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# 10 Mutual recognition in the wider context

## Key points

- The free trade agreements (FTAs) between Australia and the US (AUSFTA) and New Zealand and China (NZ–China FTA) have two general outcomes that may impact on mutual recognition:
  - Immediate and staged lowering of specified trade barriers are expected to increase the flow of goods, labour and services between the FTA partners.
  - Commitments for future cooperation on a range of trade issues are expected to further reduce barriers and facilitate trade over the long term.
- Mutual recognition impacts arise from an international agreement entered into by a mutual recognition partner with a third country if, as a result of the agreement, lower quality goods are sold or less qualified persons are registered in the partner country. Under mutual recognition, those goods and people could subsequently flow into, and become a risk for, the non-FTA signatory.
- The AUSFTA or the NZ–China FTA currently pose no significant risk to mutual recognition partners, arising from lower quality goods or less qualified persons:
  - The FTAs do not change domestic regulatory requirements related to the standards of goods or occupation-registration in ways that are relevant under mutual recognition.
  - Although the NZ–China FTA incorporates a cooperation agreement related to electronic equipment and appliances, the new regime is expected to ensure the quality and standards of those goods from China and to strengthen the compliance regime.
- Mutual recognition effects from future FTA-related cooperation agreements may arise if the agreements result in regulatory change that affects the standards for goods or qualifications for registered persons. It is important, therefore, that the FTA partners consider mutual recognition when negotiating these agreements.
- Australia and New Zealand have continued to expand and strengthen their economic links through recent agreements that extend mutual recognition to new areas such as offers of securities, and support trans-Tasman compliance and enforcement initiatives.

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The years since the 2003 review of the mutual recognition schemes have seen some major international trade developments happen in both Australia and New Zealand. Each country has engaged separately with major trading partners to negotiate bilateral free trade agreements (FTAs). There have also been initiatives between the trans-Tasman neighbours to provide support for the mutual recognition schemes and extend the economic areas covered by mutual recognition.

This chapter reviews some of these developments and considers what impacts they may have on the mutual recognition schemes. The first part of the chapter examines two bilateral free trade agreements that Australia and New Zealand have signed with third countries. The second part of the chapter looks at recent agreements between Australia and New Zealand that enhance mutual recognition between the two countries.

## **10.1 Bilateral engagement with third countries**

The United States–Australia Free Trade Agreement (AUSFTA) and the New Zealand–China Free Trade Agreement (NZ–China FTA) are recognised by the Australian and New Zealand governments as important to the long term strategic goals and the economic wellbeing of their respective countries.

If there are mutual recognition effects on Australia and New Zealand resulting from the FTAs, these effects will arise from what the Mutual Recognition Agreement (MRA) and the Trans-Tasman Mutual Recognition Arrangement (TTMRA) term the ‘mutual recognition principle’, which is based on Australia and New Zealand having faith in each other’s regulation of goods and occupations (chapter 2). That confidence, however, does not necessarily extend to the regulatory regimes of third countries.

If Australia or New Zealand enter into a bilateral agreement with a third country, goods or persons from the third country may end up in the mutual recognition partner, under circumstances that did not exist before the agreement. If a bilateral FTA provides for lower quality goods to be sold, or persons less qualified to practise occupations, then that bilateral agreement may put the mutual recognition partner at risk.

Several participants recognised that such risks already exist in relation to other international agreements. In particular, occupation-related issues that arise in the trans-Tasman setting as a result of the European Union (EU) model of mutual recognition are set out in box 10.1. The EU model of mutual recognition is discussed in more detail in appendix C.

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### Box 10.1 **European Union impacts on mutual recognition**

Issues for optometrists may arise in the trans-Tasman setting as a result of the European Union mutual recognition arrangements.

A loophole existed until recent times whereby optometrists with membership of the British College of Optometrists could gain registration in New Zealand, bypassing the examination and accreditation processes that all other applicants for registration in Australia and New Zealand were required to undergo. This had several effects. British optometrists were able to become registered in Australia and New Zealand without any confirmation of their competence or the adequacy of their training while Australian and New Zealand optometry graduates and optometrists from every other country were required to demonstrate competency.

The second effect was that through European Union arrangements, optometrists from other European countries, in which standards of optometric practice were regarded as inadequate in Australia and New Zealand, could become members of the British College of Optometry, then gain registration in New Zealand, which entitled them to automatic registration in Australia. (Optometrists Association Australia, sub. 42, p. 6)

Potential risks were also identified in relation to nurses and midwives originating from the European Union.

Our understanding of the English language component of the European Union (EU) model is that evidence of English language proficiency is not required if the applicant originates from an EU member country. We feel very strongly that this is an aspect of another model that we would not want adopted in Australia. Proficient oral, written and verbal English language skills are essential skills for health professionals to have in order to ensure safety of the public. In Australia the current guidelines for assessment of overseas trained nurses and midwives incorporates evidence of English language skills for all but those coming from a few countries. This is a far better system for protecting the public. (Australian Nursing and Midwifery Council, sub. 17, p.1)

There are generally two main outcomes of FTAs that have potential consequences for the mutual recognition schemes:

- increased trade flows of goods, people and services between the FTA partners
- commitments to cooperate in specified areas to lower trade barriers and increase trade flows over time.

The following discussion of bilateral agreements focuses first on the expected outcomes of the AUSFTA and then of the NZ–China FTA. This is followed by a separate discussion on Annex 14 of the NZ–China FTA, because it is a mutual recognition agreement within an FTA. The final section of the FTA discussion summarises the mutual recognition-related effects of the agreements.

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## The US–Australia Free Trade Agreement

### *Background*

The United States and Australia concluded AUSFTA in February 2004 and it came into force on 1 January 2005. It is a comprehensive agreement with 23 chapters covering a wide range of trade areas including goods, financial and other services, investment, government procurement, standards and technical regulations, telecommunications, competition, electronic commerce, intellectual property rights, labour and the environment.

The objectives and major expected outcomes of AUSFTA on the flow of goods, people and services to and from Australia are set out in box 10.2. The aspects of the FTA that may have relevance for the existing mutual recognition schemes are summarised as a means of identifying how those impacts may flow on to New Zealand through mutual recognition.

### *AUSFTA cooperation provisions with potential to impact on mutual recognition partners*

Along with the expected tariff-related provisions identified in box 10.2, the AUSFTA includes broad commitments to enhance cooperation between Australia and the United States in particular areas. These commitments may, in future, lead to more specific cooperation agreements relevant to mutual recognition or harmonisation between the two treaty partners. Some of these agreements could include legislative changes that affect the regulation of goods and persons registered for occupations in the following areas:

- There is a framework to promote mutual recognition of professional services through the establishment of a Professional Services Working Group. Future mutual recognition agreements of this type under the AUSFTA may impact on the movement of registered persons carrying on occupations that fall under the Trans-Tasman Mutual Recognition Arrangement (TTMRA).
- There are commitments to cooperate on investment, competition law and policy, consumer protection, telecommunications regulation, and electronic commerce. At least some of the agreements that may result in these areas are likely to include elements of mutual recognition and harmonisation of regulatory regimes.

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## Box 10.2 AUSFTA aims and expected outcomes for Australia

The aims of the Agreement are to:

- improve Australia's trade relationship with the world's most dynamic and richest economy representing a third of the world's GDP and the world's largest merchandise and services exporter and importer
- significantly enhance Australia's attractiveness as a destination for US investment to maintain Australia at the leading edge of growth and competitiveness
- provide some important advances in increasing access to a key market, which in many cases will increase export opportunities and help to underpin the prosperity of export sectors
- bring about dynamic gains through a closer economic partnership, and long term benefits for the Australian economy
- secure important Australian interests in areas such as health, foreign investment screening, the audio-visual sector and quarantine and food safety regimes
- encourage best practice in both the private and public sectors as the US and Australian economies integrate further.

Expected AUSFTA outcomes can be summarised as follows:

- Two thirds of all agricultural tariffs, including lamb, sheep meat and horticultural products, were eliminated when the FTA entered into force, along with greater access to the US market for beef and dairy. A further 9 per cent of tariffs will be reduced to zero by 2009.
- Continued protection of health and environment is ensured because Australian quarantine and food safety regimes are not affected.
- Duties on more than 97 per cent of US non-agricultural tariff lines (excluding textiles and clothing), were eliminated when the FTA entered into force, including automotive products, passenger and light commercial vehicles.
- Tariffs on textiles, some footwear and a handful of other items will be phased out, with all trade in goods free of duty by 2015.
- A framework to promote mutual recognition of professional services is provided through the establishment of a working group.
- Enhanced access is provided to US markets for Australian service providers for such services as professional, business, education, environmental, financial and transport.
- Benefits for the Australian financial sector will result from being associated with financing the increased trade in goods and services flowing from the FTA.
- Future access to the US financial market by Australian financial services providers is assured.

Source: DFAT (nd).

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- There is a framework for exporters to work with government in tackling barriers to trade, including technical regulation and standards, labelling, packaging, testing and certification. Mutual recognition of conformance and testing, and certification bodies is an important step in reducing barriers to the sale of goods.

The Department of Foreign Affairs and Trade Economic Analytical Unit (DFAT EAU) suggests that AUSFTA will result in enhanced cooperation in a range of the areas set out above for both goods and occupations. The benefits to Australia resulting from that cooperation could extend to third countries in several ways. For example, US recognition of educational qualifications gained in Australia may increase the value of those qualifications. This might be expected to result in an increased inflow of Asian students into Australia, where US-recognised qualifications can be obtained at lower cost than in the US (DFAT EAU 2005).

Another possible outcome of AUSFTA is mutual recognition of professional qualifications or registration between Australia and the US. This has the potential to increase the number of US professionals working in Australia. This increase may affect New Zealand because an increased numbers of US professionals registered in Australia will be eligible for registration in New Zealand as well.

When cooperation agreements arising from AUSFTA are finalised and implemented, they will have the potential to impact on goods and people moving between the US and Australia as FTA partners, and from Australia to New Zealand as mutual recognition partners. It is important, therefore, that Australia consider these impacts and consult with the other mutual recognition jurisdictions at an early stage in the development of all relevant cooperation agreements.

## **The New Zealand–China Free Trade Agreement**

### *Background*

New Zealand and China signed the NZ–China FTA in April 2008. Along with the NZ–China FTA, the two countries also concluded the Environment Cooperation Agreement (ECA) and a Memorandum of Understanding on Labour Cooperation (MoU). The three agreements were negotiated at the same time and the existence and purpose of the ECA and MoU are referenced in the FTA. All three are legally binding agreements that entered into force on 1 October 2008.

Negotiations on the NZ–China FTA commenced following the completion of a 2004 joint study report, which concluded that a high-quality FTA could be expected to deliver positive benefits for both countries. The NZ–China FTA is the first FTA China has entered into with a developed country, and the first comprehensive

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agreement for China to cover goods, services and investment from the beginning of the agreement (MFAT and Ministry of Commerce 2004).

In addition to the separate agreements on labour and the environment, the FTA contains a specific mutual recognition agreement, called a cooperation agreement. Annex 14 of the NZ–China FTA is an agreement between New Zealand and China on Cooperation in the Field of Conformity Assessment in relation to Electrical and Electronic Equipment (EEEMRA). Although the EEEMRA was originally negotiated separately from the FTA, the timing allowed it to become an integral part of the wider agreement. This cooperation agreement relates to the mutual recognition of conformity assessment and is discussed separately in the next section of this chapter.

The objectives and major expected outcomes of the NZ–China FTA on the flow of goods, people and services to and from New Zealand are set out in box 10.3. These aspects of the FTA may be relevant to the mutual recognition schemes because the impacts for New Zealand may flow on to Australia.

#### *NZ–China cooperation provisions with potential impacts*

The NZ–China FTA includes general cooperation provisions that may impact on mutual recognition of goods. In particular, the FTA establishes a framework for cooperation among regulators through mutual recognition and harmonisation aimed at facilitating the removal of barriers to trade relating to customs procedures and cooperation, sanitary and phytosanitary measures and intellectual property.

The general cooperation provisions that may impact on occupations include:

- Both parties have agreed to establish a Joint Working Group to explore possibilities for mutual recognition of respective vocational qualifications.
- The FTA includes commitments that provide for people from China to enter New Zealand as employees for up to three years, subject to specified qualifications requirements. This quota covers up to 1000 entrants at any one time, across 20 specified skilled occupations. Within the limit of 1000, the number of entrants in any of the specified occupations is limited to a maximum of 100 at any one time (FTA quota).

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### Box 10.3 **NZ–China FTA aims and expected outcomes for New Zealand**

The aims of the Agreement are to:

- increase access for New Zealand trade and investment and the profile of companies in China, which will contribute to growth, jobs and higher living standards
- resolve trade and investment issues that may arise in the future using the framework established in the FTA
- establish a framework for discussion and cooperation on labour and environment issues
- support New Zealand's objective of broadening and deepening relations in Asia and with China in particular
- support New Zealand's wider trade policy interests in strengthening economic integration in the Asia-Pacific and multilaterally.

A national interest analysis was prepared to assess the FTA from the perspective of New Zealand. The benefits relating to trade in goods are expected to be:

- the removal over time of tariffs on 96 per cent of New Zealand's current exports to China, which is estimated to be an annual duty saving of NZ\$115.5 million based on current trading patterns, including:
  - over the first five years, tariffs on infant milk formula, casein, frozen fish, frozen fish fillets, methanol, animal fats and oils, apples and wine
  - over the first nine years, tariffs on beef and sheep meat, edible offals, sheepskins and kiwifruit
  - creation of a country-specific tariff quota for New Zealand wool, which will provide initial duty free entry for approximately 75 per cent of average annual exports in the period between 2004 and 2006.
- provision for NZ exporters to apply for 'advance rulings' in respect of origin and a commitment for NZ goods entering China to be released within 48 hours of arrival
- retention of New Zealand's rights under the World Trade Organisation to take action against unfairly traded imports from China and to prohibit export subsidies
- provisions for China to expand its commitments in relation to trade in services including in education and environmental services and to facilitate the movement of business people in China.

*Source:* MFAT (2008).

Most of the provisions for goods and occupations relate to future commitments and initiatives that are yet to be developed in detail. However, the FTA quota arrangement already has a developed framework that includes 20 specified occupations for which New Zealand has an identified skills shortage. Some of the 20 occupations are registered occupations under the mutual recognition schemes. Examples include certain types of engineers, veterinarians, registered nurses, early

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childhood teachers, auditors, specified medical technicians, electricians and plumbers.

The quota arrangement under the NZ–China FTA could impact on Australia either through the quantity or quality of FTA quota registered persons who have the potential to be admitted into Australia. The ‘quantity’ outcome will depend on whether an increase in FTA quota-registered persons in New Zealand results in an increase in those person entering Australia. The ‘quality’ outcome will depend on what qualifications and other requirements are put in place before a person from China is allowed to carry on the occupation in New Zealand. The realisation of either outcome ultimately depends on whether any FTA-registered persons actually move to Australia and carry on the occupation that they have registered for in New Zealand. These potential impacts are considered further in the last section of the FTA discussion.

### **Agreement between New Zealand and China on Cooperation in the Field of Conformity Assessment in relation to Electrical and Electronic Equipment**

As discussed above, there is a mutual recognition or cooperation agreement in the area of electrical equipment associated with the NZ–China FTA. The EEEMRA was negotiated separately between the relevant regulatory agencies of both countries and is now incorporated into the FTA as Annex 14.

The NZ–China FTA provides generally for New Zealand exporters to request Chinese approval in advance related to whether their goods comply with Chinese requirements. The EEEMRA, however, goes further. The countries have agreed to recognise compliance marks applied in the country of export as evidence that the goods comply with electrical safety and electromagnetic compatibility (EMC) requirements of the importing country. The EMC requirements deal with ‘radio interference’.

This means that New Zealand exporters may apply the China Compulsory Certification (CCC) mark to all New Zealand products exported to China within the scope of the EEEMRA. Conversely, Chinese exporters may apply the CCC(NZ) mark to Chinese products exported under the EEEMRA to New Zealand.

The ability to pre-certify products for export from New Zealand to China is expected to provide a significant benefit to New Zealand manufacturers, through reduced transactions costs. These lower costs represent a comparative advantage over exporters from other countries whose products have to be tested or re-tested in China.

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The Australian Communications and Media Authority (ACMA) commented and asked a question in relation to this aspect of the EEEMRA:

ACMA's concern is that the TTMRA will operate to make lawful the supply within Australia of a product that is eligible for supply to New Zealand under a MRA between New Zealand and a third country, notwithstanding that the product does not meet Australian regulatory requirements. For example, if a MRA concluded between New Zealand and a third country provides for New Zealand to accept the third country's compliance mark, is Australia under an obligation to allow that product to be supplied to Australia if it bears the third country's compliance mark? (sub. 13, p. 4)

The answer to ACMA's question depends on whether the goods in question are covered under the special exemption for radiocommunications devices discussed in chapter 7. If the goods are not covered by the exemption, they are covered under the schemes. In that case, goods that meet the requirements for sale in New Zealand, including the CCC(NZ) mark, will be eligible for sale in Australia. The implicit concern about quality, however, appears to be unfounded. The information from New Zealand regulators is that EEEMRA products will be tested, inspected, and certified as meeting New Zealand's current product safety and compatibility standards (New Zealand Government 2008b).

The EEEMRA is also expected to strengthen New Zealand's compliance regime for in-scope products because China's system includes the compulsory pre-market approval (inspection, testing and certification) described above. This is a more rigorous system than New Zealand's current domestic regime, which relies heavily on self declaration and post-market surveillance. There are also provisions to increase the ability and obligation for regulators to cooperate in taking action against fraudulent declarations by exporters and to coordinate enforcement activities. This will allow New Zealand regulators to trace non-conforming products back to testing bodies and, ultimately, Chinese manufacturers.

The New Zealand Government has explicitly acknowledged in the NZ–China FTA National Interest Analysis that decisions related to agreements like the EEEMRA will impact on Australia because of the TTMRA. The focus of that document was the EEEMRA, but the reference nonetheless signals an intention to liaise with the relevant Australian authorities (New Zealand Government 2008).

In spite of the intended and actual consultation, the ACMA submission quoted above shows that some regulators in Australia were concerned, at least initially, that the NZ–China FTA would compromise the standards for Chinese electrical products being imported into Australia via New Zealand. ACMA's subsequent submission on the draft report notes that their primary concern is not with the *de facto* recognition of other or lower technical standards, but the fact that Australia will have no choice but to recognise the CCC(NZ) mark without the opportunity to undertake

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consultation with Australian stakeholders (ACMA sub. DR75, pp. 2–4). This mutual recognition of compliance marks issue is discussed in the next section.

## **FTA impacts relevant to mutual recognition schemes**

It is clear from government statements and publications that the Australian and New Zealand Governments expect their respective FTAs to have positive effects on the economies of each FTA country. The question for this review, however, is whether some of the effects for the FTA country — good or bad — flow on to that country’s mutual recognition partner. This assessment of the relationship between the FTAs and the mutual recognition schemes focuses primarily on the resulting changes in relevant quantity and quality aspects of goods and occupations.

### *Goods*

There are not likely to be significant mutual recognition-related risks from an increased quantity of goods resulting from the FTAs, unless there is a quality issue as well. If there is no quality difference arising from the FTA, the quantity effects of an FTA will be related only to a possible increase in the flow of goods.

First, if an FTA actually does increase the quantity of third-country goods flowing into the other mutual recognition partner (non-FTA country), this effect should lead to greater competition in the market and lower prices for consumers. The expected positive economic effects from an FTA relate primarily to increased trade from lower tariff and non-tariff barriers. If the FTA between one mutual recognition partner and a third country also increases goods into the non-FTA country, then this mutual recognition impact is likely to have similar positive effects.

Second, an FTA will not affect any tariff or non-tariff requirements that are determined by source country or ‘rules of origin’ in the non-FTA country. Tariffs are an example of a requirement determined by rules of origin and can be used to illustrate the FTA quantity effects from lower AUSFTA tariffs. The New Zealand tariff for AUSFTA goods that originate in the United States will be the same, whether the goods come via Australia or whether the goods come directly to New Zealand. There is no incentive to send these goods to New Zealand via Australia. As a result, more AUSFTA goods into Australia does not mean more AUSFTA goods into NZ.

The risks arising from mutual recognition impacts related to third country goods are more likely to arise from lower quality goods rather than issues of quantity. The confidence Australia and New Zealand have in each other’s regimes does not necessarily extend to a third-party regime. There is a possibility, therefore, that a

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bilateral agreement between a mutual recognition partner and a third country puts the non-FTA country at risk in circumstances where third-country goods of lower or unacceptable quality can be sold as a result of the FTA.

There can be a wide range of different quality goods being sold in New Zealand and Australia at any one time in any particular product category. While the quality may differ, the goods will all need to meet the relevant domestic requirements for the sale of these goods. The regulatory requirements set a ‘minimum’ threshold for such things as consumer health and safety criteria. In the context of mutual recognition, lower quality means that these domestic requirements are lowered, allowing goods to be sold after the FTA that would not have met the requirements that were in place before the FTA.

For this quality issue to be a problem, the FTA would need to provide for a legislative change in the existing domestic standards or other requirements related to the sale of the good. Using the NZ–China FTA as an example, if the FTA lowers requirements or standards for the sale of Chinese goods in New Zealand, as compared to higher (and more costly) requirements in Australia, there may be an incentive to ship US goods via New Zealand to Australia.

If, on the other hand, the regulatory requirements related to the sale of goods remains the same, the quality of FTA goods poses no greater threat than any other Australian or New Zealand goods. There is no indication that the Australia or New Zealand FTAs contain any concessions related to lowering of standards that would be of concern to the mutual recognition partner.

In the case of the AUSFTA, some import quarantine conditions are affected, but these fall outside the scope of the mutual recognition schemes because quarantine laws are permanent exemptions under the TTMR Acts (chapter 8). In the case of the NZ–China FTA, the Australian Quarantine and Inspection Service raised some questions about the resulting risk of Chinese traditional medicines coming into Australia. Currently, Chinese traditional medicines will fall outside the TTMRA as part of the permanent exemption for risk foods or the special exemption for therapeutic goods. If, however, the work to bring some of those exemptions under the mutual recognition schemes is successful, then there may be a future risk to either mutual recognition partner from bilateral agreements with third countries that result in lower standards for these goods.

In addition, the National Interest Analysis for the NZ–China FTA specifically noted that no legislative changes would be made as a result of the FTA, except for those related to the EEEMRA. As previously discussed, the EEEMRA is expected to increase the quality of goods imported into New Zealand from China, rather than to lower standards.

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There is one other mutual recognition impact that should be considered. The two ACMA submissions to this study point out that, as a result of the NZ-China FTA, Australia will be required to recognise the CCC(NZ) mark for goods imported under the EEEMRA regime (ACMA sub. 13, p. 4; ACMA sub. DR75, p. 3). Chapter 7 discusses the radiocommunications special exemption and deals with the issue of compliance marks in more detail. The compliance mark is relevant here as a possible mutual recognition impact that may arise even when there are no changes to the standards as a result of an FTA.

In general, compliance marks are used by regulators and the industry as *prima facie* evidence that goods meet regulatory requirements. In Australia and New Zealand, stakeholders are already familiar with the C-tick for EMC compliance and the Regulatory Compliance Mark (RCM) related to electrical safety. These marks are recognised to indicate that electrical and radiocommunications equipment meet New Zealand and Australian standards for those goods.

The discussion in chapter 7 points to the harmonisation in the areas of electrical and radiocommunications equipment as good examples of cooperation between regulators. The C-tick was established through concerted joint Australia and New Zealand effort and consultation. ACMA points out that it will now need to educate the Australian regulators and industry suppliers about the CCC(NZ) mark, notwithstanding that Australian regulators had no say in New Zealand's policy decision to create and accept a new mark (ACMA sub. DR75, pp.3–4). The submissions did not quantify the expected cost of informing Australian stakeholders about the new mark, but it should be noted that the New Zealand regulators will also need to go through a similar process to inform its stakeholders.

### *Occupations*

In relation to occupations, the AUSFTA and the NZ–China FTA provide for future cooperation or mutual recognition initiatives for certain occupations. These commitments may have impacts related to the TTMRA if they affect the number of persons applying for registration in Australia or New Zealand, or if they impact on the qualifications of persons applying. There are similarities between the assessment of FTA quantity and quality impacts for occupations and those for goods. The risks associated with less qualified people in registered occupations are of greater concern than those associated with larger numbers of suitably qualified people entering the non-FTA country.

The impact of the FTAs on the number of people from third countries successfully moving from one mutual recognition partner to the other is not likely to be significant. The AUSFTA includes a commitment to promote mutual recognition of

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professional services between Australia and the United States. The NZ–China FTA provides for a joint working group to explore possibilities for mutual recognition of vocational qualifications. These provisions may mean that, eventually, US professionals (under AUSFTA) and Chinese individuals with vocational training (under the NZ–China FTA) will be more easily able to register in FTA partner countries to carry on occupations.

The possibility of increased numbers of FTA-registered people in Australia and New Zealand does not mean there will be more FTA-registered people in the non-FTA country. The FTAs do not provide people with increased immigration access to the relevant mutual recognition partner. Australia and New Zealand set their own requirements for permanent entry, residency and citizenship that are outside the scope of the mutual recognition schemes and that are not changed by the FTAs. For example, the immigration requirements for Chinese applicants for residency in Australia will be the same whether they apply from China or New Zealand.

There is a possibility that some of the FTA-registered people will use the experience of working under the AUSFTA in Australia, or the NZ–China FTA in New Zealand, to facilitate finding jobs in the non-FTA country. Having a job and an employer that will sponsor an applicant may increase the possibility that the applicant qualifies for immigration. Although it is possible that FTA's may provide some third-country nationals opportunities that assist them in immigration, the decision on that entry process remains under the exclusive control of the mutual recognition partner concerned. Moreover, the NZ–China FTA-registered people are under a quota that reflects labour shortages in New Zealand. In cases such as this, it is unlikely that unemployment would become a factor in Chinese practitioners moving to Australia.

Current FTA-related cooperation agreements and those that may be agreed in the future also need to be assessed in relation to whether the agreements affect the qualifications of persons applying for registration. It is again important to note that persons currently registered for occupations in New Zealand and Australia will have a wide range of qualifications and skills. The registration requirements in each jurisdiction will set the minimum criteria to be met before person can be registered for an occupation.

In the context of mutual recognition, the facilitation of the movement and registration of people under a cooperation agreement only becomes a mutual recognition risk if the agreement leads to less qualified persons being registered than was previously allowed. These registered persons will then be covered under the TTMRA and will be able to avail themselves of mutual recognition.

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The NZ–China FTA provides a specific example related to a cooperation agreement. It allows for a quota of Chinese nationals to work in New Zealand in occupations where there is a shortage of skilled labour. The FTA does not, however, provide for accelerated recognition or special treatment for any of the listed occupations at the present time. A Chinese person working under the FTA quota arrangement will need to meet any relevant existing requirements for registration in New Zealand. This means that, even if a Chinese person in New Zealand under the FTA-quota does gain entry into Australia, the qualifications of that person will be consistent with other persons moving to Australia from New Zealand.

The TTMRA reflects that New Zealand and Australia have similar objectives for their regulatory regimes. The risk that either partner would accept persons to carry on occupations in their own country that the other country would reject would, therefore, have been judged to be extremely low when the TTMRA was agreed.

Notwithstanding the underlying confidence in each other’s regimes, it is important that mutual recognition partners take special care when they undertake FTA cooperation agreements related to occupations. In contrast with the temporary exemption mechanism for goods, there are currently no legislative fixes available to prohibit occupational registration under mutual recognition. It is, therefore, even more important in the area of occupations that consultation between Australia and New Zealand be undertaken when one country engages in further development of mutual recognition of occupations with a third country.

FINDING 10.1

*The US–Australia Free Trade Agreement and the New Zealand–China Free Trade Agreement do not significantly increase the risk to consumers of lower quality products or registered persons with lower qualifications entering New Zealand or Australia under the TTMRA.*

### ***Enhancing the opportunities and mitigating the risks of FTAs***

Although the previous sections in this chapter focus primarily on the possible risks from international agreements such as the AUSFTA and the NZ–China FTA, there are also opportunities arising from such agreements. The mutual recognition opportunities are another factor for New Zealand and Australia to consider in dealings with third countries.

Cooperation agreements between either Australia or New Zealand and a third country may result in recognition or harmonisation of regulatory regimes. This cooperation by one mutual recognition partner may form the basis for future cooperation between the other mutual recognition partner and that third country

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because differences in standards have already been dealt with to some extent. In areas where Australia and New Zealand have joint standards or joint compliance bodies, an agreement between one mutual recognition partner and a third country may automatically extend to the other because the joint standards or bodies become recognised by the third country under the agreement.

There is also a reverse side to recognition of third-country standards when mutual recognition partners have achieved harmonisation or joint standards. The recognition by one partner that another country's standards are equivalent to the harmonised or joint standards means that the mutual recognition partner will, by default, also have to recognise those third-party standards as acceptable.

This mutual recognition effect has particular relevance for two special exemptions under the TTMRA — EMC and therapeutic goods. As discussed in the previous section, harmonisation of EMC standards means that Australia has to recognise the CCC(NZ) mark for goods that are no longer under the radiocommunications special exemption. In addition, there is a possibility that the therapeutic goods special exemption could be removed by establishing a joint trans-Tasman regulatory regime for therapeutics (chapter 7). If Australia or New Zealand subsequently made a mutual recognition agreement with a third country in the area of therapeutics, this could potentially raise an issue similar to that highlighted by ACMA.

ACMA expressed concerns that EMC goods from China, that do not meet Australian regulatory requirements in term of compliance marks, might flow into Australia as a result of the NZ–China FTA (sub. 13). In particular, ACMA was concerned that acceptance of third-country compliance marks should provide an equivalent level of confidence for governments, industry and consumers in Australia (sub. DR75). These concerns suggest that perceptions of risk from third-country engagement by one partner are important in a mutual recognition context. This reaction may be heightened when concerted effort and significant resources have been expended to develop harmonised or joint standards, such as a joint compliance mark. Similar perceptions may arise in the area of therapeutic goods, as a result of bilateral engagement by either Australia or New Zealand with a third country, following removal of the special exemption and establishment of a joint regulatory regime.

However, a joint regulatory regime should not preclude Australia or New Zealand recognising, in coming years, third-country standards as equivalent. Both Australia and New Zealand have existing obligations, as members of the World Trade Organisation (WTO) and as parties to the WTO Agreement on Technical Barriers to Trade (TBT Agreement), to recognise equivalent standards of other WTO countries.

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The TBT Agreement includes a requirement that all WTO parties give positive consideration to accepting the standards of other parties as equivalent if they produce equivalent outcomes. The TBT Agreement also allows for the right of parties to ask for reasons if standards are not accepted as equivalent, while the WTO framework provides various mechanisms for dispute resolution. Both the NZ–China FTA and the AUSFTA repeat these obligations, even though the United States and China already have existing obligations as WTO members (USTR 2007).

Given that Australia and New Zealand have international obligations to recognise third-country standards, that recognition may result in a perception of risk. In turn, that perception may discourage progress towards mutual recognition or harmonisation between Australia and New Zealand. A mutual recognition partner may be reluctant to invest the effort into harmonising standards if the other partner might unilaterally recognise third-country standards as equivalent, without prior consultation with the first partner.

The Commission considers it unlikely that, having signed up to joint standards, New Zealand or Australia would take actions that undermined those standards. Nonetheless, as mentioned, perceptions of risk might undermine confidence in the regulatory regimes of the mutual recognition partners. Such perceptions can be avoided through effective information exchange between the partners and, if judged appropriate, explicit commitments to consult in advance of bilateral engagement in the relevant area.

Several submissions suggested that the Productivity Commission recommend that Australia and New Zealand take into account the possible impacts on the schemes of their separate international agreements with third countries (for example, Australian Nursing and Midwifery Council, sub. DR65, p. 2). The Australian Quarantine and Inspection Service recognised the potential for mutual recognition consequences arising from all trade agreements with third countries, not just FTAs. It commented:

We consider that there would be value in strengthening the requirement of either side to consider impacts of such arrangements on their trans-Tasman partner. One means may be to implement a reporting obligation of the impacts that these arrangements may have on trans-Tasman trade, with the negotiating trans-Tasman partner informing the relevant sectoral co-operation program(s). (sub. DR83, p. 3)

Both the Australian Department of Foreign Affairs (DFAT) and the New Zealand Ministry of Foreign Affairs (MFAT) undertake high-level information exchanges with their trans-Tasman counterparts in recognition of the close relationship between the countries, and to keep the other informed about relevant international initiatives and developments.

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The actual negotiation for the international agreements are undertaken with a high level of security and confidentiality in relation to the details of the agreed text. It is, however, important to balance the need for confidentiality with the need to consult and discuss the desired objectives and expected outcomes of international agreements with stakeholders who will be affected, including mutual recognition partners.

Both New Zealand and Australia have a comprehensive consultation process with their own stakeholders when developing international agreements. Part of this process is the consideration of how new agreements might impact on existing international obligations, including those under mutual recognition. The reference to the TTMRA in the NZ–China FTA National Interest Analysis demonstrates that New Zealand specifically considered mutual recognition effects when undertaking the EEEMRA (New Zealand Government 2008).

Nevertheless, there is evidence from submissions that stakeholders, including regulators, are not convinced that current levels of consultation are sufficient to mitigate the risks that may arise. The concerns raised in submissions indicate there may be a need for further education and awareness of possible mutual recognition impacts related to international agreements.

Neither the DFAT or the MFAT ‘guides’ to free trade agreements currently includes a reference to mutual recognition or to the relevant mutual recognition partner (DFAT 2005; MFAT 2007a). An agreed consultation and assessment process could be developed with input from all the jurisdictions, for international agreements that may impact on mutual recognition partners. Those processes could then be documented in publications such as the abovementioned FTA guides, to increase transparency for stakeholders and to give the jurisdictions confidence that mutual recognition considerations are adequately built into international agreements at all levels.

#### FINDING 10.2

*Free trade agreements generally include commitments by the parties to engage in further cooperation, recognition and harmonisation agreements that may create opportunities and may pose risks for a mutual recognition partner:*

- *Opportunities arise if the cooperation agreement extends recognition or harmonisation to the mutual recognition partner, or if the agreement provides a platform for discussions between the mutual recognition partner and the third country.*
- *Risks arise if the cooperation agreement results in lower quality goods being sold or less qualified persons carrying on occupations in the free trade partner that subsequently flow into the mutual recognition partner.*

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- *Opportunities can be increased and risks can be mitigated if Australia and New Zealand consider mutual recognition implications when cooperation agreements are negotiated.*

RECOMMENDATION 10.1

*Australia and New Zealand should take into account the possible impacts that international agreements will have on the mutual recognition framework when negotiating future initiatives with third countries.*

## **10.2 Recent Australia and New Zealand mutual recognition initiatives**

Since the TTMRA, Australia and New Zealand have continued to expand the scope of mutual recognition and cooperation into additional areas. There are recent agreements that provide useful approaches for consideration if the mutual recognition schemes change as a result of this review. This section focuses on two agreements, in particular:

- The Agreement between the Government of Australia and the Government of New Zealand in relation to Mutual Recognition of Securities Offerings (MRSO).
- The Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement (PRET).

These agreements may be relevant to the future development of the mutual recognition schemes because the MRSO provides a legislative model that may be useful if there is a decision to extend the mutual recognition schemes to other areas such as services. The PRET provides greater support for trans-Tasman enforcement, which could encourage compliance with extended schemes.

### **Agreement Between the Government of Australia and the Government of New Zealand in relation to Mutual Recognition of Securities Offerings**

The MRSO came into force on 13 June 2008. In a joint statement, the Commerce Minister and the Australian Minister for Superannuation and Corporate Law called the MRSO a ‘landmark agreement’ (MED 2008).

The primary objectives of the MRSO are to:

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- remove unnecessary regulatory barriers to trans-Tasman securities offerings, in order to facilitate investment between New Zealand and Australia
  - enhance competition in domestic capital markets
  - reduce costs for business
  - increase choice for investors.

A secondary objective is to significantly reduce compliance costs for issuers wishing to offer securities to investors in New Zealand and Australia (MED 2008). The expected outcomes of the MRSO for both countries are summarised in box 10.4.

Although the legislative requirements of Australia and New Zealand securities law differ in a number of respects, the underlying policy goals are the same. These goals can be achieved by mutual recognition of services related to securities offerings. Before the MRSO, New Zealand and Australian issuers had to comply with the relevant fundraising requirements in both countries, unless the issuer was granted an exemption by the second country. A major part of the increased costs for issuers wanting to offer securities across the Tasman related to the production of two sets of offer documents.

The MRSO now allows an issuer of securities to extend an offer that is being lawfully made in the home country to investors in the host country without the need to meet additional substantive requirements under the host country's legislation. Under the MRSO, the home jurisdiction regulator will have primary responsibility for supervising a cross-border offer. The host jurisdiction regulator responsibility is directed at ensuring compliance with the entry and ongoing requirements for the MRSO scheme. Legislation in each country will, to the extent necessary, expressly provide for these powers.

A breach of the MRSO requirements by an issuer could be the subject of both civil and criminal proceedings, in the home jurisdiction or the host jurisdiction. At present there is a risk arising from the fact that civil pecuniary penalty orders and criminal fines are not enforceable across the Tasman. This problem is one of the issues addressed by the newly-signed PRET between Australia and New Zealand, discussed in the following section.

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#### Box 10.4 Expected outcomes of MRSO for Australia and New Zealand

There are a number of expected outcomes associated with the new regime:

- A greater flow of capital between countries. This may have some fiscal benefits for the governments and may encourage national economic growth more generally.
- Investors will benefit from increased choice for investment and therefore greater scope for risk diversification. A greater number of issuers of securities may also lead to a more efficient allocation of capital to investors, which ultimately will provide more effective and appropriate products to investors.
- The competitiveness of smaller issuers may be affected by increased numbers of issuers in the market, but this risk is mitigated to some extent by access to a greater number of investors.
- Although the extent of the host country authority over issuers from the home country will be limited, this is mitigated by the requirement that the issuers will have to comply with the ongoing requirements of the host country regime.
- The costs savings for Australian issuers under the new regime are expected to range from A\$10,000–A\$50,000 per securities offering, inclusive of legal costs. Costs savings for New Zealand issuers are likely to be proportionately similar. The cost of the previous regime was reduced for issuers granted general exemptions that allowed securities to be offered without complying with some of the requirements of the host jurisdiction.
- The costs associated with the new regime relate to the need for issuers to submit the home country offer documents to the host country regulator when applying for entry into the scheme. The magnitude of these costs was not clear at the time of the Regulatory Impact Statement.

Source: MED (2008).

#### *Impact of MRSO on the mutual recognition schemes*

The MRSO does not directly affect the operation of the Mutual Recognition Acts or the Trans-Tasman Mutual Recognition Acts in relation to the flow of goods and persons carrying on occupations. It does, however, extend the scope of the mutual recognition schemes between Australia and New Zealand into a new area, by providing for mutual recognition in cross-border provision of securities offers.

More prosaically, the MRSO also provides a legislative model for implementing the regime that may be useful when considering other changes or extensions to mutual recognition. In New Zealand, the framework for mutual recognition of securities offerings was implemented by inserting a generic mutual recognition framework into the *Securities Act 1978* (NZ) through the addition of a new part 5 to that Act. Part 5 provides for the making of regulations to give effect to mutual recognition

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regimes in relation to offers of securities that are regulated in other countries (the part 5 model).

The purpose of adding the part 5 model into the NZ Securities Act was to provide for parliamentary agreement on the generic framework for mutual recognition of securities offers which reduces barriers to cross-border service provision, while preserving appropriate safeguards. The model then allows the details of a particular recognition scheme to be set out in regulations. This means making or changing entry and ongoing requirements, as well as adding other countries to the scheme, can be accomplished without the need to amend the statute.

The mutual recognition schemes are broad and wide ranging in coverage and scope. As a result, the TTMR Acts are necessarily general with high level requirements relating to most goods and registered occupations. In contrast, the MRSO is an example of mutual recognition principles being extended into one specific service provision area, but with the potential to include additional jurisdictions to the schemes at different times with some flexibility for allowing each jurisdiction to come under the regime with slightly different requirements. The part 5 model appears to be a useful and efficient framework for implementation of the MRSO in New Zealand and may be worth considering when and if changes are made to the mutual recognition schemes.

## **Agreement Between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement (PRET)**

### *Background*

The New Zealand and Australia Governments signed the PRET on 24 July 2008. At the time, the governments acknowledged the long-standing friendship and close historic, political and economic relationship, which is reflected in the CER Agreement and indicates confidence in each other's judicial and regulatory institutions. In a joint statement, the Australian Attorney-General and the New Zealand Associate Justice Minister stated:

This Treaty represents an unprecedented level of cooperation between Australia and New Zealand in civil court proceedings ... Being able to resolve trans-Tasman disputes more effectively and at lower cost supports closer economic relations between Australia and New Zealand and will underpin a broad range of other trans-Tasman initiatives. It is a fitting contribution to the 25th anniversary year of the CER. (McClelland and Dalziel 2008)

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The treaty is based on recommendations made in December 2006 by the Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement, established by the New Zealand and Australian Prime Ministers in 2003 (MOJ 2006). The findings of the working group revealed a need to address a range of trans-Tasman issues that arise in civil proceedings and that undermine the effectiveness of various regulatory regimes in each country. The need for such an instrument arises from the significant increase in the movement of goods, people, assets and services between New Zealand and Australia over time (chapter 4). Greater mobility means greater numbers of cross-border issues and disputes involving individuals and businesses.

The expected outcomes of PRET for Australia and New Zealand are outlined in box 10.5. The objectives of the agreement are to:

- achieve closer integration between the New Zealand and Australian civil justice systems
- make the resolution of trans-Tasman disputes simpler, less costly and more efficient
- make any remedies more effective
- support the success of the trans-Tasman trade relationship.

#### *Impacts on the mutual recognition schemes*

PRET will increase the effectiveness of each country's regulatory rules when disputes or enforcement issues arise in the trans-Tasman context. This support of the compliance regime will underpin a broad range of other trans-Tasman initiatives such as mutual recognition, harmonisation and the development of common standards.

Benefits from the treaty — such as the enforcement of fines for non-compliance with legislation — will be particularly important for the MRSO because it mitigates the host regulator's loss of control over issuers who will now be regulated in the home country. The PRET may have less of an impact on the mutual recognition schemes because of the compliance structure of the TTMR Acts. The current legislation has limited enforcement powers and compliance obligations.

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### Box 10.5 **PRET expected outcomes for Australia and New Zealand**

The following outcomes for the treaty partners are expected:

- Civil proceedings from a court in one country are allowed to be served in the other without additional requirements.
- The range of civil court judgments that can be enforced across the Tasman is extended. Judgments can only be refused enforcement if they conflict with public policy in the country of enforcement.
- The treaty provides for interim relief to be obtained from a court in one country in support of civil proceedings in the other.
- The regime may be extended to tribunals on a case by case basis.
- A common 'give way' rule is adopted and applies when a dispute could be heard by a court in either country.
- Greater use of technology for trans-Tasman court appearances is encouraged.
- Enforcement of civil penalty orders across the Tasman is allowed.
- Trans-Tasman enforcement of fines for certain regulatory offences is allowed, where there is a strong mutual interest in doing so.

*Source:* McClelland and Dalziel (2008).

The Acts are only a defence for sellers against non-compliance with other regulation, and do not authorise enforcement action for mutual recognition of goods (chapter 8). The discussion in chapter 5 indicates that applicants for occupational registration under the TTMR Acts fare somewhat better because they may appeal to a Tribunal to have a decision of the registration authority reviewed.

There are two ways in which the PRET might be directly relevant to mutual recognition. First, the treaty allows for legal representatives to appear remotely, without being registered in the relevant jurisdiction with leave of the Court. Second, it may affect a particular occupation-registration case because the agreement provides for the possibility that the mutual recognition of proceedings could be extended to tribunals, as well as the relevant courts, on a case-by-case basis. There is, however, no indication from consultations or submissions whether there is a need for this.

The PRET may also be relevant to the mutual recognition schemes if the findings and recommendations of this review result in amendments to the compliance and dispute resolution framework of the schemes. PRET would then support any additional cross-border dispute resolution arising between home and host jurisdictions in relation to what is currently covered by mutual recognition, or as it is modified or extended in the future.

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*Recent trans-Tasman agreements may provide alternative or complementary approaches for improving the operation of mutual recognition. The new agreements apply mutual recognition to some services and strengthen trans-Tasman enforcement and dispute resolution. It is important that these new instruments be considered alongside other options when modifying the mutual recognition schemes.*