

Response to Mutual Recognition Schemes Productivity Commission Draft Report, June 2015

Background

The Queensland Board of Examiners is established under Part 10 of the [Coal Mining Safety and Health Act 1999](#) (Qld) and part 10 of the [Mining and Quarrying Safety and Health Act 1999](#) (Qld).

The Board's role in relation to statutory positions in the metalliferous and coal mining industries in Queensland is to:

- determine the required competencies
- develop exam format and content
- assess applicants for their experience and knowledge
- issue certificates of competency.

The Board of Examiners consists of a chairman who is an inspector and at least 6 other members, each with at least 10 years practical experience in the mining industry. No more than 3 members can be inspectors, and at least 6 must be currently engaged in the mining industry.

The Board of Examiners (BOE) grants the following certificates of competency: first class mine manager certificate of competency (underground coal mines), second class mine manager certificate of competency (underground coal mines), deputy certificate of competency (underground coal mines), open-cut examiner certificate of competency (surface coal mines), and first class mine manager certificate of competency (underground metalliferous mines).

Key points:

- The BOE is very concerned about 'jurisdiction shopping and hopping' within the Australian mining industry and under the Trans-Tasman Mutual Recognition Act, and the potentially very serious safety implications. The 2012 Report of the Royal Commission on the Pike River Coal Mine Tragedy in New Zealand commented about related concerns and details are provided later in this submission.
- The BOE supports the option on page 10 of the Draft Report that additional requirements or conditions to be met prior to registration could attach to service providers from other jurisdictions to protect health and safety, on the grounds that registration requirements in the person's original jurisdiction were inadequate at the time of the person's registration in the original jurisdiction. Community expectations in Queensland particularly for the safe operation of underground coal mines are very high, after four major coal mining disasters over the past 29 years, including the Moura disasters in 1986 which killed 12 people and 1994 which killed 11 people.
- The BOE supports the draft report view that continuing professional development requirements should apply equally to all persons (including those registered through mutual recognition) when renewing their registration.
- The BOE strongly opposes automatic mutual recognition for mining safety critical occupations.

Improving the operation of mutual recognition for occupations

Jurisdiction shopping and hopping

The draft report acknowledges that the current mutual recognition scheme can create opportunities for shopping and hopping and that around 35 per cent of the occupation-registration bodies that responded to the Commission's survey were concerned about shopping and hopping. The draft report indicates that the risk of, rather than the potential benefit from, shopping and hopping dominated submissions and information provided by study participants and that among this group, the concerns were concentrated in occupations where registration bodies did not consider that the prerequisite training requirements are comparable across jurisdictions.

The BOE has very strong concerns about potential safety risks when shopping and hopping occurs in safety critical occupations or positions in high hazard industries such as coal and metalliferous mining.

The BOE supports the option on page 10 of the Draft Report that additional requirements or conditions to be met prior to registration could attach to service providers from other jurisdictions to protect health and safety, on the grounds that registration requirements in the person's original jurisdiction were inadequate at the time of the person's registration in the original jurisdiction.

These additional requirements or conditions to be satisfied prior to mutual recognition could include examination and training to facilitate mutual recognition rather than regulators refusing mutual recognition, on safety grounds. The BOE also notes that due to ambiguities in the Mutual Recognition Act (MRA) it is also arguable that the examples of regulators (in box 2 on page 10 of the Draft Report) requiring further examination or training of mutual recognition applicants are not breaches of the MRA.

Community expectations in Queensland particularly for the safe operation of underground coal mines are very high, after four major coal mining disasters over the past 29 years, including the Moura disasters in 1986 which killed 12 people and 1994 which killed 11 people.

There is some evidence of shopping and hopping occurring in the mining industry which the Board of Examiners considers to be a safety concern. For example, the Royal Commission in the Royal Commission on the Pike River Coal Mine Tragedy Report volume 2 (page 62) noted that there is the perception that New Zealand is the back door way for miners to more easily obtain their certificates of competency, as it is generally accepted that Australian mining qualifications are of a higher standard and are more difficult to achieve than the New Zealand licences. The Royal Commission also footnoted (footnote 46) the example of a mine manager at Pike River at the time of the coal mining disaster who had failed three times to obtain a Queensland certificate, yet had obtained a certificate in New Zealand. There has been a perception in the mining industry that a way to overcome failing the exams for certificates of competency in Queensland was to come through the back door with a NZ certificate into NSW and then apply in Queensland.

Even though the New Zealand Government has started to implement measures to improve mining competency levels in New Zealand following the 2010 Pike River coal mining tragedy, this does not immediately address concerns about lower competency requirements in the past for current holders of New Zealand mining certificates.

The case of Board of Examiners under the Mines Safety & Inspection Act 1994 (WA) v Lawrence [2000] FCA 900 (5 July 2000) included the following comment at paragraph 3: "... *mutual recognition agreements affecting occupational qualifications may attract jurisdiction shopping which takes as a starting point the jurisdiction with the lowest registration requirements so that the standards of all host jurisdictions are effectively reduced to those of the lowest common denominator.*" The Lawrence case was about a prime example of jurisdiction shopping and hopping.

The BOE notes the draft report's assessment on pages 123 to 124, about shopping and hopping concerns also reflecting problems with the VET Registered Training Organisations (RTO) sector in Australia, and agrees with the need for concerns about VET quality to be addressed.

Continuing professional development

The BOE notes that there is ambiguity in the MRA about the ability of a jurisdiction to impose a requirement on a mutual recognition applicant to undergo further continuing professional development training, as required of local applicants.

The Commission's view that legislation should allow continuing professional development requirements to apply equally to all persons when renewing their registration (page 11) is supported by the BOE. The MRA should be amended to make it clear that ongoing registration, further training and professional development apply equally to all persons within an occupation, including those registered under mutual recognition, otherwise safety and health and security may be compromised. It is fair that all licence holders in a jurisdiction be subject to the same ongoing requirements such as continuing training, continuing professional development and criminal record checks.

Determining occupational equivalence

The BOE supports the option on page 10 of the Draft Report that additional requirements or conditions to be met prior to registration could attach to service providers from other jurisdictions to protect health and safety, on the grounds that registration requirements in the person's original jurisdiction were inadequate at the time of the person's registration in the original jurisdiction.

In relation to the achievement of equivalence and the nature of conditions that may be imposed by a local registration authority to achieve equivalence, some stakeholders interpret the meaning of "conditions" too narrowly by arguing that it can only be a restriction or limitation. Section 4 of the MRA provides that unless the contrary intention appears, "conditions, when used in relation to occupations, means conditions, limitations or restrictions". The ordinary dictionary meaning of "conditions" includes a situation that must exist before something else is possible or permitted or set prior requirements on something before it can occur or be done.

This ordinary meaning is consistent with setting the condition that a local examination (covering Queensland's risk management based mining safety legislation) is passed to achieve equivalence for certificates of competency for safety critical mining positions.

Mining workers may come from other jurisdictions where equivalent safety risks do not exist (e.g. they do not have underground coal mines or there are not many complex metalliferous or coal mines) or have different mining methods under their regulations, and therefore may not yet be sufficiently competent to manage different or substantial safety risks, without the completion of further training and/or testing by the registration body.

Improving the movement of workers whilst auditing safety competency levels through the same procedures that are used for local workers seeking registration, provides a clear way to overcome mobility barriers whilst not compromising safety. In this way workers can also gain mobility and full registration without the imposition of restrictions that restrict the activities that a worker can do and employment opportunities.

The registering authorities can instead of refusing registration or imposing restrictions which may make a worker less marketable in the new jurisdiction, facilitate the required level of competency by requiring the condition of additional training modules or examination processes to audit competency as they already do for local workers. The costs would not be great and the benefits may be substantial particularly when there are safety issues and if the worker is more marketable because there are no restrictions placed on the worker's registration limiting the activities that can be conducted.

A registration authority may want to grant registration on the "condition" that an applicant successfully completes a specific competency unit of training or passes a local examination as the condition necessary to achieve equivalence, rather than limit the activities that can be performed as the "restriction" to the registration.

The passing of the written mining safety legislation examination is the prior condition to registration occurring not only for mutual recognition applicants but also for local applicants. The successful completion of the mining safety examination as a condition prior to registration, enables registration and worker mobility, and is preferable to limiting or refusing registration for mutual recognition applicants. This approach to the imposition of conditions has been crucial in upholding safety in the Queensland mining industry by ensuring workers are competent and enabling worker mobility.

The approach of the BOE is to require both local and mutual recognition applicants to pass an examination (covering Queensland's risk management based mining safety legislation) as a condition to being awarded a certificate of competency for a particular safety critical mining occupation. This has been effective and efficient in reducing safety and health risks and ensuring compliance with the mining safety legislation which requires workers to be competent.

Automatic mutual recognition for occupations

The Commission was asked to consider automatic mutual recognition (AMR), which would allow individuals to provide services beyond their home jurisdiction without having to register again (similar to what applies to the sale of goods). While the draft report finds that the AMR model is suitable for individuals who work beyond their home jurisdiction on a temporary or occasional basis,

there is little economic rationale for adopting AMR for people moving permanently to a new jurisdiction, particularly if they intend to practise solely in their new jurisdiction.

Automatic mutual recognition

The BOE strongly opposes automatic mutual recognition for safety critical mining certificates of competency.

In the draft report, the Commission suggested there would be aggregate benefits from automatic mutual recognition, though relatively small initially (page 13). The financial savings in adopting an automatic mutual recognition scheme should not be put before health and safety.

The Commission also suggested that potential benefits from automatic mutual recognition may grow as individuals use the opportunity to register in a lower-cost jurisdiction (page 13). However, it can be argued that this 'benefit' has the potential to increase jurisdictional shopping and hopping, a current concern of many jurisdictions across a variety of occupations.

Improving governance arrangements

The large mining states of Queensland, New South Wales and Western Australia have been working together through the National Mine Safety Framework and the Australasian Mining Competency Advisory Council (AMCAC), (formerly the Tri-State Competency Advisory Council) towards greater consistency for the competencies required for the carrying on of safety critical positions at mines and the activities authorised to be carried out under each registration. Other jurisdictions can also participate over coming years in the AMCAC. AMCAC is likely to assist with the identification of equivalent competencies and mining positions, and mobility over time, but does not address concerns about differing competency standards for registrations across mining jurisdictions over past decades.

Effectiveness of the users' guide

The users' guide developed by the CJRF has not been effective other than as a general introductory guide and in some respects it is potentially confusing and misleading. For example, in some sections, it does not provide comprehensive guidance or interpretation backed up by relevant court or tribunal decisions about the interpretation of ambiguous sections of the legislation. In some sections, it also fails to refer accurately to the wording of the relevant sections of the legislation by recasting the law arguably incorrectly in its own specific words (for example, in the second paragraph of section 1.2 of the guide).

The users' guide later includes a footnote 3 on page 13, the last sentence of which is seemingly in contradiction to the earlier misquote of the legislation. The guide does not clearly explain when it is acceptable for a registering authority to require an upgrade of qualifications in order to achieve equivalency of occupation, although this possible course of action is mentioned in footnote 3.

In section 2.1, the users' guide provides an example of the application of conditions to achieve equivalence for pest controllers which involves the pest controllers not being allowed to undertake certain tasks (due to a lack of previous training or experience in the use of chemicals to control

termites) until they have fulfilled the requirements of the State in which they intend to work, (which by implication is relevant further training in the use of chemicals to control termites). This approach and example is supported however, the preceding paragraph describes the imposition of conditions as only restricting registration to certain activities. Conditions should not only be interpreted as restrictions on full registration, as the meaning of conditions can include pre-requisites to be satisfied, for example, training to be completed, in order to achieve equivalence.

Also of greater concern for safety regulators, is the inadequate coverage in the guide about how safety and health issues may be taken into account.

The MRA includes some safeguards related to safety and health. For example, under section 31, on review, the Administrative Appeals Tribunal (AAT) clearly may determine that occupations carried on in two States are not equivalent, if the activity, if carried out by a person not conforming to the appropriate standards, could expose persons to a real threat to their health or safety.

The current Chief Justice of the High Court of Australia has also commented on the interpretation of the MRA in relation to safety issues, when he was a Federal Court Judge in the case of Board of Examiners under the Mine Safety and Inspection Act (WA) v Lawrence (2000) FCA 900. He confirmed that the AAT may take into account safety and health considerations and provided the example of safety concerns that may relate to a manager of an underground coal mine not conforming to appropriate standards.

It would be useful for the users' guide to cover how registering authorities can also address safety and health concerns based upon the caselaw guidance in Mine Safety and Inspection Act (WA) v Lawrence (2000) FCA 900 that is available, as the legislation is not clear.

The clarity of the MRA could also be greatly improved if there are clearer "safety and health issue" procedural connections from registering authority level to AAT review to possible ministerial declarations within the MRA, as the Act balances the respective policy interests of removing barriers to labour mobility due to occupational registration differences across jurisdictions, whilst if necessary, taking into account considerations of health or safety, either through equivalence of occupations with conditions or non-equivalence.

The MRA in section 31 only clearly indicates that the tribunal review body (Administrative Appeals Tribunal) (AAT) can determine non-equivalence for health or safety reasons where it is not practicable to protect health or safety through regulating. In these cases the registration refusal by the Tribunal lasts only 12 months. This short period of 12 months can be problematic if there are legitimate safety and health concerns and issues may not be able to be resolved within this timeframe, for example through a ministerial declaration.

If the AAT on review may clearly take into account safety issues, surely registering authorities can do so as well, otherwise the safety issues would not need to be reviewed on appeal by the AAT. The Act is also silent about how safety and health concerns may be addressed through Ministerial declarations.

Even though the MRA clearly enables the AAT under section 31 to make a declaration that occupations are not equivalent either because the activities are not substantially the same (even with the imposition of conditions) or for health or safety reasons, the MRA would be improved if it clearly spells out what options registration authorities have to advance arguments for conditional registration (e.g. after successfully completing a training module or examination for safety reasons) or against registration on the basis of safety and health reasons. Similarly, it could be clearer about options open to Ministers in relation to safety and health and the imposition of conditions related to safety concerns, through Ministerial declarations.

The users' guide also appears to be out of date or unaware of other relevant court and tribunal decisions (for example, *Agapis and Plumbers Licensing Board* [2013] AATA 187 (28 March 2013) and *Re Tkacz Ex Parte Tkacz* [2006] WASC 315) about "fit and proper" issues mentioned in section 2.3. The guide is difficult to understand in relation to the point it makes about fit and proper, and is arguably incorrect about what fit and proper considerations can be taken into account.

The disclaimer on page 2 of the guide highlights how limited and unreliable it is as the disclaimer states that the guide is not comprehensive and is not legal advice. It informs users to refer to the relevant legislation and consider seeking their own legal advice in relation to their own circumstances.

As the Mutual Recognition legislation is ambiguous in a number of sections, a range of differing legal advices can be received over time, when legal advice is sought.

When the users' guide is updated by the Commonwealth Government it should be updated in consultation with State Government Departments, and State Government approval sought for any revised versions of the users' guide.

Yours sincerely

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