

Dental Council

Te Kaunihera Tiaki Niho

Submission

on the 2014 review of the

Mutual Recognition Agreement and the Trans-Tasman Mutual Recognition Arrangement

February 2015

To the Australian Productivity Commission
LB 2, Collins Street East
Melbourne
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AUSTRALIA

Introduction

The Dental Council ("Council") welcomes the invitation from the Productivity Commission to participate in the public consultation process regarding the *2014 Review of the Mutual Recognition Agreement and the Trans-Tasman Mutual Recognition Arrangement*. Council has carefully considered the information set out in the Issues Paper and has focused its submissions as responses to those specific questions posed, in respect of which Council has knowledge and experience.

Council is responsible for regulating the professions of dentistry, dental hygiene, clinical dental technology, dental technology and dental therapy in 20 scopes of practice. Like the other 16 authorities regulating health practitioners in New Zealand, the Dental Council operates under the Health Practitioners Competence Assurance Act 2003 ("HPCAA").

Section 158 of the HPCAA provides that the Trans-Tasman Mutual Recognition Act 1997 ("TTMRA") obligations imposed on it by the HPCAA and ensures the purpose of that act is achieved, while at the same time accommodating the more singular requirements of the Trans-Tasman Mutual Recognition Arrangement. This does from time to time require reconciling conflicting obligations and policy objectives.

Executive Summary

In response to the Issues Paper on the *Mutual Recognition Agreement and the Trans-Tasman Mutual Recognition Arrangement*, the Dental Council makes the following points:-

- According to the HPCAA, the TTMRA prevails over the HPCAA, however Council is of the view that the TTMRA, having not been updated since the implementation of the HPCAA and the Health Practitioner Regulation National Law (the "National Law") does not reflect the modern aspects of either of these enactments, in particular in relation to the concept of practitioner competence and the competence regime set out in Part 3 of the HPCAA
- TTMRA has positively enhanced the ability of practitioners to transfer between jurisdictions, at little cost and with comparative ease.
- There has been no particular cost to Council in implementing the provisions of TTMRA, with all costs being recovered through TTMRA registration fees.
- Mutual recognition is preferable to harmonisation, because amongst other benefits, it provides to the public the necessary sense of ownership of the regulatory process to engender confidence in its outcomes.
- Cooperation between the regulatory authorities in each of the jurisdictions has resulted in closely aligned standards, processes and prerequisites for registration, enabling TTMRA to work simply, quickly and efficiently.
- Council has only once used its power to impose a condition on a registrant's registration under TTMRA. It is confident however, subject only to the anomaly that exists in relation to competence issues, that where considered appropriate both it and the ADC can easily impose a condition to on a registrant's registration to mirror one that appears on the practitioner's registration in the other jurisdiction.
- The TTMRA Act requires amendment to take account of orders made by Council in relation to practitioner competence, and to permit the release of information to the ADC about such orders; and the reasons for making them.
- Ongoing registration requirements should apply to all practitioners equally, whether they have registered pursuant to TTMRA or otherwise. There is currently no justification for treating TTMRA registrants and other registrants differently.
- Jurisdiction 'shopping and hopping' has occurred with the dental profession, however a significant change to Council's registration examination programme will remove the enablers of this.

General Comment

Since the introduction of the TTMRA in 1997, the regulatory framework governing oral health practitioners has very significantly changed in both New Zealand and in Australia. In December 2004 the HPCAA was implemented in New Zealand and in 2009 and 2010, the Health Practitioner Regulation National Law (the “National Law”) was enacted in each of the Australian states and territories. This has resulted in a much closer alignment between two regulatory regimes and has led to a significantly increased level of cooperation between the two regulatory authorities – the Dental Council (in New Zealand) and the Dental Board of Australia (“DBA”). Cooperation between the two jurisdictions encompasses a number of areas:

- Council is currently working with the DBA to develop common competencies for the dental specialist scopes of practice.
- For a number of years, Council and the Australian Dental Council (“ADC”) (on behalf of DBA) have jointly undertaken and managed the accreditation of all Australasian oral health education programmes to a common standard through a joint Accreditation Committee.
- Until now, the written component of the registration examinations for overseas trained dentists has been managed by the ADC on behalf of both jurisdictions with the clinical component of the examinations being independently run and managed in each country. For a number of reasons, including a statistical analysis of practitioner competence cases in New Zealand, Council will shortly announce a full outsourcing of its overseas trained dentist registration examinations to the National Dental Examining Board of Canada (“NDEB”). The NDEB examination is equivalent to the current Australian and New Zealand standards and competencies for entry to the register, reciprocity having been granted by both jurisdictions.

Regular meetings are held between Council and the DBA and by the joint Accreditation Committee at both governance and operational levels..

Questions Raised in the Issues Paper

Question 1 - What have been the benefits of mutual recognition under the MRA and TTMRA, and what evidence is there to support your assessment?

The ease of transfer between the two jurisdictions for oral health practitioners accorded by TTMRA is attested by the statistics over the last 5 years. Whilst no comparative pre-1997 data exists the

TTMRA - Australian applicants registering in New Zealand							
	2010	2011	2012	2013	2014	2015*	Total
General Dental	7	10	14	13	20	6	70
Dental Specialist	2	1	4	0	2	1	10
General Dental and Specialist	0	0	0	2	2	1	5
Dental Hygiene	0	1	3	2	2	0	8
Dental Therapy	0	1	1	0	0	0	2
Dental Technology	3	2	4	0	0	0	9
Clinical Dental Technology	0	0	0	0	2	0	2
Dual	0	0	0	0	3	1	4
TOTAL	12	15	26	17	31	9	110

* as at 31 January 2015

comparison between the requirements placed on transferring practitioners under TTMRA and those having to complete the 'normal' registration process, suggests that far fewer practitioners would be transferring if TTMRA was not available. Council's 'normal' registration process requires candidates to establish their qualifications; prove their identity; provide three referees attesting to both clinical competence and fitness for registration; provide satisfactory hepatitis 'A' and 'B' test results; and where necessary proof of current English language competence. None of these requirements are necessary under TTMRA.

TTMRA - New Zealand practitioners seeking registration in Australia							
	2010	2011	2012	2013	2014	2015*	Total
General Dental	16	84	59	54	44	5	262
Dental Specialist	0	2	2	3	2	0	9
General Dental and Specialist	1	3	6	7	7	2	26
Dental Hygiene	1	15	7	5	5	1	34
Hygiene + Therapy (Dual)	1	21	14	20	5	3	64
Orthodontic Auxiliary	0	1	0	1	0	0	2
Dental Therapy	0	6	4	3	3	0	16
Dental Technology	2	1	0	0	0	0	3
Technology + Clinical Technology	0	0	6	0	2	1	9
TOTAL	21	133	98	93	68	12	425

*at 31 January 2015

Question 2 - What have been the costs of implementing and maintaining mutual recognition under the MRA and TTMRA, and to what extent are these outweighed by the benefits?

No particular costs have been incurred in implementing and maintaining mutual recognition. Being not for profit statutory authority funded entirely by registered practitioners, Council operates on a strict 'user pays' cost recovery basis. Accordingly all costs associated with managing and transacting TTMRA registration applications are met through the TTMRA registration application fee paid by the candidate.

Question 5 - For which ... occupations is mutual recognition a better alternative than other forms of regulatory cooperation (for example, harmonisation) in the sense that it generates a greater net benefit to the community?

Council is of the view that mutual recognition is the most appropriate form of regulatory cooperation, and is to be preferred over alternatives such as harmonisation. The current HPCAA is patient-centric, the primary function of Council being to "...protect the health and safety of the public..."¹ Similarly with the National Law. Whilst the harmonisation of legislation may be feasible along the lines of the EU model, it is fundamental to the success of publically focused regulation to ensure ongoing public confidence and engagement. It is submitted that this is only practically possible where the public perceive 'ownership' of the regulatory processes. If a practitioner registered only in Australia, was entitled as of right to practice in New Zealand, how would the confidence of the New Zealand public be maintained when practitioner disciplinary or competence issues arising in New Zealand, were dealt with by the Australian regulatory authority?

¹ Section 3(1) Health Practitioners Competence Assurance Act 2003

Question 26 - How well does mutual recognition between Australia and New Zealand work for health professionals other than doctors?

Through cooperation, Council and the DBA have informally harmonised their standards and prerequisites for the registration of practitioners, to the extent that one is easily able to accept registrants in one jurisdiction, for registration under TTMRA in the other. As a consequence, TTMRA applications are able to be completed quickly and easily by applicants and processed by Council with minimal resort to DBA beyond verifying Australian registration, candidate good standing and any conditions or restrictions on registration.

An indicator of the success of the scheme may be found in Council's TTMRA registration application statistics. Over the last 5 years, Council has received 110 applications from Australian registered oral health practitioners, of which one was declined because of ongoing disciplinary proceedings and three decisions were postponed, for the similar reasons. No decisions of Council have been appealed to the Trans-Tasman Occupations Tribunal.

Question 38 - How often do occupation-registration bodies impose conditions on people registering under mutual recognition? In which occupations or jurisdictions does this most often occur, and what conditions are imposed?

With largely 'harmonised' standards and competencies the need for the imposition of conditions is likely to be restricted to cases where the applicant has a pre-existing condition on their Australian registration. To date, no such cases have arisen. In the one case where a condition has been imposed on a registrant, this related to a procedure being undertaken by the practitioner in Australia which exceeded the parameters permitted by the relevant scope of practice in New Zealand.

Question 39 - Are the systems for setting conditions on occupations effective and efficient? If not, what changes are required, and what would be the costs and benefits?

The systems for setting conditions on occupations are generally effective and efficient. However there is one regulatory anomaly.

The TTMRA recognises and provides for disciplinary processes but does not do so for competence processes. Part 3 of the HPCAA establishes a unique statutory competence regime for managing practitioner competence concerns. It is non-adversarial; is designed to be remedial and educative; and to assist the practitioner to regain full competence. It has none of the characteristics of a disciplinary process. No charges are laid, and accordingly the practitioner has no ability to refute an allegation or a finding that his or her competence may be deficient. The process relies on an assessment of the practitioner's competence by a committee of two of his or her peers and a lay person, which provides a written report for Council's consideration. Following consideration of that report and any other pertinent information if Council considers that it has reason to believe that the practitioner fails to meet the required standard of competence, it must make one or more of a number of specified orders. Additionally, where Council has reasonable grounds to believe that a practitioner poses a serious risk of harm to the public by practising below the required standard of competence, it may make one of a number of orders, including ordering the interim suspension of the practitioners practising certificate. The practitioner has no ability to challenge Council's order other than by way of appeal to the District Court.

Part 3 of the HPCAA is quite clearly delineated from the disciplinary provisions contained in Part 4, which require the generally accepted disciplinary processes of laying charges which must be proved and which the practitioner can defend.

When Council orders the interim suspension of a practitioner's practising certificate for reasons of competence, what action can be taken to reflect that suspension in Australia? There is no statutory ability for DBA to mirror on its register, the action taken against the practitioner in New Zealand.

Section 32(1) of the TTMRA provides:

(1) If a person's registration in an occupation in New Zealand:

- (a) is cancelled or suspended; or
- (b) is subject to a condition;

on disciplinary grounds, or as a result of or in anticipation of criminal, civil or disciplinary proceedings, then the person's registration in the equivalent occupation in an Australian jurisdiction is affected in the same way.

This provision cannot be applied, because the practitioner's registration has not been suspended on disciplinary grounds. Additionally, and for the same reasons, the New Zealand statutory authority is unable to relate the detail of the interim suspension to its Australian counterpart, because the TTMRA provision enabling the furnishing of information² is restricted to "...actual or possible disciplinary action..." Accordingly Council can only provide the ADB with information already in the public domain, or otherwise permitted by section 157 of the HPCAA.

Statutory recognition of the HPCAA competence regime needs to be included in the TTMRA to enable reciprocity of action by both jurisdictions, and the ability for one to inform the other of the reasons for the action taken.

Question 40 - Have the review processes available through the Administrative Appeals Tribunal and Trans-Tasman Occupations Tribunal been effective in addressing disputes about conditions imposed on occupational registrations?

Council is aware of only 3 cases being heard by the Trans-Tasman Occupations Tribunal, and none since 2010. No case involving an oral health practitioner has been referred to the Tribunal.

Question 41 - Should people registered under mutual recognition be subject to the same ongoing requirements as other licence holders in a jurisdiction? Why or why not?

The rationale for occupational mutual recognition is permit practitioners registered in one jurisdiction to register and practice in another with the minimum barriers and at the minimum cost whilst preserving the statutory integrity of each jurisdiction. To exempt or to add requirements to mutual recognition registrants so that their ongoing obligations differ from other practitioners in that jurisdiction is to fundamentally undermine the concept of mutual recognition, and in effect create a different class of practitioner. Council and the DBA maintain 'harmonised' standards and competencies such that there is no justification for the imposition of differing ongoing requirements on TTMRA registrants.

Question 42 - Are amendments to mutual recognition legislation needed to clarify whether requirements for ongoing registration apply equally to all registered persons within an occupation? Are there alternative options? What are the costs and benefits of these approaches?

Council is of the view that no amendments to mutual recognition legislation are necessary to clarify whether requirements for ongoing registration apply equally to all registered persons within an occupation.

Question 43 - Is there any evidence of jurisdiction 'shopping and hopping' occurring for occupations which is leading to harm to property, health and safety in another jurisdiction via mutual recognition? If so, what is the extent of the problem and is it a systemic issue affecting an entire occupation? Is there evidence of any benefits, such as regulatory competition and innovation between jurisdictions?

² Section 33 Trans-Tasman Mutual recognition Act 1997

Council acknowledges that whilst almost 4 times³ as many New Zealand registered dentists and dental specialists sought registration in Australia under TTMRA as their Australian counterparts sought registration in New Zealand, it cannot be confirmed that has been entirely due to jurisdiction 'shopping and hopping'.

In the past, it has been the case that candidates who do not gained immediate registration in Australia have applied in New Zealand through the individual assessment process or by undertaking registration examinations. Following registration in New Zealand, a number subsequently sought registration in Australia

There were a number of possible reasons for dentists and dental specialists pursuing the New Zealand examination route:

- The examination fee was lower in New Zealand than in Australia (cost recovery only in New Zealand versus commercial operation in Australia).
- The exam was two days shorter in New Zealand than Australia.
- There was generally no waiting time to sit the New Zealand examination whilst there frequently was in Australia.
- Council accepted Australian enrolled candidates to sit the New Zealand clinical examination, but not vice versa.

Until now, the written component of the registration examinations for overseas trained dentists has been managed by the ADC on behalf of both jurisdictions with the clinical component of the examinations being independently run and managed in each country. For a number of reasons, including a statistical analysis of practitioner competence cases in New Zealand, Council will shortly announce a full outsourcing of its overseas trained dentist registration examinations to the National Dental Examining Board of Canada ("NDEB"). The NDEB examination is equivalent to the current Australian and New Zealand standards and competencies for entry to the register, reciprocity having been granted by both jurisdictions.

With the advent of Council's new examination process, the historic reasons that may have underpinned any jurisdiction 'shipping and hopping' have been removed.

Question 44 - How effective are current informal and formal processes — dialogue between jurisdictions, referral of occupational standards to Ministerial Councils, and recourse to a tribunal — in addressing concerns about differing standards across jurisdictions?

Ongoing and frequent dialogue between Council and DBA and between Council and ADC at both operational and governance level has led to a significantly increased level of cooperation between the two jurisdictions. Areas of ongoing cooperation include:

- the development of common competencies for the dental specialist scopes of practice;
- an alignment of practice standards; and,
- a joint Accreditation Committee to undertaken and manage the accreditation of all Australasian oral health education programmes to a common standard.

The extent and success of cooperation has been encouraging.

³ Over the period 1 January 2008 – 31 January 2015 297 New Zealand registered dentists and dental specialists sought registration in Australia under TTMRA. During the same period 85 Australian registered dentists and dental specialists sought registration in New Zealand.