mutual recognition of other business licences

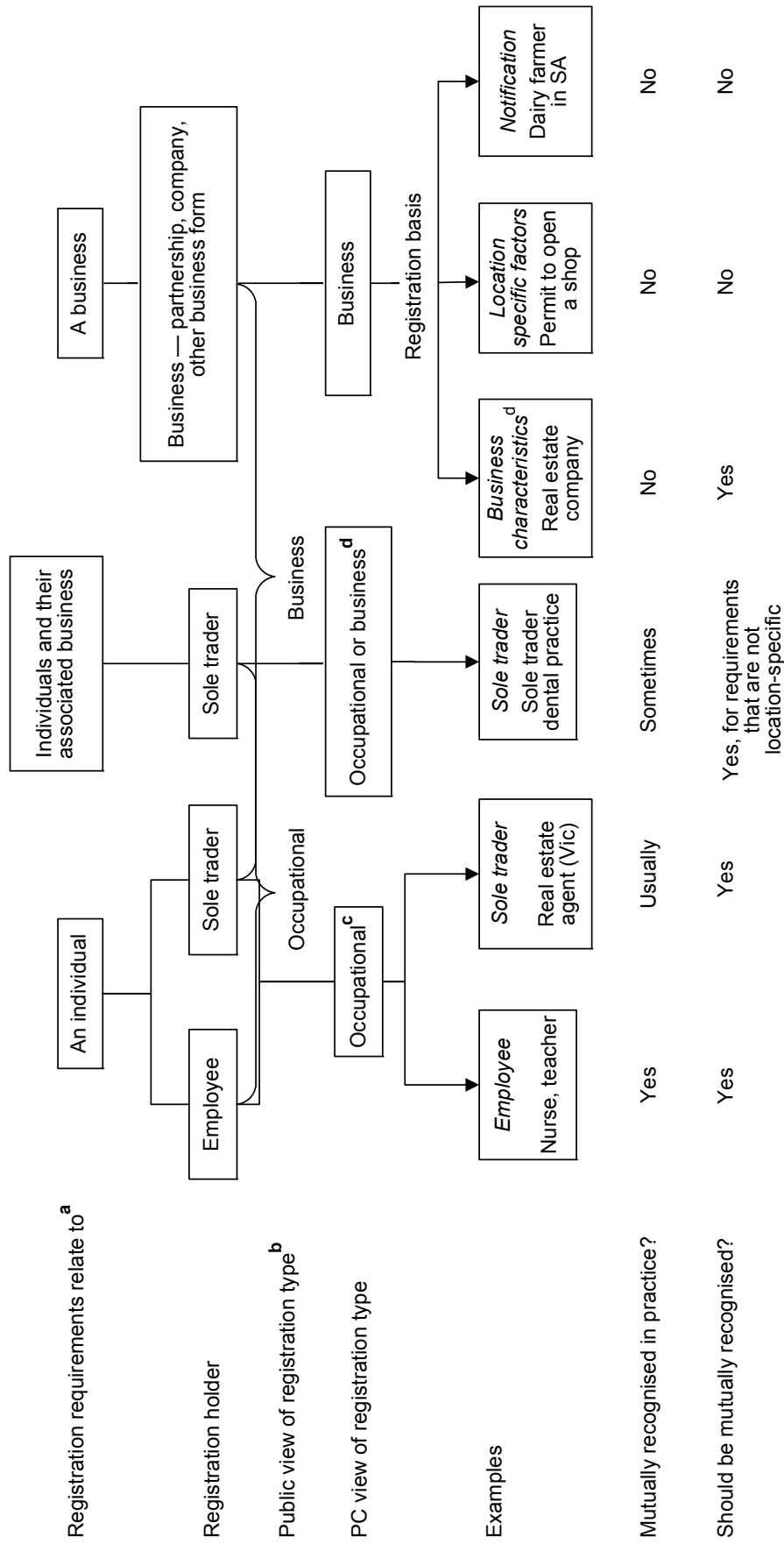
Three classes of business registration associated with business entities that are not individuals can be identified (in reality, registration may involve elements of more than one of these classes):

- Registration based on a requirement that the business notify the relevant regulatory authority that it is in operation — an example is the requirement that all food-handling businesses in New South Wales notify their details to the NSW Food Authority. A key motivation for registration of this type is to facilitate communication with, and inspection by, the local regulatory authority.
- Registration tied to the location of the business — a permit for a café to place tables and chairs on the footpath or for a trade waste business to operate are examples of registration of this type.
- Registration based only on characteristics of the business — for example, relating to requirements around insurance, financial reporting and the characteristics of company employees, which might include a requirement that one or more directors have a specific qualification.

The first two types of licences can be considered ‘pure’ business licences. If the licence requirements relate only to these matters, there is no element that requires the ‘corporate person’ or business entity to be ‘fit and proper’ to carry on the business.

In contrast, the third type of business licence includes requirements related to the business entity that make it ‘fit and proper’ to carry on the business activities.

Figure 9.1 A registration taxonomy



^a Registration here means authorisation conferred under legislation by a local registration authority. ^b The intention with the bracket labelled 'business' is to indicate that some sole trader registrations are viewed as business registrations and outside the scope of mutual recognition. ^c Licence requirements relate to an individual being 'fit and proper' to carry on an occupation. ^d Licence requirements relate to an individual or business entity being 'fit and proper' to carry on a business.

It would appear that none of these forms of business registration are currently covered by mutual recognition, in some cases with good reason. Mutual recognition would make no sense for registration based on the location of a business. A permit to dispose of waste in one location, for example, is of no relevance in another. Similarly, registration based on notification does not appear to be a candidate for mutual recognition. Notification is not based on characteristics of a business that could then be mutually recognised.

Mutual recognition could potentially be extended to apply to business registration requirements that relate to business characteristics. At the moment, in many areas of service provision (for example, motor car traders, electrical contractors and real estate agents), a business run by a sole trader can access mutual recognition, whereas an identical business run by a company cannot. The costs to a business of having to resubmit all registration requirements in each jurisdiction in which it operates could be significant. As the Commission recently noted:

A business seeking industry-specific registration to operate in all states and territories would potentially need to:

- complete up to eight different application forms
- supply up to eight different packages of supporting material, some of which would be duplicated across jurisdictions and some of which would be unique to a given jurisdiction
- possibly complete a number of police checks and advertise the applications in a number of major newspapers
- pay up to eight different application and licence fees. (PC 2008d, p. XXV)

With mutual recognition, at least some of these steps could be less onerous. The same arguments that support the mutual recognition of sole traders' licences (for example, around reduced impediments to mobility with consequent benefits to consumers stemming from greater competition) exist for company licences.

The capacity for ownership changes in businesses that are not run by sole traders is a key reason advanced against mutual recognition of business licences. However, provided a business continues to comply with the requirements for registration in the second jurisdiction, for example, that all directors or owners are fit and proper, then ownership changes should not be a barrier to the mutual recognition of a licence.

Note, some business licences will be covered by COAG's national licensing initiative, but only for those occupations targeted by that initiative.

Mutual recognition could be extended to business registration requirements where similar requirements would result in an individual being registered for mutual recognition purposes.

9.4 Cross-border and short-term service provision

As noted in chapter 2, the architects of the MRA focused on goods and occupations because many services (for example, banking and finance, telecommunications and transport) were regulated at a national level. Similarly, the TTMRA excludes services because the 1988 CER Protocol on Trade in Services led to free trade in many services. However, analysis of the mutual recognition schemes reveals that regulatory heterogeneity, duplication and specificity (that is, limitation of service provision to individuals or businesses with very specific characteristics) create non-tariff barriers to trade in services. Potential exists for the schemes to be extended in ways which reduce these barriers.

Members of registered occupations engage in trade in services when they:

- deliver services across borders via the phone or internet (that is, on a remote provision basis). With developments in technology, this is a more common phenomenon than it was when the mutual recognition schemes were established, and will become even more prevalent in the future
- work on a short-term basis across state/territory or country borders, for example, some support staff travelling with sports teams or providing ‘fly in, fly out’ services to mining companies
- live in population centres that span borders and work in each jurisdiction, for example, some residents of Albury–Wodonga; the ACT and Queanbeyan; and Tweed Heads and Coolangatta.

Trade in services of these types corresponds to modes 1 (point 1) and 4 (points 2 and 3) of the World Trade Organisation classification of modes of service delivery:

- Mode 1 — a local supplier remotely provides a service to a foreign customer. This is the cross-border service provision model, an example of which is the remote provision of financial advice.
- Mode 2 — a purchaser travels abroad to buy a service from a local provider. Overseas tourists buying services from an Australian tour operator is one example of this mode.

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- Mode 3 — a service provider establishes a commercial presence in a foreign country, through investment in a foreign affiliate or subsidiary.
 - Mode 4 — a service provider visits another country to supply a service there on a short-term basis.

The terms ‘cross-border’ and ‘short-term’ service provision used in the following discussion correspond to modes 1 and 4 of service delivery, respectively.

The issue of impediments to trade in services for members of registered occupations was raised by the New Zealand Government:

At present, the TTMRA focuses on [the permanent] movement of service providers, rather than on cross-border [or short-term] provision of services. This approach does not address the increasingly common situation of a person who practises a registered occupation in country A seeking to provide the relevant services to persons in country B, without becoming resident in country B or establishing a place of business in country B.

Where a service provider registered in country A is entitled to registration in country B under the TTMRA, it follows that there is no issue as to the qualification or fitness of the service provider to provide the service. A requirement to seek registration in country B before providing services in that jurisdiction creates a barrier to trade in services, and gives rise to compliance costs for businesses which may be significant compared with potential profits from occasional cross-border service delivery. (sub. 53, p. 17)

The New Zealand Government noted that the Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement signed by Australia and New Zealand on 24 June 2008 will facilitate the resolution of legal disputes about trans-Tasman service provision (chapter 10). Given this development, it suggested that: ‘it may be timely to examine potential benefits and implications of extending the scope of the TTMRA to cross-border provision of services in registered occupations’ (sub. 53, pp. 18–19).

A more cautionary view, however, was put forward by the NSW Government:

... the EU mutual recognition scheme does not require re-registration in the second jurisdiction ... [Use of] such an approach in the MRA and TTMRA would have the potential to resolve issues relating to the cross-border or short-term provision of services. However, it would raise many more issues than it would resolve ... (sub. 55, p. 25)

The NSW Government identified a range of issues that might emerge if practitioners were not required to register in each jurisdiction in which they operate. These included problems arising from: differences in licence scopes between jurisdictions; difficulties for regulators in monitoring compliance with regulatory requirements if they are not aware that someone is working in their jurisdiction; and

the need for an arrangement to permit the enforcement of disciplinary action against a person not registered under a jurisdiction's relevant Act (sub. 55, pp. 25–6).

Within Australia, and between Australia and New Zealand, cross-border and short-term service provision are impeded by the way service providers tend to be regulated. Variation in regulations across jurisdictions creates non-tariff barriers to trade by raising the cost of doing business across borders for 'foreign' service providers. While regulations typically apply equally to both local and 'foreign' service providers, heterogeneity in regulation is likely to disproportionately affect service providers that seek to operate across borders. Those providers often need costly legal and commercial assistance to modify existing business models and structures in order to accommodate different requirements in different jurisdictions.

In addition, even when regulations are identical between jurisdictions, 'foreign' service providers can face higher costs than locals because they are forced to maintain separate business structures and processes in each jurisdiction.

Regulations can, therefore, create barriers to market penetration by 'foreign' service providers.

In the case of occupations, three 'classes' of jurisdiction-level regulation can be identified — regulation governing: occupational registration; characteristics of the service provider; and characteristics of the services provided. A person with appropriate qualifications, for example, can apply for registration as a real estate agent. Before he or she can start providing services, he or she may need to have, for example, a principal office, a trust fund and a complaints process. In providing services, he or she may need to adhere to regulation governing, for example, auction processes and tenancy agreements.

The latter two classes of regulation represent regulation of the 'manner of carrying on' an occupation. Provided this regulation applies equally to all persons and is not based on 'the attainment or possession of some qualifications or experience relating to fitness to carry on the occupation', it falls outside the coverage of the mutual recognition schemes.⁴ That is, it is an exception to the schemes — service providers must comply with the regulations of the jurisdiction in which they deliver services.

In some instances, it is possible that these 'manner requirements' are a larger impediment to the mobility of service providers than the need to reregister. A real estate agent operating as a sole trader in Victoria and New South Wales, for example, currently needs to: maintain two registered offices; operate two, separately

⁴ (*Mutual Recognition Act 1992* (Cwlth) s. 17(2), *Trans-Tasman Mutual Recognition Act 1997* (Cwlth) s. 16(2), *Trans-Tasman Mutual Recognition Act 1997* (NZ) s. 17(2)(c)).

audited, trust accounts; contribute to two fidelity funds; and adhere to two sets of professional conduct regulations.⁵

Importantly, because regulation in each class is often jurisdiction specific, a question arises about which jurisdiction's regulations govern the practice of providers when they deliver services outside their home jurisdiction.

While COAG's national licensing initiative will resolve the need for multiple licences for many occupations within Australia (chapter 5), members of registered occupations not covered by the initiatives, including residents of New Zealand, will continue to face the need to reregister when providing services in more than one jurisdiction. In addition, national licensing, *per se*, will not address the barriers created by interjurisdictional variation in 'manner' regulations or the duplication of effort that arises from the need to comply with these regulations in more than one jurisdiction.

Unfortunately, the Commission has no information on the prevalence of cross-border and short-term service provision in the Australian and New Zealand contexts. Nor does it have good quality information about whether or not service providers (or their employers) view interjurisdictional differences in regulation as a barrier to operating in more than one jurisdiction. However, it is possible to derive relevant information from analyses conducted in a broader context.

Trade in services — the international experience

In most developed economies, services typically account for around two thirds of GDP. The relative importance of services for domestic economies is not reflected in international trade flows, however, with services making up only about 20 per cent of global and OECD trade in 2006 (OECD 2008).

In part, the relatively small share of services in international trade reflects the impact of non-tariff barriers. Like that of tariff barriers, the impact of non-tariff barriers is, effectively, to insulate local producers from foreign competition. Those foreign providers that manage to enter a local market face higher operating costs, allowing local competitors to increase their prices. Looking at the provision of engineering services across national borders, Nguyen-Hong (2000) found that barriers to establishment and ongoing service provision by foreign suppliers had the effect of raising the price of these services by between 1 and 15 per cent in the

⁵ The relevant Victorian legislation does, however, permit agents operating in New South Wales and South Australia to have their principal office within 48 kilometres of the Victorian border, if they are also registered in the jurisdiction in which their office is located. (*Estate Agents Act 1980* [Vic], s. 35).

economies he examined. The detrimental economic impact of non-tariff barriers to service provision is generally thought to be large (boxes 9.1 and C.1).

Box 9.1 Economic impact of removing non-tariff barriers to trade in services

The OECD estimates that an OECD-wide reduction in average regulatory restrictiveness to match the least restrictive national level, combined with harmonisation of all bilateral ‘regulatory stances’, would increase international trade in services by 90 per cent, on average across OECD countries. The OECD estimates, further, that significant increases in productivity and output would ensue across all member countries. The reason output grows is that lower transaction costs from more efficient and diversified communication, finance and transport services, for example, allow productivity gains from specialisation to be realised throughout the economy.

According to the OECD, in 2003, Australia had the highest degree of regulatory heterogeneity of all OECD countries, with 40 per cent of services regulations differing from those of its trading partners. On the other hand, Australia was judged to have the least restrictive regulatory stance of all OECD countries, meaning that restrictions on overseas service providers were relatively few. The OECD’s modelling suggests that Australia’s GDP per capita could increase by 1 per cent as a result of international services trade liberalisation.

Source: OECD (2008).

The way forward

International research on non-tariff barriers to trade in services highlights the potential for widespread economic benefits from their removal. This has led, for example, the European Union to initiate a process to create a seamless internal market for services by 2010 (appendix C). It is reasonable to expect that benefits would flow from the removal of non-tariff barriers to service provision between Australia and New Zealand, or between Australian jurisdictions.

In the trans-Tasman context, mutual recognition under the MRA and TTMRA already provides an effective means of overcoming some non-tariff barriers to service provision. For example, mutual recognition of occupational registration removes some obstacles to trade in services — by facilitating the movement of providers across borders. But it does not overcome the barriers created by the need for service providers to comply with multiple sets of regulation.

Initiatives to address barriers of this type have recently been implemented between Australia and New Zealand in some sectors. One example is the recent agreement covering Mutual Recognition of Securities Offerings (MRSO), which came into force

in 2008 (chapter 10). The MRSO allows, for example, a New Zealand company to extend its share offer to Australian investors, without the need to meet additional requirements under Australian legislation, such as the printing of a separate prospectus. Moreover, under the agreement, the offer of New Zealand securities in Australia is governed by New Zealand legislation, with Australia's role limited to monitoring compliance with that legislation. Breaches of the MRSO requirements could result in criminal or civil proceedings in either Australia or New Zealand.⁶

The MRSO model is similar in many respects to that adopted in the recent EU Services Directive (appendix C). The Directive allows foreign providers of a range of services to remain under control of their 'home' jurisdictions, but with the possibility that some 'host' jurisdiction requirements will continue to apply in certain defined cases. The three-year implementation process for the Directive requires EU member states to screen their national legislation for any requirements that would create barriers to the cross-border or short-term provision of services, or to the establishment of foreign providers. This 'mutual evaluation' process is currently underway (appendix C, box C.2).

The Productivity Commission considers that the European Union's mutual evaluation process provides a potential model for approaching the extension of the mutual recognition schemes to service provision across borders. Under a similar model, Australian jurisdictions and New Zealand could conduct a comprehensive and transparent stocktake of their respective regulations to identify those regulations that constitute barriers to services provision by 'foreign' suppliers.

This exercise could have a broad focus. The goal could be the identification of any regulation that creates a barrier to trade in services, and consideration of appropriate policy responses. Mutual recognition may be a potential solution to only some of the issues identified. In the course of analysing the mutual recognition schemes, for example, the Commission came across a number of pieces of regulation that restrict the provision of services to very specific providers (box 9.2). Regulatory specificity of this type has the potential to create impediments to trade in services.

The evaluation could be initiated, managed and supervised by the Cross-Jurisdictional Review Forum (CJRF), given that its terms of reference include:

- [4] i. receive, share, record details, and promote broader policy discussion by appropriate agencies within each jurisdiction, of the issues in respect of any

⁶ Other mutual recognition agreements entered into by Australia allow for the possibility that services provided by local suppliers to foreign clients will be regulated under Australian law (and vice versa). A recent example is the Mutual Recognition Arrangement between Australian and US stock market regulators, which has provisions to consider allowing securities brokers-dealers of either country to operate in the other market, based on 'home' regulations (ASIC 2008).

areas of economic activity that are not covered by existing mutual recognition arrangements where:

- (a) an argument has been made that the fact that they are not so covered is limiting the effectiveness of existing mutual recognition arrangements; or
- (b) the Cross-Jurisdictional Review Forum considers that there is value in exploring the potential scope to expand the Arrangement. (CJRF 2004, appendix E)

The process could focus on, but not be limited to, those occupations that figure prominently among services traded across particular borders. In the Australian context, the provision of services by tradespeople between adjoining states would be an important area to examine. In the trans-Tasman context, investigation of regulations impeding the provision of: finance and insurance; accounting and auditing; legal; engineering; and architectural services, would be more worthwhile.

Box 9.2 Legislative specificity creates impediments to trade

Some Australian legislation is framed in a way that restricts certain activities to people or businesses with very specific characteristics. For example:

- the Corporations Act Regulation 7.1.29A(2) defines a 'recognised accountant' to be a member of one of three Australian accounting bodies (Stokes, J., Sydney Branch of the New Zealand Institute of Chartered Accountants, pers. comm., 29 July 2008)
- Workcover Western Australia requires audiologists providing audiometric assessments for workers' compensation purposes to be registered. Both initial and ongoing registration rely on full membership of the Audiological Society of Australia (Workcover Western Australia 2008)
- the NSW Casino, Liquor and Gaming Control Authority approves training providers to deliver responsible service of alcohol (RSA) certificates (box 5.1). The vast majority of providers are located in New South Wales
- Victorian regulation limits the provision of some real estate industry training to Victorian TAFE Institutes and the Real Estate Institute of Victoria (Estate Agents (Education) Regulations 2008 (Vic)).

Specific requirements of this type represent impediments to services trade. Specification of Australian-only accounting bodies in legislation, for example, creates an obstacle to New Zealand accountants undertaking work in Australia.

In addition, requirements of this type have the potential to create registered occupations. In the case of RSA certificates, people with qualifications gained interstate under regimes that qualify them as registered for mutual recognition purposes, would be legally able to apply for mutual recognition in New South Wales.

If, at the conclusion of this process, it is apparent that regulatory action is warranted to reduce impediments to service provision across borders, the types of initiative that might effectively reduce those barriers would need to be considered by the jurisdictions. One option — comparable to the European Union’s ‘country of origin principle’ (appendix C) — could involve permitting individuals who provide services in more than one jurisdiction to:

- register only in their ‘home’ jurisdiction
- adhere to the ‘service provider’ regulations of their home jurisdiction when working in ‘host’ jurisdictions
- comply with the ‘service provision’ regulations of any host jurisdiction.

Under this option, a registered architect based in New Zealand and providing services to a client in Australia, for example, could do so without registering in Australia, or complying with Australian regulations governing characteristics of his or her practice (for example, insurance and continuing professional development requirements), but would have to abide by the Australian building code.

However, given the uneven levels of access to critical business information by individual consumers and by firms, it may be desirable, in the first instance, to limit the ability for providers to operate across borders based on home jurisdiction regulation to business-to-business transactions.

Two considerations support a delayed start to the proposed stocktake of existing legislation by Australian jurisdictions and New Zealand:

- The Agreement Between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement, although signed, has not yet come into force. This agreement, which offers cheaper and more effective resolution of trans-Tasman disputes, would be of considerable assistance to the smooth operation of service provision across borders (chapter 10). Its implementation will effectively remove a problem noted by the previous review of the schemes (PC 2003), regarding the lack of trans-Tasman regulatory enforcement mechanism.
- The results of the EU mutual evaluation process will be known at the end of 2009 at the earliest. It would be desirable for these results to inform any similar exercise undertaken in Australia and New Zealand.

FINDING 9.4

Following the implementation of the Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement, Australian jurisdictions and New Zealand could conduct a comprehensive and transparent stocktake of their

legislation, similar to the mutual evaluation process under the European Union Services Directive. This stocktake would aim to identify major barriers to service provision across borders, and could be initiated and managed by the Cross-Jurisdictional Review Forum.

If, based on the outcomes of that stocktake, regulatory action is deemed to be warranted, the jurisdictions could consider the types of initiative that would facilitate trade in services.