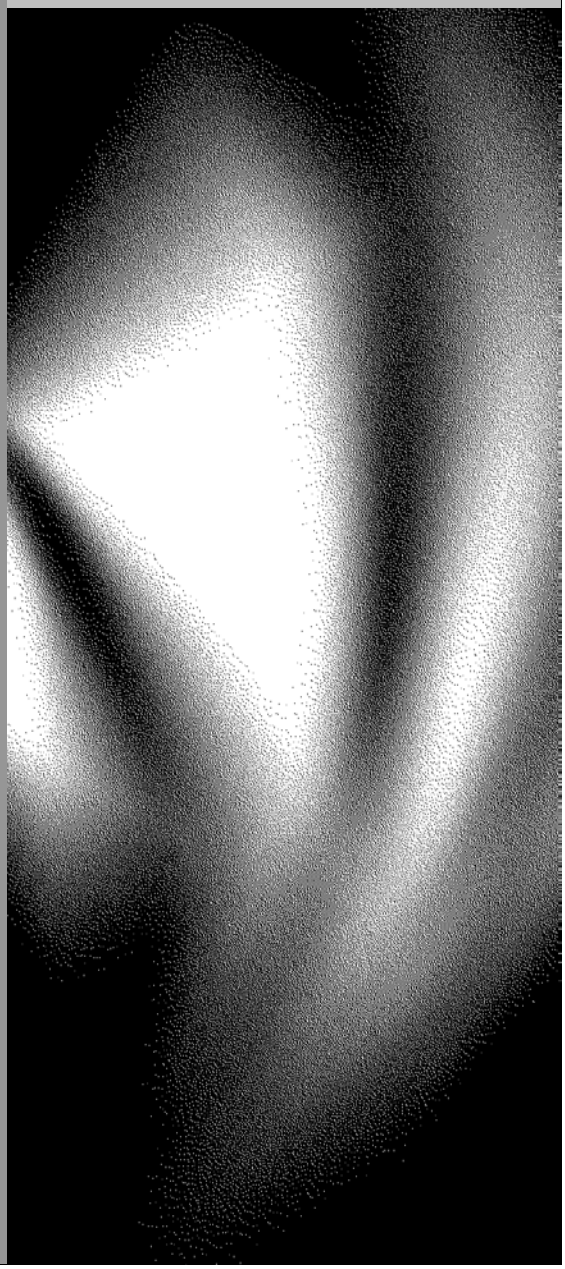
PRODUCTIVITY COMMISSION

Evaluation of the Mutual Recognition Schemes

Research Report

8 October 2003



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The Productivity Commission

The Productivity Commission, an independent Commonwealth agency, is the Government's principal review and advisory body on microeconomic policy and regulation. It conducts public inquiries and research into a broad range of economic and social issues affecting the welfare of Australians.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Information on the Productivity Commission, its publications and its current work program can be found on the World Wide Web at www.pc.gov.au or by contacting Media and Publications on (03) 9653 2244.

Foreword

The Mutual Recognition Agreement and the Trans-Tasman Mutual Recognition Arrangement are important government initiatives to facilitate greater integration and competitiveness of the Australian and New Zealand economies. They involve significant cooperation across ten governments at the national, state and territory levels.

This evaluation by the Productivity Commission arises from the requirement under the Trans-Tasman Mutual Recognition Arrangement that it be reviewed after five years, in conjunction with the second five yearly review of the Mutual Recognition Agreement. The Commission's report was requested by the ten governments concerned, who will draw on it in considering possible changes to the two schemes. While the Commission found the schemes to be effective overall in achieving their objectives, it has identified a number of potential improvements.

In preparing its report, the Commission has drawn on information and views from a wide range of sources in Australia and New Zealand, including industry organisations, business entities, professional groups, unions and individuals, as well as government officials from all jurisdictions. The Commission is grateful for the input provided in submissions and at meetings and roundtable discussions, including in response to the draft report.

This evaluation and report were overseen by Commissioner Tony Hinton, with the support of inquiry staff from the Commission's Canberra office.

Gary Banks
Chairman
October 2003

Terms of reference

2003 Review of the Mutual Recognition Agreement and the Trans Tasman Mutual Recognition Arrangement

PRODUCTIVITY COMMISSION ACT 1998

1. The Productivity Commission is requested to undertake a Review of the Mutual Recognition Agreement (MRA) and the Trans Tasman Mutual Recognition Arrangement (TTMRA) and furnish a report to the Parliamentary Secretary to the Treasurer, on behalf of the Treasurer, within 9 months of commencing the study.
2. The Review of the MRA and TTMRA will:
   a) assess the efficiency and effectiveness of the MRA and TTMRA in:
      - fostering and enhancing trade and workforce mobility between Australian States and Territories and New Zealand;
      - enhancing the international competitiveness of Australia and New Zealand businesses and Trans Tasman business sectors; and
      - enhancing the capacity of Australia and New Zealand to influence international norms and standards.
   b) consider whether any changes to the MRA and TTMRA and the related legislation, or the implementation thereof, are required to improve their operation;
   c) examine whether broadening the scope and objectives of the MRA and TTMRA would enhance their efficiency and effectiveness, and if so, how this might be done; and
   d) examine options for ensuring that MRA and TTMRA issues are considered early in domestic policy processes and that implications for the schemes' regulation coordination are taken into account.
3. In relation to 1:
   a) any options for change should be practically achievable and based on clear evidence that the expected benefits would outweigh the costs (including any implementation costs); and
   b) the MRA and TTMRA should remain closely aligned to ensure the consistent application and continuing workability of mutual recognition principles under these arrangements.

4. In relation to the MRA, the Review should consider whether the existing provisions for exemptions and exclusions should be retained.

5. In relation to the TTMRA, the Review, consistent with the intention to minimise exemptions and exclusions from the Arrangement, shall:

   a) assess any amendments or additions to the laws in the Schedules and comment on their consistency with the principles underpinning the Arrangement; and

   b) examine the scope for deletions from or amendments to the Schedules, including:

      i) whether permanent exemptions or exclusions under the scheme and related legislation should be retained; and

      ii) progress in meeting existing obligations under the special exemption cooperation programs, including:

         – whether the scheme's effectiveness would be enhanced by reform of the special exemption framework to accommodate cooperation programs with extended work schedules; and

         – handling of special exemptions where harmonisation or mutual recognition is not in prospect.

6. The Productivity Commission's research findings shall be presented to Australian Heads of Government and the New Zealand Prime Minister nine months from the date of commissioning.

7. The Review Report shall be presented to Australian Heads of Government and the New Zealand Prime Minister within about three months of receiving the Productivity Commission's findings.

IAN CAMPBELL

8 JANUARY 2003

Contents

Foreword **III**

Terms of reference **IV**

Abbreviations **XIV**

Key points **XIV**

Overview **XV**

Findings **XXVII**

1 Introduction **1**

1.1 Background to mutual recognition 2

1.2 Previous reviews 5

1.3 The reference 7

1.4 The Commission's approach 7

1.5 Structure of the report 8

2 Mutual recognition framework **9**

2.1 Legislative environment 9

2.2 Mutual recognition mechanisms 12

2.3 Coverage of the MRA and TTMRA 16

3 Objectives and assessment criteria **23**

3.1 Clear and credible objectives 24

3.2 Effectiveness 25

3.3 Efficiency 26

3.4 Practicality 27

3.5 Sovereignty 28

3.6 International obligations and sovereignty 30

3.7 Conclusion 31

4 Impact of mutual recognition 33
4.1 Introduction 33
4.2 Impacts on goods mobility 34
4.3 Impacts on labour mobility 39
4.4 Prices, wages, costs, economies of scale, and standards 47
4.5 Standard Setting 54
4.6 Other Impacts 62
4.7 Conclusion 64

5 Operation of mutual recognition 67
5.1 Mutual recognition of goods 67
5.2 Mutual recognition of registered occupations 75
5.3 Appeal processes 99
5.4 Monitoring and compliance systems 102

6 Regulation and standards processes 105
6.1 Regulation and mutual recognition 105
6.2 Standard setting 115

7 Permanent exemptions and exclusions to mutual recognition 143
7.1 Permanent exemptions: goods 143
7.2 Permanent exemptions: occupations 166
7.3 Exclusions 169

8 Special exemptions under the TTMRA 173
8.1 Introduction 173
8.2 Hazardous substances, industrial chemicals and dangerous goods 177
8.3 Therapeutic goods 195
8.4 Road vehicles 201
8.5 Gas appliances 212
8.6 Electromagnetic compatibility and radiocommunications equipment 218
8.7 Consumer goods 221

9 Scope of the schemes 227
9.1 Exceptions applying to goods 228
9.2 Exceptions applying to occupations 237
9.3 Expanding the schemes 238

A Submissions and meetings 261

B 1998 Review Recommendations 273

C Registered occupations and licences under legislation 279

D Other approaches to mutual recognition 303

E Interstate mobility by occupation 313

F Minimum Energy Performance Standards 339

G Variations in food standards 345

References 351

BOXES

1 Key Issues for the Special Exemption Cooperation Programs XXI
5.1 Conformity assessment and compliance regimes 73
5.2 Mutual recognition for service providers — an example 77
5.3 Short term provision of services across jurisdictions 86
5.4 A national legal profession in Australia 87
5.5 Variation in standards across jurisdictions 91
5.6 Current competency standards – New Zealand health professionals 98
6.1 Australian Regulation Impact Statement (RIS) requirements 107
6.2 New Zealand RIS and LAC requirements 110
7.1 Tasmanian situation — abalone, crayfish and scallops 162
9.1 The use of measurement devices 240

FIGURES

2.1 Scope of the MRA 18
2.2 Scope of the TTMRA 19
4.1 Trends in trade in goods between Australia and New Zealand, 1980 to 2000 34

4.2 Total trans-Tasman merchandise trade as a share of total world trade, 1980 to 2000 35
4.3 Total trans-Tasman trade in commodities not subject to an exemption, 1980 to 2000 36
4.4 Total trans-Tasman trade in four commodity groups subject to an exemption, 1980 to 2000 36
5.1 Movement of goods under MRA and TTMRA: processes and institutions 69
5.2 The registration process 76
5.3 Movement of registered service providers under MRA and TTMRA: processes and institutions 79
6.1 Food regulation 136
8.1 Organisational structures for regulating chemicals in Australia 181
E.1 Main source of arrivals in States and Territories 319
E.2 Standardised arrivals in registered occupations 324
E.3 Hypothetical (implied) arrivals in registered occupations 325
E.4 Deviation of standardised arrivals from implied arrivals in registered occupations 325
E.5 Interstate arrivals decomposition — registered and other occupations 326

TABLES

2.1 Categories of items not covered by MRA and TTMRA 17
4.1 Top five trans-Tasman exports by year for 1980, 1997 and 2000 38
4.2 TTMRA registration in New Zealand's Health Sector 42
4.3 Total first time and TTMRA registrations in Australia by profession, 1998 to mid-2002 43
4.4 Total TTMRA registrations for each profession by State, since 1998 44
4.5 Trans-Tasman movement of pharmacists, 1999 to August 2003 45
4.6 Estate agents licensed under Mutual Recognition Act since 1 July 1993 45
4.7 Lawyers admitted in NSW under mutual recognition compared to new practitioners 46
4.8 New Zealand trained professionals registering under TTMRA 64
C.1 Registered occupations 281
E.1 Movers of New Zealand birth 320

Abbreviations

AAT	Administrative Appeals Tribunal (Australia)
ACA	Australian Communications Authority (Commonwealth)
ADR	Australian Design Rule
ANTA	Australian National Training Authority
APVMA	Australian Pesticides and Veterinary Medicines Authority
CER	Closer Economic Relations Agreement
COAG	Council of Australian Governments
CRR	Committee on Regulatory Reform
DEST	Department of Education, Science and Training (Commonwealth)
DOTARS	Department of Transport and Regional Services (Commonwealth)
ECE	Commission of the European Communities
EMC	Electromagnetic Compatibility
ERMA	Environmental Risk Management Authority (New Zealand)
ESS	Electrical Safety Service (New Zealand)
FSANZ	Food Standards Australia New Zealand
GASA	Gas Appliance Suppliers Association (New Zealand)
GHS	Globally Harmonised System for the Classification and Labelling of Chemicals
HSNO	Hazardous Substances and New Organisms Act 1996 (New Zealand)
IANZ	International Accreditation New Zealand
IEC	International Electrotechnical Commission
ISO	International Standards Organisation
ITAB	Industry Training Advisory Body
ITU	International Telecommunication Union

JAS-ANZ	Joint Accreditation System of Australia and New Zealand
LTSA	Land Transport Safety Authority (New Zealand)
MCCA	Ministerial Council on Consumer Affairs
MCE	Ministerial Council on Energy
MED	Ministry of Economic Development (New Zealand)
MEPS	Minimum Energy Performance Standards
MRA	Mutual Recognition Agreement
MSDS	Material Safety Data Sheet (also known as SDS)
NATA	National Association of Testing Authorities (Australia)
NDPSC	National Drugs and Poisons Schedule Committee (Australia)
NICNAS	National Industrial Chemical Notification and Assessment Scheme (Australia)
NOHSC	National Occupational Health and Safety Commission (Australia)
NSC	National Standards Commission (Australia)
NTRC	National Road Transport Commission (Australia)
NZIER	New Zealand Institute of Economic Research
OIML	International Organisation of Legal Metrology
ORR	Office of Regulation Review (Australia)
PC	Productivity Commission
RIS	Regulatory Impact Statement
SAI	Standards Australia International Ltd
SNZ	Standards New Zealand
SPS	WTO Agreement on the Application of Sanitary and Phytosanitary Measures
TBT	WTO Agreement on Technical Barriers to Trade
TGA	Therapeutic Goods Agency (Australia)
TTMRA	Trans-Tasman Mutual Recognition Arrangement
TTOT	Trans Tasman Occupations Tribunal (New Zealand)
UN-ECE	United Nations European Economic Commission

OVERVIEW

Key points

- While data are limited, there are indications that the Mutual Recognition Agreement (MRA) and the Trans-Tasman Mutual Recognition Arrangement (TTMRA) have been effective overall in achieving their objectives of assisting the integration of the Australian and New Zealand economies and promoting competitiveness. They should continue.
- Many of the permanent exemptions and exclusions should remain, as mutual recognition would otherwise erode justified regulatory differences. However, some modifications to coverage, scope, administrative practices and review mechanisms are warranted.
- Improvements likely to yield net benefits include:
  - clarifying or correcting some permanent exemptions (for example, changing the endangered species exemption to reflect the current legislation in Australia) to increase policy consistency and effectiveness;
  - limiting the exception for the registration of sellers to apply only to regulatory differences based on health, safety and environmental grounds;
  - removing occupational qualification requirements from business licences that are inconsistent with mutual recognition objectives;
  - facilitating the use of the exemption and referral processes available under the MRA and TTMRA to introduce or change standards;
  - making it easier to appeal decisions and review provisions of the MRA and the TTMRA;
  - integrating product safety bans with the temporary exemption mechanism; and
  - increasing the attention given to mutual recognition obligations by policy makers effecting new or revised regulation.
- Consideration should be given to establishing a review group of officials to assess expanding mutual recognition to cover regulations governing the use of goods and possibly to undertake other MRA/TTMRA related work.
- Significant further progress in relation to the TTMRA special exemptions will require greater cooperation across agencies and jurisdictions to address inconsistent and cumbersome regulatory practices.
  - Better focussed cooperation programs would assist reaching agreement across jurisdictions.
- The effectiveness of the schemes would be enhanced by undertaking an awareness program on the obligations and benefits of mutual recognition, aimed at regulators, policy advisers and relevant industries and professions.

Overview

The nine Australian Heads of Government and the New Zealand Prime Minister requested the Productivity Commission to review the Mutual Recognition Agreement (MRA) and the Trans-Tasman Mutual Recognition Arrangement (TTMRA). The Commission was asked to report on:

- their objectives and operation;
- their effectiveness and efficiency;
- their coverage and scope;
- ways to ensure mutual recognition obligations are considered early in policy-design processes; and
- possible improvements.

What is mutual recognition?

Mutual recognition of regulations is a vehicle for promoting economic integration. It is one of a number of techniques available to governments to reduce regulatory impediments to goods and services mobility across jurisdictions.

While mutual recognition can apply to many things, the MRA and the TTMRA apply to regulations affecting the sale of goods and the registration of occupations. By allowing producers and registered occupations to meet only one set of standards, rather than two or more, mutual recognition reduces the barriers and costs to movement across jurisdictions. If goods meet the regulatory requirements of their home jurisdiction, they can be lawfully sold in all other participating jurisdictions. Similarly, if people meet the registration requirements of their home jurisdiction, they can be registered for the equivalent occupation in other participating jurisdictions.

Both the MRA and TTMRA apply only to the *sale* of goods and to the *registration* of occupations. They do not extend to the manner of sale, transport, storage, handling, inspection, or usage of goods, or to the manner of delivery or the remote provision (across borders) of services. In contrast, mutual recognition in the European Union applies to anything that restricts sale. Moreover, in contrast to Canada, where mutual recognition is extended on a case-by-case basis, under the MRA and TTMRA all goods and registered

occupations are subject to mutual recognition unless specifically *excluded*. By limiting the scope and choosing an 'opt-out' model, Australia and New Zealand have designed a scheme that is not administratively burdensome and avoids extensive and protracted negotiations.

Why was mutual recognition introduced?

The MRA was formulated in response to frustration about the extent of regulatory differences across Australia and the resultant adverse impacts on industry of operating in the multiple regulatory environments of the States and Territories. Prior, to its inception, businesses trading in more than one jurisdiction had to:

- satisfy the multiple regulatory standards of the various jurisdictions;
- package and label goods differently for sale in different jurisdictions; and
- satisfy product testing requirements of other jurisdictions prior to sale in those jurisdictions.

Similarly, different regulatory standards for the registration of occupations across Australian jurisdictions were seen as inappropriately inhibiting the movement of skilled people.

The TTMRA had its origins in the MRA and the economic integration objectives of the Closer Economic Relations (CER) Agreement between Australia and New Zealand.

Has mutual recognition been effective?

A lack of data and problems in disentangling the effect of mutual recognition from other factors complicate assessments of the effectiveness of the MRA and TTMRA. However, the Commission concludes, in part based on discussions with interested parties, that both schemes have contributed to their objectives to:

- increase trade and workforce mobility across jurisdictional borders;
- contribute to the integration of participating economies;
- enhance internal and external competitiveness;
- increase uniformity of standards;
- increase choice and lower prices for consumers;
- decrease costs to industry; and
- increase access to economies of scale.

Data are not available on the movement of goods across Australian jurisdictions, although anecdotal information supports the view that the MRA has contributed to the movement of goods across Australian jurisdictional borders. While it is not possible to determine empirically the contribution of mutual recognition to trade and workforce mobility and to the integration of the markets, the movement of goods across the Tasman has increased and the general trend has been for Australia and New Zealand to become an increasingly important trade partner for the other. In the case of labour mobility, there have been significant increases in the number of people in registered occupations moving to new jurisdictions since the introduction of the mutual recognition schemes. In general, more New Zealanders have registered in Australia, than vice versa.

Mutual recognition appears to have facilitated Australia and New Zealand's influence over international norms and standards. Under the umbrella of the CER and the TTMRA, Australia and New Zealand have developed common positions and strategies on many issues in a number of international forums, including the International Standards Organisation (ISO), Codex Alimentarius, the United Nations Economic Commission for Europe (UN-ECE) and the WTO Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary (SPS) Committees. Australia and New Zealand have negotiated mutual recognition arrangements on conformity assessment with Europe through tripartite talks (although they do not have a tripartite agreement) and the two countries have also cooperated extensively in Asia Pacific Economic Cooperation (APEC*)* forums on regulatory issues. Nevertheless, there are, of course, occasions where Australia and New Zealand disagree and take different positions.

Overall, the Commission assesses the MRA and TTMRA as contributing to the integration of the economies of Australia and New Zealand and concludes that they should continue.

Can the schemes be improved?

The Commission considers improvements can be made to the design of the schemes in relation to their operation, coverage and scope.

Operation of the existing arrangements

Improving awareness

An inadequate awareness of mutual recognition obligations is impeding the implementation of mutual recognition for both registered occupations and goods. For occupations, there is inadequate awareness among regulators and professional associations of some procedures and obligations of mutual recognition. For instance, there are cases where registrants are not granted their full rights under mutual recognition and this inhibits

occupational mobility. Also, for goods, the Commission saw evidence of poor knowledge amongst some producers, suppliers, retailers, consumers and regulators.

Better dissemination of information on the obligations and benefits of mutual recognition by jurisdictions would help to ensure that the gains from mutual recognition are maximised. This could be addressed with a deliberate awareness raising campaign.

Mobility for registered occupations

While mutual recognition has, in general, reduced impediments to occupational mobility, several problems in the day-to-day operation of the schemes could be dealt with by:

- enhancing the information exchange systems and procedures among registration boards (for example, in relation to incomplete disciplinary actions) by greater use of electronic database registration systems with capacity for access by counter-part registration boards;
- improving the capacity of registration systems to accommodate short notice applications for registration to allow short term service provision across jurisdictions;
- encouraging Australian occupational registration authorities to develop national registration systems where the benefits justify the costs; and
- encouraging jurisdictions to continue to work on reducing differences in registration requirements to address concerns that the entry of professionals through the 'easiest jurisdiction' might lower overall competencies.

The Commission considers other concerns raised in relation to 'local knowledge' requirements, the length of time allowable for checking applications, capacity to delay teachers from teaching until it is established they are 'fit and proper' and discrepancies across jurisdictions over 'recency of practice' can be addressed within the existing arrangements.

Mobility of goods

There are indications that goods mobility is also being impeded by producers not having available appeal mechanisms to handle circumstances of non-delivery of mutual recognition obligations. Within the TTMRA, two particular concerns emerged during the review over the application of mutual recognition, namely: problems in the application of conformity assessment on electrical appliances; and the treatment of food products that are not covered by joint agreement between Australia and New Zealand. Further work by Australian and New Zealand officials on these issues is warranted.

Implementing monitoring and enforcement

Monitoring and enforcement are important elements of the operation and successful on-the-ground delivery of the benefits of mutual recognition. Although the TTMRA requires the participating parties to monitor, and Ministerial Councils to report on, the effectiveness of the arrangement, it appears little has been done. Similarly, there are few mechanisms for enforcement of mutual recognition obligations and decisions. Also, there seems to be inadequate accountability where jurisdictions do not fully meet mutual recognition obligations. This could be addressed by a new review group of officials as discussed below.

Coverage

All goods and registered occupations are subject to mutual recognition unless they have been explicitly cited as 'exemptions'. Many exemptions reflect prudent decisions made at the outset in order to deal with clear jurisdictional differences (such as different environment protection needs) that were addressed through differentiated regulation. In some cases, they reflect jurisdictional sovereignty exercised in relation to differing social values and mores. In other cases, exemptions are based on the judgement that mutual recognition could jeopardise public health and/or safety.

Permanent exemptions

The Commission considers that many of the permanent exemptions are justified (for example, firearms, fireworks, gaming machines, quarantine, endangered species, Radiation Protection Act (NZ) and Antiquities Act (NZ) — for the last two items, Australia's equivalent legislation is dealt with under TTMRA exclusions). However, some changes to the permanent exemptions for particular goods, or the regulations underlying them, would seem beneficial, including:

- amending the wording of the permanent exemption on endangered species to reflect the current legislation in Australia, in order to ensure policy consistency;
- reviewing the case for moving Agricultural and Veterinary Products from the permanent exemption list to the special exemption for Hazardous Substances, Industrial Chemicals and Dangerous Goods in order to explore possibilities to establish greater consistency in the way these chemicals are classified, approved and regulated;
- considering whether there is scope for harmonisation across Australian jurisdictions for regulation of pornographic material and the classification of publications, films and computers;

- removing the *Imported Food Control Act 1992* (Commonwealth) from the list of permanent TTMRA exemptions, after there is reciprocal treatment of Australian food imported into New Zealand, effective procedures are in place for maintaining a common high-risk food list, and third country issues are addressed;
- developing uniform standards across Australian jurisdictions in relation to ozone protection; and
- working towards removing the permanent exemption for medical practitioners for the next review, five years from now.

TTMRA Special Exemptions

The TTMRA's six special exemptions cover areas where it was thought that mutual recognition had the potential to generate net benefits, but where there were issues outstanding that needed resolution before mutual recognition could apply. While some progress has been made in resolving the issues — agreement has been almost fully reached on electromagnetic compatibility (EMC) and on consumer products — many remain unresolved. Box 1 summarises the key continuing issues in relation to the six special exemptions.

Unless the issues outlined in the box are addressed, the special exemptions seem destined to become permanent exemptions. Australia and New Zealand could usefully regard resolution of these issues with each other as an important stepping stone towards harmonising with international standards and greater integration with global markets. Identifying changes to resolve the outstanding technical issues is beyond the scope of this evaluation, but the Commission notes that sharper focus on them is needed for progress to be made. The Commission considers that benefits would arise from extending the length of the cooperation programs and only requiring annual reports on progress made. An extended tailor-made work program for each special exemption should improve the chances that each will be resolved. Generally, permanent exemption should only be applied selectively to goods and regulations for which harmonisation or mutual recognition has been clearly demonstrated to be impossible.

Box 1 **Key Issues for the Special Exemption Cooperation Programs**

- Hazardous Substances, Industrial Chemicals and Dangerous Goods

While New Zealand has a unified regulatory regime applying to all chemicals (and substances), Australia has very complex and fragmented regulatory systems relating to chemicals. Many chemical products are regulated separately for different uses and risks, with different jurisdictions taking different approaches. This fragmentation of responsibilities in Australia impedes progress towards mutual recognition or alignment, not only with New Zealand, but globally. The Globally Harmonised System for the Classification and Labelling of Chemicals could provide the catalyst for Australia and New Zealand harmonisation. With cooperation from all Australian participants, Australia and New Zealand could be in a position to harmonise the implementation of classifications systems in accordance with the new international system by 2008.

- Therapeutic Goods

The planned joint agency for therapeutic goods will assist agreement. However, problems could occur from applying mutual recognition, as perverse incentives could encourage jurisdictions to opt out of joint standards, so their businesses can benefit from selling to the market niche created. In these cases, the question of the risk versus the costs involved also needs to be addressed.

- Road Vehicles

Differences in standards remain. Australia recognises only Australian Design Rules (ADR) for road vehicles, while New Zealand accepts all vehicles and vehicle components that comply with ADR, UN-ECE, European, Japanese or US standards, and its own national standards. Although Australia has adopted UN-ECE technical regulations, it has not applied them. This increases industry costs and inhibits imports. Furthermore, neither country has developed the capacity to approve conformity assessments to any UN-ECE standards. This, inter alia, limits Australia and New Zealand's ability to export to third countries.

- Gas Appliances

Australian mandatory requirements and New Zealand voluntary standards for energy efficiency and labelling are not aligned, nor are standards for unflued heaters aligned. Further, Australia does not recognise conformity assessments carried out in New Zealand to Australian or other standards.

- Electromagnetic Compatibility (EMC) and Radiocommunications Equipment (RC)

All EMC requirements and most RC frequencies have been harmonised. Due to historical differences and the substantial costs of realignment, harmonisation for a number of devices — wireless burglar alarms and doorbells, baby minders, keyless car door locking and CB radio — is not possible in the short to medium term.

- Consumer Product Safety Standards and Bans

Significant progress has been made. Regulators continue to explore the only remaining unresolved consumer product exemption — baby restraints for cars. Australia is not prepared to recognise restraints without top tethers. Separate product banning and temporary exemption processes and slow-moving procedures to harmonise standards across all jurisdictions after a ban has been issued need to be addressed.

Scope

The scope of the MRA and TTMRA, by applying to regulations relating only to the sale of goods and registered occupations, is quite narrow. Scope is further limited by the exclusions and exceptions defined in the relevant acts.

Exclusions

The four broad areas of TTMRA exclusions — customs controls and tariffs; intellectual property; taxation; and specified international obligations — relate to 'nation-state' issues and should be left in place to avoid unintended effects. The resolution of differences would generally be more appropriately addressed in other forums, such as through seeking resolution of tax issues under the CER. As international law relating to intellectual property may be evolving, the case for changing this exclusion should be reassessed in five years time, in the context of the next scheduled review.

Exceptions

The Commission assessed the case for extending mutual recognition beyond its current application to the sale of goods and the registration of occupations. Possibilities include extending mutual recognition to cover: the manner of sale; transport, storage, handling and inspection; the use of goods; and the manner of delivery and cross-border provision of services. In many cases, removal of these exceptions would cause significant disruptions by allowing products or practices to be used in incompatible and conflicting environments. In some areas, the wholesale application of mutual recognition obligations could weaken the structures put in place by governments to manage high-risk activities, ranging across health provision in hospitals, occupational health and safety, building codes, and the movement of dangerous substances, amongst others. An analogy would be if a country that had elected to use the metric system had to accept systems, products and practices based on the imperial system of weights and measures.

Regulation of use of goods and a review group

There is a case to selectively expand the range of regulations to which mutual recognition applies. Prima facie, if a good can be sold in a jurisdiction, its use in that jurisdiction should be possible. In particular, mutual recognition could be extended to regulations governing the use of goods that impede goods mobility and for which inclusion would be justified on cost-benefit grounds.

Consideration should be given to establishing a review group of officials to identify 'use requirements' that meet these criteria. The group, with representatives from all

participating jurisdictions, including New Zealand, could possibly report to COAG or to COAG's Committee for Regulatory Reform.

Jurisdictions would inform the group of 'use regulations' impeding goods mobility. The group could use these cases to assess the extent of the impediments to goods mobility from 'use' regulations. It could also advise on ways to resolve cases. For reviews, a guiding principle should be to identify regulation that impedes goods mobility across the jurisdictions. The review group would conduct assessments of whether to subject the regulations to mutual recognition based on the criteria of whether:

- the requirement is directed at a legitimate policy goal;
- the requirement is proportionate to that goal; and
- there is a less trade-restrictive method of achieving that policy goal.

The prime purpose of such a group would be to examine the potential to expand the scope of mutual recognition to regulations governing the use of goods. However, the remit for this group could be expanded to address also some other mutual recognition issues raised in this report. As needs arise and resources permit, the review group could address a number of weaknesses in the current system, by fulfilling the following roles:

- advising on the resolution of disputes arising from the application of the MRA and the TTMRA — targeting concerns that have general policy implications;
- monitoring and enforcement of mutual recognition obligations, including compliance with the requirements for temporary exemptions and special exemptions;
- providing the point of contact for a complaints system, with targeted investigation of these complaints; and
- identifying sectors or scope issues to review.

Other exceptions

In addition to the selective expansion of mutual recognition to regulations governing the use of goods, other modifications — after an assessment of best approaches and possible limitations — could be implemented in relation to the following:

- the registration of sellers, which is an aspect of the manner of sale exception, could be limited to health, safety and environmental considerations;
- the removal of occupational registration requirements from business licences where they are not necessary for a valid policy reason and represent indirect barriers to the movement of skilled people; and

- where qualifications are specified in a formal instrument for a business activity (legislation, regulation or gazette), ensure they are not jurisdiction-specific and mutually recognise qualifications from other participating jurisdictions.

Machinery to change coverage and scope

Under current arrangements, issues concerning scope and changes to permanent exemptions are generally only considered during a full mutual recognition review. In contrast, machinery is in place to regularly assess possible changes to the special exemptions and to deal with issues arising from the application of temporary exemptions. However, in both these last two cases, it should be made easier to use these mechanisms.

Policy design and mutual recognition

The Commission was also asked to look at ways to ensure mutual recognition issues are considered early in policy-design processes. In large part, the machinery to help achieve this is already in place. Both countries and almost all Australian jurisdictions have requirements to prepare Regulation Impact Statements (RISs) for jurisdictional based regulations. Furthermore, COAG has RIS requirements as set out in the *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Stand-Setting Bodies*. Thus, it would be straightforward to include implications of mutual recognition obligations in the 'checklist' of possible impacts to be assessed in the RIS for new or revised regulation. While this should facilitate early consideration by agencies that integrate the preparation of RISs into their policy development process, it will do little if agencies belatedly apply RISs in the decision-making processes. Where policy and regulation-making processes do not require a RIS, jurisdictions could devise other practical ways to ensure mature recognition issues are addressed, where appropriate.

Development and implementation of uniform standards

The proponents of mutual recognition expected that it would lead to a degree of 'regulatory competition' across jurisdictions and that governments would respond by seeking to harmonise standards in a variety of areas, rather than contemplate a potential 'race to the bottom'. Hence, provisions were made, through the temporary exemption category and referral process, to resolve problems arising from differing standards. However, these mechanisms are little used. There are grounds for facilitating the temporary exemption and referral processes, especially in cases where there are pressing health, safety or environmental concerns. There are also grounds to find ways to integrate the temporary exemption process with the use of product bans.

By way of the temporary exemption mechanism and more generally through proposals to develop uniform national or trans-Tasman standards, standards are developed through Ministerial Councils and other national standard-setting bodies, with the expectation that they will be harmonised or at least made compatible across participating jurisdictions. However, often States and Territories subsequently introduce variations. This means that differences between standards and thus, barriers to inter-jurisdictional trade, can be introduced after an extensive inter-jurisdictional process. This undermines one of the dominant rationales of the Ministerial Council standard-setting processes. One option to address this concern would be to ask jurisdictions to state at the time any reservations about fully accepting nationally agreed standards. This would permit concerns to be addressed collectively before they are manifested in divergent regulations and requirements.

Findings

Impact of mutual recognition

FINDING 4.1

Data inadequacies have meant that it has not been possible to identify reliably the impacts of the MRA and TTMRA on goods mobility. Overall, the perception of interested parties is that mutual recognition has increased goods mobility and trends in available data are consistent with this.

FINDING 4.2

Both anecdotal information and such data as are available support the view that mutual recognition has contributed significantly to increased labour mobility across MRA and TTMRA jurisdictions.

FINDING 4.3

There is evidence of increased activity to harmonise standards for a number of registered occupations and anecdotal evidence of decreased costs to industry from the operations of the MRA and the TTMRA.

FINDING 4.4

The MRA and TTMRA appear to have had beneficial effects in relation to better standard making.

Operation of mutual recognition

FINDING 5.1

The operation of mutual recognition would be enhanced by Australian and New Zealand regulators recognising approvals or conformity assessments made by their counterparts or by Australia/New Zealand regulator-accredited third party conformity assessment bodies.

FINDING 5.2

Achieving MRA and TTMRA objectives (in relation to both goods and occupations) would be assisted by jurisdictions disseminating, in a coordinated manner, information on the obligations and benefits of mutual recognition. This campaign to enhance the knowledge and awareness of mutual recognition would be directed at their own regulators, local governments, relevant industries and professional associations.

FINDING 5.3

The one month period for registration boards to check applications under mutual recognition and the criteria for postponement appear to be appropriate.

FINDING 5.4

Information flows among registration boards across jurisdictions would be enhanced by a greater use of electronic database registration systems with capacity for access by counterpart registration boards.

FINDING 5.5

There are likely to be net benefits from improving the capacity of registration systems to accommodate short notice applications for registration, to allow the short term provision of services across jurisdictions.

FINDING 5.6

Australian occupational registration authorities should continue to consider developing national registration systems where the benefits justify the costs. Such systems would further assist short term service provision across jurisdictional borders.

FINDING 5.7

Jurisdictions in Australia and New Zealand continuing to work on reducing differences in relation to registration requirements, helps to address concerns (including costs incurred) of jurisdictional 'shopping and hopping'.

FINDING 5.8

Existing mutual recognition arrangements seem to be sufficiently flexible to address the needs for 'local knowledge' requirements to be incorporated into the delivery of registered occupational services.

FINDING 5.9

The efficacy of occupational standards and, therefore, confidence in the mutual recognition process, is being enhanced by the trend for jurisdictions to require some degree of 'recency of practice' as a requirement of registration.

FINDING 5.10

Responsibilities for oversight, monitoring and enforcement should be clarified and restated. Monitoring of, and compliance with, mutual recognition obligations are enhanced by each jurisdiction's designated coordinating department or agency taking active responsibility for mutual recognition.

Regulation and standards processes

FINDING 6.1

The incorporation of mutual recognition considerations into Australia's policy and regulation-making processes would be enhanced by explicitly including mutual recognition obligations in the regulatory impact statement requirements or guidelines that apply at each level of government. Where policy and regulation-making processes do not require a regulatory impact statement, jurisdictions should devise other practical ways to ensure mutual recognition issues are addressed, where appropriate.

FINDING 6.2

The incorporation of mutual recognition considerations into New Zealand's policy and regulation-making processes could be enhanced. New Zealand's regulation impact statement requirements may be adaptable to encompass them. Alternatively, New Zealand could explore including such requirements into its Legislation Advisory Committee Guidelines.

FINDING 6.3

The reduction in impediments to economic integration would be assisted by establishing follow-up mechanisms to help ensure that agreed national standards are introduced at a jurisdictional level in a way that does not compromise the intent and operation of those standards. Where a jurisdiction does not intend to directly adopt a national standard developed through the Ministerial Council process, it should make this clear at the time to see if differences can be resolved.

FINDING 6.4

The process for removing permanent exemptions from the MRA needs clarification and could be simplified.

FINDING 6.5

The regular 5 yearly review of the MRA and TTMRA, which incorporates analysis of exemptions, exclusions and exceptions, continues to provide a process to ensure that the scope of mutual recognition is appropriate.

FINDING 6.6

There are grounds for examining options to streamline the process for resolving the issues underpinning temporary exemptions.

FINDING 6.7

It is important to seek the most practical and least trade restrictive way to achieve policy goals. In doing this, the RIS process provides a useful mechanism by which to explore possible policy alternatives and assess all realistic options on a comparative basis.

FINDING 6.8

The TTMRA exemption provisions enable all jurisdictions and interested Government agencies to contribute to developing policies for Ministerial consideration for food products subject to unaligned standards. Temporary exemptions could be initiated more simply if Australian jurisdictions delegated this power to FSANZ. Any review of options for streamlining of the current processes for resolving temporary exemptions could usefully address issues relating to flexibility of timelines, facilitating peer review technical assessments, and balancing the interests of Australia and New Zealand.

Permanent exemptions and exclusions to mutual recognition

FINDING 7.1

There are grounds, based on regional differences resulting in different regulations, plus the consequent additional enforcement, for retaining the MRA and TTMRA permanent exemption for the sale of firearms and other prohibited or offensive weapons.

FINDING 7.2

There are grounds, based on differing jurisdictional preferences, for retaining the MRA and TTMRA permanent exemption for the sale of fireworks.

FINDING 7.3

There are grounds, based on differing jurisdictional preferences, for retaining the MRA and TTMRA permanent exemption for gaming machines.

FINDING 7.4

Consideration could be given to whether there is scope for achieving harmonisation, thus enabling removal of all or part of the permanent exemption for the MRA in Schedule 1 for pornographic material and Schedule 2 for the classification of publications, films and computer games. In the absence of harmonisation, the permanent exemption should be retained.

FINDING 7.5

On the grounds of sovereignty and differences in approach between the two countries, the TTMRA permanent exemption for pornographic material and classified publications, films and computer games should be retained.

FINDING 7.6

The MRA permanent exemption for quarantine is justified as quarantine requirements need to be implemented at the jurisdictional level to be effective.

FINDING 7.7

The TTMRA permanent exemption for quarantine is warranted. Different risks justify different regulation.

FINDING 7.8

There are grounds for retaining the MRA and TTMRA permanent exemption relating to endangered species. Consideration should be given to amending the wording of the TTMRA to reflect the current legislation.

FINDING 7.9

There appears to be scope to develop uniform standards, consistent with international standards, across the Australian jurisdictions in relation to ozone protection. This could ultimately enable removal of the MRA permanent exemption for ozone protection legislation.

FINDING 7.10

Should a national standard for ozone protection be developed in Australia, consideration could then be given to the need to maintain the TTMRA permanent exemption for ozone protection.

FINDING 7.11

In view of the strong support for the scheme by both the South Australian Government and the South Australian community, it is unlikely that the permanent exemption for the Container Deposit Legislation in the MRA can be removed.

FINDING 7.12

There are grounds for retaining the permanent exemption for Tasmanian legislation relating to abalone, crayfish and scallops in the MRA and TTMRA.

FINDING 7.13

The Imported Food Control Act 1992 (Commonwealth) could be removed from the list of TTMRA permanent exemptions after there is reciprocal treatment of Australian food imported into New Zealand, effective procedures are in place for maintaining the high-risk food list and the existing and projected third country issues are dealt with effectively.

FINDING 7.14

There are public health and safety reasons for retaining the TTMRA permanent exemption for the New Zealand Radiation Protection Act 1975.

FINDING 7.15

There are cultural reasons for retaining the TTMRA permanent exemption for the New Zealand Antiquities Act 1975.

FINDING 7.16

The TTMRA permanent exemption for medical practitioners allows for some restrictions for certain non-Australian and non-New Zealand trained doctors. There are public health grounds for this permanent exemption to be retained at this time. However, 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.

FINDING 7.17

The TTMRA exclusions for customs controls and tariffs, taxation and specified international obligations should be retained.

FINDING 7.18

The TTMRA exclusion for intellectual property should be retained to ensure it does not undermine the patents rights system. As patent law and practices are evolving, including in relation to international agreements, there may be scope to re-evaluate this exclusion in the next review.

Special exemptions under the TTMRA

FINDING 8.1

While it is expected that it will be appropriate to terminate within two or three years the special exemptions for consumer product safety standards, gas appliances and radiofrequencies, with only a limited number of products or laws requiring permanent exemptions, in the medium to long term the six Cooperation Programs will continue to serve a useful purpose in reducing technical barriers to trade.

FINDING 8.2

All TTMRA exemptions should be defined as narrowly as possible to limit the scope for new regulations inappropriately impeding economic integration and to ensure that they apply only to products or laws where no further integration is possible or desirable.

FINDING 8.3

When either country is developing a new set of standards for any product, there would be benefit in consultations with counterparts in the other country. In this way, impacts on production, mutual recognition and trade can be identified early. Clear reasons would need to be given for a non-harmonised outcome.

FINDING 8.4

All regulation of chemicals, on both sides of the Tasman, should be based on alignment with international systems where these exist or are being developed unless there are clear reasons not to do so.

FINDING 8.5

In aligning State and Territory provisions for inner labelling of packaging, benefits would arise from consultations with relevant authorities in New Zealand.

FINDING 8.6

A report should be submitted to the Ministerial Council on Workplace Relations by April 2005 on the merits of:

- *moving agricultural and veterinary products from the permanent exemption list to the Cooperation Program on Hazardous Substances, Industrial Chemicals and Dangerous Goods, to address their risks as chemicals; and*
- *adding a new special exemption and cooperation program for this category to address their risks to food, biosecurity and livestock.*

FINDING 8.7

In Australia, the fragmentation of responsibilities across agencies in relation to hazardous substances, industrial chemicals and dangerous goods impedes progress towards achieving mutual recognition or harmonisation with New Zealand.

FINDING 8.8

A major work program to harmonise classifications of chemicals between Australia and New Zealand would not be warranted, except in relation to Material Safety Data Sheets and inner labelling, until international trends on the implementation of the Globally Harmonised System for the Classification and Labelling of Chemicals (GHS) can be identified. In the interim, there may be advantages in the National Industrial Chemical Notification and Assessment Scheme (Australia) (NICNAS) and the Environmental Risk Management Authority (New Zealand) (ERMA) exploring the feasibility of identifying chemicals and products or substances on their registers with a low risk profile that could be removed from the scope of the special exemption.

FINDING 8.9

There appear to be advantages to Australia and New Zealand harmonising their approaches to implementing the GHS, in alignment with the approaches that are taken by their major trading partners, particularly in relation to chemical concentrations and whether classifications should be based on substances or chemicals. However, as there are many regulatory barriers to progressing the Special Exemption on Hazardous Substances, Industrial Chemicals and Dangerous

Goods, there are likely to be significant benefits from conducting a joint Australia and New Zealand review to:

- *identify ways to maximise the potential of the GHS to eliminate unnecessary compliance costs for business and improve the international competitiveness of Australia and New Zealand;*
- *develop options for coordinating policy across Australian jurisdictions;*
- *identify options for coordinating policy between Australian and New Zealand jurisdictions;*
- *identify options for streamlining classification and approval processes across jurisdictions and aligning documentation requirements; and*
- *hold a trans-Tasman forum.*

FINDING 8.10

The Special Exemption on Hazardous Substances, Industrial Chemicals and Dangerous Goods should be extended, without annual roll overs, until 2008, when the GHS is expected to be implemented worldwide. The scope of the exemption could be reduced as alignment occurs with the emerging GHS and across the States and Territories, the Federal Government and the New Zealand Government.

FINDING 8.11

Full mutual recognition of chemicals may not be desirable in the interests of protecting health, safety and the environment. However, the Cooperation Program on Hazardous Substances, Industrial Chemicals and Dangerous Goods could achieve further integration of trans-Tasman markets. The submission under the Cooperation Program to COAG of a project plan (based on the recommendations of any review undertaken as outlined in finding 8.9) and annual reports on its implementation, would assist progress towards more cohesive policies in the regulation of chemicals.

FINDING 8.12

Administrative costs would be reduced by extending the special exemption for therapeutic goods, without annual roll over requirements, until mid 2006 when it should be possible to identify a realistic timeframe for reducing or eliminating the special exemption.

FINDING 8.13

Due to the complexity of the issues, the different individual circumstances and the inconsistent consequences likely to arise from decisions to opt out of joint regulations, there is merit in including in the Treaty, which will establish the new joint therapeutics agency, provisions to:

- *prescribe processes where each case is examined on its individual merits, to determine whether mutual recognition should still apply; and*
- *ensure decisions on whether mutual recognition applies are reached taking into account the WTO SPS principles that restrict the legitimate sphere of mandatory regulations to the protection of health, safety and the environment, follow international standards and call for mandatory requirements to be the least trade restrictive possible.*

FINDING 8.14

Due to the size of the New Zealand market, if New Zealand mirrored the current Australian approach to motor vehicle regulation, it would adversely affect New Zealand exporters and consumers. It would also contravene the principle that bilateral and regional mutual recognition arrangements should strengthen the integration of international markets, not act to segregate the parties from them.

FINDING 8.15

One way to apply the TTMRA to road vehicles would be for Australia to adopt the New Zealand approach of recognising motor vehicle standards from several major road vehicle producing countries. However, given the initial cost of adopting this approach and the likelihood of widespread adoption of UN-ECE standards internationally, this would not be in Australia's interests.

FINDING 8.16

Administrative costs would be reduced by extending the special exemption for motor vehicles, without annual roll over requirements, until 2006. Submission of a project plan and annual progress reports under the Cooperation Program on Road Vehicles to the Australian Transport Council and COAG would assist in reducing the special exemption in areas where trade barriers have practical effects. The project could include consideration of the following issues:

- *mutually recognising conformity assessments issued by Australia or New Zealand to an ADR standard, or a UN-ECE standard, where Australia and New Zealand have both applied that UN-ECE standard under the 1958 Agreement;*

- *mutually recognising conformity assessments from third countries, where all three countries accept or have adopted or applied a UN-ECE standard;*
- *developing a capacity for issuing approvals to UN-ECE standards that are relevant to Australian and/or New Zealand industry; and*
- *reducing the scope of the special exemption for road vehicles under the TTMRA in line with the mutual adoption of UN-ECE standards.*

FINDING 8.17

The objectives of mutual recognition would be assisted if trans-Tasman discussions were held on aligning Australian mandatory requirements and New Zealand voluntary standards for energy efficiency and labelling as closely as possible, with the goal of making mutual recognition or harmonisation possible.

FINDING 8.18

Administrative costs would be reduced by extending the special exemption for gas appliances for a maximum of three years, without annual roll over requirements. In the interim, the submission under the Cooperation Program to COAG of a project plan with annual progress reports would assist in minimising current technical barriers to trade. The project plan could:

- *assess the effectiveness of the new New Zealand compliance regime;*
- *address the issues relating to unflued heaters;*
- *examine options for mutual recognition of conformity assessment to joint Australia/New Zealand standards or international standards carried out in Australia, New Zealand or third countries, with one conformity assessment recognised as valid for like products manufactured on both sides of the Tasman;*
- *identify any products or mandatory requirements that will require a long term exemption; and*
- *progress in aligning energy efficiency standards.*

FINDING 8.19

Electromagnetic compatibility is no longer subject to special exemption. An extension of the special exemption for radiocommunications, without annual roll over requirements, until 2005, when the radio frequency spectrum that cannot be aligned has been identified, would allow time to complete this program. Due to incompatibilities permanent exemptions will be required for the laws relating to some radio frequency spectrum allocations.

FINDING 8.20

After 2005, it should be possible to replace the special exemption on radiocommunication equipment by a longer term special exemption restricted to equipment using radio frequency spectrum where harmonised allocations have been identified as impractical in the medium term, but for which harmonisation might be achievable.

FINDING 8.21

Administrative costs would be reduced by extending the special exemption on consumer product safety standards, without annual roll over requirements, until 2005 to allow the Cooperation Program to:

- *specify a way forward to harmonise or mutually recognise children's car restraints by that date and, if this is not possible, to replace the wide special exemption with a specific permanent exemption for New Zealand exports to Australia of children's car restraints;*
- *explore the feasibility of an integrated, more flexible approach to bans, recalls and temporary exemptions; and*
- *explore the feasibility of a trans-Tasman database for bans and recalls.*

Scope of the schemes

FINDING 9.1

It appears that most aspects of the manner of sale exception to mutual recognition should be retained. While differences between jurisdictions may give rise to compliance costs for business, their removal would be complicated and costly and could be contrary to the interests and preferences of local communities. As the differences do not appear to significantly impede trade, harmonisation would generate few benefits.

FINDING 9.2

One particular aspect of the manner of sale exception, the registration of sellers, could be limited only to where health, safety and environmental considerations apply. This would prevent any unnecessary limitation on the capacities of business providers and, thus, the movement of people.

FINDING 9.3

Significant progress has been made in harmonising transport requirements within Australia and it would appear that the exception to the MRA could be removed once regulations in relation to infectious goods and explosives have also been harmonised.

FINDING 9.4

The storage and handling exception to mutual recognition should be retained in order to avoid risk to health, safety and the environment. While the introduction of the GHS and related labelling requirements will improve standardisation in this area, it will not totally resolve the issues. It would assist mobility and reduce risks if the States and Territories were to restrict differences in storage and handling requirements to situations where particular local circumstances necessitated their adoption to protect health, safety and the environment.

FINDING 9.5

The inspection of goods exception to mutual recognition is required to allow effective enforcement of regulations made under the other exceptions to mutual recognition and provides only minimal barriers to the movement of goods. On these grounds, the exception relating to inspection of goods should be retained.

FINDING 9.6

The exception relating to the manner of carrying on an occupation should be retained. Different practices across jurisdictions do not appear to impede mobility in any significant way.

FINDING 9.7

Regulations applying to the use of goods can impede inter-jurisdictional trade. Prima facie, regulations governing the use of goods should be subject to mutual recognition. However, there is considerable uncertainty about the extent of differences in regulations on the use of goods across jurisdictions and about the benefits and costs that might flow from applying mutual recognition to these regulations. Any move to do so needs to be guided by some form of cost–benefit analysis.

FINDING 9.8

One way to assess whether the scope of mutual recognition should be expanded to include regulation on the use of goods would be for all jurisdictions to undertake a

complaint-driven review process to identify use requirements that are barriers to trade and make recommendations as to how to proceed to reduce adverse impacts on trade.

FINDING 9.9

A group of officials, with cross-jurisdictional representation, could be established to undertake the review processes following on from findings 9.7 and 9.8. This group could also have other mutual recognition responsibilities.

FINDING 9.10

Business licences themselves should not be brought into the scope of the mutual recognition schemes as the additional complexity and conflict from mutually recognising licences are likely to outweigh the gains. There are valid policy reasons to retain some hybrid business licences. However, where possible, occupational registration requirements should be removed from business licence requirements, especially where they represent indirect barriers to the movement of skilled people.

FINDING 9.11

The mobility of service providers would be improved if mutual recognition applied to qualifications listed in formal instruments for business activities or if the qualifications listed included both suitable Australian and New Zealand qualifications.

FINDING 9.12

Essentially, co-regulation for occupations has the same economic impacts as registration under legislation. Consideration needs to be given to whether co-regulation should be covered by mutual recognition, rather than leaving this judgment to the courts.

FINDING 9.13

There are significant legal uncertainties and insurance issues surrounding the remote provision of services across jurisdictions. These issues need to be addressed generally, not just in relation to the MRA and TTMRA.

1 Introduction

The economies of the Australian States and Territories have become more integrated. Contributing factors have included technological advances in communications and improved distribution systems that have made it feasible to service wider markets. Advantages derived from economies of scale have also been important in forging closer links across Australian jurisdictions.

The links between Australia and New Zealand have been significantly enhanced by the Australia-New Zealand Closer Economic Relations Trade Agreement (CER), which had its 20th anniversary this year. It was one of the world's earliest bilateral trade initiatives and it has been successful in establishing a more comprehensive and open trading and economic policy environment for the two countries. It was founded on the expectation that improved market access would enable each economy to benefit from greater specialisation, economies of scale and productivity growth.

Mutual recognition has also played a role in integrating the economies of Australian jurisdictions, as well as the Australian and New Zealand economies. Mutual recognition was progressively adopted by the Commonwealth and all Australian States and Territories between 1992 and 1995, and mutual recognition between Australia and New Zealand commenced in 1998.

In broad terms, the terms of reference for this study require the Commission to review the efficiency and effectiveness of the legislation underpinning mutual recognition — the *Mutual Recognition Act (Commonwealth) 1992*, the *Trans-Tasman Mutual Recognition Act (Commonwealth) 1997* (Australia) and the *Trans-Tasman Mutual Recognition Act 1997* (New Zealand).

The Mutual Recognition Agreement (MRA) and the Trans-Tasman Mutual Recognition Arrangement (TTMRA) embody two basic principles:

- goods that can be sold lawfully in one jurisdiction may be sold in any other, even though the goods may not comply with the regulatory standards in the other jurisdiction; and
- if a person is registered to carry out an occupation in one jurisdiction, he or she can be registered to carry out the equivalent occupation in any other jurisdiction without the need for further assessment of qualifications and experience.

As described later, these principles apply subject to certain exceptions, exemptions and exclusions.

1.1 Background to mutual recognition

Under the Australian Constitution,[1] there is free trade among the States (and Territories) and, overall, there is considerable economic integration. However, this integration has been, and continues to be, constrained to some extent by the differing regulatory requirements across the States and Territories. For example, there are significant differences in relation to the regulation of some goods and services, especially for health and safety standards,[2] and in the registration and licensing of some occupations.

The origins of mutual recognition essentially derive from the recognition that economic integration generates benefits and that reductions in impediments to labour and goods mobility increase the prospects of that integration. The 1989-90 Annual Report of the Industry Commission noted that, using the European experience as a useful pointer, the homogeneity of Australian society suggests that a mutual recognition of regulations in Australia should be possible.

New Zealand, as a sovereign nation with its own history, regulatory framework and policy environment, has developed its own set of regulations, many of which are different to those in Australia. These differences similarly constrain to some extent the economic integration of the Australian and New Zealand economies.

There is a consensus that, for the most part, harmonisation offers benefits to both Australia and New Zealand. However, achieving harmonisation of the regulatory requirements across all jurisdictions of Australia and New Zealand would be a formidable task. Moreover, it is not clear that all differences in standards actually impede integration: in some instances, the benefits that flow from harmonisation could well be less than the implementation costs. Mutual recognition by each jurisdiction of the regulatory standards of other jurisdictions is one way of reducing regulatory impediments, without incurring the costs of achieving harmonisation. The close commonality of history, culture and objectives across Australia and New Zealand reduces significantly the risk that mutual recognition would compromise any jurisdiction's basic interests. In other words, a regulation of a jurisdiction that

[1] Section 92 of the Commonwealth of Australia Constitution.

[2] Throughout this report, unless the context requires otherwise, the term 'standards' is used generically to refer to norms that range from voluntary standards to mandatory requirements, including alternative compliance mechanisms and technical regulations.

meets that community's expectations should, in most instances, normally be acceptable to other jurisdictions.

MRA

Mutual recognition in Australia was discussed at the October 1990 Special Premiers' Conference. Heads of Government agreed that fundamental regulatory reform was needed 'in order to enhance the flexibility and competitiveness of the Australian economy'. To help achieve this, they endorsed a policy of mutual recognition of standards and regulations, relating to the sale of goods and to the qualifications and experience requirements for occupational registration (CRR 1991, p. 1). The Committee on Regulatory Reform (CRR) was established to develop an approach to mutual recognition, with its proposed framework presented at the 1991 Special Premiers' Conference.

On 11 May 1992, following a national consultation process based on CRR's proposed framework, the Premiers and Chief Ministers of the Australian States and Territories signed an *Inter-governmental Agreement Relating to Mutual Recognition* and endorsed a draft Commonwealth bill. The inter-governmental agreement set in train a process for the establishment of a mutual recognition scheme in Australia and for the adoption of its legislative framework. The legislation to implement mutual recognition was passed progressively from late 1992 to late 1995. New South Wales and Queensland were the first states to adopt the legislation and, following a referral under section 51 (xxxvii) of the Constitution, the Commonwealth passed the *Mutual Recognition (Commonwealth) Act 1992* in December 1992. Western Australia was the last jurisdiction to join the scheme in late 1995.

Implementation of the MRA meant that, with some exceptions, the regulatory requirements (within the scope of the scheme) of any individual State and Territory would be accepted by all other States and Territories, even if the standards in one jurisdiction were lower than another. In areas where genuine concerns existed about the operation of mutual recognition, the MRA was expected to encourage States and Territories to agree on minimum essential requirements via a process of harmonisation of standards and regulatory requirements (CRR 1991, p. 2). The particular model of mutual recognition was chosen with a view to durability and an expectation of minimum administrative bureaucracy (see appendix D for a discussion of other mutual recognition schemes, for example, Canada, EU, nurses in the US).

TTMRA

The TTMRA had its origins in both the MRA and CER. In April 1995, COAG and the New Zealand Government released a discussion paper expressing support for the participation of New Zealand in a trans-Tasman mutual recognition arrangement and inviting submissions from interested parties (COAG et al 1995). The paper pointed to a number of potential benefits from widening the existing domestic mutual recognition scheme to include New Zealand. Identified benefits included:

- reaping further gains from liberalisation of trade between the two countries by reducing non-tariff barriers;
- achieving greater economies of scale by expanding the 'domestic' market, with consequent benefits for the competitiveness of exports; and
- increasing the momentum for reducing unnecessary regulatory barriers across other trading partners by providing a model of regulatory cooperation.

It was also hoped that mutual recognition between the two countries would provide an impetus for both countries to consider the appropriateness of their existing regulation and impose greater discipline on regulators contemplating the introduction of new standards, regulations and registration requirements (CRR 1998b, p. 10).

Legislation establishing a mutual recognition scheme between the two countries — based heavily on the existing mutual recognition legislation in Australia, with some additional exemptions and exclusions — was developed. The scheme commenced on 1 May 1998.

All States and Territories except Western Australia have adopted trans-Tasman mutual recognition legislation. Western Australia introduced (but has not yet passed) a TTMRA bill into its Parliament in November 2002. The Commission notes that sunset clauses in Queensland and Tasmanian legislation, that took effect in April and May 2003 respectively, meant that TTMRA obligations were no longer operative. Queensland took legislative action in August 2003 to reactivate its TTMRA obligations, with retrospective effect back to April 2003. The Tasmanian Government has introduced a Bill into Parliament to reactivate the TTMRA (Department of Treasury and Finance, pers. comm., 25 September 2003). The South Australian TTMRA legislation is scheduled to expire on 23 September 2004 and the Government has expressed its intention to take action to further extend the Act. The TTMRA legislation for the other jurisdictions do not contain sunset clauses.

1.2 Previous reviews

MRA

There have been several reviews of the MRA.

In early 1997, the Office of Regulation Review (ORR) published a preliminary assessment of the impact of mutual recognition in Australia. It found that 'the scheme appears to be working reasonably well and has achieved its primary goal of removing many regulatory barriers to the movement of people in registered occupations, and to interstate trade in goods' (ORR 1997, p. viii).

Determining the impact of mutual recognition on the goods market was difficult, as no quantitative data are available on the movement of goods between jurisdictions. However, qualitative evidence suggested that the awareness of mutual recognition was high amongst food producers, but lower in industries producing manufactured goods (ORR 1997, p. 37). The ORR also reported that mutual recognition had encouraged the development of national standards in some markets (ORR 1997, p. 40).

Western Australia in 1997 also held a review of the operation of the mutual recognition scheme to determine whether its adoption of the Commonwealth Act should be continued. It found that:

- it was difficult to determine the impact of the Act using the available data on the number of registrations under mutual recognition or the goods affected by the scheme;
- submissions highlighted positive impacts including improved employment mobility and recruitment, transfer of skills and knowledge, the creation of national goods markets and the elimination of costs for businesses;
- awareness of mutual recognition was higher amongst those in the occupational category than in the area of goods; and
- mutual recognition had been a stimulus for the creation of national standards for goods and occupations. (sub. 102, p. 2)

The review concluded that it was in Western Australia's interest to remain part of the mutual recognition scheme (Government of Western Australian 1997).

A review of the MRA was undertaken by the CRR in 1998 (CRR 1998a). Submissions to the review supported the view that the MRA was working well by encouraging the freedom of interstate trade in goods, the development of national standards and the removal of barriers to the movement of labour. However, a number of issues and concerns were raised at the time of the review. Most related to

either a lack of national consistency of regulations and standards or the scope for expanding mutual recognition. For example:

- Some submissions identified inconsistencies across jurisdictions in the banning and recall of defective goods under product safety regulation. In this case, the review recommended that national arrangements be developed to ensure a consistent approach.
- Other submissions highlighted frustration where goods were able to be sold in another jurisdiction, but regulations regarding the *use* of the product rendered it unsaleable. The review recommended ongoing monitoring of the issue to ensure that use requirements were not used to undermine the objectives of the MRA.
- Submissions suggested that jurisdiction-based National Competition Policy reviews resulted in inconsistencies and fragmentation and were negating the positive impacts of MRA. The 1998 review expressed concerns that the reduction in mobility arising from moves to various forms of light-handed occupational registration (driven in part by national competition policy) had the potential to undermine the benefits of mutual recognition.

The 1998 CRR review also looked at the exemptions and exceptions under the Commonwealth *Mutual Recognition Act 1992*, in accordance with the Competition Principles Agreement between the States, Territories and the Commonwealth. Under this agreement, jurisdictions are required to assess whether potentially anti-competitive aspects of legislation are justifiable in the public interest. The review assessed the nine permanent exemptions (including, for example, regulations relating to fireworks, endangered species and ozone protection) and exceptions to the legislation (laws relating to the manner of sale, transport, storage, handling and inspection of goods). It concluded that all exemptions and exceptions should be maintained although, in some cases, further work to address national inconsistencies was recommended.

Jurisdictions generally supported the CRR review's recommendations, although concerns were raised by Queensland and Victoria with respect to recommendations on pornographic material, manner of sale, and packaging and labelling. The 1998 CRR review's recommendations are in appendix B. The 1999-2000 Annual Report on National Competition Policy noted that a working group was to be set up by the CRR to resolve any outstanding issues, including those recommendations with which Queensland and Victoria had concerns (Commonwealth of Australia 2002a, p. 3). However, the 2000-01 Annual Report indicated that any further work would be taken up in the next review of the MRA in 2003 (Commonwealth of Australia 2002b, p. 82).

TTMRA

Parties to the TTMRA agreed that the first general review of the scheme's operation would be in 2003 and proposed that it be done in conjunction with the second five yearly review of the MRA.

1.3 The reference

The terms of reference for this evaluation ask the Commission to:

- assess the efficiency and effectiveness of the MRA and TTMRA;
- consider whether any changes are required to improve their operation; and
- examine whether broadening the scope and objectives of the MRA and TTMRA would enhance their efficiency and effectiveness and, if so, how this might be done.

The Commission has also been asked to examine the existing framework for permanent and special exemptions and exclusions under the MRA and TTMRA.

The final report of the evaluation is to be presented by the Commission to the Australian Heads of Government and the New Zealand Prime Minister nine months from the date of commissioning (8 October 2003).

1.4 The Commission's approach

On receipt of the terms of reference, the Commission informed interested parties by means of a circular and sought their input into the matters raised in the terms of reference. This circular included an attachment outlining some issues arising from the reference. The review was also advertised in some major newspapers in both Australia and New Zealand.

The Commission met with a wide range of organisations in Australia and New Zealand with an interest in matters within the terms of reference, including business entities, industry organisations, unions, professional groups and Australian, State, Territory and New Zealand government officials.

After release of the draft report in June 2003, round table discussions were held with interested parties in Wellington, Auckland, Sydney, Melbourne and Canberra to assist further the production of the Final Report.

The Commission received 122 submissions prior to the release of the draft report and another 58 submissions following its release.

Appendix A lists organisations and individuals who participated in the evaluation.

The Commission records its thanks to all those who contributed to this review, especially those who provided written submissions.

1.5 Structure of the report

The remainder of the report is structured as follows:

- Chapter 2 describes the overall framework of the MRA and TTMRA schemes.
- Chapter 3 outlines the criteria used in assessing the two schemes.
- The effects of the mutual recognition schemes on trade and workforce mobility and international competitiveness and their influence on international agreements are addressed in chapter 4.
- Issues relating to the operation and monitoring of the MRA and TTMRA are covered in chapter 5.
- Chapter 6 discusses the implications for the mutual recognition schemes of regulation and standards setting.
- Chapter 7 examines permanent exemptions and exceptions under the schemes.
- Chapter 8 discusses progress under the special exemption cooperation programs.
- Options for broadening the scope of the schemes are discussed in chapter 9.

2 Mutual recognition framework

This chapter describes the framework of mutual recognition, in particular, the mechanisms by which the MRA and TTMRA work, the scope of the schemes and the exceptions, exclusions and exemptions.

2.1 Legislative environment

As noted in the previous chapter, Australia (Commonwealth, States and Territories) and New Zealand have enacted legislation for the obligations of the MRA and TTMRA.[1] Decisions made under MRA and TTMRA legislation may be subject to appeal to the Administrative Appeals Tribunal (AAT) for Australia and the Trans Tasman Occupations Tribunal (TTOT) for New Zealand. In addition, there is a Ministerial Council referral process for clarifying standards in certain circumstances.

Account must also be taken of the commitments made by Australia and New Zealand as members of the World Trade Organisation (WTO). The WTO agreements establish a framework in which countries are able to liberalise trade by reducing non-tariff barriers. As they apply to numerous countries and trading situations, they are neither stringent nor specific. Instead, they aim to ensure that new standards are as least trade restrictive as possible, while still allowing countries to introduce new standards or regulations.

As part of the Uruguay Round of negotiations of the WTO, the General Agreement on Trade in Services (GATS), the Sanitary and Phytosanitary (SPS) agreement and the Technical Barriers to Trade (TBT) agreement were adopted by all members of the WTO. Australia and New Zealand must act consistently with their international obligations under the GATS, SPS and TBT Agreements, including in relation to action taken on mutual recognition.

[1] Western Australia's legislation in relation to the TTMRA has yet to be passed by the WA parliament. Sunset clauses in Tasmania and Queensland's TTMRA legislation took effect on 1 May 2003, but action has been taken to reinstate TTMRA obligations. Details are provided in chapter 1.

Due to the broad multilateral nature of these agreements, they tend to enable, but not require, mutual recognition of standards and regulations. For example, the GATS aims to progressively reduce barriers to trade in services by requiring, subject to qualifications, that there be no discrimination or preference between countries in trade in services. There are exceptions in relation to: public order; human, animal or plant health; or regulations necessary to secure compliance with other laws not inconsistent with GATS. The GATS operates by the maintenance of a schedule listing the sectors in which a member grants market access to other members. GATS Article 7 allows for mutual recognition by permitting members to enter into agreements or autonomously recognise the standards of other members. These agreements must be open for other members to join.

The SPS Agreement allows Members to introduce sanitary or phytosanitary measures which would otherwise breach a Member's obligations under the General Agreement on Tariffs and Trade 1994 (GATT 1994). An example of such a measure would be a ban on importing a particular kind of meat because it contains a hormone that may be harmful to human health. Article 2.4 of the SPS Agreement provides that sanitary or phytosanitary measures which conform to the Agreement shall be presumed to be in accordance with the obligations of Members under GATT 1994. However, to conform with the SPS Agreement, countries must ensure their sanitary or phytosanitary measures are based on science.

Technical standards other than sanitary measures are covered by the TBT Agreement. The TBT applies to all products and covers other non-tariff barriers to trade such as technical regulations, standards and conformity assessment. In line with other WTO agreements, the TBT encourages uniform treatment of products, regardless of their place of origin. Article 2.2 of the TBT requires that standards will not be any more trade restrictive than necessary.

The TBT works in several ways to encourage WTO Members to adopt international technical standards. Article 2.4 of the TBT requires Members to consider the adoption of international standards[2] when formulating their own standards. According to Article 2.5 of the TBT, if a Member adopts an international standard it creates a rebuttable presumption that this standard does not impede international trade. In all areas, the TBT encourages transparency through the notification, publication and availability of standards. In the area of conformity assessment, Article 6 of the TBT encourages Members to mutually recognise the conformity assessment procedures of other Members.

[2] In this context, the term 'international standards' refers to standards developed in international forums. However, throughout this Report, unless the context requires otherwise, it also includes national or regional standards that have been adopted or recognised as alternative compliance mechanisms by a number of countries.

However, while the TBT encourages the adoption of international standards, Members are still free to apply their own standards, particularly to meet what are regarded as 'legitimate' objectives: national security; human health or safety; animal or plant health or safety; the environment; or the prevention of deceptive practices. In this case, scientifically based risk assessment is one of the criteria to be considered.

The MRA and TTMRA legislation generally overrides any other State, Commonwealth or national legislation in both Australia and New Zealand. Section 6(2) of the *Mutual Recognition (Commonwealth) Act 1992* states that the MRA does not affect the operation of other Commonwealth laws and does not limit the operation of a State law so far as that law can operate concurrently with the MRA. Section 5 of the *Trans-Tasman Mutual Recognition Act 1997* (Australia) provides that the TTMRA has effect despite anything in any other Commonwealth law enacted before the commencement of the TTMRA. It also provides that any Commonwealth law made after the commencement of the TTMRA is to be construed as having effect subject to the TTMRA, except where that law expressly overrides the TTMRA. Section 5 of the *Trans-Tasman Mutual Recognition Act 1997* (New Zealand) provides that every law of New Zealand must, unless otherwise expressly provided, be read subject to the TTMRA. These provisions were included to ensure that the obligations of the mutual recognition schemes were not accidentally or deliberately circumvented by individual jurisdictions' legislative actions.

Local governments are also subject to the obligations set out in the MRA and TTMRA. However, the practical effect of this may be minimal, as most local governments do not regulate the 'sale' or 'registration' activities that are covered by current mutual recognition requirements. Nevertheless, any move to expand the scope of mutual recognition to, say, use of goods or manner of provision of a service, would need to take into account the impact on local government. For example, many local governments enforce environmental rules that govern how people may use particular products. Including the use of goods within mutual recognition would influence the way local governments carry out such enforcement activities. This is discussed further in chapter 9.

2.2 Mutual recognition mechanisms

Goods

As noted earlier, the essence of the MRA and TTMRA is that goods produced in or imported into a participating jurisdiction that may be lawfully sold in that jurisdiction may also be lawfully sold in the other participating jurisdictions. This means that producers do not need to satisfy the standards or requirements of the other jurisdictions in a number of areas. These 'requirements that do not need to be complied with' are set out in the legislation (see, for example, section 10 of the *Mutual Recognition (Commonwealth) Act 1992* and section 11 of the *Trans-Tasman Mutual Recognition (Commonwealth) Act 1997*). They include requirements on:

- the goods themselves (for example, their production, composition or quality);
- the way goods are presented (for example, their packaging, labelling or age);
- inspection of goods; and
- the location of the production of goods (in particular, any requirements that any step in the production of goods not occur outside the jurisdiction).

In addition, the mutual recognition legislation notes that any other requirement relating to sale that would prevent or restrict, or have the effect of preventing or restricting, the sale of the goods in the jurisdiction, does not need to be complied with. As noted by the Western Australia Legislative Assembly in their consideration of the MRA, this clause is broad and could potentially encompass a range of indirect barriers to the sale of goods across Australian jurisdictions (1994, p. 16). The Assembly suggested that the aim of the clause was to discourage jurisdictions from using indirect means, such as regulations on the use of goods, to frustrate the operation of mutual recognition. In practice, however, jurisdictional regulations on the use of goods have been allowed and have not been overridden by mutual recognition. This is discussed further in chapter 9.

Occupations

For occupations, the MRA and TTMRA allow a person who is registered in one jurisdiction to be registered in the other participating jurisdictions for the equivalent occupation and to carry on that occupation in those other jurisdictions. This means that professionals do not need to satisfy the requirements of the other jurisdictions regarding qualifications and experience in order to be registered in an equivalent occupation. Appendix C lists information provided by governments on occupations registered by their jurisdiction.

There are several concepts encapsulated in the mechanism of mutual recognition for occupations, most important of which are 'registration' and 'equivalence'. The definition and interpretation of these concepts have a major influence on the extent to which mutual recognition operates for occupations. These concepts are discussed further below.

Registration

Registration is defined in the mutual recognition legislation as including:

> … licensing, approval, admission, certification (including by way of practising certificates), or any other form of authorisation, of a person required by or under legislation for carrying on an occupation. (See, for example, section 4(1) of the *Mutual Recognition (Commonwealth) Act 1992*.)

This definition of registration makes it clear that all types of *formal* registration are captured, regardless of the particular term used to describe that registration. Also, when registration is on a formal basis, all parts of that registration must be recognised. The example given in the mutual recognition legislation is that of a legal practitioner (see, for example, section 17 of the *Trans-Tasman Mutual Recognition (Commonwealth) Act 1997*). In order to practise, a legal practitioner must gain admission by a court and a practising certificate by another body. Mutual recognition applies to each part of this registration and each authority involved.

Case law from the Administrative Appeals Tribunal (AAT) has provided some guidance on the concept of registration. For instance, in *Shakenovsky and The Dental Board of NSW [1999] AATA 983*, the Tribunal found that registration 'includes any form of approval by or under legislation for carrying on an occupation'.[3] The Tribunal considered that entry of particulars into a register (in this case, a description of the individual as an oral and maxillofacial surgeon) was enough to satisfy the mutual recognition requirement for a system of registration as an oral and maxillofacial surgeon, even though the register was officially a 'dentist register'.

The 1998 review of the MRA noted that the definition of registration excluded more 'light-handed' approaches to occupational regulation, such as negative licensing and co-regulation, as these forms of regulation did not involve the formal issuance of an authorisation to practise (CRR 1998a). Negative licensing allows people to practise unless they breach legislation-based conduct requirements, while co-regulation allows private organisations, under government endorsement (usually legislative), to regulate the conduct and standards of their members. Following this, the

[3] See www.austlii.edu.au/au/cases/cth/aat/ for the full text of AAT cases.

definition would also appear to exclude regulation that sets certain qualification requirements for practice, but which does not issue any authorisation based on attainment of that qualification. For example, while New Zealand child-care workers must attain a particular qualification (as gazetted by the Minister of Education) to be a 'person responsible' within a child-care centre, there is no formal registration process.[4] The lack of registration would seem to imply that mutual recognition cannot be activated — New Zealand child-care workers are not in possession of any registration that could be recognised by Australian jurisdictions, and there is no registration board in New Zealand to which registered child-care workers from Australia can apply. These issues are discussed further in chapter 9.

Equivalence

Another important definitional aspect of mutual recognition for occupations is the concept of equivalence. Under the MRA and TTMRA, all forms of registration implemented under legislation are recognised in other jurisdictions, if they apply to equivalent occupations.

Equivalence is explicitly defined in the legislation governing mutual recognition by reference to activities (see, for example, Part 3(4) of the *Trans-Tasman Mutual Recognition (Commonwealth) Act 1997*). An occupation is taken to be equivalent if the activities authorised to be carried out under each registration are substantially the same.

Many of the cases heard by the AAT involve issues of equivalence. The AAT may make an *order* that a person who is registered in a particular occupation in one jurisdiction is (or is not) entitled to registration in another jurisdiction in a particular occupation, and may specify or describe conditions that will achieve equivalence (see, for example, section 31(1) of the *Mutual Recognition (Commonwealth) Act 1992*).

The AAT, in *Peter Rowe v. NSW Police Service [1997] No. Q96/738 AAT No. 11945*, noted that:

> … there are, in practical terms, five distinct steps to be undertaken in determining the equivalence of occupations. The first is to identify the occupation for which the person is registered in the first state or territory. This is followed by the identification of the activities authorised to be carried out under that registration. The third step is to identify an occupation in the second state or territory for which a person may be

[4] See 'Qualifications for Persons Responsible in Early Childhood Centres and Home-Based Care Coordinators' 18 December 2000, at http://www.minedu.govt.nz. Also 'Registration: Legal Requirements: Who must register?', at http://www.trb.govt.nz/. Regulations are contained in Education (Early Childhood Centres) Regulations 1998.

> registered and the fourth to ascertain the activities authorised to be carried out under that registration. A comparison is then made between the activities authorised to be carried out under each of the registrations to determine whether those activities are substantially the same. That is the fifth step. Part of that fifth step is to consider whether conditions should be imposed on registration to achieve equivalence between those occupations. (para. 12)

Some occupational associations have undertaken work to establish which occupations in each participating jurisdiction are equivalent. For example, the New Zealand Law Society drew up a matrix outlining occupational equivalence for practising certificate purposes (see sub. 17, pp. 19–20). This matrix was distributed to all New Zealand District Law Societies, along with process guidelines, to assist Societies in registering applicants from Australian jurisdictions under the TTMRA.

Registration boards have also made use of their right to impose conditions on registration to achieve equivalence. For example, midwives relocating from Australia who register under TTMRA in New Zealand are not allowed to prescribe medicines:

> … until they provide evidence to Council of completion of a learning package (self-directed or on site) that covers relevant New Zealand legislation and specific pharmacology and prescribing information. Once approved, they have the 'no prescribing' condition on practice removed. (Nursing Council of New Zealand, sub. 68, p. 7)

However, there may be limitations on the extent to which conditions can be used to narrow down activities for equivalence purposes. For instance, the Registrar of the Supreme Court of Queensland said:

> To reduce, by the imposition of conditions, the activities authorised by registration as a Solicitor in Queensland to those activities which a Licensed Conveyancer in New South Wales is legally authorised to carry on, is not to effect the registration of such a person as a Solicitor in Queensland. It would purport to effect the registration in Queensland of something, which is outside the denotation of the term "solicitor". The activities in respect of which such a person would be registered would not be representative of those which a Solicitor is authorised to carry on. (*Turner and The Registrar, Supreme Court of Queensland [2002] AATA 741)*

The Commission understands further hearings on this case were held on 31 July and 1 August 2003 and that the final decision of the AAT will not be known for some months (Australian Institute of Conveyancers, sub. DR141, p. 1). Conveyancing has proven to be a particularly contentious area for the concept of equivalence, with the Victorian Conveyancers' Association calling for licensing authorities to 'set clear guidelines to at least show the nature or scope of activities required for the profession and to set out the conditions by which a person is able to identify with or achieve mutual recognition' (sub. 101, p.3).

It appears that the AAT seeks to take a commonsense approach towards the issue of equivalence. Several cases have drawn on the comment of Lockhart J in *Sande v Registrar, Supreme Court of Queensland* 134 ALR 560 [565] that the *Mutual Recognition Act 1992* must be applied in a practical, commonsense manner and regard must be had to the substance of the matter and the substantial equivalence of occupations (see, for example, *Stan Kozera v. Law Society of the ACT No. A96/494 AAT No. 11782*). However, some professions are still experiencing difficulties with the operation of the concept.

As well as decisions resulting from appeals to the AAT or TTOT, the concept of equivalence is also subject to any formal *declarations* made by Ministers or by either the AAT or TTOT in the context of a review.

- Ministers from two or more jurisdictions may jointly *declare* that specified occupations are equivalent, and may set conditions that will achieve equivalence (see, for example, section 31 of the *Trans-Tasman Mutual Recognition (New Zealand) Act 1997*). For instance, in 2000-01, Ministerial Declarations were made by the Minister for Minerals and Energy (SA), the Minister for Mineral Resources (NSW) and the Minister for Mines and Energy (Qld) regarding the equivalence of particular miners' licences across these States (discussed in *Lawrence and Coal Mining Qualifications Board, Department of Mineral Resources (NSW) and Anor [2002] AATA 389*). Ministerial declarations take precedence over declarations from the AAT or TTOT.
- The AAT or TTOT may *declare* that certain occupations are not equivalent (see, for example, section 30(2) of the *Trans-Tasman Mutual Recognition (Commonwealth) Act 1997*. This indicates they are satisfied either that the activities involved are not substantially the same (even with the imposition of conditions), or that registration in jurisdiction A should not entitle registered persons to carry on a particular activity in jurisdiction B, due to health, safety or environmental concerns. In the latter case, where the declaration is made on the basis of health, safety or environmental concerns, it has effect for a maximum of 12 months. During this time, the matter must be referred to the relevant Ministerial Council to look at the registration requirements for the occupation in question.

2.3 Coverage of the MRA and TTMRA

In contrast to systems such as Canada's, where mutual recognition applies on a case-by-case basis, Australia and New Zealand have chosen a system where all goods and registered occupations are covered unless specifically excluded. Although there are some common features, the categorisation and scope of items

not covered varies both between the MRA and the TTMRA, and between goods and occupations (table 2.1). The particular goods, occupations and laws/regulations not covered by the schemes are shown in figure 2.1 and 2.2.

Table 2.1 **Categories of items not covered by MRA and TTMRA**

	MRA		*TTMRA*	
	Goods	*Occupations*	*Goods*	*Occupations*
Exclusions	✘	✘	✔	✘
Exceptions	✔	✔	✔	✔
Permanent exemptions	✔	✘	✔	✔
Temporary exemptions	✔	✘	✔	✘
Special exemptions	✘	✘	✔	✘

✘ No provision for this category in the scheme. ✔Provision for this category is included in the scheme.

Exclusions

Unlike the MRA, the TTMRA has a category of *exclusions* containing certain laws relating to the sale of *goods* that may otherwise be unintentionally affected by the application of mutual recognition between nation states. These laws, which in essence relate to the sovereign rights of nation states, are listed in Schedule 1 of the *Trans-Tasman Mutual Recognition (Commonwealth) Act 1997* and the *Trans-Tasman Mutual Recognition (New Zealand) Act 1997*. They relate to: customs controls and tariffs; intellectual property; taxation and business franchise and stamp duties; and the implementation of international obligations.

Figure 2.1 **Scope of the MRA**

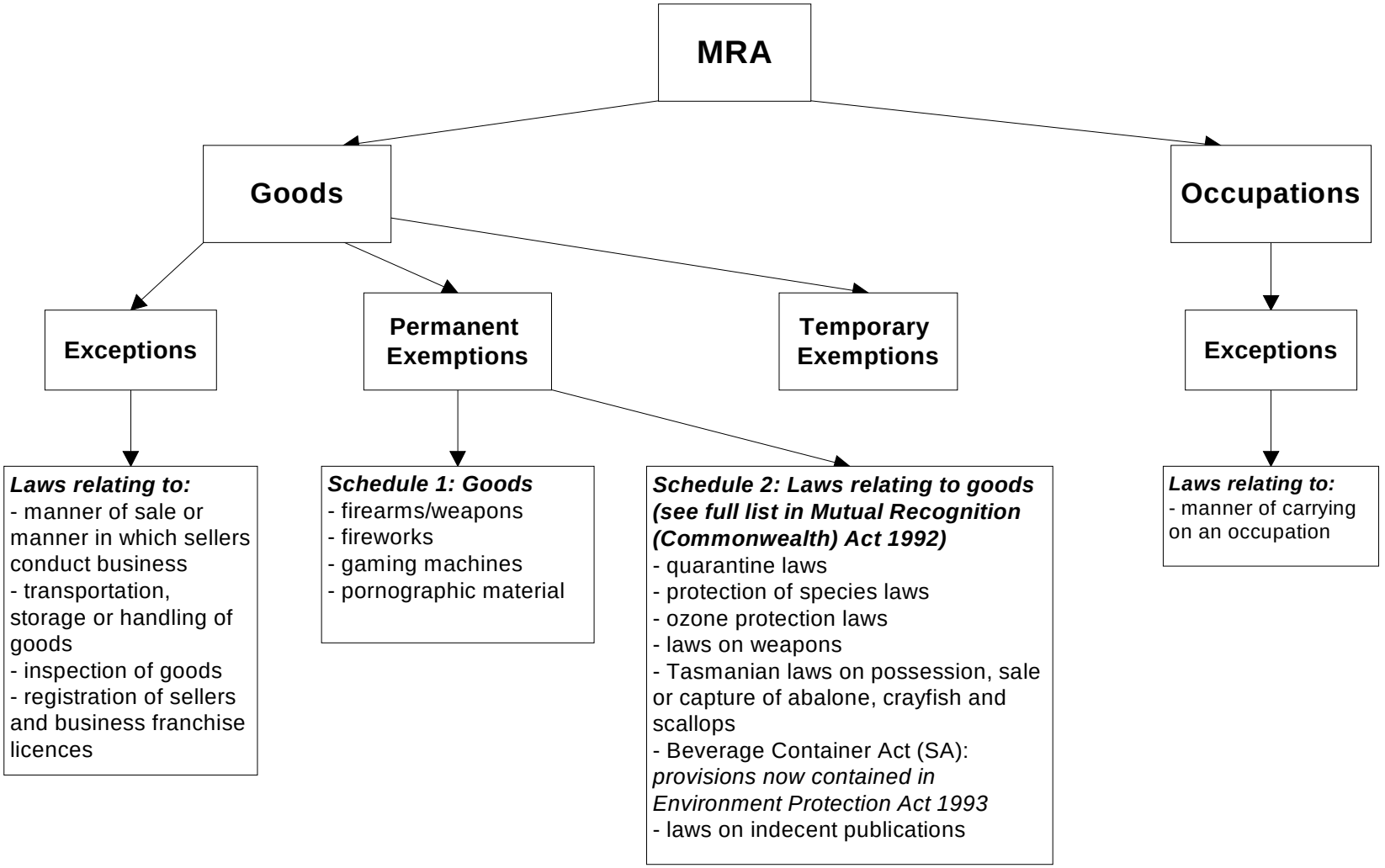
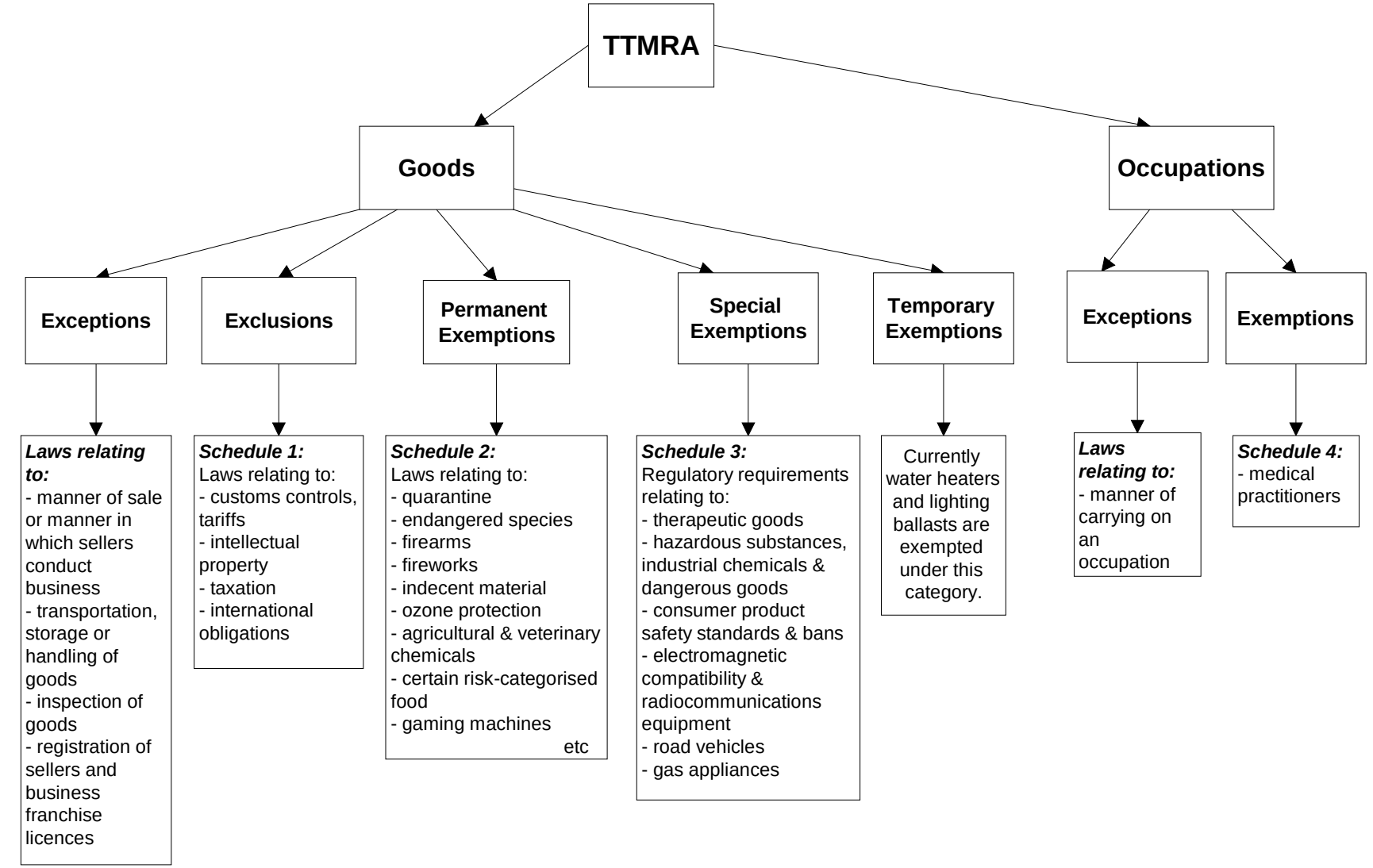


Figure 2.2 **Scope of the TTMRA**



Exceptions

Exceptions, which are explicitly identified in the relevant Commonwealth, State and Territory, and New Zealand legislation, comprise laws and regulations that are considered to be outside the intended scope of the MRA and TTMRA. They are identical in both the MRA and TTMRA and apply to both goods and occupations. The exceptions relating to goods are:

- Laws that affect the manner of sale of goods in the other jurisdictions or the manner in which the seller conducts, or is required to conduct, business in the other jurisdictions. This includes laws relating to: the contractual aspects of the sale of goods; the registration of sellers; the requirement for business franchise licences; persons to whom goods may or may not be sold; and the circumstances in which goods may or may not be sold.
- Laws in the other jurisdictions regarding the transportation, storage or handling of goods, as long as the laws apply equally to goods produced in or imported into the other jurisdictions and the laws are aimed at health, safety or environmental matters.
- Laws of the other jurisdictions regarding the inspection of goods, as long as such inspection is not a prerequisite to the sale of goods, the laws apply equally to goods produced in or imported into the other jurisdictions, and the laws are aimed at health, safety or environmental matters.

While not explicitly excepted from the schemes, regulations relating to the usage of goods, rather than their sale, are also not covered by the mutual recognition schemes.

In relation to occupations, the only exception is laws that regulate the manner of carrying on an occupation. While not explicitly identified as an exception, remote provision of a service, where the provider is not situated in the same jurisdiction as the receiver, is not covered by the mutual recognition schemes.

Permanent exemptions

Permanent exemptions apply to goods under the MRA and both goods and occupations within the TTMRA. Broadly speaking, these are goods and laws that, in principle, could be covered by mutual recognition. However, the parties to the schemes deemed mutual recognition to be inappropriate for these items. Permanent exemptions may also include laws or regulations encompassing standards that some

jurisdictions are unwilling to accept and for which harmonisation or agreement on a common standard was not foreseen as possible.

Schedule 1 and 2 of the *Mutual Recognition (Commonwealth) Act 1992* list the *permanent exemptions* to the MRA. Firearms and other weapons, fireworks, gaming machines and pornographic material are *goods* that are specifically exempted from the agreement. The permanent exemptions also include *laws* of States relating to quarantine and endangered species, as well as laws relating to ozone protection, weapons, indecent material, the South Australian *Beverage Container Act 1975* (provisions now contained in the *Environment Protection Act 1993*) and Tasmanian laws on possession, sale or capture of abalone, crayfish or scallops.

Permanent exemptions in the TTMRA broadly parallel those areas listed as permanent exemptions in the MRA.

The only permanent exemption relating to occupations is the exemption applying to medical practitioners in the TTMRA. One reason for this exemption was to prevent undermining the objectives of Australia's National Medical Workforce Strategy through the entry of third-country-trained doctors (COAG et al, 1995, p. 31). Other participants saw it more as a mechanism to overcome problems with differing competency standards between Australia and New Zealand. The New South Wales Medical Board referred to New Zealand as having 'different and lower standards for registration' (sub. 81, p. 3), while the Medical Council of New Zealand expressed concerns with Australia's differing assessment of medical practitioners in 'areas of need' (sub. 80, p. 5).

Temporary exemptions

There is scope for *temporary exemptions* for goods in both the MRA and the TTMRA. They may be created if a jurisdiction is concerned that the standards or regulatory requirements relating to a good are such that its sale could threaten health, safety or the environment. Temporary exemptions apply only in the jurisdiction that applies the exemption. They are intended to operate for a maximum of 12 months, with the relevant Ministerial Council responsible for making a determination on whether the regulatory requirements in question should be amended and, if so, in what way. The three possible outcomes are mutual recognition, harmonisation or addition to the list of *permanent exemptions*. Harmonisation is typically preferred over mutual recognition in areas that are perceived as critical to public health, safety or the environment (COAG et al 1995, p. 5). A 12 month extension is available to allow time for legislative or other action to be taken to implement the Ministerial Council recommendations.

At present, temporary exemptions are in place for water heaters and lighting ballasts under the TTMRA. These are discussed further in chapter 6 and appendix F.

Special exemptions

Special exemptions exist only in the TTMRA and apply only to goods. They were created to allow further examination of the regulatory requirements in Australia and New Zealand to determine whether mutual recognition is appropriate or if harmonisation can be attained. Special exemptions last for 12 months. During this time, Australian and New Zealand officials take part in 'Cooperation Programs', which aim to develop complementary regulatory arrangements. The exemptions can be, and in practice have been, rolled over until the Cooperation Program is complete.

Special exemptions apply to six categories of goods and regulations: therapeutic goods; hazardous substances, industrial chemicals and dangerous goods; consumer product safety standards and bans relating to specific goods; electromagnetic compatibility and radiocommunications equipment; road vehicles; and gas appliances. The current status of these exemptions is discussed in detail in chapter 8.

3 Objectives and assessment criteria

> 'The Commonwealth, States and Territories were jointly responsible for implementing the mutual recognition principle in the law of Australia, following the realisation that the existence of multiple regulatory environments across the States and Territories was impeding freedom of trade, and compromising the ability of the nation to compete in the international economy.' (Mutual Recognition Legislation Review, CRR 1998a)
>
> 'The objective of the Arrangement is to remove regulatory barriers to the movement of goods and service providers between Australia and New Zealand, and to thereby facilitate trade between the two countries. This is intended to enhance the international competitiveness of Australian and New Zealand enterprises, increase the level of transparency in trading arrangements, encourage innovation and reduce compliance costs for industry.' (Trans-Tasman Mutual Recognition Arrangement, 1998)

In accordance with its Act, the Commission's assessment of the mutual recognition schemes needs to be from the perspective of the welfare of the community as a whole. The definition of 'community' merits examination, as for this evaluation it encompasses not only Australia but also New Zealand. Furthermore, the interests of the States and Territories must be considered. While an initiative may have overall benefits, the distribution of the gains and losses may be spread unevenly across participating jurisdictions.

The terms of reference specify some assessment criteria: effectiveness; efficiency; and practically achievable. They also require that any changes be consistent with Australia and New Zealand's international obligations. As well, due regard to jurisdictional sovereignty is central to this review. This chapter focuses on the meaning and application of these criteria in evaluating the MRA and TTMRA.

The terms of reference also request slightly different emphases be placed on the assessments of the exemptions and exclusions of the MRA and the TTMRA. For the former, the Commission is asked to consider whether the exemptions and exclusions should be *retained* and, for the latter, consistent with the intention to *minimise* exemptions and exclusions, to consider deletions or amendments. Nevertheless, in this evaluation, the criteria are applied in the same manner to both the MRA and the TTMRA.

3.1 Clear and credible objectives

Ultimately, any government initiative should be judged against the credibility and desirability of its underlying objectives. Based on the background papers leading to the MRA and the TTMRA, mutual recognition has worthwhile aims.

The principal objective of the MRA is to promote freedom of movement of goods and service providers within Australia. As noted in chapter 1, this was set in the context of the frustration encountered by business in operating in the multiple regulatory environments of the States and Territories; and the recognition that these barriers to interstate trade were limiting Australia's capacity to compete internationally, resulting in lower productivity and growth. It was thought that lower regulatory impediments to the movement of people and goods across jurisdictions would contribute to the following objectives:

- a national goods and labour market;
- increased competitiveness of the national market;
- greater choice for consumers; and
- decreased costs to business.

Furthermore, it was envisaged that mutual recognition would put added pressure on participating parties to seek harmonisation in areas where genuine concern existed about the effects of recognising non-equivalent standards in the same market. The Australian Second Reading Speech, for the TTMRA legislation, noted some additional practical benefits from the MRA, including:

- greater cooperation between regulatory authorities and the accelerated development of national standards where appropriate; and
- greater discipline on individual jurisdictions contemplating the introduction of new standards and regulations.

For example, for more than a century the States and Territories were unable to reach agreement on uniform national food regulation, but were able to after the MRA was established. The 1998 review by the Committee of Regulatory Reform noted that historically, government, business and industry had pursued uniform national regulation as a way to free trade across the States and Territories, and they turned to mutual recognition in frustration over extremely slow progress. Supporters considered that, not only would mutual recognition provide an alternative to uniformity, it would also add pressure to achieve it, where appropriate.

The objectives of the TTMRA encompass and build on the goals of the MRA. They include:

- integration of the markets of all the jurisdictions in Australia and New Zealand to create a single economy;
- increased trade and workforce mobility between Australian States and Territories and New Zealand;
- enhanced international competitiveness of Australian and New Zealand businesses; and
- increased influence by Australia and New Zealand on international norms and standards.

Compatibility of standards is also a goal of the TTMRA. Ministerial Councils and other intergovernmental regulation-making bodies are subject to COAG's *Principles and Guidelines for Standard Setting and Regulatory Action by Ministerial Councils and National Standard-Setting Bodies* (1997). This guide states that, wherever possible, regulations and standards should be compatible, even if not uniform, with the relevant international standards in order to minimise unjustified impediments to trade.

The objectives of mutual recognition should be seen in the context of the recognition of the importance of both countries participating in the global economy in order to maximise welfare. In general, greater integration of the Australian and New Zealand economies should be efficiency-enhancing.

3.2 Effectiveness

To judge effectiveness of the MRA and the TTMRA, it is necessary to assess the difference that they make to meeting their objectives — the integration of the Australian and New Zealand market; trade and workforce mobility; inter-jurisdictional and international competitiveness; compatibility with international norms and standards; Australia and New Zealand's influence over international norms and standards; consumer choice; lowering compliance costs to industry; and the compatibility of standards — beyond what would have occurred without them. This is the 'additionality' criterion. Indications of the difference that mutual recognition makes are provided in chapter 4.

The terms of reference also require an assessment of possible changes to the MRA and the TTMRA, to improve their effectiveness in meeting the objectives of mutual recognition. There are several aspects of the 'design features' of the two mutual recognition schemes to consider:

1. coverage — the range of goods and services that are subject to mutual recognition;

2. scope — the range of regulatory activities that are subject to mutual recognition;
3. operation — procedures to move people or goods and the available appeal mechanisms;
4. monitoring of impacts and enforcement of compliance;
5. machinery put in place to change the coverage and scope — those applying to national standard-setting generally, those for making changes to the exceptions and exclusions under the mutual recognition schemes in particular, and the five year reviews, such as the current one, which provide the capacity to change all aspects of the mutual recognition schemes, including their scope; and
6. mechanisms used to ensure policy makers take account of mutual recognition issues when developing standards and other relevant regulation.

These design features determine the effectiveness of the two mutual recognition schemes in meeting their ultimate objectives. Issues relating to the operation, monitoring and change machinery of the mutual recognition schemes are addressed in chapters 5 and 6, along with questions concerning greater awareness of mutual recognition issues during policy development. The coverage of the schemes is addressed in chapters 7 and 8, while the scope is discussed in chapter 9.

3.3 Efficiency

At the broadest level, an arrangement is efficient if resulting benefits outweigh all costs involved, so that a net benefit is generated. The mutual recognition schemes are unusual in that they focus on removing regulatory barriers to movement of goods and people across jurisdictional borders. For the removal of regulatory barriers to be an efficient change, therefore, it should generate gross benefits greater than the gross costs. For example, while a change, such as expanding the scope of mutual recognition to include say, manner of service provision, would be effective by improving mobility, it is not so clear-cut whether such a change would be efficient, because changes may not generate benefits greater than the incurred costs. The benefits chiefly flow from the better use of resources and from a reduction in the costs of complying with and administering regulations. As well as the immediate benefits derived from mutual recognition reducing the compliance costs of regulation, lower barriers to movement can stimulate individuals and businesses to take advantage of new opportunities that will arise from supplying a larger market; accessing cheaper inputs; and being able to compete more effectively in the world economy. These dynamic gains can be hard to predict and estimate, but they are often the source of the greatest gains. They add to productivity and growth. There is, however, another potential source of benefit: mutual recognition leads to a closer examination of the rationales for pre-existing and new regulations in each

jurisdiction, including the economic and social justifications of the differences in regulation across jurisdictions. This can lead them to agree to harmonise regulations, where net benefits would result.

The costs of mutual recognition consist of more than the administrative costs of the scheme itself. In addition, through mutual recognition each jurisdiction forgoes the opportunity to dictate exclusively its own set of regulations to its own set of values and opportunities.

Whether reductions in cross-jurisdictional differences in regulation reduce or increase costs, in aggregate and at the end of the day, will depend on the particular circumstances of the case. For example, if quarantine were not exempted from mutual recognition, then products could be brought into jurisdictions without inspection. While this would have the first round effect of reducing the costs of compliance for importers and the costs of administering quarantine programs for governments, second round effects could be grave if, as a consequence, a species is wiped out or animal disease is introduced with adverse effects for farmers.

3.4 Practicality

It is important to the participating jurisdictions that any suggested changes to the mutual recognition schemes be practical. As mutual recognition operates in areas where regulation already abounds, changes to coverage; scope; operation; monitoring; policy-development mechanisms; and procedures to change coverage, can have far-reaching implications. For example, the Australian Communications Authority (sub. 25) has pointed out that fundamental differences in radiofrequency usage will make it impossible for Australia and New Zealand to mutually recognise all product types. And, while mutual recognition embodies regulations impacting on conditions of sale, an extension to include regulations which impact on usage requirements could be extremely difficult to implement in some areas and could undermine the health and safety or environmental objectives of some usage requirements.

Similar considerations apply for the extension of mutual recognition to cover manner of provision of a service. Both have the potential to unravel or undermine the structures put in place by governments to manage high-risk activities, ranging over health provision in hospitals, occupational health and safety, building codes, and the movement of dangerous substances, amongst others. This would occur if products and practices were made legally acceptable in incompatible and conflicting environments. An analogy would be if a country using the metric system had to accept systems, products and practices based on the imperial system of weights and measures, resulting in connection incompatibilities, etc.

Not only is compatibility of regulation important, it is also important to ensure that any changes to the machinery, which implements and reviews mutual recognition, do not involve high resource or transition costs unless even larger benefits will result from these changes.

3.5 Sovereignty

An underlying consideration, and one which explains many regulatory differences, is the exercise of jurisdictional sovereignty. Mutual recognition offers an attractive reconciliation of political sovereignty and economic efficiency.

Sovereignty concerns the power to make decisions and take actions. Sovereignty can apply to different sized communities. According to the principle of subsidiarity promoted by the European Union, the central policy question is identifying the optimum decision-making unit.

In democratic market states, there is a presumption towards maximising the decision-making and action-taking power of individuals and families. Indeed, individual or consumer sovereignty is a cornerstone of economic theory, in that it is assumed that individuals (and not groups) are the core decision-making units in society and take action, individually or in groups. Within that framework, most limitations placed by government, on individual rights to make decisions and take actions, should be based on situations where the individuals' behaviour has adverse effects on others, for which they do not bear the full cost. And encouragement of certain behaviour should be based on situations where the individual is not fully recompensed for positive effects of their actions on others.

The size of the affected community varies with the nature of the decision. When the impacts of decisions are felt by individuals throughout a community, and only in that community, the decisions are best made by the affected community collectively. When the effects spill over into other communities, one possible ideal is to create a decision-making body specifically to resolve the issue. This can be expensive or impossible. Hence, there are government decision and implementation machinery built around different-sized communities: local councils, state governments and national governments. And beyond the nation state there are international decision-making bodies.

This evaluation is particularly concerned with the sovereignty exercised by sub-national jurisdictions and by nation states. There is concern that jurisdictional and national sovereignty are diminished in an increasingly integrated world. In particular, policies aimed at removing barriers to cross-border flows of goods and people place limits on internal policies.

There is, however, a trade-off between regulations or policies carefully tailored to specific jurisdictions (state, territories, nations), and the advantages of freer movement of goods and services across jurisdictional boundaries.

One strategy is to try to minimise the barriers to economic integration, while at the same time maximising the sovereignty of the nation state on issues that matter. Often, there are a number of ways by which to achieve goals, and many cultural objectives can be pursued without inhibiting trade to any great extent. It also often requires the acceptance that it is more important to achieve a bottom line objective than to control the means of achieving it.

There is a potential that, under mutual recognition, the lowest standard will become the norm, as producers and service providers will choose the least costly method of compliance. This leads to fears about a 'race to the bottom', with standards spiralling downwards as jurisdictions compete to attract business and people with valued occupations.

However, when two or more jurisdictions have similar cultures, values and standards of living, then their regulations will address many of the same objectives and their optimal sets of regulation, chosen independently, may be very similar. Hence, mutual recognition works best when the jurisdictions involved have similar levels of incomes and similar objectives. While there are differences both amongst Australian jurisdictions and between Australia and New Zealand, the variation is contained with a much narrower band than applies throughout the world.

When different regulations are used to achieve the same objective, the question arises as to whether the greater costs of compliance and decreased competition are justified. Sometimes, differences are intrinsic to a locality and require tailor-made regulations, such as protecting unique flora and fauna, or which deal with region-specific environmental problems, such as temperature inversion in Canberra or Christchurch. In contrast, human beings largely require the same sorts of basic interventions to preserve their health and safety, though preferences for higher standards usually correlate with higher levels of income. Other issues are based on deep differences in history, values or opportunities, and these explain differences in regulations. For example, Australia has banned a certain category of abortion-inducing pharmaceuticals, while they are available in New Zealand; the Treaty of Waitangi has significant influence on New Zealand laws; and the ACT took a position, based on ethical arguments, to encourage free-range eggs in the ACT.

Jurisdictions assert that they value highly the right to alter regulations. Sometimes this right is important in order to adapt to local preferences and conditions, as noted above. Other times, it reflects underlying differences in legal frameworks and regulatory philosophies, such as those focused on outcomes versus those focused on

specifying inputs. In these circumstances, it can be difficult to transplant identical standards into the regulatory machinery of different jurisdictions. However, there are cases, where it is difficult to understand why regulatory differences prevail. Sometimes, one can only conclude that the pursuit of difference reflects either a desire to protect local industry, using standards to act as non-tariff barriers to trade; or a desire to justify the existence of state-level or local-level bureaucracy.

A priori, one would expect the question of infringements of sovereignty to be a bigger issue for nation states than for jurisdictions within the one nation. However, this has not always proven to be the case in this evaluation.

The current regulatory structures of most of the Australian States started to evolve before Federation. The allocation of responsibilities between the Commonwealth and the States was established by the 1901 Federal Constitution, before advances in communications and distribution systems made it feasible to service much wider markets and before the advantages of economies of scale became such a driving factor in shaping economic environments. Inconsistent regulatory structures and philosophies lead to inconsistent standards which inhibit inter-jurisdictional trade and the reaping of gains from economies of scale. The costs of the inhibition of trade have changed while the constitutional structure, of sovereign state, territories and nations, has not.

3.6 International obligations and sovereignty

Issues of sovereignty also arise in relation to the requirement of the terms of reference that any suggested changes made by this review be consistent with Australia's and New Zealand's international obligations. The WTO's Agreements on Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT) are particularly relevant. Under these, Australia and New Zealand are obliged to regulate in ways that are least disruptive to trade and to adopt international standards where possible. The SPS and TBT Agreements and Article XXIV:12 of the GATT 1994, place obligations on a Member to take reasonable measures as may be available to it to ensure observance of the relevant provisions of the Agreements by its regional and local governments. Although only required to take 'reasonable measures', at the end of the day, a Member may be subject to the WTO's dispute settlement regime in respect of measures affecting the observance of Agreements taken by its regional or local governments. There are challenges for WTO Members which are federations. In the case of Australia, the Commonwealth Government may legislate to give effect to Australia's treaty obligations by using a range of constitutional powers, including the external affairs power (section 51(xxix)). In relation to the SPS and TBT Agreements, the

Commonwealth Government has not adopted the legislative approach, preferring to work with the States and Territories to achieve outcomes through other means.

New Zealand also has to deal with sovereignty issues relating to differences between the national government and local governments. Similarly, at times, in the name of sovereignty New Zealand has pursued standards which are not in line with the direction taken by the international community.

3.7 Conclusion

The approach taken in this evaluation is to apply the assessment criteria from the perspective of the welfare of Australia and New Zealand as a whole, while noting differences in the impacts on, and the preferences and interests of, jurisdictions. In this assessment, 'clear evidence' of gains, as requested in the terms of reference, is not limited to quantitative evaluations. The application of quantitative cost/benefit analysis can generate soundly based assessments of efficiency. However, this approach is critically dependent on the availability of relevant and reliable data and on the use of reliable parameters for the estimation process. At times, quantitative assessment results in some factors, often the gains, being undervalued and, generally, the quantitative approach requires some subjective valuations. Therefore, it can give a false impression of accuracy. There is also a paucity of relevant data in relation to the costs and benefits of mutual recognition. An 'in principle' and structured analysis of all impacts, including but not limited by quantitative assessment, can provide a fuller indication of efficiency than can a purely quantitative assessment.

The criteria are applied in the same manner to both the MRA and the TTMRA. Any considerations for retaining, minimising, removing — or expanding — the provisions of both schemes are consequent upon the assessment made. The central issue is whether a demonstrable net benefit would be derived by making changes to the design of the mutual recognition schemes.

Chapter 4 provides some analysis assessing the impact of mutual recognition. Subsequent chapters assess possible improvements to the schemes.

4 Impact of mutual recognition

4.1 Introduction

This evaluation is concerned with assessing two schemes based on a relatively simple concept with wide-ranging impacts across many industries and professions, rather than schemes that are focussed on one particular industry, region or social activity. As well as the direct effects associated with mutual recognition, there are also potential second and third round effects.

The expected first round impact of the agreements was an increase in the mobility of goods and labour across the jurisdictions involved. The increased mobility was subsequently expected to increase competition among suppliers of goods and services, as well as to provide greater choice to consumers and users. Possible third round effects were anticipated to include: greater realisation of scale economies; downward pressure on prices and/or converging prices; increased discipline on standards setting in jurisdictions, resulting in greater uniformity of standards; and Australia and New Zealand combined having a greater influence on international standard setting than either country on its own. In the long run, participating governments expected mutual recognition to lead to greater innovation and flexibility, increased capacity to compete internationally and higher growth in the economies involved.

While information about the impact of mutual recognition would be useful in shaping possible changes to the schemes, little information is available to enable this assessment. For example, no statistical data are available on cross-jurisdictional trade in Australia. The Office of Regulation Review stated:

> The scheme was designed to operate in a decentralised fashion without significant bureaucratic resources to monitor its operation. Much of the experience of mutual recognition is known only to the parties involved. (1997, p. 11)

This chapter, nevertheless, looks at such evidence as is available to assess the extent to which the expected impacts have occurred and, as far as possible, comments on the distributional impacts for different groups. The comments provided by the parties involved have been an important input to this assessment.

4.2 Impacts on goods mobility

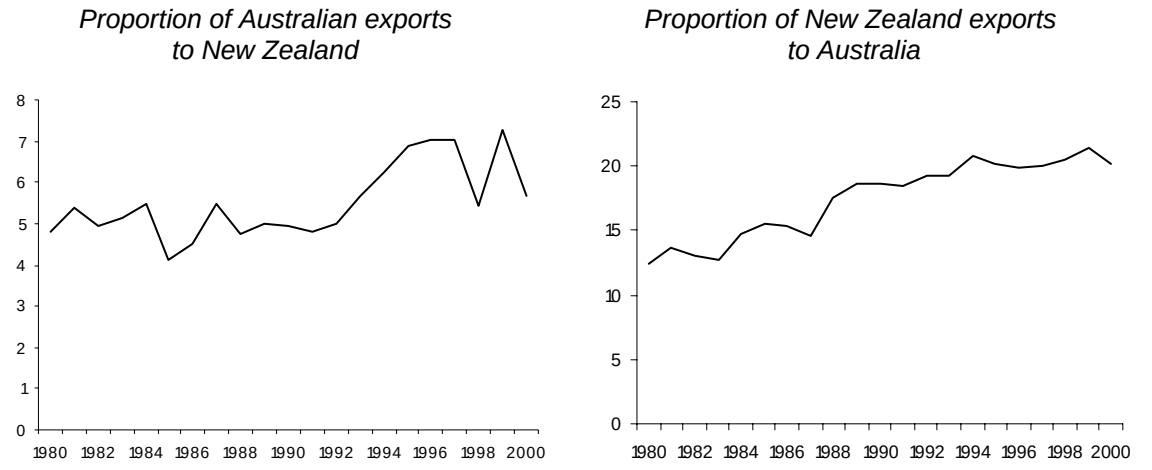
Growth in trans-Tasman trade

Figure 4.1 depicts certain data for trade between Australia and New Zealand. For both countries, the general trend since 1980 has been for the other to become an increasingly more important trade partner. By 2000, 5.7 per cent of Australia's exports of goods were being sold to New Zealand and 20.2 per cent of New Zealand's exports were sold to Australia. The recent volatility in Australian exports to New Zealand in part reflects New Zealand drought conditions and the overall recent economic downturn.

However, it is important to recognise that changes over time cannot necessarily be attributed to mutual recognition. There are many factors affecting trade outcomes (including, of course, CER). It is impossible to identify separately with any certainty the possible contribution of mutual recognition. Consequently, the information is provided essentially only as background to the discussion of mutual recognition.

Figure 4.1 **Trends in trade in goods between Australia and New Zealand, 1980 to 2000[a]**

Value share, per cent



a The figures represent value of exports to the designated country as a proportion of total exports.

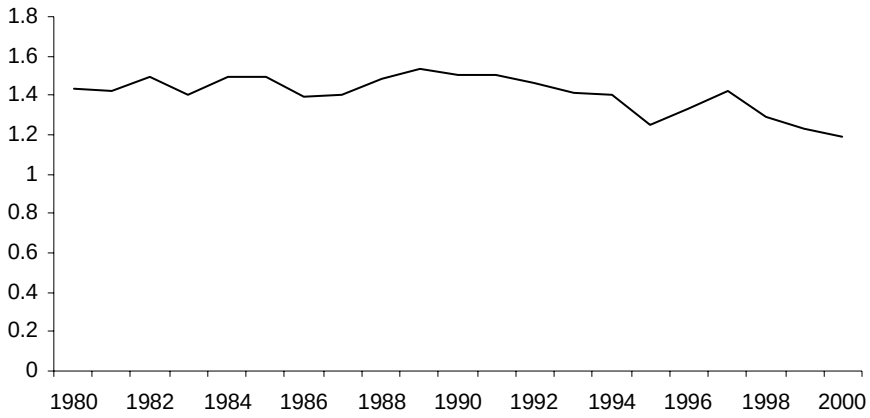
Data sources: WTA (2003) and WTF (2000).

Although New Zealand and Australia have become increasingly important to each other as trading partners, their combined share in world trade has been declining (figure 4.2). This is not surprising, given that over the last 20 years many less developed countries have increased their participation in world trade at rapid rates.

Inter-country trade within Europe has also expanded as internal barriers to trade have been lowered.

Figure 4.2 **Total trans-Tasman merchandise trade as a share of total world trade, 1980 to 2000[a]**

Value share, per cent



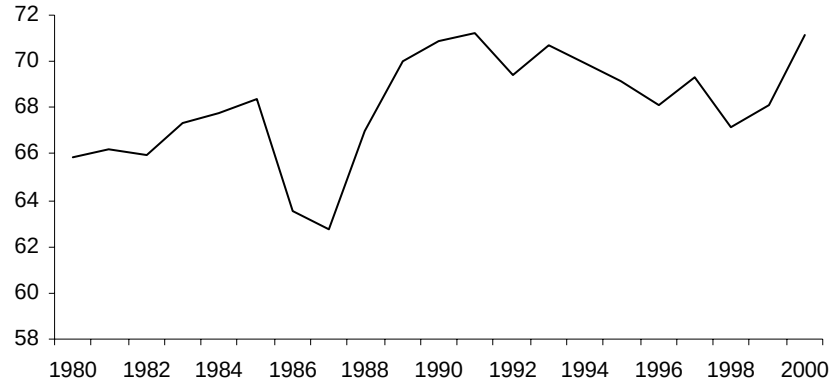
a The figure represents the combined value of trans-Tasman trade as a proportion of total world trade (imports and exports).

Data sources: WTA (2003) and WTF (2000).

Although it is not possible to attribute causation, it is suggestive that, while total trans-Tasman trade in commodities not subject to an exemption has generally increased since 1997 (figure 4.3), the value of trade in four exempt commodities has declined (figure 4.4).

Figure 4.3 **Total trans-Tasman trade in commodities not subject to an exemption, 1980 to 2000[a]**

Value share, per cent

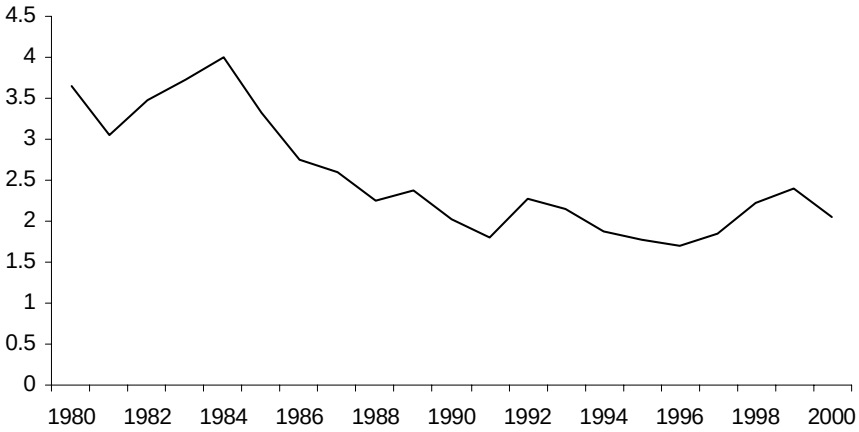


a This figure represents the total value of exports from Australia to New Zealand and from New Zealand to Australia in all merchandise except those fully or partially subject to an exemption: gas equipment, medicinal and pharmaceutical products, road vehicles, chemicals, consumer goods and communication equipment and firearms, expressed as a share of total trans-Tasman trade.

Data sources: WTA (2003) and WTF (2000).

Figure 4.4 **Total trans-Tasman trade in four commodity groups subject to an exemption, 1980 to 2000[a]**

Value share, per cent



a This figure represents the total value of exports from Australia to New Zealand and from New Zealand to Australia in gas equipment, medicinal and pharmaceutical products (therapeutic goods), road vehicles and firearms, expressed as a share of total trans-Tasman trade.

Data sources: WTA (2003) and WTF (2000).

Of the top five traded commodities (table 4.1), most are not subject to any form of TTMRA exemption. Motor vehicles (the second or third ranked export) are a stand-out, as this category is covered by a special exemption. However, New Zealand freely admits passenger motor vehicles from Australia, in line with New Zealand's policy of accepting motor vehicles meeting several standards.

Other evidence on the mobility of goods

Very few submissions were received from Australian or New Zealand businesses that deal with goods that are not subject to some type of exemption under either the MRA or the TTMRA.[1] The New Zealand Government offered a comment that may explain this:

> … Limited survey work and discussions with business in New Zealand suggest however that we can have reasonable confidence that the benefits have been widespread and substantial. They have simply been accepted (there is no incentive to proselytise the benefits) and are now taken for granted. (sub. 110, p. 4)

In contrast, producers of goods affected by an exemption expressed frustration about restraints on trading across the Tasman:

> There are considerable impediments to trade at a product level on both sides of the Tasman that impact directly on our members. These include the Therapeutic Goods Authority in Australia and the Environmental Risk Management Authority in New Zealand (Hazardous Substances and New Organisms Legislation) and a variety of both state and federal regulations relating to issues such as advertising and transport.
>
> Both regimes impose significant costs to our member's products that are excessive and inhibit new or innovative products entering each market in the respective product areas. (Cosmetic Toiletry and Fragrances Association of New Zealand Inc, sub. 34, p. 4)

Sometimes there is a mixed story for those goods that are subject to MRA within Australia, but are exempted from the TTMRA. For example, Gas Technical Regulators Committee stated that:

> Within Australia GTRC [the Gas Technical Regulators Committee] has made full use of the MRA to the effect that gas appliances approved and/or sold in one state can be traded in all states and territories without further certification. (sub. 112, p. 1)

[1] Victoria's Department of Primary Industries (DPI) views the MRA and TTMRA favourably: 'Where the mutual recognition schemes have impacted on the commercial fishing industry, it has been of benefit to those involved. Expected complications with, for example, monitoring and compliance have not materialised. Specific examples include the monitoring of mercury levels in shark imported from interstate and New Zealand that are processed and sold in Victoria. Victorian processors also take crayfish from South Australia and benefit from this trade.' (sub. 116, p. 9)

However, the GTRC is not optimistic that it will be easy to remove the entire TTMRA special exemption, noting that proposals for solutions to address country-specific variations have resulted in cumbersome and confusing processes (sub. 112, p. 3).

Table 4.1 **Top five trans-Tasman exports by year for 1980, 1997 and 2000[a]**

	1980	*1997*	*2000*
Exporting Country	*Products*	*Products*	*Products*
Australia	1. Gas oils	1. Ships, boats and floating structures	1. Motor spirits and other light oils
	2. Motor spirits and other light oils	2. Calculating machines, cash registers	2. Passenger motor cars
	3. Passenger motor cars	3. Passenger motor cars	3. Calculating machines, cash registers
	4. Aluminium ores and concentrates (including Alumina)	4. Medicaments (including veterinary medicaments)	4. Special transactions and commodities not classified
	5. Universals, plates and sheets, of iron or steel	5. Petrol. Oils and crude oils	5. Medicaments (including veterinary medicaments)
New Zealand	1. Chemical wood pulp, soda or sulphate	1. Petrol. Oils and crude oils	1. Petrol. Oils and crude oils
	2. Newsprint	2. Gold, non-monetary	2. Wood of coniferous species, sawn, planed, tongue
	3. Wood of coniferous species, sawn, planed, tongue	3. Wood of coniferous species, sawn, planed, tongue	3. Gold, non-monetary
	4. Carpets, carpeting and rugs	4. Newsprint	4. Special transactions and commodities not classified
	5. Sheep or lambswool, degreased, in the mass	5. Aluminium and aluminium alloys, worked	5. Chemical wood pulp, soda or sulphate

a Listing of commodity items (4-digit SITC level) ranked by value of trade.

Data sources: WTA (2003) and WTF (2000).

With regard to the inability, to date, for Australia and New Zealand to agree on a harmonised standard for Minimum Energy Performance Standards (MEPS) for fluorescent lamp ballasts, Atco Controls Pty Ltd, complained that: 'The different MEPS will have the effect of restricting trade between Australia and New Zealand, and are likely to lead to a substitution of ballasts from countries further afield in preference to Australian imports' (sub. 98, p. 3).

FINDING 4.1

Data inadequacies have meant that it has not been possible to identify reliably the impacts of the MRA and TTMRA on goods mobility. Overall, the perception of interested parties is that mutual recognition has increased goods mobility and trends in available data are consistent with this.

4.3 Impacts on labour mobility

Quantitative analysis of interstate mobility by occupation

The Commission used data from the Census of Population and Housing for three years (1991, 1996 and 2001) to examine the geographic mobility of people employed in registered occupations subject to mutual recognition, compared with all the other occupations combined. Thus, the study analysed the interstate mobility of people in registered occupations before and after the introduction of the MRA in 1993 and before and after the introduction of the TTMRA in 1998. Thirty-two registered occupations were studied. (A full description of the study, including a list of the occupations, is contained in appendix E.)

While it would be possible to look at the gross inflows of people between states, before and after the introduction of mutual recognition, this risks attributing to mutual recognition the effects of other factors on mobility. To address this issue, this study compared how the interstate mobility in registered occupations differed from the national average of all occupations. The study also looked at the *differences* between states, using a decomposition approach called 'shift-share analysis', to analyse how inflows into each state of occupations subject to mutual recognition have changed over the period 1991 to 2001.

The results indicate that the arrival rates in all jurisdictions were higher for registered occupations than the overall national arrival rate for all occupations.

The total number of people moving into any of the States and Territories was around 184 000 persons during 1990-91, 213 000 during 1995-96 and 225 000 during 2000-01. When this inflow of employed persons is decomposed into three main sources — other Australian States, people born in New Zealand and people from overseas born in other places — the results indicate that more than two-thirds of the inflow of employed persons into Australian jurisdictions have arrived from other Australian States and Territories.

The number of persons moving during these census years on a standardised basis are 179 000, 207 000 and 219 000, respectively. Of the 179 000, almost 9 per cent of arrivals were in the registered occupations in 1990-91. This percentage had increased by 0.2 percentage points to 9.2 per cent by the year 2000-01. After adjusting for the effect of age and occupation, the figures show that, after mutual recognition, the number of people in registered occupations, moving into a new jurisdiction increased from 15 500 in 1990-91 (before the MRA or the TTMRA) to 18 500 in 1995-96 (after the MRA but before the TTMRA), an increase of 19 per cent. There was a further increase of 8 per cent in 2000-01 (after the MRA and the TTMRA), taking the total number of arrivals to around 20 000. In absolute terms, Queensland and New South Wales have received more interstate movers in registered occupations than the other States and Territories.

In sum, while the effects of mutual recognition cannot be disentangled from other factors, on the basis of the assessment in appendix E mutual recognition appears to be associated with a modest increase in the number of interstate arrivals in registered occupations compared with the other occupations.

Other assessments of occupational mobility

A number of submissions provided data on the numbers of people within registered occupations who reported using the mutual recognition mechanism to move across borders. While these data are not available on a consistent or comparable basis, they are indicative of developments since the introduction of both mutual recognition schemes and supplement the quantitative analysis based on ABS census data.

The Department of Employment, Science and Training (DEST) has also surveyed registrations in Australia under the TTMRA, providing a more direct indication of its impacts. Unfortunately, DEST notes difficulties in obtaining data from State Registration Boards, precluding a definitive snapshot of the impact the TTMRA across the range of professions involved (sub. 26, p. 7).

Mutual recognition was designed to remove the impact of the different regulatory standards between the States and Territories and New Zealand, governing registration of occupations, on labour mobility between Australia and New Zealand. If mutual recognition is working well, employers should more easily be able to source their labour needs from a wider pool of people, as the barriers to moving people across jurisdictions are lower and the time involved shorter. Workers can seek higher rates of pay and/or seek life-style preferences across all jurisdictions, knowing that they can move relatively easily and quickly.

Many submissions that commented on the impacts of MRA and TTMRA on labour mobility considered that they had been effective. The New Zealand Government stated:

> Generally the TTMRA is considered to be working well and achieving its objectives across all regulated occupational groups. It has enhanced workforce mobility between the two countries and has significantly reduced compliance costs by eliminating the need to prove professional competence through re-testing and re-certification of personnel. It has, moreover, enhanced and streamlined the registration process. Importantly, it has also improved information sharing between registration authorities and professional bodies across the Tasman and, in the case of health practitioners, it has promoted the acceptance of universally accepted clinical standards. (sub. 110, p. 7)

DEST considered that mutual recognition has made a significant contribution to the economy by improving workforce mobility:

> Knowledge and skills are universally accepted as being central to economic growth and competitiveness. Governments of all jurisdictions represented under the mutual recognition arrangements demonstrate a commitment to a mobile and flexible workforce responding to education, training and industry needs to deliver these skills. Mutual recognition contributes substantially to the portability of skills and transparency of the recognition processes, thereby enhancing labour market outcomes. (sub. 26, p. 4)

The NSW Department of Fair Trading also observed that the 'administrative costs associated with an application for mutual recognition are generally lower than the costs of processing an application from an individual seeking a licence for the first time' (sub. 117, p. 6).

Impact of the TTMRA on mobility

While the Australian Department of Foreign Affairs and Trade (DFAT) noted that more than 450 000 New Zealanders reside in Australia, and around 50 000 Australians now live in New Zealand (sub. 78, p. 1), only a small proportion of these have arrived using the TTMRA provisions. However, in noting the benefits of increased labour mobility under the TTMRA, DEST reported:

> While complete 2002 figures are not yet available, the data available show that to date, a total of 3606 professionals have registered to practise in Australia under TTMRA legislation. There is a general opinion that TTMRA is benefiting the majority of professionals and resulting in an efficient transferability of skills across the Tasman. The benefit is seen to lie in the streamlining of the process, both in terms of cost and time as it bypasses the need to apply for an assessment of overseas skills and obtain Australian recognition separately. This is particularly so in the case of those professions that assess through examination, processes which can be both lengthy and costly. (sub. 26, p. 6)

The New Zealand Government provided numbers on Australian health professionals seeking registration under TTMRA in New Zealand since its inception (table 4.2).

Table 4.2 **TTMRA registration in New Zealand's Health Sector**

Profession	*Number of people registered in New Zealand since 1998*
Chiropractors	18
Dentists	20
Dental Technicians	3
Medical Radiation Technologists	19
Nurses	530[a]
Occupational Therapists	19
Optometrists	14
Dispensing Opticians	1
Pharmacists	21
Physiotherapists	83
Podiatrists	3
Psychologists	35

[a] Of the 530 nurses registered, 194 are Comprehensive nurses, 138 are General nurses, 73 are General and Obstetric nurses, 25 are Psychiatric nurses, 1 is a Psychopaedic nurse, 62 are Midwives, and 37 are Enrolled nurses.

Source: New Zealand Government (sub. 110, p. 7).

The New Zealand Government also noted:

> Evidence suggests that the TTMRA has had a significant impact on registration numbers on both sides of the Tasman, indicating that people are using the Arrangement as intended. While the trend is that more New Zealanders have registered in Australia, in some professions registration numbers suggest the opposite. For example, recent figures suggest that of the 388 registered New Zealand patent attorneys, 254 are Australians registered under the TTMRA. Likewise the TTMRA has been successfully used by a large number of health practitioners when registering in New Zealand. (sub. 110, p. 7)

And the Employers and Manufacturers Association (Northern) commented:

> The professions tend to have transportability and mobility between the two countries and are now well reflected with job ads being run simultaneously in both countries for a number of positions. This is particularly so in the higher skill and senior management roles. (sub. 83, p. 4)

Data on new registrations in Australia by profession between 1998 and mid 2002 supplied by DEST are shown in table 4.3. TTMRA registrations reached 3606 over this period, equivalent to 5.4 per cent of all new registrations.

Table 4.3 **Total first time and TTMRA registrations in Australia by profession, 1998 to mid-2002**

Profession	*First time registrations other than TTRMA*	*TTRMA registrations*	*Total registrations*	*TTRMA percentage of total registrations*
Architects	1 640	26	1 666	1.6
Cadastral Surveyors	267	6	273	2.2
Chiropractors	1 129	20	1 149	1.7
Dentists	1 966	153	2 119	7.2
Legal Practitioners	9 130	343	9 473	3.6
Nurses	12 629	1 672	14 301	11.7
Occupational Therapists	857	35	892	3.9
Optometrists	273	181	454	40.0
Pharmacists	2 018	67	2 085	3.2
Physiotherapists	2 947	252	3 199	7.9
Podiatrists	1 022	26	1 048	2.5
Psychologists	5 913	34	5 947	0.6
Radiographers	1 201	158	1 359	11.6
Teachers	19 916	596	20 512	2.9
Veterinarians	2 188	37	2 225	1.7
Total	**63 096**	**3 606**	**66 702**	**5.4**

Source: DEST (sub. 26, pp. 11–12).

DEST noted that the number of registrations granted under the TTMRA appear, in general, to be increasing.

Based on data collected from State Registration Boards (table 4.3), DEST also commented on the composition of professionals registering under TTMRA from 1998 to 2002:

> The data show that the highest number of TTMRA registrations [in Australia] was for nurses (1672), followed by teachers (596), legal practitioners (343) and physiotherapists (252). These four professions represent 80% of the total TTMRA registrations reported. (sub. 26, p. 8)

In percentage terms, the largest users of the TTMRA have been optometrists (40 per cent of all new registrations since 1998). (Though the Optometrists' Registration Board of Victoria noted that the more comprehensive data collected by optometry boards, compared with other professions, may be one reason for this result (sub. DR149, p.2).) In comparison, nurses registered under the TTMRA comprised only 12 per cent of new registrations in Australia.

Information on the destination of New Zealand professionals registering in Australia under the TTMRA was provided by DEST. This shows that, from the beginning of 1998 to the middle of 2002, New South Wales registered the highest number of professionals (1698), followed by Queensland (1466) and, with a significant gap, Victoria (222) (table 4.4).

Table 4.4 **Total TTMRA registrations for each profession by State, since 1998**

Profession	*NSW*	*QLD*	*VIC*	*SA*	*NT*	*ACT*	*TAS*
Architects	17	0	9	0	Not provided	0	0
Cadastral Surveyors	0	4	1	1	0	0	0
Chiropractors	11	7	Not provided	2	0	0	0
Dentists	72	30	40	4	3	3	1
Legal Practitioners	291	38	Not provided	8	2	Included with NSW	4
Nurses	823	722	Not available	25#	65	28	9#
Occupational Therapists		22		3#	10		
Optometrists	144	Not available	34	2	0	0	1
Pharmacists	41	13	Not provided	6	3	4	1
Physiotherapists	144	61	31	9	5	2	3
Podiatrists	14	2	8	1		1	0
Psychologists	14	9	8	1	1	1	0
Radiographers	58	6	87	1	1	0	5
Teachers		547	Not available	46			3
Veterinarians	6	5	4	6	7	1	8
Total	**1 635**	**1 466**	**222**	**115**	**97**	**40**	**35**

No State registration required. # Data from 2001 only.

Source: DEST (sub. 26, pp. 12–13).

In some professions, it is not clear how much of an improvement in mobility can be sourced to the TTMRA, compared with the processes that applied before its introduction. For example, after allowing for the fact that the population of the UK is about three times that of Australia, New Zealand and the UK have significantly more pharmacists moving between their countries to practise than occurs between Australia and New Zealand. The numbers of pharmacists using mutual recognition to relocate across the Tasman over the past five years are shown in table 4.5 below.

Table 4.5 **Trans-Tasman movement of pharmacists, 1999 to August 2003**

	Aust pharmacists in to NZ	*NZ pharmacists out to Aust*
1999	9	21
2000	2	32
2001	3	33
2002	6	50
2003, to August	2	15

Source: Pharmaceutical Society of New Zealand (sub. DR156, p. 1).

In comparison, each year, about 100 New Zealand pharmacists obtain reciprocal registration into the UK and about 30 UK pharmacists come to New Zealand under a reciprocity of registration arrangement which has been in place since the late 1960s (sub. 108, p. 1). Australia and New Zealand had a similar arrangement prior to 1998, so mutual recognition may not have added significantly to the pre-existing arrangements.

Impact of the MRA on mobility

There have been significant differences in apparent outcomes between the MRA and TTMRA, especially for some occupations. For example, data provided by the Business Licensing Authority of Victoria on estate agents indicate that a total of 546 licences have been issued under the MRA since 1 June 1993 (table 4.6). In contrast, under the TTMRA, only one licence has been granted for an estate agent in Victoria (sub. 29, p. 5).

Table 4.6 **Estate agents licensed under Mutual Recognition Act since 1 July 1993**

By State where first licensed

Jurisdiction	*Numbers*
New South Wales	309
ACT	12
Queensland	129
South Australia	60
Western Australia	23
Tasmania	11
Northern Territory	2
Total	**546**

Source: Business Licensing Authority of Victoria (sub. 29, p. 5).

Similarly, in contrast to the impacts under the TTMRA reported above, the MRA has made a difference to the movement of pharmacists within Australia:

> … the MRA has made the administration of interstate registration immeasurably easier and more efficient. It has also led to a quick and efficient transfer of professional skills with no discernible negative effects on the protection of the public.
>
> Contrary to initial concerns, pharmacists under disciplinary clouds have not been able to move undetected across borders. If anything, the Board's experience is that all pharmacists are subjected to closer scrutiny than was the case prior to the commencement of the MRA. While all Australians appear to be more mobile than they were ten years ago, the movement of pharmacists between and among States and Territories is many-fold greater than ten years ago. (sub. 88, p. 2)

The experience has been similar for teachers:

> The Victorian Institute of Teaching would confirm that the MRA and TTMRA are effective in enhancing teaching workforce mobility between the Australian States and New Zealand and, in the majority of cases, would be seen to be of benefit to both the individual and the profession across boundaries. The Institute believes that its processes have contributed to this outcome. (sub. 116, p. 6)

The NSW Government submission presented information provided by the NSW Legal Practitioners Admission Board, comparing the number of interstate and New Zealand practitioners admitted under mutual recognition in NSW with the number of new practitioners admitted (table 4.7).

Table 4.7 **Lawyers admitted in NSW under mutual recognition compared to new practitioners**

Year	*Interstate*	*New Zealand*	*New*
1998	297		1 341
1999	364		1 440
2000	375	103	1 144
2001	303	118	1 483
2002	247	70	1 748

Source: New South Wales Government (sub. 117, p. 7).

The New South Wales Government commented:

> Mutual recognition provisions have enabled a New Zealand legal practitioner or an interstate legal practitioner transferring his or her practice to NSW to commence practise in NSW with less delay than previously. Further, in the case of New Zealand practitioners, the mutual recognition arrangements have eliminated the requirement that they complete certain educational requirements. This has created a more competitive market for legal services. (sub. 117, p. 6)

This observation is backed up by the New Zealand Law Society:

> … the arrangements appear to have eased the process for admitting into New Zealand lawyers who have previously been admitted in Australian states and territories that have implemented TTMR. Preliminary observation indicates that the arrangement has increased the professional mobility of practitioners on both sides of the Tasman. (sub. 17, p. 2)

However, the number of registrations for lawyers under MRA is declining due to the introduction of a national services agreement, which ensures mobility of legal professionals in other ways. This is discussed further in chapter 5 (box 5.4).

The New South Wales Government also noted increased mobility in other occupations:

> The mutual recognition of health professionals has led to greater mobility and flexibility of the workforce in this sector. The streamlined application and registration processes under the MRA and TTMRA allow health practitioners to commence work immediately following lodgement of an application. (sub. 117, p. 7)

While mutual recognition has benefited many occupations in moving across jurisdictions, it does not overcome all of the costs and shortcomings resulting from different licensing regimes across Australia. For example, the Real Estate Institute of Australia said:

> These differences promote inefficiencies for regulators in duplicating resources and effort across Australia. In labour mobility, they make it costly and time-consuming for real estate industry professionals to meet different requirements … Moreover, these differences affect the consumer in terms of their expectations and confidence in industry service across the nation. (sub. 86, p. 5)

FINDING 4.2

Both anecdotal information and such data as are available support the view that mutual recognition has contributed significantly to increased labour mobility across MRA and TTMRA jurisdictions.

4.4 Prices, wages, costs, economies of scale, and standards

Data for assessing possible wider effects of mutual recognition are not readily available, although a number of submissions supported the view that mutual recognition had made a difference. The New South Wales Government said:

> The removal of different regulatory standard requirements for goods under the MRA and TTMRA has led to a range of economic benefits for business and consumers. By requiring registration in only one jurisdiction for a product to be legally sold in all jurisdictions, mutual recognition has reduced compliance costs and allowed business to

better exploit economies of scale by producing a single product for sale in all jurisdictions across Australia and New Zealand. These provisions have brought about increased competition in the market place and greater choice for consumers. (sub. 117, p. 2)

The sections below outline likely effects.

Impact on prices

The increased integration of the economies of the Australian States and Territories, and the Australian and New Zealand economies, as a result of mutual recognition, should have encouraged some further alignment of prices for tradeable goods. When producers no longer have to meet additional testing or compliance costs, or produce a special run for a market, the costs of supplying each market tend to converge. In turn, this could be expected to be reflected in prices.

A priori, one might expect price alignment to result in price increases in 'cheap' locations, and price falls in 'expensive' locations. However, in practice, the actual extent of price movement and alignment in response to mutual recognition will be influenced not only by the supply response to the policy, but also other factors such as the level of local wages, the relative efficiency of the non-traded (retailing) service and the extent of competition in each location. Greater efficiency and competition in a location will exert additional downward pressure on prices.

Little information is available on the alignment and movement of prices within Australia and between Australia and New Zealand that may have been influenced by mutual recognition.

Impact on wages

Increased mobility of labour resulting from mutual recognition may also be expected to encourage greater alignment of real wages within occupations, as workers move to exploit higher wage opportunities in other locations. A priori, wages may be expected to rise in low-wage locations and fall in high-wage locations, in response to changes in the relative scarcities of workers.

As in the discussion of prices, the extent of wage movement and alignment due to mutual recognition will depend on the supply response to the policy, that is, the number of people who actually move because of the MRA or TTMRA. However, there are a number of factors to consider. First, people are considerable less mobile than goods. A decision to move to a new location will be influenced not only by wages but also by potential lifestyle, family commitments, culture and the state of

the labour market in general. Second, wages are generally more 'sticky' — particularly downwards — than goods prices. This can be due to institutional factors, such as union pressure or workplace agreements, or to firms' wage policies. The extent of wage alignment and movement will, therefore, depend crucially on the actual mobility response of workers and the level of rigidity in nominal wages.

In relation to this, the Australian Nursing Federation (ANF) noted that:

> Nurses move across State/Territory borders when there is a marked differential in wages and conditions which are negotiated in each jurisdiction and at different times. It is the ANF's position that while mutual recognition agreements makes relocation easier it is not a significant contributor for nurses making these type of decisions. (sub. DR170, p. 14)

There may also be additional dynamic effects from increased labour mobility. As more skilled workers flow into a location, 'agglomeration effects' may occur — workers may achieve a higher degree of specialisation, gain greater bargaining power and accumulate human capital faster (Box 2000, pp. 17–19). These effects may lead to higher wage growth and levels in the agglomerated location. In those areas of labour out-migration, a cycle of decline may set in, with falling wages and reductions in job opportunities.

The analysis of labour mobility earlier in this chapter suggests that, while mutual recognition has been an important mechanism for professionals wishing to move, the absolute numbers of people moving in response to mutual recognition has been relatively small. As such, the effect on wage alignment and movement may be small.

Decreased costs to industry

One objective of the mutual recognition schemes was to reduce costs to business. DFAT commented:

> TTMRA has delivered to exporters on both sides of the Tasman greater flexibility, wider choice and lower business compliance costs through mutual recognition and harmonisation of product standards. (sub. 78, p. 1)

While the compliance costs for goods under mutual recognition may be reduced, significant costs may still exist for goods in the exemption categories, as the New Zealand Direct Selling Association points out:

> … a number of our multi-national members have informed us that they can not sell their full range into Australia due to the combination cost and regulatory barriers imposed under the current TGA structure. …

> The compliance costs for applications both in fees and in indirect costs from Consultants, company time and imposed obligations under the default controls being set for new products are significant. A recent hair removal lotion cost more than $10,000 for the application fees alone and the company cost in time was estimated at around 3 times this value. (sub. 32, p. 4)

It is likely that businesses entities would have difficulties in disentangling the effects on costs of mutual recognition from other factors.

Realising economies of scale

The MRA and TTMRA remove the need for a business operating in one jurisdiction to satisfy:

- the multiple regulatory standards of the participating jurisdictions;
- requirements to package and label goods differently for sale in separate jurisdictions; and
- different testing requirements across a number of jurisdictions prior to sale in those jurisdictions.

Removing these requirements has meant that businesses can better capture the economies of scale available through producing a product to a single standard for sale throughout Australia and New Zealand.

These simple but effective mechanisms are an important part of regulatory reform designed to increase productivity and growth. The Commission has been unable to obtain information on the improvements made by mutual recognition to accessing economies of scale. However, the frustration expressed by Rheem Australia when regulatory differences prevent trade is indicative of the costs of not accessing economies of scale:

> Rheem initially supported the principle of Mutual Recognition and the TTMRA, as we could see the potential for similar products being made in plants in both countries, with common manufacturing processes, common tooling, purchased parts, economies of scale and the possibility of load-shedding to improve manufacturing efficiencies.
>
> Active support was given by both Rheem Australia and Rheem New Zealand in the preparation of joint Australian and New Zealand water heater standards.
>
> Rheem now believes that the New Zealand Government has legislated for an "out of step with the rest of the world standard" this has killed all the benefits intended to be enjoyed by participating in the TTMRA for the water heating industries of both countries. (sub. 85, pp.1–2)

Race to the bottom versus regulatory competition

The 'race to the bottom' (that is, the potential for mutual recognition to pressure jurisdictions to move to inappropriately lower standards) is a concern voiced by several regulators. As the barriers to movement are reduced, there is a potential for the lowest standard to become the dominant one. Different points of view were expressed on this issue.

Business New Zealand (sub. 113a, p. 6) noted that:

> The perception that mutual recognition causes a 'race to the bottom' stems from a view that the jurisdiction with the lowest registration threshold effectively becomes the de facto benchmark for all jurisdictions. Business New Zealand is yet to see evidence that this perception has any foundation in practice. If there are concerns around the integrity of the regimes some jurisdictions have in place for occupational registration, then we submit that they should be addressed by that jurisdiction at a policy level (preferably in coordination with other jurisdictions) rather than taking the blunt and retrograde step of excluding the occupation from the scope of the TTMRA.
>
> Business New Zealand also notes that while registration may set a 'minimum benchmark', the employer will choose to fill vacancies taking account of applicants' experience, qualifications, and other attributes, which in many cases will be well above the standard for registration.

In contrast, particular concerns were raised by the Victorian Government in relation to security officers, teachers and early childhood services:

Private security officers

> Victoria Police considers that the application of mutual recognition principles to the private security industry is problematic. This arises because of the lack of consistency in relation to training requirements. The various jurisdictional licensing schemes which operate across the States, Territories and New Zealand vary, for example, from those which prescribe a course of training (e.g. NSW) to those where the standard is that which is considered "appropriate" (e.g. SA) to others where no standard is prescribed (e.g. ACT).
>
> It is therefore possible for a person to move between States, or from New Zealand, and to gain a licence under mutual recognition without meeting the training or competency requirements of the second jurisdiction. This undermines jurisdictional standards, and could result in untrained personnel working in high risk areas where the clear intent of the local legislation is not to allow it. (sub. 116, p. 4)

Early childhood services

> Current Victorian legislation, the Children's Services Regulations 1998 (R25), outlines the requirements for qualified staff in licensed children's services. There are also requirements in the Victorian Department of Human Services Preschool Funding and Policy Guide around approved early childhood teacher qualifications.

> The current Victorian process is to have an outside agency review all overseas qualifications for equivalence to our requirements. Victoria's DHS would be particularly concerned about accepting mutual recognition of New Zealand early childhood qualifications as several of these have been currently assessed as not equivalent. (sub. 116, p. 5)

Teachers

> The Victorian Institute of Teaching has noted, however, that 11.5% of teachers awarded registration under the mutual recognition arrangements would not meet the qualification requirements for teacher registration in Victoria. Given the strength of research evidence demonstrating the fundamental importance of qualified, competent and motivated teachers to the improvement of student outcomes, it is a matter of concern that the mutual recognition principles do not provide the necessary flexibility to recognise different qualification requirements of some States. (sub. 116, p. 7)

However, in two of these cases, this concern has led to the expected response under mutual recognition — the competition amongst products and skills subject to differing regulatory requirements has been met by governments seeking to harmonise standards rather than contemplate a potential 'race to the bottom'. In particular:

> In November 2002 the Australasian Police Ministers' Council endorsed a proposal to address this issue through the development of appropriate competency standards for private security industry licensing, for consideration by the Council as occupational standards under the MRA and the TTMRA. (sub. 116, p. 4)

and

> … the Ministerial Council on Education Training and Youth Affairs has established a Teacher Quality and Educational Leadership Taskforce to establish a National Framework for Standards for Teaching. The Institute recommends that a key priority under such a Framework should be to establish consistent or agreed standards (including qualifications) for entry to the teaching profession. (sub. 116, p. 7)

Similarly, with engineers, the Institution of Professional Engineers New Zealand Incorporated (IPENZ) noted:

> If the legislation on the two sides of the Tasman is out of step in terms of the stage of evolution then the effective standard becomes the lowest common denominator. Thus when NZ updated its engineering registration to the most modern of the three stages (regular re-proof) at a time when Queensland were still using the first stage (lifetime registration) New Zealand is forced to accept the most dated approach. (sub. 11, p. 2)

Again, ways have been found to address the problem:

> Our work-around is to use the powers under the CPEng Act to require those engineers to undergo immediate checking of competence, and if they fail to meet the competence standard in this review they are then removed from the register. (IPENZ, sub. 11, p. 2)

Also, developments within Australia indicate these issues are being addressed:

> In 2002 Queensland introduced new legislation governing the way engineers are registered. While there are differences with the New Zealand CPEng Act … there are similarities. These include reference to competence-based assessment, the requirement for all existing registrants to re-apply for registration and inclusion of provisions for the periodic revalidation of competency. … the Institution of Engineers (Australia), … is currently considering similar changes within their professional membership classes. (sub. 11, pp. 2–3)

Regulatory competition encouraged by mutual recognition can have beneficial effects, for example, the New South Wales Pharmacists Board noted that:

> … MRA has led to a harmonisation of procedures and standards between and among States and Territories. It has heightened rather than lessened the spirit of "competition" between and among registering authorities, so, rather than leading to mediocrity or lowest common denominator, which is a usual concern about harmonisation, MRA may well have contributed to the raising of professional and administrative standards by encouraging continuous improvement. (sub. 88, p. 2)

Similarly, the ANF observed that the standards bar has been raised as the combined resources of nine nurse regulatory bodies (including New Zealand) are used to address safety and quality issues for the nursing profession and the public for whom the legislation is in place (sub. DR170, p. 9).

Standards have also been harmonised for lawyers with the development of an Australian national registration for lawyers.

In sum, mutual recognition provides strong incentives to resolve differences in standards. The resolve to reach common ground amongst jurisdictions to settle on a mutually-agreed standard appears to be stronger for occupations than for goods.

The observation that opening up an occupation to mutual recognition may in fact raise the standard of practice is also made by the Veterinary Surgeons Board of Western Australia, but based on the increased diversity delivered:

> It is only by increasing the diversity of competent veterinary surgeons available to work in Australia that the profession can assure that it will remain on the cutting edge of professional development and, thus, be able to continue to service the needs of the community in a highly professional and competent manner. (sub. 49, pp. 1–2)

FINDING 4.3

There is evidence of increased activity to harmonise standards for a number of registered occupations and anecdotal evidence of decreased costs to industry from the operations of the MRA and the TTMRA.

4.5 Standard Setting

Influence on standard setting and harmonisation

The architects of the MRA and TTMRA anticipated benefits for standard setting as well: more consistent legislation within Australian jurisdictions and across the Tasman deriving from increased dialogue among regulators; a stronger influence in shaping international standards; and a greater ability for Australian and New Zealand businesses to compete internationally.

Increase in dialogue between regulators

One useful outcome of the MRA and TTMRA has been to encourage effective and regular communications between regulators, a precondition for mutual recognition to succeed. A number of examples of this are outlined in the preceding section and throughout the report. The New Zealand Government noted:

> TTMRA has become a central driver of regulatory policy co-operation between Australia and New Zealand. This has ensured that the Arrangement is a dynamic instrument capable of adapting to continually changing circumstances and delivering continuing benefits to stakeholders. (sub. 110, p. 2)

And the Australian Council of Physiotherapy Regulating Authorities noted:

> It is our experience that these initiatives in legislation of physiotherapists have given impetus to increased dialogue with our New Zealand counterparts. The nature of this dialogue has included comparisons of the examination process for overseas candidates. The process of examination involves scrutiny of overseas candidates undergraduate training, existing accreditation and a general analysis and better understanding of individual state, territory and trans-Tasman registration processes. (sub. 87, pp. 3–4)

The New Zealand Chambers of Commerce and Industry stated:

> Not only does the TTMRA act to remove differences in national regulatory systems as barriers to trade, it also constitutes a powerful basis for improving regulatory systems through cooperation between the two countries and the incorporated Australian states systems. (sub. 66, p. 2)

Generally, the longer the dialogue has been taking place, the more effectively the regulators work together. For instance, communications among surveyors and also among nurses across all Australian and New Zealand jurisdictions predate the TTMRA by many years and these organisations have evolved effective processes for dealing with problems that arise. Registration boards in a number of other sectors acknowledged that they had benefited from the obligation that the MRA and

TTMRA have placed on them to work closely together. For example, the Australian Dental Council (ADC) observed:

> There has been a very positive and constructive working relationship maintained between councils. The DCNZ [Dental Council of New Zealand] has observer status at ADC – the councils have a joint Accreditation Committee and there is significant movement towards harmonisation of examination processes. Goodwill and flexibility have benefited both councils as well as the public. (sub. 6, p. 2)

Within Australia, the communication between boards in general appears to be effective as well, for example, the Queensland Teachers Registration Board noted that:

> From an administrative point of view, dealing with applications under mutual recognition proceeds smoothly, with efficient assistance being received from (and given to) the other registering authorities. (sub. 39, p. 1)

Harmonisation within trans-Tasman jurisdictions

To date, the MRA and TTMRA have had some successes in achieving closer alignment of regulatory regimes. While there have been stumbling blocks, such as in the case of Minimum Energy Efficiency Standards (MEPS) (discussed further in appendix F and chapter 6) the schemes have acted as an impetus for harmonisation in areas such as food and therapeutic goods, where harmonisation was previously considered too difficult to attempt:

> The TTMRA was effective in facilitating trans-Tasman trade in food products when food standards in Australia and New Zealand were different – ie, from the inception of the TTMRA in May 1997 to December 2002. During this period it would have been recognised as a force supporting the development and implementation of uniform food standards. (FSANZ, sub. 91, p. 3)

The schemes place pressure on regulators to develop consistent laws. The Australian National Training Authority (ANTA) noted:

> Indeed, without the MRA in operation, ANTA believes that its efforts to improve the interface between industry licensing and the VET [Vocational Educational Training] system's Training Packages would be significantly more difficult, if not impossible. With the MRA in place, there is some pressure on industry regulators to adopt consistent regulatory requirements. …
>
> In the absence of the MRA, this pressure would not exist and the task of gaining agreement between eight or more individual industry regulators would be magnified in instances where occupational licences exist at State and Territory level. (sub. 73, p. 8)

By creating more opportunities for regulators to network, the schemes have promoted a greater shared understanding of the principles underlining the regimes

in the various jurisdictions and their strengths and weaknesses. The process of closer alignment may have encountered obstacles, sometimes due, at least in part, to the resistance of regulators to adopt this objective as a primary aspect of their role. Nonetheless, the debates and negotiations that mutual recognition generates, can result in more robust and simpler legislation for both registered occupations and the sale of goods. The Australian Council of Physiotherapy Regulating Authorities noted:

> Both mutual recognition acts encourage another dimension of discipline and rigour upon registration authorities and legislators. In terms of its effectiveness, the objectives are achieved with relatively simple regulation and at low cost. (sub. 87, p. 3)

NOHSC observed:

> … simplification of regulation may result from TTMRA implementation, such as recognition of MSDS and inner labelling of chemicals. … (sub. 106, p. 2)

The TTMRA has also promoted further cooperation between the two national standards organisations. Standards New Zealand stated:

> An objective is that the number of joint Standards should be maximised with the aim of increasing the ratio of joint standards to total Australian Standards (that is AS plus AS/NZS) beyond the current 33%. (sub. 105, p. 2)

On the other hand, Standards Australia noted that, while some trans-Tasman differences have been eliminated, there are other cases where this has not happened:

> … there are also a great many instances where there are separate Australian and New Zealand Standards for the same subject. This is especially true in areas where there are few true international standards such as building and construction. One cause of this is the different regulatory regimes in both countries that have contributed to different standards being applied differently in regulations. Examples of this include areas such as fire protection, occupational health and safety, heavy machinery, health care, construction practice, etc. (sub. 51a, p. 2)

Indeed, the New South Wales Government observed:

> Advice provided by NSW agencies suggests that while there has been significant progress in the implementation of mutual recognition across the Tasman through the TTMRA, progress has been greater under the MRA. The ability to reach national agreements has been easier than negotiating equivalent regulatory requirements across the Tasman. …
>
> Under the MRA and TTMRA most electrical products are now subject to harmonised energy labelling or Minimum Energy Performance Standards (MEPS) requirements. The MRA, however, has had greater success in negotiating equivalent regulatory regimes than the TTMRA. (sub. 117, pp. 2–3)

The New South Wales Government attributes the greater harmonisation of regulatory regimes for electrical product energy efficiency across Australia to an

officer-level committee, the National Appliance and Equipment Energy Efficiency Committee (NAEEEC), chaired by the Australian Greenhouse Office (AGO), which facilitates co-ordination and joint funding of activities such as product check-testing, data collection and management and information dissemination. NAEEEC reports to the Ministerial Council on Energy (MCE) through the Energy Efficiency and Greenhouse Working Group. The Government also considers that COAG's *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies*, which require a common approach to the development of and principles supporting nationally developed regulations and the use of regulatory impact statements to justify regulatory action, to be an important factor (sub. 117, p. 3).

The New South Wales Government also observed:

> As electrical products were not placed on the Special Exemption Schedule, regulators of electrical products have been forced to take a more proactive role in dealing with TTMRA issues. As a result, with the exception of ballasts and electric storage water heaters, the Australian and New Zealand labelling and MEPS regimes are utilising harmonised standards and regulatory requirements. It is likely that, at some time in the future, the New Zealand and Australian energy efficiency requirements for products such as ballasts and heaters will align.
>
> In contrast, in 1998, gas appliances were placed in the Special Exemption Schedule. To date, the respective regulatory agencies have been unable to agree on mutual recognition arrangements. It is anticipated that the Special Exemption for gas appliances under the TTMRA will be extended beyond 2004. (sub. 117, p. 10)

The schemes have also operated as a discipline on the introduction of new regulation. The New Zealand Government commented:

> The Arrangement has also placed greater discipline on governments contemplating the introduction of new and diverging standards and regulations for the sale of goods and registration of occupations. In doing so, it provides a counterbalance to any pressures for excessive regulation. It also allows scope for beneficial regulatory competition between the Parties. This is entirely consistent with both Australia's and New Zealand's commitment to meet the objectives of the WTO TBT Agreement and with the COAG Principles and Guidelines for National Standard Setting and Regulatory Action which underpin the development of regulatory responses under the TTMRA. (sub. 110, p. 3)

However, harmonisation is often not without cost to individual jurisdictions. It may have short term negative effects for local industries. For example, small New Zealand firms producing gas heaters may not be able to comply with the subsequent agreed standards preferred by other jurisdictions. With regard to occupations, attempts to harmonise standards has sometimes meant narrowing the scope of third country recognition:

> The major benefit has obviously been the harmonisation of standards within the jurisdictions in Australasia. There has been some cost however, in that, amongst other things, to conform with mutually agreed standards, the Veterinary Council of New Zealand has had to de-recognise previously recognised qualifications from veterinary schools which are not subject to any of the aforementioned accreditation processes ie, graduates from the Irish Vet School and some of the European Schools. (New Zealand Veterinary Association, sub. 31, p. 2)

It is also relevant to note that, if harmonisation within Australia or across the Tasman runs counter to international trends, its ultimate effect may be negative. Indeed, the wider imperative of globalisation is itself a force for increased harmonisation. The New Zealand Construction Industry Council (NZCIC) stated:

> The NZCIC, and previously the CLG, has had a policy that in the first instance we support the adoption in New Zealand of international standards where they are appropriate. As a second preference we support the development and adoption of joint Australia/NZ standards. Finally, we develop our own SNZ standards only where neither of the other courses of action is available or appropriate. (sub. 113, p. 2)

Global Harmonisation

There have been cases where trans-Tasman harmonisation has provided the springboard for global harmonisation:

> … we see much potential in Australia and New Zealand taking a more coordinated and concerted approach to global mutual recognition and harmonisation of professional qualifications.
>
> An excellent example of such a global initiative is that of the hospitality industry, where mutual recognition of qualifications between New Zealand and Australian jurisdictions has been achieved. The New Zealand Hospitality Standards Institute has gone a step further by taking a leading role in encouraging the globalisation of hospitality qualifications, an initiative which should be of huge benefit for young Australians and New Zealanders wishing to gain valuable experience in the hospitality trade while on their 'OE'. This pro-active approach of using the TTMRA as a basis for 'going global' should be possible for other occupations and we submit that such an approach should be encouraged. (Business New Zealand, sub. 113a, pp. 6–7)

More generally, both Standards Australia International and Standards New Zealand aim to adopt international standards wherever possible. This shows up in the figures. In 1996, the total number of New Zealand standards were 2150 — of these, 891 were Joint Australia/New Zealand Standards (including 450 internationally aligned) and 170 were international standards approved for New Zealand use. In total this meant that in 1996, 620 (28.8 per cent) were internationally aligned. By 30 June 2003, of the 2561 New Zealand Standards, 1008 (38 per cent) were internationally aligned and 2151 (80 per cent) were aligned with Australia.

Under APEC's Voluntary Action Plans, electrical and electronic appliances, food labelling, rubber products and machinery have been set as priority areas. New Zealand has 100 per cent alignment with international standards for these priority areas (New Zealand Ministry of Foreign Affairs and Trade, 2003).

Similarly:

> Standards Australia has a policy of adopting International Standards wherever possible. This policy is in line with Australia's obligations under the World Trade Organization's Code of Practice, which requires the elimination of technical Standards as barriers to international trade. As a result, approximately 33% of current Australian Standards are fully or substantially aligned with International Standards. (It is important to understand that there some areas of industry where no significant International Standards exist, such as building, construction and occupational health and safety. Around one third of Australian Standards simply have no international equivalent).[2]

In 2003, 35 per cent of Standard Australia's 6700 standards were internationally aligned, compared with 22 per cent in 1997.[3]

Influence on international regulatory environments

International standards setting

It is generally agreed that Australia and New Zealand have made a significant contribution within international standard setting bodies. This is partly due to the rule in most international standards setting bodies (eg, ISO, IEC and Codex Alimentarius) of one country, one vote, irrespective of the country's population base. However, it is also due to the ability of Australia and New Zealand, as non-aligned countries, to broker solutions between factions and also to the technical expertise they bring to the negotiating table. The development of the GHS is an example where Australia and New Zealand have had considerable influence.

Regional initiatives

In the Asia-Pacific region, Australia and New Zealand have generally supported each other's initiatives and in the ASEAN Free Trade Agreement – CER

2 See Standards Australia http://www.standards.com.au/STANDARDS/INFO/ALLABTSTNDRDS/ALLABTSTNDRDS.HTM#39 (accessed 12 September 2003).

3 See http://www.standards.com.au/catalogue/Script/GetPage.asp?searchkey=Annual%20Report&url=/STANDARDS/ANNUAL%20REPORT/1999-ANNUAL-REPORT/1999-ANNUAL-REPORT.HTM#search (accessed 12 September 2003).

(AFTA/CER) talks have worked closely to develop joint positions. The New Zealand Government noted:

> The shared experience and depth of understanding of good regulatory approaches and frameworks for reducing regulatory barriers to trade have allowed Australia and New Zealand to lead the development of APEC's substantive work on standards and conformance and to shape bilateral approaches. APEC's Standards and Conformance Subcommittee today is regarded as one of the key parts of the Asia Pacific region's trade and technical infrastructure. In this context, New Zealand and Australia have been instrumental in designing the electrical and electronic goods mutual recognition framework which allows participation by member countries at various levels reflecting economies' different states of technical competence. It remains however a fact that the unique circumstances that underpin the TTMRA, similarity and confidence in our respective regulatory approaches supported by political ambition, are not readily found with other bilateral trade partners. (sub. 110, pp. 3–4)

The TTMRA as a model for other bilateral agreements

The New Zealand government pointed out that one of the understandings which underpinned the TTMRA was that it would contribute to the development of the Asia Pacific region by providing a possible model for cooperation with other economies. Non-tariff barriers, including technical barriers to trade, have become increasingly important as tariff barriers on manufactured exports have come down. The Government stated: 'Some estimates today suggest that the cost of these technical barriers amount to between 8% to 15% of the total value of exports, significantly higher than the global tariff profiles on many manufactured goods' (sub. 110, p.3).

Similarly, the New Zealand Chambers of Commerce and Industry commented:

> … by consolidating the terms of the TTMRA it is hoped that the arrangement can provide a model of cooperation to extend to other economies, in particular within the APEC community where, alongside Australia, much of New Zealand's trade focus is now directed. Indeed, perhaps one of the key areas of potential that can be found with CER and TTMRA is the ability for their frameworks and principles to be more widely applied in the negotiation of international free trade agreements. (sub. 66, p. 2)

The similarities in their basic legislative structures, juridical principles and cultures have enabled Australia and New Zealand to implement one of the most comprehensive mutual recognition agreements in the world. However, given the special trans-Tasman links, the TTMRA 'negative listing' model of 'everything is in unless it is expressly exempted' (as opposed to the 'everything is out unless it is expressly stated to be in' approach) is likely to run up against major problems in other possible bilateral negotiations on mutual recognition.

Australia and New Zealand both aim to extend their networks of mutual recognition agreements. Australia and New Zealand negotiated mutual recognition arrangements with the EU through tripartite talks. In other Government to Government negotiations this may not be possible. The present FTA talks between Australia and the USA are a case in point. Without some examination of possible flow-on effects, other separate mutual recognition arrangements by Australia or New Zealand have the potential to create problems for the TTMRA; for example, the potential to open up the possibility of 'backdoor' entry to the other partner from third countries.

The MRA and TTMRA are intended to increase the international competitiveness of domestic firms: first, by opening up markets to competitors from other jurisdictions; and second, by providing local firms with greater economies of scale and more efficient distribution networks. These improved economies result in lower costs for domestic firms and should enable them to compete more effectively on the international market.

In this context, the New Zealand Chambers of Commerce and Industry noted that the TTMRA acted as:

> … a practical building block towards free trade. … Chambers support an open economy, with removal of distortions and reduced costs to business.
>
> … the Chambers view the TTMRA as both strengthening the trade positions of the individual members in a bilateral sense, and ensuring that the Trans Tasman economy as a whole is actively consolidated and more competitively placed in the global marketplace. (sub. 66, pp. 1–2)

However, in this regard, the Cosmetic Toiletry and Fragrance Association of New Zealand Inc (CTFA) offered a word of warning:

> It is our concern that regulators and politicians do not fully consider the TTMRA and MRA when considering new legislation and that this must be a prerequisite if ultimately New Zealand and Australia are to provide a model for a Australasian common market.
>
> Such considerations should however not ignore that fact that both countries are part of a global market and products are no longer sourced just from domestic manufacturers but at the best quality and price from the global market.
>
> It is our contention that the TTMRA and MRA not be used to provide an Australasian set of rules to the exclusion of the rest of the world and to set artificial barriers to trade which in the long term will make domestic manufacturers uncompetitive and lacking in innovation.
>
> We must ensure that in this process we do not allow regulatory structures to be created that will stifle new innovation and better products from reaching consumers whether these structures are Trans-Tasman or isolated to a single country or state. …

> The CTFA does not believe that in a combined market of under 24 million people we can justify operating a separate set of rules from the rest of the world and as the world moves to the GHS then so should both the Australian and New Zealand markets but not in isolation. (sub. DR134, p. 3)

FINDING 4.4

The MRA and TTMRA appear to have had beneficial effects in relation to better standard making.

4.6 Other Impacts

Some impacts, which potentially might have a net negative effect, include:

- a 'brain drain' where skilled people leave their home jurisdictions to pursue opportunities elsewhere; and
- entry by professionals trained in third countries through the 'easiest' route and moving on to other member jurisdictions, thus weakening the qualification and experience requirements of their ultimate destination jurisdiction.

'Brain drain'

Some interested parties raised the question of whether increased integration and labour mobility under mutual recognition had led to a 'brain drain' from some jurisdictions. Mutual recognition increases the ease with which skilled registered professionals can move and, therefore, raises the potential for low-wage jurisdictions to experience an outflow of skilled people.

For example, the Australian Dental Council, stated:

> … the flow of dentists between countries is disproportionately in favour of Australia. Whilst increases in the Australian dental workforce are very necessary, they should not occur at the expense of New Zealand. (sub. 6, p. 2)

However, discussions with a range of interested parties from New Zealand suggested that the 'brain drain' to Australia was not a large concern within that country. Overseas experience was seen as a plus, with the real challenge resting in attracting people back to the New Zealand labour market and revitalising areas of out-migration.

For example, Business New Zealand stated:

> With regard to the 'brain drain', it is true that New Zealand experienced a large outflow of people to Australia during the late 1990s. For example, a net migration outflow of almost 25,000 was recorded for the 1999 calendar year, rising to nearly 32,000 for the 12 months ended May 2001. However, in our view it is highly unlikely that the TTMRA was a significant factor in this large outflow.
>
> Of far greater importance to migration flows between Australia and New Zealand is the relative performance of the two economies. Over recent history New Zealand has always lost more people than it has gained from Australia … This is only to be expected when Australia's GDP per capita is over 30% higher than New Zealand's. Furthermore, whereas Australia has grown consistently strongly since the mid 1990s, New Zealand suffered 2-3 years of significantly lower growth in the late 1990s, which at the time made Australia an even more attractive place to live and work. Now that the two economies are growing at similar rates the net outflow eased to around 12,000 for the 2002 calendar year.
>
> It should also be pointed out that while mutual recognition might make it easier for people to leave, it also makes it easier for those wishing to come and thereby help fill skills and labour shortages. (sub. 113a, p. 6)

A recent paper by the New Zealand Treasury also showed that 'emigration to Australia occurs across all skill categories roughly in the same proportion as the population as a whole' (Bushnell & Choy 2001, p. 10). The study examined trans-Tasman migration flows from 1947 to 2000 and suggested that, due to the Trans-Tasman Travel Arrangement, which allows movement regardless of formal skills, Australia and New Zealand essentially have a common labour market:

> … People of all skill levels have migrated because of employment and income prospects in Australia. This is not a brain drain, which implies the departure of only the most talented. … It has allowed the migration of a broad mix of New Zealanders … (Bushnell & Choy 2001, pp. 10–11)

Also, there do not appear to be any serious concerns about brain drain for Australian jurisdictions. In discussing the MRA, the New South Wales Medical Board noted:

> Despite initial misgivings about technical difficulties and a possible outflow of conditional doctors from some jurisdictions, the mutual recognition arrangements have worked very successfully to enable medical practitioners to move freely around Australia. (sub. 81, p. 3)

Overall, while mutual recognition is seen as contributing to cross-jurisdictional movements by professionals, this is not generating concerns that a 'brain drain' has been occurring.

Third country sourcing

A number of interested parties expressed concern that third country trained professionals were making use of MRA and TTMRA provisions to enter jurisdictions through the 'easiest' route, thus subverting the qualification and experience requirements of their ultimate destination jurisdiction. Parties noted that such activity had the potential to lower standards and impose costs on jurisdictions, and queried whether this was intended under the mutual recognition legislation. This issue is discussed further in chapter 6.

Unfortunately, data are not available to assess the extent to which third country sourcing effects were taking place. While DEST has collected information on registrants from New Zealand with New Zealand qualifications, the majority of registration boards were not able to provide information on the country of training of TTMRA registrants. The lack of comprehensive data prevents a valid comparison of the total number of TTMRA registrants with the number of registrants trained in other countries, entering Australia. Hence, these data can only indicate basic trends, namely that each year, the number of New Zealand qualified professionals using TTMRA has increased (figures for 2002 were only measured for the first half of the year) (table 4.8).

Table 4.8 **New Zealand trained professionals registering under TTMRA**

	1998	1999	2000	2001	2002[a]	Total
New Zealand qualified TTMRA registrants	89	171	227	265	153	905

a The data for 2002 are only for the first half of the year.

Source: DEST (sub. 26, p. 14).

4.7 Conclusion

Assessments of the effectiveness of the schemes, especially in relation to goods, are frustrated by the lack of relevant data and, just as importantly, by the difficulties in assessing what may have occurred in the absence of the schemes. It has not been possible to confirm statistically the generally accepted view that there is a significant link between mutual recognition and mobility of goods. This reflects an absence of data for analysis of inter-jurisdictional trade within Australia and the swamping of most impacts associated with the TTMRA by other domestic and international developments. However, there is some anecdotal and other evidence to

suggest that the mutual recognition schemes have been successful in promoting goods trade.

Stronger evidence exists for the positive effect mutual recognition has had on occupational mobility. The available data show that a significant number of individuals across the range of occupations have used the mutual recognition provisions. Numerous individuals report satisfaction with increased facilitation provided by both mutual recognition schemes in making registration of occupations portable across jurisdictions. In addition, there is some information to support the view of many interested parties that the MRA and TTMRA have had positive wider effects.

5 Operation of mutual recognition

This chapter assesses the existing processes for applying mutual recognition obligations, with the objective of identifying possible improvements.

5.1 Mutual recognition of goods

Processes and institutions

The process for applying mutual recognition obligations in relation to goods is relatively straightforward. If a business wishes to sell its goods in another jurisdiction, it need only be able to demonstrate that its product can be legally sold in the home jurisdiction. Under mutual recognition, a second jurisdiction is required to accept goods that meet the regulatory requirements of the home jurisdiction. The requirements for legal sale in the home jurisdiction will vary according to the type of product and the particular regulatory authorities involved, with some goods facing more rigorous compliance regimes than others. Conformity assessment (testing, inspections and certification) may take place before sale and/or as part of a post-market surveillance regime.

A number of players are involved in this process. Conformity assessment may be undertaken by regulators themselves, or by laboratories or inspection bodies, with certification bodies issuing certificates of conformity to particular standards. Inspection and certification bodies are themselves accredited, by the regulator or an accreditation body — in Australia, the National Association of Testing Authorities (NATA) is the lead accreditation body and, in New Zealand, International Accreditation New Zealand (IANZ) fulfils this role.[1] NATA and IANZ signed a mutual recognition agreement in 1981 covering laboratory accreditation. This

[1] The Joint Accreditation System of Australia and New Zealand (JAS-ANZ) is a third body providing accreditation in the trans-Tasman market. It was established by a formal treaty in October 1991. JAS-ANZ has significantly fewer clients than IANZ and NATA. A meeting was held in 1999, looking at options for the efficient delivery of accreditation on both sides of the Tasman. The meeting found that JAS-ANZ was not financially viable and recommended that the accreditation of certification be split between NATA and IANZ (IANZ, Wellington, pers. comm., 28 March 2003). However, a later meeting of the JAS-ANZ board decided that the continued operation of JAS-ANZ could still be viable.

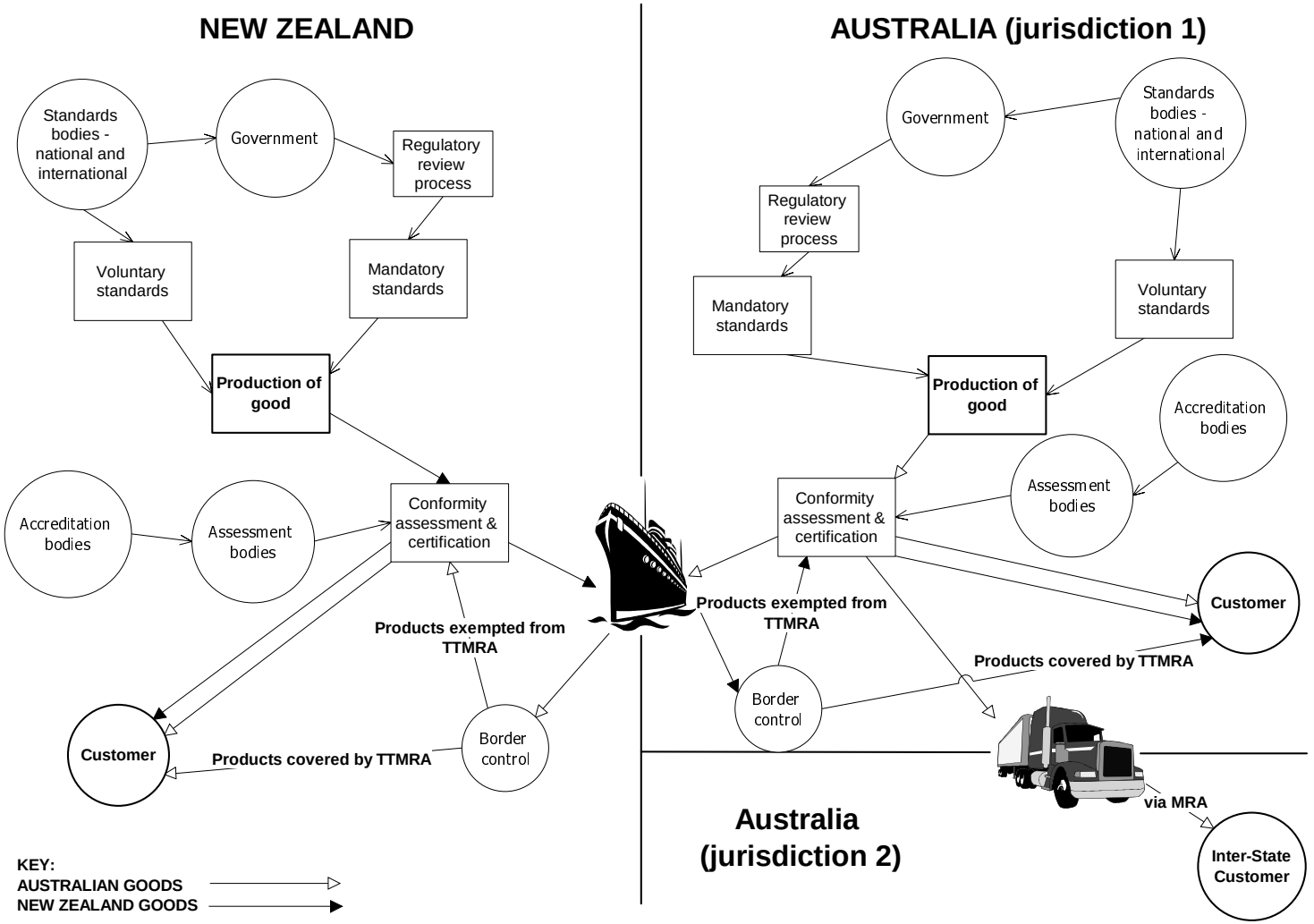
means that NATA and IANZ accept test, measurement and inspection reports from laboratories and testing agencies in the other jurisdiction that carry the NATA or IANZ mark. However, regulators do not necessarily accept IANZ or NATA accreditation.

For the operation of the MRA, State and Territory Consumer and Fair Trading departments are the key entities ensuring that goods sold in their jurisdiction conform with MRA requirements and consumer protection legislation. Commonwealth entities also play a role in protecting the public through the administration of national legislation, for example, the ACCC and its administration of the *Trade Practices Act 1974*.

In the case of the TTMRA, New Zealand's consumer and fair trading infrastructure (including the Commerce Commission and the Ministry of Consumer Affairs, among others) joins the Australian agencies noted above in monitoring compliance with regulations. There is also an additional layer of checking, with goods entering the second jurisdiction encountering customs and quarantine services. The particular entities involved are the New Zealand Customs Service, the Australian Customs Service, New Zealand's Ministry of Agriculture and Forestry's Quarantine Service and the Australian Quarantine and Inspection Service (AQIS). The TTMRA does not override the obligation for goods to meet a jurisdiction's requirements regarding customs controls and tariffs (as specified in Schedule 1 of the legislation) or quarantine (as specified in Schedule 2 of the legislation). Customs services also ensure that the TTMRA exemptions, such as those relating to indecent material and agricultural and veterinary chemicals, are enforced at the border.

Figure 5.1 depicts the processes and institutions involved in the movement of goods across Australia and New Zealand in the wider context of mutual recognition, from the setting of standards, to production and conformity assessment, to border control, and to final consumption. Standards setting is discussed in chapter 6.

Figure 5.1 **Movement of goods under MRA and TTMRA: processes and institutions**



Issues

Awareness of mutual recognition obligations

According to several interested parties, many producers and suppliers are not aware of mutual recognition obligations. For example, the New Zealand Government noted 'there is evidence to suggest some traders in New Zealand are not aware of their rights to sell into Australia under New Zealand regulatory requirements' (sub. 110, p. 5). This is consistent with the findings of the 1998 review of the MRA, which recommended that the Industry Ministers' Council consider carrying out an awareness campaign among manufacturers and retailers (see appendix B, rec. 5).

Awareness may also be a problem at the regulator level. This has manifested itself in a number of barriers to the movement of goods. For example, the New Zealand Government noted:

> Some regulators, who have either recently assumed their roles or who have not bought wholeheartedly into the Arrangement, can be reluctant to accept products that comply with New Zealand requirements. This has been the case where regulators have been uncertain about the implications of the Arrangement in respect of different packaging and labelling standards. For example, in a recent case, Australia raised issues with New Zealand over quantity marking on the main display and marking in centilitres. New Zealand wine labels show measurements in centilitres whereas the Australian domestic legislation requires measurements in millilitres. The Australian Customs authorities had not appreciated that the TTMRA means that a good that may be sold in New Zealand may be sold in Australia without meeting any additional requirements relating to the presentation of goods such as packaging and labelling. Similar issues have been encountered in New Zealand. (sub. 110, pp. 5–6)

The barriers arising from regulator behaviour may be reinforced by retailers and consumers. For example, Fisher and Paykel noted that their electrical products from New Zealand also face barriers to entry to the Australian market at the retail level:

> The regulators have over many years created the culture (quite legitimately) for retailers to look for Approval Numbers. A NZ made product would not have such a number and be the subject of many queries from retailers — much more trouble than it's worth. The disruption caused by such queries far outweighs any small advantage gained by using TTMRA. (sub. 56, p. 2)

The New Zealand Government noted:

> … The difficulties come about when auditing is carried out by a state or territory regulator who interprets the TTMRA to apply as a "defence provision" against an enforcement action rather than a market access equivalence.

> In one particular example, the audit inspector advised the Australian retailer that a product offered for sale did not have an Australian approval marking and that although it carried a NZ certification, this could only be taken into account if an enforcement action was begun against the retailer. Feeling insecure, the retailer removed the product from sale and insisted that the New Zealand supplier obtained an Australian approval before the products were placed back on sale.
>
> The problem becomes worse for products that do not require certification in New Zealand and where no labelling or documentation exists that might be equivalent to an Australian approval. In these cases, the retailer is again reluctant to sell the product as surveillance activities cause too much embarrassment and stress for the retailer. (sub. DR159, p. 22)

The New Zealand Government also noted:

> … generally the Australian market is dominated by purchaser preference whereby consumers favour products that comply with Australian regulations over products which take advantage of the application of the TTMRA provisions. (sub. 110, p. 6)

When the MRA was introduced, a campaign was undertaken to inform relevant organisations about associated obligations and opportunities. Similarly, an awareness raising campaign accompanied the introduction of the TTMRA. This included the production of a 'User Guide', which is now available on the Department of Foreign Affairs and Trade (DFAT) website.

However, no ongoing publicity or information dissemination took place. It now appears that knowledge and awareness of the obligations and opportunities of mutual recognition has diminished as time has passed, individuals have moved on and new industry players and entities have emerged.

To the extent that an inadequate awareness of mutual recognition obligations is resulting in producers taking additional steps to meet regulations in other jurisdictions, the benefits of mutual recognition are not being fully realised. Similarly, a lack of commitment on the part of some regulators to the principles of mutual recognition has the potential to erode the benefits of the schemes. These circumstances provide a basis for a publicity campaign to provide information to regulators and suppliers on the obligations and benefits of the mutual recognition schemes.

Conformity assessment

As noted, some suppliers have difficulties selling into the Australian market if their product does not show an Australian approval number. This highlights some of the difficulties that can occur with divergent regulatory regimes.

Regulators are required to monitor compliance with their regulations and, as noted in box 5.1, they may do this in a number of ways. Most of the measures they may take do not compromise mutual recognition obligations. However, where regulators apply approval systems, as a prerequisite for offering goods for sale or as a condition of use, mutual recognition in its pure form is not possible. Whether importers are disadvantaged in relation to local suppliers depends, in large measure, on the willingness of regulators to accept conformity assessments that are carried out, or recognised, in the importer's home jurisdiction.

There are a number of products where approval systems operate. Australian regulators apply approval systems for electrical and gas appliances, measurement devices and road vehicles; New Zealand and most Australian states require approvals for pressure vessels; and both countries have approval systems for food, therapeutic goods and chemicals. Conformity assessment issues related to those goods under special exemption are discussed in chapter 8.

In general, barriers to trans-Tasman mutual recognition are minimised where approvals or conformity assessments made by regulators or accredited third party conformity assessment bodies are recognised by regulators in both Australia and New Zealand.

FINDING 5.1

The operation of mutual recognition would be enhanced by Australian and New Zealand regulators recognising approvals or conformity assessments made by their counterparts or by Australia/New Zealand regulator-accredited third party conformity assessment bodies.

Electrical equipment and appliances

The goods category of electrical equipment and appliances is one area where differing regulatory regimes and conformity assessment processes can inhibit the movement of goods between Australia and New Zealand. Australia has a list of approximately 60 electrical products for which it requires pre-market approvals based on conformity assessment to joint Australian/New Zealand standards. The approvals are not only a precondition of sale, but States and local authorities may make them a condition of usage (usage is discussed further in chapter 9). Unlisted products require only supplier declarations accompanied by third party assessments. Australian regulators recognise conformity assessment bodies approved by NATA or IANZ.

Box 5.1 **Conformity assessment and compliance regimes**

There are five basic options for monitoring compliance with regulations. These are:

Option One	*Option Two*	*Option Three*	*Option Four*	*Option Five*
Regulator approvals based on inhouse testing, inspections & certifications	Regulator approvals based on test reports & certification by conformity assessment bodies approved by the regulator	Regulator approvals based on test reports & certification by conformity assessment bodies approved by an accreditation agency	Mandatory requirements for test reports & certification by conformity assessment bodies approved by an accreditation agency but no requirement for regulator approvals	Self declarations by suppliers which ***may*** be supported by test reports & certification by conformity assessment bodies approved by an accreditation agency

While post-market surveillance is generally a feature of all five options, only three emphasise pre-market surveillance, where an approval must be obtained prior to sale. Approvals are granted on the basis of:

- testing and/or certification undertaken in-house by the regulator; or
- testing and/or certification by a conformity assessment body approved by the regulator; or
- testing and/or certification by a conformity assessment body accredited by an accreditation body (mandatory third party conformity assessments).

The other two options do not require regulator approval prior to goods being offered for sale. Instead, the supplier is required to make a self declaration that their product complies with the relevant regulations. Usually these self declarations, together with supporting documentation, must be published on the regulator's website. The regulations may, or may not, include mandatory requirements for third party conformity assessments but, even where they are not required, suppliers aware of their value as a risk management tool may cite test reports or certification as evidence of compliance. Monitoring for compliance under these options relies entirely on surveillance after the goods have been offered for sale.

Australia, like Europe, tends to favour pre-market approaches. This is based on the view that the approval process gives greater control over products reaching the market — a 'prevention is better than cure' approach. Also relevant is the value of having approval numbers in educating retailers, installers and users on how to recognise a safe product. New Zealand, in common with the USA, inclines towards supplier declarations. The strength of this system is that it places responsibility for compliance irrefutably on the supplier. Where an approval is granted for a product that is subsequently found to be defective, it becomes a matter of contention as to where liability lies. The New Zealand regulators maintain that changing to regimes that place responsibility unequivocally on suppliers has increased their effectiveness.

In New Zealand, seven types of electrical appliances require pre-market approval prior to sale, based on the joint Australian/New Zealand standards. Approval of an Australian State or Territory is accepted as an equal alternative to the approval issed by the New Zealand regulator (New Zealand Government, sub. DR159, p. 20). For other product types, supplier declarations are required prior to the product being lawfully saleable in New Zealand. The declaration must identify the supplier and state the mechanism used to assess the product (for example, testing in New Zealand, a CE mark etc). Products with an Australian approval may be lawfully sold without a supplier declaration being required. The system is performance based, so particular tests or laboratories are not specified for supplier declarations. The New Zealand regulator generally obtains supplier declarations from the seller, if it requires to see them. Products bearing Australian certification may be imported directly into the New Zealand market without passing through Australia (New Zealand Government, sub. DR159, p. 21).

While most States and Territories accept New Zealand approvals for its seven listed electrical products, this is not consistent, and supplier declared products are generally not accepted. In practice, the Australian approval regime means that, while a good without an approval number may be able to be sold legally in Australia under the TTMRA, retailers may refuse to stock the good, regulators may require retesting, consumers may refuse to buy the good, and those who do buy the good may find themselves unable to use it. New Zealand suppliers of electrical appliances therefore find they need to obtain approval numbers for any goods they wish to sell in Australia. The defence provided by the TTMRA obligations is of little use, as the products may not reach the shelf in the first place.

Where conformity assessments are carried out by IANZ-accredited bodies to the joint Australian-New Zealand standard for appliances, approval numbers can be obtained relatively quickly and retesting is not required, as these assessments are accepted by Australian regulators. Nevertheless, it is an additional step that adds time and cost to the process of selling goods in the Australian market. Most firms that manufacture electrical appliances on both sides of the Tasman find it easier to simply get approvals under the Australian system. For example, Fisher and Paykel noted:

> TTMRA does not work for an Australasian company such as F&P with production on both sides of the Tasman. Doing different processes for different products (dependent on country of manufacture) is more disruptive than just going through certification in Australia. (sub. 56, p. 4)

However, for some other goods, the conformity assessments recognised in New Zealand may not be accepted by the Australian regulator. This means that products must be tested or retested in Australia in order to gain approval. Even where the

regulator in the exporter's home jurisdiction unilaterally recognises conformity assessments carried out in Australia, making it possible to undertake conformity assessment in Australia to cover both markets, the exporter is disadvantaged as it is almost always easier and less costly to test products locally and to engage local certifiers and inspectors.

Raising awareness of the obligations contained in the TTMRA, as suggested earlier, would be one useful way to reduce some of these difficulties. As noted by the New Zealand Government:

> As the TTMRA clearly entitles products from New Zealand to be sold in Australia without the need for any further testing, certification or approvals, this situation illustrates the need for better information about the principles and provisions of the Arrangement. (sub. DR159, p. 22)

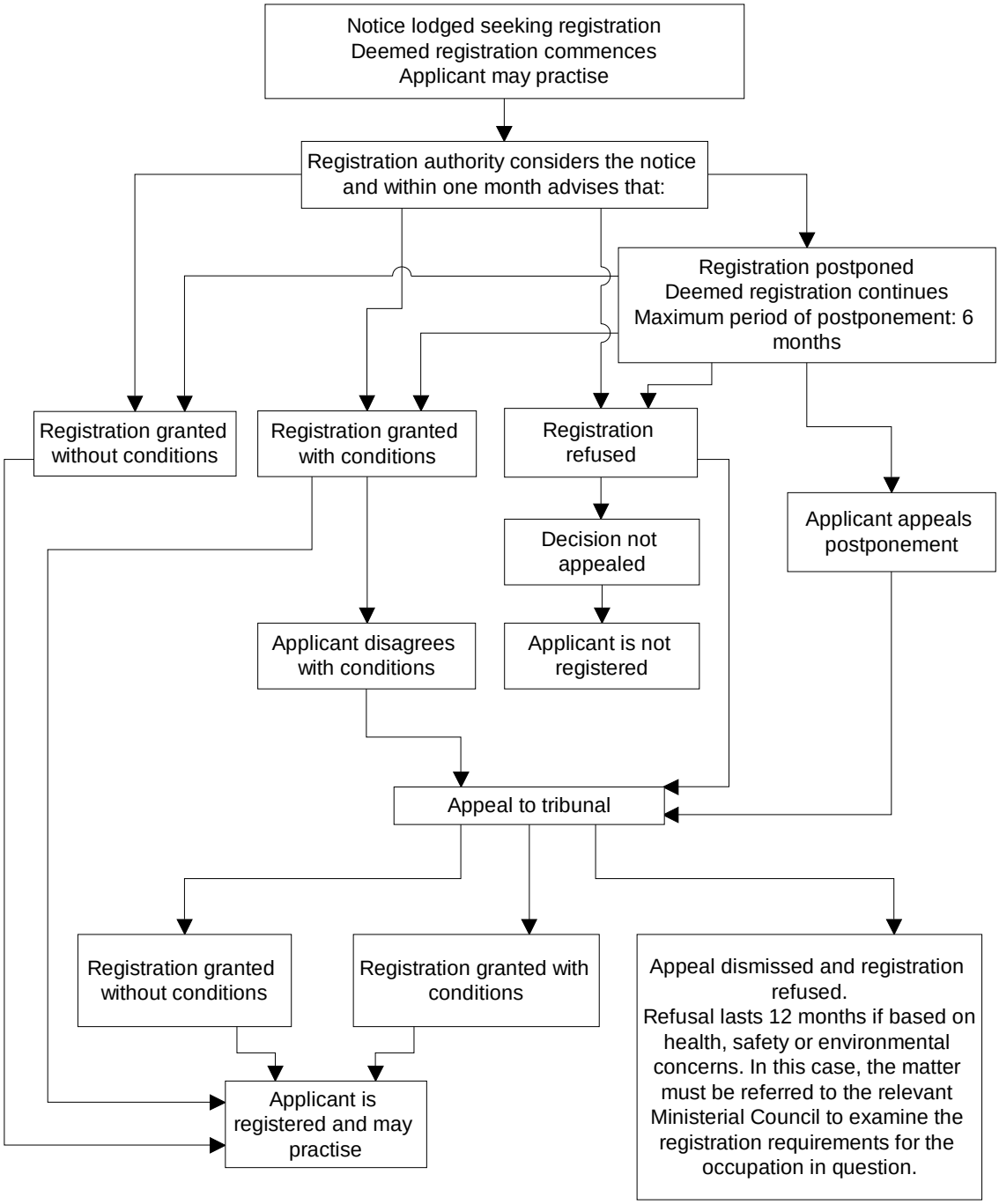
Removing the need to obtain an Australian approval number, by recognising the conformity assessment undertaken in New Zealand, would be the outcome most in line with established mutual recognition principles and obligations.

However, the situation also highlights the importance of joint standards and agreement on acceptable conformity assessment procedures. Where products are manufactured to the joint standard and conformity assessment is undertaken by accredited assessment bodies, trans-Tasman trade is generally easier, as each party has greater comfort with the quality and safety of the products. Agreement by all States and Territories and New Zealand on which products require approvals, whose approvals are acceptable and which assessment bodies are regarded as competent would help to smooth the operation of mutual recognition in this area. Joint approval registers would be another possibility.

5.2 Mutual recognition of registered occupations

Under mutual recognition obligations, an individual registered to practise an occupation in one jurisdiction is able to obtain registration to practise an equivalent occupation in another jurisdiction. To do this, individuals simply forward details of their registration in the home jurisdiction to the registration board in the second jurisdiction and sign a consent form enabling the registration board to undertake reasonable investigations relating to their application. Subject to a checking process, during which they are able to practise, registration is recognised and, if appropriate, approval to practise is given. The registration process is depicted in figure 5.2 and an example is described in box 5.2.

Figure 5.2 **The registration process**



Source: Based on CRR (1998b, p. 16).

As noted in chapter 2, mutual recognition applies to all parts of the registration system. Depending on the jurisdiction and occupation, initial 'registration' may include requirements to register, obtain a licence, obtain a practising certificate or prove current competency. Some jurisdictions have annual requirements that must

be met for ongoing registration, while others have a 'one-off' registration process. Under mutual recognition, a jurisdiction must recognise a person's registration from another jurisdiction, even if that registration does not include all the requirements that the second jurisdiction places on local registrants.

Box 5.2 **Mutual recognition for service providers — an example**

Jill is a registered psychologist who wishes to move her practice from Queensland (Qld) to Western Australia (WA). Under mutual recognition, what does she need to do?

There are a number of steps Jill must take. First, she must lodge a written notice with the local registration authority for psychologists in WA. This notice must formally state where she is currently registered and which occupation she is wishing to pursue in WA. Documentation must also be provided to prove her current registration. These requirements are set out in the legislation (see, for example, section 19 of the *Mutual Recognition (Commonwealth) Act 1992*).

After lodging the notice, Jill would have 'deemed registration' in WA. This means that she may practise in WA as she would in Qld, while the WA registration authority reviews her notice.

The registration body has one month to either grant, postpone or decline the application. In considering the application, the authority will check that: the information and documents provided are true and correct; that Jill's circumstances have not changed materially since lodging the notice (for example, that her registration in Qld has not recently been suspended); and that the occupation she wishes to practise in WA is 'equivalent' to her registered occupation in Qld. Equivalence would be satisfied if the activities carried out under registration in Qld are substantially the same as those that would be carried out in WA. Conditions could be applied to the registration in WA to achieve this.

If the application is approved, Jill will be allowed to practise in WA after paying the required registration fee. Continuance of registration will then be subject to the laws of WA, as for any other psychologist practising in WA.

A number of players are involved in this MRA and TTMRA occupational registration process, as shown in figure 5.3. Most commonly, registration activities are administered by registration boards for individual occupations. These boards are given their responsibilities under legislation. For example, the New Zealand *Nurses Act 1977* requires the Nursing Council to maintain a register of nurses and to ensure that registered nurses have completed an appropriate nursing program and passed all prescribed examinations.[2] Registration activities may also be partly or wholly administered by an occupation's professional body, for example, the Institute of

[2] Note that this Act is to be repealed shortly and replaced with new Health Practitioners Competence Assurance legislation (see box 5.6 for details).

Professional Engineers New Zealand assesses engineers for registration with the Engineers Registration Board.

Issues

Awareness of mutual recognition obligations

Some review participants suggested that, on occasion, individual registration boards have not fulfilled their obligations under the mutual recognition legislation. It is unclear whether this is due to a lack of understanding of their obligations, a lack of resources to undertake their obligations, or simply a lack of commitment to the principles and objectives of mutual recognition itself.

The Commonwealth Department of Education, Science and Training (DEST) suggested that there was:

> … a lack of shared understanding among State regulatory bodies … as to the intent of the TTMRA. … DEST is still, at times, called on to explain the requirement to accept applications for registration from New Zealand for registration by registration boards. (sub. 26, p. 7)

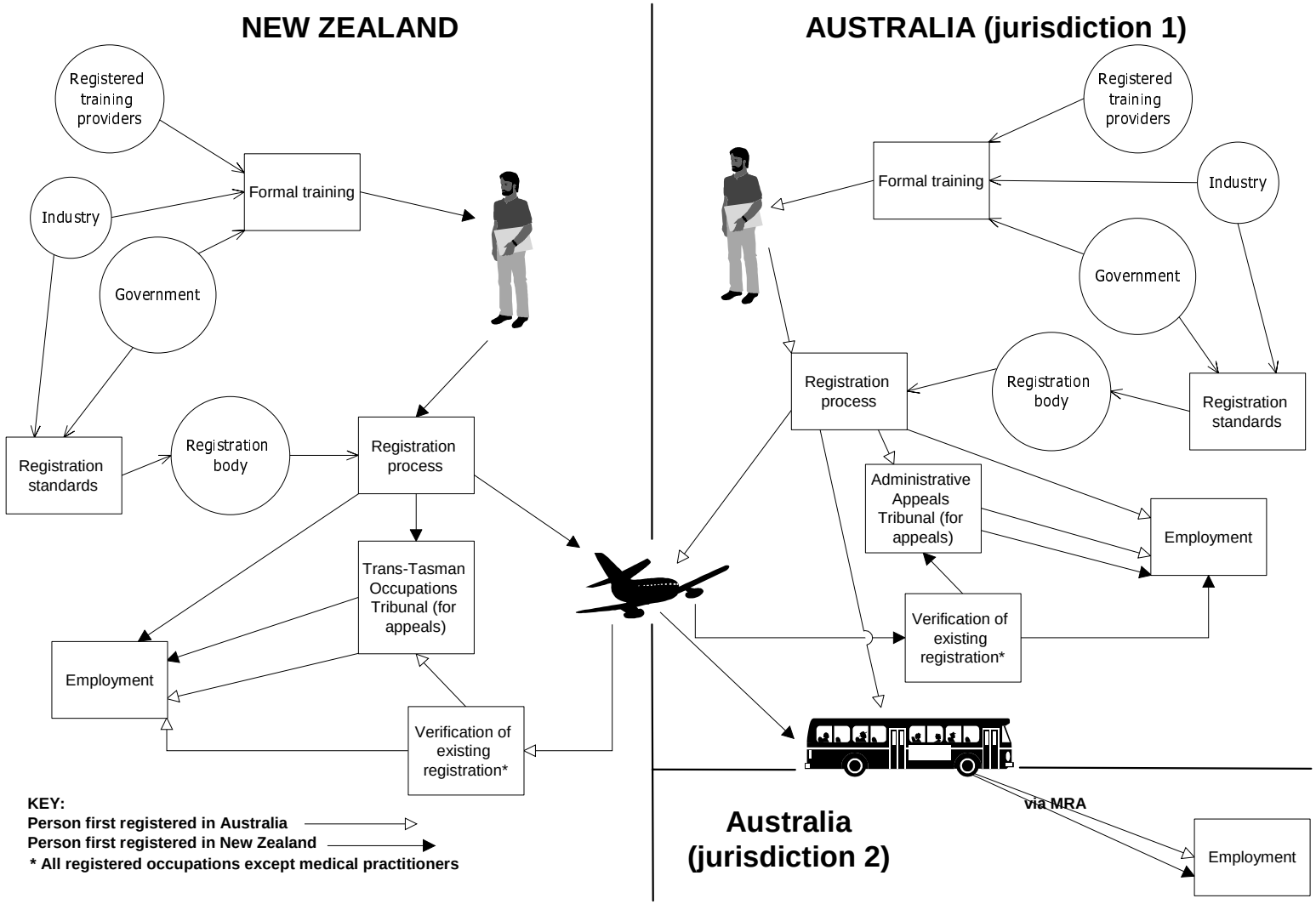
However, some submissions suggested a more deliberate disregard for the requirements of mutual recognition. For example, contrary to the intention of mutual recognition, the Australian Institute of Radiography appears to assess *qualifications* rather than registration, saying:

> In the last 12 months, the AIR's Overseas Qualifications Assessment Panel (OQAP) has rejected two applicants holding valid NZ Registration as their qualifications (diploma level) did not meet the Australian Degree level standard and the post graduate clinical experience did not overcome this deficit. (sub. 70, p. 2)

The New Zealand Occupational Therapy Board commented:

> … NZ registered occupational therapists are being treated differently depending on whether they are trained in New Zealand or not. (sub. 12, p. 1)

Figure 5.3 **Movement of registered service providers under MRA and TTMRA: processes and institutions**



Many interested parties agreed that an awareness raising campaign that identified the benefits and obligations of mutual recognition would help overcome these problems.

FINDING 5.2

Achieving MRA and TTMRA objectives (in relation to both goods and occupations) would be assisted by jurisdictions disseminating, in a coordinated manner, information on the obligations and benefits of mutual recognition. This campaign to enhance the knowledge and awareness of mutual recognition would be directed at their own regulators, local governments, relevant industries and professional associations.

Process concerns

Information gathering and privacy

Some registration boards raised concerns about the processes set out in the mutual recognition legislation. A number revolved around gaining more information about an applicant. For example, the Chiropractors Registration Board of WA said:

> The present Act only provides for a written notice between Boards about an applicant to state that the applicant is not the subject of disciplinary proceedings. It should include whether the person is the subject of a complaint. In many occasions disciplinary proceedings may not occur for a number of months after a complaint is received. (sub. 2, p. 1)

With regard to teachers, the Tasmanian Department of Premier and Cabinet expressed concerns that:

> Under the MRA and TTMRA the Board is obliged to register teachers from other jurisdictions regardless of whether their qualifications meet the standards required by the Board and a character/police check is effectively precluded. (sub. 74, p. 1)

In practice, registration boards take a variety of approaches to their information gathering and sharing activities under mutual recognition obligations. Some make use of informal networks across jurisdictions to gather and share information on applicants or on any registered professionals under disciplinary action. Others rely on formal mechanisms. Some gather and share more information than is listed in the mutual recognition legislation. Others strictly follow the legislation.

Underlying these concerns is some confusion about what information is legally allowed to be disclosed or sought. The mutual recognition legislation states that the written notice to the registration authority of the second jurisdiction *must* contain

certain information (see, for example, section 19(2) of the *Mutual Recognition (Commonwealth) Act 1992*). However, it does not appear to restrict the registration authority from seeking other information, such as proof of identity. Furthermore, the legislation requires an applicant to give consent for the exchange of information relevant to their application and provides for the sharing of information 'reasonably required' by a registration authority, with this information able to be provided 'despite any law relating to secrecy or confidentiality'. In particular:

- Section 19(2)(h) of the *Mutual Recognition (Commonwealth) Act 1992* requires a person to give consent to the making of inquiries and exchange of information relevant to their mutual recognition application. Sections 37 and 38 of the Act further clarify that registration authorities: must furnish information reasonably required by other registration authorities in meeting their obligations under mutual recognition; that this information may be provided despite any law relating to secrecy or confidentiality; and that, once received, information must be treated according to any law in the second jurisdiction relating to secrecy or confidentiality.
- Similarly, section 18(2)(h) of the Trans-Tasman Mutual Recognition Act of Australia requires a person to give consent to information exchange relevant to their application. Sections 37 and 38 of the Australian legislation state that registration authorities must furnish information reasonably required in connection with registration, deemed registration, or actual or possible disciplinary action, despite any law relating to secrecy, confidentiality or privacy, and that, once received, information must be treated in accordance with local law on secrecy, confidentiality and privacy. Schedule 5 of the Act describes some general principles to be applied when dealing with personal information.
- The New Zealand legislation differs slightly from this formula. While section 19(2)(i) of the New Zealand mutual recognition legislation also requires applicants to give consent to relevant information exchange, section 33(1)(b)(ii) explicitly states that the furnishing of information relating to deemed registration or actual or possible disciplinary action must not contravene the New Zealand *Privacy Act 1993*. It is unclear how this different formulation affects the exchange of information for mutual recognition purposes. A number of New Zealand parties commented it had seriously hindered their ability to seek reasonable information about mutual recognition applicants. On the other hand, section 6, Principle 11, of the *Privacy Act 1993* states that an agency may disclose personal information if the individual concerned has authorised the disclosure (similar to one of the principles outlined in Schedule 5 of the Australian legislation). Given the requirement under the mutual recognition legislation for individuals to consent to information exchange regarding their

application, it seems that the Privacy Act should not present a barrier to reasonable information exchange.

In sum, the current mutual recognition legislation appears to give registration authorities sufficient scope to gain relevant information about applicants, including police checks. The gathering of this information is unlikely to contravene Australian or New Zealand laws on privacy, confidentiality or secrecy. However, these issues are primarily a question of legal interpretation of the mutual recognition legislation, particularly in relation to the scope of information 'relevant to an application'. Testing them through the AAT and TTOT would provide clarity on the extent to which information can be gathered and used in the registration process.

Also, while further information may be gathered, this can add further costs to the process. The Health Professions Licensing Authority of the Northern Territory noted:

> Staff in the Registrations Section at the HPLA have indicated that a number of jurisdictions, regardless of the type of practitioner involved, require documentation which is in addition to that stated in the legislation. … This has the potential to increase the time taken to process an application and can expose applicants to increased costs. (sub. 58, pp. 1–2)

Deemed registration and postponement of registration

Some boards considered that more time should be allowed in the deemed registration period to assess information before an applicant is registered. For example, the Chiropractors Board of Queensland noted:

> The Board does not consider this time to be sufficient to allow jurisdictions to undertake necessary checks and balances, given that some Registration Boards do not meet regularly. It has been found that in some cases, where Registration Boards do meet on a monthly basis, that the one month timeframe is still insufficient, given outside influences with respect to the receiving of information etc. (sub. 24, p. 2)

The Queensland Nursing Council also noted the timeframe and suggested more criteria for postponement should be included:

> The legislation provides for specific circumstances in which the granting of substantive registration may be postponed. These circumstances are very limited and do not allow for situations where there is a need to impose conditions on a licence … Often it is not possible to fully consider these matters within the one month timeframe … expansion of the criteria for postponement to better allow consideration of applications when necessary, would be appropriate. (sub. 7, pp. 2–3)

However, the majority of registration boards appeared comfortable with the one month limit on granting or declining substantive registration and the options for postponement.

FINDING 5.3

The one month period for registration boards to check applications under mutual recognition and the criteria for postponement appear to be appropriate.

With respect to teacher registration, some jurisdictions were concerned that the one month period of deemed registration specified under mutual recognition allowed teachers to commence employment prior to the registration board administering a 'fit and proper person' check. 'Fit and proper person' checks for teachers may encompass a police check and personal declarations, as well as checks with former employers and registration boards. Depending on the matters raised by these checks, an applicant's 'fit and proper person' check may take from several days to several months. Jurisdictions felt that allowing a teacher to be employed prior to such checks could undermine the objective of ensuring appropriate child protection. The Tasmanian Department of Premier and Cabinet stated that 'it would be arguably in the public interest for teacher registration bodies to apply mutual recognition subject to being satisfied as to character' (sub. 74, p. 2). (Note that not all States administer these checks via the registration boards — the New South Wales Government advised that '… it is the employer who undertakes the "fit and proper person" check … a teacher cannot commence duty until the checks are concluded' (sub. DR179, p. 2)).

However, schools and other educational institutions may choose not to employ a teacher until they are satisfied that the applicant has passed, or is likely to pass, the appropriate police checks and character assessments administered by the local registration board. The Queensland Board of Teacher Registration supported the notion that employers could make decisions in this regard and suggested that:

> The acknowledgment of receipt of a notice of application would provide evidence to employers of a teacher's "deemed registration", and should make it clear that a final determination is dependent on appropriate character checks. (sub. DR146, p. 1)

The Commission acknowledges that some jurisdiction have concerns about the capacity of schools to deal with this approach. For example, the Tasmanian Teachers Registration Board raised concerns over administrative pressures, particularly when a teacher needs to be employed urgently, saying:

> The Teachers Registration Board is aware, for example, that some schools are yet to implement properly procedures to check that a teacher is registered prior to employing them, let alone considering whether there are any character issues. (sub. DR147, p. 1)

However, the Commission considers that there are adequate available processes under the current system of deemed registration and that altering mutual recognition legislation to create a separate process for teachers is unwarranted. Schools make many decisions regarding the safety and wellbeing of students — they should, therefore, be capable of making a decision to delay hiring a teacher until they are satisfied that character checks have been completed, if they regard this as an appropriate course of action. It is important to note that, while mutual recognition gives applicants the right to deemed registration, it does not confer the right to be employed as a teacher. The decision to employ ultimately rests with the employers and their assessment of the person's character, skills, attributes and qualifications.

The Commission also notes that the issue of character checks was raised at a recent MCEETYA meeting, with the Council requesting the preparation of model uniform legislation for the conduct of criminal record checks of persons seeking to work in educational settings with children (South Australian Government, sub. 165, p. 6). Consistency in the approach taken across jurisdictions may give boards greater comfort that individuals have undergone appropriate checks.

Disciplinary action

With respect to the MRA, the Builders Registration Board of Western Australia commented:

> There appears to be a lack of coordination and cooperation across jurisdictions when it comes to disciplinary action. There is no reliable means that provides for the notifying and recording of information regarding disciplinary action between the States. (sub. 77, p. 3)

Submissions on the TTMRA raised the same concern, for example:

> … while there is a good deal of on-going information exchange amongst the Australian states, there does not appear to be a reliable trans-Tasman system which would alert, for example, the New Zealand regulator if a practitioner entitled to practise in both jurisdictions was disciplined by an Australian regulator. This is an issue that we need to work to address. (New Zealand Law Society, sub. 17, p. 4)

Registration boards do not have the ability to postpone an applicant's registration simply on the basis of pending or current disciplinary action. However, under mutual recognition legislation, if the applicant has falsely stated in their written notice that they are not the subject of disciplinary proceedings or if the applicant has become the subject of disciplinary action since lodging their notice, then there may be grounds for postponement (see section 22 of the *Mutual Recognition (Commonwealth) Act 1992* and section 21 of the *Trans-Tasman Mutual Recognition (Commonwealth) Act 1997*). In any case, it is important to ensure that information is

shared between registration boards, as boards are entitled to act on any cancellation or suspension of registration, or application of conditions to registration, in the applicant's home jurisdiction. If a person's registration is cancelled due to disciplinary action in their home jurisdiction, the second jurisdiction is entitled to refuse or cancel registration.

Some occupations have electronic database registration systems and, in some of these cases, there is scope for interrogation across jurisdictions. There would seem to be scope to expand this practice, thereby addressing some of the concerns raised by boards about information inadequacy. The New South Wales Government supported options to facilitate sharing of information across jurisdictions:

> Information sharing could lead to more efficient processing of applications and allow for improved information sharing across jurisdictions of disciplinary actions initiated in one jurisdiction. However, the cost and practicality of establishing and maintaining systems … requires further consideration. …
>
> Privacy issues would also need to be fully considered before personal data can be transferred across jurisdictions. (sub. DR179, pp. 2–3)

FINDING 5.4

Information flows among registration boards across jurisdictions would be enhanced by a greater use of electronic database registration systems with capacity for access by counterpart registration boards.

Short term provision of services

Several submissions pointed to difficulties encountered by service providers who wished to temporarily practise in another jurisdiction (see box 5.3).

Carrying out a registered occupation while unregistered in that jurisdiction raises substantive issues, even if the individual is registered in the 'home' jurisdiction. For example, the Australian Veterinary Association noted that 'practitioners who provide advice or consultation interstate without registration in the jurisdiction have been sued and their indemnity insurance has failed to protect them' (sub. 111, p. 2). Facilitating the short term provision of services across jurisdictional borders, while still retaining sufficient controls to ensure the maintenance of health, safety and the environment, yields benefits for both the wider community and for individual service providers.

Box 5.3 **Short term provision of services across jurisdictions**

The Australian Physiotherapy Association noted the problems experienced by sports physiotherapists attached to national teams:

> … sporting team physiotherapists travelling with their teams have to register in each State and Territory to which their team travels.
>
> … If required to register in each State and Territory, physiotherapists would be required to pay between $890 and $950 to be registered under the MRA.
>
> … many physiotherapists find the paperwork even more daunting.
>
> … A further complication is the time taken to process applications for temporary registration. Members report waiting periods of eight weeks or more … Once teams enter their finals seasons it is not uncommon to find that the location of the next game will only be known one week in advance. This places physiotherapists in a difficult situation: travel with the team and practice unregistered or do not travel with the team. Clearly both options are unacceptable. (sub. 67, p. 3)

Members of the veterinary profession noted similar problems:

> … the process and cost of individual State registration acts as a barrier to the mobility of veterinarians who wish to carry out acts of veterinary science in NSW.
>
> There are two situations that arise commonly. One is where a NSW veterinarian is injured or becomes ill and urgently needs to find a veterinarian to carry on the work of his/her practice. … it is often that the only people available are interstate. … The need to submit particular documents and fees, with the resultant delay is often enough to deter interstate veterinarians, particularly when they are doing it as a favour for a colleague.
>
> The second situation which is becoming more common is that where the circumstances require that the veterinarian has particular skills. For example, unusual species such as marine mammals or other rare breeds where there are only a few veterinarians in Australasia that have the experience to give valuable veterinary advice. Again, the delay in processing and the fees required are often a barrier to making these people available for the duties the public and animal owners of NSW require. (sub. 61, p. 1)

The Australian Physiotherapy Association also noted similar problems experienced by physiotherapists wishing to undertake professional development in another jurisdiction:

> … the APA has mandated participation by members in professional development activities. Members must participate in such activities in order to retain APA membership.
>
> Many professional development activities have a hands-on therapy component so participants must be registered in order to participate. Members from States such as Tasmania and Western Australia, and in remote areas such as the "Top End", find it necessary to travel to other States in order to attend … These members incur substantial costs in transport and accommodation … The fact that they have to register in the State in which the course is held means extra costs. Additional costs and paperwork provide a disincentive for members to travel to the professional development courses that they need. (sub. 67, pp. 3–4)

Some occupations in Australia avoid this problem by having a system of national registration to allow their members to practise in all Australian jurisdictions without any further paperwork or processes. For example, patent attorneys are regulated at a federal level and their registration is recognised Australia-wide. The Standing Committee of Attorneys-General recently agreed to endorse national legal profession model laws, to further harmonise regulatory requirements across jurisdictions and, in effect, create a national practising certificate (see box 5.4).

Box 5.4 **A national legal profession in Australia**

The legal profession in Australia has been working towards a national legal services market for some time. Since 1994, New South Wales, Victoria, the ACT, the Northern Territory, South Australia and Tasmania have operated a portable national practising certificate scheme (NPCS), so that lawyers temporarily practising interstate could rely on their home practising certificate, insurance arrangements and fidelity fund contributions. Western Australia currently has legislation before Parliament that will introduce the scheme.

However, while the NPSC allowed greater mobility of legal practitioners between the participating jurisdictions, barriers remained. In particular, interstate lawyers who established offices in host jurisdictions had to meet additional requirements related to insurance and fidelity funds. While mutual recognition provisions could be used to move across participating and non-participating states, this still required applicants to gain registration in each jurisdiction in which they practised.

Work continued towards nationally consistent regulation, with the Commonwealth Attorney-General in October 2001 calling for a taskforce to develop proposals for uniformity. This work has resulted in an agreement by Commonwealth, State and Territory Attorneys-General to endorse model provisions as a basis for consistent laws to facilitate a national legal profession. The model provisions will bring uniformity to many areas, including the standards for legal training, the recognition of qualifications and procedures for misconduct, and will allow legal practitioners to practise interstate with one practising certificate.

While the model provisions essentially set standards at a national level, the system maintains the ability of States and Territories to regulate lawyers' compliance with these standards and to participate in the regulation of this profession. This differentiates the system from that of patent attorneys, who are regulated at a Commonwealth level.

Source: Law Council of Australia (2001), SCAG (2003).

The idea of a national practising certificate was raised in the 1998 review of the MRA. Recommendation 6 of that review proposed that 'occupational registration authorities consider, where appropriate, the development of a national practising certificate based on mutually agreed registration requirements'. The Commission

considers that this option should be explored, especially for those occupations that experience relatively frequent service provision across jurisdictional borders. As shown by the legal profession, a national system need not require a new bureaucracy to be set up at the Commonwealth level — once uniform standards are agreed by jurisdictions, individual jurisdictions can continue to apply those standards and monitor their members within existing structures.

The Commission notes that the Victorian Department of Human Services is currently undertaking a review of the regulations applying to health professions, which canvasses the issue of national registration models. A discussion document is due to be released in October 2003. In a previous discussion paper on the regulation of medical practitioners and nurses, the Victorian Department of Human Services noted:

> A truly national system of health practitioner registration may have significant benefits such as:
>
> - a single registration fee and application process, allowing practice anywhere in Australia;
> - uniformity of registration requirements;
> - cost savings for the professions and government; and
> - increased innovation and more timely implementation of reforms. (2001, p. 44)

Other options, such as more streamlined temporary registration processes, could also be considered, perhaps as an interim measure, while national registration systems are implemented. For example, the Australian Council of Physiotherapy Regulating Authorities recommended:

> … that there be more flexibility in the legislative provisions within each state to provide consistent categories for limited or temporary registration to enhance portability between states. (sub. 87, p. 6)

Another good example, highlighted by the Nurses Board of South Australia, was:

> … the agreement by all States/Territories, through the ANC [Australian Nursing Council], to waive the fees where a nurse is required to have registration in more than one State/Territory as a result of working across State/Territory borders. (sub. 63, p. 4)

With an increasing number of service providers operating on a trans-Tasman basis, concerns with short term service provision also arise at the trans-Tasman level. The options presented for short term service provision within Australia are also applicable at the trans-Tasman level.

FINDING 5.5

There are likely to be net benefits from improving the capacity of registration systems to accommodate short notice applications for registration, to allow the short term provision of services across jurisdictions.

FINDING 5.6

Australian occupational registration authorities should continue to consider developing national registration systems where the benefits justify the costs. Such systems would further assist short term service provision across jurisdictional borders.

Jurisdiction shopping

A number of interested parties expressed concern about jurisdiction shopping leading to 'back door entry' ie, individuals 'shop around' to find the jurisdiction with the easiest or cheapest requirements for registration and then use the MRA and TTMRA to move to their preferred jurisdiction.

This concern was most often raised in discussions about the movement of third country trained service providers. In some cases, it appears that New Zealand accepts a wider range of qualifications in satisfying registration requirements than does Australia. This may occur for a variety of reasons, such as historical arrangements or ties with a particular country, or shortages of a particular occupation leading to a loosening of requirements. In other cases, particular Australian States may have lower standards for third country trained service providers.

Several interested parties questioned whether individuals from third countries should have access to the provisions of the TTMRA at all. Some felt that the spirit of the agreement was to enhance the mobility and opportunities of Australians and New Zealanders, not those from other countries. Others were concerned that third country service providers were benefiting from the TTMRA, while Australians and New Zealanders received no reciprocal rights in those third countries.

While it is unclear whether the original agreement envisaged wide-ranging use by third country individuals, it is clear that the economies of Australia and New Zealand gain by having access to skilled people. As such, the more pertinent issue to address is that of ensuring the maintenance of appropriate standards across registered occupations. The New Zealand Government noted:

> … as long as both countries are willing to accept the standards of the other, it is unclear why the origin of the registered practitioner should make a difference. If the practitioner can achieve the registration standards that are accepted under the TTMRA, then their prior history (eg. where they practised prior to residency in Australia or New Zealand) should be irrelevant. (sub. DR159, p. 9)

The New Zealand Government suggested that the more compelling issue was whether appropriate background checks could be carried out on third country practitioners. It noted that 'consultation with registration bodies suggest that the appropriate background checks are carried out' (sub. 110, p. 10).

There is concern that the entry of service providers through the 'easiest jurisdiction' might lower the overall competency of the occupation in Australia and New Zealand and lead to the 'lowest common denominator' becoming the benchmark. A number of professions expressed concerns about the variety of standards accepted across jurisdictions and questioned whether some standards were robust enough to maintain public health and safety (see box 5.5). In contrast, the New Zealand Government noted:

> There is however, as far as the government is able to assess, no evidence in New Zealand to suggest that concerns about lowering of standards are widely held … (sub. 110, p. 9)

The Australian Nursing Federation (ANF) also noted:

> Some commentators have suggested that mutual recognition agreements result in a downgrading of standards as regulatory authorities seek agreement between jurisdictions. In the ANF's view, this has not been the experience for nursing. Our observation is that the standards bar has been raised as the combined resources of nine nurse regulatory bodies (including New Zealand) are used to address safety and quality issues for the nursing profession and the public for whom the legislation is in place. The current system is providing a benchmarking process that can only benefit nurses and nursing practice throughout Australia and New Zealand. (sub. DR170, p. 8)

There is also a concern that 'shopping and hopping' behaviour imposes inappropriate costs on jurisdictions. The Dental Council of New Zealand pointed to problems with the retention of registrants, saying:

> It appears that South African dentists in particular are using New Zealand registration as an 'easier' entry to Australia. They gain NZ registration and then without having lived or practised in New Zealand, use their NZ registration to gain registration in Australia under TTMR. The current retention rate of overseas dentists registered in New Zealand without the need to sit and pass registration examinations is 40% at year two. This is a cause of concern. (sub. 4, p. 1)

Box 5.5 **Variation in standards across jurisdictions**

A number of submissions raised concerns about the variation in standards across jurisdictions. As an example of trans-Tasman concerns, the New Zealand Chiropractic Board highlighted a recent case where:

> … a Canadian chiropractor applied for registration and undertook the Board's competency examinations … The candidate failed the Board's examinations dismally.
>
> The Board then received an application from the same chiropractor under the provisions of the TTMRA. He had been able to obtain registration in Victoria, a state which at that time did not require candidates for registration to undertake competency examinations …
>
> … this chiropractor's inability to pass entry-level competency examinations indicates that he could be a danger to the New Zealand public… (sub. 42, p. 4)

The Australian Dental Association commented:

> A much more serious and significant variation exists between the differing Australian and New Zealand approaches to the registration of overseas-trained dentists. … the New Zealand Dental Council (NZDC) has now adopted a more subjective approach to the registration of overseas-trained dentists. The requirement to sit the Council examinations may be waived on subjective assessment … The consequence is that the more "flexible" (some would say "lower standard") entry possible through the NZDC and the application of TTMRA lead to concerns about the easy "back door" entry of dentists to Australia …
>
> … around 60% of overseas-trained dentists who utilise the easier entry through the NZDC subsequently move across the Tasman to Australia … the standard of dental practice may be lowered and the safety and wellbeing of the Australian community may be compromised. (sub. 62, pp. 2–3)

The New Zealand Psychologists Board noted:

> … we have concerns about the ability of applicants to exploit the varying registration requirements in each jurisdiction … We are aware that two Australian jurisdictions have less rigorous standards than New Zealand, and that applicants have taken advantage of this to achieve registration in New Zealand via TTMR. (sub. 45, p. 1)

There are also concerns within Australia. The Architects Board of South Australia said:

> … the New South Wales Registration authority has, at the instigation of the New South Wales State Government, adopted an alternative method for individuals to become registered. This program enables individuals who have significant experience to become registered without the formal academic qualifications required in all other States.
>
> Individuals … will therefore be registered automatically should they seek registration in another jurisdiction under the Mutual Recognition Agreement.
>
> … this alternative route to registration may … lower standards. (sub. 75, p. 2)

The Builders Registration Board of Western Australia noted:

> … an applicant failed the Board's Assessment Papers to become a registered builder in Western Australia and consequently went to another State and achieved registration there. They then returned to Western Australia … the Board was obliged to grant registration under mutual recognition.
>
> The lack of uniformity of standards is a fundamental problem and these inconsistencies have the potential to erode the quality and standard of the building industry in Western Australia. (sub. 77, p. 2)

DEST noted potential issues with the interaction of mutual recognition and immigration rules:

> To be granted a permanent visa to Australia in the points tested visa categories of the Government's skilled migration program, a successful skills assessment is essential. In some professions this is a lengthy and costly process that some professionals prefer to avoid, instead seeking registration in New Zealand and, on the basis of TTMRA, demonstrating that they meet registration requirements in Australia. (sub. 26, p. 14)

Many submissions suggested imposing a residency requirement to address the concerns about 'hopping' from one jurisdiction to another. For example, the Chiropractors Board of Queensland recommended that:

> … Trans-Tasman Mutual Recognition Legislation be amended so that a person must prove to the local registration authority a period of 6 months residency in either Australia or New Zealand when lodging a notice for registration under Trans-Tasman Mutual Recognition Legislation. (sub. 24, p. 2)

The Nursing Council of New Zealand commented:

> … an overseas nurse may apply and be granted registration in New Zealand, then apply under TTMRA for registration in Australia, without having practised in New Zealand. New Zealand has therefore been used as a mechanism to gain registration in Australia. A requirement for residency in the jurisdiction of registration would mitigate against this practice … (sub. 68, p. 6)

Others considered a period of practice in the first jurisdiction to be appropriate. For example, DEST recommended:

> That the review consider the introduction of a minimum period of New Zealand professional practice to alleviate concerns that some professionals trained in a third country are using the TTMRA to gain permanent Australian residency, instead of going through the usual assessment processes for overseas professionals wanting to work in Australia. (sub. 26, p. 3)

Some submissions suggested a combination of residence and practice. The Australian Institute of Radiography requested that:

> The TTMRA be restricted for Registration of Professionals to those whose qualifications have been gained in Australia or New Zealand
>
> OR
>
> to residents of more than 3 years in New Zealand who have documented three years' full time equivalent clinical experience in NZ. (sub. 70, p. 1)

However, constraints such as residency or minimum practice periods would seem to be heavy-handed and difficult to administer, relative to the potential benefits. Registration boards would incur costs in undertaking further checks relating to an applicant's residency status, yet the fact that a person has lived in a jurisdiction for a

period of time does not guarantee their competency. Boards would also incur costs in checking that applicants have attained a prescribed length of work history and experience in a particular jurisdiction and checking that this work experience appropriately relates to the registration in question. The Victorian Department of Human Services suggested statutory declarations of practice within a jurisdiction could be one option for implementing a minimum practice requirement (sub. DR168, p. 5). This would place the costs on individual applicants rather than registration boards. However, given the lack of quantitative evidence on the size of the problem, it would seem appropriate to avoid imposing these costs on registration boards or individuals.

Some participants also noted that, for their profession, the imposition of residency or minimum practice requirements would severely restrict the mobility of their members and that this would affect their ability to service the public effectively. When registration requirements differ across jurisdictions, it will always be the case that mutual recognition will create the potential for some overall lowering of standards. However, it is not clear that the standards for professions overall have been lowered to a substandard level by 'shopping and hopping'. Restricting the mobility of professionals could impose net costs for some occupations.

Overall, where there are concerns that 'shopping and hopping' is lowering standards or unduly adding to costs, the most appropriate action would seem to involve minimising the differences in requirements across jurisdictions, by reaching agreement on the appropriate competency threshold.

Nevertheless, the difficulty of reaching agreement, and the extent of negotiation needed, should not be underestimated. Attempts to develop Australia-wide competency standards alone have encountered problems. It is also acknowledged that the level of cooperation required for this task is more difficult for smaller professions with more limited resources. The New Zealand Veterinary Association noted that harmonisation was made simpler due to the existence of a trans-Tasman body prior to TTMRA taking effect (sub. 31, p. 1). DEST noted:

> … the resources (time, money and intellectual) necessary to develop relationships with New Zealand counterparts can be difficult for small organisations. For this reason some of the smaller professions struggle to undertake the necessary harmonisation to facilitate mutual recognition across the Tasman. (sub. 26, p. 16)

As suggested in the 1998 review of the MRA, it may be useful for occupational registration authorities to establish (where they have not already done so) a forum for inter-jurisdictional communication and cooperation, where issues relating to mutual recognition can be discussed and resolved (see appendix B, rec. 7).

FINDING 5.7

Jurisdictions in Australia and New Zealand continuing to work on reducing differences in relation to registration requirements, helps to address concerns (including costs incurred) of jurisdictional 'shopping and hopping'.

Local knowledge

Several interested parties expressed concerns that mutual recognition obligations inappropriately overrode the need for local knowledge requirements to be incorporated into the delivery of professional services and inhibited registration boards from imposing local knowledge requirements for registration. Several participants suggested that local knowledge is critical for the safe practise of an occupation, and that anyone moving under mutual recognition should be required to undertake or fulfil local knowledge requirements in the new jurisdiction. For example, the Council of Pharmacy Registering Authorities said:

> This Council therefore strongly urges, for the protection of the Australian public, that the Review supports the plea that discretion be given to pharmacy registering authorities to require one month's supervised practice and to provide a tutorial on forensic matters and the Pharmaceutical Benefits Scheme to all New Zealand applicants before granting registration under the TTMRA. (sub. 71, p. 2)

This concern was also raised in the 1998 review of the MRA. In that case, the review team concluded that the skills and competencies held by a registered person should also give them the ability to understand and interpret the legal and other requirements needed to carry out their occupation. The review team were 'not convinced that this issue represented a significant shortcoming in the way the MRA works or that any changes to the scheme were warranted' (CRR 1998a, section 5.2.13).

The information provided to the Commission for this current review does not provide strong grounds for disputing the 1998 finding. In addition, some participants in the current review noted that the mutual recognition legislation already allows them to impose conditions to ensure local knowledge, such as attendance at a training course on local issues. In particular, a legal opinion for the Pharmaceutical Society of New Zealand said that section 20(3)(a) of the New Zealand legislation, which states that conditions may be imposed to achieve equivalence of occupations, allows them to require applicants to undertake four weeks supervised pharmacy practical training to gain familiarity with New Zealand laws, ethics and medicines subsidy procedures, followed by a satisfactory interview by an approved practising pharmacist (sub. 108, p. 2).

FINDING 5.8

Existing mutual recognition arrangements seem to be sufficiently flexible to address the needs for 'local knowledge' requirements to be incorporated into the delivery of registered occupational services.

Recency of practice

In order to gain (or retain) registration, a number of jurisdictions require individuals to have some degree of 'recency of practice' or proof of current competence eg, to have practised sometime in the last two years, or to have completed a certain number of hours of professional development or passed a competence test. Several participants expressed concerns about those instances where jurisdictions do not require applicants to demonstrate recent practice or current competence, saying that this had the potential to undermine standards. The Health Professions Licensing Authority of the Northern Territory said, for example:

> The legislation governing the registration of nurses in New South Wales is the only Nursing/Nurses Act in Australia which does not contain any recency of practice provision and does not require a nurse to demonstrate competence to be eligible to hold a licence to practise.
>
> This means that regardless of how long a nurse has been out of practice they are eligible to apply to the Nurses Registration Board of New South Wales for a licence to practise …
>
> When the Board in the Northern Territory issues a licence they do so having first satisfied themselves that the person applying for the licence is a safe and competent practitioner. … This basic tenet of licensure is negated due to the current situation in New South Wales. (sub. 58, p. 3)

However, the New South Wales Government advised that this situation is to change:

> … the *Nurses Amendment Bill 2003*, which has now been passed by both Houses of the NSW Parliament, proposes the introduction of a thorough system by which the Nurses Registration Board may assess the competency of an applicant for registration or re-registration. The new Section 4B, to be inserted in the Nurses Act, identifies the factors necessary for a person to be "competent to practise nursing" and Schedule 1B will enable the Nurses Registration Board to hold an inquiry into an applicant's competence to practise nursing. These provisions will enable the Board to consider how recently an applicant has practised nursing. (sub. DR179, p. 3)

The Health Professions Licensing Authority noted that, in theory, they might refuse an application where a person had not practised for many years on the basis of non-

equivalence, but that this approach has not been tested in the AAT (sub. 58, p. 3). Such a case would provide further guidance on the equivalence concept if tested.

Recency of practice requirements are likely to be a low cost hurdle for registration boards to enforce. Such requirements help to ensure adequate standards of professional service. It seems appropriate that any cross-jurisdiction discussions of appropriate standards also encompass the issue of recency of practice.

There is an increasing tendency towards requiring assurance of current competency in addition to recent practice. For example, New Zealand's proposed Health Practitioners Competence Assurance Bill will introduce measures for ongoing competency training and testing across a number of health professions (see box 5.6). Current competency requirements help to enhance confidence in mutual recognition processes, as they provide further evidence of a registrant's ability to effectively provide the service.

Some participants expressed concern that introducing current competency requirements would be costly. The Optometrists Registration Board of Victoria noted:

> … because the Department of Optometry and Vision Sciences, The University of Melbourne will not assess 'current competency', this is not feasible in Victoria without setting up an entirely new process of assessment for registered optometrists. We understand that similar circumstances apply in the other jurisdictions. This would be very costly. An alternative is to rely on The Optometry Council of Australia and New Zealand (OCANZ) to set up some sort of procedure, or even perhaps put people through their present examination or part thereof. In turn this would be costly for candidates. (sub. DR149, p. 2)

However, there may be lower cost options for boards wishing to introduce current competence requirements. For example, the Nursing Board of Tasmania requires a declaration from applicants, rather than administering a test:

> In Tasmania any nurse who applies for registration or re-applies for a licence to practise must sign a declaration to state that she/he has maintained their competence to practise based on the Australian Nursing Council National Competency Standards. (sub. 38, p. 1)

One potential issue with current competency requirements, raised by the Queensland Nursing Council, is whether such requirements could be regarded as 'attainment or possession of some qualification or experience'. Under section 20(4) of the Mutual Recognition (Commonwealth) Act 1992, for example, continuance of registration in the second jurisdiction is subject to the laws of the second jurisdiction, as long as those laws apply equally to all persons carrying on or seeking to carry on the occupation and are not based on the attainment or possession

of some qualification or experience relating to fitness to carry on the occupation. The Queensland Nursing Council said that, if 'competence' could be defined as a qualification or experience, then a board may be unable to administer their regular competency tests on people who registered under mutual recognition:

> … it is possible that a person could be registered in one jurisdiction that did not have a requirement for competence for continued licensure, gain registration in a second jurisdiction through Mutual Recognition that did have such a requirement, and retain registration in the second jurisdiction even though all other practitioners were expected to demonstrate continuing competence for practice. (sub. DR139, p. 1)

The answer to this may depend on the particular form of current competency assessment that registered professionals are required to undertake. Clarity may emerge over time as contentious cases are heard by the AAT and TTOT.

FINDING 5.9

The efficacy of occupational standards and, therefore, confidence in the mutual recognition process, is being enhanced by the trend for jurisdictions to require some degree of 'recency of practice' as a requirement of registration.

Delivery of training

Some concerns were expressed about the operation of the training sector in Australia. In particular, ANTA drew attention to a recent report, *'A Licence to Skill'*, which detailed cases where Training Packages were not consistently accepted by regulators as sufficient for registration (Stenning et al, 2002). The report also noted that, in some cases, training institutions were not teaching the entire Training Package, as constructed by Industry Training Advisory Bodies (ITABs). Some participants in the review speculated whether training providers were occasionally pushing students through qualifications too quickly, in order to mould qualification timeframes to student visa timeframes. Others suggested the training packages did not give sufficient weight to industry requirements.

Box 5.6 Current competency standards – New Zealand health professionals

New Zealand health professionals will soon be operating under a new regulatory framework. The Health Practitioners Competence Assurance (HPCA) Bill provides consistent processes for the registration and ongoing competence of practitioners and requires registration authorities to certify that practitioners are qualified and competent to practise within a certain scope. These scopes of practice describe the activities practitioners are qualified to perform, the conditions under which the activities may be performed and a date for review. Authorities must also put processes in place to ensure practitioners maintain their competence throughout their careers.

The Bill requires registration authorities to describe their professions in terms of scopes of practice and to prescribe qualifications for each scope of practice. These scopes and qualifications must be gazetted. Applicants may be registered to practise within a particular scope of practice if they are fit for registration, have the prescribed qualifications and are competent to practise within the scope of practice. Conditions (eg supervision) may be attached to a practitioner's scope of practice, if this is required to ensure competent practice. Practitioners must hold a current practising certificate (issued annually) in order to practise. This certificate details the scope of practice approved for the practitioner.

The TTMRA is not affected by the provisions of the HPCA. An applicant who is registered in Australia will have their registration recognised and will be entitled to be registered for the equivalent occupation in New Zealand. An applicant's individual annual practising certificate will be tailored to ensure that the scope of practice in New Zealand matches the applicant's activities in Australia.

The optometry profession believe that the introduction of the HPCA legislation will resolve their difficulties with the entry of British optometrists, in particular, the ability of members of the British College of Optometrists to be registered in New Zealand without examination. The Optometrists Association had noted:

> … This decision provides a back-door entry for UK registered optometrists who wish to practise in Australia but want to avoid a test of their competency to register in Australia. …
>
> … No optometric registration board, no head of optometry school, no professional association in any jurisdiction in Australia or New Zealand regards UK registration as suitable for automatic registration in Australia or New Zealand. (sub. 79, p. 2)

The Association believes that the requirement for boards to gazette scopes of practice and related qualifications will enable the New Zealand optometry registration authority to remove the automatic acceptance of the British qualification, thus resolving their concern with the operation of mutual recognition.

Source: New Zealand Ministry of Health http://www.moh.govt.nz/moh.nsf/wpg_Index/Publications-Health+Practitioners+Competence+Assurance+Bill (accessed 11 August 2003). Health Practitioners Competence Assurance Bill Explanatory note.

The quality delivery of training is vital for maintaining trust in competency qualifications. That trust is crucial for maintaining confidence in the mutual recognition system. Confidence in the quality of a person's training provides a solid basis for recognising their competence and skills under the MRA and TTMRA. Quality training can be supported by vigorous assessment of training providers, independent accreditation of those providers and robust and regular auditing procedures. In addition, agreement on the appropriate training required to practise a particular profession would help to underpin agreement across jurisdictions on the appropriate standards required for registration. As such, it would be valuable for those jurisdictions undertaking work to reduce differences in registration requirements to engage with training providers and ITABs to ensure that agreed standards are backed up by a robust and appropriate training program.

5.3 Appeal processes

Goods

There are no formal appeal bodies for goods trade designated in the mutual recognition legislation. Instead, any appeals or challenges are heard in the courts. There appears to have been little use of this appeal mechanism, although this does not necessarily indicate a lack of problems. Some interested parties indicated that individual firms often found it less costly to meet a second set of regulatory requirements in the second jurisdiction than to defend themselves in, or initiate, court proceedings. This is quite contrary to the intention of mutual recognition and indicates that there may be scope for a lower cost appeal mechanism for producers and sellers of goods in the trans-Tasman market.

In addition, while the TTMRA provides a legal defence for the sale of goods, the apparent lack of scope for suppliers to bring an action against parties refusing to accept their goods at all is of concern to some parties. The New Zealand Government questioned:

> … rather than simply providing for a defence to prosecution after the event, should the regime provide a mechanism for determining whether the regime applies to permit goods to be sold, in advance of such sales? (sub. 110, p. 18)

One option for dispute resolution in the goods area would be to establish an advisory forum, made up of representatives from each jurisdiction ie, a review group of officials. For example, the forum could take the form of a senior officials group reporting to COAG or to COAG's Committee for Regulatory Reform (CRR), with technical expertise sought as required from officials and other persons in the

relevant jurisdictions. The group could provide policy-oriented guidance on issues where the proper operation of mutual recognition with respect to goods trade appears to be impeded and make recommendations on how the issues might be resolved. Recommendations could then be considered by CRR and actioned as appropriate.

This sort of forum has been advocated by those in industry. For example, the New Zealand Employers and Manufacturers' Association (Northern) recommended that:

> … a Joint Watch Dog group be established by both the New Zealand and Australian Government to monitor the development of the TTMRA and that this group becomes responsible for identifying new areas for the TTMRA to address while acting meanwhile as an arbitrator for the agreement. (sub. 83, p. 7)

The forum could investigate concerns brought to it by industry, consumers or government. The establishment of this forum is discussed further in chapter 9.

Occupations

Formal appeal mechanisms exist for those individuals whose registrations have been declined or who have had conditions imposed on their registration and where these issues cannot be resolved within registration boards' internal appeal processes. If a registration body decides that an occupation is not equivalent, or that conditions need to be imposed to achieve equivalence, the body must advise the applicant that they have recourse to the AAT (Australia) or the TTOT (New Zealand) — the bodies designated in the mutual recognition legislation to hear appeals relating to the decisions of registration boards. The Nurses Board of Western Australia noted that appeals may also be made to the District Court and that once the Western Australian State Administrative Appeals Tribunal is established in 2004, appeals will be able to be made to this body as well (sub. DR143, p. 1).

The AAT has heard a number of cases since the inception of the MRA in 1992, with a number of further cases being resolved at the pre-hearing stage. No cases have been formally heard by the TTOT. However, to April 2003, two cases had been filed with the TTOT, with both reaching resolution before the hearing stage (TTOT, Wellington, pers. comm., 10 April 2003).

Case law formed by the AAT has helped to shape the way mutual recognition works for occupations. In particular, it has provided guidance on the concept of equivalence. Tribunal members take into account mutual recognition legislation, other relevant legislation relating to the occupation and opinions from industry experts in making their decisions.

However, some professional groups have concerns with the interpretations of mutual recognition concepts that are emerging from the AAT. For example, in the nursing profession, some jurisdictions run single registers (where all nurses are classified as general nurses), while other jurisdictions run multiple branch registers (where nurses may be classified as, say, a mental health nurse, a comprehensive nurse or a midwife). In discussing the difficulties in determining equivalence of nurses in cases where jurisdictions' classification systems differ, the Queensland Nursing Council noted:

> … an applicant with registration as a nurse in a jurisdiction with a single register, applied for licences to practise in several different categories of the multiple branch register operated by another jurisdiction. Although the second jurisdiction initially refused to grant a licence for other than general nurse practice, a decision of the Administrative Appeals Tribunal overturned this decision and required that licences be granted in the other categories. This may lead to the situation where a nurse is licensed to practise in a field for which they have had little educational preparation or relevant experience. (sub. 7, p. 2)

In this case, the AAT reasoned that medical organisations would be unlikely to employ a nurse in areas beyond their capability or expertise and that employers selecting candidates would take work experience into account (ORR 1997, p. 85).

Some participants requested that the concept of equivalence (and conditions which may be imposed to achieve equivalence) be developed into specific guidelines for registration authorities (see, for example, the Queensland Government, sub. DR151, p. 2). However, given that occupations vary so widely, it is probably difficult to set out more specific guidelines for equivalence than those that are already contained in the mutual recognition legislation. The specificity of the appeals process via the AAT and TTOT is its strength, in that decisions are made that are relevant to the particular case. This is preferable to asserting a general rule that may not be appropriate for every occupation. The New South Wales Government suggested harmonisation of occupational standards or the development of national standards may be an alternative means of addressing equivalence disputes under the TTMRA and MRA (sub. DR179, p. 8).

More generally, some submissions expressed dissatisfaction with the appeal mechanisms open to them. For example, the Optometrists Association of Australia said:

> Our concerns about the New Zealand Government's decision to accept British optometric qualifications without examination have not been alleviated by the explanation of the appeals mechanisms available under the TTMRA. It would be beyond the resources of optometrists' boards in Australia to make the necessary appeals and we find it difficult to believe that we would be able to influence the Ministerial Council on a matter such as this. (sub. 79, p. 4)

Some interested parties suggested there was a lack of awareness amongst individuals (particularly those in occupations with weaker unions) of the availability of an appeal process. However, registration boards are obligated under the mutual recognition legislation to inform individuals of their right to appeal if their registration is declined or has conditions imposed.

There may be scope for raising awareness amongst entities involved in registration of their responsibilities under the legislation, to ensure their obligations with respect to appeals are fulfilled. There may also be scope to raise awareness amongst individuals of their rights to appeal under the mutual recognition legislation. This could be achieved within the awareness campaigns proposed in finding 5.2.

5.4 Monitoring and compliance systems

At the outset of both the MRA and the TTMRA, processes were set up to allow monitoring of the arrangements. Under the MRA, the Parties agreed that Heads of Government may request Ministerial Councils to report on the effectiveness of the scheme and, with respect to occupations, Heads of Government would request the Ministerial Council on Vocational Education, Employment and Training (and its successors) to monitor and report on the scheme (see section 7.1.4 of the Inter-governmental Agreement on the MRA). Under the TTMRA, sections 12.2.1 and 12.2.2 of the Inter-governmental Agreement require Heads of Government of the participating parties to monitor the effectiveness of the arrangement and make resolutions on the future operation of the arrangement, and enable the relevant Ministerial Councils to report on the effectiveness of the arrangement in their particular area of responsibility and of the arrangement overall.

Despite these provisions, however, little monitoring appears to have taken place. When the MRA was introduced, the Federal Bureau of Consumer Affairs was officially charged with monitoring its operation. This organisation was subsequently abolished and it is unclear which body, if any, picked up the responsibility. It is also unclear whether Ministerial Councils have undertaken any monitoring work. With respect to the TTMRA, while individual departments, such as DEST, have attempted to gather some data in areas of interest to them, there is a lack of coordinated information gathering for the scheme as a whole. Regular reviews of the MRA and TTMRA, such as this one by the Commission, in accordance with provisions of the two schemes, appear to represent the most regular form of monitoring.

As noted earlier in the chapter, compliance with mutual recognition obligations is also sometimes less than adequate. This may be due to a lack of awareness, or a more deliberate disregard for the obligations contained in the agreements. The Victorian Government suggested that:

> Registers in each jurisdiction of the licensing/registration schemes to which mutual recognition applies could be used to actively promote accountability for mutual recognition policy and the quality of public information on mutual recognition at the licensing scheme level. (sub. DR168, p. 5)

To ensure appropriate monitoring and compliance takes place, responsibility for these tasks needs to be made clear. While each jurisdiction may have a department or central agency that is nominally 'responsible' for mutual recognition, it appears that, in some cases, their role is not widely known. The division of responsibilities between each State, Territory and central/national government needs to be clarified and restated.

The Australian Nursing Federation suggested evaluation and monitoring at the occupational level should be supported:

> The lack of any formal evaluation within nursing of either the application or the outcome of the mutual recognition agreements is of concern to the ANF. We would strongly recommend that the Federal Government provide financial support for those occupational groups that are effectively implementing and monitoring the MRA and the TTMRA. The majority of costs associated with nursing regulation are borne by nurses themselves ie through their registration fees. Nurses obviously receive some benefits from the mutual recognition agreements, however there are other positive outcomes for the nation and for the States and Territories. The Federal Government could fund, for example, the costs associated with national and international collaboration as well as review and evaluation. (sub. DR170, p. 12)

The importance of strong leadership, monitoring and enforcement was illustrated by national competition policy. In particular, competition policy showed that to maintain a robust policy process, it is vital for there to be an area that ensures that the process retains its integrity, that reliable information is collected to inform decision makers about the efficacy and efficiency of the system, and that jurisdictions play by the rules. The support of COAG and the Commonwealth Cabinet gave the Competition Policy program authority and 'political muscle', thus reducing the risk that jurisdictions would renege on their agreed obligations (Holmes & Argy 1997). The National Competition Council, in its capacity as an assessment body, also helped to maintain momentum and focus within the jurisdictions.

FINDING 5.10

Responsibilities for oversight, monitoring and enforcement should be clarified and restated. Monitoring of, and compliance with, mutual recognition obligations are enhanced by each jurisdiction's designated coordinating department or agency taking active responsibility for mutual recognition.

6 Regulation and standards processes

Mutual recognition operates within a vast framework of laws, regulations and standards that influence the characteristics of goods for sale and the criteria for registration in an occupation. Hence, the coherence of the processes by which these laws, regulations and standards have been created are crucial to the operation and acceptance of mutual recognition by participating parties. This applies at the State and Territory, national and trans-Tasman level.

This chapter discusses regulation making at a general level, the mechanisms for raising awareness of mutual recognition obligations within this process and issues around uniformity (section 6.1). The processes under the MRA and TTMRA for setting standards for goods and occupational registration, including the exemption and referral processes, are discussed in section 6.2.

6.1 Regulation and mutual recognition

In response to the operation of the MRA, which highlighted discrepancies in standards between jurisdictions and created an impetus for the development of national standards, in 1995 the Council of Australian Governments (COAG) endorsed *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies* (Principles and Guidelines) (COAG 1997). The purpose of this document was to:

> … ensure that where new standards are considered, they are subject to sufficient scrutiny to guard against the imposition of unnecessary regulation. … The aim of any national standards setting process should be to achieve minimum necessary standards, taking into account economic, environmental, health and safety concerns. (COAG 1997, p. 3)

These Principles and Guidelines are intended to govern the approach of Ministerial Councils and other inter-governmental standard setting bodies when developing any proposals that have a regulatory impact. While they were particularly developed to support the temporary exemption and referral mechanisms established under the MRA, they are intended to have much wider application. The Principles and Guidelines require the preparation of a regulatory impact statement (RIS) for new regulations, or existing regulations which are reviewed or reformed.

In Australia, RISs are also required at a Commonwealth level, and by most States and Territories, although not by local governments. New Zealand also requires all policy proposals submitted to Cabinet that result in government bills or statutory regulations to be accompanied by a RIS. The requirements for RISs in Australia are discussed in box 6.1, while the New Zealand requirements are set out in box 6.2.

Policy awareness

There are a large number of departments, regulatory agencies and other bodies involved in the development of policy relating to the regulation of goods and occupations. Many entities have individual responsibility for policy development in their specialist area.

The extent to which these entities individually take MRA and TTMRA obligations into account in their policy making, and collectively ensure consistency between and across policies, is unclear. In formulating policy, officials have a myriad of factors to consider — international obligations, industry concerns, social impacts, interaction with other policy initiatives and so on. The obligations of mutual recognition are just one facet, and a recent one at that, that policy makers need to keep in mind. It is perhaps not surprising that, at times, new policies do not mesh in with mutual recognition. For example, the Commission notes that legislation regulating fuel quality standards does not appear to give due consideration to mutual recognition issues. While the *Fuel Quality Standards Act 2000* creates a national fuel standard for Australia, it does allow for higher standards to apply in specified areas in Australia. Western Australia has higher fuel standards particularly in regard to a fuel additive MTBE, which is regarded as a potentially carcinogenic water pollutant. However, there is no account taken of mutual recognition obligations in the legislation. The *Australian Fuel Quality Standards Amendment Regulations 2001* included a temporary exemption for fuel for the TTMRA. This ceased to have effect after 31 December 2002.

Box 6.1 **Australian Regulation Impact Statement (RIS) requirements**

A RIS is a document prepared by the department, agency, statutory authority or board responsible for a regulatory proposal. It requires an assessment of the costs and benefits of various feasible options, followed by a recommendation supporting the most effective and efficient option. A RIS should be available for consideration by decision makers prior to decisions being taken about regulatory issues. RISs are used by all levels of government except local government. RISs should be publicly available.

The RIS process for national standard setting

COAG requires RISs to be prepared for new regulations proposed, or existing regulations which are reviewed or reformed, by Ministerial Councils and national standard-setting bodies. These requirements are set out in COAG's *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies* (COAG 1997).

Where a Ministerial Council or standard-setting body proposes to agree to regulatory action or adopt a standard, it must first certify that the regulatory impact assessment process has been adequately completed. Adequate completion requires that an impact statement for the proposed regulatory measures has been prepared, which:

- demonstrates the need for regulation;
- details the objectives of the measures proposed;
- outlines the alternative approaches considered (including non-regulatory options) and explains why an alternative approach was not adopted;
- documents impacts, showing which groups benefit from regulation and which groups pay the direct and indirect costs of implementation;
- demonstrates that the benefits of introducing regulation outweigh the costs (including administrative costs);
- demonstrates that proposed regulation is consistent with relevant international standards (or justifies the extent of inconsistency); and
- sets a date for review and/or sunsetting of regulatory instruments (COAG 1997, pp. 12–13).

The RIS process for the Commonwealth

Commonwealth departments, agencies, statutory authorities and boards making, reviewing and reforming regulations, must comply with the procedures and processes set out in *A Guide to Regulation* (ORR 1998).

The seven key issues to be addressed in a Commonwealth RIS are:

- the problem or issues which give rise to the need for action;
- the desired objective(s);

Continued next page

Box 6.1 **(continued)**

- the options (regulatory and/or non-regulatory) that may constitute viable means for achieving the desired objective(s);
- an assessment of the impact (costs and benefits) on consumers, business, government and the community of each option;
- a consultation statement;
- a recommended option; and
- a strategy to implement and review the preferred option (ORR 1998, p. A2).

A major part of the RIS is analysing the impact of the proposed regulatory measure. Impact assessment may include formal cost-benefit analysis or risk analysis, or more informal qualitative analysis. In looking at the impact of proposed regulatory measures, policy makers are asked to consider how proposals will affect existing regulations and the roles of existing regulatory authorities (ORR 1998, p. D7). This is to ensure that new regulations do not conflict with, or duplicate, existing regulations.

In considering the costs, benefits and impacts of any proposed regulatory measures, Commonwealth officials are explicitly asked to pay particular attention to several areas:

- A RIS must examine whether regulatory options restrict competition. A RIS should not recommend a regulation that restricts competition unless it can be demonstrated that the benefits to the community outweigh the costs, and that there are no alternatives for achieving the desired objective.
- All RISs should include an analysis of the effects on small businesses of the proposed regulation, including consideration of the paperwork and regulatory burden on these businesses. A Trade Impact Assessment should be undertaken as part of the RIS, when proposed regulation will have a direct bearing on export performance (ORR 1998, pp. B6–7).

State and Territory RIS processes

Formal RIS requirements exist in New South Wales, Victoria, Queensland, South Australia, Tasmania, the Northern Territory and the ACT. Western Australia does not have formal RIS requirements, however, it does have requirements for Small Business Impact Statements (SBIS) and Regional Impact Statements. RIS requirements for each State and Territory are outlined in appendix E of *Regulation and its Review 2000–01* (PC 2001) and appendix D of *Regulation and its Review 2001-02* (PC 2002a).

Sources: COAG (1997), ORR (1998), PC (2001), PC (2002a).

Explicitly noting mutual recognition obligations in RIS guidelines would assist in raising the profile in Australia of mutual recognition obligations for policy advisers. Mutual recognition would then become another item on the 'checklist' of possible impacts, including on competition, on trade and on small business (as is required by the Commonwealth Government), that a policy may have.

In New Zealand, the guidelines for RISs are less prescriptive. As with Australian RISs, New Zealand RISs must incorporate discussions of feasible options and possible impacts. However, while RIS guidelines in Australia explicitly mention trade, competition and small business as areas to be assessed, the New Zealand RIS guidelines specify broader categories, such as 'direct and indirect impacts' and 'administrative and compliance impacts'. Consideration of trade, competition and other impacts are intrinsically to be included in the cost-benefit analysis. One area that is given explicit mention in New Zealand RIS guidelines is the impact on compliance costs for business. Where such compliance costs exist, policy makers must include a Business Compliance Cost Statement (BCCS) alongside the usual RIS analysis. There may be scope for mutual recognition to be given more prominence in the RIS guidelines for policy makers. Guidance could also be given to policy advisers via the New Zealand Legislation Advisory Committee (LAC) Guidelines, as described in box 6.2.

Participants supported initiatives for raising awareness of mutual recognition amongst policy makers. The New Zealand Employers and Manufacturers' Association (Northern) said:

> The EMA advocates that new regulations should be tested against mutual recognition in either country to ensure that proposals will be consistent and not impose trade barriers between New Zealand and Australia. (sub. 83, p. 7)

The Cosmetic Toiletry and Fragrance Association (CTFA) expressed a similar view:

> TTMRA should be looking to produce from the respective Governments policy that aligns and compliments when considering regulations. The CTFA believes that it is necessary to have all such policies tested against the TTMRA on a basis of impact, costs to mutual recognition business and domestic impact. This does not mean that domestic priorities might not apply, such as security, but such issues would be the exception rather than the rule. (sub. 34, p. 7)

Governments generally intend that a RIS be prepared early in the policy-making process to ensure important impacts and issues are identified early. However, some interested parties felt that improvements were needed in this area. For example, Business New Zealand commented that 'too many statements still seem as though they have been included as an afterthought and lack rigorous analysis' (sub. 113a, p. 8).

Box 6.2 **New Zealand RIS and LAC requirements**

In New Zealand, all policy proposals submitted to Cabinet that result in government bills or statutory regulations must be accompanied by a RIS, unless an exemption applies. Where a proposal has business compliance cost implications, a Business Compliance Cost Statement (BCCS) must be incorporated into the RIS (Cabinet Office 2001a, p. 18).

A RIS should contain statements on:

- the nature and magnitude of the problem and the need for government action;
- the public policy objective(s);
- feasible options (regulatory and/or non regulatory) that may constitute viable means for achieving the desired objective(s);
- the net benefit of the proposal, including the total regulatory costs (administrative, compliance and economic costs) and benefits (including non-quantifiable benefits) of the proposal, and other feasible options; and
- the consultative program undertaken (Ministry of Commerce 1999, pp. 1–2).

A BCCS should identify:

- the source of any compliance costs;
- the parties likely to be affected, by sector and size of firm;
- quantitative (if possible) or qualitative estimates of compliance costs (both in aggregate and upon individual firms, persons);
- the longer term implications of the compliance cost for business — are they one-off costs? Will they be reducing over time?;
- an assessment of the risks associated with any estimates and the level of confidence that can be placed on the compliance costs assessment;
- the key issues relating to compliance costs identified in consultation;
- any overlapping compliance requirements with other agencies; and
- the steps that were taken to ensure that compliance costs were minimised (Cabinet Office 2001b).

The Legislation Advisory Committee's (LAC) *Guidelines on Process and Content of Legislation* (2001) provide a further checklist for officials, including consideration of appropriate consultation, interaction with international obligations and standards, and relationship to existing law.

Sources: Cabinet Office (2001a) and (2001b); LAC (2001); and Ministry of Commerce (1999).

See http://www.med.govt.nz/buslt/compliance.html

Use of the RIS framework early in the policy-making process is to be encouraged, particularly where issues of mutual recognition are involved. Simply put, the sooner issues are raised, the easier it is to deal with them, especially when issues span several jurisdictions — for example, a proposed regulation at State level regarding the labelling of a product has the potential to involve eight other jurisdictions in Australia, as well as New Zealand. Jurisdictions noted that the TTMRA could be perceived as an obstacle to policy development, if its effects were not considered early on:

> Early identification of TTMRA issues and implications could lead to more integrated or innovative policy as it would enable alternative approaches to be considered or more fully explored. It could also identify alternatives to regulation, or alternatives that are less administratively cumbersome. (sub. DR167, p. 9)

The New Zealand Government also noted:

> In the past problems have arisen due to a failure to recognise the implications of the Arrangement and factor this into the cost benefit analysis at an early stage of the policy development process or due to an unresolved conflict between the objectives of the TTMRA and other policies in the area of social regulation. The Regulatory Impact Statement regimes in both countries provide a good mechanism to raise this awareness of the TTMRA and introduce some obligations on policy makers to incorporate the Arrangement in the policy development process. (sub. DR159, p. 2)

Consultation is a vital part of the preparation of a RIS and, as such, enforcement of the consultation requirement is taken seriously by Australia's Office of Regulation Review (ORR). Within Australia, relevant groups for consultation purposes may include bodies and individuals at the Commonwealth, State and Territory and local government levels, businesses, consumers, unions, environmental groups and any other groups affected by the regulatory process.

For trans-Tasman mutual recognition issues, where standards may be set by Ministerial Councils or other national standard-setting bodies, consultation must also include relevant bodies and individuals from New Zealand. In addition, any ORR comments on a RIS, and responses made by Ministerial Councils or standard setting bodies, are available to New Zealand as well as State, Territory and Commonwealth parties (COAG 1997, p. 15).

In general, participants did not appear to have problems with RIS consultation processes on a trans-Tasman basis. Even so, the Commission has previously noted the scope for Australia and New Zealand to further harmonise their regulation-making processes, including the application of COAG RISs (PC 2002a, p. 53). Since 2001 the ORR has worked closely with New Zealand officials, with New Zealand establishing a formal RIS system very similar to that of the Commonwealth. This dialogue should continue, to ensure that impact assessment is

thorough and that concerns from both sides of the Tasman are addressed. The National Occupational Health and Safety Commission (NOHSC) considered that, while policy processes could be enhanced by including mutual recognition obligations in RIS guidelines, as suggested in the Productivity Commission's preliminary findings, further alignment of RIS requirements was still required:

> … the differences evident between current Australian and New Zealand Regulatory Impact Statement (RIS) requirements … may still result in different outcomes that may not benefit trade between both countries. … Australian (Commonwealth) RIS requirements are somewhat more stringent than RIS requirements in New Zealand. … the TTMRA would be better served if RIS requirements were more adequately aligned between Australia and New Zealand. This is also true for the Commonwealth and States/Territories in regard to the MRA. (sub. DR177, p. 6)

There is still scope for a more integrated approach to the development of RISs. Ensuring the participation of both Australia and New Zealand officials in the preparation and approval of RISs for Ministerial Council standard-making processes would enable trans-Tasman issues to be uncovered more quickly and would be more efficient than running two parallel RISs. It would also set the resolution of differences between the jurisdictions within a robust analytical framework. This approach may require some adjustment of current RIS processes.

The range of legal instruments to which RIS requirements apply vary across jurisdictions. In particular, they are not always required for primary legislation or legislative reviews. To address this gap, the New South Wales Treasury has proposed 'incorporating mutual recognition issues into other policy and regulation-making processes, even where a RIS is not required (for example, legislative reviews)' (sub. DR179, p. 4).

At a broader level, a strong and active department or body providing oversight of mutual recognition policy and operations at a national level enhances the consistency and coordination of policy. There is an inherent tendency for policy making to become 'department-focused', with different responsibilities being allocated to different departmental silos. Central oversight bodies reduce the risk that mutual recognition issues are overlooked at the policy formulation stage, and the attendant risk that policies conflict with one another. They may also provide impetus for looking at new areas of policy. Also, as noted in chapter 5, monitoring of, and compliance with, mutual recognition obligations is enhanced by each jurisdiction's designated coordinating department or agency taking active responsibility for mutual recognition. The New Zealand Government pointed out the importance of communication between these agencies, saying 'coordination between jurisdictional contact points is also essential for the consistent and timely delivery of information on the implications of the TTMRA' (sub. DR159, p. 2).

FINDING 6.1

The incorporation of mutual recognition considerations into Australia's policy and regulation-making processes would be enhanced by explicitly including mutual recognition obligations in the regulatory impact statement requirements or guidelines that apply at each level of government. Where policy and regulation-making processes do not require a regulatory impact statement, jurisdictions should devise other practical ways to ensure mutual recognition issues are addressed, where appropriate.

FINDING 6.2

The incorporation of mutual recognition considerations into New Zealand's policy and regulation-making processes could be enhanced. New Zealand's regulation impact statement requirements may be adaptable to encompass them. Alternatively, New Zealand could explore including such requirements into its Legislation Advisory Committee Guidelines.

Uniformity of standards

While mutual recognition can be an effective means of reducing the impact of different standards across jurisdictions, there are occasions where uniformity of standards is considered to be the most desirable outcome. In this case, the way in which standards are adopted by jurisdictions has important consequences for the ease of achieving uniformity.

In New Zealand, the process for adopting a standard at a national level is relatively straightforward. Once a standard is incorporated into legislation or regulations, it then becomes a legal requirement.

However, the process is not so simple in Australia, due largely to the greater number of jurisdictions and the powers each jurisdiction has over standard setting. In areas where the Commonwealth has the authority to set standards, standards are written into legislation or regulations and implemented uniformly across Australian jurisdictions (for example, intellectual property). But in areas where the States and Territories have the authority to set standards, a proposed national standard may be adopted to different degrees in different ways across jurisdictions. For example, standards prepared by NOHSC (say, in the area of workplace hazards) may be adopted in three different ways by States and Territories, by the introduction of:

- a '*template*', where the content of the standard is identical to that put forward by NOHSC;

- a '*mirror*' standard, where the outcomes and objectives of the standard are the same, but the content may differ; or
- a '*reference*' to another jurisdiction's legislation.

Standards may be set out in *model laws*, such as those developed for the legal profession (discussed in chapter 5). The National Road Transport Commission (NRTC) noted it had moved from template laws to model laws and policy principles as a process for implementing national road transport law, due to difficulties with applying the template process:

> Current thinking favours future road transport legislative reforms being produced by model law, which jurisdictions would be able to reference or substantively implement. Reasons for this view are:
>
> - the template approach has had only limited success; …
> - instead of compelling jurisdictions to adopt every word of a legislative document, which is the hallmark of a template system, jurisdictions are encouraged to contribute to the development, approval and implementation of a legislative document which is developed as a model to guide them in implementing agreed national policy locally; … (sub. 122, pp. 9–10)

The ability of States and Territories to introduce 'variations on a theme' can introduce difficulties in those areas where officials are working hard to achieve harmonisation. Even seemingly subtle differences in legislation can have substantive effects on the nature and content of a particular standard, leading to higher compliance costs for suppliers and service providers in meeting standards across jurisdictions. The ability of States and Territories to unilaterally alter or amend standards also has implications for the resolution of exemptions (discussed in chapter 8). Where collectively agreed decisions are made at a Ministerial Council or national level, and agreement is reached about a legislative change or task to be undertaken, jurisdictions should be encouraged to follow through on their commitments and to make clear any reservations they may have with adopting the Ministerial Council agreement.

FINDING 6.3

The reduction in impediments to economic integration would be assisted by establishing follow-up mechanisms to help ensure that agreed national standards are introduced at a jurisdictional level in a way that does not compromise the intent and operation of those standards. Where a jurisdiction does not intend to directly adopt a national standard developed through the Ministerial Council process, it should make this clear at the time to see if differences can be resolved.

6.2 Standard setting

Standards are formulated by bodies at a variety of levels, from international bodies, to national regulators, to local councils, to the private sector itself. Some standards are used voluntarily by firms and individuals in their day-to-day activities, while others are written into legislation and made mandatory. The mutual recognition obligations of the MRA and TTMRA apply to *mandatory standards* applying to the sale of goods and the registration of service providers. These can take the form of a range of different instruments, ranging from primary law to subordinate legislation to technical standards. Technical standards may be either directly embodied in legal instruments or referenced so that updates to the standards are automatically made law.

The crux of mutual recognition is the recognition of standards — on safety, competence, material contents and so on — that set the rules for what is legally sold and who is registered. It is important that these standards are robust, as greater trust in the standards and product development of other jurisdictions leads to greater comfort in accepting the obligations of mutual recognition.

Under the MRA and TTMRA schemes, the exemption and referral processes also constitute explicit mechanisms by which standards can be introduced or changed at the national and trans-Tasman levels. These processes were introduced to resolve any tensions that arose due to the impact of differences in standards under mutual recognition obligations. They are an important mechanism by which to achieve harmonisation in areas where mutual recognition is impractical.

Most crucially, whatever body prepares the standards, the developers and/or the sponsoring regulators (be it a department, ministry or regulatory agency) ought to follow best practice in developing a standard, as outlined in COAG's Principles and Guidelines, including the preparation of a RIS. Otherwise, there is a risk that the benefits of the regulation will not be maximised nor its costs minimised. One of a number of concerns is that regulatory trade barriers will be unnecessarily created. Objectivity, consultation and participation by interested parties helps to ensure standards are robust and appropriate.

This section discusses those bodies that set standards for goods and occupations, then looks at each standard setting mechanism under the MRA and TTMRA, describing how they work and identifying particular issues associated with each. They include the permanent exemption process, special exemptions, temporary exemptions and the referral mechanism.

Standard-setting bodies

Goods

Internationally, many technical standards are formulated by the International Organisation for Standardisation (ISO), the International Electrotechnical Commission (IEC) and the International Telecommunication Union (ITU). Other international bodies such as the UN and OECD also play a role in developing standards. Compatibility with international standards, where possible, is recommended in both COAG's *Principles and Guidelines* and in MRA/TTMRA documentation. As mentioned in chapters 2 and 3, standards should also be in accordance with Australia's and New Zealand's obligations under the WTO.

The national standards bodies, Standards Australia International Ltd (Standards Australia/SAI) and Standards New Zealand (Standards NZ/SNZ), play a particularly important role in developing technical standards, whether they are adopted from international standards or developed locally. Both bodies work closely with industry, consumers and government in Australia and New Zealand to develop standards and have a policy of adopting international standards wherever possible. Standards NZ noted that the hierarchy for reviewing or proposing standards is: first, to look for an appropriate international standard that could be adopted or used as a basis for a joint Australia/New Zealand standard; second, to formulate or amend a joint standard; and, third, to only develop a new national standard if necessary (sub. 105, p. 2). If adopted by regulators or otherwise included in the legislative requirements for the sale of goods, then these standards are subject to mutual recognition obligations.

Standards NZ and Standards Australia signed an 'Active Cooperation Agreement' (ACA) in 1992 and have had a close relationship, with annual Board-to-Board meetings and cross-representation on each other's Councils. Under the ACA, both organisations are responsible for project managing a proportion of the total joint standards development, with Standards Australia taking on 85 per cent of projects and Standards NZ taking on 15 per cent of projects (Standards NZ, sub. 105, p. 2). This ratio is based on the population differential between the countries. Projects range in complexity, with some projects simply requiring a committee to review an international standard for adoption in Australia and New Zealand, while others require a full standards development process. Standards NZ noted that 76 per cent of standards in New Zealand are now joint standards with Australia (sub. 105, p. 3). In Australia, 2000 of the 6700 Australian Standards are joint Australia-New Zealand standards (Standards Australia, sub. 51a, p. 1).

The ACA was scheduled to expire on 29 June 2003, however, with the mutual agreement of the two bodies, it was extended until 29 September 2003. Standards Australia and Standards NZ have been in the process of renegotiating the ACA. Standards Australia noted:

> … SAI has been attempting to renegotiate the ACA with SNZ with the view of arriving at a replacement agreement in the form of a memorandum of understanding that would be fair and equitable for both SAI and SNZ and that would reflect the wishes of both Australia and New Zealand stakeholders. (sub. DR173, p. 1)

Standards NZ said:

> Subsequent to our submission [sub. 105] SNZ was advised by SAI that it did not wish to renew the ACA, instead it preferred to enter an agreement that in essence reflected the commercial objectives of SAI, including exploitation of copyright and cost sharing of standards development. In the absence of a mutually acceptable agreement the ACA and therefore the ability to develop Joint Standards will lapse on 29 September 2003. (sub. DR162, pp. 1–2)

Standards Australia's desire to renegotiate the ACA may partly be due to a perception that the current ACA has not been successful. It noted:

> The outcomes have not been as successful as originally anticipated … In most cases these joint standards represent issues where:
>
> - both countries agree to adopt or harmonise with an international standard, or
> - an Australian Standard already exists and is used in New Zealand without a significant need to prepare a separate New Zealand Standard.
>
> … there are a great many instances where there are separate Australian and New Zealand standards for the same subject. This is especially true in areas where there are few true international standards such as building and construction. (sub. 51a, p. 2)

It may also be due to concerns that Standards Australia is bearing an inequitable load in terms of standards development and the associated costs:

> The reality of the current ACA is that SAI undertakes more than 90% of the work required to produce joint standards whereas SNZ derives equal benefit from such joint work. (Standards Australia, sub. DR173, p. 1)

Standards Australia is now of the view that 'joint standards should only be prepared where there is a real market place need ie, where there are real differences in published standards between the two countries' (sub. 51a, p. 2). This stance has caused some concern amongst industry. The New Zealand Construction Industry Council (NZCIC) stated:

> If Standards NZ and industry wish to preserve the development of joint standards with Australia then they need to get a clear signal from users of joint standards that they value their existence. If industry supports the continued development of joint standards

> then SNZ will be in a position to open a dialogue with SAI and the NZ government to bring pressure to bear to reverse the decision by the Standards Council of Australia.
>
> … This is a critically important issue that requires our immediate attention. (sub. 113b, p. 2)

The New Zealand Government also expressed concern, saying:

> … we would like to reiterate the importance of the joint standards development process as a tool for promoting mutual recognition across the Tasman. The recent events involving Standards Australia's position that the Active Co-operation Agreement between Standards Australia and Standards New Zealand be replaced by a Memorandum of Understanding makes this issue even more pertinent. The importance of developing joint standards for Australia and New Zealand cannot be overlooked. There is a high degree of stakeholder and business interest in New Zealand in maintaining a joint standards process with Australia as this is seen to benefit manufacturers on both sides of the Tasman and facilitates trade across our borders. (sub. DR159, p. 3)

Dismantling the joint standard making process between Standards Australia and Standards NZ has the potential to slow progress in areas where jurisdictions have chosen to pursue harmonisation as a more practical approach than mutual recognition. Standards NZ said:

> While we appreciate that Standards Australia is a private business and therefore has a commercial imperative, we also believe that the need for Joint Standards to support the objectives of TTMRA, and the fact that businesses on both sides of the Tasman continue to attach the highest priority to joint trans-Tasman standards are valid considerations that must be considered in addition to purely commercial objectives. (sub. DR162, p. 2)

The Commission considers it important to maintain a joint standard setting capability between Australia and New Zealand. While Standards Australia and Standards NZ are not the only bodies able to develop joint standards, greater pressure will be put on the alternative mechanisms for formulating joint standards if they are unable to reach agreement on a suitable working relationship. It would be regrettable if a lack of agreement led to the loss of the contribution of Standards Australia's and Standards New Zealand's expertise to the development of trans-Tasman harmonised standards.

Regulators also play a role in developing standards for products. Such standards may be adopted at a State, Territory or national level, depending on the regulator's jurisdiction and the level of agreement across jurisdictions. In some cases, regulators have also formulated standards that apply across both Australia and New Zealand.

Industry may also establish standards for processes or products. These are not mutually recognised unless in some way embodied or referenced in legislation.

Occupations

Standards for occupations are usually set by the professional bodies within an individual occupation, with input from government and industry as to the competencies they require from service providers in that field. For these standards to be covered by mutual recognition obligations, governments must either mandate the specific requirements or delegate the power to impose entry requirements to the relevant registration body. In many cases, these standards are set at a State, Territory and New Zealand level, and may not be uniform across jurisdictions. However, standards can also be set at a national or trans-Tasman level using Ministerial Council processes. For example, as noted in chapter 5, MCEETYA is currently investigating model uniform legislation for the conduct of criminal record checks of persons seeking to work in educational settings with children.

Exemption processes and standards

The MRA and TTMRA exemptions (permanent, special and temporary) exist because of differing standards across jurisdictions. In the case of permanent exemptions, it was considered that certain differing standards could not be aligned, and permanent exemption from the obligations of mutual recognition was seen as the best solution. Special exemptions exist in the TTMRA to provide time for Australia and New Zealand to formally work through the specific areas (as set out in the legislation) where standards differ significantly, with the goal of either mutually recognising each other's standards, harmonising standards or permanently exempting the area if no other solution can be found. The temporary exemption category sets out processes for the resolution of problems arising from differing standards which have emerged during the operation of mutual recognition.

Each exemption category has a particular process for examining standards and then including, reviewing or removing laws or goods from the MRA and TTMRA schedules. These processes are discussed below, while chapters 7 and 8 look at whether the *current* exemptions themselves are appropriate and how they might be progressed in the future.

Permanent exemptions

As depicted in figures 2.1 and 2.2 of chapter 2, there are a number of permanent exemptions for both goods and laws in the MRA and TTMRA (and an occupation

in the TTMRA) where the parties considered there was no prospect of mutual recognition or harmonisation. All of these exemptions were introduced at the start of the schemes. No new categories of permanent exemptions have been made to date. However, two jurisdictions have expressed interest in creating new permanent exemptions in the areas of environment protection (Tasmanian Government, see sub. DR169, pp. 4–5) and Genetically Modified Organisms (Office of the Gene Technology Regulator, pers., comm., 11 September 2003). The appropriate process for these parties to follow would be to initiate a temporary exemption or referral, in order to trigger a Ministerial Council investigation into the issues.

Additions to the schedules of permanent exemptions in the MRA and TTMRA may only be made with the unanimous consent of the Heads of Government of participating jurisdictions.[1] In making their decision, Heads of Government may take any Ministerial Council recommendations into consideration. The South Australian Government expressed some concerns about the process of implementing a permanent exemption:

> … As a result of an oversight during drafting, the permanent exemption for offensive weapons failed to cite the section of South Australia's Summary Offences Act dealing with other weapons … In order to correct this error, South Australia had to put in place a temporary exemption for other weapons and body armour while obtaining the endorsement of all jurisdictions. With the exception of Queensland, the endorsement requires a notice to be published in the Gazette. In Queensland however, an Act of Parliament must be passed before the necessary regulation can be endorsed. …
>
> It took over two years and considerable time and effort … to successfully complete this process … This example, which highlights the lack of flexibility and arduous nature of current processes, exemplifies the potential benefits which could be achieved if Queensland could be persuaded to amend its legislation to follow the procedural approach of other jurisdictions, whereby a permanent exemption can be endorsed by a notice published in the Gazette. Alternatively, a mechanism could be adopted by which, wherever possible, amendments be made by a simple majority of jurisdictions (which would be 6 jurisdictions) or a two-thirds majority (which would be 7 jurisdictions) rather than by unanimous agreement of all 10 jurisdictions as required at present. (sub. 114, pp. 7–8)

Permanently exempting a product, law or occupation from mutual recognition may have significant effects on the level of trade or mobility of people between jurisdictions. As such, the process for exemption needs to be robust. Requiring unanimous consent from all 10 jurisdictions before creating a new permanent exemption provides the greatest level of impetus for jurisdictions to cooperate to seek a solution that satisfies concerns about standards and maintains mobility of goods and people. Removing the requirement for unanimity may not be desirable.

[1] See parts 6 and 8 of the MRA and TTMRA Inter-governmental Agreements, respectively.

However, the example does highlight the difficulties that arise when jurisdictions follow significantly different processes to implement Ministerial Council decisions. Queensland may wish to consider the merits of bringing its gazettal processes closer to those followed in the other States and Territories.

Permanent exemptions may also be removed from the schedules. The process for removing permanent exemptions from the TTMRA is quite simple. Under the TTMRA, a participating party may unilaterally delete a law of its jurisdiction from the Schedules at any time.[2] However, the MRA legislation and inter-governmental agreement do not appear to have an explicit process for the removal of permanent exemptions. Under section 47 of the *Mutual Recognition (Commonwealth) Act 1992*, the Governor-General may amend the Schedules but, before this may be done, each participating jurisdiction is required to gazette the amendment and formally request the amendment be made. There may be scope for clarifying whether this full process is required to delete permanent exemptions under the MRA, particularly as review participants indicated to the Commission that there may be scope for the removal of some permanent exemptions (the particulars are discussed in chapter 7).

FINDING 6.4

The process for removing permanent exemptions from the MRA needs clarification and could be simplified.

The prime mechanism to initiate a review or analysis of *existing* permanent exemptions is via the five yearly review of the MRA and TTMRA, as per section 12.1.1 of the TTMR Inter-governmental Arrangement. The South Australian Government recommended that 'the practice of periodically reviewing the mutual recognition arrangements be discontinued' (sub. 114, p. 1). However, taking a fresh look at permanent exemptions every five years, as part of the regular review cycle, is a good way to ensure that mutual recognition arrangements remain current and no more restrictive than necessary. The Commission endorses the five yearly review as a means of ensuring that the benefits of exemptions remain greater than the costs and that changes in the environment and circumstances are taken into account.

FINDING 6.5

The regular 5 yearly review of the MRA and TTMRA, which incorporates analysis of exemptions, exclusions and exceptions, continues to provide a process to ensure that the scope of mutual recognition is appropriate.

[2] See section 13.5 of the Inter-governmental Arrangement on TTMR, section 80(3) of the *Trans-Tasman Mutual Recognition (New Zealand) Act 1997* and section 45(5)(b) of the *Trans-Tasman Mutual Recognition (Commonwealth) Act 1997*.

Special exemptions

Under the TTMRA, a Cooperation Program was established for each of six special exemptions. These exemptions were expected to run for a maximum of five years — starting in early 1998 with the commencement of the TTMRA and finishing by early 2003. The programs had the objective of expediting 'the examination of differences in regulatory requirements between the Parties, with a view to addressing them through either mutual recognition, harmonisation or permanent exemption' (see section 9.1.2 of the TTMR Inter-governmental Arrangement). After five years of special exemption, a permanent exemption is able to be more easily obtained, with the agreement of only two-thirds of participating jurisdictions required.

Under each Cooperation Program, officials provide Annual Cooperation Reports to Heads of Government, via Ministerial Councils. These reports:

- outline progress made in resolving whether to mutually recognise, harmonise or permanently exempt;
- set timetables for further work;
- nominate areas that no longer required special exemption; and
- where further work was required, provide evidence to show that a continuation of the special exemption was necessary.

In deciding on the appropriate regulatory approach, the TTMR Inter-governmental Arrangement required officials to follow COAG's preferred approach to setting standards, as outlined in COAG's Principles and Guidelines (COAG 1997). For the Cooperation Programs, this documentation indicated a need for initial identification of the differences between regulations in each jurisdiction and then analysis of the costs and benefits of the three regulatory options (mutual recognition, harmonisation or permanent exemption). To further assist officials in preparing their analysis, the Commonwealth Office of Regulation Review (ORR) provided particular guidelines for special exemptions:

> … where the recommendation [of the Annual Cooperation Report] is to rollover a special exemption for a further 12 months, the level of analysis required to justify the recommendation will be significantly less than in the case of a permanent exemption recommendation. This 'first stage' RIS [Regulatory Impact Statement] would set out the problems and issues/objectives, but may not be able to identify options or evaluate impacts. In some cases a rollover may be justified without recourse to any evaluation of the costs and benefits of not rolling over because it will be clear from the timetable for completion of the cooperation program that any other course of action is not feasible.

> Before any decision is made to convert a special exemption … to a permanent exemption a comprehensive 'second stage' RIS must be prepared for the decision makers in accordance with the COAG Principles and Guidelines.
>
> … Decisions to harmonise regulations or to allow mutual recognition to operate will also require a RIS. (Department of Industry, Science and Resources, Canberra, pers. comm., May 1999)

In practice, progress with special exemptions has been mixed. While the process has worked well for consumer product safety regulations and electromagnetic compatibility (EMC), other special exemptions have encountered some difficulties. In some areas there have been few incentives for jurisdictions to agree on the standards that are to apply. The New South Wales Government noted '… the ability to extend exemptions, however, can reduce the incentive for jurisdictions to align standards' (sub. 117, p. 10). This may be magnified by the anticipation that, as the TTMRA currently stands, it is easier to transform special exemptions into permanent exemptions after five years. Interested parties also felt the annual rollover process has added little to the process. However, each special exemption has its own particular issues and circumstances that makes generalisation difficult. A detailed discussion of each special exemption is contained in chapter 8. Overall, the impediments to resolving outstanding issues seem to be more related to the specific areas of regulatory differences, rather than to the special exemption processes themselves.

Temporary exemptions

A temporary exemption provides the means to quickly remove a good, law or occupation from mutual recognition obligations, while at the same time initiating a process to resolve the issue by seeking agreement amongst all jurisdictions on the appropriate standards. Such exemptions may be implemented to protect the health and safety of persons or prevent, minimise or regulate environmental pollution (see, for example, section 15.2 of the *Mutual Recognition (Commonwealth) Act 1992*). A temporary exemption applies only in the jurisdiction that seeks the exemption and may operate for up to 12 months.

The temporary exemption process itself is straightforward. A jurisdiction wishing to impose a temporary exemption, because of a conflict emerging in relation to mutual recognition obligations, must make a regulation exempting the item in question. Prior to the expiration of the exemption, the relevant Ministerial Council will endeavour to determine the standard that is to apply, with this standard (new or existing) requiring the agreement of two-thirds or more of Council members. Any new standards must go through a regulatory impact process, as set out in COAG's Principles and Guidelines, before they can be approved and implemented. If this

process is successful and implementation occurs, the temporary exemption is removed and the conflict with mutual recognition has been resolved. The mutual recognition legislation provides for an additional 12 month period for legislative or other action to give legal force to the Ministerial Council determination. This implementation period is invoked through the gazettal of a regulation by the relevant jurisdiction.

If the Ministerial Council finds that a good should be permanently exempted (by a vote in favour by not less than two-thirds of the participating parties), approval must be sought from Heads of Government. Unanimous consent is then required for a new permanent exemption to be made.

Use of the temporary exemption mechanism

The mechanism for invoking temporary exemptions has been used relatively infrequently in the MRA and TTMRA. There may be a number of possible reasons for this — jurisdictions may manage to achieve their required outcomes without the need to resort to an exemption, there may be a relatively small number of issues requiring this sort of attention, or perhaps jurisdictions utilise different processes for resolving issues between them. Alternatively, jurisdictions may not be comfortable with the temporary exemption process. Three cases are discussed below: where some jurisdictions are achieving required outcomes in other ways; where jurisdictions have concerns about the speed of implementing a temporary exemption; and where jurisdictions have concerns about the speed of resolution of temporary exemptions.

Using alternatives to temporary exemptions

Product bans and safety standards are an interesting example of where some jurisdictions are choosing to resolve issues without using temporary exemptions. Bans and safety standards are mechanisms used by jurisdictions to remove goods from the market or to impose requirements on goods before they may be sold. In Australia, product bans and safety standards may be implemented by both the Commonwealth and by individual States and Territories although, in practice, the majority of bans are State and Territory imposed bans. In New Zealand, product bans and safety standards are implemented only at a national level.

Product bans and safety standards are not exempted from the application of the MRA or, with the exception of bans and standards relating to child car safety restraints, from the application of the TTMRA. This means that an individual jurisdiction's bans and safety standards may be rendered ineffective, as 'unwanted' goods may enter the jurisdiction and be lawfully sold under the mutual recognition

principle if they are lawfully sold in another participating jurisdiction. To exempt a product ban or safety standard from the application of mutual recognition, it is necessary to implement a temporary exemption. The temporary exemption then allows 12 months for jurisdictions to resolve the issues that led to the standard or ban.

However, despite the fact that product bans and safety standards implemented by themselves by individual jurisdictions are *legally* ineffective, due to the ability to circumvent them under the MRA and TTMRA, some jurisdictions continue to use them without also commencing the temporary exemption process. Submissions suggest jurisdiction-level product bans and safety standards are generally *practically* effective, despite the mutual recognition defence available to manufacturers and suppliers. For example, the NSW Government commented:

> … all Australian jurisdictions continue to introduce state product safety regulations and orders. The NSW Department of Fair Trading has found that where NSW has introduced new safety standards, manufacturers and importers have responded by designing and producing goods that comply.
>
> Anecdotal evidence suggests that, once a regulatory body has specified a safety standard for a product, manufacturers and importers are reluctant to use the mutual recognition defence principle to sell products that do not meet the safety standard. (sub. 117, p. 4)

In addition, the Victorian Government noted:

> … there will always be pressures for unilateral action on product safety issues. Mutual recognition does create an automatic constraint … However, this may not be well known to producers and distributors, and it would be unrealistic to expect regulators to publicise this option. (sub. 116, p. 8)

While bans and safety standards by themselves may be administratively easier for individual jurisdictions, as they do not require input into a Ministerial Council temporary exemption process, their use in this way does have the potential to undermine the mobility objectives of the MRA and TTMRA. Different jurisdictions in Australia and New Zealand have different approaches to banning and the process does not necessarily trigger a more robust national or trans-Tasman assessment of the appropriate standards that should be applied to a good. For example, in Queensland bans lapse after 18 months and a regulation is then required to continue the restrictions on sale or usage. The regulation requires a regulatory impact statement, which ensures that the implications of the ban are thoroughly examined. In contrast, some other states have no time limitations on bans. Avoiding the temporary exemption process, which is designed to find harmonised or compatible solutions, means that these jurisdictional bans can remain in perpetuity.

Use of the ban mechanism can, therefore, potentially provide a channel by which to implement permanent differences in standards across jurisdictions and raise costs and barriers to trade. Coupled with an apparent lack of awareness or willingness on the part of manufacturers/suppliers to use the mutual recognition defence principle, the use of product bans raises the potential for the mobility of goods to be impeded without a robust examination of the costs and benefits of doing so.

There may be scope for improving the product ban process, by introducing more uniformity across jurisdictions and tying the ban process more closely to the temporary exemption process. This would help to ensure that bans are considered by all jurisdictions and appropriate standards are formulated at a cross-jurisdictional level. This is discussed further in chapter 8.

Implementing temporary exemptions

Other jurisdictions have raised concerns about the speed of setting up the temporary exemption process, especially in cases where there are strong concerns about the health and safety impacts of a product. The ACT's Deputy Chief Minister described a recent case where:

> A consumer product safety order … was signed by the ACT Attorney General on 8 December 2002.
>
> Before the consumer product safety order could be made, the Department had to seek a regulation under the *Mutual Recognition (Australian Capital Territory) Act 1992*. This added significantly to the time it took to finalise the consumer product safety banning order exposing consumers to risk of physical injury or death. (sub. DR123, p. 3)

The ACT Department of Justice and Community Safety advised that, as the *Mutual Recognition (ACT) Act 1992* is administered by the ACT Treasury, the regulation to implement a temporary exemption had to be sought from the Minister for Economic Development, Business and Tourism. This step took a number of weeks.

Once the temporary exemption regulation was granted, the ACT Government then implemented a product ban. Under the ACT's product ban processes, to implement a ban the Minister (in this case, the Attorney-General) must:

- make a consumer product safety order (consisting of a notification statement, a short description of the goods to be banned and an explanatory statement outlining the objective of the order); and
- notify the consumer product safety order, by either entering the details of the order into the ACT legislation register (a computer database) or publishing the

order in the Gazette (with the requirement that the order must later be included in the register).[3]

This can be completed within several hours.

However, the overall time taken to implement the temporary exemption and ban was felt to be excessive and a potential threat to the health and safety of the public, as the good was available in the marketplace for several weeks after the decision to ban was made. The ACT Department of Justice and Community Safety said:

> Even in those jurisdictions where the responsibility for administering the relevant legislation lies with the same Minister, the need to draft a regulation before issuing a banning order is time wasting and exposes the community to a high level of unacceptable risk.
>
> The process under section 15 [of the Commonwealth mutual recognition legislation] is cumbersome and inefficient and unless the trader voluntarily agrees to remove the goods from sale, a dangerous product can legally be sold until such time as this process is completed. (sub. DR150, p. 1)

The ACT Government also raised concerns about the permanency of product bans under a temporary exemption, saying:

> The issue to be addressed is how governments can act quickly to ban dangerous goods when permanent action is urgently required and where provisions under the MRA prevent such action being taken without the unanimous agreement of participating parties. (sub. DR123, p. 1)

The ACT Department of Justice and Community Safety noted:

> … The Act limits the temporary exemption to a period of no more than 12 months, with the result that a dangerous product could re-appear on the market leaving no provision for the ACT to ban the product again. (sub. DR150, p. 1)

As a result of their concerns about the speed and permanency of temporary exemptions, the ACT Government has proposed a permanent exemption for product safety bans, saying:

> … the relevant consumer product safety banning order provisions of the fair trading legislation of the States and Territories should be added to Schedule 2 of the Commonwealth Act as a permanent exemption. This would allow a jurisdiction to act swiftly when a dangerous product appears in the marketplace threatening the health and safety of consumers without having to first make a temporary exemption regulation (which can only last 12 months anyway) under the Mutual Recognition legislation. A permanent exemption will guarantee the integrity of product safety legislation Australia wide. (sub. DR150, p. 2)

[3] See the *Fair Trading (Consumer Affairs) Act 1973*, No 17.

However, it is not clear that the ACT Government's concerns are due to the temporary exemption process itself:

- First, other jurisdictions noted that they implement a ban first and then seek a temporary exemption under the MRA or TTMRA. The implementation of the ban sends a strong signal to manufacturers and suppliers that the good is regarded as unfit for sale — interested parties from the business sector noted that most firms would abide by any product ban or standard in order to uphold their business reputation. The temporary exemption may then be sought, with the involvement of other government departments if necessary. This process achieves both the quick removal of the good from the market and the initiation of a robust analysis of the standards applying to the good.
- Second, the temporary exemption process can achieve permanent 'banning' of goods. While it is correct that unanimity is required at the Heads of Government level to introduce a new permanent exemption to the MRA or TTMRA, a permanent exemption is not the only way to permanently remove an unsafe good from the marketplace. Jurisdictions may agree to a harmonised standard for the good under temporary exemption. This harmonised standard may be such that the unsafe good is not able to be sold — thus essentially keeping the ban. This standard only requires two-thirds agreement within the Ministerial Council. Of course, the Ministerial Council may recommend removal of the temporary exemption and mutual recognition of the existing standard. This would occur if the Council viewed the standard already applying to the good to be adequate and would suggest that the jurisdiction taking out the temporary exemption had an overly risk-averse approach compared to other jurisdictions. While one could assert that conditions across Australia are different and that a jurisdiction may be justified in having a more risk-averse approach, it is difficult to see why a product that is considered safe in one jurisdiction should not also be generally considered safe in another.

Other jurisdictions had strong concerns about the ACT Government's suggested approach to product bans. The Commonwealth Treasury noted:

> … Treasury does not support the proposal put forward by some Fair Trading authorities to make State and Territory legislation for banning consumer products a permanent exemption under the MRA.
>
> The draft report acknowledges that the mutual recognition schemes have been successful in the significant alignment of State and Territory consumer product regulations. Should consumer product banning regulations be exempted from the MRA, it is likely that State and Territory regulations would again diverge, resulting in unnecessary compliance difficulties for product suppliers. It is also noted that, should consumer product bans be exempted from the MRA, the same argument would apply to the TTMRA. (sub. DR130, p. 1)

The New Zealand Government also expressed concern, saying:

> The Ministerial Council on Consumer Affairs (MCCA) is currently considering a proposal to request COAG to place the banning provisions of product safety fair trading legislation in Schedule 2 of the MRA, thereby exempting these provisions from the application of mutual recognition principles. It is understood that MCCA has agreed to await the outcome of the Productivity Commission's report before making a final decision.
>
> While the proposal at this stage is focussed only on the MRA, it could, if implemented, be then raised in the context of the TTMRA. The proposal impacts adversely on the broader MRA/TTMRA objectives to move to a consistent and uniform approach to product safety issues based on robust analysis, and for the benefit of consumers and traders.
>
> New Zealand has serious reservations about the proposed exemption of product banning provisions from the MRA on the following grounds:
>
> - the advisory committees supporting MCCA (SCOCA [Standing Committee of Officials on Consumer Affairs] and CPAC [Consumer Products Advisory Committee]) have processes that support the development of uniform and robust measures to inhibit the supply of unsafe goods. These processes do not appear to have been utilised by the ACT, the jurisdiction leading the Schedule 2 exemption proposal;
> - the MRA and TTMRA do not prevent individual States and jurisdictions from taking prompt action against the supply of unsafe goods. Recall action and product bans can still be imposed under fair trading legislation and media publicity utilised to highlight this;
> - a good, which is legally sold, can still be subject to a product recall if it is established that the product is unsafe;
> - a trader supplying product into a market that had determined that the product was unsafe would be at severe risk under product liability laws;
> - removal of consumer product safety legislation from the MRA or TTMRA runs counter to the intentions of the MRA and TTMRA. Both of these arrangements were introduced to address inefficiencies in the market place - inefficiencies created to a large degree by the varying standards and regulations (bans) that apply in the different jurisdictions. In practical terms it would mean a return to the regime where a supplier may have to meet six different rules for one product (for example. toys that expand in water);
> - the MRA supports the development of robust safety analysis, under which a safety issue can be handled consistently throughout Australia and New Zealand and acts as a deterrent to the proliferation of insupportable regulation;
> - the MRA is overarching legislation — however the rights are not automatic and evidence would suggest that it is unlikely to be used as a defence against a charge of supplying an unsafe product; and

- currently many banning orders are written in the form of performance or specification requirements (more appropriately used for developing product safety standards). The ACT proposal could well see a proliferation of such banning orders to circumvent the MRA in relation to product safety standards. (sub. DR159, pp. 7-8)

The Commission does not support permanently exempting product bans from the MRA. Submissions suggested that bans are effective in quickly removing goods from the marketplace and the Commission believes that the temporary exemption process initiates a robust analysis for setting appropriate standards for goods. Exempting product bans from the MRA would be a backward step. Temporary exemptions can be implemented quickly and there appears to be no need to make changes to address implementation times. The problems being experienced by the ACT would perhaps be better addressed at source ie, by that jurisdiction enabling a ban to be put in place without first taking out a temporary exemption from mutual recognition.

Resolution of temporary exemptions

Some concerns have been raised over the length of time allocated for resolving a temporary exemption. Some interested parties felt that the 12 month process could be streamlined so that decisions could be made and solutions implemented in a shorter time.

The Tasmanian Government suggested that the current temporary exemption process created a disincentive to the harmonisation of standards and the development of new standards, and presented options for improvement:

- removal of the requirement to submit the proposed standard to the Head of Government of each participating party for approval. Approval by a Ministerial Council should be sufficient in all cases;
- removal of the requirement for legislation by all jurisdictions after approval by the respective Heads of Government. Legislation by a majority of the jurisdictions should be sufficient; and
- extend the temporary exemption period to three or four years … (sub. DR169, p. 4)

However, the Consumer Safety Unit of the Commonwealth Treasury did not agree with the preliminary finding in the draft report suggesting that there were grounds for examining options to streamline the temporary exemption process, especially in cases where there are pressing health, safety or environmental concerns. It noted:

> … information submitted to the review does not necessarily make a case for streamlining mutual recognition temporary exemption processes. The information may alternatively indicate that other regulation mechanisms are unwieldy. Accordingly, it would be appropriate for the relevant jurisdictions to give further consideration to the

> perceived problem before streamlining of the mutual recognition processes is contemplated. I would be concerned that streamlining may unnecessarily dilute the key benefit of mutual recognition in fostering a coordinated approach to regulation. (sub. DR130, p. 1)

By suggesting streamlining, the Commission did not mean that harmonisation should be eschewed. The Commission considers that it is important that jurisdictions seek mutually agreed solutions to safety concerns as they arise, while at the same time being able to address the safety concerns immediately. The speed with which resolution can be achieved will largely depend on the commitment of all parties to achieving this. The sort of streamlining that could take place might include out-of-session discussion and resolution of safety issues.

FINDING 6.6

There are grounds for examining options to streamline the process for resolving the issues underpinning temporary exemptions.

Current temporary exemptions

There are currently two products (electric storage water heaters and lighting ballasts) under temporary exemption from the TTMRA. These exemptions were initiated by New Zealand and are based on differences in the Minimum Energy Performance Standards (MEPS) adopted by Australia and New Zealand (see appendix F for discussion). Some parties saw these exemptions as highlighting the tensions that arise when the objectives of mutual recognition diverge from other national priorities, such as environmental policy or industry policy. The New Zealand Government suggested the key to minimising these tensions was early consultation, a clear cost-benefit framework with which to analyse policy options and a preparedness to cooperate (sub. 110, p. 11). The main concern expressed by interested parties, in regard to temporary exemptions under the TTMRA, was a perceived lack of consultation between the parties and a tendency to 'go it alone'.

Background

The Australian MEPS and labelling program for electrical appliances and equipment forms part of the 1998 National Greenhouse Strategy, which originally evolved from labelling initiatives undertaken by New South Wales and Victoria in the 1980s. The aims of the strategy are to achieve energy conservation, environmental benefits and industry development by extending and enhancing the effectiveness of existing energy efficiency labelling and minimum energy performance standards (Australian Greenhouse Office, sub. 115a, p. 1). Mandatory

MEPS were introduced in New Zealand in 2002, replacing the voluntary energy labelling system that had been in place since 1987.

Both countries aim for consistency with their counterparts in the other country. Australia's National Greenhouse Strategy states that the Australian program will be pursued by 'ensuring consistency of approach between Australia and New Zealand wherever possible' (Australian Greenhouse Office, sub. 115a, p. 2). Similarly, the New Zealand scheme proposed to 'ensure that the MEPS and energy labelling regime is compatible with the regime in Australia and based on the same joint Standards' (Australian Greenhouse Office, sub. 115a, p. 2).

While consistency is a goal, differences have arisen over time. The Australian Greenhouse Office (AGO) noted a number of negative consequences that may occur when divergent standards are adopted in each country. These included:

- confusion arising from differing labels and differing standards for products freely traded between Australia and New Zealand;
- a loss of confidence in their national system promoted by government as providing them with world class product;
- increased R&D costs for manufacturers making products to meet differing standards and extra compliance monitoring costs to ensure products made for one country are not inadvertently sold to the other;
- the lack of scale economies in producing more than one product leading to higher unit costs;
- the resource costs of each country conducting their own differing national program;
- the resource costs required by the TTMRA process to justify different energy efficiency standards. (sub. 115a, p. 3)

Electric storage water heaters

New Zealand has adopted MEPS for electric storage water heaters at a level higher than Australia's, in order to support its National Energy Efficiency and Conservation Strategy.

Concerns have been expressed about both the substance of this temporary exemption and the process by which it came about. It is clear that when one partner pursues standards that are 'out of step' with international standards, it can have adverse consequences for investment and presents industry with unpalatable choices. This may include investing to comply with the standards, while risking that they will subsequently be removed and make the investment unprofitable. The case also highlights the importance of consultation and communication between officials in each country, including clear statements as early as possible on any reservations about the standards being developed. Using the RIS process to explore possible policy alternatives is essential, in order to assess all realistic options on a

comparative basis. The RIS process can help to find the most practical and least trade restrictive way to achieve policy goals. In this case, for example, changes to energy pricing may achieve many of the same results, with less regulatory intervention.

None of the options facing New Zealand are entirely satisfactory. If MEPS for water heaters were to continue to be exempt from the TTMRA, New Zealand would meet its energy savings targets but:

- Australian manufacturers may choose not to service the New Zealand market, as it may not be viable for them to manufacture specific New Zealand MEPS compliant products;
- there may be reduced competition in the New Zealand market place; and
- New Zealand consumers may then face greater costs and limited consumer choice.

It is likely that, in the case of free trans-Tasman trade in water heaters:

- New Zealand consumers would have wider choices at a wider range of prices;
- New Zealand industry could be at risk as:
  - if New Zealand maintained its higher standard, New Zealand manufacturers would not be competing on a level playing field; and
  - if New Zealand adopted an equivalent standard to Australia, New Zealand manufacturers may not be able to cover the cost of any investment they have made to meet the higher standards; and
- New Zealand would not meet its energy saving targets.

The temporary exemption process requires that the Ministerial Council on Energy (MCE) consider the standards that are to apply to water heaters and advise on an appropriate course of action. However, the MCE has not been asked to consider any proposals at present. The New Zealand Government noted that the AGO, in collaboration with the New Zealand Ministries for the Environment, Economic Development and Foreign Affairs and Trade and EECA, are managing the process of finding an agreed solution to the issues around water heaters (sub. DR159, p. 32).

Lighting ballasts

Similar to the water heater case, standards for lighting ballasts were initially developed jointly between Australia and New Zealand. In this case, Australia lowered the required energy efficiency rating in response to industry concerns at meeting the higher standard, while New Zealand stayed with the higher level.

This divergence, resulting in the instigation of a temporary exemption by New Zealand, raises several issues:

- the extent to which industry interests should influence decisions on standards; and
- the potential for significant adverse effects on trans-Tasman trade as a result of divergence in standards — in this case, New Zealand currently accounts for 15 per cent of Australian ballast exports, equivalent to $4.885 million in 2002 (Atco Controls Ltd, sub. 98, p. 9).

As with water heaters, EECA, the Ministry of the Environment and the AGO are working towards the resolution of these issues.

Looking to the future

Officials in Australia and New Zealand have now agreed to enter into a Memorandum of Understanding (MOU), which aims to achieve closer cooperation between the relevant regulatory agencies and initiate a better long term planning process. The AGO say the MOU will deliver scheme alignment by:

- investigating product groups for possible inclusion in regulatory programs;
- sharing the results of such investigations and making a joint decision on how to proceed;
- developing common standards for the measurement of energy performance;
- developing common standards that set energy performance classes;
- devising compatible regulatory regimes; and, where relevant,
- explaining to stakeholders the reasons why alignment cannot be achieved for specific product types. (sub. 115a, p. 5)

EECA also noted that they and the New Zealand Ministry for the Environment and the AGO have agreed in principle to release a common three year program from calendar year 2005 (EECA 2003, p. 7). EECA noted that, in the long term, Australia and New Zealand would have common plans, would strive for alignment where possible and would share information and costs (EECA 2003, p. 7).

However, there may need to be further discussions over funding. The AGO noted that the costs of the Australian energy efficiency program have ‘not been insignificant’ (sub. 115a, p. 5). Since 1990, energy efficiency agencies in Australia have invested more than $10–15 million, and the program is projected to deliver more than $4 billion of benefits over the next 15 years. The AGO provided some recent examples of financial and staffing contributions to its national program that highlight the differences in funding between Australia and New Zealand:

- Water Heaters: the AGO and Australian jurisdictions have spent over $100 000 in comparative testing used to develop a joint test method for this product type in 2002 and 2003 (with this being the product that the New Zealand Minister encouraged his Australian counterparts to match his country's MEPS). EECA advised that it was not able to assist with funding this joint testing though it did facilitate some New Zealand products being made available for testing;
- Commercial refrigeration: the AGO and Australian jurisdictions will spend over $150 000 in developing the MEPS and test method for this product type in 2003 and 2004. New Zealand officials have advised that they would like to join this process after the funding contributions of government and industry (both Australian and New Zealand) are resolved;
- General verification testing and standards development: the AGO and Australian jurisdictions will spend as much as $500 000 this financial year on these related topics. In 2003, EECA has offered $10 000 towards enforcement activities. (sub. 115a, pp. 5–6)

The levels of funding provided by each jurisdiction may need to be addressed to ensure the success of the new MOU.

The issues around MEPS also further highlight the need for Standards Australia and Standards NZ to maintain a good working relationship, as discussed earlier. EECA note that, in Australia, energy efficiency agencies have an arrangement with Standards Australia, where the relevant product standard is used as the vehicle to promote nationally consistent standards brought into law by each state and territory. To operate a similar scheme in New Zealand, EECA say it is important that both countries use common standards, with each country's standards organisation agreeing to develop joint standards for those products identified for regulation in the work plans (EECA 2003, p. 8).

FINDING 6.7

It is important to seek the most practical and least trade restrictive way to achieve policy goals. In doing this, the RIS process provides a useful mechanism by which to explore possible policy alternatives and assess all realistic options on a comparative basis.

Other issues: Food

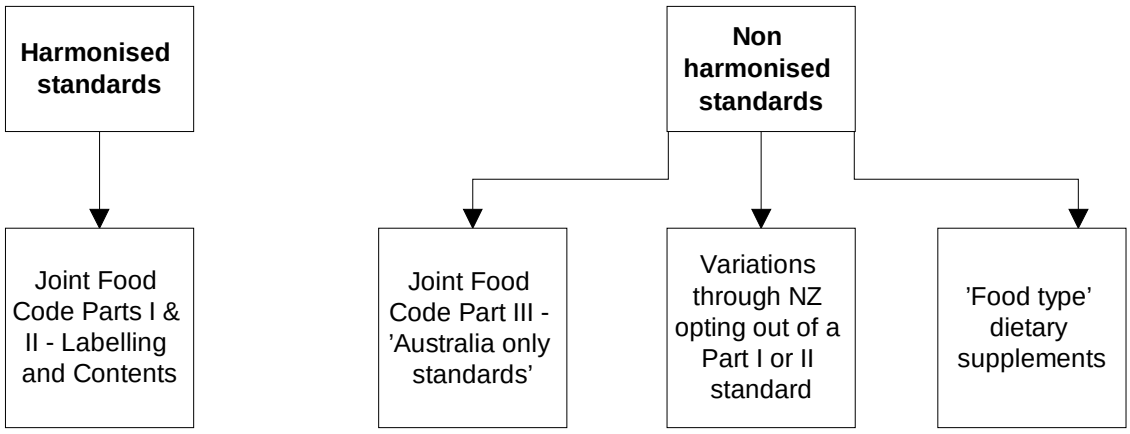
A significant issue has developed in relation to the standards applying to food products.

The Australia New Zealand Food Standards Code

The TTMRA applies to food products and, in anticipation of this, COAG established the Australia New Zealand Food Safety Authority, now Food Safety Australia New Zealand (FSANZ), under the Agreement Between the Government of Australia and the Government of New Zealand Concerning a Joint Food Standards System (the Treaty). Its objective is to address and prevent the reccurrence of the problems that industry had experienced in meeting inconsistent food safety requirements across jurisdictions. The primary goal is to facilitate trade by harmonising rather than mutually recognising good standards. In December 2001, both countries introduced the Joint Australia New Zealand Food Standards Code (the Joint Food Code). Parts I and II relate to food content and labelling; Part III to Australia only.

Variations in standards may occur in three ways: where an 'Australia only' standard affects the content or labelling of food; where New Zealand has exercised its powers under Annex D of the Treaty to 'opt out'; and in relation to dietary supplements (see figure 6.1 and for details refer to appendix G). Where agreement is not reached, the food item will be subject to mutual recognition as food is not exempted from the TTMRA.

Figure 6.1 **Food regulation**



Issues

The ability to adopt different standards and the mechanisms for regulating their affect on the TTMRA have created problems for the Department of Health and Ageing (DOHA) and FSANZ. FSANZ remarked:

> …the process of harmonising food regulation in Australia and New Zealand is well advanced but outstanding differences remain which impose costs on industry and may also have implications for public health and safety. (sub. 91, p. 1)

Where one country takes a more conservative risk management approach, the TTMRA obligations provide scope to develop a niche market for the country with the less restrictive standards as its manufacturers and exporters may continue to sell in the other market while local manufacturers and importers are prohibited from doing so. Particular issues have arisen with dietary supplements, maximum residue limits, hemp seed oil and county of origin labelling (CoOL) (for details refer to appendix G).

DOHA and FSANZ advocate changes to the Food Treaty to establish less stringent grounds and more streamlined processes for obtaining temporary and permanent exemptions under the TTMRA as a way by which to prevent to sourcing from the other country under mutual recognition. In their view the current processes are unnecessarily complicated and inflexible, as FSANZ cannot obtain an exemption on behalf of all the States and Territories.

Instead, AQIS and New Zealand officials are working to create a common border for food by developing processes for maintaining a common list of high risk foods, in order to provide adequate controls for food products that present a high risk and must be dealt with in an emergency. Hence, the perceived problem lies only with food that presents, or may present a lesser risk.

It is clear that when the Treaty was negotiated, the Australian and New Zealand Governments agreed that the sovereignty of each country to opt out of a joint standard should be respected but that such a decision should have minimal impact on trans-Tasman trade. To broaden the grounds for a temporary exemption would constitute a radical departure from the Parties' original intention. It would also contradict the intention of TTMRA that exemptions only be called when there is a significant risk to health, safety and/or the environment. Moreover, the New Zealand Government disputed the fact that the current conditions have acted as a disincentive to harmonisation, asserting that New Zealand officials have been acutely aware of the need to resolve issues from a TTMRA perspective. It argues that most of the issues are transitional as both countries seek to harmonise their separate systems (sub. DR159, p. 2).

However, it is arguable that sovereignty is compromised when the health and safety standards a country wants to apply can be circumvented by a trade agreement or, at least theoretically, create a disincentive for harmonisation. Besides their preferred option, which is considered below, DOHA and FSANZ suggested three further options which are considered in more detail in appendix G, namely:

- to permit ANZFRMC to approve temporary exemptions with flexibility to determine their duration and, on the request of FSANZ, to agree to a permanent exemption unless disapproved by 1/3 of the Heads of Government;
- to extend the scope of *the Imported Food Control Act 1992* to enable ANZFRMC to make orders to prevent food that does not comply with 'Australia only' standards being imported from New Zealand; and
- to amend the TTMRA to provide a permanent exemption for all food that does not comply with the Joint Food Code, but with flexibility to waive the exemption where the differences do not cause Australia a concern.

Moreover, a year is not always a realistic timeframe in which to develop a standard, especially if it requires consultations with another country and, given FSANZ's role in developing standards for adoption nationally, it may be appropriate for it to create temporary exemptions.

DOHA and FSANZ's preferred option

DOHA and FSANZ propose integrating TTMRA considerations into the legislative and decision making structures of the Joint Food Standard System processes. Temporary exemption provisions for food products would be included in the Australian FSANZ Act. FSANZ would consider whether an exemption was appropriate as part of its policy development process with ANZFRMC making a final determination.

This proposal does not take into account the fact that FSANZ's responsibilities are wider for Australia than New Zealand and in developing 'Australia only' standards it is acting as an Australian, not a joint, agency. Hence, it would be unlikely to bring a disinterested perspective to the issues. It could also create a disincentive for FSANZ to seek a compromise that was acceptable to both countries.

The New Zealand Government stated:

> One of the strengths of the TTMRA is that the exemption process requires a whole of Government approach. Restricting this approach to the sector concerned removes the discipline of needing to convince other departments …. the New Zealand Government has an interest in maintaining the TTMRA's present underpinning of the joint food standards system. (sub. 159, p. 14)

Moreover, as outlined below, AQIS has pointed out that exemptions could have wide reaching percussions under the WTO TBT and SPS Agreements as the more restrictive controls would not necessarily apply to products from third countries.

AQIS's response

AQIS does not concur with DOHA and FSANZ. It 'is committed to working with NZ officials to deal with the existing situation. AQIS strongly advocates that an alternative mechanism to implementing permanent or temporary exemption in the TTMRA be found to manage the issue of inconsistent regulations between the two countries.' AQIS offered the following comments on the few foods that remain under separate standards and the operation of the Imported Food Control Act:

> A permanent or temporary exemption for application of the Imported Food Control Act in the TTMRA for foods where the standards were not harmonised may create a restrictive trade measure. Using the hemp seed oil standard, (which precludes the use of hemp seed oil in food in Australia only) as an example — the variety of food that may contain hemp seed oil is very large. It is not possible using the tariff code system to target foods that may contain hemp seed oil without casting a much wider net, and so creating an irritating barrier to trade. Bakery products, snack bars, ice cream and ice confection products and many others potentially contain hemp seed oil. All of these products imported from NZ would need to be impeded, and the question asked "does this contain hemp oil"?
>
> However, to meet our obligations under WTO, products from NZ would need to be treated in the same manner as products from other countries. It is not proposed that all products that potentially contain hemp seed oil regardless of its origin, are impeded, only those from NZ. …
>
> Unless all other imports are treated in this manner, it would be a trade restrictive measure, applied only to NZ, creating a possible breach of WTO obligations.
>
> It should also be noted that the Imported Food Control Act was primarily implemented to protect the health and safety of the public from potential food borne illness. It was not set up to deal with issues of competition. (sub. DR158 , p. 2)

AQIS believes that any solution should take into account:

- the aim to have harmonised food regulations;
- recognition of international standards where they exist;
- inspection and other measures to ensure (sovereign) compliance; and
- the risk category of foods involved.

AQIS also suggested:

> While the present situation is that Australian requirements are more stringent than NZ in the few inconsistent food regulations, there remains the possibility that this may well be reversed in the future, with Australian standards being less stringent than the NZ

> regulation. The application of the suggested TTMRA exemption would create a recurrence of the very circumstances that AQIS is now trying to correct ie, disproportionate effort in relation to risk in creating market access for Australian food products exported to NZ. (sub. DR158 , p. 3)

However the Commission has received advice from the Australian Attorney General's Office that while Annex D (2) – (5) of the Food Treaty does not apply to Australia, it prohibits New Zealand from creating trade barriers, except where there are exceptional risks to health, safety or the environment, where it decides to opt out of a joint standard. This situation also reflects the non reciprocal nature of the present arrangements.

Alternative approach

New, discrete provisions in the TTMRA to deal with the application of mutual recognition of food products could provide an opportunity to prescribe processes that would allow more realistic temporary exemption periods, balance the interests of both countries, ensure their concerns are taken into account, provide peer reviews of risk assessments and encourage negotiation of mutually acceptable solutions.

To streamline the temporary exemption processes to allow FSANZ to create temporary exemptions for all Australian jurisdictions would require their consent. The COAG Guidelines could be amended to provide prima facie guidance on when temporary exemptions should apply where only one country has an existing standard, both countries have an existing standard or neither country has a standard.

Consideration could also be given to conferring on ANZFRMC the power to make a permanent exemption unless disapproved by one third of lead Ministers, but to give New Zealand the option to request the issue be reconsidered by COAG if it viewed the ANZFRMC decision as inequitable. COAG would then need to reapprove the permanent exemption unanimously.

FINDING 6.8

The TTMRA exemption provisions enable all jurisdictions and interested Government agencies to contribute to developing policies for Ministerial consideration for food products subject to unaligned standards. Temporary exemptions could be initiated more simply if Australian jurisdictions delegated this power to FSANZ. Any review of options for streamlining of the current processes for resolving temporary exemptions could usefully address issues relating to flexibility of timelines, facilitating peer review technical assessments, and balancing the interests of Australia and New Zealand.

The referral process

Another process for setting standards for goods and registered occupations is the referral mechanism set out in the mutual recognition legislation. Referrals trigger similar Ministerial Council processes as those for temporary exemptions, except that the good to which the referral relates continues to be subject to mutual recognition obligations during the period of Ministerial Council consideration. Ministerial Councils may also receive referrals to consider the appropriate competency standards for a person to carry on a particular occupation or activity. As noted in chapter 2, referrals to Ministerial Councils to determine competency standards may also be made by the AAT or TTOT.

The 1998 review of the MRA recommended that issues about standards or regulatory requirements relating to goods be resolved by Ministerial Councils under either the temporary exemption or referral mechanism (see appendix B, rec. 4). It also recommended that jurisdictions make greater use of the referral mechanism where concerns exist about the competency of persons registered in other jurisdictions (see appendix B, rec. 8).

However, it appears that the referral mechanism for standards applying to goods and occupations has been little used. The reason for this is unclear. Some interested parties felt that the mechanism was not explicit or obvious enough in the mutual recognition documentation and that some entities may not be aware of their ability to refer competency matters to Ministerial Councils. Given that the mutual recognition documentation includes both legislation and signed arrangements between Heads of Governments, this may be a valid concern. The referral mechanism is only described in the arrangements, not in the legislation.

Other interested parties pointed to process issues. While it is inevitable that setting uniform standards for multiple jurisdictions will be difficult, some review participants felt that the referral process was too slow and cumbersome. ANTA noted that the Ministerial Council approach to determining competency standards would be lengthy and resource consuming, without any guarantee that a consistent national approach would be achieved (sub. 73, p. 9). For its purposes, ANTA recommended a reform approach based on a directive from COAG that would commit governments to establishing consistent nationally-agreed competency-based requirements for occupations and to use the Vocational Education and Training (VET) system to achieve these competencies.

Any streamlining of the process for resolving issues underpinning temporary exemptions, as suggested in finding 6.6, may also be appropriately applied to the referral process.

7 Permanent exemptions and exclusions to mutual recognition

The terms of reference require the Commission to examine the scope for changes to the exemptions and exclusions within the mutual recognition arrangements. Specifically, the Commission is asked to consider whether the existing provisions for permanent exemptions and exclusions within the MRA and TTMRA should be retained and, in relation to the TTMRA, to examine possible amendments, deletions or additions to the laws in the Schedules, consistent with the intention to minimise exemptions and exclusions. Special exemptions under the TTMRA are covered in the next chapter.

As explained in chapter 3, despite the slightly different emphases on the assessments of the MRA and TTMRA, the permanent exemptions and exclusions are examined using the same criteria, as outlined in chapter 3. In brief terms, the test is whether the exemptions and exclusions have a substantive rationale and whether modifying or deleting them would generate net benefits (including whether the change would be practical). In the case of permanent exemptions, goods and occupations are discussed separately, followed by consideration of the four exclusions under the TTMRA.

7.1 Permanent exemptions: goods

There is considerable overlap in the goods and laws permanently exempted under both schemes.

As set out in figure 2.1, the MRA contains permanent exemptions for some goods, as well as certain regulations and laws relating to goods. In particular, Schedule 1 of the MRA contains four permanent exemptions for goods: firearms and other prohibited or offensive weapons; fireworks; gaming machines; and pornographic material. Schedule 2 of the Act contains some 29 legal instruments relating to ozone reduction, weapons, SA's beverage containers, and classified publications, films and computer games; and generally refers to any law of the States and Territories relating to quarantine and protected species; and to any law of Tasmania relating to the minimum sizes of its abalone, crayfish and scallops.

Permanent exemptions under the TTMRA (figure 2.2) refer to certain laws, including Commonwealth laws, relating to the sale of goods in areas where the parties considered that the application of mutual recognition principles would not be appropriate. They encompass the same goods under the MRA, but there are some additional categories, as follows:

- agricultural and veterinary chemicals (Commonwealth law);
- *Imported Food Control Act 1992* (to the extent that it deals with risk categorised food commodities — Commonwealth law);
- *Radiation Protection Act 1965* (New Zealand law); and
- *Antiquities Act 1965* (New Zealand law).

The following sections review the rationale for the permanent exemptions and examine whether there are grounds for their retention. They draw on the discussion of the costs and benefits of the permanent exemptions in the 1998 CRR review of the MRA, where exemptions were reviewed for their anti-competitive effects and whether these were justified on grounds of net or public benefit and no feasible alternative. That review did not identify any permanent exemptions that could be removed.

The South Australian Government submission supported retention of all the current permanent exemption provisions in the Schedules of the MRA and TTMRA (sub. 114, p. 6). Other jurisdictions' views on specific permanent exemptions are noted in the following discussion.

Firearms and other prohibited or offensive weapons

As a result of the Port Arthur shootings in 1996, the Commonwealth moved to develop nationally consistent gun laws that limited the range of weapons available in Australia. It also provided for more stringent and restrictive licensing and special procedures for the acquisition and sale of weapons. However, the regulation of other prohibited or offensive weapons (such as crossbows, knuckle dusters and certain types of knives, for example, flick knifes) is inconsistent across jurisdictions.

The 1998 review referred to the 'strong community expectations that government will continue to provide effective controls on the sale of all weapons' and accordingly concluded that this permanent exemption should be retained (CRR 1998a, section 6.1.5).

It could be argued that given the more consistent approach across Australia, together with the small constraining effect the exemption has on the size of the

firearms market, it is now feasible to remove the exemption for firearms in the MRA.

However, while minimum regulatory standards apply overall, there are still differences in the regulations for firearms across jurisdictions. There are also regulatory differences across jurisdictions for the sale of major component parts for firearms. These differences primarily reflect different usages and cultural mores. The exemption for firearms for the MRA and TTMRA allows these differences to be taken into account. The 1988 review also observed that even if regulations are similar, enforcement by each jurisdiction provides an extra safeguard.

The Queensland Government supported retention of this permanent exemption as an effective means of maintaining appropriate standards (sub. 96, p. 9). The Victorian Department of Justice indicated that it would not support any change to the current permanent exemption arrangements for firearms (sub. 116, p. 7).

While the exemption limits the firearms market to some extent, there would not appear to be grounds for removing this permanent exemption, at this stage.

FINDING 7.1

There are grounds, based on regional differences resulting in different regulations, plus the consequent additional enforcement, for retaining the MRA and TTMRA permanent exemption for the sale of firearms and other prohibited or offensive weapons.

Fireworks

The 1998 review noted that the reason for the permanent exemption for fireworks was to allow States and Territories to maintain jurisdiction-specific regulation for the manufacture and sale of fireworks. All Australian States ban the sale of fireworks to the general public, while the Territories permit their sale to the general public at selected times of the year. In New Zealand, fireworks are allowed to be sold to the public for a limited period in the lead up to Guy Fawkes celebrations in early November. That review noted that the benefits of lower medical and enforcement costs may outweigh the costs of the restriction, which include higher prices for fireworks and restrictions on consumer choice. Accordingly, it recommended retention of the exemption.

Two options for the removal of this permanent exemption were identified in the 1998 review. One was for jurisdictions to develop uniform requirements relating to the sale of fireworks, thus making the exemption redundant. However, this would require jurisdictions to reconcile differences in views about whether to make

fireworks available on selected dates of the year. The second option was to remove the permanent exemption and rely on restrictions to the use of fireworks to limit their availability. However, this latter measure would lead to higher enforcement costs in ensuring restrictions on use are complied with.

The Queensland Government supported retention of the permanent exemption for fireworks for the MRA and TTMRA (sub. 96, p. 9). The South Australian Government noted that the Commission's preliminary finding in the draft report for retention of this exemption 'is consistent with the position put forward by the South Australian Government on previous occasions' (sub. DR165, p. 8).

Different community attitudes towards the use of fireworks by the general public and the appropriate level of safety and differing circumstances across jurisdictions make this a contentious issue. The exemption for fireworks for the MRA and TTMRA allows these differences in social values and judgments to be taken into account. In the absence of a common standard being developed, there would appear to be grounds for retaining this permanent exemption.

FINDING 7.2

There are grounds, based on differing jurisdictional preferences, for retaining the MRA and TTMRA permanent exemption for the sale of fireworks.

Gaming machines

As noted by the 1998 review, the gaming machine industry in Australia is tightly controlled, with a comprehensive licensing regime regulating requirements relating to the manufacture, sale, possession and operation of gaming machines. However, many of the controls are not subjected to MRA obligations, as they do not regulate the sale of gaming machines. For example:

- A person is generally required to have a gaming machine licence to possess a gaming machine on their premises. Anyone wishing to manufacture gaming machines and to sell or supply machines must also hold a gaming machine licence. As the MRA does not impact on 'the manner of sale of goods in the second state', removal of the exemption would not affect these particular licensing requirements. Sellers of goods would still need to observe differing requirements relating to the sale of goods in different jurisdictions.
- All Australian jurisdictions impose restrictions of one kind or another on gaming machines and on gaming machine numbers, whether by a maximum allowable in particular types of venues, a cap on the number permitted to operate in a region or in total, or both (PC 1999, p. 13.8). For example, gaming machines are not permitted in clubs and hotels in WA and in the casino in the ACT (Banks 2002,

p. 30). Caps are generally put in place because of concerns about the possible adverse social impacts of gaming machine gambling, particularly in the context of a rapid increase in their numbers and in the number of venues with gaming machines. Removal of the permanent exemption, however, would not affect these types of restrictions.

Nevertheless, some gaming machine industry controls would be subject to the MRA obligations if the permanent exemption were removed. These relate to the restrictions imposed by jurisdictions on the type of gaming machine. Differences arise, for example, from features such as the minimum payouts, maximum bets and whether note acceptors are permitted. Such restrictions impose additional costs on producers, limit the use of economies of scale and restrict consumer choice. The differing economic regulations governing gaming machine operation, along with various differing technical requirements across jurisdictions mean, for example, that multiple versions of the same game have to be developed and tested (Aristocrat submission to PC 1999, p. 39).

The 1998 review recommended that the exemption should be maintained, in view of its limited negative impact on competition because of the existence of other restrictions that did not fall under the mutual recognition scheme.

A National Standard Working Party comprising Australian and New Zealand regulators was established in 1994 to develop technical requirement documents to be used by each individual jurisdiction as the basis for working towards a common technical requirement for the evaluation of gaming machines. Commonality of technical requirements has helped to reduce the duplication of effort by manufacturers in the design and manufacture of a gaming machine supplied into multiple jurisdictions. It also provides cost savings when equipment previously approved in one jurisdiction is assessed for approval in other jurisdictions. However, each jurisdiction provides an appendix to the national standard setting out additional requirements (along the lines of the features outlined above for the operation of machines) manufacturers must comply with in that jurisdiction.

The Queensland Government supported retention of the permanent exemption for gaming machines for the MRA and TTMRA (sub. 96, p. 9).

Gambling is a contentious issue. It is widely recognised as imposing significant costs on some individuals, their families and the community more broadly. On the other hand, it is also recognised as an important leisure activity for a significant proportion of the population. And, for governments, gambling has become an increasingly important revenue source.

Governments have traditionally used a variety of regulatory mechanisms to try and achieve a sensible balance between these opposing considerations — in other words, to preserve gambling as an option for those who value it as a leisure activity, while regulating many aspects to temper gambling abuse and the associated costs. However, as indicated above, differing views about the virtues of gambling, and of different forms of gambling, have resulted in significant variation in the regulatory regimes imposed by different governments. In effect, these regulatory differences reflect differences between jurisdictions in community views about gambling. Given the pervasive nature and the uncertainty surrounding the social costs attached to gambling, such differences are understandable.

The removal of the existing exemption on gaming machines would reduce the capacity of governments to influence an activity in their jurisdiction — namely gambling — which many consider as having a significant effect on lifestyles and community values.

New Zealand has adopted Australia/New Zealand National Standards on gaming machines but, as noted, each of the States and Territories maintain their own unique requirements. The recently introduced NZ *Gaming Machine Act 2003* (that repeals the *Gaming and Lotteries Act 1977*), makes provision to prescribe minimum standards for the design, manufacture and performance of gambling equipment, including gaming machines. The New Zealand Government considers it important to retain flexibility, particularly if circumstances change under the new legislation. It considers that the differences in legislation and approaches to gambling between New Zealand and the Australian States makes it appropriate to retain this permanent exemption for the TTMRA (Ministry of Economic Development, pers., comm., 24 September 2003).

In light of these considerations, coupled with the fact that the Working Party on technical standards has worked to reduce some of the costs to manufacturers of providing machines to different jurisdictions, it appears there are grounds for retaining the permanent exemption on gaming machines.

FINDING 7.3

There are grounds, based on differing jurisdictional preferences, for retaining the MRA and TTMRA permanent exemption for gaming machines.

Pornographic material and classified publications, films and computer games

Australia has a national system of classification for publications, films, and computer games. Classification decisions are made by the Classification Board, an

independent statutory body. In New Zealand, this is done by the Office of Film and Literature Classification, an independent entity.

For the MRA, Schedule 1 exempts all pornographic material, while Schedule 2 contains the State and Territory classification legislation dealing with enforcement issues — the public sale, exhibition, hire and advertising of publications, films and computer games that must comply with Australian classification legislation. There is uniform availability of this type of classified material across Australia, with two exceptions:

- it is legal to sell X-rated material in the ACT and the NT; and
- the sale of restricted publications is permitted in all jurisdictions other than Queensland.

The law in all States does not prohibit X-rated films being possessed for personal use, although it does prohibit the public exhibition or display of these films. The Western Australian Government commented:

> … the Department of Justice advised that the restrictions placed upon the advertising, sale and distribution of X films form part of the *Censorship Act 1996* (WA). This legislation is consistent with that of the other States. Given the extant opposing views in the community about this material, the Government is satisfied that the current legislation represents an effective compromise which does not thwart the rights of those who choose to acquire this material for private purposes. (sub. DR164, p. 1)

The Attorney-General's Department stated:

> In agreeing to the development of the cooperative national classification scheme, States and Territories agreed to the Commonwealth having power to make classification decisions provided that it was within the power of States and Territories to decide what material was available in their own jurisdictions. …
>
> The permanent exemption … should be retained as jurisdictions have agreed that it is important for each jurisdiction to be able to regulate the availability of this type of material in accordance with the wishes of the people of those jurisdictions. (sub. DR161, p. 3)

The 1998 review indicated that one potential alternative is the creation of uniform national requirements relating to the sale of classified material. It noted that, in practical terms, the effectiveness of the present scheme was severely compromised by the ability of consumers to purchase these products from firms located in the ACT or from overseas, particularly by mail order. Nevertheless, the review recommended maintenance of this permanent exemption, as jurisdictions prefer their own specific restrictions.

Similarly, publications, films and computer games are exempted from the TTMRA for Australia by means of:

- Schedule 1 through the Customs (Prohibited Imports) Regulations as 'objectionable goods'[1] from New Zealand are not permitted to be imported unless permission in writing has been granted by the Commonwealth Attorney-General (currently delegated to the Director of the Australian Classification Board); and
- Schedule 2 contains the relevant State and Territory legislation so that it is an offence to sell or display any classifiable goods that do not meet Australian classification standards.

New Zealand's *Films, Videos and Publications Classification Act 1993* and *Crimes Act 1961*, section 124 (sale of indecent matter) are also listed as permanent exemptions to the TTMRA. The censorship regime in New Zealand recognises Australian ratings for unrestricted films and regulations provide for the cross-rating of such films. However, Australia and New Zealand have different approaches to the classification of restricted material.

The Attorney-General's Department noted that 'there are numerous examples of different classification decisions by the Australian and New Zealand classification bodies and it would be unacceptable to Australian communities if the TTMRA applied' (sub. DR161, p. 4). The Department considered that the exception to the TTMRA for the Customs and Classification Acts should be retained on the basis of different community standards.

The Queensland Government considered its legislation (namely *Classification of Films Act 1991* and *Classification of Publications Act 1991*) to be 'an effective means of ensuring appropriate standards are maintained regarding indecent material' (sub. 96, p. 9). It expressed support for continuation of the permanent exemption for pornographic material for the MRA and TTMRA.

The Tasmanian Government indicated that it did not object to the preliminary findings in the draft report that consideration be given to retaining or removing the permanent exemption for the MRA for pornographic material (sub. DR169, p. 4). The Victorian Department of Justice 'would support exploration of ways to make the mutual recognition regime more effective in relation to the sale of pornographic material' — specifically, for the sale of X-rated videos (sub. DR168, p. 6).

[1] The definition of 'objectionable goods' covers pornographic material, any publications and other goods that describe matters of sex, drug abuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults. In contrast, New Zealand must consider whether material promotes or supports matters that are likely to be injurious to the public good.

As interactive games fall into the film and literature classification area, these are not presently covered by mutual recognition due to the exemption. The Interactive Software Association of New Zealand (ISANZ) pointed out that there are significant compliance costs involved for them due to the need to have their games rated separately for Australia and New Zealand plus the need to specifically label for New Zealand:

> … for New Zealand games which are mostly brought into Australia first for trans-shipment into New Zealand includes the need to open each game place a New Zealand label on the inside cover and again on the outside of the cover before resealing in shrink wrap …
>
> This same process is required for movies (video and DVD) sold into New Zealand. (sub. DR136, p. 4)

ISANZ believes that there should be work on how to apply a common rating system for film, video and published work. It said:

> We accept that each country wishes to protect its people from electronic and visual media that might be harmful to the social fabric of each country, but we would argue that this can be achieved within the TTMRA and within a harmonised system. …
>
> Given that we have common cultures we believe it must be possible to establish a common platform for dealing with such products and reducing the compliance costs for both countries. (sub. DR136, p. 4).

Retention of the permanent exemption for pornographic material in Schedule 1 and State and Territory classification legislation for publications, films and computer games in Schedule 2 for the MRA enables jurisdictions to make different judgments and maintain different approaches to the availability of this type of material. With the limited exceptions noted above, interested parties generally did not address this issue in their submissions.

In the absence of harmonisation, the exemption is required to allow a jurisdiction the freedom to determine the type of material it will allow within its borders. The Attorney-General's Department noted that it did not have the opportunity to discuss its response with the States and Territories, but that it would include this matter on the agenda for its meeting with State and Territory censorship officials in September 2003. The Commission considers that this exemption could be reviewed to determine whether there is any scope for removing all or part of the permanent exemption.

Given the differences in approach between Australia and New Zealand and the variation in Australian States in the type of restricted material they allow, the New Zealand Government considered it appropriate to retain the permanent exemption for the TTMRA (Ministry of Economic Development, pers., comm., 22 September

2003). In such situations, it would be reasonable that, based on sovereignty issues, each country should be able to enforce its own standards.

FINDING 7.4

Consideration could be given to whether there is scope for achieving harmonisation, thus enabling removal of all or part of the permanent exemption for the MRA in Schedule 1 for pornographic material and Schedule 2 for the classification of publications, films and computer games. In the absence of harmonisation, the permanent exemption should be retained.

FINDING 7.5

On the grounds of sovereignty and differences in approach between the two countries, the TTMRA permanent exemption for pornographic material and classified publications, films and computer games should be retained.

Quarantine

As set out in Schedule 2 of the MRA, the exemption for quarantine covers laws where the following applies:

- the law regulates or prohibits the importation of specific goods into a State or defined area of the State;
- the State or area is substantially free of a particular disease, organism, variety of a species or genetic disorder;
- it is reasonably likely that the good could carry or introduce into that area a disease, organism, variety of a species or genetic disorder; and
- it would have a long-term and substantially detrimental effect on the whole or any part of the State. (Here, 'State' refers to a state or territory of Australia.)

The 1998 review noted that the effects of a breach of quarantine law are very difficult to reverse and that freer interstate trade that may result in violations of the ecological integrity of jurisdictions is not in the national interest and that there were no obvious alternatives to the exemption. Accordingly, it concluded that the exemption should be retained.

The Tasmanian Government supported retention of this exemption to enable the continued operation of the quarantine system. However, it recommended that the exemption be reassessed to ensure it is consistent with nationally agreed quarantine policy. Two matters were raised. First, the Tasmanian Government noted that the requirements under the MRA are more prescriptive than the TTMRA, since it is

necessary to prove that it is 'reasonably likely' that a 'substantial detrimental effect' will occur before the exemption can apply. It commented that:

> … the TTMRA provides a somewhat broader, general exemption in line with World Trade Organisation principles. The imposition of restrictive thresholds in the MRA has the capacity to impact on the right of a State or Territory to take independent precautionary quarantine action. (sub. 74, p. 2)

Second, it noted the new arrangements for addressing regional differences in relation to import risk recently agreed to by the Primary Industries Ministerial Council, saying that the nature of the MRA exemption may impact on the capacity of governments to follow through on those arrangements (sub. 74, pp. 2–3).

The Department of Agriculture, Fisheries and Forestry noted that Commonwealth, State and Territory Ministers responsible for primary industry agreed, through an exchange of letters in 2002 under the auspices of the Primary Industries Ministerial Council, that the Commonwealth would address regional differences in pest status and risk as part of the import risk analysis process and take such differences into account in developing risk management measures for imports. Regional differences in pest and risk status do not necessarily correspond with jurisdictional borders (sub. DR166, p. 1).

Further, the Department responded:

> … while we concur with Tasmania's objectives in seeking to ensure that the MRA is consistent with nationally agreed quarantine policy and that it does not unintentionally impede the operation of national approaches to quarantine risk management, we see no need to amend the wording of the exemption clause. The exemption clause for quarantine allows the States and Territories to put in place appropriate measures to recognise regional differences in pest and risk status in a way that is consistent with nationally agreed quarantine policy. (sub. DR166, pp. 1–2)

For the TTMRA, the Australian permanent exemption for quarantine states:

> (a) the law is enacted or made substantially for the purpose of preventing the entry or spread of any pest, disease, organism, variety, genetic disorder or any other similar thing; and
>
> (b) the law authorises the application of quarantine measures that do not amount to an arbitrary or unjustifiable discrimination or to a disguised restriction on trade between Australia and New Zealand and are not inconsistent with the requirements of the Agreement establishing the World Trade Organisation.

The New Zealand TTMRA permanent exemption refers to:

> Any law relating to quarantine, to the extent that it deals with any requirement described in section 10(2) relating to the sale of goods and does not amount to an arbitrary or unjustifiable discrimination or a disguised restriction on trade between Australia and New Zealand.

The responsibility for Australian border quarantine matters rests with the Australian Quarantine Inspection Service, while general responsibility for quarantine policy was transferred to Biosecurity Australia in October 2000. In New Zealand, the Ministry of Agriculture and Forestry has responsibility. Some States and Territories have transferred responsibility for delivery of national quarantine to the Commonwealth, while Western Australia, Tasmania and the Northern Territory provide quarantine services on behalf of the Commonwealth under an Agency Agreement. The relevant State and Territory Departments (such as the Department of Agriculture or Department of Natural Resources and Environment) have responsibility for intrastate and interstate quarantine.

Quarantine is clearly an area where negative spillovers or externalities are relevant. Importers, producers and consumers may make gains from bringing in goods without fully taking into account the adverse effects on others. The adverse effects could range from destroying species or commercial crops to otherwise limiting the quality of life of those living in the relevant jurisdiction. This problem has the added characteristic of dealing with irreversible consequences. While not strictly a quarantine issue, the introduction of cane toads in Australia has had far-reaching consequences with their spread to other regions and their costs grossly outweighing any benefits gained from reducing beetle populations in sugar plantations (which was the original reason for introducing them). To date, it has been impossible to eradicate the toads.

The Agreement on Sanitary and Phytosanitary Measures of the World Trade Organisation has set international disciplines on the use of quarantine measures, requiring them to be based, where appropriate, on international standards and guidelines. Where measures more stringent than international standards are deemed necessary, they must be based on scientific analysis and accepted risk assessment techniques.

The Employers and Manufacturers' Association (Northern) Inc. of New Zealand (sub. 83, p. 6) does not accept that bio-security should be used to block agriculture, horticulture or aqua-culture products where there is no proven hazard or where adequate measures are in place to ensure no risk exists. However, this does not preclude the need for jurisdictions to retain control over goods that pose biosecurity risks to local environments.

In a large country like Australia, the need for, and nature of, quarantine requirements can vary quite markedly from one region to another. For example, certain pests and diseases that are prevalent in tropical regions of Australia are not found in the cooler southern regions. While, in some instances, climatic differences mitigate against their spread, this is not true of all pests and diseases. In these circumstances, there are grounds for the maintenance of State and Territory

quarantine regulations to restrict the spread, and the potential costs, of pests, diseases and the like to other regions in Australia.

In relation to the treatment of genetically modified organisms[2] (GMOs), Australia passed the *Gene Technology Act 2000* to establish a national scheme for the regulation of these organisms in Australia. The operation of this scheme would appear to be exempt by virtue of the quarantine exemption in the TTMRA. Consideration of the risks posed to the environment by GMOs need to be assessed in the context of Australia's unique environment, including flora and fauna. Consequently, a regulatory approval granted in New Zealand on the basis that the GMO would not harm the New Zealand environment may be of little relevance to the assessment of the consequences of the release of the GMO in Australia. An example relates to the research being done in New Zealand to genetically modify a parasitic worm as a means to control feral brushtail possums, an Australian native marsupial introduced into New Zealand that has become a major animal pest. Release of such an agent in Australia may have potentially devastating consequences for this country's possum populations (Office of the Gene Technology Regulator, pers., comm., 11 September 2003). In New Zealand, the Hazardous Substances and New Organisms Act, which covers GMOs, is a special exemption for the TTMRA.

Similarly, the quarantine exemption within the TTMRA reflects the need to contain the transmission of plant and animal pests and diseases and protect human health across national borders.

FINDING 7.6

The MRA permanent exemption for quarantine is justified as quarantine requirements need to be implemented at the jurisdictional level to be effective.

FINDING 7.7

The TTMRA permanent exemption for quarantine is warranted. Different risks justify different regulation.

Endangered species

An exemption also applies for the MRA and TTMRA to laws made substantially to protect a species (or other class of animals or plants) from extinction in the jurisdiction and to prohibit or restrict their possession, sale, killing or capture.

[2] GMOs are organisms (plant, animal, fungi, bacterial or viruses) that have been modified in such a manner that they cannot be derived through 'traditional' breeding methods.

The 1998 review stated:

> … States and Territories need the freedom to tailor their laws and policies to their unique requirements regarding the protection of their flora and fauna, in order to protect the biological resources of the jurisdiction. (CRR 1998a, section 6.6.4)

It considered that the goal of freer interstate trade through the removal of this MRA permanent exemption was not in the national interest and concluded that the exemption should be maintained.

The Tasmanian Government submission supported retention of this permanent exemption so that measures can be put in place to protect endangered species. It stated that:

> The status of a species, endangered or otherwise, can differ between jurisdictions, in part because geographic dispersion is a pertinent factor in determining the status of a species. (sub. 74, p. 3)

The South Australian Government also supported retention of this permanent exemption (sub. 114, p. 6).

Environment Australia pointed out that the wording of this exemption for the TTMRA should be amended to reflect the current legislation (the *Environmental Protection and Biodiversity Conservation Act 1999*) and incorporate the words 'killing, injuring, taking, trading, keeping, moving or interfering' (sub. 65, p. 3). It suggested that Schedule 1 of the Australian legislation should be amended to refer to Part 13A of the *Environmental Protection and Biodiversity Conservation Act 1999* (which replaced the *Wildlife Protection (Regulation of Exports and Imports) Act 1982*; repealed on 11 January 2002) specified in the TTMRA (sub. 65, p. 4).

Environment Australia also indicated that other provisions that should be included under Schedule 1 of the TTMRA relate to laws implementing the Convention on Biological Diversity, the Bonn Convention, the Agreements with Japan and China for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment (known as JAMBA and CAMBA), the Apia Convention, the World Heritage Convention and the Ramsar Convention (sub. 65, p. 4).

There is considerable variation in endangered animal and plant species both within Australia and between Australia and New Zealand. Consequently, there is a clear need for some variation between jurisdictions in the regulatory regime required to protect endangered species. As mutual recognition could result in the circumvention of a jurisdiction's regulations, there are grounds for maintaining the existing exemption.

FINDING 7.8

There are grounds for retaining the MRA and TTMRA permanent exemption relating to endangered species. Consideration should be given to amending the wording of the TTMRA to reflect the current legislation.

Ozone protection

When the MRA commenced in 1993, ozone protection legislation varied across jurisdictions. The 1998 review of the MRA noted that the success of the national ozone protection strategy was due, to a significant degree, to the operation of variable ozone protection regulation. The 1998 review concluded that the creation of uniform national standards for ozone protection was unlikely, due to the fact that jurisdictions faced different circumstances. As the success of the ozone protection strategy was regarded as in the national interest, the review concluded that the exemption was justifiable.

The current legislation seeks to provide a system of controls on the sale of substances which, when released into and dispersed in the atmosphere, act as atmospheric pollutants (such as refrigerators and air conditioners containing chlorofluorocarbons) that contribute to the depletion of ozone in the stratospheric ozone layer.

The Commonwealth legislation in this area (*Ozone Protection Act 1989* (Cwlth)) implements the provisions of the Montreal Protocol on Substances that deplete the Ozone Layer. The Montreal Protocol aims to promote international cooperation in developing and implementing specific measures to control the consumption of ozone-depleting substances. Australia ratified the protocol in May 1989. A review of the legislation, which was completed in January 2001, recommended extension of the legislation to ensure national consistency in ozone protection regulation across all States and Territories, in relation to supply and end-use. Commonwealth legislation to this effect has been introduced into Parliament.

The Tasmanian Government submission noted that the original legislation contained in the MRA (*Chlorofluorocarbons and other Ozone Depleting Substances Control Act 1988* of Tasmania) has been repealed and should be replaced by Part 6 of the *Environmental Management and Pollution Control Act 1994*, which is dedicated to the control of ozone depleting substances, as defined in the Commonwealth *Ozone Protection Act 1989*.

Further, the Tasmanian Government questioned the need to retain the exemption as the legislation is now essentially consistent across Australia. It suggested that an assessment be made regarding the ongoing need for this exemption in view of discussions between the Commonwealth and all States and Territories for the Commonwealth to assume greater regulatory responsibility in this area (sub. 74, p. 4).

In view of international developments and the 2001 review of the relevant legislation and resulting legislation, it is not clear that there is a need to maintain jurisdiction-specific standards within Australia. The Commission supports measures to develop nationally consistent standards in this area.

New Zealand, like Australia, is a signatory to the Montreal Protocol and therefore implements import and export controls on ozone depleting substances. There is no production of these substances in New Zealand. New Zealand has an accelerated phase down program for the ozone depleting substances compared to many other parties to the Protocol, including Australia (Ministry of Economic Development, pers., comm., 22 September 2003).

FINDING 7.9

There appears to be scope to develop uniform standards, consistent with international standards, across the Australian jurisdictions in relation to ozone protection. This could ultimately enable removal of the MRA permanent exemption for ozone protection legislation.

FINDING 7.10

Should a national standard for ozone protection be developed in Australia, consideration could then be given to the need to maintain the TTMRA permanent exemption for ozone protection.

Beverage Container Act 1975 (South Australia)

South Australia's Container Deposit Legislation was included as a permanent exemption to the operation of the MRA. This Act was repealed in 1995 and the relevant provisions of the Act are now contained in the *Environment Protection Act 1993*.

The beverage container scheme aims to control litter and provide arrangements for aggregating and recycling used beverage containers, thus contributing to the protection of the environment in South Australia. Under the scheme, a consumer receives a refund for return of certain empty beverage containers (most containers

are returned to a depot rather than the original retailer). All beverage sellers across Australia who wish to sell their beverage in South Australia are subject to the scheme. The scheme requires the Environment Protection Authority (EPA) to approve containers and their refund marking (or labelling) before sale (section 68 of the *Environment Protection Act (SA) 1993*). Consequently, businesses that wish to sell their beverages in South Australia incur some additional costs in labelling.

The 1998 review regarded the beverage container legislation as successful in South Australia. Following introduction of the scheme, significant recycling had occurred for glass, aluminium and plastic beverage containers. It acknowledged that, while industry is responsible for running the scheme, costs would be passed on to consumers in the form of higher beverage prices. It recommended that the exemption be maintained.

A report was prepared by Phillip Hudson Consulting Pty. Ltd. in March 2000 for the South Australian Environment Protection Agency on the economic and environmental impacts of the container deposit legislation. The report found that:

> The deposit mechanism of the Container Deposit Legislation has had, and continues to have, a positive impact on consumer and community behaviour in relation to the collection and return of deposit containers and thereby contributing significantly to the Government's overall litter reduction objectives. (Phillip Hudson Consulting 2000, p. 38)

It noted that additional costs associated with the scheme are either absorbed by industry or passed on to national consumers and, therefore, to national consumers of products — not just South Australian consumers. It estimated that South Australia bears around 20 per cent of the estimated national costs associated with the scheme. In other words, the direct cost of the scheme's handling fees to producers and consumers in South Australia was in the order of $2.3 million each year, compared with the $11.6 million borne nationally (pp. 21–22).

It concluded that:

> Given the community's very high acceptance level of the legislation and deposit system, we conclude that the net cost is how much the South Australian community is prepared to pay for the unquantified benefits associated with reduced litter and improved environmental outcomes … (p. 38)

Since the inception of the South Australian scheme in 1975, there has been a marked change in community attitudes. More specifically, the benefits of recycling and conservation have generally been widely accepted and adopted by consumers, industry and the government. The Commission notes that other jurisdictions promote recycling and litter management in ways that do not require exemption from the mutual recognition provisions, thus avoiding the costs that the South

Australian scheme imposes on producers from outside the state that also supply product to the South Australian market.

There is a case for removal of this permanent exemption. However, any change would require the South Australian Government to support removal of this exemption. This is unlikely given that, in its submissions, the South Australian Government strongly supported continuation of the scheme.

In response to the Commission's preliminary finding in the draft report, the South Australian Government strongly contended 'that there is not a case for removing the permanent exemption applying to the beverage container provisions' (sub. DR165, p. 4). It conducted a lengthy review of the beverage container provisions between 2000 and 2003 to identify the need for any legislative amendments. It said:

> The container refund system has demonstrated ongoing success over the past 25 years and is supported overwhelmingly by the SA community. … Accordingly, the South Australian Government remains committed to retaining and improving the CDL system. (sub. DR165, p. 2)

The Australasian Soft Drink Association Limited considered that this permanent exemption 'is an anomaly that has outlived both its economic and environmental usefulness' and expressed support for the Commission's preliminary finding. It said:

> … the South Australian Government should review this legislation with the aim of its replacement with schemes to promote recycling and litter management as adopted in all the other jurisdictions that are party to both the MRA and TTMRA. (sub. DR145, p. 2)

FINDING 7.11

In view of the strong support for the scheme by both the South Australian Government and the South Australian community, it is unlikely that the permanent exemption for the Container Deposit Legislation in the MRA can be removed.

Tasmanian law relating to abalone, crayfish and scallops

This exemption regulates the size of abalone, crayfish and scallops that a person may capture, possess, buy or sell in Tasmania. The *Living Marine Resources Management Act 1995* aims to achieve sustainable management of living marine resources to protect the indigenous fish stock of Tasmania and to promote the viability of the industry. Under this Act, the Governor has the power to make regulations regarding a number of matters, including a regulation limiting the size of fish that a person may capture, possess, buy or sell in Tasmania.

The 1998 review noted that the Tasmanian regulations were tougher than the counterpart South Australian regulations because of the greater measures needed to maintain the breeding stocks in the Tasmanian ecosystem. It noted that the single practicable form of inspecting the size of fish is random inspection and that this is no help as intrastate and interstate fish are practically indistinguishable. The review recommended no change to the exemption.

The case for retaining or abolishing this exemption hinges on the differences between jurisdictions in certain characteristics of the fish stock — for example, in the case of female rock lobsters, their size when they reach sexual maturity. If the difference is significant, and regulations in place in other jurisdictions would lead to a clear diminution in the fish stock, there are grounds for continuing the different regulations and, therefore, the exemption. On the other hand, if the effect of the application of law has only a marginal effect, then the continuation of the exemption might not be justified.

The Tasmanian Government submissions strongly supported the retention of this exemption. It said:

> Restricting the size of individual abalone, crayfish or scallops taken by commercial and recreational fishing sectors is an essential fisheries management tool to maintain fish stocks at sustainable levels. The Australian abalone, crayfish and scallop fisheries comprise a number of different species. These species … grow at different rates and become sexually mature at different sizes and ages. Therefore a size limit, which is applicable to one species, may be inappropriate for others. (sub. DR169, p. 6)

The exemption is based on the differing sizes at which fish achieve sexual maturity in Tasmanian waters compared with other jurisdictions. For example, the minimum size limits of 110mm carapace length for male lobster and 105mm for female rock lobster have been set to conserve egg production. The Tasmanian Government argued that the exemption is necessary so that undersized rock lobsters are not passed off as rock lobsters from South Australia, where the growth rates and size of onset of maturity are lower than in Tasmania (sub. 74, p. 3). The situation for each of these species is outlined in box 7.1.

The Victorian Department of Primary Industry stated that, in the interest of consistency and to minimise exemptions, the Commission should investigate the possibility of deleting this clause (sub. 116, p. 7).

The Commission sought comments from interested parties on whether there was a case for retaining the exemption based on the extent of different characteristics of fish stock across regions. Except for the Tasmanian Government, no further submissions were received on this matter.

Box 7.1 **Tasmanian situation — abalone, crayfish and scallops**

The Tasmanian Government has outlined the rationale for retention of the permanent exemption for each of these species.

Abalone:

Size limits for blacklip abalone, the most prevalent in Tasmania, are different from those in other states. Victorian blacklip size limits range from 100mm to 120mm, 115mm for NSW and 125mm and 130mm in SA. Variation in size occurs with abalone growing slowest and maturing at a smaller size in Bass Strait and along the north coast while growth rates and size increase in a southerly direction. From an original system of one size limit for all fishing, the commercial fishery now operates with five size limits for blacklip abalone in different areas of Tasmania (114mm, 127mm, 132mm, 136mm and 140mm). Recreational fishers have two size limits for blacklip (of 127mm and 136mm) and cannot possess 'small' abalone in the larger size limits areas irrespective of where the abalone was caught. Thus, only licensed commercial divers may legally take or possess (anywhere) abalone less than 127mm.

For greenlip abalone, the SA size limits are 130mm and 145mm while in Tasmania size limits are 145mm and 150mm.

Crayfish:

The Victorian fishery has the same minimum size limits as Tasmania while the SA size limit is lower because the growth rates and size at onset of maturity are different to Tasmania.

Scallops:

The Commonwealth has the same size 80mm shell width size as Tasmania. The Victorian fishery does not have a minimum size set in legislation. Concern regarding this size limit in Tasmania has resulted in a proposal, with industry support, to the Tasmanian Scallop Fishery Advisory Committee to increase the limit to 90mm in 2004.

Source: (sub. DR169, pp. 6–8).

FINDING 7.12

There are grounds for retaining the permanent exemption for Tasmanian legislation relating to abalone, crayfish and scallops in the MRA and TTMRA.

Agricultural and veterinary chemicals

The agreement between the Governments of Australia and New Zealand for a joint food standards system (ANZ food treaty) provides the framework for the setting of joint food standards. However, the scope of this agreement specifically excludes the specification of maximum residue limits for agricultural and veterinary chemicals in food for public health and safety reasons. This particular TTMRA permanent

exemption is dealt with in chapter 8, section 8.2, in the context of the discussion about hazardous substances.

Imported Food Control Act

For the TTMRA, Australia permanently exempted the *Imported Food Control Act 1992* (IFCA) (Cwlth) for risk categorised food commodities. Australia did not support total exemption of New Zealand foods from the IFCA requirements because of ongoing food safety concerns, and because Australia and New Zealand have differing lists of high-risk food imports and different food inspection systems.

Australia has ceased inspection of low-risk food from New Zealand. For high-risk food imports into Australia, the Australian Quarantine and Inspection Service (AQIS) inspects imports from all countries (reduced according to the compliance rate), except where AQIS has a government to government certification agreement with the exporting country. In that case, the certification is accepted and there is minimal inspection of the food on entry into Australia (no more than 5 per cent). Following agreement between AQIS and the NZ Ministry of Agriculture and Forestry for the certification of risk products exported to Australia from New Zealand, the majority of NZ shipments are released directly to the market with only audit sampling being conducted at AQIS expense.

On implementation of the TTMRA, the New Zealand imported food inspection program continued to treat Australian food as product from any other country. Only high-risk food is inspected, regardless of the source country. Following the TTMRA, Australian domestic suppliers were able to access the New Zealand market without the usual requirement for export registration for premises and AQIS inspection. Where foods are considered by NZ authorities to be high-risk, Australian products are subject to inspection and testing, unless accompanied by the appropriate certificates. A policy shift in New Zealand in mid-2002 has had the effect that it no longer accepts AQIS certification. Despite efforts to revert to the previous arrangement, this has not been achieved.

AQIS has noted that ‘while Australia and NZ continue to inspect risk foods, there is little, if any added health outcomes from this costly exercise’ (sub. 99, p. 1). A working group comprising the New Zealand Food Safety Authority, AQIS and Food Standards Australia New Zealand (FSANZ) has been established to explore ways of harmonising their lists of risk-categorised food commodities (sub. DR153, p. 11). Such a move would remove the need for this permanent exemption (sub. 91, p. 9).

AQIS recommends that the existing exemption of risk food inspection be removed from the TTMRA, providing that:

- there is reciprocal treatment of Australian food imported into New Zealand; and
- the existing and projected third country issues are recognised and dealt with effectively (sub. DR153, p. 12).

As New Zealand does not routinely inspect foods, other than those that it regards as high-risk, food from third countries has a relatively easy and unregulated route to the Australian market via New Zealand. This has the effect that Australia's import controls for low risk food from other countries can be bypassed.

AQIS stated that it 'is continuing efforts to deal constructively with New Zealand officials in ensuring reciprocal treatment and in resolving third country issues' (sub. DR158, p. 1).

FSANZ noted that:

> … authorities in Australia and New Zealand have begun a process to agree on a single list of high-risk foods, and a subsequent process to maintain the single list over time. The authorities expect that a single list of high-risk foods will be finalised during 2004, as part of a wider harmonisation review of the imported food controls to achieve a common border around Australia and New Zealand. (sub. DR160, p. 1)

Once these issues are resolved, FSANZ supports removal of this permanent exemption.

The Australia-New Zealand Business Council Inc. (New Zealand) expressed support for removal of this Act from the list of permanent exemptions (sub. DR137, p. 2).

FINDING 7.13

The Imported Food Control Act 1992 (Commonwealth) could be removed from the list of TTMRA permanent exemptions after there is reciprocal treatment of Australian food imported into New Zealand, effective procedures are in place for maintaining the high-risk food list and the existing and projected third country issues are dealt with effectively.

Radiation Protection Act 1965

This New Zealand Act, which is administered by the National Radiation Laboratory within the New Zealand Ministry of Health, contains a number of control mechanisms. These include controls on the manufacture, importation and sale of radioactive material by requiring the prior consent of the Minister for Health; and

on the sale of irradiating apparatus, which is only permitted to a person holding a licence under the Act.

The aim of any regulatory system in this area is to ensure that all planned exposures of people to radiation are at a suitably low level of exposure and that the likelihood of an accident occurring that results in a greater exposure than this is also suitably low. Risks to the public may be exacerbated by the fact that many of the effects of radiation are long term and cannot be sensed immediately.

The New Zealand Government has indicated the need to maintain strict border control to enable it to control the tracking of radioactive sources (Ministry of Health, New Zealand, pers. comm., 9 May 2003). This is being strengthened by a Code of Conduct for the Safety and Security of Radioactive Sources that is being developed by the International Atomic Energy Agency. New Zealand is currently examining its Act to bring it up to date.

For Australia, the *Customs (Prohibited Imports) Regulations* of the Commonwealth, listed as an exclusion for the TTMRA, cover radioactive materials.

FINDING 7.14

There are public health and safety reasons for retaining the TTMRA permanent exemption for the New Zealand Radiation Protection Act 1975.

Antiquities Act 1975

Under the TTMRA, the *Antiquities Act 1975* (New Zealand) restricts the export of antiquities from New Zealand. These include goods that are:

- of national, historical, scientific or artistic importance;
- related to the European discovery, settlement, or development of New Zealand; and/or
- appear to be, more than 60 years old.

A certificate of permission is required from the New Zealand Ministry for Culture and Heritage.

Within the Australian TTMRA, legislation regarding cultural items in Australia is included as an exclusion under 'other international obligations' (Schedule 1, Part 2). Australia ratified the 1970 UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property on 30 October 1989. This followed the passage of the *Protection of Movable Cultural Heritage Act*

1986, which was passed to give the international convention force in Australian law (Department of Environment and Heritage, pers. comm., 2 July 2003).

The purpose of the Australian Act is to protect, for the benefit of the nation, heritage objects that, if exported, would significantly diminish Australia's cultural heritage. It implements a system of export permits for certain heritage objects defined by the Act as 'Australian protected objects'. Applications are processed in accordance with the legislative scheme established under section 10 of the Act. The Minister for the Environment and Heritage makes the final decision as to whether an export permit will be granted. Since the commencement of the operation of the Act, 31 objects have been refused export permits (Department of Environment and Heritage, pers. comm., 2 July 2003).

FINDING 7.15

There are cultural reasons for retaining the TTMRA permanent exemption for the New Zealand Antiquities Act 1975.

7.2 Permanent exemptions: occupations

The only permanent exemption for occupations relates to medical practitioners for the TTMRA. However, in the case of doctors trained in Australia and New Zealand, mutual recognition-type arrangements already apply. As the Medical Council of New Zealand noted:

> At this stage medical practitioners who have an Australian or New Zealand primary or post-graduate medical qualification are mutually recognised by the other country's registration authorities. This means that a doctor qualified in Australia or New Zealand is able to travel and work with relative ease between the two countries. (sub. 80, p. 3)

In regards to the exemption, the Council said:

> … having made several moves towards mutual recognition the Council believes that it is still necessary for medical practitioners to be excluded from the TTMRA. There continue to be differing standards between the registration of overseas-trained doctors and on-going competence legislation between New Zealand and the states of Australia. At this point the Council does not believe that it is in the interests of the health and safety of the New Zealand public for medical practitioners to be included in the TTMRA. (sub. 80, p. 3)

The Medical Council of New Zealand noted that one of these differences relates to the assessment of doctors by Australia in 'areas of need', where conditional registration is granted. These arrangements relate to the registration of overseas trained doctors in Australia where the various registration boards have requirements for conditional registration for doctors filling positions in areas of need. Assessment

is undertaken by each board to ensure that minimum standards are met for practice within that jurisdiction. According to the Medical Council of New Zealand, Australia has set different criteria for doctors in these designated areas, where the demand for a medical practitioner overrides the need for the usual level of competence assessment. The Council does not believe that this two-tier assessment process is acceptable or in the interests of the New Zealand public. However, it recommends another review of this exclusion in five years time in view of continuing efforts towards harmonisation of registration of overseas-trained doctors and competency assessment (sub. 80, pp. 5–6).

The Commonwealth Department of Health and Ageing considers that the exemption is necessary to ensure that overseas trained doctors from countries other than New Zealand are required to undergo the Australian Medical Council (AMC) examinations to assess their medical competence. Accordingly, the Department supports the continued exemption for medical practitioners from the TTMRA (sub. DR176, p. 1).

The AMC stated that:

> … the criteria for recognition of certain medical qualifications for the purposes of registration in New Zealand differs from that agreed nationally in Australia. If the exclusion of medicine from the TTMRA is withdrawn, there will need to be agreement on the harmonisation of basic standards for registration between Australia and New Zealand. (sub. 54, p. 2)

The Occupational Therapy Board (New Zealand) regards it as anomalous and inequitable that the TTMRA does not apply to all health professionals. It suggests that the exemption afforded medical practitioners should be removed (sub. 12, p. 2). The Australian Nursing Federation is of the view that medical practitioners should be specifically required to work toward this exemption being removed in time for the next review (sub. DR170, p. 1).

The New Zealand Government expressed its support for retention of the exemption at this time, in recognition of the different standards for the registration of overseas-trained doctors and the different ongoing competence legislation between Australia and New Zealand. However, it supported moves to resolve this issue before the next review. It stated:

> … officials anticipate it could be possible to examine whether the exemption could be removed by the next review in 5 years time. The continuation of the exemption creates an anomaly since medical practitioners remain the only health occupation to be exempted. (sub. DR159, p. 10)

It went on further to say:

> Given the close collaborative arrangements between New Zealand and Australian medical registration authorities and professional colleges, and the equivalency of the medical profession, we consider it should be feasible for the AMC and the Medical Council of New Zealand to develop consistent entry requirements and standards for registration purposes in the near future. (sub. DR159, p. 11)

A number of recent reports have highlighted that shortages of surgeons are likely in the future. A report by the Centre for Population and Urban Research at Monash University notes that 'the growing reliance on overseas-trained surgeons is a symptom of the emerging shortage of surgeons in Australia and (to a lesser extent) in New Zealand' (Birrell et al 2003, p. 41). In addition, a report to the ACCC by Professor Jeff Borland of Melbourne University found likely shortages of surgeons in a majority of surgical sub-specialities, particularly in general surgery and orthopaedic surgery (ACCC 2003). These trends reinforce the need to work towards resolving issues about third country competencies.

In 1996, the Commonwealth Government introduced legislative changes that limited access to medicare provider numbers for new doctors and overseas trained doctors, including New Zealand residents. A doctor registered in Australia after 1 November 1996 is required to serve ten years before being eligible to obtain an unrestricted provider number. From 18 October 2001, a temporary resident New Zealand doctor is unable to obtain an unrestricted provider number, while a New Zealand doctor living permanently in Australia needs to wait ten years from the time of gaining permanent residency before obtaining a provider number. As the New South Wales Government pointed out, these restrictions on medicare provider numbers act to hamper the mutual recognition of New Zealand doctors (sub. 117, p. 7). The Department of Health and Ageing commented that New Zealand doctors may practise privately and assess medicare benefits provided they obtain an exemption to the requirements of section 19AB of the *Health Insurance Act 1973*. These exemptions are granted for work in districts of workforce shortage that for general practice are generally in rural and remote areas of Australia. This restriction does not affect the ability of these doctors to work in public hospitals or salaried positions (sub. DR176, p. 2).

FINDING 7.16

The TTMRA permanent exemption for medical practitioners allows for some restrictions for certain non-Australian and non-New Zealand trained doctors. There are public health grounds for this permanent exemption to be retained at this time. However, 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.

7.3 Exclusions

The four broad areas of exclusions for the TTMRA relate to 'nation-state' type issues. In developing the arrangement, parties identified a number of laws that could be unintentionally affected by the application of mutual recognition principles, thereby warranting exclusion from the coverage of the TTMRA, namely:

- customs controls and tariffs — to the extent that laws provide for the imposition of tariffs and related measures (for example, anti-dumping and countervailing duties) and the prohibition or restriction of imports (for example, firearms);
- intellectual property — to the extent that laws provide for the protection of intellectual property rights and relate to the requirements for the sale of goods;
- taxation and business franchises — to the extent that laws provide for the imposition of taxes on the sale of locally produced and imported goods in a non-discriminatory way (for example, goods and services tax (Commonwealth and New Zealand) and business franchise and stamp duties (States and Territories); and
- specified international obligations — to the extent that laws implementing those obligations deal with the requirements relating to the sale of goods (CRR 1998b, p. 22). The international obligations included by Australia are the:
  - Convention on International Trade in Endangered Species of Wild Fauna and Flora;
  - Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal;
  - Charter of the United Nations in relation to UN sanctions;
  - United Nations Educational, Scientific and Cultural Organisation Convention regulating the International Trade in Cultural Property; and
  - European Union–Australia Wine Agreement — Protection of Certain Names and Expressions.

New Zealand includes the United Nations Act, Trade in Endangered Species Act and Ozone Layer Protection Act in its list of exclusions for international obligations.

The *categories of laws* excluded from the scheme may only be amended if all the participating parties agree.

The *laws* listed in the Exclusions Schedule to the TTMRA can be amended unilaterally by any party as long as the amendment removes or reduces the extent of

an excluded law or substitutes another law that falls within the categories described above.

With the exception of *intellectual property*, there is no basis to remove the categories of exclusions outlined above. The exclusion for intellectual property is discussed below.

FINDING 7.17

The TTMRA exclusions for customs controls and tariffs, taxation and specified international obligations should be retained.

Intellectual property

Intellectual property rights (IPRs) cover ideas, inventions and creative expressions for which there is a public willingness to bestow the status of property. IPRs provide certain exclusive rights to the creators of intellectual property (IP), to allow them to reap commercial benefits from their creative effort or reputation. The purpose of IPR legislation is to protect against 'free-riding' by means of unauthorised imitation, copying or deceptive use of identifying marks.

All intellectual property involves some investment in intellectual effort or, in the case of trademarks, investment in reputation. Industrial property is generally protected by legally registered rights, including patents, trademarks and designs. Copyrights and neighbouring rights are unregistered (they apply automatically against unauthorised copying and duplication).

The Commission understands that intellectual property was exempted from the TTMRA in order to ensure that it would not undermine the system by which patent rights are allocated on a regional basis. If, for example, a product is patented in Australia, but not in New Zealand, then it can be freely sold in New Zealand by anyone, but cannot be sold in Australia without the permission of the patentee (who does not have to give permission). Invoking the TTMRA to allow the product to be sold in Australia without restriction would undermine this system. This is due to the primacy of the TTMRA legislation (see section 2.1). This is not the intention of any of the participating governments.

It is in society's interest to ensure the dissemination of new knowledge or ideas to the wider community. Expansion of the IP regime in the registered areas of patents, trademarks and designs would broaden the register, broaden the knowledge base available through the register and increase the market size in which the temporary monopoly is granted, providing a stronger incentive to innovate and invent. A number of regional patent organisations have been set up to coordinate the

examination and grant of patents for several countries. For example, the European Patent Office examines and grants patents for a number of countries that are members of the European Patent Convention (EPC). Once a European patent is granted, it can be converted into a national patent in any of the member countries of the EPC that were designated in the original application.

Australian patent law resembles not only the British patent law on which it is founded, but also the patent laws in most other developed countries. While, strictly speaking, the Paris Convention (which originated in 1883) and the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS, which came into effect from the beginning of 1995) to protect IPRs on an international scale — do not require harmonisation of patent legislation; a similarity in broad patenting concepts across countries has occurred. This has been driven partly by international contacts and partly by the universal nature of technology (Revesz 1999, p. 85).

New Zealand is also a signatory to the Paris Convention and the TRIPS agreement, but there are considerable differences between the New Zealand and Australian patent legislation. While the New Zealand Government commenced a review of its Patents Act and has introduced amendments that are largely in line with the corresponding provisions of the Australian Act, there are still a number of issues on which they continue to differ.

ISANZ is concerned about the lack of commonality for Trademark protection and copyright rules and believes that harmonisation of these (along with Commercial laws such as the Fair Trading Acts and Trade Practices Act) would have significant benefits to industry operating on both sides of the Tasman. Hence, it advocated that this should be set as the target area for the next review (sub. DR136, p. 4).

FINDING 7.18

The TTMRA exclusion for intellectual property should be retained to ensure it does not undermine the patents rights system. As patent law and practices are evolving, including in relation to international agreements, there may be scope to re-evaluate this exclusion in the next review.

8 Special exemptions under the TTMRA

8.1 Introduction

Originally the TTMRA identified five sectors where immediate mutual recognition was not practicable: Hazardous Substances, Industrial Chemicals and Dangerous Goods; Road Vehicles; Therapeutic Goods; Gas Appliances; and Electromagnetic Compatibility (EMC) and Radiocommunications (RC) equipment. In 1999, a sixth special exemption on Consumer Product Safety Standards was added. The Arrangement established five year Cooperation Programs for each of these sectors to resolve outstanding issues by harmonisation, mutual recognition or permanent exemption. While progress has been made (for example, agreement has almost been fully reached on EMC and on consumer product safety standards) significant issues remain unresolved.

As outlined in chapter 3, it is generally understood that the broad goals of both the MRA and TTMRA favour establishing an integrated market across the Tasman; increasing trade between Australian States and Territories and New Zealand; enhancing the international competitiveness of Australian and New Zealand businesses; and increasing the influence by Australia and New Zealand on international norms and standards. Compatibility with international standards is also a goal of the TTMRA and is one of the prime means by which integration is made easier. Just as has occurred under the MRA, parties to the TTMRA expect greater cooperation between regulatory authorities and the accelerated development of harmonised standards where appropriate. Both countries want to participate in the global economy as fully as possible.

The special exemptions represent those areas where the parties were hopeful that greater integration could be achieved, but acknowledged there were issues outstanding that needed resolution. This chapter examines the barriers to greater integration in the areas subject to special exemptions. Each of the six Cooperation Programs are assessed separately below. In a number of cases, the differences in regulatory practices have been the most significant barrier to greater integration, rather than the nature of the goods themselves. While the latter may justify ongoing

exemption on efficiency grounds, differences in regulatory practices can be addressed where parties are committed to doing so. However, the adjustment costs involved in removing barriers imposed by different regulatory practices may be high in some cases. It is not always easy to make the judgment that net benefits will be positive, at least in the short term (though even in the short run there may be clear gains from removing regulatory duplication).

While differences in regulatory approaches can be a legitimate reason for delaying further integration, they rarely constitute a long term justification. In order to realise all the opportunities in the global market in these goods, both countries will need to make changes to the way they regulate these goods. Hence, the judgment is made that in the long run, in most areas greater integration will be efficiency enhancing, even when adjustment costs are taken into account. Australia and New Zealand could usefully regard resolution of these issues with each other as an important stepping stone towards reconciling attitudes and approaches to international standards. Of course, issues of sovereignty arise and, in a number of cases, the final judgment about efficiency effects should be left to a specific review of each.

Full mutual recognition may be possible for electromagnetic compatibility and possibly, consumer product safety standards (if differences over child car restraints are resolved) and gas appliances. In some areas — radiofrequency allocations and therapeutic goods (and possibly consumer safety products) — the need for long term exemptions is likely to be limited to a few specific products or standards. On the other hand, on health and safety grounds, there are sound reasons for individual jurisdictions to retain authority to grant approvals for sale and use of those chemicals that pose significant risks. Hence, only partial mutual recognition in this area is likely to be feasible in the medium term. For road vehicles, the process of achieving mutual recognition will depend on the successful implementation, and further evolution, of the UN-ECE Agreement which is expected to occur gradually and even then may need to be qualified. While creating partial exemptions is resource intensive and may distort resource allocations in either economy, the benefits of maximising market access are likely to outweigh their negative effects.

Under Article 9.2.3 of the TTMRA, during the first five years after the TTRMA came into force, conversion of special exemptions to permanent exemptions required the unanimous approval of COAG. However, but now permanent exemptions can be made with the agreement of only two thirds of the Heads of Government. To date no action has been taken to do so. As the New Zealand Government has commented:

> … a special exemption should move to a permanent exemption only on the basis of a reason grounded in unacceptable risks to health, safety or the environment … Difficulty

in aligning regulatory systems should not be accepted as a good reason for permanent exemption. (sub. DR159, p. 4)

Termination of any of the Cooperation Programs at this stage would suggest incorrectly that any further degree of integration in those sectors would not be possible or the effort warranted. There is a strong case to extend each of the special exemptions for a tailor-made period, as suggested below.

Relevant factors in assessing Cooperation Programs

A number of factors should be considered in evaluating progress towards mutual recognition under the Cooperation Programs:

- The annual roll over provisions have proved cumbersome and resource intensive, and there is agreement among officials that they have not served a useful purpose.
- Mutual recognition is intended to promote integration with the global economy.
- The current regulatory structures and the delegation of responsibilities between the Commonwealth, the States and Territories relating to the special exemption areas evolved before the momentum towards globalisation began to influence markets. In exercising their powers, jurisdictions need to be mindful of the impact of the new environment on the capacities of industries to operate in world markets and on costs to consumers and consumer choice.
- As signatories to the WTO Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary (SPS) Agreements, Australia and New Zealand are encouraged to:
  - regulate in a way that is not any more restrictive to trade than necessary;
  - limit mandatory requirements to protect national security, human health or safety; animal or plant health or safety; or to prevent deceptive practices;
  - adopt international standards where possible;
  - make their standards transparent through their notification, publication and availability; and
  - mutually recognise the conformity assessment procedures of other Members.
- To prevent regulation that is inconsistent with the principles of the TTMRA, regulators need to consult other TTMRA jurisdictions early in the policy development process, a necessity not always appreciated by regulators.
- Regulatory systems are not static. Where harmonisation or mutual recognition has been reached, there remains a need to monitor future developments to ensure progress is not eroded.

- The options for accommodating unresolved differences within the TTMRA framework are not limited to full mutual recognition or permanent exemption — harmonisation, mutual recognition of conformity assessments, partial exemptions and unilateral recognition are also possibilities.
- Exemptions should be defined as narrowly as possible to ensure that once harmonisation or mutual recognition has been reached on an issue, new, diverging regulations are not implemented subsequently without effective scrutiny by the TTMRA jurisdictions affected, a possibility that currently exists.

The Government of New South Wales supported the need for consultation during the development of standards, particularly in areas in which differences have delayed work towards harmonisation (sub. DR179, p. 6).

FINDING 8.1

While it is expected that it will be appropriate to terminate within two or three years the special exemptions for consumer product safety standards, gas appliances and radiofrequencies, with only a limited number of products or laws requiring permanent exemptions, in the medium to long term the six Cooperation Programs will continue to serve a useful purpose in reducing technical barriers to trade.

FINDING 8.2

All TTMRA exemptions should be defined as narrowly as possible to limit the scope for new regulations inappropriately impeding economic integration and to ensure that they apply only to products or laws where no further integration is possible or desirable.

FINDING 8.3

When either country is developing a new set of standards for any product, there would be benefit in consultations with counterparts in the other country. In this way, impacts on production, mutual recognition and trade can be identified early. Clear reasons would need to be given for a non-harmonised outcome.

Classification and definitional issues

In many instances, the boundaries between definitions of food, medicines, complementary medicines, agricultural and veterinary products, therapeutic goods and hazardous substances, etc are arbitrary or grounds can be found for placing them in several different categories. It is not surprising, therefore, that different jurisdictions have taken different approaches to regulating these products, often resulting in overlap and inconsistency. For example, the maximum permitted

percentage of certain ingredients may differ depending on whether the products are regulated as food or complementary medicines. Different approaches to classifying chemicals is also central to the problems of further alignment in this area.

Agricultural and veterinary products are regulated as chemicals in relation to their toxicological profile and separately for their effect on food, biosecurity and livestock. They were given permanent exemption status for reasons detailed below. However, because of their relationship with a number of goods subject to special exemption, they are considered in this chapter, rather than in isolation under the discussion of the permanent exemptions.

8.2 Hazardous substances, industrial chemicals and dangerous goods

Background

The Chemicals Cooperation Program broadly covers five aspects that affect the sale of chemicals across the Tasman — notification/approval, assessment/evaluation, hazard classification, information requirements and packaging. Apart from programs to harmonise Material Safety Data Sheets (MSDSs)[1] and inner labelling,[2] to date there remains little prospect of achieving early harmonisation or mutual recognition for most of these areas of regulation.

Chemicals are integral components of most manufactured and processed primary products. They are widely used in industry and domestic settings. Computers, software, furniture, books, paints, household cleaners and cosmetics, to name but a few, all contain chemicals, or chemicals are used in their manufacture. Though no studies have been undertaken to quantify the savings, it is generally agreed that reductions in regulatory barriers to trade in chemicals will result in substantial benefits for industry and consumers. For example, the Productivity Commission found that more efficient approval processes for chemicals would have downstream effects for automotive suppliers (PC 2002b, p. 93).

The chemicals industry is one of the largest sectors in the world with annual sales of about US$2 trillion. Regulation of chemicals affects over 900 000 businesses in

[1] An MSDS is defined as ‘a document that describes the properties and uses of a material, that is, the identity, chemical and physical properties, health hazard information, precautions for use and safe handling information’ (NOHSC 2011 (2003)).

[2] ‘Inner labelling’ is a term used by NOHSC to describe labelling on the product, or packaging nearest the product, when it is sold or distributed with multi-layers of packaging.

Australia (NOHSC 2002, p. 7). In 2000-01 the Australian chemicals and plastics industry contributed $6.9 billion in industry value added, with an annual turnover of $22 billion. Exports were valued at $2.8 billion and imports at $11.3 billion (Allen Consulting Group, 2003). New Zealand exports and imports are valued at about NZ$2 billion and NZ$3 billion respectively and are mainly with Australia (NZCIC, sub. 119, p. 2).

Many chemicals, improperly or inappropriately handled or used, are hazardous. Regulations to protect health, safety and the environment are indispensable and apposite measures differ according to local conditions. Not surprisingly, this is a sector where worldwide some of the most intractable technical barriers to trade are to be found.

In recognition of the severity of this obstacle to international trade, the United Nations is sponsoring the creation of a Globally Harmonised System for the Classification and Labelling of Chemicals (GHS). Both Australia and New Zealand are active contributors to its development. The GHS, now finalised, comprises a classification scheme for all the harmful properties associated with chemicals. When the associated guidance material is completed in 2005, it will include guidelines for MSDSs and labelling related to handling, packaging, storage and transport of chemicals. Further international harmonisation initiatives based on the GHS are also under way (New Zealand Government, sub. DR159, p. 4). The GHS does not cover rules for approvals for importation, production, sale or use. Nor does it cover medicines or food, though chemicals may be used in food processing.[3]

The GHS aims to minimise unnecessary duplication in classifications, labelling and MSDSs. The scheme has the support of the EU, the USA and chemical industries and there is a concerted drive internationally for global adoption of the scheme by 2008. APEC is encouraging member countries to aim for its introduction two years earlier, in 2006 (APEC 2002). The International Council of Chemicals Association has called for a similar acceleration of the program (Dyer, B., New Zealand Chemicals Industry Council, pers. comm., 28 May 2003). The Australian Minister for Trade has also endorsed the adoption of the GHS (Vaile 2002, Government media release).

New Zealand and Australia have responded differently to the GHS and this underlies some of the ongoing problems in reducing the range of hazardous substances subject to the special exemption. Nevertheless, the Australian Office of Chemical Safety and the National Occupational Health and Safety Commission (NOHSC) is confident that, though Australia comes from a different starting point, if all jurisdictions acknowledge the importance of aligning and streamlining their

[3] See http://www.unece.org/trans/danger/publi/ghs/officialtext.html (accessed 20 May 2003).

regulations as closely as possible, Australia, like New Zealand, will be in a position to take maximum advantage of the GHS by 2008 and that much closer interaction between the two systems should be achievable by that date (Hartley, M., pers. comm., Canberra, 10 August 2003).

Existing regulatory frameworks

At present, Australia and New Zealand have very different approaches to regulating chemicals. Australia's complex regulatory system generally requires each new chemical to be considered for classification and control under a number of different systems while, in New Zealand, new substances (not just chemicals) must be classified according to the country's unified regulatory regime. This divergence in approaches creates significant barriers to trade and is the most significant explanator of the slow progress in resolving this special exemption. NOHSC and the New Zealand Government acknowledged the lack of progress in their submissions. NOHSC commented:

> Responsibilities that cross portfolio and/or Ministerial Councils' responsibilities can make some aspects of the Co-operation Programme difficult to negotiate.
>
> ... In Australia the fragmentation of responsibilities for regulating chemicals has impeded progress. However this is largely due to the different approaches taken in the various Australian sectors (such as workplace, consumer and agricultural chemicals) to particular aspects of regulation. (sub. 106, pp. 2–3)

The New Zealand Government commented:

> The relatively limited progress under the broader programme can be attributed to:
>
> - inconsistency between the Australian State, Territory and Federal jurisdictions with one another, and with New Zealand. This has contributed to the difficulties experienced by the Chemical Co-operation Programme in achieving mutual recognition … (sub. 110, p. 14)

The New Zealand framework

New Zealand was the first country to adopt GHS classifications, incorporating them into the *Hazardous Substances and New Organisms Act 1996* (HSNO). The Ministry for the Environment has overall responsibility for policy on hazardous substances in New Zealand and the New Zealand Environmental Resource Management Authority (ERMA) for its implementation. ERMA classifies all chemicals, for explosiveness, flammability, oxidising capability, toxicity, corrosiveness and ecotoxicity based on GHS criteria.[4] It grants approvals and

[4] *Hazardous Substances and New Organisms Act 1996*, New Zealand, Part VI.

imposes conditions for imports, manufacture, sale, transport, storage and usage of all *hazardous substances.*[5] Approvals are based on the following criteria:[6]

- the sustainability of all native and valued introduced flora and fauna;
- the intrinsic value of ecosystems;
- public health, including occupational health;
- economic and related benefits;
- international obligations; and
- the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu,[7] valued flora and fauna, and other taonga[8] under the Treaty of Waitangi.

In June 2003, the New Zealand Government announced a new strategy that will give ERMA more flexibility in assessing low risk applications, reduce the time required to process those types of approvals and the cost to industry. Transfers of chemicals from control under the old legislation to HSNO are also being simplified (Hobbs (New Zealand Environment Minister) 2003, Government media release).

The Australian framework

In contrast to New Zealand, Australia has chosen to wait until the terms of the classification, guidelines and labelling requirements are finalised before adopting the GHS, in order to see how it is implemented by its major trading partners. In some instances, relevant agencies have still to commit to its adoption, notably in relation to dangerous goods.

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5 In New Zealand, hazardous substance means any substance with one or more of the following properties: explosiveness, flammability, capacity to oxidise, corrosiveness, toxicity (including chronic toxicity), ecotoxicity (with or without bioaccumulation) or a substance which, on contact with air or water (except where the temperature or pressure has been artificially increased or decreased) generates a substance with any of those properties (in excess of minimum degrees of hazard thresholds which are consistant with the GHS).

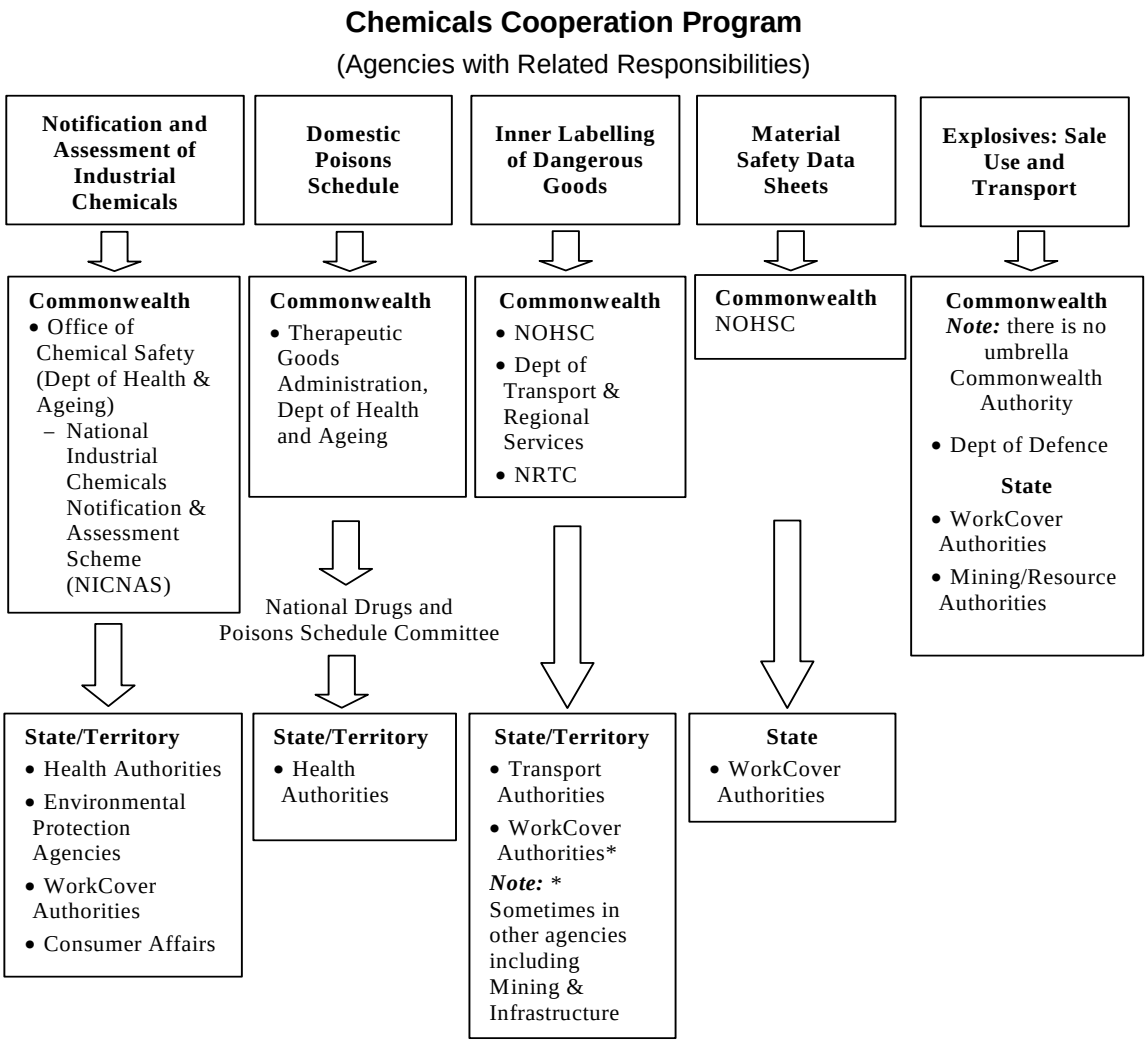
6 *Hazardous Substances and New Organisms Act 1996*, section 6.

7 A place sacred to Maori in the traditional, spiritual, religious, ritual, or mythological sense.

8 Maori treasures, including sacred sites and traditional practices relating to the care of land and traditional Maori land based resources.

Further, Australia has a more complex institutional structure for classifying, approving and regulating chemicals, with responsibilities distributed over Commonwealth and State governments. Figure 8.1 outlines the current regulatory framework. While there are no mandatory requirements relating to ecotoxicity, one of the properties covered by the GHS, Environment Australia assesses chemicals and recommends classification in accordance with GHS guidelines for the National Industrial Chemical Notification and Assessment Scheme (NICNAS) (sub. DR153, p. 7) and the Australian Pesticides and Veterinary Medicines Authority (APVMA) (Laskey, D., APVMA, 23 September 2003). The NOHSC Approved Criteria for Classification of Hazardous Substances contains criteria for environmental classification for all workplace chemicals and comes into effect in December 2004 (sub. DR177, p. 5).

Figure 8.1 **Organisational structures for regulating chemicals in Australia**



Source: Based on NOHSC (sub. 106, p. 6).

The **Office of Chemical Safety** is a unit, established in January 2003 within the Commonwealth Department of Health and Ageing (DOHA), charged with bringing more cohesion to the classification and risk assessment of chemicals in Australia. It comprises five divisions including a treaties and export division and a chemical review and international harmonisation division. This office has the potential to develop into a central reference point for the development of consistent standards and streamlined processes over a wide variety of regulatory organisations that have powers affecting trade in chemicals. It also includes:

- The **National Industrial Chemical Notification and Assessment Scheme (NICNAS),** previously under NOHSC. NICNAS assesses the risks for occupational health and safety, public health and the environment, of all new industrial chemicals imported or manufactured in Australia. Its reports may contain recommendations to industry and to regulators on classifications and regulatory requirements.
- The **Other Chemical Products and Medicines Assessment Division,** which has a similar function to NICNAS for new chemicals, other than industrial chemicals.

The **National Drugs and Poisons Schedule Committee (NDPSC)** is a statutory committee established under the *Therapeutic Goods Act 1989,* which recommends classifications or schedules for medicines, agricultural and veterinary chemicals, and domestic chemicals, for inclusion in the Standard for Uniform Scheduling of Drugs and Poisons (SUSDP). Criteria used for determining the appropriate scheduling of substances are developed in-house and cover toxicity profiles, safety in use, potential for abuse and access. Substances classified by NDPSC are referred to as **dangerous goods.** The classifications are used in controlling industrial and domestic use, transportation and storage and in environmental protection. The Committee's recommendations have no force in Commonwealth law but the SUSDP contains template regulations for States and Territories to base their poisons control legislation on. Appendices to the SUSDP supplement the Schedules by setting out additional controls or requirements. The NDPSC comprises representatives from the Therapeutic Goods Administration (TGA), the APVMA, State and Territory Governments, New Zealand Government, industry, consumers and technical experts. Responsibility for scheduling medicines is likely to be transferred to the proposed joint agency for therapeutic products (Therapeutic Goods Agency and Medsafe 2003).

The **National Occupational Health and Safety Commission (NOHSC)** reports to the Minister of Workplace Relations. It provides a forum for the Commonwealth, State and Territory governments, employer organisations and trade unions to develop national approaches to occupational health and safety matters, including

developing standards for MSDSs and labelling for packaging, storage and handling of both hazardous substances and dangerous goods for industrial use. NOHSC has the power to declare national occupational health and safety standards and codes of practice but these are not legally enforceable unless State and Territory Governments adopt them.[9] The National Road Transport Commission, State, Territories and Commonwealth employment and work relations and environmental protection agencies and the Commonwealth Department of Industry, Tourism and Research have responsibilities that interlink with the regulation of chemicals.

The States and Territories make and administer their own laws on **explosives** which, as they apply to usage and manner of sale, are also outside the scope of the MRA.

The **Pesticides and Veterinary Medicines Authority** administers a national registration scheme for pesticides and veterinary products in relation to their effects on food, bio-security and livestock. The Department of Agriculture, Fisheries and Forestry has responsibility for strategic policy but States and Territories regulate the sale and use of these products in their territories.

With this diverse and dispersed range of regulatory bodies with different but often overlapping responsibilities, it has so far proved impossible for Australia to agree on a national uniform framework, let alone reach agreement with any other country.

Issues

Relevant issues for the discussion of the possibilities of mutual recognition of chemicals under the TTMRA include:

- duplication and fragmentation;
- divergence from TGA templates at the level of States and Territories;
- coordination between agencies;
- the debates on whether the GHS should be applied to chemicals or substances (which are mixtures of chemicals);
- the thresholds for requiring approvals;
- differences in approvals criteria;
- agricultural and veterinary chemicals; and
- current regulatory structures.

[9] See http://www.nohsc.gov.au/OHSLegalObligations/NationalStandards/nationalstandards.htm (accessed 18 June 2003).

Duplication and fragmentation

Approximately 90 per cent of chemicals that require classification and approvals as hazardous substances in Australia also require classification and approvals as dangerous goods (Carlisle, R., Queensland Department of Emergency Services, pers. comm., 28 May 2003). Sometimes separate applications for dangerous goods must be made to individual States. Labelling, including pictograms (for example, a skull and cross bones in a black triangle) can differ in each system. Chemicals with explosive properties require further classification and approvals from each State in which they are used.

Hence, within Australia, the use of different classifications for different types of chemicals and uses requires duplicate applications, creating significant compliance costs. As multiple labelling for the same purpose on a product can be confusing, it also diminishes the effectiveness of labelling and MSDSs as warning devices.

Divergence from TGA templates

The practice of each State creating additional, inconsistent requirements in the appendices in the SUSDP undermines the purpose of the NDPSC, which is to achieve uniformity of regulation throughout Australia. Changing one word on a label, for example, 'shall' to 'must' means a manufacturer must produce a second label. In recognition of this difficulty, the Mutual Recognition Agreement Legislation Review (CRR 1998a) recommended:

> That the COAG Committee on Regulatory Reform develop for consideration by Heads of Government, amendments to the *Mutual Recognition Act 1992* aimed at ensuring that packaging and labelling requirements relating to transport, storage and handling, in particular, requirements to Material Safety Data Sheets are covered by the mutual recognition principle. (See appendix B, rec. 27.)

The Galbally Report on the *National Competition Review of Drugs, Poisons and Controlled Substances Legislation* (COAG 2001) also recognised the cost to industry of different labelling, packaging and advertising requirements in particular and recommended that all Australian jurisdictions adopt scheduling decisions with reference to the SUSDP. It recommended consistent record keeping requirements between the States and Territories and a more performance based approach to regulation. It further noted the uncoordinated way in which scheduling decisions were adopted by the States and Territories, for example, some in Ministerial Orders, others by gazetting administrative decisions, which made information difficult to locate.

Coordination between Australian agencies

The Galbally Report (2000), while recognising that the same requirements may not be appropriate for workplaces as for domestic environments, recommended greater consistency in the regulation of hazardous substances and dangerous goods in Australia. It suggested three strategies for achieving this end:

- greater coordination between NOHSC and NDPSC;
- adoption of the GHS but only if it does not undermine current safety levels; and
- clear demarcation of which agency has control of chemicals and/or their use.

In adopting the GHS, it should be noted that Australia and New Zealand, as well as other OECD countries, were the prime movers in its development. Where there is an inconsistency between the GHS and current legislation, rather than enforcing current standards, a rebuttable presumption that the GHS will permit adequate levels of protection against health, safety and environmental risks would be more appropriate. During 2003, NOHSC intends to introduce MSDSs for industrial chemicals, developed in line with GHS guidelines, that are harmonised across all Australian and New Zealand jurisdictions.

Over the next two years NOHSC will also seek to harmonise the inner labelling requirements of hazardous substances and dangerous goods. The Fifth Annual Report of the TTMRA Chemicals Cooperation Program suggests trans-Tasman alignment of inner labelling should only be attempted once Australian regulations are harmonised, but it may be expedient to assess the impact of options on the New Zealand legislation and to consult with New Zealand. Alignment of inner labelling requirements will entail significant changes to Commonwealth and State legislation and calls for an appreciation among all concerned of the impact of harmonisation on Australian and New Zealand trade. These impacts should be assessed in the RISs prepared for these regulatory changes. The Tasmanian Government stated:

> Workplace Standards Tasmania is working within the frameworks provided by the National Occupational Health and Safety Commission (NOHSC) to reach consistency in national Standards, particularly in the identified priority Standards. (sub. DR169, p. 6)

However, these initiatives do not go far enough if Australia is to maximise the potential benefits of the GHS in terms of both trade and safety. Further alignment is required as the GHS envisages uniform regulations for all packaging and labelling of all chemicals, including agricultural and veterinary products and explosives, for all uses and in all situations, including storage and transportation. In terms of this evaluation, unless Australia eventually embraces the GHS, it will be out of step with

most of its trading partners, its trade will be impaired, and progress over reconciling differences across the Tasman will be permanently constrained.

Substances versus chemicals

In New Zealand, classification and approvals are substance based, whereas in Australia they are principally chemical assessment based. However, NOHSC Approved Criteria allow for classification of both substances and mixtures, similar to the GHS approach (NOHSC, sub. DR177, p. 5). Basing requirements on substances is more risk averse. It is predicated on the fact that mixtures of substances can *sometimes* have unpredictable results in relation to the risks their individual components present. However, the benefits of this approach must be weighed against the considerable cost to industry and taxpayers. The New Zealand Government has commented that industry has chosen to interpret the term 'substances' narrowly, but the HSNO Act permits a broad definition that can cover entire ranges of products and would permit industry to minimise the number of applications they require (sub. DR159, p. 26).

The merits of each approach is the subject of debate, both locally and in the international community. Hawkless Consulting Pty Ltd, for instance, considered that the substance approach has merit on the grounds that the chemicals approach 'does not consider the likely synergistic or ameliorating effects that may occur when chemicals are mixed together to form "substances"' (sub. DR157, p. 2). Currently, Australia and New Zealand's major trading partners base their classifications on chemical identification assessments (Hartley, M., pers. comm., Canberra, 10 August 2003). The USA supports this approach for the GHS, but Europe is considering adopting a substance based approach (Commission for the European Union, 2001).

The New Zealand Environment Minister recently announced a strategy to introduce more flexibility and simplified approval processes for low risk products, which should assist New Zealand to enter into arrangements to align its requirements with Australia. However, as New Zealand acknowledges, depending on international developments, further modifications of New Zealand's pioneering scheme may still be necessary to minimise trade barriers across the Tasman and globally.

Thresholds for requiring approvals

Thresholds for requiring approvals are determined by the relevant authorities in quite different ways. For instance, New Zealand has adopted the GHS minimum degree of hazard threshold for acute toxicity (an LD_{50} of 5000 mg/kg), which is also the SUSDP threshold, but NOHSC and the Australian Code for the Transport of

Dangerous Goods by Road and Rail (ADG) threshold is an LD_{50} of 2000 mg/kg. NICNAS has no limit. Another difference is that New Zealand has no threshold for weak concentrations of chemicals.[10]

While it is sensible to await developments in the implementation worldwide of the GHS before introducing major changes to the classification scheme for chemicals operating in either country, in the interim, there is scope for exploring the possibilities for mutual recognition of existing low risk products across the Tasman. The new strategies for approving this type of product that New Zealand is now developing should assist this endeavour and should help address industry concerns in this area, such as the difficulties K Mart experienced in exporting graphite crayons to New Zealand — due to differences in approvals criteria and testing requirements, container loads of goods were detained until the crayons were retested to New Zealand requirements (K Mart New Zealand, sub. DR128, p. 2).

The new MSDSs based on GHS guidelines will not circumvent the problem of some New Zealand exports to Australia including MSDSs when none are required, or the need for some Australian exports to New Zealand to include MDSDs when none are needed in Australia. However, when finalised, the GHS will include thresholds for MSDSs and labels. Provided New Zealand and Australia harmonise to those guidelines, this problem will eventually disappear.

FINDING 8.4

All regulation of chemicals, on both sides of the Tasman, should be based on alignment with international systems where these exist or are being developed, unless there are clear reasons not to do so.

FINDING 8.5

In aligning State and Territory provisions for inner labelling of packaging, benefits would arise from consultations with relevant authorities in New Zealand.

Approvals

To align approvals for sale and use is problematic. There may be good cultural, economic, environmental and climatic reasons for divergence among jurisdictions. The New Zealand requirement to take into account the Treaty of Waitangi in

[10] The Cosmetic Toiletry and Fragrance Association of New Zealand Inc. identified this as a major problem for the growth of its industry. It said that registration of a new hair removal product for sale on the New Zealand market cost $10 000 in application fees, with an estimated cost in company time of three times that amount (sub. 34, p. 5). Hawkless Consulting Pty Ltd also endorsed the principle of a concentration threshold (sub. DR157, p. 3).

granting approvals is not appropriate outside New Zealand. Similarly, flammability can be much more an issue in the Northern Territory than it is in colder and wetter areas in Tasmania and New Zealand.

Even if all jurisdictions were to adopt the same criteria on which to base their approvals, the consequences would not necessarily be the same. For instance, if Australia were to implement the approval criteria in New Zealand legislation (other than Treaty of Waitangi considerations), the economic consequences of prohibiting the use of certain powerful explosives in a number of States that have large mineral resources would be different than in other jurisdictions where those resources are not present. Population density may also legitimately influence criteria for approvals.

By leaving approvals to individual State, Territory and New Zealand jurisdictions, approvals can be adapted to take local conditions into account. A more centralised approach could lead to situations where either safety is compromised in some jurisdictions or stricter conditions are imposed than warranted in others. There is also a risk that decision makers at a national level will not be aware of pertinent local conditions. However, regular consultations between regulators on their approvals and approval processes could serve to minimise trade barriers.

Agricultural and veterinary chemicals

In Australia, NDPSC classifies agricultural and veterinary products mainly in relation to their toxicological profile. In relation to their risks for food, bio-security and livestock, the Commonwealth Department of Agriculture, Fisheries and Forestry (AFFA) is responsible for strategic policy, the APVMA for registration of the products and the States and Territories for their sale and use regulation.

In New Zealand, the Ministry for Environment and ERMA are responsible for regulating agricultural and veterinary products in relation to their toxicological profile, while the new New Zealand Food Safety Authority has responsibility for regulation to control risks to food, biosecurity and livestock.

At the time the TTMRA was negotiated, it was decided to exclude agricultural and veterinary products from the TTMRA because:

- ‘good agricultural practice’ is often different and this needs to be recognised in the local regulatory regimes (Government of Victoria, sub. 116, p. 10);
- Australia was still establishing the Australian Pesticides and Veterinary Medicines Authority and harmonising its toxicology assessments across States;

- New Zealand had concerns that the impact of including these products within the scope of the TTMRA could:
  - compromise other trade agreements New Zealand has entered into on Maximum Residue Levels (MRLs);
  - increase compliance costs for small businesses; and
  - give New Zealand insufficient influence over its standards if it had only one vote to Australia's nine votes (Pitford, B., New Zealand Food Safety Authority, pers. comm., 21 May 2003).

However, as the GHS encompasses agricultural and veterinary medicines with their regulation as chemicals, it may be appropriate to include agricultural and veterinary products within the scope of the Cooperation Program on Hazardous Substances, Industrial Chemicals and Dangerous Goods as regards their toxicological profiles. Although these products are exempted, they can be affected as a consequence of amendment to other legislation, in particular, drugs and poisons legislation, leading to unintended consequences for agricultural and veterinary chemicals. For example, amendments to signal headings on drugs and poisons also affected signal headings on agricultural and veterinary chemicals. This change was not well communicated to agricultural interests and resulted in potential risks.

Agricultural and veterinary products often present high risks, requiring very detailed documentation to support applications for approvals. The high compliance costs and the importance of the agricultural sector to both economies suggest that both countries would benefit from initiatives to align the regulations on classifications and the use of these products and, where possible, to reduce duplications in approval documentation. Given this scenario, a new Cooperation Program on agricultural and veterinary products as they affect food, biosecurity and livestock, to examine options for reducing barriers to trade, would also serve a useful purpose.

The Victorian Department of Sustainability and Environment and the Victorian Department of Primary Industries opposed placing agricultural and veterinary chemicals in special exemption programs on the grounds that it is not appropriate to consider these products with other chemical risks; and fast tracking New Zealand approvals in Australia in the 1990s had disastrous consequences due to the diversity of the Australian environment (sub. DR168, p. 6).

AFFA concurred, stating:

> It is the Department's view that the removal of the special exemption classification solely for the purpose of precipitating greater harmonisation of the agricultural and veterinary chemical arrangements with NZ is incompatible with our national interest in terms of public health and safety, environmental protection and agricultural trade with major international markets. Furthermore, it has the potential to undermine Australia's

well-established and internationally acknowledged position as a best-practice system. (sub. DR166, p. 2)

NOHSC also expressed reservations for this proposal, stating:

> The NOHSC Office is concerned that the inclusion of Ag/Vet chemicals into this program will in effect double the number of government agencies involved in the Chemicals Cooperation Program negotiations. This is due to the food, biosecurity and livestock components of ag/vet products being administered by a range of agencies that are not currently involved under the chemicals cooperation program. This may raise resource difficulties in coordinating the program. However, administration of this may be made easier if this program came under the responsibility of the Health Minister's Council who have coverage of the larger components of the program. That said, implementation of the GHS for such chemicals would remove many regulatory inconsistencies that exist in the classification and labelling of ag/vet chemicals and chemicals of other sectors. (sub. DR177, p. 6)

The Commission has not proposed applying the TTMRA to these products immediately. What was proposed in the draft report was moving them from the permanent exemption category to the special exemption category to investigate the possibilities of reducing technical barriers to trade in this area. It should be noted that the toxicological profiles of agricultural and veterinary products are assessed by NICNAS and that the objective of the Cooperation Program on Chemicals is to reduce regulatory barriers to trade only where this does not create significant risks for health, safety or the environment. The Commission also raised the possibility of a new, separate cooperation program to address the issues that relate to food, biosecurity and livestock, as opposed to issues relating to their chemical profiles, to avoid expanding the existing program further than is necessary to achieve consistency. It is not proposed that jurisdictions relinquish their authority to control issuing approvals, but that legislation, classifications and documentation should be aligned as closely as possible to prevent *unnecessary* duplication. This is consistent with the recommendations of the Galbally Report (Galbally 2000) which, in addressing the problem of inconsistency in Australian jurisdictions, recommended States and Territories adopt:

- the Commonwealth *Agricultural Products and Veterinary Medicines Code 1994* in their legislation;
- NDPSC recommendations by referencing the SUSDP; and
- the GHS.

The Government of New South Wales endorsed these proposals, stating:

> Workcover NSW advises that moving agricultural and veterinary products from the permanent exemption list to the Cooperation Program on Hazardous Substances, Industrial Chemicals and Dangerous Goods would be consistent with the *Occupational*

> *Health and Safety (Dangerous Goods) Act 2003 (NSW)* which creates a single regime for the regulation of all hazardous substances, industrial chemicals and dangerous goods. (sub. DR179, p. 6)

It further noted:

> … a COAG Review of Hazardous Materials is currently being undertaken under the auspicies of the National Counter-Terrorism Committee. The COAG Review will examine the risk of hazardous goods being used in a terrorist attack. Creation of a special exemption for agricultural and veterinary chemicals might enable changes from the COAG Review to be incorporated into a national or trans-Tasman regulatory regime. (sub. DR179, p. 7)

FINDING 8.6

A report should be submitted to the Ministerial Council on Workplace Relations by April 2005 on the merits of:

- *moving agricultural and veterinary products from the permanent exemption list to the Cooperation Program on Hazardous Substances, Industrial Chemicals and Dangerous Goods, to address their risks as chemicals; and*
- *adding a new special exemption and cooperation program for this category to address their risks to food, biosecurity and livestock.*

Current regulatory structures

In Australia, the fragmentation of responsibilities in this sector impedes progress towards cohesive policies that are required to achieve greater mutual recognition with New Zealand. The NDPSC's failure to date to make a firm commitment to the GHS and the ongoing difficulties experienced in attempts to gain consensus on explosives are just two examples of the problem (NOHSC, sub. 106, pp. 2–4).

Providing a blueprint for a new configuration of organisational structures for the regulation of chemicals is clearly beyond the scope of this review. However, attempts to harmonise with New Zealand in this area provide an early warning signal to Australia that current regulatory arrangements place Australia's competitive position in global markets at risk. The difficulties that Australia is experiencing in interfacing its systems with New Zealand's will be repeated in negotiations with other countries. Once full agreement on the GHS guidelines is reached, strong pressure from industry is likely to result in their rapid adoption globally. With its current regulatory structures, Australia runs a risk of falling behind the rest of the world in arriving at a position where it can take advantage of the synergies that the GHS has the potential to deliver.

Four interested industry associations[11] commissioned the Allen Consulting Group to prepare a report exploring options to promote a national approach to chemical regulation. Noting the plethora of bodies responsible for aspects of chemical regulation in Australia, the report advocates three initiatives to assist the process that merit consideration:

- giving a Ministerial Council responsibility for overseeing the ongoing coordination of the regulation of chemicals. (It identifies the Industry and Technology Ministerial Council as a suitable candidate but, as the Ministerial Council for Workplace Relations already has responsibility for the TTMRA Cooperation Program, this Ministerial Council would appear more appropriate);
- a series of intergovernmental agreements to underpin national consistency strategies; and
- a National Forum to:
  - provide stakeholders, and regulators in particular, with a greater appreciation of the impact of regulation and the need for more cohesive strategies;
  - encourage stakeholders to contribute to the development of a national policy; and
  - foster support for a national policy (Allen Consulting Group 2003).

Hawkless Consulting Ltd, which prepared a Regulatory Impact Statement for NOHSC on the Cooperation Program, also registered its concerns on the fragmentation of responsibilities for the regulation of chemicals. It advocated:

> A single coordinating agency be created to develop policy and oversee the implementation of such policy by other Commonwealth, State and Territory agencies in respect of **all** aspects of the management of **all** chemicals in Australia, including classification, labelling, transport, storage, packaging, use and importantly, environmental impacts. The legal authority of this agency should parallel the roles, authorities and responsibilities of ERMA New Zealand to the extent that the Australian Constitution permits this. (sub. DR157, p. 2)

FINDING 8.7

In Australia, the fragmentation of responsibilities across agencies in relation to hazardous substances, industrial chemicals and dangerous goods impedes progress towards achieving mutual recognition or harmonisation with New Zealand.

11 The Plastics and Chemicals Industry Association, the Australian Consumer and Specialty Product Association, the Australian Paint Manufacturers Federation and the Australian Chamber of Commerce and Industry.

Future directions

It is evident that a special exemption under the TTMRA for hazardous substances is still required and that full mutual recognition may not be attainable or desirable. As developing classifications is resource intensive, there is a case for waiting until the guidelines to the GHS are finalised and it becomes clear how Australia and New Zealand's major trading partners intend to implement it, particularly in relation to minimum thresholds and the substances versus chemical debate, before the two countries attempt a comprehensive exercise to harmonise their classification systems.

Nevertheless, in the meantime, it is important that Governments continue to work under the Cooperation Program towards closer harmonisation and to develop cooperative mechanisms that will place Australia and New Zealand in a strong position to meet the challenges, and take maximum advantage of the opportunities, that international standardisation to the GHS will create.

NOHSC plans to review the Hazardous Substances Regulatory Framework in 2004. However, a wider review, possibly done jointly between Australia and New Zealand, that takes into account the full scope of the GHS and examines its implications for hazardous substances, industrial chemicals, dangerous goods, agricultural and veterinary products and explosives as well as public health, workplace, transport, storage, food and environmental regulation would permit a more comprehensive overview of the issues.

In such a review, the following issues should be examined:

- the implications of the GHS making no distinction between hazardous substances and dangerous goods and including within its classifications explosive properties and agricultural and veterinary chemicals;
- the potential for chemicals or substances with properties encompassed by the GHS to require *classification* once only and for unifying MSDS, labelling, handling, storage and transport requirements;
- the potential to use risk assessments made in third countries as a basis for granting approvals in Australia and New Zealand;
- the potential to align the documentation required for applications for classification and approvals of chemicals in all Australian and New Zealand jurisdictions, in accordance with international best practice;
- the disciplines needed to ensure jurisdictions adhere strictly to templates developed nationally or jointly with New Zealand, except where local circumstances require a deviation to protect health, safety and the environment,

in order to achieve the cohesion that would minimise compliance costs in the sector; and

- the organisational structures that would result in the maximum levels of cohesion between the jurisdictions, including the merits of a coordinating central authority in Australia and underpinning coordination through memorandums of understanding between relevant government agencies.

The review could also include a trans-Tasman forum.

FINDING 8.8

A major work program to harmonise classifications of chemicals between Australia and New Zealand would not be warranted, except in relation to Material Safety Data Sheets and inner labelling, until international trends on the implementation of the Globally Harmonised System for the Classification and Labelling of Chemicals (GHS) can be identified. In the interim, there may be advantages in the National Industrial Chemical Notification and Assessment Scheme (Australia) (NICNAS) and the Environmental Risk Management Authority (New Zealand) (ERMA) exploring the feasibility of identifying chemicals and products or substances on their registers with a low risk profile that could be removed from the scope of the special exemption.

FINDING 8.9

There appear to be advantages to Australia and New Zealand harmonising their approaches to implementing the GHS, in alignment with the approaches that are taken by their major trading partners, particularly in relation to chemical concentrations and whether classifications should be based on substances or chemicals. However, as there are many regulatory barriers to progressing the Special Exemption on Hazardous Substances, Industrial Chemicals and Dangerous Goods, there are likely to be significant benefits from conducting a joint Australia and New Zealand review to:

- *identify ways to maximise the potential of the GHS to eliminate unnecessary compliance costs for business and improve the international competitiveness of Australia and New Zealand;*
- *develop options for coordinating policy across Australian jurisdictions;*
- *identify options for coordinating policy between Australian and New Zealand jurisdictions;*
- *identify options for streamlining classification and approval processes across jurisdictions and aligning documentation requirements; and*
- *hold a trans-Tasman forum.*

FINDING 8.10

The Special Exemption on Hazardous Substances, Industrial Chemicals and Dangerous Goods should be extended, without annual roll overs, until 2008, when the GHS is expected to be implemented worldwide. The scope of the exemption could be reduced as alignment occurs with the emerging GHS and across the States and Territories, the Federal Government and the New Zealand Government.

FINDING 8.11

Full mutual recognition of chemicals may not be desirable in the interests of protecting health, safety and the environment. However, the Cooperation Program on Hazardous Substances, Industrial Chemicals and Dangerous Goods could achieve further integration of trans-Tasman markets. The submission under the Cooperation Program to COAG of a project plan (based on the recommendations of any review undertaken as outlined in finding 8.9) and annual reports on its implementation, would assist progress towards more cohesive policies in the regulation of chemicals.

8.3 Therapeutic goods

Background

Therapeutic goods cover medicines and therapeutic devices (for example, heart-lung machines, prosthetics and walking frames). In 1997, differences in the classification and regulation of medicines and an underdeveloped regulatory regime for therapeutic devices in New Zealand contributed to the decision to create a special exemption for this category of products. Broadly, the Cooperation Program is required to remove or reduce regulatory barriers between the two countries while ensuring the protection of public health and safety.

Health and safety reasons for a joint therapeutics agency

Unregulated therapeutic goods pose risks for the health and safety of consumers and for suppliers, institutions and health professionals advising on their use. The proliferation of new therapeutic goods creates a challenge, especially in countries with a small population base, as the resources required to regulate comprehensively and to a high standard are difficult to sustain. In 1996, when the TTMRA was negotiated, New Zealand was having difficulty in meeting the demand for pre-market approvals in medicines and had virtually no regulatory framework for

medical devices. Australia was in a better position, but, was expecting to face problems if the exponential growth in new therapeutic goods continued (NZIER 2000, p. iii).

Against this background, the Australian and New Zealand Governments decided to meet the trade facilitation objectives of the Cooperation Program, by not only harmonising the vast majority of standards applying to therapeutic goods, but also creating a joint therapeutics agency to replace the Therapeutic Goods Administration (TGA) in Australia and Medsafe in New Zealand.

The new agency

There is broad agreement on arrangements for legislation, governance, accountability and reporting for the joint agency. A Ministerial Council of the Australian and New Zealand Health Ministers will oversee the agency and a Board will be accountable to the Health Ministers of each country for the agency's efficient operation.

The agency will regulate therapeutic products manufactured in Australia and New Zealand and/or traded between the two countries to ensure they meet appropriate standards of quality, safety and efficacy. Its functions will include pre-market approval, licensing and auditing manufacturers of products, post-market surveillance and the oversight of advertising. The agency will be responsible for issuing product licences, which will be required for most products before they may be sold in Australia or New Zealand. Each product will be traceable to assist in monitoring compliance and implementing recalls. The agency will have comprehensive enforcement powers in both countries.

It is anticipated that, eventually, there will be harmonisation of almost all regulation in this sector. Already the schedules for over 90 per cent of medicines have been aligned and both countries intend to introduce legislation on medical devices based on the United Nations Global Harmonisation Taskforce principles and the EU Medical Devices Directives. Work is continuing to align the remaining 10 per cent of medicines, but there may be individual standards where a permanent exemption is required. Prices will continue to be set under the Pharmaceutical Benefit Scheme (PBS) in Australia and Pharmac in New Zealand.

Anticipated effects on trade of the new agency

Australian and New Zealand businesses trading across the Tasman will benefit from reduced compliance costs as they will be required to make only one licence application to operate in both markets. The Agency should also be able to process

licences more quickly than is currently possible and there will be increased market opportunities for businesses currently only registered in one country.

The New Zealand Institute of Economic Research (NZIER) concluded that support for a joint agency came from:

> ... potential contribution to the collective regulatory capacity of both countries in the medium and longer term, support for further convergence of regulatory arrangements under CER and the TTMRA; and possible benefits in terms of leveraging the regional standing of Australian regulatory arrangements and the Australian therapeutics industries. (NZIER 2000, p. iii)

NZIER also found the joint agency would:

> Underpin a key role as a voice determining or influencing outcomes in regional (and global) cooperation on standards and conformance matters. (NZIER 2000, p. x)

However, the Cosmetics Toiletry and Fragrance Association of New Zealand Inc expressed concerns about the rigour of existing standards and negative effect on industry if the new agency were to adopt them without adequate reassessment of risks and compliance costs:

> Both regimes impose significant costs to our members that are excessive and inhibit new or innovative products entering each market in the respective product areas ...
>
> Our members are concerned with the current cost structure as applied in Australia under the TGA being transported to the proposed joint agency and that no assessment of risk versus cost to business is being made. (sub. 34, p. 4)

Issues

Opting out

The proposed Treaty for the joint agency will contain a narrowly drafted opt out clause to deal with localised threats to public health and safety and differences in social attitudes. (For instance, New Zealand approves the use of mifeprispone to induce medical abortions; Australia does not.) It will be important to recognise different cultural attitudes as a grounds for permanent exemption under the TTMRA for therapeutic goods only, as the TTMRA permits temporary exemptions for other goods only to protect health, safety and the environment. It is important also to ensure that the arrangements do not undermine each country's ability to take swift action to protect health and safety in their own jurisdiction in emergencies.

On the other hand, while there may be legitimate reasons for divergence, it is also important to limit the incentive for the trade consequences of divergence to act as an incentive for either party to create a niche market for its industry. For instance, in

the arrangements supporting the joint food code, New Zealand has the ability to opt out of a proposal. If it adopts a lower standard than the Australian standard, under the TTMRA, it is able to export foods to Australia at the lower standard, potentially giving its suppliers a competitive advantage. DOHA suggested:

> Where one country chooses to depart from the harmonised scheme in relation to particular products, the TTMRA should not operate to allow the supply of those products produced in one country to be sold in the other country, depending upon the nature of the opt-out. In addition, it should also ensure that, where the opt-out has been invoked, it does not operate to prevent each country from prohibiting the supply of goods that:
>
> - are produced in other countries;
> - may legally be sold in the other (trans-Tasman) country; and
> - do not meet the requirement of the (trans-Tasman) country that wishes to prevent their sale. (sub. 104, pp. 6–7).

This proposal would have the effect of an 'Australia only' standard reducing, or eliminating, competition from New Zealand sourced goods in Australian markets if the Australian standard is higher, or give New Zealand the ability to lock Australian products out of its domestic market if the New Zealand standard is higher. Conversely, a default position where the TTMRA applies will generally result in opening up opportunities for a niche market in the other country for the country with a lower standard.

Rather than having a set position on whether the TTMRA should apply to variations in standards, the complexity of the issues, variations in circumstances and the inconsistent consequences likely to surround decisions to opt out of joint regulations, suggest that in each case the trade consequences should be considered on their individual merits, taking into account a variety of other factors including:

- the reasons for invoking the opt out and whether they are necessary for the protection of health, safety or the environment;
- whether effective monitoring of compliance and traceability in both countries is possible without an exemption; and
- WTO TBT and SPS Agreement principles, namely:
  - the legitimate sphere of mandatory regulations is the protection of health, safety and the environment;
  - international standards should be followed where possible; and
  - signatories have an obligation to regulate in a manner that causes the least restriction on trade.

Assessments should be made on a basis that will discourage jurisdictions from opting out unless there are specific and significant reasons for doing so.

Classification of therapeutic goods

Australia and New Zealand have taken different approaches to a range of products that New Zealand has classified as dietary supplements. New Zealand regulated them separately from foods and medicines under the *Dietary Supplements Regulations 1985*, categorising them as low risk products and generally taking a more light handed approach to their regulation. Australia classifies these products as medicines or foods. 'Therapeutic type' dietary supplements are generally distinguishable from 'food type' regulatory supplements by carrying health claims or being in a dose form that would normally be recognised as therapeutic for example, tablets, capsule, injection, suppository, ointment cream etc. These products require approvals from the TGA before they may be sold in Australia. Lacking the resources to monitor them, New Zealand does not allow health claims about complementary medicines other than those expressly permitted — for example, the benefits of folic acid for pregnant women — while Australia takes the opposite approach. Consequently, trade in these products across the Tasman requires separate packaging.

The decision has been taken to include Australian complementary medicines and, in principle, New Zealand 'therapeutic type' dietary supplements and complementary healthcare products within the scope of the new agency. Medsafe, NZFSA and ANZFSC have issued discussion papers that propose 'therapeutic style' dietary supplements be included in the project to create a joint regulatory agency.

Regulation of Low Risk Products

Business New Zealand, the Cosmetics Toiletry and Fragrance Association of New Zealand Inc., the Direct Selling Association of New Zealand and the Australian Consumer and Specialty Products Association all stated that they would not like to see the TGA's current procedures for assessing low risk products carried over to the new agency. The Cosmetics Toiletry and Fragrance Association of New Zealand Inc commented:

> We do not wish to see overly bureaucratic systems or the current costs structures present in the TGA applied under this agency. For internationally proven products such as sunscreens through to skin care products utilising SPF as a secondary purpose, we find the current Australian TGA system to be excessive and not related to the risk benefit ratio for such products.

> We would also like to point out that newer and safer sunscreen products (titania metal based screening) are able to be sold in New Zealand and manufactured to the Australian and New Zealand joint standard but are as yet not able to be sold in Australia. These same products are available in most markets in the world and … it is both a frustration to this industry in the depth of process for the Australian TGA and the costs which must ultimately be passed on to the consumer. (sub. DR134, p. 4)

Transitional issues

Establishing a joint agency and harmonising all regulation has taken longer than the five years originally set for the Cooperation Program. The 2003 Therapeutics Goods Cooperation Report to the Council of Australian Governments states that it is anticipated that a treaty will be signed early in 2004 and that the agency will begin operations in mid 2005. It is proposed that the Acts currently regulating therapeutic goods in each country will then be repealed and new legislation reflecting the harmonised arrangements will be enacted in both countries. Issuing dual licences for products currently licensed only in one market will take longer. In the interim, licences issued under the old regime will continue to have effect, but only in the country where they were issued, and will require continued exemption under the TTRMA.

Clearly mutual recognition in this area would be premature. An extension of the special exemption for therapeutic goods until mid 2006 should allow the new agency time to begin issuing new product licences, assess how long it will take to complete the process and implement the joint regulatory arrangements for therapeutic goods.

FINDING 8.12

Administrative costs would be reduced by extending the special exemption for therapeutic goods, without annual roll over requirements, until mid 2006 when it should be possible to identify a realistic timeframe for reducing or eliminating the special exemption.

FINDING 8.13

Due to the complexity of the issues, the different individual circumstances and the inconsistent consequences likely to arise from decisions to opt out of joint regulations, there is merit in including in the Treaty, which will establish the new joint therapeutics agency, provisions to:

- *prescribe processes where each case is examined on its individual merits, to determine whether mutual recognition should still apply; and*

- *ensure decisions on whether mutual recognition applies are reached taking into account the WTO SPS principles that restrict the legitimate sphere of mandatory regulations to the protection of health, safety and the environment, follow international standards and call for mandatory requirements to be the least trade restrictive possible.*

8.4 Road vehicles

Background

Reasons for the special exemption

Vehicles that are not road worthy are a contributory factor in road deaths and injuries. Hence, the safety features of vehicle design are a central pillar in road safety regulation. In addition, vehicles pollute the environment so it is important that their design incorporates features to promote fuel efficiency and reduce emissions.

The principal reason for including road vehicles among the special exemptions to the TTMRA arose because Australia and New Zealand held, and still hold, quite different positions on the acceptability of standards set by other countries. All vehicles manufactured or imported into Australia have to be assessed for conformity to Australian Design Rules (ADRs), whereas New Zealand considers that the standards set by a number of countries satisfactorily safeguard vehicle safety.

There are two aspects to regulations: the standards with which a product must comply; and the steps that the manufacturer or supplier must take to demonstrate compliance with those standards. As long as New Zealand recognises a number of suites of standards recognised internationally and Australia only accepts conformance to ADRs, full mutual recognition will not be possible. However, Australian standards and those adopted by the international community are both converging on UN-ECE Technical Regulations on Vehicle Safety and Emissions. If this continues, eventually these will no longer present a barrier to mutual recognition. A more significant problem is the need to obtain duplicate conformity assessments. This affects all Australian and New Zealand vehicle and vehicle component exporters, but particularly smaller businesses, including New Zealand specialty and component manufacturers.

Cooperation Program

The Cooperation Program established to resolve the differences in regulatory requirements between the two countries under the TTMRA was given three objectives:

- progress harmonisation between Australian and New Zealand standards;
- identify areas where permanent exemptions are the only acceptable option; and
- progress mutual recognition of conformity assessment.

Little progress has been made on any of these objectives. DOTARS prepared a number of draft joint trans-Tasman standards that the Australian National Road Transport Authority (NRTC) presented to the Ministerial Council on Transport in 1999, but these were never submitted to COAG. DOTARS stated that the advantages of pursuing harmonisation on a bilateral level have been superseded by international developments (sub. 76, p. 4).

The different profiles of the vehicle manufacturing sectors in Australia and New Zealand influence their approaches. Australia has a sizeable vehicle manufacturing industry which, until recently, was centred largely on domestic markets but, in accordance with Government policy, now has exports worth about A$5 billion per annum. In contrast, the New Zealand industry is focused solely on manufacturing components and specialty vehicles for export. In 2001, 13 per cent of motor vehicles and 10 per cent of vehicle components manufactured in Australia were exported to New Zealand. New Zealand exports to Australia were negligible (PC 2002b, p. 27).

The Australian approach

Under the Australian system, approvals are granted for each *type* of new vehicle manufactured or imported into Australia. Approvals are not given for compliance with each of the current ADR standards but on compliance with the entire suite of ADR regulations. Certification and test reports assessing compliance with individual ADRs may be carried out anywhere in the world but, after approvals have been granted, the Australian Inspection Services assesses the competence of test facilities and manufacturing plant and carries out post market surveillance of vehicles offered for sale to ensure they comply with the specifications on which the Australian approval was based. Non compliance results in bans and recalls.

The Australian requirements are relaxed to some extent for a low volume scheme that allows for imports of limited numbers of used vehicles (other than large trucks and buses) that comply with ADRs current at the time they were manufactured and

for exotic makes of cars such as Ferrari and Lotus to enter Australia with some relaxation of the requirements to *demonstrate* compliance with current ADRs. Used vehicles imported under the low volume import scheme are subject to individual conformity assessment by DOTARS approved workshops. Some States, for example, Victoria, link certification of modified used vehicles to indemnity insurance assessments.

The New Zealand approach

Besides its own national standards, New Zealand accepts all vehicles and vehicle components that comply with ADR, UN-ECE, European, Japanese or US standards. New Zealand accepts conformity assessments undertaken in countries where it has confidence in that country's conformity assessment capabilities. Like Australia, approvals focus on the whole vehicle. All the components of a vehicle must comply with the same suite of standards, that is, ADR or Japanese, but not a mix of both. If a vehicle undergoes substantial modification, then re-certification is required, even if the components comply with one of the recognised standards. No pre-market approvals are required, but the supplier must be able to produce documentation to demonstrate conformity to a suite of national or international standards. New Zealand does not inspect test facilities or manufacturing plant.

The UN-ECE Technical Regulations on Vehicle Safety and Emissions

The UN-ECE began as a forum to harmonise European regulations, resulting in the United Nations European Economic Commission Agreement 1958, which is administered by the United Nations Inland Transport Committee Working Party. The 1958 Agreement currently has 38 signatories including Australia, New Zealand, the European Union and Japan. In 1998, the EU and US Governments signed an Agreement on Global Technical Regulations[12] where they agreed to use the UN-ECE as the forum for the development of harmonised vehicle safety and emission standards. APEC has also agreed that the UN-ECE should be the forum for the region to debate the alignment of road vehicle standards.

The principle objective of the UN-ECE standards is to eliminate the need for duplicate conformity assessment. It is premised on member countries having confidence in the accreditation systems and conformity assessments of other member countries. Under the 1958 Agreement, this is achieved by a country *applying* all or any of the UN-ECE standards. In doing so, it agrees to accept products that have been assessed by a conformity assessment body accredited by the

12 See http://www.unece.org/trans/main/wp29/wp29wgs/wgs/wp29gen/ wp29 glob.html (accessed 18 June 2003).

country manufacturing and/or supplying the product. A party that has applied a regulation, also has the right to issue approvals or accredit third parties conformity assessment to that UN-ECE standard.

New Zealand has applied 38 UN-ECE standards that are mandatory in New Zealand, but reserves the right to opt out of any should it consider that necessary in the interests of health, safety or the environment. It regards the other UN-ECE technical regulations as voluntary standards and continues to recognise compliance with four other international standards — the Japanese, EU and US standards, as well as ADRs — by conformity assessment bodies accredited by countries in which it has confidence in their conformity assessment regime. The New Zealand Land Transport Safety Authority (LTSA) has advised that it has not contemplated issuing approvals or accrediting third party conformity assessments in the foreseeable future.

To date, Australia has harmonised over 50 ADRs with the UN-ECE standards, but has not applied those standards under the 1958 Agreement. It now accepts all test reports and certifications that are approved to UN-ECE standards from other countries that are signatories to the Agreement. However, as the Australian system is based on whole vehicle approvals, after the approval has been issued DOTARS considers it necessary, irrespective of the number of ECE approvals a manufacturer holds for individual conformity assessments, to inspect vehicle test facilities and production plant, at its expense, to ensure its laboratory and manufacturing practices accord with Australian requirements. The National Association of Testing Authorities (NATA) acts as its agent.

So far, Australia has not approved any of the standards that it has harmonised and so it cannot issue approvals to UN-ECE standards or accredit third parties to do so. It has concerns about a lack of capacity to meet industry demand for approvals to UN-ECE standards. It would require amendments to legislation to authorise the approvals and authorise a charging framework and notification of the Joint Standing Committee on Treaties.

However, until Australia takes the crucial step of applying and approving UN-ECE standards, it will have only partially exploited the potential of the Agreement to reduce costs for Australian industry. Harmonisation of ADRs to UN-ECE standards does not necessarily eliminate the need for Australian industry to obtain conformity assessments from countries that have applied the standard. Even though the standard is the same as the ADR, until Australia applies and approves the UN-ECE, other member countries are not obliged to recognise Australian test reports or certification to ADRs.

Review of the Australian Motor Vehicle Standards Act

A review held in Australia five years ago, to meet the requirements of the Competition Principles Agreement, found against recognising international standards. The Task Force, chaired by the Federal Office of Road Safety and set up in 1998 to review the *Australian Motor Vehicle Standards Act 1989*, acknowledged that an approach based on accepting standards from other countries would give consumers more choice and decrease compliance costs, concluded that the benefits of the existing regime outweighed the costs to industry and the community. More specifically it feared recognition of different standards would variously:

- lead to consumer confusion;
- require lower or higher standards than are appropriate for Australia in some areas;
- require the establishment of a regulatory body to determine whether specific international standards are acceptable and to verify compliance with those standards; and
- preclude the development of requirements to deal with unique Australian conditions (Review Task Force 1999, p. 32).

Aware that in some countries more stringent inspection standards for used cars result in faster rates of depreciation than in Australia, the Task Force was also concerned that, given the choice, Australian consumers might prefer to purchase these lower cost vehicles and, in so doing, destabilise the Australian manufacturing industry. Restrictive standards and conformance measures are not appropriate instruments for preventing these outcomes, which confuse trade measures with health safety and environmental protection. However, DOTARS maintained:

> The industry policy aspects of the issue were certainly noted but the dominant consideration was whether the operation of the concessional low volume arrangements compromised the integrity of the Act. (sub. DR144, pp. 3–4)

The findings of the 1999 Review of the Motor Vehicles Standards Act (Review Task Force 1999) that most of the barriers to mutual recognition under the TTMRA would be eliminated by the development of joint standards has not come to fruition.

Issues

The limited progress in advancing the Cooperation Program crucially reflects there being two different approaches.

Problems for New Zealand in adopting the Australian approach

When the Cooperation Program was set up it was assumed that New Zealand would recognise the joint standards exclusively along with Australia. This would mean that any cars imported into New Zealand, that were not also imported into Australia, would need to be retested and recertified to the full suite of joint standards and possibly require adaptations of the vehicles to meet those standards. This would increase the cost to New Zealand consumers and reduce consumer choice.

Business New Zealand remarked:

> New Zealand's approach has resulted in significant gains for the consumer by making newer, safer, more environmentally friendly vehicles much more affordable. (sub. DR129, p. 2)

New Zealand's small component industry is export oriented. Hence, national design standards are less important than giving manufacturers the ability to produce, and have their products assessed, to standards recognised in export markets. The ability to sell on a domestic market without further conformity assessment to national standards results in lower costs for the exporter and New Zealand consumers. It was not proposed that New Zealand would bear the cost of inspecting manufacturing plant throughout the world. Also, New Zealand did not consider being able to utilise the Australian system as an incentive, because it has confidence in the accreditation regimes of the countries producing vehicles to the standards its recognises, bearing in mind that there are strong commercial incentives for industry to get it right. Bans and recalls of road vehicles, or components, seriously damage a manufacturer's reputation, besides being extremely costly.

New Zealand recognition of joint standards only would provide Australian manufacturers and suppliers with a competitive advantage in New Zealand over suppliers from third countries. This would contravene the principle that bilateral and regional mutual recognition arrangements should strengthen the integration of international markets, not act to segregate the parties from them. And it would not advance the TTMRA objective to enhance the international competitiveness of Australian and New Zealand enterprises.

FINDING 8.14

Due to the size of the New Zealand market, if New Zealand mirrored the current Australian approach to motor vehicle regulation, it would adversely affect New Zealand exporters and consumers. It would also contravene the principle that bilateral and regional mutual recognition arrangements should strengthen the integration of international markets, not act to segregate the parties from them.

Problems for Australia in adopting the New Zealand approach

With international practice converging on the UN-ECE standards, the effort and expense that would be involved in Australia recognising certification to the standards of countries with major vehicle manufacturing capabilities is no longer merited. Hence, the benefits from Australia following the New Zealand approach would now appear to be of limited duration and not worth pursuing.

Nevertheless, some of the concerns expressed against adopting this approach are not necessarily well founded. For instance, the Australian National Environmental Protection Commission stated:

> It is further understood that New Zealand does not have its own vehicle emission standards, and has adopted a policy whereby so long as vehicles meet the emission standards applicable in the country(ies) of origin, then the vehicle may be imported into New Zealand. Under the TTMRA such vehicles could be re-exported to Australia and would not have to meet the standards specified in the Australian Design Rules. (sub. 95, p. 1)

In fact, Australian emission standards are unlikely to be undermined by applying the TTMRA to road vehicles, as international standards are generally comparable to, or higher than the relevant ADRs. With the continuing improvement in vehicle design to protect safety, lower emissions and enhance fuel efficiency, there may be legitimate safety and environmental reasons for Australia to be concerned about imports of *used* cars, but measures to address these matters do not need to include an exclusive regulatory framework that prohibits the mutual recognition of comparable third country standards.

FINDING 8.15

One way to apply the TTMRA to road vehicles would be for Australia to adopt the New Zealand approach of recognising motor vehicle standards from several major road vehicle producing countries. However, given the initial cost of adopting this approach and the likelihood of widespread adoption of UN-ECE standards internationally, this would not be in Australia's interests.

Divergence from international standards

Designing national standards that 'improve on' international standards works against the trade facilitation objectives of the international standardisation taking place via the UN-ECE. Unless there are compelling reasons for a deviation, minimum mandatory standards should be set at the levels of protection that the international community finds acceptable, as reflected in the UN-ECE technical regulations.

States and Territories in Australia have responsibility for registering vehicles. Currently, they all base registration on national approvals. As this is essential for the free circulation of vehicles around Australia, it gives States and Territories a considerable influence over the adoption or development of ADRs. Hence, it is important for the competitiveness of the Australian vehicle industry that regulators from all Australian jurisdictions appreciate the significance of the trade consequences and trade facilitation aspects of their role. The appropriate forum for gaining acceptance of new standards is the UN-ECE. It may be equally important for the long term viability of local industry for minimum local standards to be set no lower than those that are internationally accepted. The Commission considered that Australia's lower vehicle emission and, more particularly, fuel standards may be hindering technological innovation. In relation to fuel standards, the Commission commented:

> Apart from contributing to poorer environmental outcomes, lower fuel standards might well be a further constraint on the industry's uptake and development of engine technologies necessary to remain competitive in global markets. That is, if these technologies cannot be used, or used optimally, in vehicles sold in Australia because of the lower fuel quality, it could be difficult to justify expensive product development work that would mainly have application in export markets. (PC 2002, p. 90)

There may be very good reasons, in limited circumstances, for New Zealand and Australia to put in place requirements that are incompatible. New Zealand has tighter restrictions on vehicle dimension and axle weights than Australia, reflecting the limitations of some New Zealand roads and bridges and the difference in typography that alters the economic impact of vehicle size restrictions on long distance hauls in Australia. In recognition of the impact of variations in local conditions, mass and dimension limits are outside the scope of the UN-ECE technical regulations.

Similarly, legitimate reasons may exist for deviations from, or imposing standards additional to, international standards. For instance, for safety reasons it is internationally accepted that steering and other vehicle controls should be on the opposite side of a vehicle to the side of the road on which they are required to be driven. Rules are required to ensure that the complex modifications required to

convert left hand drive cars to right hand drive for use in Australia or New Zealand do not compromise the safety of the vehicle as a whole.

Nothing in the adoption of international standards precludes the development of additional requirements to deal with these kinds of unique local conditions. The implementation of international standards requires this kind of flexibility to allow for variations in local conditions. This capacity to add to international requirements does not seem to have been recognised by the 1999 Review Task Force. At the same time, each additional requirement may create trade barriers and adds to vehicle costs. If variations are not used sparingly and only when required to meet major safety risks created by local conditions, they inhibit the potential for the mutual recognition of road vehicle standards across the Tasman and with third countries.

Conformity assessment

One of the issues the Cooperation Program was directed to consider was to progress mutual recognition of conformity assessment. New Zealand unilaterally recognises Australian conformity assessments, but currently Australia requires all imports from New Zealand to be conformity assessed in Australia to Australian standards. The 5th Annual Cooperation Program Report for Road Vehicles makes no mention of progress towards Australia accepting conformity assessments carried out by New Zealand conformity assessment bodies accredited by IANZ. This is despite the fact that IANZ has accredited laboratories to undertake testing and inspections for several types of vehicle components, including mechanical restraints (for example, seat belts) and electrical components. New Zealand also produces kitset cars which it exports widely, but is experiencing difficulty in obtaining conformity assessments to ADRs. Alternative Cars Ltd stated:

> Alternative Cars Ltd has been trading for some 20 years and has been exporting for 10. One of the most difficult markets has been the Australian, not because of the regulations, but because of the expense it takes to get the vehicles components certified. So often … we have to employ an Australian Certifier in Australia. When an item fails to pass the vehicle has to return to NZ for modification and returned to Aust for retesting. An expensive exercise! If NZ engineers, Laboratories, etc, were recognized by the State and Federal authorities it would ease the expense of these tests thus reducing the cost of the vehicle to the Australian purchaser. These vehicles have 65% NZ and 15% Australian manufactured content. (sub. DR171, p. 1)

DOTARS stated that the issue of recognising IANZ accreditation has not arisen in discussions with New Zealand (sub. DR144, p. 5). This is surprising given it is a requirement of the Cooperation Program and there is no obvious reason why negotiations should not be fruitful.

Business New Zealand concurred with this assessment, stating, in relation to road vehicles:

> … options should be explored for reducing or eliminating the difficulties New Zealand manufacturers experience in having the conformance of their products assessed for the Australian market. (sub. DR129, p. 2)

DOTARS, outlining the reason for its policy, commented:

> NATA accredited laboratories are recognised under the Australian system because departmental officials are directly involved in the NATA accreditation process of laboratories testing to the ADRs. This arrangement provides the necessary confidence that mandatory requirements are being met. (sub. DR144, p. 5)

NATA and IANZ have a close working relationship that is supported by a memorandum of understanding. If DOTARS is unable to accept IANZ accreditation, it will have difficulty implementing the UN-ECE fully as required when a country applies a standard.

On a more practical level, New Zealand manufacturers can face problems in obtaining copies of the relevant ADRs, details of Australian conformity assessment bodies accredited to carry out the relevant tests and certifications, or even ascertaining if an approval is required. Airplex, a New Zealand firm that has successfully exported windshields to 30 countries, was unable to pursue expressions of interest in its product from Australian industry due to difficulties in accessing information on whether it required approvals for its products. In the short term, more publicity in New Zealand on how to access information on existing Australian design and conformity assessment requirements could alleviate problems of this nature.

Approvals to UN-ECE Technical Regulations

While New Zealand, and to a large extent Australia, have minimised the barriers for imports, they have not been so diligent in addressing the issue of facilitating exports, including exports from New Zealand to Australia. A greater focus on reducing technical barriers to trade for exports may not only assist trans-Tasman trade, but could create synergies for increasing exports to third countries. Of importance to both economies is the development of a capacity within the two countries to issue UN-ECE approvals. The costs of engaging inspectors from overseas, to visit Australia and/or New Zealand annually to inspect plant, and of sending prototypes overseas for testing, are considerable. For small businesses producing components, this technical barrier to trade can be prohibitive.

DOTARS stated that manufacturers tend to amortise certification over all markets (sub. DR144, p. 4). Hence, where duplicate certification is required, not only

industry encounters unnecessary costs in supplying export markets, but local consumers bear some of those costs. These problem may be overcome without resorting to the UN-ECE Agreement by entering into individual arrangements with other countries — Australia has limited mutual recognition agreements with the EU and Thailand. However, developing the capacity to issue UN-ECE approvals for vehicle components that they export is the most efficient short to medium term option for reducing duplication.

Future directions

The 5th Annual Cooperation Program Report for Road Vehicles recommended that road vehicles should be subject to a full permanent exemption. The report had the support of the regulators in all TTMRA jurisdictions. DOTARS stated that not to terminate the Cooperation Program would give Ministers the misleading impression that the program was active when, in fact, no communication had been entered into between Australia and New Zealand for 18 months. However, to terminate the Cooperation Program and institute a permanent exemption would suggest that reducing the current barriers to trade was neither desirable nor possible, when this is not the case. While clearly there are significant obstacles to full mutual recognition at present, permanent exemption is not in either country's interests. There are limited areas where Australian and New Zealand regulators and accreditation bodies could usefully cooperate, ensuring easier access for road vehicle components and specialty cars from New Zealand into Australia. A new, less ambitious, ongoing program would ensure that New Zealand manufacturers producing vehicle components and specialty cars compete on a level playing field with Australian manufacturers. Initially the program could concentrate on:

- Australia recognising conformity assessments by IANZ accredited conformity assessment bodies to an ADR or UN-ECE standard that both Australia and New Zealand recognise. This strategy would eliminate unnecessary procedural and substantive barriers to trans-Tasman trade and permit the scope of the special exemption to be reduced in those areas where there is a practical effect; and
- the Australian and New Zealand regulators maintaining and publicising a joint list of conformity assessment bodies in third countries that they recognise as competent to test to UN-ECE standards.

FINDING 8.16

Administrative costs would be reduced by extending the special exemption for motor vehicles, without annual roll over requirements, until 2006. Submission of a project plan and annual progress reports under the Cooperation Program on Road Vehicles to the Australian Transport Council and COAG would assist in reducing

the special exemption in areas where trade barriers have practical effects. The project could include consideration of the following issues:

- *mutually recognising conformity assessments issued by Australia or New Zealand to an ADR standard, or a UN-ECE standard, where Australia and New Zealand have both applied that UN-ECE standard under the 1958 Agreement;*
- *mutually recognising conformity assessments from third countries, where all three countries accept, or have adopted or applied a UN-ECE standard;*
- *developing a capacity for issuing approvals to UN-ECE standards that are relevant to Australian and/or New Zealand industry; and*
- *reducing the scope of the special exemption for road vehicles under the TTMRA in line with the mutual adoption of UN-ECE standards.*

8.5 Gas appliances

Background

Gas appliances improperly designed or produced can lead to gas poisoning, fire, burns and asphyxiation, sometimes with fatal consequences. Regulations to ensure these products are safe are, therefore, imperative.

Australian concerns about the efficacy of New Zealand's compliance regime was the primary reason the TTMRA could not be extended to gas appliances when the arrangement was negotiated. Differences in standards and the scope of mandatory requirements were contributing factors, with Australia expressing reservations about the safety effectiveness of the New Zealand regime.

The Cooperation Program was expected to identify and implement the changes that would enable the TTMRA to be extended to gas appliances. This is another Cooperation Program where only modest progress has been achieved.

The Australian approach

Australia has a compliance regime which is consistent with the regulations of its other major trading partners, including Japan, Hong Kong and the USA. It requires third party presale certification to Australian standards, which are modelled on EU regulations. In addition, Australia carries out post market inspections. At present Australia only recognises compliance to Australian standards (Gas Technical Regulators Committee, sub.112, p. 2).

Australia has mandatory requirements to protect health, safety and the environment and for energy efficiency, fitness for purpose and labelling to attest to their compliance with Australian standards.

Compliance regulation in New Zealand

New Zealand has less comprehensive requirements than Australia. New Zealand mandatory requirements address safety only. There are voluntary standards for energy efficiency. Compliance with New Zealand regulations permits the use of its new GasSafe logo. Fitness for purpose is a matter for consumer protection legislation in New Zealand.

Until 2002, New Zealand relied entirely on voluntary compliance and post market surveillance. Recognising that this regime did not provide an adequate level of protection, the New Zealand Energy Safety Service (NZESS) and the New Zealand Gas Suppliers Association (GASA) cooperated to develop a new compliance regime based on mandatory supplier declarations. These must be posted on a website and supported by documentation, to be produced on request. The regulator has instituted a system of systematic and random audits and the gas appliance industry also intends to monitor products appearing on the market for compliance (GASA, sub. 33, p. 3).

New Zealand developed these new standards without reaching agreement with Australia. The New Zealand Government was aware that, in not making third party certification mandatory under the new compliance framework, its new regime would not lead to harmonised Australian and New Zealand approaches. Countervailing considerations were the inability of small New Zealand businesses to meet the cost of third party certification and a belief that consumer protection is most effective if responsibility for failing to meet standards is placed squarely on suppliers.

The New Zealand primary legislation is performance based. It allows the NZESS to recognise certification to Australian and EU standards, as well as adherence to New Zealand's own referenced standards, as meeting the mandatory regulatory outcomes prescribed by New Zealand legislation.

The Australian regime, which requires third party certification, has more comprehensive requirements than either the old or new New Zealand regime. Once the New Zealand system has been in operation for two or three years, an assessment of the new New Zealand regime and comparative risks of the Australian and new New Zealand approach should be possible.

It is generally difficult to determine the extent of the impact of this special exemption on gas appliances. Both countries use gas appliances extensively, particularly for heating homes and hot water. GASA reports that the larger New Zealand firms exporting to Australia comply with Australian requirements (sub. 33, p. 4).

Trans-Tasman trade in gas appliances has the following characteristics:

- Australian industry is geared to produce unflued heaters that meet Australian standards. It is not economic for Australian manufacturers to produce the cheaper, lower quality merchandise permissible in New Zealand, exclusively for the New Zealand market;
- Australian industry does not face competition from cheaper New Zealand products as they are prohibited from being sold in Australia;
- Australian and New Zealand suppliers wishing to export across the Tasman need meet only one set of requirements — Australian requirements — to satisfy regulators in both countries;
- larger New Zealand manufacturers are able to meet Australian standards, but it is not economic for small producers to do so;
- 95 per cent of heaters mass produced in New Zealand are certified to an international standard, the majority to Australian standards (Gas Technical Regulators Committee, sub. 112, p. 3);
- the lower New Zealand standard that the New Zealand regulator considers adequate to protect health, safety and the environment, benefits New Zealand consumers by providing greater domestic competition and cheaper products;
- Australian manufacturers are able to meet New Zealand regulations to reduce seismic risks with attachments to their standard models and so are not at a disadvantage in competing with their New Zealand counterparts; and
- it is not in the Australian consumer's interests to pay for appliances incorporating features to counter seismic risks, when those risks are negligible in Australia, except perhaps in the Newcastle area.

It is unclear what savings could be achieved from economies of scale if the same standards applied throughout Australia and New Zealand and whether this would offset the cheaper price that has been available in New Zealand due to less intensive compliance requirements. New Zealand has recently changed its compliance regime, which should create better protection for appliances produced locally, but it will take some time to see what difference they make to prices and the effectiveness of the New Zealand regime.

Issues

Compliance regimes

Australia has concerns that the new New Zealand compliance regime may not provide a high enough level of protection against health, safety and environmental damage. Under its prior regime, New Zealand experienced 5 fatalities attributable to defective gas appliances between 1997-98 and 2001-02. In comparison, in Victoria, there were 7 fatalities during the same period. These figures represent a fatality rate per year per million population exposed to gas of 0.43 for New Zealand and 0.23 for Victoria (Green, J., New Zealand Energy Safety Service, Wellington, pers. comm., 23 September 2003).[13]

Divergence in requirements

Scope

Australian mandatory requirements for gas appliances are wider than those in force in New Zealand. However, alignment of New Zealand voluntary standards and Australian mandatory standards for energy efficiency and emissions could lead the way for Australian jurisdictions to accept New Zealand gas appliances certified to New Zealand voluntary standards as meeting their requirements. The Government of South Australia considered that mutual voluntary standards could not be aligned (sub. DR165, p. 9), but there is no reason why the content of the standards cannot be the same. However, full mutual recognition may not be possible as New Zealand gas appliances that do not adhere to the voluntary standards would remain unacceptable to Australia.

Variations in standards

There are three areas of divergence in the national standards of Australia and New Zealand. First, New Zealand has standards for seismic risks that are not relevant in Australia. Second, New Zealand permits the use of mobile unflued heaters on the grounds that modern models now burn fuel more efficiently and safely, while *some* Australian States continue to ban this type of heater. Third, Australia has more stringent emission standards for unflued heaters.

[13] The New Zealand Government considered that the ability to make such comparisons is clouded by many influences that cannot easily be factored in, such as statistical variability when dealing with relatively small numbers (sub. DR159, p. 5).

Standards to address seismic risks would be superfluous to Australian requirements, (except perhaps in the Newcastle area) so there are good reasons for retaining the differences as a permanent exemption. The New Zealand requirements relate only to very large appliances, but further work could usefully be undertaken to address the issues for harmonisation of the regulations on unflued heaters.

In addition, State regulations and local authority by-laws on the usage of gas appliances create an irritant for interstate and trans-Tasman trade as they usually require Australian approval numbers for appliances to be connected to gas mains (Fisher and Paykel, sub. 56, p. 3).

As the New South Wales Ministry of Energy and Utilities remarked:

> … the adoption of joint Australian and New Zealand Standards, recognised in each jurisdiction's legislation, would greatly assist in the mutual recognition of such appliances. (sub. DR179, p. 7)

Recognition of International Standards

The Gas Technical Regulators Committee (GTRC), comprised of regulators from all the States and Territories and New Zealand, noted:

> GTRC have been advised by NZ Industry that 95% of the mass produced models of gas appliances for sale in NZ have been assessed and approved under one of the major international schemes (with the majority of appliances being subject to the Australian scheme).
>
> It should be possible to accommodate this 95% under a scheme of recognition and to exempt the other 5%. (sub. 112, p. 3)

It also commented:

> The appliance standards and the approvals scheme are modelled on those that exist in the UK, Europe, USA, Japan and Canada and the Australian members of GTRC believe that the principle of mutual recognition is best served by a push for mutual recognition of the schemes used in these countries. (Gas Technical Regulators Committee, sub. 112, p. 2)

However, mutual recognition of *standards* alone will not remove the existing barriers to trade; mutual recognition of conformity assessments is a greater obstacle for New Zealand suppliers.

Conformity assessment

Conformity assessment is a significant barrier to trade between the two countries (GASA, sub. 33, p. 4 and Fisher and Paykel, sub. 56, p. 3). To obtain approvals,

Australian regulators require all third party conformity assessment to be carried out by the Australian Gas Association accredited conformity assessment bodies. This places New Zealand exporters at a disadvantage as they must incur the cost and inconvenience of sending each model to Australia for testing.

In New Zealand, no conformity assessment body has applied for IANZ accreditation. Though the New Zealand Gas Appliances Laboratories do conformity assessments, it does not make commercial sense for them to seek accreditation to Australian standards, unless their conformity assessments are accepted in Australia. Hence, it is important for Australian regulators to agree, in principle, to accept conformity assessments from IANZ accredited conformity assessment bodies, rather than waiting for such accreditation to exist.

However, there is a further problem. As Australia only recognises Australian standards, New Zealand manufacturers with other export markets may need to carry out duplicate tests, as third countries may not accept test reports to Australian standards. Australian exporters face similar obstacles. Even if, as in this instance, the Australian standards are based on an internationally recognised standard, either the exporter or the Australian regulator must negotiate with the importing country to obtain recognition of the Australian standards.

In addition, third country imports into Australia must be tested, inspected and certified a second time and sometimes require adaptations to meet local requirements. These costs disadvantage third country suppliers and, ultimately, local consumers. It is therefore encouraging to note initiatives are now being taken to address this problem. The 5th Annual Report of the Cooperation Program stated:

> The Cooperation Program on gas appliances is addressing this problem at a national level. It is considering the possibility of moving towards a performance based approach where both countries recognise mutual recognition of test reports and certification to internationally recognised standards undertaken in either country to reduce the need for duplication. This should reduce compliance costs, and costs to consumers in both countries. It should also assist exports to third countries.

Future directions

In 2002, the GTRC decided to suspend drafting a regulatory impact statement requesting permanent exemption pending implementation of the New Zealand scheme.

New Zealand has proposed an extension of the special exemption for 3 years to explore the potential for further harmonisation or mutual recognition that the new New Zealand scheme may afford. The 5th Annual Report of the Cooperation

Program acknowledges that this would allow the steering group for the Cooperation Program time to complete the work aimed at reducing the scope of the special exemption outlined in a draft heads of agreement prepared at the Gas Technical Regulators Committee meeting in October 2002. After 2006, a limited permanent exemption for some products or regulations may be required but only if, for technical reasons, it is apparent that no further alignment is possible.

FINDING 8.17

The objectives of mutual recognition would be assisted if trans-Tasman discussions were held on aligning Australian mandatory requirements and New Zealand voluntary standards for energy efficiency and labelling as closely as possible, with the goal of making mutual recognition or harmonisation possible.

FINDING 8.18

Administrative costs would be reduced by extending the special exemption for gas appliances for a maximum of three years, without annual roll over requirements. In the interim, the submission under the Cooperation Program to COAG of a project plan with annual progress reports would assist in minimising current technical barriers to trade. The project plan could:

- *assess the effectiveness of the new New Zealand compliance regime;*
- *address the issues relating to unflued heaters;*
- *examine options for mutual recognition of conformity assessment to joint Australia/New Zealand standards or international standards carried out in Australia, New Zealand or third countries, with one conformity assessment recognised as valid for like products manufactured on both sides of the Tasman;*
- *identify any products or mandatory requirements that will require a long term exemption; and*
- *progress aligning energy efficiency standards.*

8.6 Electromagnetic compatibility and radiocommunications equipment

Background

A wide range of communication devices use radiofrequency spectrum, including computers, mobile phones, radios and some therapeutic devices. Unless the allocation of spectrum that these devices use is regulated in some way, interference problems are likely to emerge. In some cases this may result in serious

consequences for health and safety (for instance, they may interfere with paging systems in hospitals, factories or businesses). Although the use of spectrum is coordinated internationally through the adoption of relatively generic spectrum plans, there are also many variations between countries. To the extent that Australian and New Zealand regulators have allocated different spectrum for the use of like devices, problems will arise in using those devices in one country or the other. An ordinary off-the-shelf 27MHz CB radio purchased in Australia and fully compatible with Australian standards will create unacceptable interference problems when operating in the same spectrum in New Zealand.

The Australian Communications Authority (ACA) and the New Zealand Ministry of Economic Development (MED) are the regulators responsible for implementing the Cooperation Program to harmonise regulations for electromagnetic compatibility (EMC) and radiocommunications equipment (RC).

Work on harmonisation began in the early 1990s, but only gathered momentum with the inception of the TTMRA. The 2002-03 Joint Annual Report to the Heads of Australian and New Zealand Governments on the Electromagnetic Compatibility and Radiocommunications Cooperation Programme, advised that harmonisation of EMC is now complete and no longer requires an exemption.

Currently, joint standards, including standards for conformity assessment, are being developed for a number of RC product categories. The ACA and MED signed a Memorandum of Understanding (MOU) in November 2002, in which they agreed to institute similar audit and enforcement procedures and comparable penalties. The MOU will allow compliance documentation held in one country to be valid in both and for a framework to be developed for seamless trans-Tasman supplier registration and mutual recognition of product labelling.

The ACA and MED plan to initiate mechanisms to control trade in non-harmonised products and to have in place a coordination process for product standard maintenance by April 2004. The ultimate phase of the program — identification of radiocommunication frequencies that will require a special exemption and implementation of all harmonised arrangements — is expected to be completed by December 2004. Recently, preliminary agreement has been reached between the ACA and MED in regard to mutual recognition for the following nine RC product categories: UHF Citizen Band; VHF-FM Land Mobiles; MF/HF Maritime; VHF Maritime; VHF Aeronautical; Radiopaging; Emergency Position Indicationing Beacons and Satellite Distress Beacons. The five RC product categories where agreement has not been reached are considered below.

The New Zealand Government commented:

> The EMC Co-operation Program has been notable in particular for a high degree of proactive regulatory co-operation and co-ordination, supported by a clear appreciation of the objectives of the TTMRA. (sub. 110, p. 13)

Issues

Existing radio frequency allocations

The problems with the five remaining RC product categories (HF Citizen Band, HF Inshore Boating, Cordless Telephones, Low Interference Potential Devices (LIPDs) as they are known in Australia, or Short Range Devices (SRDs) in New Zealand and Spread Spectrum Devices) arise largely from historical usage and the fact that there are few international standards in this area. LIPDs/SRDs are a significant category where alignment is probably not possible in the short to medium term because, with the exception of some international allocations, frequencies were allocated locally before the benefits of harmonisation had materialised. LIPDs or SRDs include wireless burglar alarms, wireless doorbells, baby minders and keyless car door locking. Given the fact that all existing devices would become obsolete, the cost to consumers of arbitrarily changing to a different frequency would be high. The ACA and MED are of the view that the flow on costs to consumers are unlikely to warrant alignment until shifts in technology open up opportunities. However, while market to market mutual recognition is unlikely in the foreseeable future for these products, work will continue on the alignment of various frequency bands for cordless phones, LIPDs/SRDs and Spread Spectrum Devices.

FINDING 8.19

Electromagnetic compatibility is no longer subject to special exemption. An extension of the special exemption for radiocommunications, without annual roll over requirements, until 2005, when the radio frequency spectrum that cannot be aligned has been identified, would allow time to complete this program. Due to incompatibilities permanent exemptions will be required for the laws relating to some radio frequency spectrum allocations.

FINDING 8.20

After 2005, it should be possible to replace the special exemption on radiocommunication equipment by a longer term special exemption restricted to equipment using radio frequency spectrum where harmonised allocations have been identified as impractical in the medium term, but for which harmonisation might be achievable.

8.7 Consumer goods

Background

After the TTMRA came into force on 1 May 1998, it became apparent that before full mutual recognition could apply, the differences in a number of consumer product safety standards between Australia and New Zealand and the effect of bans in Australian and New Zealand jurisdictions would need to be examined, in the interests of safety. The composition and properties of a product or its safety is not always apparent from its appearance and often consumers do not have the technical expertise or the means to test the safety of a product. Regulation is required to address this asymmetry in knowledge between the manufacturer and consumer.

Consumer products can pose a degree of risk to health, safety or the environment or generate issues related to consumer choice and, consequently, are subject to consumer product standards and bans under Trade Practices, Consumer Affairs and Fair Trading legislation in all trans-Tasman jurisdictions. Product standards deal with minimum safety requirements and consumer information.

The Consumer Products Advisory Committee, set up in 1997 under the direction of the Ministerial Committee on Consumer Affairs (the MCCA), identified over 300 Australian and 14 New Zealand product regulations, ranging from cots to diving apparatus to tobacco warnings, where inclusion in the TTMRA posed issues for health and safety. In 1999, Australian and New Zealand jurisdictions passed regulations to exempt legislation in the 25 areas still requiring attention, and in doing so, created the special exemption on Consumer Product Safety Standards.

The exercise in ensuring that Australian and New Zealand legislation is compatible has had collateral benefits. It has led to the repeal of outdated legislation and there is anecdotal evidence that industries have found the shift towards more performance based regulation gives them more scope for innovation (Strachen, D., Queensland Office of Fair Trading, pers. comm., 27 April 2003). Despite the difficulties associated with coordinating input from a wide range of regulators, by 2003, all the standards had been aligned except for those for children's car restraints. In a number of instances this was achieved through the development of joint Australian/New Zealand standards, in others by mutual recognition.

It would appear that not all suppliers and manufacturers rely on the mutual recognition arrangements. Either they do not market their products in jurisdictions with higher standards or they manufacture to the requirements of the jurisdiction with the highest standards (Strachen, D., Queensland, Office of Fair Trading, pers. comm., 27 April 2003).

Issues

Three issues have been identified in relation to consumer products:

- child car restraints;
- the difficulty in coordinating input and decision making amongst a wide range of regulators; and
- more closely integrating recall and banning processes with temporary exemptions.

Child restraints

The difficulty associated with children's car restraints stems from differing Australian and New Zealand policies on imported road vehicles and their components. Australia and New Zealand have developed a joint standard for children's car restraints. However, while Australia recognises only the AS/NZS standard, New Zealand also recognises two others, the EU and US standards.

Both countries agree that the AS/NZS standard provides better protection, but New Zealand cannot rely on it exclusively as some vehicles in the New Zealand fleet are not designed to take top tethers, which are a key feature of the joint standard. Nor can older cars in Australia accommodate car child restraints made to the AS/NZS standard. The Consumer Product Regulation Cooperation Progam Report to COAG in February 2003 stated:

> A final recommendation in respect of the child restraint regulation should be formulated by the relevant authorities within the next 2 years. (p. 3)

If mutual recognition is not possible, a partial permanent exemption may be required, limited to car restraints exported to Australia from New Zealand that do not conform to the AS/SNZ standard.

Coordination of policies

In its submission, the Secretariat of the Ministerial Council on Consumer Affairs noted:

> The resolution of regulatory differences under the TTMRA can be complex when a number of authorities are involved in the administration of certain regulations but this is probably unavoidable and necessarily has to be resolved by the parties. (sub. 90, p. 1)

The Consumer Products Advisory Committee provides a useful forum for debating harmonisation and mutual recognition issues as they arise and has generated

initiatives resulting in harmonised trans-Tasman regulation. The development of national standards in Australia under the *Trade Practices Act 1974* also simplifies the process of trans-Tasman mutual recognition.

Recalls and bans

Except as they apply to children's car restraints, the TTMRA covers Consumer Protection Acts which cover bans and recalls. Howver, regulators need the power to take immediate action to ban products that are known to be unsafe, or potentially pose a risk to health, safety or the environment, but do not contravene existing laws to prevent them coming on to, or remaining on, the market in their jurisdiction. They must also be able to recall products found to be unsafe that are already on the market, at least until the issue can be considered further.

Coordination of bans, recalls and temporary exemptions

As noted in chapter 6, all trans-Tasman jurisdictions have different approaches to banning. Some have time limits that result in requirements for regulatory impact statements, while others can implement permanent bans easily. The reluctance of suppliers to challenge a ban means that bans retain their effectiveness, without jurisdictions needing to use the temporary exemption mechanism provided under the MRA and TTMRA. Consequently this circumvents the need for the jurisdictions to seek a common position. There is a risk that unless the temporary exemption and banning processes are linked more closely, there will be a gradual divergence in standards that will eventually require a similar exercise to the one initiated for the 300 products considered under the Cooperation Program now nearing completion. That many banning orders are written in the form of performance or specification requirements (New Zealand Government, sub. DR159, p. 8), a form more appropriate to product safety standards than bans, accentuates that risk.

The Government of New South Wales, while supporting consultation among jurisdictions during standards development, noted the concerns of its Ministry of Fair Trading, that higher levels of formalised consultation could result in delays in the regulation-making process in the important area of consumer and product safety (sub. DR179, p. 6).

One option for addressing these concerns would be to integrate the temporary exemption and banning requirements by introducing the following procedures:

- when a jurisdiction introduces a ban, it should apply to products from all jurisdictions and have the effect of automatically activating a temporary exemption under the MRA and TTMRA;

- the jurisdiction, or jurisdictions, introducing the ban should then be required to report to the MCCA at its next meeting, with a project plan for seeking consensus for a harmonised approach to regulating the product;
- the MCCA would place an appropriate time limit on the temporary exemption; and
- if all jurisdictions do not agree to a harmonised outcome within that time period, a permanent exemption would need to be sought or the MRA and TTMRA would apply.

Tran-Tasman data base

Recommendation 3 of the Report on the Mutual Recognition Legislation Review, 1998 called for:

> ... the Ministerial Council on Consumer Affairs [to] develop national arrangements for product recalls and product safety bans to ensure consistent approaches between jurisdictions and or recall of dangerous goods. (CRR 1998a, p. 2)

It is not clear whether the MCCA received the report recommendation (MCCA, sub. 90, p. 1), but it has set up a website (www.recalls.gov.au) that posts all voluntary product recalls notified under the Australian *Trade Practices Act 1974*. In addition, it has sponsored agreed operational and communication protocols for all product recalls within Australian jurisdictions. Australia did not consider that it was necessary to involve New Zealand in this exercise but New Zealand has access to the Australian website.

New Zealand information about voluntary recalls is available on the New Zealand Consumers' Institute website which covers, or plans eventually to cover, recalls across all sectors including electrical, gas, health, food and road vehicles. Australians have access to this website. The New Zealand Ministry of Consumer Affairs recommended that the Commonwealth request more support from Government agencies across sectors, in line with the benefits they receive from the website and protocols (Mullinder, C., Ministry of Consumer Affairs, 20 May 2003). New Zealand also administers and funds the OECD Prodsafe facility, which is a warning/alert system for regulators across OECD participants.

The Australian Treasury queries how beneficial a trans-Tasman data base would be because products banned in one country may be different from similar products supplied in the other and consumers could be confused (sub. DR130, p. 2). However, this objection may apply equally to imports into different Australian jurisdictions. The New Zealand Ministry of Consumer Affairs states that it does not rule out the possibility of funding a joint Australian and New Zealand website if the

same services on contact details of suppliers to New Zealand and monitoring of the recalls that the Commonwealth provides the States and Territories under their mandatory reporting system for voluntary recalls were included in the arrangements.

FINDING 8.21

Administrative costs would be reduced by extending the special exemption on consumer product safety standards, without annual roll over requirements, until 2005 to allow the Cooperation Program to:

- *specify a way forward to harmonise or mutually recognise children's car restraints by that date and, if this is not possible, to replace the wide special exemption with a specific permanent exemption for New Zealand exports to Australia of children's car restraints;*
- *explore the feasibility of an integrated, more flexible approach to bans, recalls and temporary exemptions; and*
- *explore the feasibility of a trans-Tasman database for bans and recalls.*

9 Scope of the schemes

This evaluation is required to assess the current scope of the mutual recognition schemes and examine whether broadening the scope of the schemes would enhance their effectiveness and efficiency and provide net benefits. For goods, only regulation relating to sale, and for occupations, only regulation relating to registration, are covered by the MRA and the TTMRA. Extending the current boundaries of the schemes may provide significant benefits, such as lowering compliance costs and reaping economies of scale. However, extending the scope may also make mutual recognition excessively complex and have wider adverse implications.

This chapter examines some options for expanding the scope of the mutual recognition schemes, including:

- removing the exceptions for goods in relation to their:
  - manner of sale;
  - transport, storage and handling; and
  - inspection (section 9.1);
- removing exceptions for occupations in relation to:
  - the manner of carrying on an occupation (section 9.2);
- expanding the schemes to cover:
  - regulation of the use of goods;
  - business licences; and
  - non-traditional forms of occupational regulation (section 9.3).

Section 9.3 also discusses the issue of remote provision of a service.

9.1 Exceptions applying to goods

Manner of sale

The manner of sale exception to mutual recognition means that any jurisdiction-specific laws relating to the manner in which a good is sold or the manner in which sellers conduct their businesses do not have to be mutually recognised by other jurisdictions. Examples of these laws include liquor licences and hygiene requirements for food vendors. These laws are exceptions to mutual recognition only where they apply equally to both locally produced and imported products. This way, the parties to the agreement sought to preserve each jurisdiction's power to regulate in these areas, while preventing such laws acting in a discriminatory way against imports.

The Acts[1] contain five specific *examples* of laws regulating manner of sale:

- the contractual aspects of the sale of goods;
- the registration of sellers or other persons carrying on occupations;
- the requirements for business franchise licences;
- the persons to whom goods may or may not be sold; and
- the circumstances in which goods may or may not be sold.

Since these are examples only, mutual recognition also does not apply to all other manner of sale requirements. Problems raised with the Commission in this area were specific to the Australian jurisdictions and did not involve trans-Tasman issues.

Contractual aspects of the sale of goods

This example encompasses mostly business-to-business transactions. Under the Australian Constitution, each State and Territory has its own Sale Of Goods Act (SOGA) that regulates contracts between manufacturers, wholesalers and retailers. Examples of requirements made under these laws include rules for determining when the ownership of goods is transferred between the parties and terms that may be implied into contracts for the sale of goods. Anti-competitive aspects are dealt with by the *Trade Practices Act 1974* (Cwlth) if corporations or interstate trade are

[1] See s11(2) of the *Mutual Recognition Act 1992* (Cwlth), s12(2) of the *Trans-Tasman Mutual Recognition Act 1997* (Cwlth) and s11(1) of the *Trans-Tasman Mutual Recognition Act 1997* (New Zealand).

involved, or by Fair Trading legislation in the States and Territories and New Zealand.

The exception for contractual aspects of the sale of goods ensures consistency in contractual dealings within jurisdictions. Its removal may lead to unnecessary complexity for the sale of goods. While there may be benefits from the harmonisation of State contractual laws, these issues would be better dealt with in other forums. Harmonisation of contractual laws on a trans-Tasman basis is more ambitious again and would perhaps be better explored through CER processes.

Registration of sellers or other persons carrying on occupations

Governments have several options available to them to regulate business activity. They can regulate the required skills of a person, the activities of that person or the activities of a business. The regulations covered by this exception relate to the sellers of goods, with the regulations focusing not on a person's skills, but on the product they are selling. These regulations may reduce the mobility of people.

A common example in most jurisdictions is the requirement that sellers of food for human consumption — both the business owners and those who handle the food — need to be registered. This is done at local council level within Australia, usually according to guidelines formulated at a jurisdictional or national level.[2] This requires the registration of the sellers of food, even if they are only within the jurisdiction for a temporary event. Usually these regulations are made for public health and safety purposes, for example, to help ensure that food is safe for consumers, but the regulations can cover a broad range of sellers' activities. The requirements may differ by jurisdiction, for example, due to climatic conditions foods may spoil faster in warm, humid conditions than in a cold and dry climate. Allowing the registration of sellers as an exception to the mutual recognition schemes allows jurisdictions to retain control over the manner of sale of certain goods by regulating those who sell them.[3] Jurisdictions retain control in this area through a variety of means, including notification by sellers that their business will be handling food and inspections of the state of premises and the practices of the sellers on those premises. While notification can be undertaken at a jurisdiction-wide level, inspections of premises are commonly carried out at the local government level.

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[2] For example, Standard 3.2.2 of the Food Standards Code, which includes hygiene, storage and disposal requirements for food handlers.

[3] In this way, this exception is analogous to the exception for laws regulating the manner of carrying on an occupation. Both exceptions allow a jurisdiction to regulate how all businesses in a particular industry conduct their trade within that jurisdiction.

The exception could be expressly limited to situations that would affect public health and safety or the environment. Such a change would allow jurisdictions to address local factors impacting on health, safety and the environment, while ensuring that this exception was not used to unnecessarily restrict the movement of goods. This limitation would not markedly change current regulatory practices in jurisdictions, as there have been significant moves towards standardisation of regulations under the Food Standards Code, and there would be few adjustment costs for government and industry.

Business franchise licences

Prior to two High Court of Australia decisions in 1997,[4] State governments were able to impose licence fees on sellers of alcohol, petrol and tobacco. This was both a significant source of revenue for the States and a means of controlling the movement and sale of these products. Following the High Court decisions, the States are no longer able to levy licence fees based on sales volume (equivalent charges are now collected through the Commonwealth excise tax). The States did, however, retain the ability to license sellers of these products and levy a flat annual licence fee, to enable them to continue to control the distribution of these potentially harmful products. These licences are not mutually recognised under the schemes.

Requirements attached to alcohol licences differ by location. For example, in Tasmania, the Licensing Board is required to take into account 'the interests and concerns of the community in the neighbourhood where the premises to which the application relates are situated' (Tasmanian Department of Treasury and Finance 1996, p. 2). One specific area of community difference in requirements is in outback regions in Australia, where alcohol abuse can be a serious community problem. An example is the requirement in the town of Tennant Creek in the Northern Territory for bottle shops and bars to close on Thursdays and the ban on the sale of four and five litre casks of wine.[5] Some local councils, for example Alice Springs, have alcohol representative committees to provide for community consultation on licensing issues specific to the local community.

The ability to control the movement and sale of these products through the business franchise licence enables jurisdictions and communities to enforce public policy through licensing requirements that the businesses in question must meet in order to

4 *Ngo Ngo Ha v New South Wales (1997) 189 CLR 465* and *Phillip Morris Ltd v Commissioner of Business Franchises (Vict.)* (1989) 167 CLR 399.

5 ABC Stateline — Northern Territory. Interview transcript 2 May 2003: http://www.abc.net.au/stateline/nt/content/2003/s846069.htm (accessed 4 May 2003).

be able to sell their goods. In this area, mutual recognition may not be appropriate due to different situations at both jurisdictional and local levels.

Persons to whom goods may or may not be sold

This example applies to certain products that cannot be sold to particular segments of the population, for example, alcohol and cigarettes cannot be sold to those under 18 years of age. However, there is a need for some variation between jurisdictions in the regulations applying to these products. Examples include the need for the Northern Territory, South Australia and Western Australia to regulate to further restrict or prevent the sale of alcoholic products to certain aboriginal communities, but not other residents in outback towns. This is often done at the request of the elders of those communities. Introducing mutual recognition of these regulations could undermine the interests and sovereignty of local communities.

The circumstances in which goods may or may not be sold

This exception covers regulations relating to the placement of goods within stores, for example, the height that products may be placed on shelves to restrict their access by children. Another example is a requirement that perishable goods not be stored in a window front for health reasons. These regulations can differ across jurisdictions, usually for public interest reasons, such as climate differences. They would rarely represent a significant barrier to trade, as they do not discriminate between goods originating from different sources. As such, removal of this exception is unlikely to yield net benefits.

FINDING 9.1

It appears that most aspects of the manner of sale exception to mutual recognition should be retained. While differences between jurisdictions may give rise to compliance costs for business, their removal would be complicated and costly and could be contrary to the interests and preferences of local communities. As the differences do not appear to significantly impede trade, harmonisation would generate few benefits.

FINDING 9.2

One particular aspect of the manner of sale exception, the registration of sellers, could be limited only to where health, safety and environmental considerations apply. This would prevent any unnecessary limitation on the capacities of business providers and, thus, the movement of people.

Transportation, storage and handling

In Australia, regulations relating to transport, storage and handling are under the control of the States and Territories. The majority of regulations relating to transport, storage and handling are made to control the risks that dangerous goods, such as chemicals or explosives, present to people or the environment.

Mutual recognition obligations do not apply to laws relating to transport, storage and handling where the laws are applied equally to locally produced or imported goods and are for public health and safety or environmental purposes. Transport issues relating to rail and road only affect the MRA. The Commission received no comments on issues relating to air and sea transport and the TTMRA.

Due to the risks involved, mutual recognition of standards relating to transport, storage and handling is not an option. It could endanger health, safety and the environment due to the confusion and conflict created by different standards, as well as problems with standards that are not compatible with local environments. However, inconsistencies across jurisdictions also potentially create confusion and constitute a barrier to trade in the form of compliance costs due to different regulations at State and/or local government level. Within Australia, harmonisation or, at least, increased compatibility of standards, appear to be the only options to address these concerns. It is generally agreed that the health, safety and environmental standards relating to transport, storage and handling could be harmonised across jurisdictions to a greater extent than is currently the case and this would result in reduced compliance costs.

The 1998 review of the MRA considered the area of transport, storage and handling and noted some of the problems that jurisdictional differences can create. It recommended:

> That the COAG Committee on Regulatory Reform examine the potential for developing national standards for the transport, storage and handling of goods for which there is variable regulation across jurisdictions. (see appendix B, rec. 26)

and:

> That the COAG Committee on Regulatory Reform develop for consideration by Heads of Government, amendments to the *Mutual Recognition Act 1992* aimed at ensuring that packaging and labelling requirements relating to transport, storage and handling, in particular, requirements relating to Material Safety Data Sheets are covered by the mutual recognition principle. (see appendix B, rec. 27)

While progress towards harmonisation has been made in the transport area, greater differences remain concerning storage and handling.

In its role as a national standard setter, the National Road Transport Commission (NRTC) has been seeking to achieve national consistency in road transport. The relative success of the NRTC was acknowledged by jurisdictions through the recent agreement by the Australian Transport Council to expand the NRTC's role to include rail transport, an area where significant problems remain. The NRTC will become the National Transport Commission to reflect this broader role.

There is national legislation, with regulations and a national code, for the transport of dangerous goods by road and rail and this is generally accepted and implemented by the States and Territories.

National legislation — the *Road Transport Reform (Dangerous Goods) Act 1995* (Cwlth) — has been referenced by a number of jurisdictions. Some have reproduced the legislation and others have incorporated it as a larger part of more general goods legislation, for example, South Australia has included it with their handling and storage legislation. The Road Transport Reform Dangerous Goods Regulations made in 1997, under the Act, have been incorporated by even more jurisdictions.

The requirements for standards are provided by the Australian Dangerous Goods Code, which goes back to the early 1980s and is now in its 6th edition (1998). It provides the 'manual' outlining what is required when transporting dangerous goods by road and rail. Working with the Advisory Committee on the Transport of Dangerous Goods (ACTDG), the NRTC developed the Dangerous Goods Code. The code is already aligned internationally with UN standards and the application of the Globally Harmonised System for the Classification and Labelling of Chemicals (GHS) is currently under consideration. Equivalent regulations applying to rail have also been put into place in most jurisdictions, sometimes in combination with the road regulations.

In sum, these efforts have effectively achieved a uniform national approach for many chemicals, but this does not cover infectious goods and explosives.

The bigger inconsistencies and issues relate to storage and handling. This area is fraught with complexity as it involves a range of highly regulated substances, with many different types of classifications and approval requirements. One impediment to the harmonisation of storage and handling regulations is the different treatment given to chemicals through their categorisation as hazardous substances, dangerous goods, veterinary medicines, pesticides or explosives.

For example, in the 1998 review of the MRA, concerns were raised about a conflict between provisions of the *Mutual Recognition Act 1992* and uncertainty over which part of the Act prevails. Packaging and labelling requirements may be set by the National Occupational Health and Safety Commission (NOHSC), the Australian

Pesticides and Veterinary Medicines Authority (APVMA) and, on the advice of the National Industrial Chemicals Notification and Assessment Scheme (NICNAS), by the States and Territories. This conflict can occur where a transport, storage and handling requirement must be included on the label of a good in a particular jurisdiction. At the time of the 1998 review, Material Safety Data Sheets (MSDSs) presented a significant problem, as different packaging and labelling requirements can increase costs to producers by requiring them to supply separate batches of the same good to satisfy different storage and handling regulations in different jurisdictions.

As discussed in chapter 8, the GHS includes guidelines for MSDSs and labelling related to handling, packaging, storage and transport. NOHSC intends to introduce MSDSs and labelling requirements that are based on the GHS, and harmonised with New Zealand requirements later this year and similar labelling requirements by 2005. Gaining the maximum benefits from this initiative will require the States and Territories to adopt these standards fully to ensure consistency and reduce barriers to the movement of goods. It remains to be seen whether other Australian agencies will adopt the GHS in a consistent manner. In May 2002, the Australian Trade Minister announced that Australia would implement the GHS on hazard classification and labelling of chemicals and MSDSs by 2006 (Vaile 2002). It is hoped this will lead to uniformity in chemical labelling standards not only within Australia and across the Tasman but also throughout the APEC region. However, multiple labelling may still be required for products that are classified as explosives or are used for agricultural or veterinary purposes if the GHS is not extended to cover them.

The Hazardous Substances, Industrial Chemicals and Dangerous Goods special exemption is the subject of a Cooperation Program aimed at resolving existing differences (see chapter 8). Because chemicals remain an exemption to the TTMRA, a variety of requirements relating to their sale, such as packaging, are exempted from the TTMRA. With the introduction of the GHS it should be possible to achieve greater consistency in transport, storage and handling requirements for chemicals.

FINDING 9.3

Significant progress has been made in harmonising transport requirements within Australia and it would appear that the exception to the MRA could be removed once regulations in relation to infectious goods and explosives have also been harmonised.

FINDING 9.4

The storage and handling exception to mutual recognition should be retained in order to avoid risk to health, safety and the environment. While the introduction of the GHS and related labelling requirements will improve standardisation in this area, it will not totally resolve the issues. It would assist mobility and reduce risks if the States and Territories were to restrict differences in storage and handling requirements to situations where particular local circumstances necessitated their adoption to protect health, safety and the environment.

Inspection of goods

Another exception to the mutual recognition principle are laws regarding the inspection of goods.[6] This exception only applies where the inspection:

- is not a prerequisite of sale;
- applies equally to imported and locally produced goods; and
- is related to a matter of health and safety or environmental pollution.

The 1998 CRR review of the MRA considered that this exception had little impact on competition and recommended its retention (CRR 1998a, section 6.11). Given that this exception can only apply where all three conditions are met, the likelihood that it is a significant barrier is low.

The first condition under this exception is that the inspection must not be a prerequisite of sale. This can occur in two situations. The first is inspections that cover aspects of the goods that do not relate to sale, but to other regulatory requirements. Among other things, these inspections may cover requirements of usage and ensuring that business franchise licences are being complied with. Such inspections are required to allow the regulatory machinery needed to enforce the other exceptions covered in this chapter. Removal of this exception would thus undermine the ability of jurisdictions to effectively regulate areas outside of mutual recognition by reducing their ability to inspect aspects of goods not related to their sale. The second type of inspection that is not a prerequisite of sale occurs when the regulator allows the goods to be offered for sale to the public, but may inspect the goods at this stage. Any goods that fail inspection may be recalled or withdrawn from sale. This is a system used in both New Zealand and Australia, called 'post-

6 *Mutual Recognition Act 1992* (Cwlth) s11(4), *Trans-Tasman Mutual Recognition Act 1997* (Cwlth) s12(4) and *Trans-Tasman Mutual Recognition Act 1997* (New Zealand) s11(3).

market' inspections.[7] Such 'post-market' inspections, where they fulfilled the other two requirements under this exception, would be excepted from mutual recognition.

To fit within this exception, such inspections must also be for health and safety or environmental reasons. Under this exception, a re-inspection process in the receiving jurisdiction must be conducted according to the standards of the exporting jurisdiction, where the good was produced. However, to date, the Commission has received little information to indicate that this is a significant issue in practice.

While pre-sale inspections are generally subject to mutual recognition, inspections of goods that fall within an exemption are not. This process of inspection is not costless. For example, Kmart noted disruption to its distribution networks and significant costs to its business:

> … each separate container may be subject to intervention for testing purposes thus multiplying the cost incurred. For instance, diversion, inspection, delivery, sampling as well as delaying delivery to store.
>
> It is important to note that the consequences of this intervention are significant. If a ceramic ware article is held for testing under the shipment-by-shipment arrangement then the entire container of toys, shoes, books and lampshades is also held. Any delay may result in empty shelves or a store missing an advertised sale date for other merchandise in the container, which translates to lost sales and excess stock on hand. (sub. 28, p. 16)

In this case, ceramic ware comes under the special exemption to the TTMRA for hazardous substances, industrial chemicals and dangerous goods, issues detailed in chapter 8.

FINDING 9.5

The inspection of goods exception to mutual recognition is required to allow effective enforcement of regulations made under the other exceptions to mutual recognition and provides only minimal barriers to the movement of goods. On these grounds, the exception relating to inspection of goods should be retained.

7 Being on a random basis, 'post market' inspections are less costly to implement, although there are the risks associated with allowing faulty products to go to the consumer market and relying on recalls to protect consumer safety. These inspections represent a low cost method of pursuing legitimate policy concerns where the authorities in a jurisdiction do not feel that pre-market inspection is warranted.

9.2 Exceptions applying to occupations

Manner of carrying on an occupation

In the area of occupations, the scope of the mutual recognition schemes does not include laws regulating the manner of carrying on an occupation within a particular jurisdiction. That is, the initial registration of a person is mutually recognised across jurisdictions within Australia and between Australia and New Zealand, but how that person carries on their occupation once they have been registered in a jurisdiction is not mutually recognised. This exception includes laws that cover areas such as trust accounts, disciplinary processes, the supervision of apprentices, continuing registration of a person or ways of allocating responsibilities and working arrangements, such as in hospitals or child care centres.

This exception is subject to two qualifications. First, the laws in question must apply equally to all persons in that occupation in that jurisdiction and, second, the laws must not be based on a person's qualifications or experience in relation to their fitness to carry on that occupation.

This exception allows differences to exist between jurisdictions relating to the manner of carrying on an occupation. These differences may result in costs, as people have to adjust to new regulations on how they can carry on their occupation if they choose to move to a new jurisdiction. Having to abide by the new jurisdiction's laws in this area could result in the diminution of the exercise of some skills for some practitioners. Alternatively, if the practitioner comes from a jurisdiction where certain skills are not required, this may require conditions to be placed on an individual's registration in their new jurisdiction with consequences for his/her employability. An example of this is that nurses' rights/obligations to prescribe medicines vary by jurisdiction. This means that a nurse may move from a jurisdiction where he/she has the right to prescribe medicines to one where he/she no longer has that right or must complete a course in order to retain those rights. These differences result in adjustment costs to individuals.

The exception of these laws from the mutual recognition schemes ensures a government can regulate all those practising registered occupations in its jurisdiction effectively and consistently, using its own regulatory mechanisms. Applying mutual recognition obligations to those regulations would generate extensive complexity and could undermine the quality and reliability of service delivery. In addition, such an application would generate few benefits, given that the regulatory differences do not represent much of an impediment to occupational mobility.

FINDING 9.6

The exception relating to the manner of carrying on an occupation should be retained. Different practices across jurisdictions do not appear to impede mobility in any significant way.

9.3 Expanding the schemes

There are some areas relating to regulation that do not fall under the current reach of the mutual recognition schemes. The benefits of bringing several of these areas within the scope of the schemes are examined below.

Use of goods

As discussed in chapter 2, the legislation implementing the MRA and TTMRA has been interpreted so as to not include regulation governing the use of goods (use requirements). In practice, this means that, while a good can be sold in all participating jurisdictions, local regulations may prevent its use in particular jurisdictions, constituting an effective barrier to the mobility of goods.

Impacts of use regulations on mobility

Concerns have been raised that the lack of mutual recognition of regulation governing the use of goods may work against the mobility objectives of mutual recognition. As the New Zealand Government commented:

> A good can be sold under the TTMRA without the need for further testing or certification. However, participating jurisdictions can provide that, in order to use that good for its intended purpose, the good must then comply with the prescribed domestic requirements. While this is not prohibited under the provisions of the TTMRA as part of its initial design, these requirements can effectively constrain sale of the relevant goods. In other words, although the requirements do not relate to the sale of goods, they have the effect of preventing or hindering sale (the test applied under the EU mutual recognition regime). (sub. 110, p. 5)

As such, the existence of jurisdiction-specific use requirements can represent a barrier to trans-Tasman and interstate trade and can impose additional costs on business. One example relates to pressure vessels, in respect of occupational health and safety issues. Pressure vessels are used as components in machinery such as boilers, and incorrect use may result in explosion. Jurisdictions control the movement of pressure vessels by regulating their use, as they cannot effectively

regulate sale under mutual recognition. The Victorian Government noted that 'Australian pressure vessel manufacturers exporting to New Zealand face an additional expense of independent certification' (sub. 116, attachment 2, p. 3). The New Zealand Government commented:

> In New Zealand there is a requirement that certain equipment must not be operated unless the equipment has a current certificate of inspection. … In Australia there is no equivalent requirement for a certification of inspection, design verification or fabrication inspection. The problem arises therefore when pressure equipment is manufactured in Australia for sale in New Zealand. If the equipment does not have design verification and fabrication inspection then it cannot be issued with a certificate of inspection. Without such a certificate, the equipment cannot be used in New Zealand. (sub. 110, pp. 6–7)

Obstacles can also be erected by local government. For example, Fisher and Paykel noted that local water authorities in Australia require plumbing certification (covering protection of the potable water supply) for clothes washers and dishwashers (sub. 56, p.3). However, this certification can only be gained from an Australian laboratory, adding expense and time to the approval process. Fisher and Paykel commented:

> Control of product is on a "connection to the plumbing" basis rather than "sale" basis and so the scheme is outside TTMRA. The owners of the scheme are well aware of the above point and have reminded me of it in the past. (sub. 56, p. 3)

Even in areas where international standards exist for the sale of some goods, jurisdictions may be able to undermine or complicate the standards by introducing use requirements. Box 9.1 contains an example of this in the area of measurement devices. Use restrictions are not always the most cost-effective method of regulation.

Definition of 'use'

Regulations relating to the use of goods are very wide-ranging. They may also encompass regulations affecting intermediate uses of certain goods as inputs into other goods and services, such as uses in factories, hospitals or for building. Any discussion about possibly expanding mutual recognition to regulation relating to the use of goods requires consideration of what this might cover.

Box 9.1 **The use of measurement devices**

Under the TTMRA, measurement devices — such as petrol pump gauges — that are legally saleable in New Zealand may be sold in Australia, but they can only be used in trade if they obtain an approval from the National Standards Commission (NSC). Both countries operate similar approval schemes for measurement devices used in trade, but the Australian legislation is now more extensive as it covers utility metering, which is self regulated by industry in New Zealand. Generally, two types of conformity assessments are required for approvals, pattern approvals requiring extensive testing of prototypes and verifications of each instrument offered for sale.

However, whereas New Zealand accepts test reports and approval certificates issued by full members of the Organisation of Legal Metrology (OIML) where the tests are carried out in conformity to the appropriate OIML international recommendation, Australia only accepts test reports from countries that have entered into a mutual recognition agreement with it. To date, it has agreements with the Netherlands and Canada. It also has an agreement with the New Zealand Ministry of Consumer Affairs (MCA) for pattern approvals test reports of non-automatic weighing instruments, but this does not address mutual recognition of test reports for flow metres, an area where the MCA does not have 1SO 17025 accreditation. For these products, New Zealand relies on test reports and approval certificates issued by full members of OIML, which Australia does not recognise. Because New Zealand's approval capability testing is not as extensive as Australia's, the NSC would not like to see the TTMRA extended to these types of goods as in the NSC's view, it would weaken the current trade measurement infrastructure (sub. 27, p. 1).

Australia will not accept verification test results conducted in New Zealand regardless of whether the laboratory is ISO 17025 accredited. This runs counter to the principles of the MRAs signed under the International Laboratory Accreditation Cooperation (ILAC) and APEC sponsored projects to foster mutual recognition of testing in the region. There is also a concern that New Zealand and Australia are requiring all measurement devices entering into their countries from 3rd countries to be re-verified even when they have already been verified in the country of origin. In this case, barriers to mutual recognition would be minimised if approvals or conformity assessments for the use of measurement devices, carried out in conformity to an OIML recommendation made by regulators or by third party conformity assessment bodies accredited by the regulator, IANZ or NATA were recognised by the regulators in both Australia and New Zealand.

Use requirements may dictate specific conditions in which a good may or may not be used, including bans on particular uses of particular goods in particular circumstances. Among other things, such conditions may include requirements relating to:

- the **purpose** of the particular use (for example, a particular chemical may only be used for cleaning);

- the **context** of the use (say, in an industrial setting as opposed to a household);
- the environmental or geographic **setting** of the use (for example, certain locations may ban the use of wood heaters);
- the identity of the **user** (for example, the licensing of persons for the use of radioactive substances);
- the **time** of use (either a particular time of day or on particular dates);
- the use **in connection with other goods or activities** (for example, criminal offences, combinations of chemicals);
- the **extent** of the use (say, maximum or minimum quantities); and
- the **method** of the use (for example, aerial spraying as opposed to handheld spraying of a chemical).

For the purposes of this discussion, the relevant issue is whether or not the use regulations specify particular characteristics of goods in a way that precludes or inhibits the use of goods coming from other jurisdictions. Those regulations that do not impede trade, such as those relating to time of use do not come within the ambit of this review. To have a direct effect on trade, the regulations must also have an effect after the goods have been sold.

In addition, general regulations directed at an outcome, such as lower noise, could impact on the use of a broad range of goods, for example, noise restrictions could impact on the use of lawn mowers, stereos or trucks. Unless they specify products with particular characteristics, that effectively exclude products from other jurisdictions, these regulations are judged to be beyond the scope of this review.

Of course, any proposal to expand mutual recognition to include use requirements would not extend to regulations that are already excepted or excluded under the mutual recognition schemes such as laws relating to the manner of sale, taxation or intellectual property; nor to any regulations relating to goods that are the subject of a permanent, special or temporary exemption.

The implications of extending mutual recognition to use regulations

Prima facie, it would seem reasonable that, if mutual recognition applies to the sale of a good, it should also apply to the use of that good. In particular, if a good can be sold in a jurisdiction, it is reasonable to expect that it should be possible to use that good in that jurisdiction. As such, there is a prima facie case for the mutual recognition of use requirements so that goods may be used in other jurisdictions.

However, the 1998 review of the MRA (CRR 1998a) considered that regulations in relation to use were difficult to include under mutual recognition, for reasons including environmental differences across Australia. The review recommended:

> That the MRA **not** be extended to cover regulatory requirements relating to the use of goods, but that the COAG Committee on Regulatory Reform continue to monitor this issue to ensure use requirements are not used to undermine the objectives of the MRA. (see appendix B, rec. 2)

There are certainly a number of implications to consider, if mutual recognition were to be expanded to include the use of goods. Public interest and governance are two important areas where the implications may be large. These are discussed below.

Public interest

From the public interest perspective, jurisdictional control of use may be warranted in some circumstances, in particular, in the presence of legitimate differences that arise from regional diversity. This arises where the environment or ecosystem in a particular jurisdiction is substantially different from the circumstances in other jurisdictions, due to climate, geography or native animal and plant life, among other things. An example of this was raised by Gas Technical Regulators Committee in relation to gas appliances:

> Some restrictions still apply to the "use" or installation of appliances in different jurisdictions. Some of these can be justified on the basis of climate, eg different ventilation requirements for flueless heaters. (sub. 112, p. 2)

Another example of regional diversity is site specific regulation for the use of chemicals, a special exemption category under the TTMRA. The Australian industrial chemicals regulator, NICNAS, conducts risk assessments on chemicals used in Australia. A key component of these risk assessments is the context in which the chemical is to be used. One specific example is a paper mill on the shores of Lake Bonney in South Australia. Because of the direct proximity to a shallow body of water with a minimal amount of outflow, localised environmental pollution concerns are heightened in this case. As such, additional requirements are placed on the use of chemicals in this mill that would not be needed in an industrial zone:

> It is recommended that the quarterly monitoring [rather than the usual practice of annual monitoring] of the treatment plant effluent discharged into Lake Bonney be continued and NICNAS should be informed of any increase in toxicity. (NICNAS 2001, p. 20)

The application of mutual recognition to the usage of chemicals in these situations may increase the local pollution levels, undermining existing environmental

regulations. This is an example of a valid use requirement, as it is specific to a local environment and may not necessarily impede trade.

No doubt, there are many other cases where it is important to specify characteristics of goods in a way that ensures that the special requirements of particular localities are met. However, were it decided to extend mutual recognition to use regulations, it would also be important to avoid situations where local conditions were falsely used to justify protection of local industries.

Governance

The extension of mutual recognition to usage could also lead to complications developing at a local council level. The monitoring of compliance with mutually recognised use requirements could fall to local authorities in the areas over which they currently have jurisdiction — more than one set of regulations would then apply to usage in one local area. This burden for local councils, where they would be required to know and enforce use regulations from other jurisdictions under mutual recognition, would be demanding. This could increase both compliance and enforcement costs as more regulations become mutually recognised.

Further complications could arise with respect to liability claims and insurance schemes in different jurisdictions. An example, raised by VicRoads, relates to the registration of motor vehicles for use in a jurisdiction:

> Under the MRA, vehicles legally registered in another jurisdiction are acceptable for registration in Victoria… certificates approving vehicle modifications that have been issued by an Engineering Signatory from another jurisdiction are not accepted by VicRoads unless that Signatory is also a VicRoads Vehicle Assessment Signatory Scheme (VASS) signatory. This is necessary to protect VicRoads from any legal liability that may arise as a result of registering the vehicle. Each VASS Signatory, in signing the VASS service agreement has agreed to indemnify VicRoads against any such claims and to carry appropriate professional indemnity and public liability insurance for that vehicle. (sub. 116, p. 8)

In this case, to mutually recognise certificates from parties that were not signatories to the VASS would expose VicRoads to liability if a faulty vehicle causes some harm in Victoria.

The European Union operates a mutual recognition system that extends to the use of goods. In order to extend mutual recognition to address all barriers to trade, the European system operates through harmonised 'core' standards for use — those that affect basic health, safety and environmental conditions — and the mutual recognition of other standards. While this has reduced the barriers to trade within the Union, this has not come without compliance and enforcement costs. For

example, since 1992, some 6000 draft national technical regulations have been notified to the Commission of the European Communities and in the same time the number of open cases in the European Court of Justice for the infringement of mutual recognition has arisen from 700 to nearly 1600 (EC 2003, pp. 26, 29). Even though some agreement has been reached on the core issues, disputes still arise within the European system, and there have been long delays in countries fully adopting some of these.

The expansion of mutual recognition to use may also result in unduly complicated regulatory regimes. As the regulation of use would no longer be available as a jurisdiction-specific regulatory option, jurisdictions wishing to continue to regulate the use of certain goods may choose to formulate more complex regulation, such as workplace conduct requirements, simply to maintain their standards. If this were the case, the differences in standards would remain, but they would be given effect in a more complicated manner, possibly increasing both compliance and enforcement costs.

In sum, an expansion of the scope of mutual recognition to include most use requirements may lead to some complications. This could result in cases where the mutual recognition of use requirements leads to a net cost rather than a net benefit, for example, where it causes environmental damage or complicates local laws.

Nevertheless, the issue is worth exploring further. There are a number of ways that the mutual recognition of use could be progressed. These are discussed next.

Models for implementing the recognition of use regulations

As shown above, the range of use requirements that could be included in the scope of mutual recognition is wide. Whether or not they are included will depend on the criteria used and the model chosen to advance the issue.

Minimising differences in regulation concerning the use of goods would reduce impediments to economic integration and be consistent with mutual recognition objectives. The challenge is to set up an efficient implementation system that both effectively identifies valid regulatory differences and removes unnecessary barriers to trade.

Model 1: all in, with opting out

One approach to introducing mutual recognition to use requirements would be to expose all regulation governing the use of goods to mutual recognition and rely on the temporary exemption mechanism to ‘opt-out’ of mutual recognition for goods

regulations where there are health, safety or environmental concerns raised by mutual recognition.

Temporary exemptions would prevent the possibility of further harm occurring from mutually recognising use requirements on the goods in question. After an exemption is announced, examination could begin on whether a permanent exemption is warranted, if the requirement could be mutually recognised, or whether there could be some harmonisation of requirements that satisfied all jurisdictions. Depending on the complexity of the issues, a process similar to a special exemption cooperation program could be established, if it were felt that 12 months were not sufficient to settle on a coordinated approach. Temporary exemptions would be warranted only where a mutually recognised use requirement would result in significant costs to the jurisdiction/s in question. To warrant an exemption, these costs would need to be specific to the jurisdiction/s in question. Examples include localised environmental concerns, inherent inconsistencies with core local laws or health and safety problems specific to the jurisdiction.

Model 2: general assessment

However, such an expansion of mutual recognition as described in model 1 could result in some unintended consequences that may not be avoided before an exemption is brought into effect. As such, a second option would be for each jurisdiction to examine all its regulations relating to the use of goods to identify valid regulatory differences, before exposing any use requirements to mutual recognition. This would be quite expensive, especially in relative terms for the smaller jurisdictions. In addition, unilateral reviews by jurisdictions may not allow sufficient focus on inter-jurisdictional impacts as they tend to have an inherent bias towards the status quo.

Model 3: focussed assessment

A third, perhaps more practical, option would be for a particular jurisdiction to undertake an evaluation of use requirements within its jurisdiction as a pilot case, to ascertain whether there would be overall benefits if undertaken for all jurisdictions.

The NSW Government suggested that one way to do this would be a:

> … survey of use-based regulations in one of the larger Australian jurisdictions … However, given that the scope of New Zealand use-based regulations could differ substantially from the regimes generally in place in Australian jurisdictions, it might be desirable to also undertake such an exercise in New Zealand. (sub. DR179, p. 8)

Model 4: case identification

Each of the options above present different problems. A prima facie expansion to include use could result in some unintended consequences arising before a use requirement could be exempted from mutual recognition. A comprehensive evaluation by all jurisdictions would be costly in terms of both resources and time. A pilot study by one jurisdiction would have the challenge of finding a volunteer.

A fourth and possibly the best alternative would be to use industry and other sources as the prime means by which to identify use requirements that inhibit trade. This approach would involve each jurisdiction collating possible examples of use requirements that present prima facie barriers to the movement of goods, as raised by industry or other interested parties within their jurisdiction. These complaints would be collected by central agencies within each jurisdiction, using each jurisdiction's established systems of communication with industry. After a period of, say, two years, the complaints from all jurisdictions would be referred to an advisory group, such as the review group of senior officials, mentioned earlier. This group would evaluate the complaints made to the jurisdictions to determine if use requirements present a significant barrier to the movement of goods. The New Zealand Government has expressed support for a group to examine use requirements that may be inhibiting goods movement:

> To ensure that this important issue is given sufficient consideration, it may be appropriate to set up a project team to explore this issue in more detail. (sub. DR159, p. 23)

The basis of evaluation could adopt the criteria used within the European system, namely that a law that is generally applicable to goods regardless of origin will not be overridden by mutual recognition if:

- it is directed at a legitimate regulatory objective (health, safety, protection of the environment, protection of consumers etc); and
- it is proportionate to that goal (that is, it does not over-regulate for a risk that has only a low chance of materialising); and
- there is no other less trade-restrictive method of achieving that goal. (New Zealand and Australian Representatives, sub. DR167, p. 2)

These factors could be used by the review group of officials in determining their recommendation as to whether a use requirement should be retained, altered, removed, mutually recognised or harmonised.

The advantage of this process is that it constitutes a less costly method to evaluate the issue of use requirements. Instead of a comprehensive review of every law in a given jurisdiction, only use requirements, that might constitute a barrier and cause

most concern, would be brought to the attention of the jurisdiction in question. The group of officials could then either review complaints on a case by case basis, or, after taking stock of the complaints prioritise a list of sectors for review. Examples of areas already brought to the attention of the Commission involving use requirements that could be reviewed by the group of officials include:

- electrical appliances;
- plumbing;
- building;
- metrology; and
- occupational health and safety.

To properly give effect to this approach the awareness campaign mentioned in chapter 5 could include clear reference to a contact point for complaints in that jurisdiction. This way industry representatives would know that they do have a mechanism, at least within the review period, to report use requirements that constitute impediments to goods mobility and therefore effective barriers to their business.

If it is found that use requirements do represent significant impediments to goods mobility, the group of officials could also determine whether or not to expand the scope of the mutual recognition schemes to include use requirements and if so, in what form — for example, the prima facie expansion or the general assessment approach discussed above (models 1 and 2).

After the group of officials has examined, and taken the appropriate action in relation to the issue of use requirements, it could also be employed to investigate other issues arising under the mutual recognition schemes. In this way, other possible barriers to trade could be dealt with in an appropriate forum.

FINDING 9.7

Regulations applying to the use of goods can impede inter-jurisdictional trade. Prima facie, regulations governing the use of goods should be subject to mutual recognition. However, there is considerable uncertainty about the extent of differences in regulations on the use of goods across jurisdictions and about the benefits and costs that might flow from applying mutual recognition to these regulations. Any move to do so needs to be guided by some form of cost–benefit analysis.

FINDING 9.8

One way to assess whether the scope of mutual recognition should be expanded to include regulation on the use of goods would be for all jurisdictions to undertake a complaint-driven review process to identify use requirements that are barriers to trade and make recommendations as to how to proceed to reduce adverse impacts on trade.

FINDING 9.9

A group of officials, with cross-jurisdictional representation, could be established to undertake the review processes following on from findings 9.7 and 9.8. This group could also have other mutual recognition responsibilities.

Business licences

Business licences relate to requirements for running a business such as the state of the premises or insurance coverage for the business. Business licences are currently outside the scope of mutual recognition.

Strictly speaking, business licences focus on the conduct of the business itself, not the person carrying on the business. However, in practice, the distinction between occupational registration and business licences can be blurry and business licences could be used as a means to circumvent the requirements of the mutual recognition schemes. A case study conducted by the NRTC into bus and coach driver authorisation and operator accreditation highlighted the difficulties that business licences may cause:

> The case study showed quite clearly the value of the Mutual Recognition Act in achieving mutual recognition of driver authorisations because requirements relating to an occupation were involved. This issue is now resolved and arrangements are working effectively.
>
> In contrast, mutual recognition of operator accreditation is still largely unresolved because of the perceived differences between jurisdictions, and because the Mutual Recognition Act does not apply. Resolving these differences needs careful consultation and negotiation, and a willingness by jurisdictions to vary their requirements, all of which takes time. (NRTC, sub. 122, pp. 13-14)

Because operator accreditation is not an occupational qualification but a business licence, the different tests between jurisdictions — relating to financial viability and training as a manager and operator among other things — could not be mutually recognised and presented significant costs to operators wishing to expand a business into a second jurisdiction. The NRTC is seeking to bring some of the qualifications

required by operator accreditation under the Australian Qualification Framework to ensure that they can be recognised across Australia.

Some business licences have developed into a form of 'hybrid licence', in that they encompass requirements of both occupational registration and business licences. Effectively, hybrid licences restrict the ownership of certain businesses to those persons registered to carry on the core occupation associated with that business, for example, restricting ownership of a dental surgery to a registered dentist. By restricting ownership this way, hybrid licences can have anti-competitive aspects.

In looking at areas to include in mutual recognition, the 1998 review covered business licensing and concluded:

> That when reviewing occupational registration and business licensing in the context of National Competition Policy reforms, governments should consider separating statutory requirements for occupational registration and business licensing, so as to not restrict the ownership of businesses to those registered to practise in the occupations which relate to the services provided by the business. (see appendix B, rec. 11)
>
> That the COAG Committee on Regulatory Reform examine the potential for the Mutual Recognition Agreement to be extended to cover business licences. (see appendix B, rec. 12)

If licence requirements were separated, businesses owned by non-registered persons that employ registered practitioners could provide competition for businesses owned by registered persons. While it is possible that there could be concerns in allowing people outside of an occupation to own a business, stringent regulation by registration boards of those practising would ensure that the only people who provide the services are registered practitioners. An example would be a doctor owning a health care centre that included an optometrist and a physiotherapist. The owner would not have to be registered in all three occupations if business licensing requirements were separated from occupational registration.

There may be cases where a business licence is linked to an occupational registration for consumer protection purposes, to ensure the service is provided safely and competently. An example is allowing only lawyers to be the directors or owners of an incorporated law firm (Ministry of Economic Development (NZ), sub. DR159, p. 10). The tying of business licences to occupational registration in this case is based around public policy, as lawyers have fiduciary duties to their clients in both their conduct and their financial affairs, as settlements are often handled through trust accounts. If a non-lawyer was an owner or director, they may use their position contrary to their duties and not face any penalty from registration authorities, such as banning or suspending them from practice. Such a licence affects only one occupation and does not hinder mobility within that occupation.

As such, there may be cases where public interest warrants the existence of certain hybrid licences. In such cases, the link between occupational registration and business licensing can be both complex and necessary to protect consumers. Where they do exist, they should be tied to only one occupation and not substantially hinder the mobility of any group of professionals.

The difficulty with hybrid licences is that, while occupational registration is within the scope of mutual recognition business licences are not. If the requirements are split, a person could have their occupational registration recognised, but not their business licence. The mutual recognition of business licences would have the benefit of allowing freer movement of capital by reducing barriers for business owners and enabling them to expand to other jurisdictions.

However, requirements of business licences vary by state and may relate to local laws such as building codes and insurance. To mutually recognise business licences may disrupt insurance schemes in several jurisdictions, and affect complex interactions with local planning rules. As such:

> It may be possible, whether through revision of the mutual recognition schemes or otherwise, to apply mutual recognition to those parts of these licensing schemes which address the fitness of the person, while retaining local scrutiny of the suitability of premises and the like. (Victorian Government, sub. 116, p. 11)

Increasingly, a corporation is the business form used to deliver services. As such, another possible expansion of mutual recognition in this area would be to mutually recognise corporations. Such an expansion may improve the mobility of companies, as they would need to expend fewer resources on obtaining new licences or registration in each jurisdiction they wish to conduct business in. However, '… simply making these [mutual recognition] provisions applicable to corporations would not do justice to the consumer/public protection objectives underpinning each licensing scheme' (Business Licensing Authority, sub. 29, p. 2).

The difference between corporations and individuals is that the identity of a corporation can change as the owners and/or directors change. Hence, a corporation that would be seeking mutual recognition of its original licence may in fact be different from the original licence holder in all but name. To overcome this problem, it would be necessary to conduct extra tests as to the fitness of the current directors and the current financial viability of the corporation. For example:

> Victoria's *Motor Car Traders Act 1986* includes a financial viability test among its licensing criteria. This reduces the risk of a failing business preserving its cash flow by improperly disposing of consumer funds or assets (vehicles) or dishonouring warranty or other obligations to consumers. This in turn reduces the risk of claims on the Guarantee Fund (financed by licence fees), as well as providing some assurance that

> licensees will be in a position to reimburse the Fund should a claim be admitted against them.
>
> Whether or not a financial viability test has been applied in the first jurisdiction, the fact that an applicant is licensed there gives no assurance of the financial viability of the proposed business in the second jurisdiction. (Victorian Government**,** sub. 116, p. 12)

These extra tests may erode any gains from mutual recognition, as a corporation would still face administrative costs when moving between jurisdictions. Additionally, existing concerns relating to jurisdictional 'shopping and hopping' may be exacerbated if corporations were mutually recognised, as they are more likely than individuals to alter their structure or residence to exploit jurisdictional differences.

As such, given the possibility of corporations exploiting existing differences between licensing schemes, and the costs that would remain even if mutual recognition were applied, at present mutual recognition should not be expanded to include corporations.

One way to progress this issue may be to review individual corporate licensing schemes, starting with those of most significance to the economy. Specific reviews would be able to deal with specific issues that arise within each corporate licensing scheme. As Consumer Affairs Victoria suggested:

> It may therefore be appropriate, as a first step, that particular corporation licensing schemes which are identified as significant to the economy be reviewed individually with a view to greater harmonisation and then brought within mutual recognition subject to appropriate conditions. The schemes for estate agents, motor car traders and travel agents would be the major candidates in the current [Victorian] Consumer Affairs portfolio. There should also be a process for determining whether a system of mutual recognition of corporations should apply when registration schemes are introduced for industries where entry was previously unrestricted. (sub. DR168, p. 9)

These reviews could create the possibility of bringing certain licences within the scope of the mutual recognition schemes in the future.

FINDING 9.10

Business licences themselves should not be brought into the scope of the mutual recognition schemes as the additional complexity and conflict from mutually recognising licences are likely to outweigh the gains. There are valid policy reasons to retain some hybrid business licences. However, where possible, occupational registration requirements should be removed from business licence requirements, especially where they represent indirect barriers to the movement of skilled people.

Listing of qualifications

Some jurisdictions regulate selected occupations by listing the qualifications of persons allowed to practise in legislation, or in some other formal instrument such as in a regulation or gazette. In some cases, where the listed qualifications are specific to one jurisdiction, this can present a barrier to the mobility of service providers.

An example of this is the gazetted requirements for a 'person responsible' for child-care centres in New Zealand, as mentioned in chapter 2. The owner of a child-care centre must ensure that there is a 'person responsible' at all times supervising the children in the centre in order to obtain a business licence. The legislation sets out the qualifications required to be a 'person responsible', and in this case all listed qualifications are New Zealand based.

Another example is in the area of accounting, a non-registered occupation that is regulated by the listing of qualifications in legislation:

> …the New Zealand Institute of Chartered Accountants is a prescribed body for the purposes of s 1280 (2) (a) (i) of the Corporations Act 2001, which facilitates our members auditing companies in Australia. However, to date the Institute has been unable to gain exemptions under FSRA [Financial Services Reform Act]regulation 7.1.29 for 'qualified accountant' status (which Australian accounting bodies were granted)… If the Institute does not obtain 'qualified accountant' status this could create additional direct costs for Institute members relative to members of Australian accounting bodies with the exemption, principally higher insurance costs in the short-term, and the additional cost of obtaining a separate license to provide 'financial advice'. (Institute of Chartered Accountants, New Zealand, sub. 55, p. 2)

These examples are effectively regulation of the person carrying on the occupation, but are outside the current scope of mutual recognition as they take the form of a requirement on the business, not the person. While it is important that each jurisdiction is able to ensure that service providers are suitably qualified, such qualifications should be mutually recognised with equivalent qualifications — for example, tertiary qualifications or membership of equivalent professional associations — from other participating jurisdictions. There are bodies in both New Zealand and Australia that provide advice on the equivalence of qualifications.

FINDING 9.11

The mobility of service providers would be improved if mutual recognition applied to qualifications listed in formal instruments for business activities or if the qualifications listed included both suitable Australian and New Zealand qualifications.

Partially registered occupations

Over time, more light-handed forms of occupational regulation have emerged and as regulatory trends have changed. Registration requirements for some occupations have been dropped in some jurisdictions. The implication for mutual recognition is that fewer occupations are able to be recognised under the schemes, as fewer occupations are 'registered' as required by the mutual recognition legislation. Different views on occupational regulation across jurisdictions has led to the existence of partially registered occupations, that is, occupations that are registered in some, but not all, of the participating jurisdictions.

In the early 1990s, governments identified the issue of partially registered occupations as an issue that 'warranted attention, given the costs both to practitioners wishing to move or operate across jurisdictions and to governments in ensuring compliance' (NCC 2001, p. 18.3). The Australian governments established the Vocational Education, Employment and Training Committee (VEETAC) Working Party on Mutual Recognition to examine the issue, and asked the Committee to determine whether each occupation should be deregistered or fully registered in all jurisdictions.

VEETAC reported back in May 1993, recommending full deregistration for a number of partially registered occupations.[8] Since then, governments have removed registration requirements for some occupations as recommended, while for others review work is still ongoing. As the NCC have noted, decisions by some governments not to require licensing or registration of particular occupations raise questions about the case supporting licensing elsewhere (NCC 2001, p. 18.3).

While those moving from a jurisdiction without registration to one with registration must clear an extra hurdle to continue to practise in their occupation, an individual must only meet initial registration requirements the first time they practise in a regulated jurisdiction. After that, he or she can move across jurisdictions using the MRA or the TTMRA as necessary.

For people moving from a regulated jurisdiction, the costs of establishing the right to practise are not an issue.

As such, mutual recognition operates to minimise any cost on an individual in a partially registered occupation who moves between jurisdictions while ensuring that each jurisdiction can retain a level of regulation that it believes is warranted for a particular occupation. Partial registration does not seem to be an issue.

[8] Their recommendations are displayed in table 18.1 of NCC (2001, pp. 18.3-18.5).

Non-traditional forms of occupational regulation

Currently, the scope of the mutual recognition schemes covers only traditional forms of occupational registration, where registration is required under legislation. However, some occupations are governed by different forms of regulation. For example, both co-regulation and negative licensing are used to regulate some occupations, yet both lie outside the scope of the mutual recognition schemes.

Negative licensing refers to a statutory requirement that allows a person to practise an occupation unless he/she is explicitly prohibited (for example, in circumstances of having engaged in some form of unacceptable conduct). This is a less expensive and less onerous form of occupational regulation, as it does not include the costs associated with the establishment of a registration board, or the costs to individuals incurred by going through the registration process before they can begin to practise. While negative licensing may require a policy officer within a department to monitor the occupation and respond to complaints, a registration board involves additional costs in processing and checking applications and periodic returns in addition to maintaining an up-to-date register of all practitioners within a jurisdiction.

There appear to have been no cases before the Administrative Appeals Tribunal (AAT) or the Trans-Tasman Occupations Tribunal (TTOT) that have tested whether more light-handed occupational regulation such as negative licensing falls under mutual recognition. Given the comment in *Shakenovsky and The Dental Board of NSW [1999] AATA 98*, that 'any form of approval' constitutes registration, it would be informative to test further cases to determine what can constitute a form of registration. The scope could potentially be quite wide — for example, many non-registered trades still face regulatory constraints to mobility, in the form of required qualifications for award purposes or for supervising apprentices.

> Co-regulation involves the development and administration of standards or codes of practice privately by industry. These codes carry more weight than a voluntary industry code of practice because 'government provides legislative backing to enable the arrangements to be enforced. This is known as 'underpinning' of codes or standards' (ORR 1998, p. E11).

Thus, the enforcement is made under legislation of a jurisdiction, while a private body administers the registration. This means that co-regulation appears to fall outside of the definition of registration under the mutual recognition schemes. As with negative licensing, people practising in co-regulated occupations will not be mutually recognised by boards in other jurisdictions, creating potential barriers to movement.

The 1998 review of the MRA considered these forms of occupational regulation and concluded:

> That the COAG Committee on Regulatory Reform examine the potential to extend the Mutual Recognition Agreement to cover non-traditional, statutory-based forms of occupational regulation such as negative licensing and co-regulation. (see appendix B, rec. 13)

If a jurisdiction is using negative licensing, it believes that a particular occupation warrants some form of regulation, but that more intensive regulation is not warranted. A possible method to reduce costs is the creation of a voluntary register for those within negatively licensed occupations. Such a register could be administered by private associations with recognition from the government of the home jurisdiction. It may be in the interests of practitioners who wanted to move between jurisdictions to apply to this register so that they may be recognised in other jurisdictions. This could clear up any uncertainty relating to the registration status of a practitioner in a jurisdiction that utilised negative licensing regulations. The creation of a voluntary register would not bring the occupation within the scope of mutual recognition as it stands, instead it would essentially change the regulatory framework from one of negative licensing to co-regulation.

Co-regulation involves at least some government endorsement of industry standards, usually in a legislative form. Additionally, there is a form of 'hands on' occupational regulation as industry bodies essentially act as de facto registration boards, bearing the costs of regulating instead of government. Essentially, co-regulation has the same economic impacts as registration under the mutual recognition schemes. As such, there may be scope for increased recognition between co-regulated industries. In the wake of the *Shakenovsky* decision, there are grounds for clarifying whether it is the intention of participating jurisdictions that co-regulation is covered by mutual recognition, rather than leaving this judgement to the courts. While there may be concerns relating to different standards within industries between jurisdictions, it could be possible to work through these just as statutory registration boards have done since the introduction of mutual recognition. An example of an occupation that has moved towards harmonisation, despite jurisdictional differences, is the legal profession, which is developing a national practising certificate to enable movement between jurisdictions (see chapter 5).

As with partial registration, both negative licensing and co-regulation reflect different choices by jurisdictions as to the level of protection warranted for a particular occupation. As discussed above, the operation of mutual recognition minimises the costs to individuals while maintaining what each jurisdiction considers to be appropriate levels of regulation within its own borders.

FINDING 9.12

Essentially, co-regulation for occupations has the same economic impacts as registration under legislation. Consideration needs to be given to whether co-regulation should be covered by mutual recognition, rather than leaving this judgment to the courts.

Remote provision of a service

The mutual recognition schemes assist those who are moving their residence to take up their occupation in their new jurisdiction as a registered person. They also assist those who wish to provide services on a short term basis in a second jurisdiction. Current mutual recognition rules require service providers to register in the second jurisdiction. Consistent with the objective of facilitating the movement of service providers, chapter 5 discussed ways to smooth the path for short term provision of a service. Options included lower fees, streamlined registration processes and national registration systems.

However, not all the services provided in a jurisdiction are undertaken by persons registered in that jurisdiction. While short term provision of services may increase as the Australian and New Zealand economies become more integrated, so too does the likelihood of the remote provision of services. Remote provision of services involves a service being delivered by means such as the telephone or the internet. Such services include health advice — 'tele-medicine' — and legal advice provided to people resident in another jurisdiction. In these cases, the provider may never set foot in the second jurisdiction. Non-registered practitioners providing services into a jurisdiction can face significant risks, for example, practitioners who provide advice or consultation interstate without registration in the jurisdiction may not be protected from legal action by their indemnity insurance.

One way to address this would be to extend the scope of mutual recognition so that registration in the home jurisdiction is sufficient, that is, to not require registration in the second jurisdiction. This would mean that the act of providing a service to a recipient in a jurisdiction would trigger the mutual recognition of the provider's registration in his or her home jurisdiction.

However, while this would provide certainty and consistency for the service providers, it would be unworkable for registration boards in each jurisdiction. Registration boards exist in most jurisdictions because the governments there believe that a particular occupation needs to be regulated. If the simple act of remote provision automatically triggered mutual recognition of registration, boards

would not be able to keep track of who was registered within their jurisdiction. This would diminish the value of the register as a complete listing of all practitioners within a jurisdiction.

The introduction of a national register for those who wish to provide services across borders may provide for greater certainty for the service providers. However, the complex problem of which law was applicable in the case of remote provision would remain. This involves determining which of two legal systems has jurisdiction over a particular contract, or an action in the case of negligence. This may turn on the nature of the services provided, or particular statutes in particular jurisdictions. There may also be problems around competing insurance requirements between jurisdictions, although there is a uniform set of laws applying to general insurers. Any differences on insurance are likely to occur because of state statutory insurance schemes (for example, workers compensation, builders warranty and compulsory third party insurance) and, possibly even because of state legislation on tort reform that would affect the insurance policies offered on professional/medical indemnity and public liability.

One solution is to designate one applicable set of laws in all cases of remote provision. Possible options in this context include:

(a) regulation by the home regulator under the home jurisdiction's rules, with a requirement to advise clients in other jurisdictions that the home regulatory regime applies;

(b) apply the regulatory requirements of the local jurisdiction in full, but without the need to register;

(c) apply the regulatory requirements of the local jurisdiction, but excluding any duplication of requirements, eg. overlapping insurance requirements. (Institute of Chartered Accountants, New Zealand, sub. DR167, p. 4)

All these options remove the requirement for registration in the local jurisdiction, where the service is provided. While these options would not apply in the case of a permanent move by a service provider, it may still result in less revenue for local registration boards as short term or remote service providers would no longer pay registration fees outside of their home jurisdiction (where they are resident). If providers were regulated in their home jurisdiction there would be an associated drop in costs of regulation for the local jurisdiction. Additional cost savings may arise from increased competition within services that lend themselves to delivery on a short term or remote basis.

A problem with these options is that if unregistered practitioners are allowed to provide a service within a jurisdiction, then the occupation in question ceases to be

a 'registered occupation' for the purposes of the mutual recognition schemes.[9] As such, if any of these options were to be adopted, the definition of a 'registered occupation' would need to be altered.

The first option, regulation by the home jurisdiction, would be the most beneficial to service providers as they would only be required to comply with one initial and ongoing regulatory scheme. However, despite the required warning to consumers, this option may have ramifications for consumer protection. Such warnings may provide adequate protection where sophisticated businesses are the end users of the service, but in the case of the general consumers a small warning contained in the contract for service may easily pass unnoticed. Similarly, consumers' access to, and understanding of, the laws of the home jurisdiction of the provider is unlikely to be on par with their knowledge and understanding of the laws of their local jurisdiction. There may be other costs to consumers:

> There could be increased costs to the recipient of the services through doing business with a provider outside the jurisdiction, particularly where problems arise, eg. the cost of dealing with a regulator in another jurisdiction, travelling to hearings, etc. (New Zealand and Australian Representatives, sub. DR167, p. 4)

Conducting one occupation in a number of ways across a jurisdiction may also undermine the public's confidence in regulatory measures for that occupation. Additionally, this option may cause problems in occupations where governments operate mandatory compensation schemes, as 'It may be difficult to ensure that cross-border traders contribute to such schemes without bringing them fully under the local regulatory regime' (New Zealand and Australian Representatives, sub. DR167, p. 4).

The second option would require continued regulation by the local authorities. This option would retain the bulk of costs that providers face in moving between jurisdictions, such as insurance, saving only the time and cost of initial registration. It could, in effect, operate as a form of continuing deemed registration for short term or remote providers of a service. This deemed registration would be triggered solely by notification from the service provider and would not give scope for any investigation with respect to initial registration requirements by the local authorities. With legislative change, this option could feasibly operate within the scope of the mutual recognition schemes. However, it may not be appropriate in certain occupations where jurisdictions feel that something more than notification (a police check, for example) should be required before any service provider is allowed to practise within their jurisdiction.

9 See: *Mutual Recognition Act 1992* (Cwlth) s4(1), *Trans-Tasman Mutual Recognition Act 1997* (Cwlth) s4(1) and *Trans-Tasman Mutual Recognition Act 1997* (New Zealand) s2(1).

The third option is similar to the approach taken in Europe.[10] This option would still apply local regulation, but would exempt short term or remote providers of a service from duplicating any requirements they had already met in their home jurisdiction. For example, where insurance is required, the remote provider could simply 'top up' their insurance from their home jurisdiction until it meets the amount required by the local jurisdiction. While this approach may further reduce costs to service providers, there may be problems in occupations where jurisdictions specify particular insurance cover — for example, a government fund — for practitioners to obtain in their jurisdiction.

Under all of these options, problems of enforcement across jurisdictions would remain. Within Australia, the *Service and Execution of Process Act 1992 (Cwlth)* operates to ensure that:

> … proceedings issued in one state can be served in another state … as if they had been served domestically. The resulting judgements are enforced throughout Australia. (Goddard 2003, pp. 3-4)

This enables effective enforcement between the Australian jurisdictions, but there is no such agreement with New Zealand at present. Thus, it would aid enforcement in cases of trans-Tasman disputes if:

> The Australian domestic model for service of civil proceedings and enforcement of judgements could be used as a model in the trans-Tasman context. There would also be a need to enhance communication requirements between regulatory authorities in different jurisdictions. (New Zealand and Australian Representatives, sub. DR167, p. 5)

Given specific problems that arise in certain occupations, reviews of different occupations may present different solutions, depending on the nature of service delivery and the nature of the consumers of the service. A specific review, on a national or trans-Tasman level, of a particular occupation may be more able to deal with complex problems of inter-jurisdictional service delivery than a general expansion of the mutual recognition schemes as different issues (such as insurance schemes and police checks) are likely to arise in different occupations. Reviews may also reveal what scope there is for harmonisation or mutual recognition of practice requirements (such as insurance) to such an extent that some occupations may be able to operate without registration in a second jurisdiction.

FINDING 9.13

There are significant legal uncertainties and insurance issues surrounding the remote provision of services across jurisdictions. These issues need to be addressed generally, not just in relation to the MRA and TTMRA.

[10] Under Articles 49 and 50 of the EC Treaty.

A Submissions and meetings

Submissions

	Submission Number	*Date received*
ACT Department of Justice & Community Safety	DR150	20 Aug 02
Airconditioning & Refrigeration Equipment Manufacturers Association (AREMA)	92	22 Apr 03
Airplex Industries Limited	118	11 Jun 03
Alternative Cars Ltd	DR171	15 Sept 03
Antal-Air Pty. Ltd.	121	16 Jun 03
Architects Accreditation Council of Australia Incorporated	13	14 Mar 03
Architects Board of South Australia, The	75	7 Apr 03
Association of Independent Schools of Tasmania	DR140	8 Aug 03
Atco Controls Pty Ltd	98	22 Apr 03
Australasian Board of Cardiovascular Perfusion	DR152	21 Aug 03
Australasian Soft Drink Association Ltd. (ASDA)	84	14 Apr 03
	DR145	12 Aug 03
Australasian Veterinary Boards Council Inc.	48	28 Mar 03
Australia New Zealand Business Council	DR137	8 Aug 03
	DR138	8 Aug 03
Australian Communications Authority (ACA)	25	21 Mar 03
Australian Consumer & Specialty Products Association	DR180	25 Sept 03
Australian Council of Physiotherapy Regulating Authorities Inc., The	87	16 Apr 03
Australian Dental Association Inc.	62	31 Mar 03
	DR155	22 Aug 03
Australian Dental Council	6	7 Mar 03
Australian Education Union	89	16 Apr 03
Australian Government — Attorney-General's Department, Legal Services and Native Title	DR161	3 Sept 03
Australian Government — Attorney-General's Department, Office of International Law	DR172	8 Sept 03

(continued next page)

	Submission Number	*Date received*
Australian Government — Department of Agriculture, Fisheries and Forestry	DR166	9 Sept 03
Australian Government — Department of Education, Science and Training	26	25 Mar 03
Australian Government — Department of the Environment and Heritage	65 DR174	1 Apr 03 23 Sept 03
Australian Government — Department of Foreign Affairs and Trade	78	11 Apr 03
Australian Government — Department of Health and Ageing	104 DR153 DR176	29 Apr 03 22 Aug 03 22 Sept 03
Australian Government — Department of Transport and Regional Services	76 DR144 DR163	7 Apr 03 11 Aug 03 9 Sept 03
Australian Government — Department of the Treasury, Consumer Safety Unit	DR130	6 Aug 03
Australian Greenhouse Office	115 115a	29 May 03 20 Jun 03
Australian Institute of Conveyancers	103 DR141	28 Apr 03 8 Aug 03
Australian Institute of Radiography	70	3 Apr 03
Australian Marine Industries Federation Limited	69	1 Apr 03
Australian Medical Council	54	28 Mar 03
Australian National Training Authority	73 DR178	2 Jun 03 24 Sept 03
Australian Nursing Council	93	22 Apr 03
Australian Nursing Federation	DR170	15 Sept 03
Australian Physiotherapy Association	67	1 Apr 03
Australian Veterinary Association Limited, The	111	22 May 03
Board of Teacher Registration, Queensland	39 DR146	27 Mar 03 12 Aug 03
Builders' Registration Board of Western Australia	77	8 Apr 03
Business ACT (ACT Government)	DR124	15 Jul 03
Business Licensing Authority	29	26 Mar 03
Business New Zealand	113a 113b DR129	9 April 03 23 May 03 6 Aug 03

(continued next page)

	Submission Number	Date received
Cadastral Surveyors Licensing Board of New Zealand	9	10 Mar 03
Chiropody Board of South Australia, The	18	19 Mar 03
Chiropractors Board of Queensland	24	24 Mar 03
Chiropractors Registration Board of Western Australia	2	13 Feb 03
	19	19 Mar 03
Civil Aviation Safety Authority	97	22 Apr 03
Cosmetic Toiletry and Fragrance Association of New Zealand Inc.	34	26 Mar 03
	DR134	8 Aug 03
Council of Occupational Therapists Registration Boards (Australia & New Zealand) Inc.	35	27 Mar 03
Council of Optometry Registration Authorities of Australia and New Zealand	44	27 Mar 03
Council of Pharmacy Registering Authorities	71	3 Apr 03
Council of Reciprocating Surveyors Boards of Australia and New Zealand (CRSBANZ)	23	24 Mar 03
Dental Board of New South Wales	109	16 May 03
Dental Board of Queensland	64	31 Mar 03
Dental Council of New Zealand	4	21 Feb 03
Dietitians Board (New Zealand)	14	14 Mar 03
Direct Selling Association of New Zealand	32	26 Mar 03
	DR133	8 Aug 03
Employers & Manufacturers Association (Northern) Inc.	83	14 Apr 03
(New Zealand)	DR132	8 Aug 03
Engineers Registration Board (New Zealand)	3	17 Feb 03
Fisher & Paykel Appliances	56	28 Mar 03
Food Standards Australia New Zealand	91	8 May 03
	DR160	3 Sept 03
Gas Appliance Suppliers Association (New Zealand)	33	26 Mar 03
	DR135	8 Aug 03
Gas Technical Regulators Committee	112	22 May 03
Hawkless Consulting Pty Ltd	DR157	27 Aug 03
Health Professions Licensing Authority (Northern Territory Government)	58	31 Mar 03
	DR126	22 Jul 03
Institute of Chartered Accountants, New Zealand	55	31 Mar 03
Institute of Patent and Trademark Attorneys of Australia	100	24 Apr 03
	DR125	17 Jul 03

(continued next page)

	Submission Number	Date received
Institution of Professional Engineers New Zealand Incorporated (IPENZ)	11	11 Mar 03
Interactive Software Association of New Zealand	DR136	8 Aug 03
Kmart Australia Ltd	28	25 Mar 03
	53	28 Mar 03
Kmart New Zealand Ltd	DR128	5 Aug 03
McGilvray, Dr. G.A., BVSc, MRCVS, FAICD	61	28 Mar 03
Medical Board of Western Australia	47	28 Mar 03
Medical Council of New Zealand	80	11 Apr 03
Ministerial Council on Consumer Affairs	90	16 Apr 03
National Occupational Health and Safety Commission (NOHSC)	106	29 Apr 03
	DR177	24 Sept 03
National Road Transport Commission	122	18 Jun 03
National Standards Commission	27	25 Mar 03
NEPC Service Corporation	95	17 Apr 03
New South Wales Government	117	6 Jun 03
	DR179	25 Sept 03
New South Wales Medical Board	81	14 Apr 03
New Zealand and Australian Representatives	DR167	11 Sept 03
New Zealand Chambers of Commerce and Industry	66	1 Apr 03
New Zealand Chemical Industry Council	119	13 Jun 03
New Zealand Chiropractic Board	42	27 Mar 03
New Zealand Government — Ministry of Economic Development	110	21 May 03
	DR159	29 Aug 03
New Zealand Government — Ministry for the Environment	DR175	23 Sept 03
New Zealand Law Society	17	14 Mar 03
New Zealand Nurses Organisation	57	31 Mar 03
New Zealand Opticians Board	43	27 Mar 03
New Zealand Psychologists Board	45	28 Mar 03
New Zealand Retailers Association	36	27 Mar 03
New Zealand Veterinary Association	31	26 Mar 03
Northern Territory Department of Health and Community Services,	72	3 Apr 03
Nurses Board of South Australia	63	31 Mar 03
	DR142	7 Aug 03

(continued next page)

	Submission Number	*Date received*
Nurses Board of Western Australia	52	31 Mar 03
	DR143	8 Aug 03
Nursing Board of Tasmania	38	27 Mar 03
Nursing Council of New Zealand	68	1 Apr 03
Occupational Therapy Board (New Zealand)	12	14 Mar 03
Optometrists Registration Board (Western Australia)	8	10 Mar 03
Optometrists Registration Board of Tasmania	30	26 Mar 03
Optometrists Registration Board of Victoria	60	28 Mar 03
	DR148	7 Aug 03
	DR149	14 Aug 03
Optometry Board of Queensland	59	28 Mar 03
Optometry Council of Australia and New Zealand	40	27 Mar 03
Osteopaths Registration Board of Victoria	15	14 Mar 03
Pharmaceutical Society of New Zealand	108	5 May 03
	DR156	26 Aug 03
Pharmacy Board of New South Wales	88	15 Apr 03
Physiotherapists' Registration Board of Western Australia	21	20 Mar 03
Podiatrists Registration Board of Victoria	107	30 Apr 03
	120	16 Jun 03
Queensland Government	96	22 Apr 03
	DR151	21 Aug 03
Queensland Nursing Council	7	10 Mar 03
	DR139	8 Aug 03
Quinlan, Ted, MLA, Deputy Chief Minister (ACT)	DR123	4 Jul 03
Real Estate Institute of Australia	86	15 Apr 03
	DR154	22 Aug 03
Real Estate Institute of South Australia	82	14 Apr 03
Rheem Australia Pty. Ltd.	85	15 Apr 03
Royal College of Nursing Australia	20	20 Mar 03
South Australian Government	114	6 Jun 03
	DR165	10 Sept 03
Standards Australia International Limited	51	28 Mar 03
	51a	12 Jun 03
	DR173	22 Sept 03
Standards New Zealand	105	29 Apr 03
	DR162	5 Sept 03

(continued next page)

	Submission Number	Date received
Surveyors Board of Victoria	16	14 Mar 03
Tasmanian Government — Department of Premier and Cabinet	74	7 Apr 03
Tasmanian Government — Department of Treasury and Finance	DR169	12 Sept 03
Teachers Registration Board of South Australia	46 DR131	28 Mar 03 7 Aug 03
Teachers Registration Board, Tasmania	DR147	13 Aug 03
Valuers Registration Board of New Zealand	41	27 Mar 03
Veterinary Surgeons Board of Western Australia	1 49	28 Jan 03 27 Mar 03
Victorian Conveyancers' Association – Australian Institute of Conveyancers (Victorian Division) Inc.	101	24 Apr 03
Victorian Government — Department of Premier and Cabinet	116 DR168	30 May 03 12 Sept 03
Western Australian College of Teaching, Interim Board	50	28 Mar 03
Western Australian Government — Department of Premier and Cabinet	102 DR164	28 Apr 03 9 Sept 03

Consultations with organisations and individuals

Australian Capital Territory

- ACT Department of Justice and Community Safety
- Architects Accreditation Council of Australia
- Attorney General's Department (Commonwealth Government)
- Australian Chamber of Commerce and Industry
- Australian Greenhouse Office (Commonwealth Government)
- Australian Nursing Council
- Australian Nursing Federation
- Australian Quarantine Inspection Service (Commonwealth Government)
- Australian Teachers Registration Board
- Australian Veterinary Association
- Business ACT (ACT government)
- Chief Minister's Department (ACT government)

- Civil Aviation Safety Authority (Commonwealth Government)
- Customs (Commonwealth Government)
- Department of Education, Science and Training (Commonwealth Government)
- Department of Employment and Workplace Relations (Commonwealth Government)
- Department of Foreign Affairs and Trade (Commonwealth Government)
- Department of Health and Ageing (Commonwealth Government)
- Department of Industry, Tourism and Resources (Commonwealth Government)
- Department of Transport and Regional Services (Commonwealth Government
- Department of the Prime Minister and Cabinet (Commonwealth Government)
- Department of the Treasury (ACT government)
- Food Standards Australia New Zealand (Commonwealth Government)
- IP Australia (Commonwealth Government)
- National Occupational Health and Safety Commission (Commonwealth Government)
- National Industrial Chemicals Notification and Assessment Scheme (Commonwealth Government)
- National Road Transport Commission (Commonwealth Government)
- Planning and Land Management (ACT government)
- Professor Jim Davis
- Real Estate Institute of Australia
- Royal College of Nursing
- Therapeutic Goods Administration (Commonwealth Government)
- The Treasury (Commonwealth Government)

New South Wales

- Australian Consumer and Speciality Products Association
- Australian Dental Association
- Australian Paint Manufacturers' Federation
- Australasian Soft Drink Association Ltd.
- Dental Board of NSW
- Employers First
- Hawkless Consulting
- Institute of Chartered Accountants in Australia

- Institute of Building Surveyors
- Interim Committee for a NSW Institute of Teachers
- Law Society of NSW
- Legal Practitioners Admission Board
- National Standards Commission
- New South Wales Bar Association
- New South Wales Cabinet Office
- New South Wales Department of State and Regional Development
- NSW Environment Protection Authority
- NSW Health Department
- NSW Health Professionals Registration Board
- NSW Institute of Teachers
- NSW Medical Board
- NSW Office of Fair Trading
- Pharmacy Board of New South Wales
- Standards Australia
- WorkCover NSW

Northern Territory

- Architects Board of the Northern Territory
- Department of the Chief Minister
- Department of Health and Community Services
- Department of Infrastructure, Planning and Environment
- Department of Justice
- Health Professions Licensing Authority
- Northern Territory Building Practitioners Board
- Northern Territory Treasury
- Teacher Registration Project

Queensland

- Board of Teacher Registration
- Department of Emergency Services
- Department of Employment and Training

- Environment Protection Agency
- Office of Fair Trading
- Queensland Building Services Authority
- Queensland Health
- Queensland Master Hairdressers Employers Industrial Union
- Queensland Nursing Council

South Australia

- Australian Institute of Building Surveyors
- Beasley Industries Pty. Limited
- Department for Administrative and Information Services
- Department for Human Services
- Department of Premier and Cabinet
- Department of Primary Industries and Resources
- National Environment Protection Council
- Nurses Board of South Australia
- Teachers Registration Board

Tasmania

- Department of Primary Industries, Water and Environment
- Department of Treasury and Finance
- Teachers Registration Board

Victoria

- Atco Controls Pty Ltd
- Australian Dental Council
- Australian Education Union
- Australian Manufacturing Workers' Union
- Australian National Training Authority
- Business Licensing Authority
- Department of Human Services
- Department of Infrastructure
- Department of Justice

- Department of Premier and Cabinet
- Department of Primary Industries
- Department of Treasury and Finance
- Institute of Patent and Trademark Attorneys of Australia
- National Competition Council
- National Road Transport Commission
- Office of Gas Safety
- Office of the Chief Electrical Inspector
- Optometrists Association Australia
- Osteopaths Registration Board of Victoria
- Pharmacy Board of Victoria
- Physiotherapists Registration Board of Victoria
- Plumbing Industry Commission
- Podiatrists Registration Board of Victoria
- Stenning and Associates
- VicRoads
- Victorian Institute of Teaching
- Victorian WorkCover Authority
- Victoria Police

Western Australia

- Builders' Registration Board
- Department of Consumer and Employment Protection
- Department of Health
- Department of Industry and Resources
- Department of Planning and Infrastructure
- Department of the Premier and Cabinet
- Health Department of Western Australia
- Medical Board of Western Australia
- Office of Energy
- Small Business Development Corporation
- State Supply Commission
- Veterinary Surgeons' Board

- Western Australian College of Teaching

New Zealand

- Business New Zealand
- Chen Palmer & Partners
- Cosmetic Toiletry and Fragrance Association of New Zealand
- Council of Trade Unions
- Dental Council of New Zealand
- Department of Courts
- Department of Labour
- Direct Selling Association of New Zealand
- Early Childhood Council
- Electrical Workers Registration Board
- Employers and Manufacturers Association (Central)
- Employers and Manufacturers Association (Northern)
- Energy Efficiency and Conservation Authority
- Energy Safety Service
- Environmental Risk Management Authority
- Fisher & Paykel Appliances Ltd
- Gas Appliance Suppliers Association of New Zealand
- Hospitality Association of New Zealand
- Hospitality Standards Institute
- Human Resources Institute of New Zealand
- Institute of Chartered Accountants of New Zealand
- Institution of Professional Engineers New Zealand
- International Accreditation New Zealand
- Kmart New Zealand Ltd
- Land Information New Zealand
- Medical Council of New Zealand
- Medical Radiation Technologists Board
- MedSafe
- Minister of Commerce, The Hon. Lianne Dalziel
- Ministry for the Environment

- Ministry of Agriculture and Forestry
- Ministry of Consumer Affairs
- Ministry of Economic Development
- Ministry of Education
- Ministry of Foreign Affairs and Trade
- Ministry of Justice
- Ministry of Transport
- MinterEllisonRuddWatts Lawyers
- New Zealand Chiropractic Board
- New Zealand Grocery Marketers Association
- New Zealand Institute of Conveyancers
- New Zealand Law Society
- New Zealand Nurses Organisation
- New Zealand Qualifications Authority
- New Zealand Opticians Board
- New Zealand Veterinary Association
- Nursing Council of New Zealand
- Occupational Registration Boards Secretariat
- Pharmaceutical Society of New Zealand
- Physiotherapists Board of New Zealand
- Real Estate Agents Licensing Board
- Standards New Zealand
- Veterinary Council of New Zealand
- Wellington Regional Chamber of Commerce

B 1998 Review Recommendations

Thirty recommendations resulted from the 1998 Mutual Recognition Agreement Legislation Review (CRR 1998a). The Review Group comprised a sub-group of the COAG Committee on Regulatory Reform, with representatives from the Commonwealth, Queensland (chair), New South Wales and Western Australia.

Recommendation 1

That jurisdictions endorse the continuation of the MRA. Jurisdictions note that clause 7.1.3 of the Agreement governs the continued operation of the MRA.

Recommendation 2

That the MRA **not** be extended to cover regulatory requirements relating to the use of goods, but that the COAG Committee on Regulatory Reform continue to monitor this issue to ensure use requirements are not used to undermine the objectives of the MRA.

Recommendation 3

That the Ministerial Council on Consumer Affairs develop national arrangements for product recalls and product safety bans to ensure consistent approaches between jurisdictions to banning and/or recall of dangerous products.

Recommendation 4

Where jurisdictions are concerned about variations in the standards or other regulatory requirements relating to goods, these issues should be resolved by the relevant Ministerial Council, through the use of the Temporary Exemption or referral mechanism.

Recommendation 5

That the Industry Ministers' Council consider carrying out an awareness campaign aimed at raising the awareness among manufacturers and retailers of mutual recognition.

Recommendation 6

That occupational registration authorities consider, where appropriate, the development of a national practising certificate based on mutually agreed registration requirements.

Recommendation 7

That occupational registration authorities put in place formal mechanisms for inter-jurisdictional communication and cooperation to establish a forum in which issues relating to mutual recognition can be discussed and resolved.

Recommendation 8

That jurisdictions make greater use of the referral mechanism contained in the MRA where concerns exist as to the competency of persons registered in other jurisdictions.

Recommendation 9

That governments should consider greater use of *national* competition reviews of occupations where appropriate to reduce the prospects of increasing inconsistency in regulation which reduces mobility of occupations between jurisdictions.

Recommendation 10

In carrying out individual State or Territory National Competition Policy reviews, governments should consider the impact of their recommendations on the mobility of persons in registered occupations under the MRA.

Recommendation 11

That when reviewing occupational registration and business licensing in the context of National Competition Policy reforms, governments should consider separating statutory requirements for occupational registration and business licensing, so as to not restrict the ownership of businesses to those registered to practise in the occupations which relate to the services provided by the business.

Recommendation 12

That the COAG Committee on Regulatory Reform examine the potential for the Mutual Recognition Agreement to be extended to cover business licenses.

Recommendation 13

That the COAG Committee on Regulatory Reform examine the potential to extend the Mutual Recognition Agreement to cover non-traditional, statutory-based forms of occupational regulation such as negative licensing and co-regulation.

Recommendation 14

That Participating Parties maintain the reference to firearms and other prohibited or offensive weapons in the Permanent Exemption Schedule of the *Mutual Recognition Act 1992* (Schedule 1(1)).

Recommendation 15

The Participating Parties maintain the reference to fireworks in the Permanent Exemption Schedule of the *Mutual Recognition Act 1992* (Schedule 1(2)).

Recommendation 16

That the Participating Parties maintain the reference to gaming machines in the Permanent Exemption Schedule to the *Mutual Recognition Act 1992* (Schedule 1(3)).

Recommendation 17

That the Participating Parties maintain the reference to pornographic material in the Permanent Exemption Schedule to the *Mutual Recognition Act 1992* (Schedule 1(4)).

Recommendation 18

That the Participating Parties maintain the reference to a law of a State regarding quarantine in the Permanent Exemption Schedule to the *Mutual Recognition Act 1992* (Schedule 2(1)).

Recommendation 19

That the Participating Parties maintain the reference to a law of a State regarding endangered species in the Permanent Exemption Schedule to the *Mutual Recognition Act 1992* (Schedule 2(2)).

Recommendation 20

That the Participating Parties maintain the reference to ozone protection legislation in the Permanent Exemption Schedule to the *Mutual Recognition Act 1992* (Schedule 2(3)).

Recommendation 21

That the Participating Parties maintain the Permanent Exemption for the South Australian beverage container deposit scheme, and that the Commonwealth Government amend their mutual recognition legislation to read "*Environment Protection Act 1993*: Part 8, Division 2 – Beverage Containers".

Recommendation 22

That the Participating Parties maintain the reference to a law of Tasmania regarding the possession, sale or capture of fish of a minimum size in the Permanent Exemption Schedule to the *Mutual Recognition Act 1992* (Schedule 2(10)).

Recommendation 23

That the Participating Parties maintain the exception relating to the manner of sale of goods.

Recommendation 24

That the COAG Committee on Regulatory Reform assess the issue of inconsistent packaging and labelling requirements for drugs and poisons, and if appropriate, develop for consideration by Heads of Government, amendments to the *Mutual Recognition Act 1992* to ensure that the scheme does cover packaging and labelling requirements for drugs and poisons.

Recommendation 25

That the exception relating to the transport, storage and handling of goods, and inspection of goods, be retained.

Recommendation 26

That the COAG Committee on Regulatory Reform examine the potential for developing national standards for the transport, storage and handling of goods for which there is variable regulation across jurisdictions.

Recommendation 27

That the COAG Committee on Regulatory Reform develop for consideration by Heads of Government, amendments to the *Mutual Recognition Act 1992* aimed at ensuring that packaging and labelling requirements relating to transport, storage and handling, in particular, requirements relating to Material Safety Data Sheets are covered by the mutual recognition principle.

Recommendation 28

That in regard to occupations, the COAG Committee on Regulatory Reform consider carrying out a survey of occupational registration agencies at least once before the next five year review.

Recommendation 29

That in regard to goods, the Industry Ministers' Council consider alternative means of gathering information regarding the impact of the MRA on goods, including the use of ABS surveys.

Recommendation 30

That further reviews of the MRA, to consider potential improvements to the scheme, take place every 5 years. That the next review take place in 2003 in conjunction with the first review of the TTMRA.

C Registered occupations and licences under legislation

The Commission sought advice from the Australian States and Territories and the New Zealand Government on the occupations registered by their jurisdictions and therefore possibly subject to mutual recognition obligations. The responses were collated and jurisdictions were requested to confirm the accuracy of the information. The resulting lists are in table C.1 below.

There is a wide range of registered occupations. In reading the table, it is important to note the following:

- It is not necessarily the case that occupations with the same title or very similar titles encompass the same activities in each jurisdiction. For example, the ACT regards 'dentists' to include dental practitioners and dental surgeons, whereas Queensland regards them as separate occupations and registers each individually. It was not possible in the time available to study the underlying legislation for each occupation in each jurisdiction to determine whether any identically or similarly titled occupations in fact encompassed different activities.
- There is not necessarily consistency across jurisdictions in the title given to a particular occupation/set of activities. For example, some jurisdictions register legal practitioners, while others register barristers or solicitors or both. The Commission has attempted to group those occupations that appear the same. Again, however, it was not possible in the time available to determine whether particular occupations were identical. The same occupation may, therefore, be listed more than once in the table, under different titles.
- There can be ambiguity in the distinction between business and occupational licences. For example, the Victorian Department of Premier and Cabinet noted that, in Victoria, while the registration schemes for real estate agents, introduction agents, motor car traders, prostitution service providers and second hand dealers are wholly or partially directed to proprietorship, they all provide for assessment or registration of individuals on the basis of personal fitness.

The Commission also sought information on those occupations that are registered at the Commonwealth level. No agency was able to provide the Commission with a

comprehensive list of these occupations. Therefore, there may be a number of occupations that are registered at the Commonwealth level, but do not appear in the table.

Given these caveats, the table should be used as a broad guide only. It has been included in this report as background information for the operation of mutual recognition obligations with respect to registered occupations.

Table C.1 **Registered occupations**

By jurisdiction

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	*SA*	*Tas*	*Vic*	*WA*
Aboriginal health worker					✔					
Acupuncturist									✔	
Agents representative					✔					
Aircraft maintenance engineer	✔	✔								
Airline transport pilot	✔									
Air traffic controller	✔									
Apiarist/beekeeper				✔			✔		✔	✔
Architect	✔		✔	✔	✔	✔	✔	✔	✔	✔
Armourer (deal/club)				✔						
Artificial insemination supervisor				✔						
Asbestos removal contractor	✔		✔	✔			✔		✔	
Assessor – load shifting certificates							✔			
Auctioneer	✔				✔	✔				✔
• Clerk					✔					
• Temporary								✔		
• Probationary								✔		
• Trainee						✔				
• General								✔		
• Real estate			✔					✔		
Audit accountant		✔								
Autogas installer								✔	✔	
Aviation examiner and medical examiner	✔									

(Continued next page)

Table C.1 **(continued)**

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	*SA*	*Tas*	*Vic*	*WA*
Beautician				✔						
Boiler operator				✔						
• Boiler attendant	✔									
• Boiler attendant (1st class/2nd class)								✔		
• Boiler/steam-engine/turbine operator									✔	
• Advanced boiler operator						✔				
• Intermediate boiler operator						✔				
• Basic boiler operator						✔				
Bookmaker/bookmaking clerk				✔	✔		✔	✔	✔	✔
Boxing/kickboxing/martial arts industry										
• Boxing participant/contestant				✔			✔		✔	
• Kickboxing participant/contestant				✔					✔	✔
• Martial arts participant/contestant							✔		✔	
• Boxing/martial arts matchmaker									✔	
• Boxing/martial arts referee									✔	
• Boxing/kickboxing trainer									✔	
• Boxing industry promoter										✔
Bricklayer						✔				
• Restricted – blocklaying						✔				
• Restricted – brick and segmental paving						✔				
Builder			✔			✔	✔		✔	✔
• Restricted – one storey						✔				
• Restricted – three storeys						✔				

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	*SA*	*Tas*	*Vic*	*WA*
Builder (continued)										
• House builder						✔				
• Building removal						✔				
• Non structural renovations						✔				
• Renovations, repairs, maintenance						✔				
• Repairs and maintenance						✔				
• Residential				✔[a]						
Building designer						✔				
• Limited design						✔				
• Interior design						✔				
Building inspector									✔	
• Completed building inspection						✔				
• Restricted –commercial buildings						✔				
• Restricted – residential buildings						✔				
Building work supervisor							✔			
Building practitioner									✔	
• Building certifier			✔		✔					
• Certified architect					✔					
• Certified plumber					✔					
• Certified engineer					✔					
Business agent			✔	✔	✔					

(Continued next page)

Table C.1 **(continued)**

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	*SA*	*Tas*	*Vic*	*WA*
Carpenter						✔				
• Formwork				✔[b]		✔				
• Falsework				✔[b]						
• Framing						✔				
• Internal finishes						✔				
• Joinery products						✔				
• Lattice and other timber work						✔				
• Outdoor construction						✔				
Casino gaming employee								✔		
Chartered accountant	✔									
Chiropractor	✔		✔	✔	✔	✔	✔	✔	✔	✔
Coal mine deputy	✔							✔		
Collectors agent (commercial)/fundraisers							✔		✔	
Commercial and private agent										
• Private investigator	✔									
• Inquiry agent				✔	✔			✔	✔	
• Inquiry sub-agent				✔						
• Investigation agent						✔	✔			
• Process server					✔					
• Private bailiff					✔					
• Commercial agent				✔	✔	✔		✔	✔	
• Commercial sub-agent				✔		✔		✔		
Commercial pilot	✔									

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	*SA*	*Tas*	*Vic*	*WA*
Commercial vehicle owner/operator	✔									
• Taxi/luxury car				✔		✔		✔	✔	✔
• Private hire car				✔						
• Motor omnibus										
• Minibus				✔						
• Bus/coach				✔		✔		✔		
• Tourist vehicle				✔						
• Special passenger vehicle				✔						
Competency certificate assessor	✔								✔	
Concreter										
• Concrete placing boom operator									✔	
• Concreting						✔				
• Concrete repairs						✔				
• Light concreting						✔				
• Minor concrete work						✔				
• Piling and foundations						✔				
• Special finishes						✔				
• Underpinning and foundation repair						✔				
Conveyancer/Conveyancing agent	✔			✔	✔		✔			
Court, industrial and employee related agent							✔			
Coxswain				✔				✔	✔	

(Continued next page)

Table C.1 **(continued)**

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	*SA*	*Tas*	*Vic*	*WA*
Crane driver/hoist driver								✔[c]	✔	
• Tower crane operator						✔				
• Derrick crane operator						✔				
• Portal boom crane operator						✔				
• Bridge or gantry crane operator				✔[b]		✔				
• Vehicle loading crane						✔				
• Nonslewing mobile crane operator						✔				
• Slewing mobile crane operator						✔				
• Boom type elevating work platform operator				✔[b]		✔				
• Elevated work platform operator									✔	
• Mobile truck mounted concrete placing boom operator						✔				
• Materials hoist (cantilever platform) operator						✔				
• Materials or personnel hoist operator				✔[b]		✔				
Credit provider/finance broker			✔						✔	✔
Dairy farmer							✔			
Dangerous goods and explosives										
• Handler	✔									
• Transporter									✔	
• Bulk driver				✔						
Debt collector										✔
Deerkeeper							✔			

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	*SA*	*Tas*	*Vic*	*WA*
Demolition contractor			✔	✔						
Dental prosthetist/clinical dental technician	✔		✔	✔		✔	✔	✔		✔
Dental specialist					✔	✔				
• Oral medicine & oral pathology			✔							
• Endodontics			✔							
• Oral & maxillo-facial surgery			✔							
• Orthodontics			✔							
• Paediatric dentistry			✔							
• Periodontics			✔							
Dental surgeon						✔				
Dental technician	✔		✔	✔		✔				
Dental therapist	[d]				✔			✔	✔	✔
Dentist	✔[e]		✔	✔	✔	✔	✔	✔	✔	✔
Dietician	✔									
Diver	✔			✔						
Dogman/dogger				✔[b]		✔		✔	✔	
Dragliner				✔[b]						
Driller (water)				✔	✔	✔	✔			
Electrician, restricted (electrical fitting; mechanical fitting; plumbing and gasfitting; refrigeration and air-conditioning)			✔	✔						
Electrical engineer									✔	

(Continued next page)

Table C.1 **(continued)**

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	*SA*	*Tas*	*Vic*	*WA*
Electrical worker or contractor	✔						✔			
• Electrical mechanic					✔	✔		✔		
• Electrical fitter					✔	✔				
• Electrical linesman					✔	✔				
• Electrical cable joiner					✔					
• Electrical contractor			✔	✔				✔		
• Electrical wiring				✔						
• Electrical jointer						✔				
• Restricted licence						✔				
• Work training licence						✔				
• Air conditioning and refrigeration contractor				✔						
• Apprentices					✔					
Electrician			✔	✔					✔	✔
Employment agent			✔			✔				✔
Emu farmer							✔			
Engineer (hydraulic)								✔		
Engineering associate	✔									
Engine driver				✔						
Entertainment industry agent/manager				✔						
Excavator				✔						
Explosive powered tool operator				✔[b]						
Explosives blaster/user	✔			✔			✔		✔	

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	*SA*	*Tas*	*Vic*	*WA*
Factory worker (under 16 yrs)				✔						
Financial adviser		✔								
Firearms collector									✔	✔
Firearms dealer								✔	✔	✔
Firearms instructor									✔	
Fitness instructor				✔						
Flight engineer	✔									
Flight service operator	✔									
Floor finisher and coverer • Cork flooring • Floor sanding and finishing (timber) • Install floating flooring • Install strip flooring (non structural) • Parquetry flooring • Seamless flooring						✔ ✔ ✔ ✔ ✔ ✔ ✔				
Fork lift operator/order picking truck operator				✔[b]		✔		✔	✔	
Front end loader driver				✔[b]						
Fumigator				✔[b]						
Futures dealer	✔									

(Continued next page)

Table C.1 **(continued)**

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	*SA*	*Tas*	*Vic*	*WA*
Gasfitter	✔		✔	✔		✔	✔	✔	✔	✔
• Journeyman gasfitter (sanitary or mechanical)	✔		✔					✔		
• Advanced gasfitter	✔		✔							
• Restricted liquefied petroleum gasfitter			✔							
• Liquefied petroleum gasfitter			✔							
• Restricted automotive gasfitter			✔							
• Gas installer						✔				
• Gas installer (advanced)						✔				
• Gas service-person						✔				
• Gas suppliers' inspector						✔				
• Gas motor fuel installer						✔				
• Hydrocarbon refrigerant gas installer						✔				
Glazer						✔				
Greyhound racing										
• Owner					✔		✔		✔	✔
• Trainer							✔		✔	✔
• Public trainer							✔			
• Attendant					✔		✔		✔	
Guidance officers								✔		
Hairdresser				✔						✔

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	*SA*	*Tas*	*Vic*	*WA*
Harness racing										
• Trainer							✔			✔
• Driver							✔		✔	✔
• Stablehand							✔			✔
Hazardous substances										
• Approved handler	✔									
• Test certifier	✔									
• Enforcement officer	✔									
Hydraulic services designer						✔				
Insulator						✔				
• Restricted – residential insulation						✔				
Introduction agent						✔			✔	
Ionizing radiation apparatus operator							✔			
Kitchen, bathroom, laundry installer						✔				
Land valuer	✔			✔		✔		✔		✔
• Specialist retail valuer						✔				
Legal practitioner			✔	✔	✔		✔		✔	✔
• Barrister	✔					✔		✔		
• Solicitor/public notary	✔			✔		✔	✔	✔	✔	
Letting agent (restricted)						✔				
Liquidator		✔								

(Continued next page)

Table C.1 **(continued)**

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	*SA*	*Tas*	*Vic*	*WA*
Load shifting equipment operator										
• Bridge or gantry crane						✔				
• Dozer						✔				
• Excavator						✔				
• Front end loader				✔		✔				
• Front end loader/backhoe						✔				
• Grader						✔				
• Order picking fork lift truck						✔				
• Road roller						✔				
• Skid steer loader						✔				
• Scraper						✔				
Marine designer						✔				
Marine engine driver				✔[b]		✔		✔	✔	✔
Marine engineer				✔		✔		✔	✔	✔
Marine pilot/skipper	✔			✔	✔				✔	
• Skipper grade 1						✔				✔
• Skipper grade 2						✔				✔
• Skipper grade 3						✔				
Marine surveyor	✔					✔				
Marriage celebrant		✔								
Massage parlour operator	✔									
Master (marine)	✔			✔				✔	✔	
• Class 3						✔				✔
• Class 4						✔				✔
• Class 5						✔				✔

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	*SA*	*Tas*	*Vic*	*WA*
Mate (maritime)	✔			✔						✔
Meat inspector									✔	
Medical imaging technologist						✔				
Medical laboratory technologist	✔									
Medical practitioner[f]	✔		✔	✔	✔	✔	✔	✔	✔	✔
Medical radiation technologist	✔								✔	
Medical specialist	✔					✔				
Metal fabricator						✔				
• Restricted – non structural metal fabricating						✔				
• Restricted – sheds, garages and carports						✔				
Midwife	✔		✔	✔	✔					
Migration agent		✔								
Mine crane driver (restricted/unrestricted)								✔		
Mine machine operator								✔		
Mine/Quarry manager	✔			✔			✔	✔	✔	
• First class mine manager (underground metalliferous mines)	✔					✔				
• First class mine manager (underground coal mine)	✔					✔				
• Second class mine manager (underground coal mine)	✔					✔				
• Deputy	✔					✔				
• Open cut examiner	✔					✔				

(Continued next page)

Table C.1 **(continued)**

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	*SA*	*Tas*	*Vic*	*WA*
Mine surveyor	✔							✔		
Mine winder driver	✔							✔		
Mine worker/quarry worker	✔									
Motor cycle riding instructor				✔						
Motor engine driver 3,2,1 (marine)				✔				✔		
Motor vehicle driving instructor				✔			✔	✔		✔
Motor vehicle repairer			✔	✔						
Motor vehicle salesperson						✔				✔
Motor vehicle trader/dealer									✔	✔
Motor vehicle yard manager										✔
Nuclear medicine technologist						✔		✔		
Nurse				✔						✔
• Authorised						✔				
• Comprehensive	✔									
• General	✔									
• General and obstetric	✔									
• Obstetric	✔									
• Psychopaedic	✔									
• Registered	✔		✔	✔	✔	✔	✔	✔	✔	
• Specialist					✔					
• Enrolled	✔		✔	✔	✔	✔	✔	✔		
• Nurse practitioner			✔							
• Mental health/psychiatric nurse	✔		✔							
Occupational therapist	✔				✔	✔	✔			✔

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	*SA*	*Tas*	*Vic*	*WA*
Optical dispenser	✔			✔			✔			✔
Optometrist	✔		✔	✔	✔	✔	✔	✔	✔	✔
Osteopath	**g**		✔	✔	✔	✔	✔	✔	✔	✔
Painter						✔				✔
• Restricted – new domestic buildings						✔				
• Restricted – repainting domestic buildings						✔				
• Restricted – roof painting						✔				
• Restricted – special finishes						✔				
Passive fire equipment installer										
• Fire doors and fire shutters						✔				
• Wall and ceiling lining						✔				
Pastoral house						✔				
• Manager						✔				
• Auctioneer						✔				
• Salesperson						✔				
Patent attorney	✔	✔		✔						
Pathologist									✔	
Pawn broker/second hand dealer	✔		✔	✔	✔	✔		✔	✔	✔
Persons who test or certify measuring instruments or who operate a weighbridge			✔	✔				✔	✔	✔
Pest management technician				✔		✔	✔	✔	✔	
• Restricted – termite barrier installation						✔				

(Continued next page)

Table C.1 **(continued)**

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	*SA*	*Tas*	*Vic*	*WA*
Pharmacist	✔		✔	✔	✔	✔	✔	✔	✔	✔
Physiotherapist	✔		✔	✔	✔	✔	✔	✔	✔	✔
Pilot	✔									
Pilot (chemical rating – aerial spraying)									✔	
Pilot (pesticide rating)				✔						
Plasterer										
• Drywall						✔				
• Solid						✔				
• Restricted – cornice fixing						✔				
• Restricted – partition installation						✔				
• Restricted – plaster setting						✔				
• Restricted – suspended ceiling fixing						✔				
• Restricted – wall board fixing						✔				
Plumber or drainer						✔				
• Plumber	✔			✔	✔	✔	✔		✔	✔
• Journeyman plumber	✔		✔							
• Mechanical plumber								✔		
• Sanitary plumber	✔		✔					✔		
• Water/roof/draining plumber								✔		
• Water supply plumber			✔							
• Plumbing contractor				✔						
• Drainer				✔	✔	✔	✔		✔	
• Drainlayer	✔									
• Operative drainer			✔							

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	*SA*	*Tas*	*Vic*	*WA*
Plumber or drainer (continued)										
• Advanced sanitary drainer						✔				
• Journeyman sprinkler fitter						✔				
• Sprinkler fitter						✔				
• Restricted water plumber – gas						✔				
• Restricted water plumber – electrical or irrigation						✔				
• Restricted drainer – domestic sewerage treatment plant maintenance						✔				
• Restricted water plumber – fire protection (hydrants & hose reels)						✔				
• Restricted water plumber – fire protection (domestic & residential or commercial & industrial)						✔				
• Restricted licences (fascias, barges, gutters & downpipes; roofing & wall cladding; skylight & ventilator installation; tanks (water supply); urban irrigation; wall cladding)						✔				
Plumbing plan certifier			✔							
Podiatrist/chiropodist	✔		✔	✔		✔	✔	✔	✔	✔
Pressure equipment inspector and design verifier	✔									
Professional engineer – chartered	✔					✔				
Property developer						✔				
• Property development salesperson						✔				

(Continued next page)

Table C.1 **(continued)**

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	*SA*	*Tas*	*Vic*	*WA*
Prostitution service provider (operator, approved manager)									✔	
Psychologist	✔		✔	✔	✔	✔	✔	✔	✔	✔
Pyrotechnician						✔	✔		✔	
Radiation therapist						✔		✔		
Radiographer • Diagnostic radiographer					✔	✔		 ✔		
Real estate agent	✔[h]		✔	✔	✔	✔	✔	✔	✔	✔
Real estate manager/branch manager	✔							✔		
Real estate sales consultant/salesperson	✔					✔		✔		
Reciprocating steam engine operator				✔[b]		✔			✔	
Refrigeration, airconditioning and mechanical service provider • Restricted – ducting manufacture and installation • Restricted – multipackaged residential airconditioning equipment and plant • Restricted – residential evaporative cooling equipment • Restricted – self contained window package residential airconditioning installation						✔ ✔ ✔ ✔ ✔				
Rehabilitation provider								✔		
Religions (Head of Denominations)								✔		

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	*SA*	*Tas*	*Vic*	*WA*
Residential designer						✔				
• Limited						✔				
• Interior						✔				
Residential property manager (on-site)				✔						
Restricted pesticide handler				✔						
Rigger				✔[b]				✔	✔	
• Advanced						✔				
• Intermediate						✔				
• Basic						✔				
Roof tiler						✔				
• Restricted – roof tile maintenance						✔				
Scaffolder	✔			✔[b]				✔	✔	
• Advanced						✔				
• Intermediate						✔				
• Basic						✔				
Seafarer	✔									
Security industry participant										
• Class 1				✔						
• Class 2				✔						
• Crowd controller					✔	✔			✔	✔
• Employee			✔							
• Master			✔	✔						
• Security consultant										✔
• Security/crowd controller						✔				
• Security officer/agent/guard	✔				✔	✔	✔	✔	✔	✔
• Security installers										✔
• Temporary worker			✔							
• Trainer			✔							

(Continued next page)

Table C.1 **(continued)**

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	*SA*	*Tas*	*Vic*	*WA*
Serviceman – fire										
• Fire detection systems						✔		✔		
• Fire extinguishing systems								✔		
• Fire fighting appliances						✔				
• Fire hydrants and fire hose reels						✔				
• Fire sprinkler systems – commercial and industrial						✔				
• Fire sprinkler systems – domestic and residential						✔				
• Fire suppression systems (special hazards)						✔				
• Fixed fire pump sets										
• Moveable fire equipment						✔		✔		
Settlement agent										✔
Sharebroker	✔									
Shopfitter						✔				
Shotfirer	✔			✔		✔		✔		
Site classifier						✔				
Specialised contractor										
• Screw in foundations						✔				
• Solid fuel heater installation						✔				
Speech pathologist						✔				
Stationary engine driver								✔		
Steam engine/locomotive driver								✔		
Steel fixer						✔				

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	*SA*	*Tas*	*Vic*	*WA*
Stock and station agent			✔	✔						
Stone mason						✔				
Strata manager				✔						
Structural landscaper						✔				
• Restricted – fences						✔				
• Restricted – retaining walls						✔				
Surveyor (land/cadastral)	✔		✔	✔	✔	✔		✔		✔
• Surveying graduate						✔				
• Surveying associates						✔				
Swimming pool and spa construction						✔				
• Restricted – concrete						✔				
• Restricted – fibreglass						✔				
• Restricted – finishes						✔				
• Restricted – maintenance and repairs						✔				
• Restricted – prefabricated or packaged products						✔				
Tax agent		✔								
Taxidermist									✔	
Teacher (school)	✔					✔	✔	✔	✔	
Thoroughbred racing										
• Apprentice jockey							✔			✔
• Jockey							✔		✔	✔
• Stable employee							✔		✔	✔
• Trainer							✔		✔	✔
• Owner							✔			✔
Tow truck driver/operator	✔			✔						

(Continued next page)

Table C.1 **(continued)**

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	*SA*	*Tas*	*Vic*	*WA*
Travel agent			✔	✔	✔	✔	✔	✔	✔	✔
Truck driver									✔	
Turbine operator						✔				
Vehicle tester									✔	
Venue consultant				✔						
Veterinary specialist			✔	✔	✔			✔		
Veterinary surgeon	✔		✔	✔	✔	✔	✔	✔	✔	✔
Veterinary surgeon (honorary)				✔						
Wall and floor tiler						✔				
Waterproofing applicator						✔				
• Restricted – commercial						✔				
• Restricted – residential						✔				
Welder (boiler/pressure vessels)	✔			✔				✔		
Welding supervisor (boiler/pressure vessels)	✔							✔		
Wildlife controller									✔	
Wildlife dealer									✔	
Winch and hoist driver								✔		
Wine maker	✔									

a NSW requires occupational licensing for residential building construction where the labour component exceeds $200 (except in the cases of work carried out by refrigeration contractors, plumbers, electricians or airconditioning contractors). **b** NSW advises that Certificates of Competency are required for these occupations, but licensing may not be required. **c** Tasmania has 11 classes of crane drivers requiring certification. **d** Dental therapists and dental hygienists will be registered in New Zealand from September 2004 under the Health Practitioners Competence Assurance Bill. **e** New Zealand regards dentists, dental surgeons and dental practitioners as the same occupation. Dentists are defined to include all dental specialists. **f** Currently a permanent exemption to the TTMRA. **g** Under the Health Practitioners Competence Assurance Bill, an Osteopathic Council will be set up, which will put in place registration procedures for osteopaths. **h** Licence may be held by either an individual or a company.

Source: Information provided by New Zealand, State and Territory Governments.

D Other approaches to mutual recognition

Mutual recognition, in broad terms, is the acceptance by two or more parties of the principle 'if it is ok by you then it is ok by me'. However, there are a variety of ways in which this principle can be put into operation. For example, the European Union (EU), the Asia Pacific Economic Cooperation group (APEC), the United States of America (US) and Canada each operate mutual recognition schemes, but these differ widely in coverage (the range of items or sectors included), scope (the range of regulations mutually recognised) and method of implementation. In deciding on a model for the MRA, and the TTMRA, the approaches of the EU and Canada were explicitly considered and discarded. The discussion below briefly looks at aspects of the way in which these countries and groups have approached mutual recognition.

European Union

The European Union model of mutual recognition was rejected by the Committee on Regulatory Reform as a model for the MRA. The Committee determined that it would entail the establishment of a large administrative bureaucracy:

> … the European Court has interpreted the Treaty of Rome to require mutual recognition of goods and occupations between member States. The European system needed to be designed to cope with the substantial differences that exist between member States. Such differences are minimal in Australia and we therefore have an opportunity to avoid creating the vast bureaucracy which has been necessary in Europe to manage such complex circumstances. (CRR 1991, p. 5)

The European mutual recognition regime is established under the EC Treaty. For goods, Articles 28–30 of the Treaty, and case law following the *Cassis de Dijon* decision of the European Court of Justice, sets out the principles of the regime (Goddard 2003, p. 7). Under the regime:

> … a Member State's law is overridden by the mutual recognition principle if it discriminates directly against goods from another Member State, or if it is "indistinctly applicable" but in practice imposes a greater burden on goods from other Member States. However a rule that is generally applicable to all goods, regardless of origin, will be valid if:

- it is directed at a legitimate regulatory objective (eg public health and safety, the environment, consumer protection);
- it is proportional to that objective; and
- it gives effect to that objective in the manner least likely to impede the free movement of goods. (Goddard 2003, p. 7)

Barnard (2001) notes that, in the context of free movement of persons, there is no equivalent to a ban on quantitative restrictions such as is detailed in Article 28 relating to goods. Instead, Article 39 provides that 'freedom of movement for workers shall be secured within the Community … Such freedom of movement shall entail the abolition of any discrimination based on nationality'. Following case law, prohibitions on entry to the country, treating migrant workers less favourably than domestic workers or the application of any 'indistinctly applicable' measures that affect essentially migrant workers are breaches of Article 39. Other Articles provide for the abolition of discrimination against people providing services, with respect to their place of establishment.

There has been a great deal of case law that has shaped the interpretation and operation of mutual recognition in the EU. Barnard (2001) suggests that the approach now is to regard any measures that directly and substantially impede or prevent access to markets as a breach of the Treaty, unless the measures are justified on public interest grounds or by express 'derogations' under the Treaty. This allows national restrictions on town planning, green belts and the like, but disallows product requirements, requirements for particular sales outlets, and certain advertising restrictions, for example.

Detail of the mechanics of the regime follow.

Goods

The European Union uses mutual recognition and technical harmonisation to support the free movement of goods across the single market. The strategy is set out in its 1985 'New Approach' to product regulation and 1989 'Global Approach' to conformity assessment, and applies to most products which are intended to be placed or put into service on the EU market (EC 2000).[1] The mutual recognition principles of the EU approach stem from the European Court of Justice ruling on the Cassis-de-Dijon case of 1979, which found that a product legally brought to one country of the EC could automatically enter the markets of other countries in the EC, even if the technical or quality requirements differed (ORR 1997, p. 3).

[1] Some products, such as foodstuffs, chemical products, pharmaceutical products and motor vehicles, do not follow the principles of the New Approach.

Harmonisation of standards and regulations is restricted to essential requirements regarding health, safety and the environment.

The New Approach sets out 'essential requirements' for goods. The requirements are organised by product 'families' (for example, 'low voltage equipment' and 'safety of toys') and are aimed at protecting the public interest, in particular the protection of health and safety of users and the protection of property or the environment. The essential requirements for each family of products are mandatory, with the details set out in the EU 'directives'.[2] All members of the EU are required to transpose the provisions of the directives into their national legislation and to remove any legislation that is inconsistent with those directives.

The technical specifications of products are described in 'harmonised standards'. Harmonised standards are voluntary — manufacturers may choose to follow these standards or to apply other standards that will provide compliance with the essential requirements. However, products that do comply with the harmonised standards benefit from a presumption of conformity with the relevant essential requirements, and require conformity assessment only once to market products throughout the EU. Harmonised standards are drawn up by the European standards bodies CEN (European Committee for Standardisation), CENELEC (European Committee for Electrotechnical Standardisation) and ETSI (European Telecommunications Standards Institute) in response to mandates issued by the European Commission. These standards are placed in the EU directives, along with the essential requirements.

The Global Approach contains eight modules of conformity assessment, relating to both the design phase of products and their production. Each EU directive gives guidance on the requirements for conformity assessment, using various combinations of the modules, for that particular product family. Member States designate 'notified bodies', which undertake conformity assessment tasks in situations where third party assessment is required. In other cases, manufacturers may satisfy the requirements of the relevant directives by retaining certain technical documentation and drawing up a 'declaration of conformity'. Conformity with the requirements set out in the directives results in the EU's 'CE mark' being applied to the product or its packaging. Market surveillance bodies monitor products on the market, to ensure compliance with the relevant directives.

However, despite these strategies and mechanisms for mutual recognition, the European Commission noted ongoing technical obstacles that were frustrating cross border trade in goods across Europe. The Commission noted:

[2] See http://www.newapproach.org/directiveList.asp (accessed 7 February 2003).

- Trade with third countries has been growing faster than trade between Member States in recent years and the convergence of prices between the Member States has more or less ground to a halt.
- 75% of businesses think that removing technical barriers to trade in goods and services should be a top priority for the Union.
- Almost one in five Swedish companies encounter barriers to trade. 85% choose to get round the problem by adapting their products to comply with the rules in the receiving country.
- Technical regulations and conformity assessment are the biggest headache for Spanish businesses — accounting for half of all problems encountered.
- The average time needed to adopt European standards increased from 4.5 years in 1995 to about 8 years in 2001. Only 22% of the 600 standards needed to create a genuine Internal Market for construction products have been adopted more than a decade after the Construction Products Directive entered into force.
- Non-application of the mutual recognition principle cut trade inside the EU by up to €150 billion in 2000. (EC 2003, p. 6)

Also, as noted in chapter 9, since 1992, some 6000 draft national technical regulations have been notified to the Commission of the European Communities and, in the same time, the number of open cases in the European Court of Justice for the infringement of mutual recognition has arisen from 700 to nearly 1600 (EC 2003, pp. 26, 29). Two thirds of infringement cases that go to the Court of Justice take longer than four years to resolve (EC 2003, p. 29).

The European Commission outlined a number of actions they viewed as necessary to facilitate free movement of goods. These included the introduction of specific rules 'to give mutual recognition more structure so as to enhance transparency and to encourage national authorities to act more "European"' (EC 2003, p. 7). One example given was mandatory notification in cases where mutual recognition is refused, the possibility for companies to demonstrate that the disputed product is lawfully marketed elsewhere in the EU by means of a standard certificate and possibilities for appeal. The Commission also suggested strengthening the New Approach and linking Community financial support for standardisation organisations to clear performance criteria related to the development of European Standards. Enforcement of Internal Market law was also discussed, with the Commission committing to undertake a study examining the desirability and feasibility of various enforcement mechanisms in the Member States (EC 2003, p. 30). Improving information about rights and obligations within the Internal Market, and the procedures available to defend those rights, was also suggested (EC 2003, pp. 30–31).

Occupations

Under European Union regulations and directives, any citizen of a Member State has the right: to move freely with his or her family to other Member States in order to take up employment; and to work under the same conditions as citizens of those countries. National provisions that are restrictive or discriminatory (such as restricting the number of foreigners able to be employed, or requiring work permits) are not applicable to EU citizens.

To further enhance the freedom of movement, the EU also introduced mutual recognition of certificates and diplomas. This was originally aimed at enabling professions to practise on a self-employed basis, as per the requirements for 'freedom of establishment' and 'freedom to provide services' under the EC Treaty. However, the principles also apply to employed persons.

Mutual recognition has taken place both on a profession-specific and a general level:

- For the health sector, the EC Treaty required harmonisation of the national rules on taking up and pursuing health professions. Harmonisation was relatively easy as training requirements did not differ greatly between countries. There is full mutual recognition of the qualifications listed in Community directives for doctors, dentists, nurses, veterinary surgeons, midwives and pharmacists. Efforts to harmonise the rules for other specific professions have been less successful. For these other professions, Community directives set out the requirements and obligations for mutual recognition. For example, Directive 98/5 states that lawyers may establish themselves in another Member State to practise their profession, but they must be assisted by a local lawyer when in court, for a period of three years.
- The difficulties of drafting directives for mutual recognition on a sectoral basis led to a more general system of mutual recognition. This was set up in three stages — first, recognition of higher education diplomas; second, recognition of diplomas, certificates and qualifications that are not part of long-term higher education; and third, mutual recognition of qualifications for access to certain commercial, industrial or craft occupations. In all cases the Member State may not refuse access to the occupation if the applicant has the qualifications required in the country of origin. However, the State may require a period of professional experience if the training the applicant received was of shorter duration than in the host country. It may also require an aptitude test or similar, if the training differs substantially and knowledge of national law is required.[3]

[3] See European Parliament Fact Sheets 3.2.2 and 3.2.3, at http://www.europarl.eu.int/factsheets/.

As with goods, the European Commission also highlighted some ongoing difficulties in providing services across borders. It noted that 'considerable differences in regulation from one Member State to the next — and the lack of confidence in each others' regulatory system — are the main reason why free movement of services has so far been more a legal concept than a practical reality' (EC 2003, p. 10). The Commission said that, while some services can be provided remotely, many still require the permanent or temporary presence of the service provider in the Member State where the service is delivered. It noted:

> For some services, such as distribution, establishment in the target market remains the key commercial strategy. However, these different ways of service provision are all hampered by a variety of legal and administrative barriers. (EC 2003, p. 10)

Here too, the Commission suggested a number of actions, including adoption of the Directive on the Recognition of Professional Qualifications and the establishment of a Directive on services, which would establish a framework to facilitate the conditions for establishment and cross border service provision, based on a mix of mutual recognition, administrative cooperation, harmonisation where necessary and encouragement of European codes of conduct (EC 2003, p. 11).

APEC

Examples of APEC-led mutual recognition initiatives follow.

Electrical and Electronic Equipment

The APEC Mutual Recognition Arrangement on Conformity Assessment of Electrical and Electronic Equipment was announced in September 1999. It is based on the recognition of test reports and certificates of conformity (based on the importing country's requirements) issued by designated test facilities and conformity assessment bodies in other participating economies. The arrangement aims to reduce duplicative testing and certification, which can add time and costs to the export of goods, and to facilitate trade more generally.

The arrangement has a number of levels of participation:

- Stage 1 involves information exchange, enabling participating economies to familiarise themselves with each other's regulatory systems;
- Stage 2 provides for product testing in the exporting country, with results recognised by the importing country; and
- Stage 3 provides for the certification of products in the exporting country, with conformity accepted by the importing country.

Participation in Stage 1 is a prerequisite for participation in either of Stages 2 or 3.

Participation in Stages 2 or 3 requires an economy to appoint a 'Designating Authority', which has a mandate to designate, suspend, remove suspension and withdraw designation of the test facilities or certification bodies under their jurisdiction. The Designating Authority also specifies the scope of the testing or conformity assessment activities that may be undertaken by Designated Test Facilities or Designated Certification Bodies.

Administration of the arrangement is undertaken by a Joint Advisory Committee, which has representatives from each participating economy. The Committee provides a forum and mechanism for discussing issues, sharing information and reaching decisions associated with the operation of the arrangement. It also plays a role in dispute resolution.[4]

Occupations: APEC Engineers

The APEC Engineers framework is an example of limited mutual recognition of a selected occupation being undertaken at a multilateral level. It was designed to contribute to the overall mobility of qualified persons among the APEC member countries and was specifically intended to:

> … facilitate practice by professional engineers by establishing a system of mutual recognition based on confidence in the integrity of the systems of assessment for professional practice within each economy, secured through continuing mutual monitoring, evaluation and verification of those systems. (APEC Engineer Coordinating Committee 2002, p. 7)

The framework is based on 'assessing the academic and professional experience of professional engineers against a standard set by the member economies for determining substantial equivalence for professional engineers' (APEC Engineer Coordinating Committee 2002, p. 3). As set out in the APEC Engineer Manual, the framework has several key elements:

- An APEC Engineer is someone who is recognised as a professional engineer within an APEC economy and who has satisfied an authorised body in that economy that they have:

[4] For further detail see the *APEC Mutual Recognition Arrangement on Conformity Assessment of Electrical and Electronic Equipment* and the accompanying *Implementation Guide* at http://www.apecsec.org.sg/scsc/scsc_mraeee1.html (accessed 26 May 2003).

  - Completed an accredited or recognised engineering program (or assessed recognised equivalent);[5]
  - Been assessed within their own economy as eligible for independent practice;
  - Gained a minimum of seven years practical experience since graduation;
  - Spent at least two years in responsible charge of significant engineering work; and
  - Maintained their continuing professional development at a satisfactory level.
- A Monitoring Committee in each participating economy is responsible for ensuring that APEC Engineers meet the above criteria and for maintaining appropriate documentation (called an 'assessment statement') on the processes by which applicants will be assessed. The Committee must also develop and maintain a Register of APEC Engineers in that economy.
- The APEC Engineer Coordinating Committee is made up of one voting member from each Monitoring Committee. It is tasked with facilitating the maintenance and development of Registers and promoting the acceptance of APEC Engineers in each participating economy.
- The framework does not remove the ability of participating economies to require additional assessment before practising. However, the participating economies consider that such testing should be restricted to jurisdiction-specific items and that a period of sponsored practice in the jurisdiction may be more effective than further assessment.

New Zealand, Australia, the United States, Malaysia, Hong Kong (China), Japan, Korea, Canada and Indonesia have been assessed as having the systems in place to operate an APEC Engineer Register. Other economies are participating in the project, but have not as yet had their assessment statements approved.[6]

[5] Participating economies accept various qualifications that have been developed, delivered or accredited in accordance with the Federation of Engineering Institutions of South East Asia and the Pacific, the Washington Accord, the Japan Consulting Engineers Association or the United States National Council of Examiners in Engineering and Surveying, or endorsed by the APEC Engineer Coordinating Committee. Successful completion of an Australian four-year undergraduate engineering course accredited by IEAust, or a New Zealand four-year engineering degree accredited by IPENZ, will satisfy this requirement.

[6] http://www.ipenz.org.nz/ipenz/finding/apec/default.cfm (accessed 26 May 2003).

United States of America

Occupations

Example: Nurses

In the US, the form of occupational regulation differs across professions. In response to increasing issues about nursing practice across state lines, the National Council of State Boards of Nursing (NCSBN) introduced in 1998 a mutual recognition model for adoption by individual states. The underlying principle was 'a state nursing licence recognised nationally and enforced locally' (Hutcherson & Williamson 1999). The model allows a nurse to have one licence (in his or her state of residency — the 'home state') and to practise in other participating states ('remote states'), without having to obtain additional licences in these other states. Nurses must practise within the scope and standards of remote states (ie, manner of provision is not subject to mutual recognition), and disciplinary action is able to be taken by both the home state and remote states.

The mutual recognition scheme is implemented by an 'interstate compact', which is adopted by participating states through the enactment of legislation. The head of the nurse licensing authority in each participating state is designated as a 'compact administrator', and is given authority to write rules and regulations to implement the compact (ie, how the states will work together).

Importantly, the NCSBN developed an information system to support the reporting and maintenance of licensing and discipline information. The onus appears to be on employers to ensure that nurses hold a legitimate licence, with state boards helping to verify information.

By April 2003, 14 states had implemented the compact, with six further states at the enactment stage.[7]

Canada

The Canadian model of mutual recognition was another that was explicitly examined by CRR as a possible model for Australia. However, their 'administrative approach' was not supported:

> … Such an approach would require very strong political and bureaucratic support over an extended period and could involve a lengthy period of negotiation before

[7] See http://www.ncsbn.org for further details.

> implementation. This would generate uncertainty and could result in considerable variation in actual implementation. (CRR 1991, p. 5)

Canada introduced its Agreement on Internal Trade (AIT) in 1995, to encourage the free flow of goods, services, labour and capital across the country. The agreement aimed to eliminate some of the barriers to internal trade that had been created by the division of regulatory and legislative responsibility between the federal and province/state levels of government. The AIT established six general rules (such as non-discrimination and transparency) and eleven sector-specific chapters of rules governing trade-related provincial policies. These were focused on removing discriminatory policies and encouraging harmonisation or mutual recognition of standards and regulatory practices (Leidy 1998). The operational detail of mutual recognition in Canada depends on the particular sector in question.

The AIT is an example of 'case-by-case' liberalisation. The general rules for encouraging mobility, harmonisation and mutual recognition, as set out in Part III of the AIT, applied only to the matters covered in the 'sector-specific chapters' of the agreement. These sectors were procurement, investment, labour mobility, consumer-related measures and standards, agricultural and food goods, alcoholic beverages, natural resources processing, energy, communications, transportation and environmental protection. Liberalisation is not complete in these areas, for example, the chapter on energy has yet to be completed and adopted. Major exceptions also remain, for example, financial institutions and services, measures forming part of regional economic development, and culture or cultural industries. Also excluded are any measures implemented for 'legitimate objectives'.

Consistent with the CRR assessment, the ORR (1997, p. 4) noted that this sort of approach to mutual recognition required strong political and bureaucratic commitment in order to be successful, was likely to be time-consuming and could create uncertainty about the regulatory environment. Indeed, the OECD noted that:

> Even with these changes, under the AIT, and a further nine years previously devoted to inter-provincial trade barriers, a single market is not fully effective in Canada. According to some commentators, Canada has had more success in removing the barriers to its external north-south trade with the United States than to its own internal east-west trade. (OECD 2001, p. 122, quoted in OECD 2002, p. 32).

E Interstate mobility by occupation

E.1 Introduction

This appendix uses data from Australia's Censuses of Population and Housing for 1991, 1996 and 2001 to examine the geographic mobility of people employed in registered occupations subject to mutual recognition. It compares the geographic mobility of this group with all the other occupations combined and analyses interstate mobility of people in registered occupations before and after the introduction of MRA in 1993 and the introduction of TTMRA in 1998.

The statistical analysis in this appendix complements an earlier study into mutual recognition by the ORR (1997). That study reported the results of a survey of registration authorities in each state and territory that indicated that in 1994-95 nearly 9000 persons were registered to practise in selected occupations using mutual recognition. This was equal to 15 per cent of total occupational registrations in that year. Because there are no data on the mobility of registered persons prior to mutual recognition, the data provided by ORR (1997) only provide a rough indication of the potential impact of mutual recognition.

The Census of Population and Housing may shed some light on the geographic mobility of persons before and after the implementation of mutual recognition. One way of assessing differences in interstate mobility is to look at the gross flows of people between states, before and after the introduction of mutual recognition. However, the disentangling of the effects of mutual recognition from the other factors at work is very difficult, if not impossible.

The other way of assessing the effects of mutual recognition is to look at how interstate mobility in particular occupations differed from the national average. Such an analysis helps to assess what has brought about the *differences* between states. This can be done through a decomposition approach called 'shift-share analysis' using the Census data — which decompose changes in arrivals of persons in a jurisdiction over a specific period of time into mutually exclusive factors.

This appendix first outlines the data used in the study, the underlying occupational classifications and the data matching required to link occupational items between censuses. The next section reports the basic data on arrivals in each state for each

census year. These data are then used to analyse the extent of arrivals in each state associated with occupations subject to mutual recognition. It investigates how these arrivals have changed over the period 1991 to 2001.

E.2 Data

The data used in this decomposition analysis come from the 1991, 1996 and 2001 ABS Censuses of Population and Housing. Data from these censuses give the breakdown of population by occupational categories listed in the Australian Standard Classification of Occupations (ASCO).[1] Using information from ORR (1997), ASCO occupations can be identified as being subject to registration requirements or not.

The Census collects data on place of usual residence on census night, one year ago and five years ago. The information collected records the state/territory of a person's usual residence at these times and shows characteristics of the age, occupation, birth place and martial status of an individual. For example, from these data it is possible to obtain interstate mobility between the year 2000 and the year 2001 for employed persons in particular occupations.[2] In estimating the changes in interstate mobility, this study used the data on usual residence at census night compared with one year ago.[3] This interstate residential mobility data are useful measures of the mobility *per se*.[4]

The 1991 Census data show interstate mobility prior to mutual recognition, while 1996 and 2001 Census data indicate mobility subsequent to mutual recognition. The decomposition analysis was not conducted for inter-country mobility in particular occupations between New Zealand and Australia to assess the impact of TTMRA. This is because data were already available from the submissions and we doubted that further analysis would add significantly more to the information presented in

[1] It is a skill-based classification which encompasses all occupations in the Australian workforce. The concept of 'job' and 'occupation' are fundamental to get an understanding of the classification. A 'job' is a set of tasks designed to be performed by one individual in return for a wage or salary. An 'occupation' is a set of jobs with similar sets of tasks. An occupation in ASCO is thus a collection of jobs which are sufficiently similar in their main tasks to be grouped together for the purposes of the classification (ABS 1997).

[2] This data do not show the occupational mobility — people moving from one occupation to another occupation.

[3] The application of gross migration appears to be relevant for the analysis of mutual recognition, rather than net migration, because it is dominated by younger people without ties often seeking employment (Flood et al 1991).

[4] Employment considerations however drive nearly 45 per cent of relocations to a different geographic labour market, followed by location and lifestyle factors (23 per cent) IC (1993) p 54.

chapter 4. However, the birth place of people who moved into Australia is available from the ABS census data.

In this study, mobility is formulated as those who:

- moved interstate in the last year (compared to their usual residence at one year ago):
  - this mobility category is further disaggregated into state of origin and state of destination, where there are ten origins — NSW, Vic, QLD, SA, WA, Tas, NT, ACT, New Zealand and overseas birth place other than NZ or not stated — and eight destination states — NSW, Vic, QLD, SA, WA, NT, Tas, and ACT; and
- did not move interstate including intrastate moves (this category also includes those who did not state their status of movement).

Data from the 1991 Census is based on the ASCO first edition. Data from the censuses of 1996 and 2001 uses ASCO second edition which applies skill level more rigorously than the first edition of ASCO.[5] To complete the current study, a concordance was made linking relevant second edition occupations with the first edition as shown in annex E.1 (shown at the end of the appendix).

Registered occupations have been mainly included in the ASCO second edition categories of Professionals, Associate professionals and Trades persons and related workers. In addition to these, some registered occupations have been categorised in to the intermediate clerical, sales and service workers in ASCO first edition. To avoid unnecessary randomisation of cells with less than three persons,[6] four digit ASCO disaggregation was provided by the ABS. The remaining broad categories are analysed at their one digit ASCO level.

Occupations that require registration to practise in various jurisdictions have been provided in broad groups in the ORR's (1997) preliminary assessment of mutual

[5] In ASCO first edition, skill level was measured operationally as the amount of formal education, on the job training and previous experience usually necessary for the satisfactory performance of the set of tasks. Whilst the concept of skill level remains unchanged in second edition, the operational criteria used to measure skill level have been refined to reflect competency-based initiatives in employment and training and to increase the emphasis on 'entry requirements' to an occupation.

[6] Cells with less than 3 people in them are randomised to 3 or down to zero. So if there is a 3 in the table, it indicates that there is at least one person with those characteristics, and possibly 2 or 3. If there is a zero, it cannot be necessarily concluded that there are no people with those characteristics. This has no affect on the statistical validity of the data as no reliance should be placed on small cells. The effect of census non-sampling errors swamps the effect of the randomisation at this level.

recognition. The ORR list is the core component of the statistical analysis presented below. Using census occupations, the major ORR list of occupations are concorded and provided in annex E.1. Although it was possible to match ASCO occupations with the ORR list, some difficulties were encountered. For example, second hand dealers are required to register in Queensland, but no ASCO item is available to match, therefore they are not assessed in this study. Likewise, apiarists or beekeepers are required to register in SA, WA, Tas, and ACT, but not in other jurisdictions. They fall into ASCO's four digit category of live stock farmers and are a proportionately very small part this group and, therefore, not considered. For the same reason, other registered occupations in some states not considered in this study include casino employees, machine gaming employees, mine managers and travel agents. Business agents, agents' representatives and bookmakers are required to register in NSW, SA, Tas and ACT but not other jurisdictions. The four digit ASCO item that closely matches with the legal definition of business agent[7] is the financial dealers and brokers item (ASCO second edition code 3212) which also includes bookmakers.

In addition, registration requirements for some occupations have changed or have been changing. For example, at the time of ORR (1997), teachers were required to register in only two states — Qld and SA — now other states are also introducing registration boards for teachers. The Victorian government has already established the Victorian Institute of Teaching under the *Victorian Institute of Teaching Act 2001*. Future changes have also been foreshadowed. For example, the Premier of New South Wales announced prior to the 2003 state election that an institute would be established which would provide a comprehensive framework of qualifications and teaching standards which would also relate to reaching appointments and the promotion of standards in teaching. The NSW Government intends to issue a consultation paper shortly on these issues. Also, the Northern Territory Government issued a discussion paper in late 2002 which proposes a Teachers Registration Board under legislated authority. The NT Government is expected to issue a revised proposal to be presented to the parliament in the August 2003 session. These potential or anticipated changes are not considered in the decomposition analysis, as 2001 census data do not capture the recent administrative changes related to the teachers registration in various states.

[7] Business agent means a person who, by virtue of section 5C of the *Agents Act 1968 (ACT)*, carries on business as a business agent. A person carries on business as a business agent if, in the course of carrying on business, the person acts, or holds out or advertises that he or she is prepared to act, as agent for principals in the sale, purchase or exchange, or in other dealings with, or in the disposition of, or in the negotiations for the sale, purchase, exchange or other dealing with, or disposition of, the goodwill in, or stock-in-trade of, businesses.

Annex E.1 lists the occupations that required registration in various states before 2001. These occupations were analysed in this appendix. They vary from jurisdiction to jurisdiction. As noted, before 2001 teachers were required to be registered only in Queensland and South Australia, while architects, surveyors, chiropractors, dentists, dental technicians, medical practitioners, legal practitioners and nurses were required to be registered in all states.

E.3 Interstate migration

Data presented in figure E.1 (see annex E.2 for full data) indicate a significant interstate movement of employed persons.[8] The figure shows data from the past three censuses for people whose state/territory of usual residence in the census year was different to their state/territory of usual residence in the previous year. The figure also shows the total arrivals from three main sources — other Australian states, NZ birth place and birth place other or not stated. More than two-thirds of employed persons have reported that they have arrived from other Australian states during those periodic snapshots.

The number of persons reporting a change of usual residence to a different state (interstate movers) in Australia were around 184 000 persons during 1990-91, 213 000 during 1995-96 and 225 000 during 2000-01. These raw population counts do not control for factors such as age and the type of occupation. To place the figures on a common base, the counts are adjusted to account for the differences in age and occupational category of movers.[9] The standardised figures show the arrival rates that would have occurred had all the occupations had identical age and occupational composition for each of the three census years.

The standardised counts of interstate movers are generally less than the non standardised counts, mainly because of the relatively high percentage of young adults in professional and associate professional categories where the interstate mobility rate is high. The number of persons moving during these census years on a standardised basis are 179 000, 207 000 and 219 000, respectively. Of the 179 000,

8 Further more, intra-state mobility (not shown) is far higher than interstate mobility presented in the annex E.2.

9 For example, nearly 1304 persons changed their place of usual residence in 2001 in the age cohort of 25-29 and the occupational category of registered nurses in Australia. Mobility in that age category is generally high. To account for that, probability of mobility is calculated for that category and subtracted from the persons who actually moved interstate. Interstate non-movers in that age cohort and occupational category were 13 661 persons, and nearly 155 persons did not stated their state of usual residence. The standardised arrivals in this category was 1181. This can be obtained from (1 304 - (1 304 (1 304/(13 661 + 155)).

almost 9 per cent of arrivals were in the registered occupations in 1990-91, this increased by 12 500 by the year 2000-01.

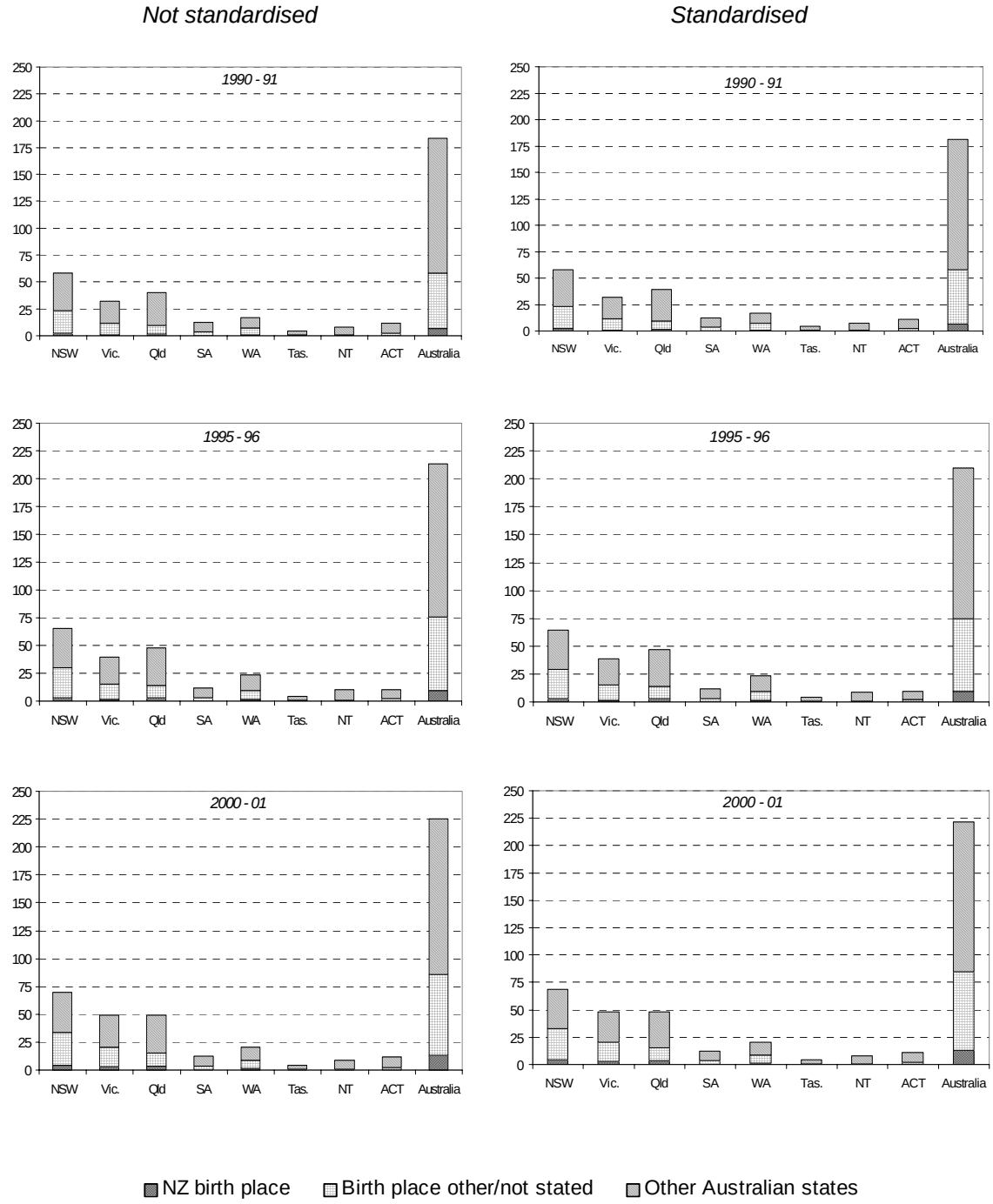
Although from a low base, the movement of people of NZ birth increased significantly during the decade (figure E.1). During 1990-91, 6548 persons have moved into Australia from New Zealand and this figure had almost doubled by the year 2000-01. There was an increase of 370 persons (0.42 percentage points) over the 1995-96 movers of NZ birth in registered occupations (see table E.1). Of the total NZ movers in registered occupations, nurses contributed to over 2 per cent of the total movers of NZ birth and were the largest overall contributors. There was also a significant increase in the arrival from NZ in a variety of professions subject to trans-Tasman mutual recognition — the legal profession,[10] school teachers, pharmacists, motor mechanics and hairdressers.

Mobility of people either interstate or from a NZ birth place provides a broad indication of the scale of movement. However, they do not provide any indication of how observed changes might have differed from general population movements and the association of any such change with the occupations subject to mutual recognition. One way of disentangling the effect of movements related to mutual recognition from general population movements is to decompose arrivals in individual occupations in individual states into components that reflect the overall national average arrival rate, national average arrival rates in individual occupations and shifts in arrivals of individual occupation within states (after controlling for these national trends). The next section outlines a method to decompose interstate movers to control for those factors.

[10] This is consistent with the closer integration between Australia and New Zealand in areas of corporate law and taxation policy.

Figure E.1 **Main source of arrivals in States and Territories**

Persons ('000)



Data source: ABS Census of Population and Housing (1991, 1996, 2001).

Table E.1 **Movers of New Zealand birth**

	1995-96		*2000-01*	
Registered occupations	*Persons*	*Percent of total*	*Persons*	*Percent of total*
2120 Building & Engineering Profs nfd	42	0.45	27	0.20
2121 Architects & L'scape Architects	12	0.13	16	0.12
2122 Quantity Surveyors	3	0.03	3	0.02
2123 Cartographers & Surveyors	6	0.06	6	0.05
2129 Oth Building & Engineering Profs	3	0.03	15	0.11
2311 Generalist Medical Practitioners	57	0.61	68	0.52
2312 Specialist Medical Practitioners	33	0.35	45	0.34
2320 Nursing Professionals nfd	3	0.03	0	0.00
2322 Nurse Educators & Researchers	0	0.00	6	0.05
2323 Registered Nurses	189	2.02	268	2.03
2324 Registered Midwives	15	0.16	12	0.09
2325 Registered Mental Health Nurses	18	0.19	25	0.19
2381 Dental Practitioners	15	0.16	3	0.02
2382 Pharmacists	12	0.13	26	0.20
2384 Optometrists	6	0.06	6	0.05
2385 Physiotherapists	6	0.06	20	0.15
2387 Chiropractors & Osteopaths	3	0.03	0	0.00
2388 Podiatrists	0	0.00	3	0.02
2391 Medical Imaging Professionals	24	0.26	28	0.21
2392 Veterinarians	3	0.03	9	0.07
2410 School Teachers nfd	12	0.13	15	0.11
2411 Pre-Primary School Teachers	6	0.06	9	0.07
2412 Primary School Teachers	36	0.39	80	0.61
2413 Secondary School Teachers	26	0.28	53	0.40
2414 Special Education Teachers	6	0.06	6	0.05
2514 Psychologists	0	0.00	12	0.09
2521 Legal Professionals	19	0.20	97	0.74
3411 Enrolled Nurses	19	0.20	6	0.05
4211 Motor Mechanics	68	0.73	111	0.84
4311 Electricians	51	0.55	56	0.42
4431 Plumbers	22	0.24	30	0.23
4931 Hairdressers	50	0.53	73	0.55
Total registered occupations	*765*	*8.18*	*1134*	*8.60*
Total other occupations	*8584*	*91.82*	*12059*	*91.40*
Total	*9349*		*13193*	

Source: ABS Census of Population and Housing (1996, 2001).

E.4 Model outline

The contribution of an occupational category — registered and other occupations — to state arrivals depends upon the rate of arrivals in that category and the share of the category. Thus, growth in employed persons in an occupational category can be represented as the weighted sum of growth in each category, that is:

$$w_{sm} p_{sm} = \sum_{i=1}^{m} w_i P_i \qquad \text{E.1}$$

$$w_{so} p_{so} = \sum_{j=1}^{o} w_j p_j \qquad \text{E.2}$$

$$p_s = w_{sm} p_{sm} + w_{so} p_{so} \qquad \text{E.3}$$

where the items labelled *w* represent the share of each occupational category in the total employed persons of a state, *p* represents the total arrivals in each occupational category. Subscript *s* represent the state, *m* is registered occupations as a group and *o* is other occupations as a group. Then adding and subtracting growth in national arrivals (p_A) gives:

$$p_s = p_A + ((w_{sm} p_{sm} + w_{so} p_{so}) - p_A). \qquad \text{E.4}$$

According to this formula, if each occupational category is equally important in each state and if each occupation in the state grew at the national average rate, then:

$$p_s = p_A \qquad \text{E.5}$$

In reality all states and territories grew differently. So the state arrival rates differ from the national arrival rate. When E.5 is not satisfied, the expression in E.4 shows the difference between the arrivals in a state and national average arrival rates. The differences in arrival rates can be explored by further disaggregation to give:

$$p_s = w_{sm}(p_A + p_{Am} - p_A) + w_{sm}(p_{sm} - p_{Am}) + w_{so}(p_A + p_{Ao} - p_A) + w_{so}(p_{so} - p_{Ao}) \qquad \text{E.6}$$

By using these expressions, it is possible to decompose interstate arrival rates by occupational category and to derive the main factors contributing to any differences from the national average arrivals. From E.6:

- p_A the national arrival effect — which measures how many persons would have moved into a state if that state had experienced same average arrival rate of nation;[11]
- the bracketed expression $w_{sm}(p_{Am} - p_A)$ describes the contribution of the differential arrival rate that is higher or lower based on the national overall average arrival rate (similarly for other occupations as group, $w_{so}(p_{Ao} - p_A)$). This is referred to as the *national differential effect*; and
- the bracketed expression $w_{sm}(p_{sm} - p_{Am})$ describes the contribution of the differential arrival rates in the same registered occupation at the state and the national level (similarly for other occupations as group $w_{so}(p_{so} - p_{Ao})$). This is referred to as the *occupational re-allocation effect.*

These two effects provide a total shift for occupational categories towards a particular state. If the joint effect of these two factors is positive for registered occupations as a group, it tentatively suggests that mutual recognition is associated with higher mobility.

E.5 Results

Figure E.2 shows the standardised arrivals (persons) in registered occupations. See annex E.3 for detailed results. Main features from the figure include:

- in 1990-91, an average of 15 500 persons arrived in registered occupations to various jurisdictions, this figure increased to 18 500 by 1995-96, an increase of 19 per cent. The arrival of persons in registered occupations continued to increase, with an increase of 8 per cent in 2000-01, compared with 1995-96 arrivals; and
- in absolute terms, Qld and NSW have received more interstate movers in registered occupations than the other states and territories.

In contrast to figure E.2, figure E.3 shows the hypothetical arrivals in registered occupations that would have occurred had arrivals increased in line with the national average arrival rate (2.59, 2.79 and 2.71 per cent in 1990-91, 1995-96 and 2000-01, respectively) across all occupations and jurisdictions. Overall, the

[11] If Australia as a whole is experiencing higher mobility (a rising tide lifts all boats), one would expect the total national arrivals rate to exert a positive effect at the state/territory level. This factor describes the change that would be expected simply by virtue of the fact that the jurisdiction is part of the changing national internal migration phenomena.

comparison of figures indicate that standardised arrivals in registered occupations (figure E.2) were higher than they would have been had they followed national trends (figure E.3) for all occupations.

Figure E.4 shows the deviation of standardised arrivals (figure E.2) from hypothetical or implied arrivals (figure E.3) for registered occupations. Subject to the qualifications associated with matching ASCO items between censuses (see section E.2), the deviations indicate that for Australia as a whole, the arrival rates for registered occupations were higher than the national average arrival rate and the average arrival rate in other occupations.

Figure E.4 reflects the above average arrival rates across many jurisdictions and the significant differences between census years. It also shows the substantial deviation in arrivals between the states and over time. For example:

- for six jurisdictions — NSW, Qld, WA, Tas, NT and ACT — arrival rates in registered occupations exceeded the national average arrival rate in each census year;
- on the other hand for Victoria, the arrival rate was below the national average for two of the three census years, while for SA the arrival rates in registered occupations were below the national average for each census year;
- the number of arrivals in registered occupations *increased* relative to the national average for Victoria over the decade, while they *decreased* for SA; and
- the number of arrivals in registered occupations in each census year was highest in Qld.

Figure E.5 decomposes changes in percentage arrivals in each occupational category in each jurisdiction for each census year. The figure emphasises the deviation of arrivals in each jurisdiction from standardised average arrivals. Arrivals in registered and other occupations are shown separately in the figure.

The left hand bar (checked pattern) in each chart and in each occupational category shows the national average arrival rate. The right hand (black) bar shows the standardised arrival rate in each jurisdiction for each census year. The bars in between decompose the difference between the national average arrival rate and the jurisdictional arrival rate into the:

- national differential effect — which represents the differential between the arrival rate for individual occupations nationally and the overall national average arrival rate over all occupations (the horizontal hatches in figure E.5);
- occupational re-allocation effect — which represents the differential between arrival rates for individual occupations at the state level and the same occupation at the national level (the spotted fill in figure E.5).

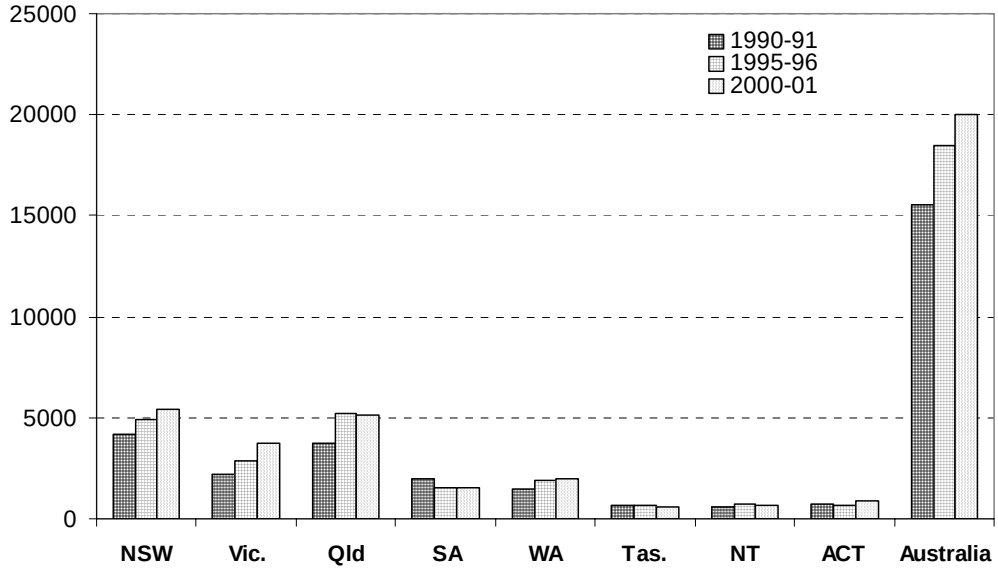
Features of interstate arrivals apparent from figure E.5 include:

- the arrival rates in all jurisdictions were higher for registered occupations compared with the overall national arrival rate (the second bar from left);
- the occupational re-allocation effect was positive in five jurisdictions — Qld, WA, Tasmania, NT and ACT — the arrival rates at these jurisdictions were above the national arrival rates for registered occupations (the third bar from left) and negative in three jurisdictions — NSW, Victoria and SA;
- there was an increase in arrivals in the occupations that require registration between states during 1995-96 compared with the arrivals in the same occupations during 1990-91, for example:
  - in Queensland, the occupational re-allocation effect was more positive for other occupations during 1990-91 (the third bar from left) than the registered occupations. By 1995-96, the positive effect was preserved for other occupations, but there was an increase in the positive re-allocation effect for registered occupations; and
  - the ease of movement in arrival of registered occupations relative to others, with mutual recognition, is also indicated in states such as SA, by a less negative re-allocation effect of registered occupations compared to the other occupations.

In summary, mutual recognition appears to be associated with higher interstate arrivals in registered occupations compared to the other occupations.

Figure E.2 **Standardised arrivals in registered occupations**

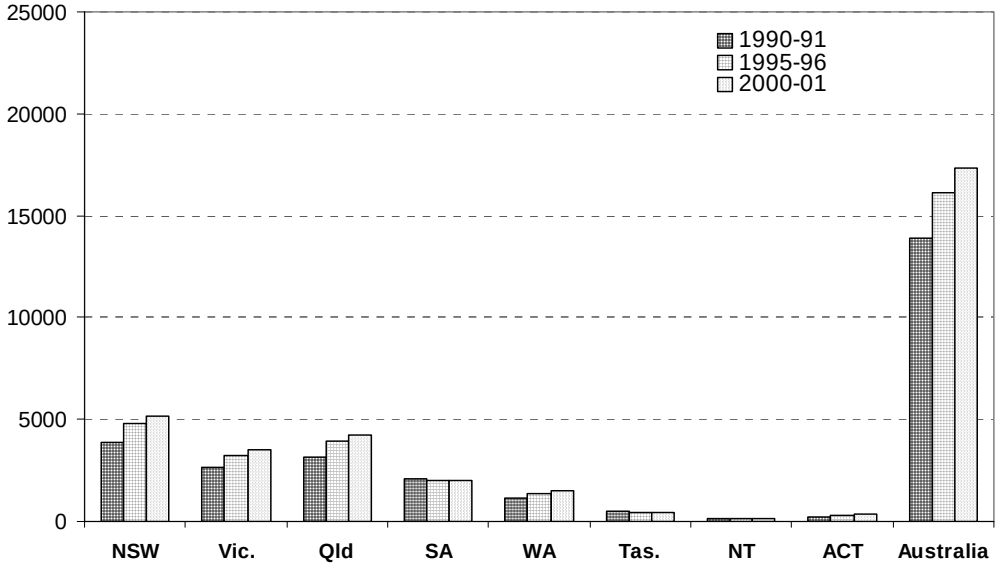
Persons



Data source: Annex E.3.

Figure E.3 **Hypothetical (implied) arrivals in registered occupations**

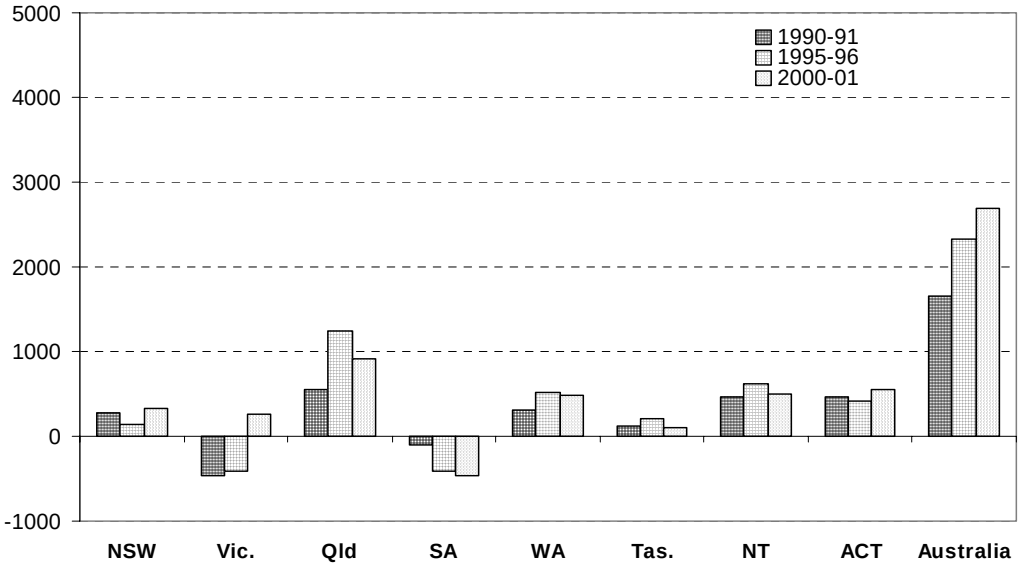
Persons



Data source: Annex E.3.

Figure E.4 **Deviation of standardised arrivals from implied arrivals in registered occupations**[a]

Persons

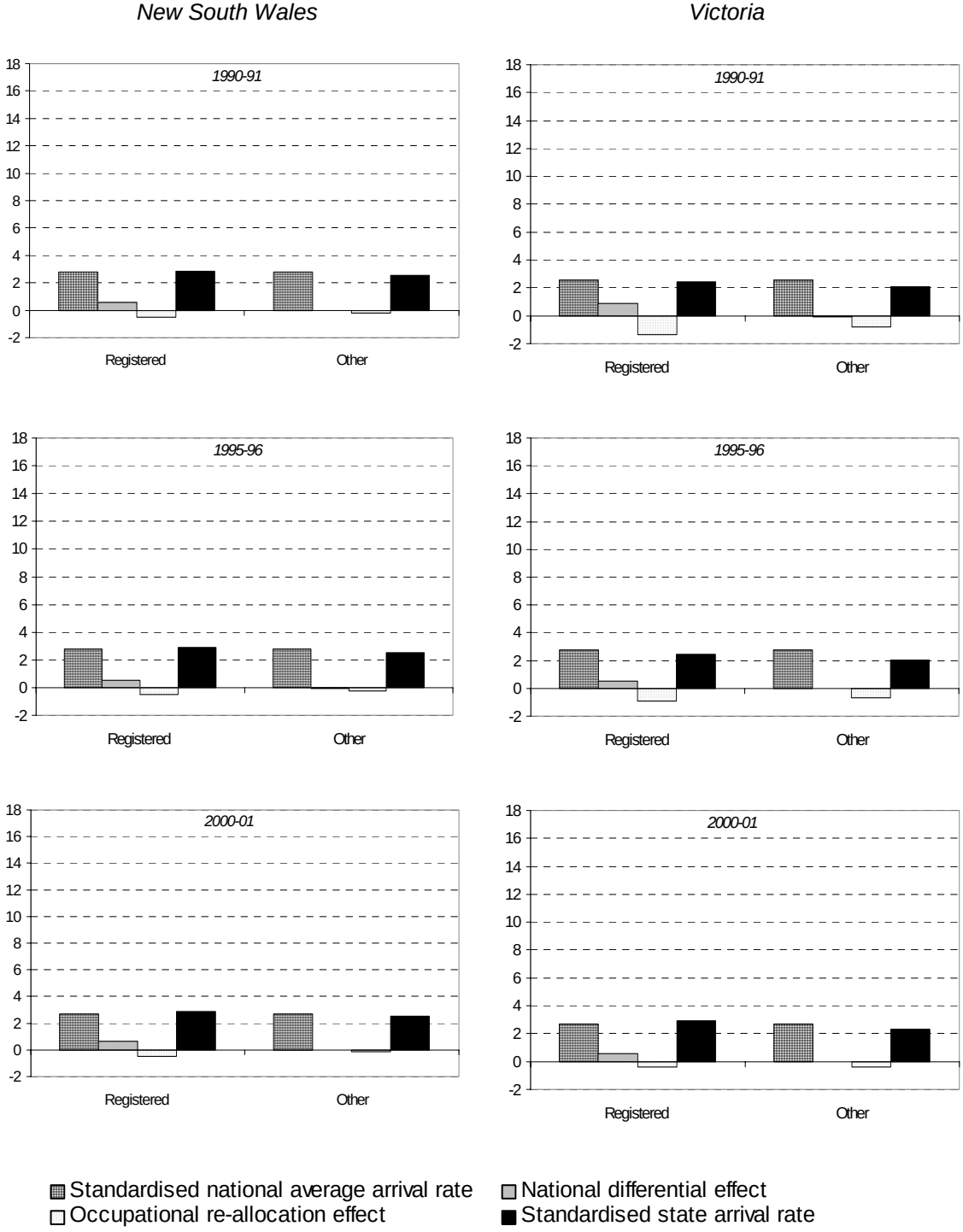


a It is a sum of national differential effect and occupational re-allocation effect — the total shift or the deviation of interstate movers from figure E.3 from figure E.2.

Data source: Annex E.3.

Figure E.5 **Interstate arrivals decomposition — registered and other occupations**

Percentage points



(Continued next page)

Figure E.5 **(continued)**

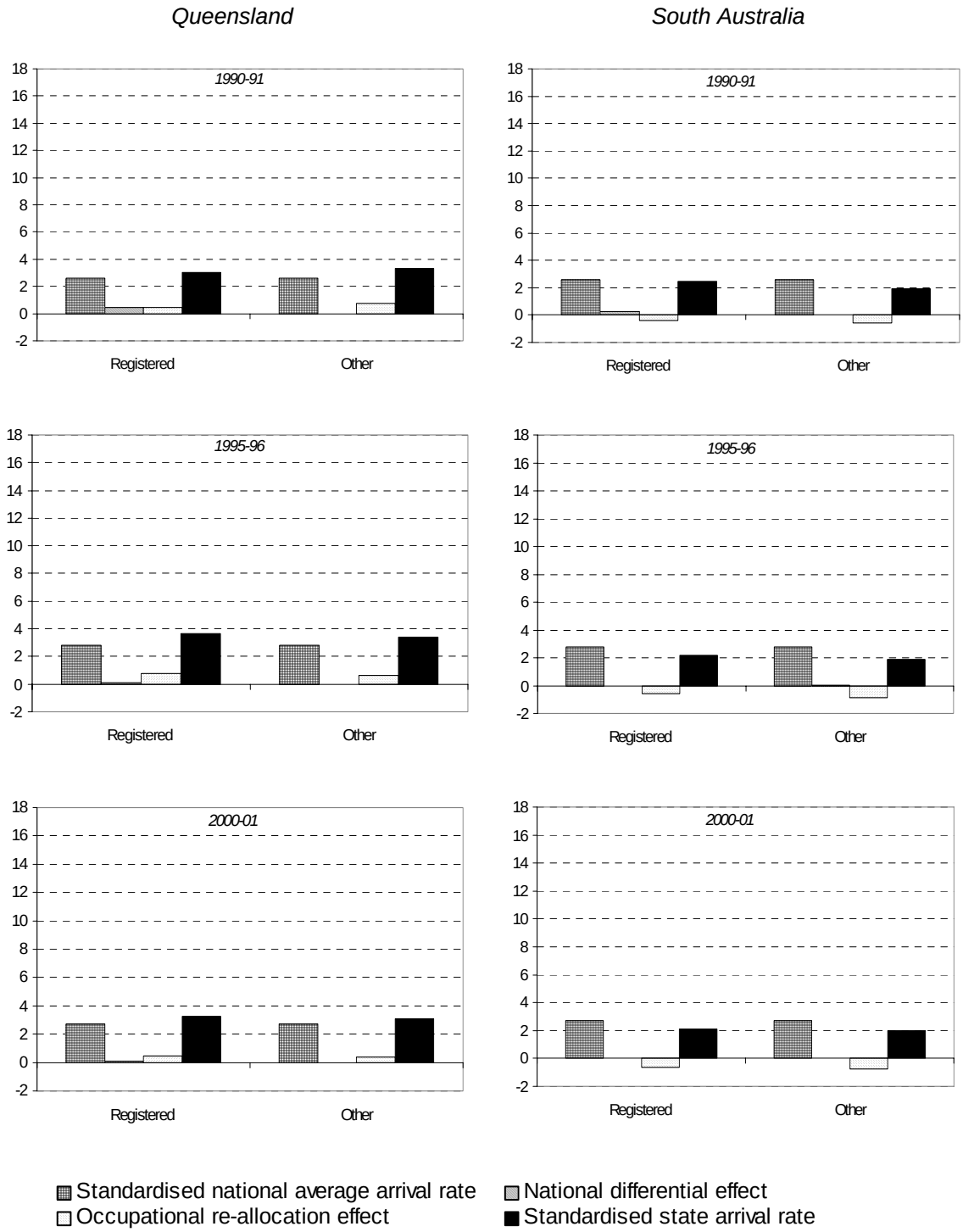


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Figure E.5 **(continued)**

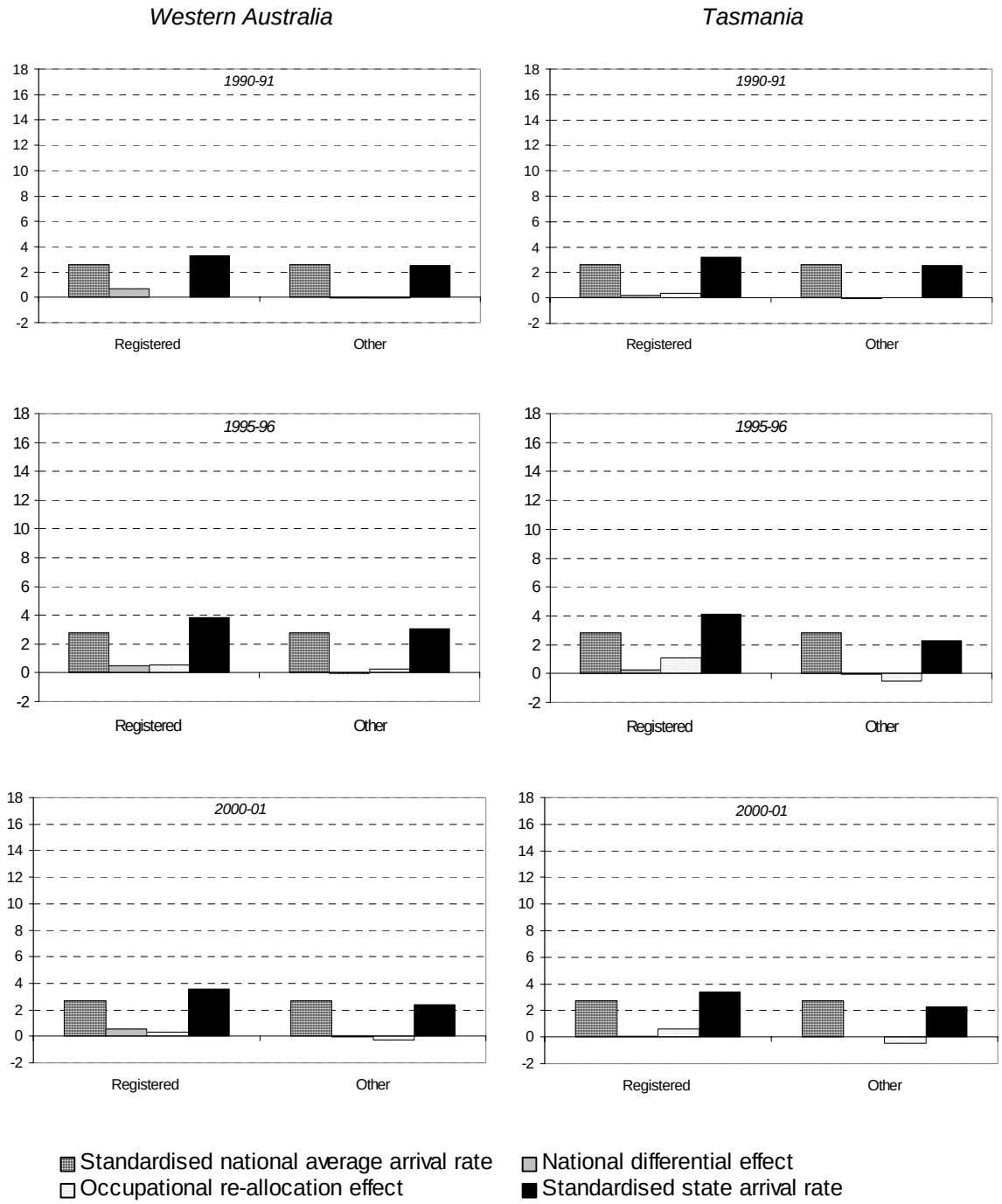

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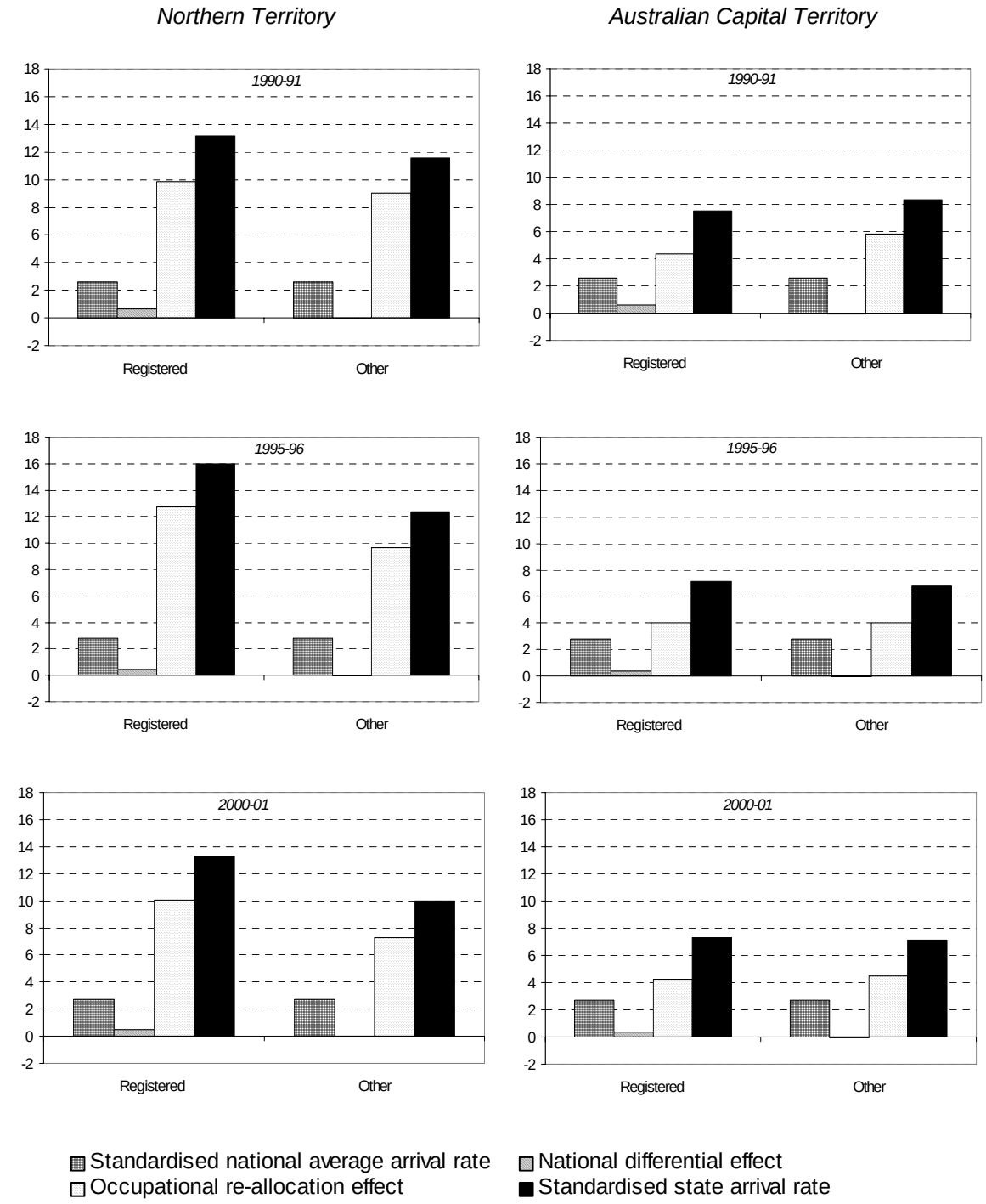
Figure E.5 **(continued)**



Data source: Annex E.3.

Annex E.1 **Concordance of occupations that require registration with the ASCO occupations**

Name of the occupation listed in ORR (1997)	*Registration in States/Territories*								*ASCO 2nd edition*	*ASCO 1st edition*
	NSW	*Vic.*	*QLD*	*SA*	*WA*	*Tas.*	*NT*	*ACT*	*4 or 6 digit*	*4 or 6 digit*
Aboriginal health worker							Yes		3493	6603 *p*
Advanced tradesman, Journeyman, Plumbers/Drainers/Gas fitters/ installers/sprinkler fitter	Yes*	Yes	Yes	Yes	Yes	Yes	Yes	Yes	4431	4409
Apiarists/Beekeepers[a]				Yes	Yes	Yes		Yes	1313-25	1401-35 *p*
Approved engine installer						Yes			4211	4601
Architects	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	2121	2201
Auctioneers[a]			Yes			Yes			5999-13	6599-11 6599-13
Boxing industry participant/Boxing promoter/Professional boxer					Yes				3993-27	3915-11
Builders/Building practitioners/Building certifier/Certifying structural engineer	Yes*	Yes	Yes	Yes	Yes	Yes	Yes	Yes	2120 2129-79 3121	2200 2219-99 *p* 3207; 3905-11; 3203-11 *p*
Business agents/Agents representative/Bookmaker	Yes			Yes		Yes		Yes	3212	1599-19; 3913-13; 6101-11; 6101-99; 6103; 6405-11*p*; 6199-11
Cadastral/title surveyors/Surveyors	Yes	Yes	Yes	Yes*	Yes	Yes	Yes	Yes	2122 2123	2203 2205
Casino employees, machine gaming employees[a]			Yes						6394	6699
Chiropractors/Osteopaths	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	2387	2317

(Continued next page)

Annex E.1 **(continued)**

Name of the occupation listed in ORR (1997)	*Registration in States/Territories*								*ASCO 2nd edition*	*ASCO 1st edition*
	NSW	*Vic.*	*QLD*	*SA*	*WA*	*Tas.*	*NT*	*ACT*	*4 or 6 digit*	*4 or 6 digit*
Dentist	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	2381	2305
Dental technicians/ Dental prosthetists/dental mechanic/ Dental hygienist	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	3492	3101; 4999
Doorkeepers				Yes					8312-13	8901-11
										8903-11
Driving instructor				Yes					6399-13	2505-19
Electricians/electrical workers/fire alarm (smoke and thermal) installer			Yes	Yes		Yes	Yes	Yes	4311	4303; 4309; 4399
Hairdressers					Yes				4931	4927
Legal practitioners/barristers/solicitors/ conveyancers	Yes	Yes	Yes	Yes	Yes*	Yes	Yes	Yes	2521	2605
Medical practitioners	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	2310	
									2311	2301
									2312	2303
Mine manager (underground and open cut, under manager, deputy manager, electrical engineer, mechanical engineer, and open cut examiner) **a**	Yes		Yes	Yes					1222-13	1305-11

(Continued next page)

Annex E.1 **(continued)**

Name of the occupation listed in ORR (1997)	*Registration in States/Territories*								*ASCO 2nd edition*	*ASCO 1st edition*
	NSW	*Vic.*	*QLD*	*SA*	*WA*	*Tas.*	*NT*	*ACT*	*4 or 6 digit*	*4 or 6 digit*
Nurses (nurse manager, nurse educator, nurse researcher, registered nurse, registered midwife, registered mental health nurse, registered developmental disability nurse and enrolled nurse)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	2320 2321 2322 2323 2324 2325 2326 3411	3401 2505-25 2999-15 6603-11; 6603-91
Optometrists	Yes	Yes		Yes	Yes	Yes	Yes	Yes	2384	2311
Occupational therapist			Yes	Yes	Yes		Yes		2383	2309
Optical dispensers	Yes			Yes					4999-11	4999-13
Podiatrists	Yes		Yes		Yes	Yes			2388	2319
Psychologists	Yes	Yes	Yes	Yes	Yes	Yes	Yes		2514	2903
Public trainer, owner trainer/open trainer				Yes					4614	4931
Radiographers	Yes			Yes		Yes	Yes		2391	2321
Real estate agents/real estate manager/ real estate sales consultant	Yes	Yes	Yes	Yes	Yes	Yes		Yes	3293	6105
Security providers/security and investigation agents			Yes	Yes					3999-17 3999-19	3999-01p 3999-99
Speech pathologist			Yes						2386	2315
Stock and station agents	Yes							Yes	3399-23	1599-99*p*

(Continued next page)

Annex E.1 **(continued)**

Name of the occupation listed in ORR (1997)	*Registration in States/Territories*								*ASCO 2nd edition*	*ASCO 1st edition*
	NSW	*Vic.*	*QLD*	*SA*	*WA*	*Tas.*	*NT*	*ACT*	*4 or 6 digit*	*4 or 6 digit*
Teachers (pre-primary, primary, secondary and special education teachers)			Yes	Yes					2410	2400
									2411	2401
									2412	2403
									2413	2405
									2414	2407
Tow truck driver/operator/dangerous goods vehicle driver[a]				Yes		Yes			7311-11	7105-13
Travel agent[a]						Yes			6397	6507
Valuers/real estate valuers	Yes		Yes			Yes			2295	6199
Veterinary surgeons/veterinarians	Yes		Yes	Yes		Yes	Yes	Yes	2392	2323

a Four digit ASCO disaggregation is not available for these partially registered occupations.

Source: ORR (1997), ASCO (1986, 2000).

Annex E.2 **Interstate movers (persons)**

		State of Usual Residence (SUR)														
		NSW			*Vic.*			*Qld*			*SA*			*WA*		
SUR		1990	1995	2000	1990	1995	2000	1990	1995	2000	1990	1995	2000	1990	1995	2000
NSW	1991	-			10235			11804			2626			3383		
	1996		-			9575			12508			2840			3061	
	2001			-			9299			13398			2636			3514
Vic.	1991	7738			-			4630			2611			2498		
	1996		8384			-			6470			2941			2444	
	2001			10513			-			6947			3232			3415
Qld	1991	14680			7374			-			1936			2398		
	1996		16129			8175			-			2600			2458	
	2001			16958			6835			-			2198			2719
SA	1991	2215			2734			1359			-			987		
	1996		2087			2183			1666			-			887	
	2001			2323			2339			1676			-			961
WA	1991	2636			2488			1893			1002			-		
	1996		3686			3421			3068			1475			-	
	2001			3136			2599			2592			1127			-
Tas.	1991	905			1242			756			291			404		
	1996		850			928			860			267			481	
	2001			793			1056			792			211			442
NT	1991	1313			1244			1693			1362			1287		
	1996		1674			1558			2485			1761			1196	
	2001			1573			1239			2299			1154			1059
ACT	1991	5238			1488			1499			492			644		
	1996		4613			1117			1293			463			442	
	2001			5330			1121			1481			486			446
Total departures	1991	34725			26805			23634			10320			11601		
	1996		37423			26957			28350			12347			10969	
	2001			40626			24488			29185			11044			12556

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Annex E.2 **(continued)**

		State of Usual Residence (SUR)																	
		Tas.			*NT*			*ACT*			*Birth place NZ*			*Birth place other/not stated*			*Total arrivals*		
	SUR	1990	1995	2000	1990	1995	2000	1990	1995	2000	1990	1995	2000	1990	1995	2000	1990	1995	2000
NSW	1991	1086			1228			4781			2460			20831			58434		
	1996		1000			1175			5234			3063			26908			65364	
	2001			988			1466			5007			4754			28778			69840
Vic.	1991	1202			800			939			974			10656			32048		
	1996		1359			1031			1229			1359			14412			39629	
	2001			1693			1246			1280			2919			17710			48955
Qld	1991	952			1667			1275			1792			7701			39775		
	1996		1391			1998			1574			2948			10810			48083	
	2001			1180			2209			1427			3796			11549			48871
SA	1991	321			1015			325			210			3129			12295		
	1996		286			1058			312			166			2861			11506	
	2001			251			1176			320			235			3322			12603
WA	1991	440			930			412			822			6149			16772		
	1996		753			1190			502			1503			7940			23538	
	2001			527			1128			356			1226			7649			20340
Tas.	1991	-			145			105			80			729			4657		
	1996		-			141			106			95			667			4395	
	2001			-			124			118			46			741			4323
NT	1991	122			-			205			112			833			8171		
	1996		141			-			282			141			906			10144	
	2001			134			-			246			104			717			8525
ACT	1991	233			270			-			98			1777			11739		
	1996		174			231			-			74			1830			10237	
	2001			183			259			-			113			2021			11440
Total departures	1991	4356			6055			8042			6548			51805			183891		
	1996		5104			6824			9239			9349			66334			212896	
	2001			4956			7608			8754			13193			72487			224897

Source: ABS Census of Population and Housing (1991, 1996, 2001).

Annex E.3 **Decomposition of interstate arrivals by occupational categories**

Shift components

	NSW		*Vic.*		*Qld*		*SA*		*WA*		*Tas.*		*NT*		*ACT*		*Australia*	
	Persons	%	Persons	%	Persons	%	Persons	%	Persons	%	Persons	%	Persons	%	Persons	%	Persons	%
1990-91																		
Registered occupations																		
Standardised state arrivals	4171	2.78	2227	2.15	3716	3.04	1994	2.47	1453	3.28	653	3.19	590	13.15	723	7.52	15558	2.92
Standardised national average arrivals	3887	2.59	2685	2.59	3167	2.59	2094	2.59	1149	2.59	532	2.59	116	2.59	249	2.59	13899	2.59
National differential effect	1178	0.79	897	0.87	547	0.45	223	0.28	285	0.64	42	0.20	30	0.67	57	0.59	3263	0.49
Occupational re-allocation effect	-895	-0.60	-1355	-1.31	2	0.46	-323	-0.40	19	0.04	80	0.39	444	9.88	417	4.34	-1603	-0.16
Total state shift (deviation)	284	0.19	-458	-0.44	549	0.91	-100	-0.12	304	0.69	122	0.59	474	10.55	473	4.93	1659	0.33
Other occupations																		
Standardised state arrivals	52770	2.41	29247	1.74	34694	3.32	10016	1.95	15009	2.49	3911	2.55	6413	11.56	10001	8.38	162087	2.57
Standardised national average arrivals	56926	2.59	43710	2.59	27096	2.59	13316	2.59	15640	2.59	3977	2.59	1439	2.59	3096	2.59	165218	2.59
National differential effect	-1081	-0.05	-846	-0.05	-431	-0.04	-233	0.00	-271	-0.05	-40	-0.03	-28	-0.05	-52	-0.04	-2982	-0.04
Occupational re-allocation effect	-3075	-0.14	-13618	-0.81	8029	0.77	-3067	-0.60	-359	-0.06	-25	-0.02	5002	9.02	6956	5.83	-148	0.02
Total state shift (deviation)	-4156	-0.19	-14464	-0.86	7598	0.73	-3300	-0.60	-630	-0.10	-66	-0.04	4974	8.97	6905	5.79	-3131	-0.03

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Annex E.3 **(continued)**

	NSW		*Vic.*		*Qld*		*SA*		*WA*		*Tas.*		*NT*		*ACT*		*Australia*	
	Persons	%	Persons	%	Persons	%	Persons	%	Persons	%	Persons	%	Persons	%	Persons	%	Persons	%
1995-96																		
Registered occupations																		
Standardised state arrivals	4922	2.87	2823	2.43	5171	3.67	1566	2.20	1910	3.84	629	4.12	754	15.96	686	7.17	18496	
Standardised national average arrivals	4777	2.79	3233	2.79	3926	2.79	1986	2.79	1387	2.79	425	2.79	132	2.79	267	2.79	16151	
National differential effect	958	0.56	631	0.54	158	0.11	-20	-0.03	249	0.50	37	0.24	21	0.45	37	0.38	2073	
Occupational re-allocation effect	-813	-0.47	-1041	-0.90	1086	0.77	-400	-0.56	274	0.55	167	1.10	601	12.73	383	4.00	271	
Total state shift (deviation)	145	0.08	-410	-0.35	1244	0.88	-420	-0.59	524	1.05	204	1.34	623	13.17	420	4.39	2345	
Other occupations																		
Standardised state arrivals	58781	2.53	35893	2.06	41154	3.39	9765	1.90	20905	3.04	3688	2.26	7838	12.41	8866	6.78	186919	2.75
Standardised national average arrivals	64845	2.79	48558	2.79	33864	2.79	14336	2.79	19185	2.79	4552	2.79	1761	2.79	3645	2.79	190767	2.79
National differential effect	-953	-0.04	-624	-0.04	-161	-0.01	20	0.00	-257	-0.04	-38	-0.02	-22	-0.04	-41	-0.03	-2077	-0.03
Occupational re-allocation effect	-5111	-0.22	-12041	-0.69	7451	0.61	-4591	-0.89	1977	0.29	-826	-0.51	1761	9.66	5262	4.02	-6110	-0.01
Total state shift (deviation)	-6064	-0.26	-12665	-0.73	7290	0.60	-4571	-0.89	1720	0.25	-865	-0.53	1738	9.62	5221	3.99	-8187	-0.04

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Annex E.3 **(continued)**

	NSW		*Vic.*		*Qld*		*SA*		*WA*		*Tas.*		*NT*		*ACT*		*Australia*	
	Persons	%	Persons	%	Persons	%	Persons	%	Persons	%	Persons	%	Persons	%	Persons	%	Persons	%
2000-01																		
Registered occupations																		
Standardised state arrivals	5453	2.88	3750	2.91	5149	3.29	1571	2.10	2001	3.59	567	3.37	639	13.25	869	7.31	20030	3.15
Standardised national average arrivals	5130	2.71	3495	2.71	4239	2.71	2031	2.71	1512	2.71	457	2.71	131	2.71	323	2.71	17336	2.71
National differential effect	1249	0.66	777	0.60	191	0.12	20	0.03	320	0.57	11	0.06	23	0.48	39	0.33	2632	0.31
Occupational re-allocation effect	-926	-0.49	-522	-0.40	719	0.46	-480	-0.64	169	0.30	100	0.59	485	10.06	507	4.26	63	0.13
Total state shift (deviation)	323	0.17	255	0.20	910	0.58	-460	-0.61	489	0.88	110	0.65	508	10.54	547	4.59	2694	0.44
Other occupations																		
Standardised state arrivals	62673	2.51	43982	2.30	41950	3.11	10796	1.96	17963	2.38	3682	2.26	6998	9.95	9810	7.12	197879	2.67
Standardised national average arrivals	67667	2.71	51931	2.71	36586	2.71	14944	2.71	20439	2.71	4409	2.71	1907	2.71	3735	2.71	201635	2.71
National differential effect	-1225	-0.04	-756	-0.04	-194	-0.01	-20	0.00	-328	-0.04	-11	-0.01	-27	-0.04	-43	-0.03	-2604	-0.03
Occupational re-allocation effect	-3768	-0.15	-7193	-0.38	5558	0.41	-4128	-0.75	-2148	-0.29	-716	-0.44	5118	7.28	6118	4.44	-1153	-0.01
Total state shift (deviation)	-4993	-0.19	-7949	-0.42	5364	0.40	-4149	-0.75	-2476	-0.33	-727	-0.45	5092	7.24	6076	4.41	-3757	-0.04

Source: Estimates based on the ABS Census of Population and Housing (1991, 1996, 2001).

F Minimum Energy Performance Standards

Electric storage water heaters

In Australia, the market for electric storage water heaters is dominated by mains pressure systems, accounting for over 95 per cent of sales nationally (Wilkenfeld 2003, p. 26). Minimum energy performance standards (MEPS), expressed as maximum standing heat losses, for all sizes of mains pressure water heaters took effect in October 1999. In 2001, the AGO published a RIS recommending a more stringent MEPS, equivalent to a 30 per cent reduction in standing heat loss compared with current MEPS levels. This recommendation was rejected in 2002 by the Ministerial Council on Energy when the New Zealand Minister abstained from the vote.

The AGO has now issued a draft RIS on small mains pressure water heaters, recommending MEPS levels for water heaters of less than 80 litres delivery to be set at a 30 per cent reduction compared with current MEPS levels (Wilkenfeld 2003, p. 10). The projected energy savings compared to 'business as usual', in terms of savings in energy supplied to cover heat loss from heaters, were 6589 GWh over the period 2001–2021 for this level of MEPS (Wilkenfeld 2003, p. 56). To give this figure some context, electricity consumption in Australia in 2000 was 181 000 GWh and is estimated to reach 340 000 GWh in 2020 (Kemp 2003). Australia does not have a standard for low pressure water heaters (New Zealand Government, sub. DR159, p. 18).

The market for water heaters in New Zealand is less dominated by mains pressure systems. In early 2002, New Zealand adopted MEPS for electric storage water heaters, at a level higher than Australia's, in order to support its National Energy Efficiency and Conservation Strategy (New Zealand Government, sub. 110, p. 11). This MEPS level represents an approximately 40 to 50 per cent lower heat loss than the present Australian MEPS level (Wilkenfeld 2003, p. 4).[1] The annual energy

[1] The draft RIS on MEPS for mains pressure water heaters notes that differences in the test methods used by Australia and New Zealand, to determine the heat loss of water heaters, make it difficult to assess the differences between the MEPS levels in each country, but that 40 to 50 per cent is the likely range. A common test has been developed, however, this will not completely align the MEPS regimes as long as Australia and New Zealand use different bases for determining heater capacities and apply different compliance regimes (Wilkenfeld 2003, p. 22).

savings anticipated with the higher New Zealand MEPS (NZ A grade) were estimated to be 62 GWh above the 2001 status quo level at year 2012 (New Zealand Ministry for the Environment, sub. DR175, p. 1). The New Zealand Government noted that these energy savings could be around 60 per cent lower in a scenario where all low pressure water heaters sold were at the NZ B grade or lower and all mains pressure water heaters were compliant to the current Australian standard (sub. DR159, p. 18). The energy savings foregone in year 2012 under this scenario would be equivalent to approximately one-third of the electricity generation of a small power station (New Zealand Ministry for the Environment, sub. DR175, p. 1). Consequently, to protect its higher standard, New Zealand has taken out a temporary exemption under the TTMRA.

Rheem Australia believe that the New Zealand standard for water heaters is 'out of step' with international standards (sub. 85, p. 2). However, given that firm-level investment has been required to comply with the new standard, they have been compelled to offer support for the temporary exemption:

> … Rheem New Zealand had no option but to support the NZ Government's temporary exemption application. This was an attempt to protect our NZ investments for manufacturing to NZ MEPS …
>
> … our NZ investment is now at risk … the Australian product will be more than able to compete with NZ product when the temporary exemption lapses … (sub. 85, p. 2)

Other interested parties felt the temporary exemption could have been avoided had there been better consultation and communication between officials in each country. The AGO noted that water heaters were submitted for Australian MEPS approval to the Ministerial Council on Energy (MCE) in early 2002, after a lengthy process:

> … Throughout that process, New Zealand officials were involved at every stage but, until late 2001, Australian officials were not advised of any New Zealand concerns at the proposed levels.
>
> In early 2002, the New Zealand Minister for Energy … abstained from supporting the water heater MEPS proposal. … His abstention within MCE had the effect of postponing the proposed regulation of more stringent standards for some types of electric storage water heaters in Australia indefinitely. (sub. 115a, p. 4)

The New Zealand Government anticipated that the differing MEPS levels were likely to converge in the medium to long term (sub. 110, p. 11). In the interim, the Energy Efficiency and Conservation Agency's (EECA) discussion document *Forward Programme 2003–2005* suggests that 'there is strong support for labelling as a possible medium-term solution' (EECA 2003, p. 12).

None of the options facing New Zealand are entirely satisfactory. If MEPS for water heaters were to continue to be exempt from the TTMRA, New Zealand would meet its energy savings targets but:

- Australian manufacturers may choose not to service the New Zealand market, as it may not be viable for them to manufacture specific New Zealand MEPS compliant products;
- there may be reduced competition in the New Zealand market place; and
- New Zealand consumers may then face greater costs and limited consumer choice.

Such an outcome was suggested recently:

> Australian manufacturers are unlikely to introduce more highly insulated models solely for the New Zealand market, and would have the choice of either withdrawing from that market or retooling all models to the NZ MEPS level, which is unlikely since it would place suppliers at a potential price disadvantage in Australia and in non-NZ export markets. It follows that a TTMRA permanent exemption would most likely reduce the range of models and market competition in NZ. (Wilkenfeld 2003, p. 66)

The New Zealand Government noted that it was difficult to accurately assess the cost differentials to manufacturers producing Australian as compared to New Zealand MEPS compliant water heaters, but that:

> … Estimates however suggest that the range of cost differentials is likely to be between $10-$50, assuming no economies of scale.
>
> There is considerable flexibility in the manufacturing process for low pressure water heaters … which suggests that no general retooling or upgrading of production plants was necessary to manufacture to the NZ MEPS standard. … For mains pressure water heaters, manufacturers tend to use a more standard assembly line production process, however they have not indicated the cost implications of producing to the NZ MEPS requirement. (sub. DR159, p. 18)

As a comparison, the cost benefit analysis contained in the Australian draft RIS on mains pressure water heaters allowed $500 000 for a once-only change to the tooling and production lines for each of the 5 models of water heaters (in the 18 to 50 litres delivery range) currently on the market, although it was noted that this was probably an overestimate of the costs (Wilkenfeld 2003, p. 60).

If the temporary exemption does not result in a further exemption, Rheem Australia considered that the market profile in New Zealand will change. Rheem noted:

> It had been suggested that the current number of imported Australian water heaters is only a few thousand units and therefore the damage would be minimal. However the equation has now dramatically changed with New Zealand manufacturers being forced to produce more expensive products due to NZ MEPS. (sub. 85, p. 2)

It is likely that, in the case of free trans-Tasman trade in water heaters:

- New Zealand consumers would have wider choices at a wider range of prices;
- New Zealand industry could be at risk as:

  - if New Zealand maintained its higher standard, New Zealand manufacturers would not be competing on a level playing field; and
  - if New Zealand adopted an equivalent standard to Australia, New Zealand manufacturers may not be able to cover the cost of any investment they have made to meet the higher standards; and
- New Zealand would not meet its energy saving targets.

Given this scenario, Rheem Australia stated:

> … the only way to permanently protect the Rheem NZ investment is to support the abandonment of the TTMRA for water heaters. This is a decision that we have been forced to reluctantly make, as the opportunities and advantages for both countries now seem to be gone. (sub. 85, p. 3)

The AGO, in collaboration with the New Zealand Ministries for the Environment, Economic Development and Foreign Affairs and Trade and EECA, are managing the process of finding an agreed solution to these issues (New Zealand Government, sub. DR159, p. 32).

Lighting ballasts

A draft RIS circulated by the Australian Government in 2001 recommended that mandatory MEPS for lighting ballasts be set at B1 — the second highest energy efficiency rating in the agreed Energy Efficiency Index (based on European standards) (Atco Controls Ltd, sub. 98, p. 5). However, after consultation with industry, including the sole manufacturer of ballasts in Australia and New Zealand, the RIS was revised to recommend MEPS for Australia be set at B2 — the third highest energy efficiency rating. The Australian MEPS apply to ballasts for linear fluorescent lamps in the range 15–70 watts and took effect from 1 March 2003 (Atco Controls Ltd, sub. 98, p. 4).

The AGO noted that, in early 2002, the New Zealand Minister for Energy agreed to support the ballast energy efficiency performance standard proposed by Australia, which implied acceptance of mutual recognition for this product (sub. 115a, p. 4). However, New Zealand continued to recommend a MEPS level of B1, with an expectation of significant energy savings. The New Zealand Ministry for the Environment suggested that, if all ballasts were at B1 or better and 40 per cent of the market moved to electronic ballasts (which attract the highest energy efficiency rating), then annual energy savings above the 2001 status quo level at year 2012 would be 140 GWh (sub. DR175, p. 2). The Ministry noted:

> The first key difference is the loss over the base case if NZ reverted to Aus MEPS — by 2012 this difference would be 22 MW or about one seventh of the proposed

> Whirinaki reserve plant, or equivalent to a small geothermal station. The second key difference is the loss of the projected "super savings" from early introduction of electronic ballasts. This is 61 MW, equivalent to 40% of the proposed Whirinaki reserve plant, or two wind farms … (sub. DR175, p. 2)

The MEPS apply to ballasts for linear fluorescent lamps in the range 15–70 watts, as in Australia, and also to ballasts for 2 tube and flat 4 tube compact fluorescent lamps (Atco Controls Ltd, sub. 98, p. 4). The MEPS took effect from 1 February 2003.

Atco Controls Ltd argued that setting MEPS at B2 is the best option for Australia, with benefits nearly 15 times greater than costs (sub. 98, p. 7). It noted that ballast production could not be easily converted for B1 production, that a wholesale switch to B1 production would require the importation of high silicon electrical steel, and that this would probably precipitate the closure of electrical steel production in Australia (sub. 98, p. 8). It also argued that setting MEPS at B1 would put Australia out of step with its trading partners in Europe, as the European Union is to adopt B2 as its MEPS level from 2005 (sub. 98, p. 5). Atco Controls Ltd suggested the adoption of B1 standards in New Zealand could have a significant impact on trans-Tasman trade, as New Zealand currently accounts for 15 per cent of Australian ballast exports (equivalent to $4.885 million in 2002), and this could give impetus for it to relocate production closer to major European markets (sub. 98, p. 10).

Ballasts for fluorescent lamps are not manufactured in New Zealand. Energy savings are, therefore, of prime consideration. The New Zealand Government noted that, without a B1 or similar MEPS level, the industry may revert to the B2 level and maintain this for up to 10 years, although it is possible that industry will begin to move to electronic ballasts over this time. It suggested that industry may wish to move to electronic ballasts sooner rather than later if market position can be maintained:

> … with the announcement of the NZ B1 standard, one large supplier went straight to electronic ballasts as these ballasts are cost competitive for multiple lamp luminaries. (sub. DR159, p. 19)

In the long term, the price of higher MEPS (B1) ballasts may reduce over time to become competitive with lower MEPS (B2) ballasts, and the need for an exemption may ultimately be removed. In the meantime, New Zealand will achieve energy savings (with higher costs borne by consumers) but there is likely to be a loss of Australian exports to New Zealand.

EECA, the Ministry of the Environment and the AGO are working towards the resolution of these issues.

G Variations in food standards

How non alignment occurs

Food Standards Australia New Zealand (FSANZ) has provided the impetus for Australian States to align their food regulations, creating an environment where there are virtually no restrictions on trade in food within Australia, an objective that eluded policymakers when they tried to achieve those results through mutual recognition. However, between Australia and New Zealand the process has not been so straightforward. The structure of the Joint Food Code reflects the fact that FSANZ's regulatory responsibilities in Australia extend from 'the paddock to the plate', whereas in New Zealand, they are limited to food content and labelling. New Zealand agencies retains direct responsibility for food hygiene, primary production and processing, including maximum chemical residue limits (MSLs) and dietary supplements. Apart from the latter, these regulatory responsibilities relate to manner of sale and production and processing. These should not impact on trans-Tasman trade except in a few instances when they affect food content or labelling.

In addition, under Annex D of the Treaty, the New Zealand Minister, on stating the grounds for considering a standard inappropriate for New Zealand, may advise the Australia New Zealand Food Regulation Ministerial Council (ANZFRMC) that New Zealand intends to vary the standard. Annex D (2) (4) states:

> (4) A standard may be inappropriate for New Zealand on one or more of the following grounds: exceptional health, safety, third country trade, environmental or cultural factors.

Article 7 of the Treaty affirms that the TTMRA shall apply to food except where it is exempted under the TTMRA.

Issues

The Commonwealth Department of Health and Ageing (DOHA) and FSANZ have three concerns:

- the current provisions provide no incentives for New Zealand to harmonise in situations where by opting out, the TTMRA presents New Zealand suppliers

with niche marketing opportunities, because Australian suppliers are unable to compete. DOHA stated:

> If mutual recognition were not the default or assured outcome when giving consideration to 'opting' out of a joint food standard, this would provide substantial additional motivation for favouring standards harmonisation. (sub. 104, p. 14);

- the current arrangement exposes Australians to potential health and safety risks and may not be swift enough in an emergency; and
- the TTMRA requires *each State and Territory* to apply for a temporary exemption which, after one year, may be extended for a further year to allow for implementation of an aligned standard or, if the issue is not resolved, converted into a permanent exemption on the recommendation of two thirds of ANZFRMC and the unanimous agreement of COAG**.** DOHA stated:

  > In practice the process is quite involved and it would be very time consuming to successfully implement a permanent exemption. This makes this mechanism virtually inaccessible as a means of exempting any particular food standard that has become a concern. (sub.104, p. 10)

Problems also arise because assessing non life-threatening risks is not always clear-cut. For instance, AQIS does not consider the risks associated with functional beverages merit quarantine controls or Codex Alimentarius, the development of international standards (Allen Consulting Group, 2002). The Australasian Soft Drinks Association (ASDA) considered its application for approval to use caffeine in all soft drinks was rejected on 'fairly nebulous and non-scientific grounds' (sub. 84, p. 4).

Examples of variations

To date, the non harmonised standards affecting the labelling and content of food, that have resulted in niche markets in Australia for New Zealand suppliers, are: dietary supplements, Maximum Residue Limits (MRLs) and the use of hemp seed oil as an ingredient of food. Country of Origin Labelling (CoOL) has emerged as a fourth issue where a variation may occur.

Dietary supplements

In New Zealand, following the US model, besides food and therapeutic goods there is a third category of edible products, called dietary supplements. These include food that has been fortified with chemicals (for example, calcium) or plant extracts. In Australia, edible products have always been classified only as food or medicines. However, as no standard existed for some novel foods, including functional

beverages, Australian suppliers could not sell them on Australian markets. While the *New Zealand Dietary Supplement Regulations 1985* are exempt from the TTMRA under the therapeutic goods special exemption, an unforeseen consequence of the TTMRA is that the exemption applies only to 'therapeutic type' dietary supplements that are subject to TGA approvals, but not to products that are classified as dietary supplements in New Zealand and food in Australia. The New Zealand Government has agreed in principle that 'food type' dietary supplements should be covered by the Joint Food Code. However, the experience with dietary supplements provide lessons with wider application and some issues remain contentious.

In the interim, the *New Zealand Dietary Supplement Regulations 1985* have enabled functional beverages to be sold in New Zealand and, by virtue of the TTMRA, in Australia as well. Functional beverages include energy drinks that contain caffeine and others that contain vitamins, minerals and other additives. Taking advantage of this situation, New Zealand soft drink manufacturers have created niche markets by producing fortified drinks for Australian markets and re-exporting Red Bull, an Austrian product with caffeine additives, to Australia.

Australia has since adopted standards for sports drinks and caffeinated beverages, but Australian manufacturers must now attempt to gain a market share from a position of disadvantage with the additional obligation of meeting extensive labelling requirements that do not apply to products from New Zealand. Moreover, Australian and New Zealand standards are still not aligned. In New Zealand caffeine, the only bittering agent besides quinine, is permitted in *all* soft drinks at a maximum rate of 200mg/L. The new Australian standard allows caffeine in Kola type soft drinks *only* up to the rate of 145 mg/L. FSANZ rejected an application from ASDA for a standard to permit caffeine of up to 145 mg/L in all soft drinks.

ASDA has also applied for a standard for drinks with added vitamins and minerals, but the standard is not expected to be completed for a further 18 months. Until then, energy drinks from New Zealand will continue to enjoy an exclusive niche market in Australia. According to ASDA, for Australian business:

> The loss of competitive advantage is further aggravated by the loss of a potential export market for these products to South East Asia and other markets. (sub. 84, p. 1)

ASDA would like to see Australian manufacturers able to produce functional beverages to either Australian or New Zealand standards until FSANZ has completed its review of dietary supplements and sports foods. FSANZ, on the other hand, maintained that allowing the TTMRA obligation to apply before it has adopted standards potentially exposes Australians to public health and safety risks, a view FSANZ considers is supported by the decision of the ANZFRMC to adopt

the new 'Australia only' standards for caffeinated beverages and sports drinks. It remarked:

> The principal risks considered by the Ministerial Council concerned consumption by non-target consumers, that is by vulnerable subgroups in the community, and also from misuse. This situation prompted the development of food standards for both products, where the risks were managed by labelling and advice statements. However the time taken from identification of the risks to the development of new standards was lengthy — a number of years. During this time the Australian community was potentially exposed to public health and safety risks. (sub. 91, p. 6)

The New Zealand Government commented:

> …the solution potentially has two elements – change the law in Australia to allow competing products to be made and change the New Zealand law to shift these products from Dietary Supplements Regulations into the Food Standards Code so that manufacturers in both countries can manufacture them. Action is underway on both fronts and resolution can be seen as simply a matter of time. (sub. DR159, p. 15)

Australian jurisdictions would be entitled to take out temporary exemptions as, in this situation, the substantiality test would apply. However, if one country has already evaluated the risk, and the TTMRA is based on recognition of the basic efficacy of each jurisdiction's system, the ASDA proposal would appear to be a sensible solution for all food products that are not high risk. Industry in both countries could develop business strategies on an equal footing, knowing that the conditions for marketing their products in one or both markets may change.

Ethylene Oxide

From 1 October 2003, under Part III of the Code applying only to Australia, the use of ethylene oxide (a substance that is used mainly to purify herbs and spices) will be disallowed in food processing in Australia as it is carcinogenic. The New Zealand standard, which predates Australia's, allows for its use under prescribed conditions that include MRLs. The principal objective of the new Australian standard is to prevent workers being exposed to concentrations of this toxin, but DOHA and FSANZ are also concerned that without a complete ban on its use, traces of ethylene oxide may remain on processed foods imported from New Zealand, posing public health and safety risks. As the reason to restrict MRLs is to protect health and safety, Australian jurisdictions would have grounds for a temporary exemption.

Hemp seed oil

In May 2002, the Australia New Zealand Food Regulation Ministerial Council (ANZFRMC) disallowed an application to permit the use of hemp seed oil as an

ingredient in food. Australian Ministers were concerned about the association of hemp with drug use and of undermining messages that their Governments wished to present on the risks of marijuana use. New Zealand also rejected the proposed standard as it was so broad and would have conflicted with New Zealand laws on drugs under the Medicines Act. However, New Zealand continues to allow the sale of food products containing hemp seed oil, as hemp seed oil does not contain tetra-hydrocannabinol and therefore is not mind altering or in itself a risk to health.

In this instance, any health and safety issues are indirect and the 'Australia only' standard is substantially attributable to cultural factors. Hence, the substantiality test to implement a temporary exemption would not be met. Only a test allowing for trade implications *and* cultural differences would cover this situation.

Country of origin labelling (CoOL)

In Australia, there is strong support for mandatory CoOL on food and this has been endorsed by ANZFRMC. New Zealand has problems with this position. It views mandatory CoOL as an impediment to international trade and inconsistent with the position the Cairns Group has taken on US country of origin requirements. Endorsement of 'New Zealand made' is much less prevalent in New Zealand than the concept of 'Australian made' in Australia. The New Zealand Government considers that CoOL should operate on the strength of its commercial merit and encourages consumers to base their choices on quality and price (sub. DR159, p. 16). It fears emphasis on CoOL may discourage Australian food processors from accessing ingredients from New Zealand as it may prevent them describing their product as 'Product of Australia'. Moreover, New Zealand must import more ingredients for processed food as it cannot produce the range of ingredients that Australia does. Tracing the origins of imported food can be difficult and costly.

Australia used CoOL in its strategy to remove British beef from distribution outlets and recall products already sold following the outbreak of Jakob Creutzfeldt Disease, but New Zealand implemented a successful and, it maintains, a more sophisticated and efficient strategy to achieve the same objectives without recourse to CoOL. As a health and safety measure, CoOL does not meet the WTO TBT Agreement test of being 'least restrictive to trade' (sub. DR159, p. 16).

CoOL would not meet the substantiality test(sub. DR172, p. 2). It would require an amendment to the TTMRA to include a new test for temporary exemptions that extended to consideration of trade impacts and broad reasons extending beyond health and safety concerns. However, it does fall within one of the Principles Underpinning the joint food standards system cited in the Treaty establishing the joint food standards system and reiterated in the first order objectives of the

Commonwealth legislation establishing FSANZ, namely the provision of adequate information relating to food to enable consumers to make informed choices.

Other DOHA and FSANZ Options

Besides its preferred option DOHA and FSANZ identified the following options for modifying the processes for obtaining temporary and permanent exemptions to:

- permit ANZFRMC to approve temporary exemptions with flexibility to determine their duration and, on the request of FSANZ, to agree to a permanent exemption unless disapproved by 1/3 of the Heads of Government;
- extend the scope of *the Imported Food Control Act 1992* to enable ANZFRMC to make orders to prevent food that does not comply with 'Australia only' standards being imported from New Zealand; and
- amend the TTMRA to provide a permanent exemption for all food that does not comply with the Joint Food Code, but with flexibility to waive the exemption where the differences do not cause Australia a concern.

These options do not:

- take into account the agreement between the parties to the Treaty that mutual recognition would apply to food subject to not harmonised standards except where there were risks to health and safety;
- include a reciprocal mechanism for New Zealand to prevent Australian products entering New Zealand if it decides to introduce a higher standard;
- provide an incentive for Australia to negotiate a solution that has regard for legitimate health and safety, environmental or trade concerns of New Zealand;
- take into account the dissymmetry of FSANZ's responsibilities in respect of New Zealand and Australia; or
- take into account WTO SPS and TBT obligations.

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