Australian Government
Productivity Commission

Review of Mutual Recognition Schemes

Productivity Commission
Research Report

January 2009

ISBN 978-1-74037-273-2

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Publications Inquiries:
Media and Publications
Productivity Commission
Locked Bag 2 Collins Street East
Melbourne VIC 8003

Tel: (03) 9653 2244
Fax: (03) 9653 2303
Email: maps@pc.gov.au

General Inquiries:
Tel: (03) 9653 2100 or (02) 6240 3200

An appropriate citation for this paper is:

Productivity Commission 2009, *Review of Mutual Recognition Schemes,* Research Report, Canberra.

The Productivity Commission

The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long term interest of the Australian community.

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.

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Terms of reference

2008 REVIEW OF THE MUTUAL RECOGNITION AGREEMENT AND THE TRANS-TASMAN MUTUAL RECOGNITION AGREEMENT

I, CHRIS BOWEN, Assistant Treasurer, under part 3 of the *Productivity Commission Act 1998*, hereby:

1) The Commission is to:

   a) assess the coverage, efficiency and effectiveness of the MRA and TTMRA since the Commission's 2003 Review, with particular attention to:

      i) the implementation of the 2003 review findings;

      ii) matters identified by the Cross Jurisdictional Review Forum; and

      iii) matters identified by the COAG Skills Recognition Steering Committee.

   b) assess how the administrative provisions (such as the annual roll-over of the special exemptions under the TTMRA) can be amended and/or enhanced to support the more efficient operation of the MRA and/or TTMRA;

   c) examine whether any components of overseas models of mutual recognition or any other changes might be made to enhance the functioning of the MRA and TTMRA;

   d) explore any possible implications for the operation of the TTMRA arising from participating jurisdictions' bi-lateral engagement with third countries.

2) In undertaking the research study, the Commission is to consult relevant stakeholders in Australia and New Zealand, including with the Cross-Jurisdictional Review Forum and the COAG Skills Recognition Steering Committee.

3) The 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 and the Commission's report is to be published.

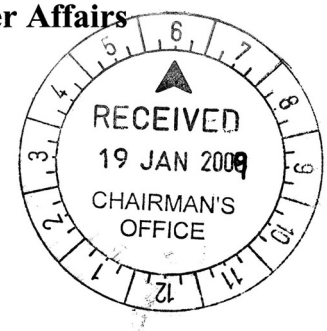
4) Within three months of receiving the Commission's findings, the Cross-Jurisdictional Review Forum is to present to Australian Heads of Government and the New Zealand Prime Minister a Review Report responding to those findings.

CHRIS BOWEN

[Received 10 April 2008]

The Hon Chris Bowen MP
Assistant Treasurer
Minister for Competition Policy and Consumer Affairs

09 JAN 2009



Mr Gary Banks AO
Chairman
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Dear Mr Banks, GARY

Thank you for your letter of 24 November 2008 requesting an extension of the reporting date for the Productivity Commission's review of the Mutual Recognition Agreement and the Trans-Tasman Mutual Recognition Agreement.

I agree to the extension you have requested and the Commission should now report to the Government, and present its research findings to the Australian Heads of Government and the New Zealand Prime Minister, by 4 February 2009.

I look forward to receiving a copy of the Commission's final report.

Yours sincerely

CHRIS BOWEN

PO Box 6022
Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7360
Facsimile: 02 6273 4125
http://assistant.treasurer.gov.au

Foreword

The Mutual Recognition Agreement and the Trans-Tasman Mutual Recognition Arrangement are innovative mechanisms for reducing the costs of regulatory differences among Australian jurisdictions and between Australia and New Zealand.

In this second five yearly review of the schemes, the Commission found that the schemes had brought benefits through increased mobility of labour and merchandise, but that there remained scope to further enhance their operations. Key areas are: bringing greater certainty to the way the schemes operate in relation to occupations; and facilitating interactions between regulators, governments, tribunals and the public.

In conducting its review, the Commission consulted with a wide range of stakeholders from industry, government and the community in both Australia and New Zealand. The study benefited from the preparedness of all parties to engage in an open and constructive dialogue.

The Commission acknowledges in particular valuable input received from the New Zealand Government and its agencies. The Commission is also grateful to the New Zealand Ministry of Economic Development for seconding to it one of its senior officials.

The study was headed by Commissioner Judith Sloan, with assistance from a staff research team managed by Patrick Laplagne.

Gary Banks AO
Chairman
January 2009

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Abbreviations

PC	Productivity Commission
AAT	Administrative Appeals Tribunal
ABS	Australian Bureau of Statistics
ACG	Allen Consulting Group
ACMA	Australian Communications and Media Authority
AGS	Australian Government Solicitor
agvet	agricultural and veterinary
AIT	Agreement on Internal Trade
ADR	Australian Design Rule
ANZCERTA	Australia New Zealand Closer Economic Relations Trade Agreement
ANZTPA	Australia New Zealand Therapeutic Products Authority
ANZSIC	Australian and New Zealand Standard Industrial Classification
APEC	Asia Pacific Economic Cooperation
APEC TEL	APEC Mutual Recognition Arrangement for Conformity Assessment of Telecommunications Equipment
APVMA	Australian Pesticides and Veterinary Medicines Authority
AQIS	Australian Quarantine and Inspection Service
ASCO	Australian Standard Classification of Occupations
AUSFTA	Unites States–Australia Free Trade Agreement
CAB	conformity assessment body
CCC	China Compulsory Certification mark
CER	Closer Economic Relations
CGE	Computable General Equilibrium
CHC	Complementary Healthcare Council of Australia

CJRF	Cross-Jurisdictional Review Forum
COAG	Council of Australian Governments
CoOL	Country of Origin Labelling
CRR	Committee on Regulatory Reform
DECT	Digital Electrical Cordless Telephones
EC	European Commission
ECJ	European Court of Justice
EEA	European Economic Area
EEEMRA	Agreement between New Zealand and China on Cooperation in the Field of Conformity Assessment in relation to Electrical and Electronic Equipment
EEMRA	APEC Mutual Recognition Arrangement on Conformity Assessment of Electrical and Electronic Equipment
EFTA	European Free Trade Association
EMC	Electromagnetic Compatibility
ESA	EFTA Surveillance Authority
EU	European Union
DEEWR	Department of Education, Employment and Workplace Relations
DIISR	Department of Innovation, Industry, Science and Research
FTA	Free Trade Agreement
FSANZ	Food Standards Australia New Zealand
GHS	Globally Harmonised System for the Classification and Labelling of Chemical
GSP	Gross State Product
GTRC	Gas Technical Regulators Committee
HF CB	High Frequency Citizen Band
HFCs	hydrofluorocarbons
IAC	Industries Assistance Commission
IPR	Intellectual property rights
IPTA	Institute of Patent and Trademark Attorneys

LPG	liquefied petroleum gas
MED	Ministry of Economic Development
MEPS	Minimum Energy Performance Standards
MFN	most favoured nation
MMRF	Monash Multi-Regional Forecasting Model
MRA	Mutual Recognition Agreement
MRSO	Agreement between the Government of Australia and the Government of New Zealand in relation to Mutual Recognition of Securities Offerings
NICNAS	National Industrial Chemicals Notification and Assessment Scheme
NZ–China FTA	New Zealand–China Free Trade Agreement
NZIER	New Zealand Institute of Economic Research
ODS	ozone-depleting substances
PRET	Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement
RIS	regulation impact statement
RSA	responsible service of alcohol
SEM	Single Economic Market
SGG	synthetic greenhouse gas replacements
SITC	Standard International Trade Classification
SSAN	security sensitive ammonium nitrate
TILMA	Trade, Investment and Labour Mobility Agreement between Alberta and British Columbia
TTMRA	Trans-Tasman Mutual Recognition Arrangement
TTOT	Trans-Tasman Occupations Tribunal
UNECE	United Nations Economic Commission for Europe

OVERVIEW

Key points

- Mutual recognition is a low-cost, decentralised means of dealing with interjurisdictional differences in laws and regulations.
- The Mutual Recognition Agreement (MRA) and the Trans-Tasman Mutual Recognition Arrangement (TTMRA) have increased the mobility of goods and labour around Australia and across the Tasman.
  - Greater mobility of goods and labour is a potential source of economic benefits, and is consistent with a move to a seamless Australian economy and a single trans-Tasman market.
- The schemes operate less effectively on the occupations side than on the goods side.
  - Differences in occupational standards between jurisdictions are a source of regulator concern, due to the potential for deficient standards to cause harm.
  - Allowing ongoing professional development and criminal record checks for mutual recognition registrants, that already apply to local registrants, would mitigate some of the risks created by interjurisdictional differences in standards.
- On the goods side, the efficiency and effectiveness of the schemes could be improved through an expansion of their coverage.
  - A range of goods are currently exempted but could now be mutually recognised. They include most gas appliances under the TTMRA and goods covered by Australian ozone protection laws under the MRA.
- In some areas, the impetus towards trans-Tasman mutual recognition or harmonisation has stalled, creating unnecessary costs for stakeholders.
  - Unless the New Zealand Parliament can soon pass legislation enacting a joint regulatory regime, the special exemption for therapeutic goods should become a permanent exemption, so as to avoid uncertainty.
- Aspects of the machinery of the schemes should be improved to reduce the administrative and legal burden they create for governments and other stakeholders.
  - Cooperation programs associated with special exemptions under the TTMRA should have a rollover and reporting period lasting up to three years.
- Regulators often do not meet their mutual recognition obligations, and firms and individuals do not make full use of the schemes.
  - Two specialist units should be created to facilitate the operation of mutual recognition of goods and occupations, through the provision of advice, complaint resolution, monitoring and awareness raising.
- Bilateral engagement by Australia and New Zealand with third countries creates more opportunities than risks for the mutual recognition partner, as long as mutual recognition implications are taken into account before agreements are made.
- Amendments to the mutual recognition legislation are urgently needed to remedy ambiguities and omissions in the Acts, as well as to enable the schemes to reach their full potential.

Overview

Background

This commissioned study is a review of the Mutual Recognition Agreement (MRA) and the Trans-Tasman Mutual Recognition Arrangement (TTMRA). The last review was conducted in 2003. Under the MRA, all Australian jurisdictions mutually recognise compliance with each other's laws for the *sale of goods* and the *registration of occupations*. This allows goods that can be lawfully sold in one jurisdiction to be sold in other jurisdictions without having to meet additional requirements. Similarly, people registered to practise an occupation in one jurisdiction are entitled to practise an equivalent occupation in other jurisdictions. This arrangement provides a low-cost, decentralised way of removing impediments to the mobility of goods and labour, while allowing jurisdictions to retain a degree of regulatory independence.

The TTMRA extends this model of mutual recognition to New Zealand, with some limitations.

Regarding both the MRA and TTMRA, this report:

- assesses the coverage, efficiency and effectiveness of the schemes since they were last reviewed in 2003
- considers how administrative provisions could be amended and/or enhanced to support more efficient operation of the schemes
- examines any possible implications for the operation of the TTMRA arising from jurisdictions' bilateral trade engagements with third countries.

In addition, the report explores whether any components of overseas models of mutual recognition or any other changes might be made to enhance the functioning of the schemes.

Why mutual recognition in Australia and New Zealand?

Australia's states and territories have the power to regulate certain areas of economic activity, which creates the potential for jurisdictions to adopt regulations and mandatory standards (collectively referred to below as 'requirements') that may constitute barriers to the movement of goods and labour around the country. The administrative and compliance burden associated with meeting duplicate — and potentially inconsistent — requirements to be able to operate in another jurisdiction can create disincentives for firms and workers to venture beyond their home jurisdiction.

In the early 1990s, Australian jurisdictions acknowledged that, in a nation with similar social, economic and political systems, their respective requirements should be adequate to meet community expectations not only in their own jurisdiction, but also across the country. In acknowledgement of this, a move to mutual recognition was initiated in 1991, resulting in the adoption by the Commonwealth and most states and territories of the *Mutual Recognition Act 1992* (MR Act). The *Trans-Tasman Mutual Recognition Act 1997* (Cwlth) and the *Trans-Tasman Mutual Recognition Act 1997* (NZ) (TTMR Acts) followed five years later.

The mutual recognition model chosen by Australian jurisdictions and by New Zealand is summarised in box 1.

How does mutual recognition benefit the community?

Lowering regulatory and technical barriers to the movement of goods and people can be achieved in a number of ways. Mutual recognition, harmonisation and uniformity of requirements are possible options (box 2). Whether the last two models are preferable to mutual recognition depends on a range of considerations, including what precisely is being mutually recognised between jurisdictions and the initial degree of regulatory difference. Recent regulatory reform initiatives by the Council of Australian Governments (COAG) have favoured harmonisation or uniformity. However, the Commission considers that, in some situations, mutual recognition offers the prospect of a less costly removal of regulatory barriers. For example, mutual recognition is appropriate when expected outcomes of differing regulations are broadly equivalent, and the costs of negotiating a common standard are likely to be high.

Box 1 **The MRA and TTMRA model of mutual recognition**

It is useful to distinguish between the operation of mutual recognition in relation to goods and occupations.

Mutual recognition of goods

Prior to the introduction of mutual recognition, sellers wanting to sell their products around Australia were potentially confronted with nine separate sets of mandatory standards and regulations: eight from each of the states and territories, and one from the Commonwealth. The key change introduced by mutual recognition is that goods produced in, or imported into, one jurisdiction, that may lawfully be sold in that jurisdiction, may be sold in a second jurisdiction without meeting the requirements of that jurisdiction with respect to:

- the goods themselves (for example, their production, quality or composition)
- the way goods are presented (for example, their packaging, labelling or age)
- inspection of goods
- the location of production of goods
- any other requirement relating to sale that would prevent or restrict, or would have the effect of preventing or restricting, the sale of goods.

Mutual recognition of occupations

Before mutual recognition was introduced, regulatory barriers to the movement of labour included an implicit requirement that licensed workers who wished to practise in another jurisdiction had to satisfy all the requirements for registration in that jurisdiction (except where one-off, interjurisdictional arrangements operated). That is, despite holding a licence to operate in one jurisdiction, these workers had to be reassessed when seeking to work in another jurisdiction. This situation placed unnecessary costs on workers, their employers and regulators.

The basis of mutual recognition for occupations is that registration in an occupation in one jurisdiction is sufficient grounds for registration in the *equivalent* occupation in another jurisdiction. Anyone in a registered occupation wishing to work in a different jurisdiction need only notify the relevant registration authority in that jurisdiction (not including occupations for which registration is nationally recognised) and, with that notification, is automatically *deemed* to be registered.

A key feature of mutual recognition of occupations is that variations between jurisdictions in the requirements for initial registration in an occupation (for instance, possessing certain qualifications) are *not* grounds for rejecting an application under mutual recognition.

Box 2 **Mutual recognition, harmonisation and uniformity**

Mutual recognition of requirements usually imposes few negotiating and administrative costs on regulators and stakeholders. If existing requirements are capable of meeting the objectives of regulation (for example, protection of the public or the environment), an agreement by jurisdictions to mutually recognise compliance with each other's requirements will lower the costs associated with mobility and transactions across their borders. Thus, required regulatory outcomes are maintained and some degree of jurisdictional independence is preserved.

The scope for jurisdictions to modify unilaterally their requirements within a mutual recognition regime has the added benefit of promoting regulatory competition.

Harmonisation of requirements means that differing requirements are aligned or made consistent. Harmonisation offers the advantage of greater certainty for stakeholders. However, when the requirements are far apart initially, the costs of negotiating alignment may be high. Of greater importance, the harmonised requirements may be more burdensome than the pre-existing ones for some stakeholders.

Uniformity of requirements means that a single standard applies across all jurisdictions. Uniformity removes any doubt stakeholders may have had regarding the quality of goods or practitioners from other jurisdictions. This can help promote trade and labour mobility. As with harmonisation, however, implementing this model can involve high negotiating costs and the risk of a 'hold out' by a jurisdiction. Moreover, the uniform requirement that is adopted may not be readily achievable by all jurisdictions.

When mutual recognition applies:

- the cost for firms of selling a product into another jurisdiction is reduced. For example, firms save on the cost of repackaging or relabelling goods that they sell in a second jurisdiction
- the cost for workers of moving to work in another jurisdiction is lowered. For example, workers save on testing, accreditation or additional training costs.

These cost reductions can, in turn, alter the economic behaviour of firms and individuals in such a way that goods and labour flow more freely across borders. Greater mobility is expected to generate economic benefits, in the short, medium and long term (box 3).

Box 3 **Potential economic benefits of mutual recognition**

- **Short-term benefits** — Other things constant, output, employment and productivity are expected to rise, and prices to fall, as a result of mutual recognition. This effect, which results in greater community welfare, is analogous to that of a country reducing its barriers to foreign trade.
- **Medium- to long-term benefits** — Over time, exposure of domestic product and labour markets to competition from other jurisdictions holds the potential for a range of additional benefits: economies of scale may allow firms to reduce their unit cost of production and, hence, their prices; competitive pressures may provide firms with incentives to innovate; and innovation may result in greater consumer choice and satisfaction. Greater choice and lower prices may also accrue to consumers of regulation — firms and individuals. Under mutual recognition, those who are regulated can 'vote with their feet' by moving between jurisdictions, thus providing regulators with incentives to keep their requirements low and efficient.

Mutual recognition is working reasonably well …

The views expressed by participants to this review, along with analysis undertaken by the Commission, suggest that the schemes have been effective in increasing the mobility of goods and labour within Australia and across the Tasman (box 4). In so doing, they have almost certainly promoted efficiency, by allowing people and products to move to those uses that contribute more to community wellbeing.

The case for mutual recognition schemes ultimately lies with the balance of the costs and benefits. Although it is not possible to quantify those costs and benefits with any precision, it is reasonably certain that the latter have outweighed the former, given that mutual recognition represents a low-cost model for overcoming impediments to mobility created by regulatory differences between jurisdictions. At the same time, mutual recognition retains the scope for regulatory competition between the jurisdictions, thus ensuring that individual jurisdictions face disincentives to implement unduly onerous regulations.

Box 4 **Participants' views on mutual recognition**

Many participants to this review said that mutual recognition is working effectively:

> For the Osteopathic profession the TTMRA has allowed for easy movement across the Tasman. It has assisted in the movement of Australian Osteopaths into [New Zealand], easing the workforce shortages. (Osteopathic Society of New Zealand, sub. 9, p. 7)
>
> The legislation enables nurse or midwifery applications from other states, territories and New Zealand to be processed in a timely manner and enable practice in Queensland immediately. This benefits Queensland in terms of workforce issues — there are no delays for employment once a decision is made to apply for a licence in Queensland. The legislation enables lower level assessment, which reduces processing times. An application received under mutual recognition take less time to process than one received under the *Nursing Act 1992*. (Queensland Nursing Council, sub. 16, p. 1)
>
> The MRA and TTMRA have been very beneficial for [the medical radiation technology, occupational therapy, pharmacy, physiotherapy, podiatry and psychology] professions as it has assisted the [Department] of Health in Western Australia to more effectively recruit these professions. There is a general shortage of health professionals in these areas and Western Australia has benefited from being able to employ professionals from the other states (and New Zealand) to help meet this workforce shortage. (Department of Health — Western Australia, sub. 20, p. 1)
>
> The mutual recognition arrangements simplified the administrative arrangements and the amount of paper work that practitioners were required to complete and standardised the processes concerned. (Optometrists Association Australia, sub. 42, p. 1)
>
> … over 80 percent of trans-Tasman goods trade is not subject to an exemption under the TTMRA. This is a strong indication of the importance of the TTMRA to the bilateral trading relationship. Notwithstanding the difficulty of determining a counterfactual, in the context of a bilateral trade relationship worth $16 billion per year, it can reasonably be inferred that the low-cost solution to regulatory differences which the TTMRA provides is acting as an important enabler of trade. (New Zealand Ministry of Economic Development, sub. DR89, pp. 1–2)

But there is room for improvement:

> It would be useful to have a point of contact on a day-to-day basis so that advice could be sought on interpreting/applying the legislation. There is a potential that differing interpretations on operational aspects of the legislation could be adopted across jurisdictions. (Teachers Registration Board of South Australia, sub. 35, p. 4)
>
> Whilst the MRA and TTMRA schemes have been successful to date, Coles believes there is room for improvement to both schemes. For example, Coles would like to see the scope/coverage broadened and increased awareness, expertise and governance arrangements. (Coles Group, sub. 46, p. 1)
>
> Raising industry and government awareness of the MRA and TTMRA, and their obligations under these schemes, will be important in influencing the operational effectiveness of the schemes. This may be achieved by making mutual recognition an integral component of regulatory reform and associated governance arrangements for more productive monitoring and compliance. (Queensland Government, sub. 52, p. 4)

… but it could be improved

Notwithstanding the benefits of mutual recognition, the schemes' efficiency and effectiveness could be improved through targeted reform of their coverage and administrative provisions.

Many of the issues that were cause for concern in 2003 continue to be a source of preoccupation for stakeholders in 2008 (box 4). Weak monitoring and enforcement of mutual recognition, combined with a lack of awareness and legal certainty around its provisions, have resulted in lower levels of use of the schemes than was anticipated. The Commission makes a number of recommendations designed to strengthen governance arrangements, raise awareness and reduce uncertainty, which in combination should result in more effective operation of the schemes.

The word 'coverage' in the terms of reference is interpreted by the Commission as including the goods and occupations subject to mutual recognition. But it is also given a broader meaning to indicate the 'scope' of the two schemes — the range of laws and activities that are within reach of mutual recognition. The application of mutual recognition could profitably be extended in terms of both the 'goods and occupations' and 'laws and activities' covered. There are valid reasons for some goods and occupations currently exempted from the schemes to become mutually recognised or, at least, mutually recognisable. The Commission also sees potential benefits, at least in the longer term, from bringing some laws and activities that are currently out of scope into the mutual recognition sphere.

Many of the changes the Commission recommends to improve the operation of mutual recognition will require legislative changes by all the jurisdictions involved in the MRA and TTMRA. There is now a sufficient build up of necessary changes to justify the administrative burden of redrafting the laws and underlying agreements governing mutual recognition. In the final chapter of this report, the Commission provides a recommended 'to do' list of administrative and legislative changes.

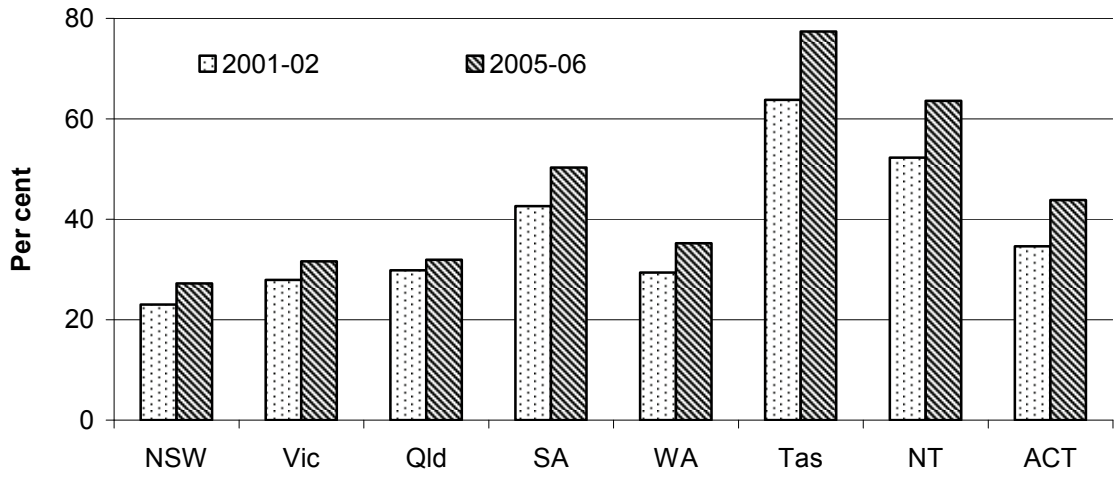
What is the evidence on mutual recognition?

Financial record keeping by firms and workers typically is not well suited to estimating the costs and benefits of mutual recognition. What evidence of impacts the Commission received for this review was largely anecdotal. Nevertheless, it revealed that, in some instances at least, the benefits gained by businesses and individuals from lower compliance costs have been substantial.

Interjurisdictional trade in goods has grown

One broad indicator of whether mutual recognition is leading to greater mobility of goods is the value of interstate trade within Australia. Between 2001-02 and 2005-06, interstate trade as a share of Gross State Product increased for all states and territories (figure 1). Comparable data for the previous decade are unavailable, which makes the role of mutual recognition in this trend difficult to ascertain. Trade flows are influenced by a variety of factors, many of them macroeconomic. Nonetheless, as the impact of National Competition Policy has shown, microeconomic factors are also important. By reducing regulatory barriers to trade, mutual recognition would undoubtedly have assisted the observed intensification of trade between states and territories. Similarly, with over 80 per cent of merchandise trade between Australia and New Zealand covered by mutual recognition, it is likely that the TTMRA has been 'an important enabler of trade' (New Zealand Ministry of Economic Development, sub. DR89, pp. 1–2).

Figure 1 **Interstate trade, Australia, 2001-02 and 2005-06[a]**
Share of Gross State Product, per cent



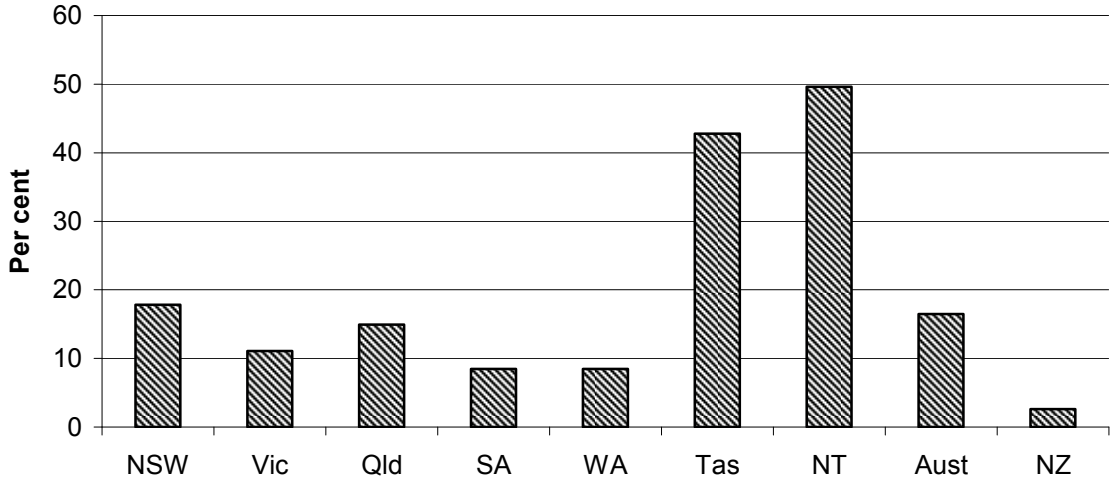
a Estimates of interstate trade are derived using the Monash Multi-Regional Forecasting model database. Total interstate trade is exports plus imports (to and from other jurisdictions, not including New Zealand or third countries). Ratios have been multiplied by 100 to express them in percentage terms.

Mutual recognition is used by workers when moving jurisdictions

A survey of occupation-registration agencies undertaken for this study suggests that mutual recognition is used for about 15 per cent of all new registrations in Australia, and about 3 per cent in New Zealand (figure 2). This figure is indicative only, given that the survey response rate varied considerably across jurisdictions and occupations. Moreover, it is not possible to know the extent to which

interjurisdictional registrations would have occurred anyway. However, had mutual recognition not operated, registered practitioners moving between jurisdictions would have faced additional retraining and accreditation costs. It is likely, therefore, that lower compliance costs from mutual recognition have contributed to some of the interjurisdictional mobility observed. This conclusion is strengthened by quantitative analyses the Commission undertook for this study, which produced findings consistent with the kinds of outcome expected under mutual recognition. For example, average wages of registered workers converged across Australian jurisdictions between 1996 and 2006, whereas those of other workers did not.

Figure 2 **Mutual recognition registrations as a percentage of new registrations, by jurisdiction, 2007[a]**



[a] Data for the Australian Capital Territory are not included as they are based on a single response, and not representative of the use of mutual recognition in that jurisdiction. Total registrations in South Australia do not include 4283 'Responsible Person' and 'Sensitive Person' licences issued.

How well are the schemes working?

Mutual recognition appears to be delivering some of the direct and indirect economic benefits that its architects had anticipated. That said, evidence received by the Commission revealed a number of problems, on both the goods and occupations sides, that continue to restrict the effectiveness of the schemes.

Opportunities exist to extend mutual recognition on the goods side

Mutual recognition applies by default to all goods sold in Australia and New Zealand, unless they are explicitly mentioned in the schedules to the Acts as being exempted or (in the case of the TTMRA) excluded.

Exemptions

Three categories of goods exemptions exist under the MRA and TTMRA (box 5).

Box 5 **Categories of exemptions under the MRA and TTMRA**

Permanent exemptions

Permanent exemptions have been applied, in both the MRA and TTMRA, to goods, or laws relating to them, for which mutual recognition would undermine individual jurisdictions' sovereignty, including in matters of public standards of decency, protection of the local environment and giving precedence to the preferences of local citizens. Thus, permanent exemptions apply to such areas as pornographic material and gaming, quarantine laws and container deposit legislation.

Temporary exemptions

Individual jurisdictions can temporarily exempt a good from the MRA and/or TTMRA, provided it is on health, safety or environmental grounds. Within 12 months, the relevant Council of Australian Governments Ministerial Council has to make a decision on whether the temporary exemption will be resolved by harmonising requirements, making a permanent exemption, or reverting to mutual recognition. If no action is taken, the temporary exemption lapses after 12 months, and mutual recognition resumes by default.

Special exemptions

Some goods were given a 'special exemption' from the TTMRA when it was established. This category was used for cases where Australia and New Zealand were hopeful that greater integration could be achieved, but recognised that further work was required. Each special exemption has a multi-year work program (termed a 'cooperation program') that aims ultimately to resolve the outstanding issues by harmonisation, mutual recognition or a permanent exemption. Five areas remain subject to special exemptions: hazardous substances, industrial chemicals and dangerous goods; gas appliances; radiocommunications devices; road vehicles; and therapeutic goods.

Few participants expressed a view about permanent exemptions. Mutual recognition should not impede a jurisdiction's ability to make laws and regulations that meet the needs and preferences of its citizens, such as in the area of public standards of decency. For this reason, it is unlikely that removal of most permanent exemptions would receive widespread support. The Commission supports their retention, therefore.

However, continuing efforts by Australian and New Zealand regulators towards harmonisation mean that there is scope to remove or reduce the coverage of the permanent exemptions for risk-categorised foods and ozone protection under the

TTMRA. In Australia, the need for a permanent exemption for laws relating to ozone protection under the MRA has been superseded by the introduction of national legislation. That exemption should be deleted from Schedule 2 of the MR Act (Cwlth).

The mutual recognition schemes can be used to circumvent a product ban imposed by an Australian jurisdiction. Unless a temporary exemption from mutual recognition is invoked at the same time as the ban, then products under ban may still be lawfully imported and sold into a jurisdiction. Information released so far about Australia's foreshadowed national consumer-product safety regime does not indicate that it will remove this loophole. A temporary exemption from mutual recognition will still need to be invoked simultaneously with an interim product ban to prevent it being overridden. But this would create timing inconsistencies. Under the foreshadowed consumer-product regime, interim product bans will last a maximum of 120 days, against 365 days (renewable once under the TTMRA) for temporary exemptions.

To resolve these potential issues, Australia's new national consumer-product regime and the mutual recognition schemes need to be closely integrated. The Commission recommends that, when an interim product ban is imposed on a good, the MRA not apply to that good, so as to avoid duplication and inconsistency between the product safety regime and the MRA temporary exemption process. Further, temporary exemptions under the TTMRA should be automatically invoked when a product ban is imposed in Australia or New Zealand, and revoked when the ban ends.

There is scope to narrow or remove some of the special exemptions under the TTMRA, either because cooperation programs have achieved their goals, or because they have come to a point where further progress is unlikely (box 6).

Where special exemptions remain, their annual renewal can be at the expense of progress under the cooperation programs. The Commission recommends, therefore, that special exemptions be extended from one to three years, and that associated cooperation programs no longer have a requirement to report annually. Instead, it would be less administratively burdensome to extend the reporting period to a maximum of three years.

Box 6 **Some special exemptions can be narrowed or removed**

Special exemptions under the TTMRA should be narrowed for gas appliances and radiocommunications devices. Some goods in these categories should now be mutually recognised (for example, natural gas appliances), while some others should be moved to a permanent exemption (for example, short-range and spread-spectrum radiocommunications devices).

Consideration should be given to making the special exemption for hazardous substances, industrial chemicals and dangerous goods permanent and/or applying mutual recognition to some areas. This should include a cost–benefit analysis that takes into account the low likelihood of harmonisation or mutual recognition between the Australian and New Zealand regimes, and the administrative burden associated with maintaining a special exemption.

Other special exemptions, such as for therapeutic goods and road vehicles, should be retained, notwithstanding that some stakeholders favoured a permanent exemption. Convergence between Australia and New Zealand in these areas remains possible and desirable, but should not prevent regulatory or technical reforms from being undertaken separately by each country. In the case of therapeutic goods, the New Zealand Government should advise the Australian Government within three months of receiving this report whether the foreshadowed trans-Tasman regulatory regime is likely to be enacted by the New Zealand Parliament within the following nine months. If enactment is unlikely, or if parliaments fail to enact the legislation within the required period of time, a permanent exemption should be adopted as soon as possible. A continuation of the status quo would only prolong the existing uncertainty.

Exclusions under the TTMRA

Under the TTMRA, laws relating to: customs controls and tariffs; intellectual property; taxation and business franchises and stamp duties; and the implementation of international obligations are excluded from mutual recognition.

Since the 2003 review of mutual recognition, there has been no realistic opportunity to remove or narrow the list of exclusions from the TTMRA. However, both Australia and New Zealand are active participants in international processes aimed at harmonising or defining protection of intellectual property, trademarks and patents around the world. Australia and New Zealand have also implemented measures, under the Closer Economic Relations Memorandum of Understanding on Business Law Coordination, with the objective of reducing regulatory barriers to doing business across the Tasman.

These initiatives include greater coordination of the regulatory frameworks governing intellectual property — including the activities of intellectual property

practitioners — on both sides of the Tasman. However, as both countries retain separate intellectual property regimes in which property rights are regionally defined, removing the exclusion from the TTMRA would undermine the effective operation of these systems.

Mutual recognition of occupations could work better

Mutual recognition applies to a broad range of registered occupations. Only one occupation is explicitly outside the coverage of the schemes — medical practitioners, who are exempted under the TTMRA. However, mutual recognition of other occupations only applies to registration. The 'manner of carrying on' an occupation is an exception under the schemes.

There are three main issues hindering mutual recognition on the occupations side: lack of clarity regarding the reach of mutual recognition; differences in occupational standards; and appropriate use of conditions.

Lack of clarity regarding the reach of mutual recognition of occupations

Mutual recognition of occupational registration appears straightforward — anyone who is registered to practise an occupation in one jurisdiction is entitled to practise an equivalent occupation in another jurisdiction, after notifying the local registration authority. This apparent simplicity is deceptive. Legal advice received by the Commission highlighted the potential for confusion regarding the forms of registration covered by the schemes.

One area of uncertainty concerns forms of regulation with no statutory registration authority. Based on legal advice, the Commission considers that coregulatory licensing schemes in which practitioners are required under legislation to hold some form of authorisation conferred by a local registration authority *are* covered by mutual recognition. On the other hand, negative and de facto forms of licensing, that specify who can or cannot be registered but have no local registration authority, are probably not covered at present. The Commission recommends that the mutual recognition Acts be amended to make clear whether or not coregulatory, de facto and negative licensing arrangements are covered.

Another area where legal advice suggests the coverage of the schemes is probably greater than previously thought derives from the definition of an occupation for mutual recognition purposes. The Commission's advice is that an authorisation granted by any entity whose functions are conferred by legislation creates a registered occupation. The granting of responsible service of alcohol certificates is an example.

Regulators should be better educated about the mutual recognition obligations they may face as a result of this interpretation.

Lack of certainty permeates the range of review, appeal and redress mechanisms available to stakeholders. In particular, while individuals can take their concerns about mutual recognition to tribunals, avenues for regulators to seek clarification of their prerogatives and duties should be better defined in law.

Variation in occupational standards are a source of friction

As in the previous review of mutual recognition, a major issue identified by study participants relates to occupational standards — qualifications, skills and experience — for registration that differ across jurisdictions. Regulators are obliged to mutually recognise each other's registrations; differences between jurisdictions in the standards required to obtain a licence are not grounds to reject a registration application.

Many participants expressed misgivings about the potential risks to property, health and safety, or the environment of lower standards in some jurisdictions. Such concerns, for example, often lead registration bodies to require criminal record checks of interstate applicants as a condition of registration, which arguably is not allowed under mutual recognition legislation. The Commission recommends that the legislation underlying the schemes be changed to allow criminal record checks for registration in a second jurisdiction, as long as those checks are also required of local registrants.

Participants also frequently raised concerns about the standards-related issue of 'shopping and hopping' — the practice of registering in the jurisdiction with the easiest or cheapest requirements and then using the MRA or TTMRA to move to a preferred jurisdiction.

In an important sense, 'shopping and hopping' is a desired outcome of mutual recognition of occupations, reflecting its role in promoting regulatory competition between jurisdictions. If workers can gain registration more cheaply and easily by registering in another jurisdiction and then invoking mutual recognition, then economic benefits ensue, provided the jurisdiction of first registration does not set standards so low that registered practitioners can cause harm.

As in the previous review, many participants claimed that significant differences in standards across jurisdictions do lead to the operation of mutual recognition causing harm to the public. However, the evidence of harm provided to the Commission was anecdotal, and appeared to reflect a 'one bad egg' scenario more than a systemic problem that would affect an entire occupation in a given jurisdiction. Nonetheless, given the limited data available to the study, the Commission cannot discount the

possibility that deficient standards in some jurisdictions have caused, or might cause, systemic harm to the public, in those jurisdictions and in others accessed via mutual recognition. Moreover, the evidence shows that some 'bad egg' situations arise as a result of variation in standards, such as when a jurisdiction allows ongoing registration without requiring recency of practice.

A 'bad egg' scenario unrelated to standards should be dealt with under the same complaint and disciplinary procedures applying to local registrants. Problems arising from another jurisdiction's standards, on the other hand, call for a different set of solutions. At present, a regulator or jurisdiction can enter into a dialogue with its counterpart with a view to narrowing the gap in standards. They also have an option of referring the question of the appropriate standards to the relevant COAG Ministerial Council. A regulator can also decline to register applicants from a particular jurisdiction. If, upon appeal to a tribunal, the decision to refuse registration were upheld, the tribunal would make a declaration to the effect that the difference in standards meant that the occupations are not equivalent, or that the difference in standards created risks for people or the environment. Moreover, the second type of declaration would trigger referral of the question of the standards that should apply to the relevant Ministerial Council.

In addition to these options, the Commission recommends that regulators be allowed to impose the same ongoing requirements (for example, for further training and professional development) on mutual recognition registrants that are imposed on local registrants. This would go some way towards remedying some of the problems arising from differences in standards across jurisdictions. The wording of the legislation suggests that, currently, people who register under mutual recognition are probably exempt from requirements that apply to local registrants. The Commission considers this an anomaly which goes against community interest. It should be rectified when the MR Act and TTMR Acts are modified.

Equivalence and conditions — interpretations differ and clarification is needed

Equivalence of *activities* authorised by registration is the cornerstone of mutual recognition in the occupations area. Mutual recognition only applies to equivalent occupations. Where a single licence authorises several activities in one jurisdiction, some of which have no equivalent in another, then equivalence can be achieved by limiting the scope of the mutually recognised licence, via the imposition of conditions.

There is evidence that concerns about standards are leading regulators to impose conditions on registration that run counter to the intent of the mutual recognition

legislation. That is, regulators sometimes impose conditions that aim to offset differences in standards rather than just to limit the scope of activities permitted.

The Commission acknowledges that regulators' decisions in this regard may stem, in part, from a lack of clarity in the legislation regarding the criteria for equivalence, and the types of condition that can legitimately be imposed. The work of regulators is also complicated, in some occupations, by variations in the activities covered by nominally-identical registrations in different jurisdictions. In some instances, the challenges associated with identifying and accommodating these differences through conditions have prompted regulators simply to reject registration applications under mutual recognition.

These issues, which lead different regulators to interpret their obligations and duties differently, have been partly mitigated by Ministerial Declarations on the equivalence of registrations in some occupations (box 7).

Box 7 **Ministerial Declarations — the future of mutual recognition?**

In response to concerns about skill shortages, in February 2006, the Council of Australian Governments set in place an initiative to achieve full and effective mutual recognition of selected trades occupations. This has since been extended to all vocationally-trained registered occupations.

This initiative led to the development of a set of equivalence tables that describe the conditions under which occupations are equivalent across jurisdictions. These form the basis of a set of Ministerial Declarations on equivalence, and have been published on a dedicated website to provide information to registration holders seeking to move jurisdictions — the licence recognition website (http://www.licencerecognition.gov.au).

Ministerial Declarations represent an innovative way around some of the issues related to equivalence and conditions. They provide increased certainty for applicants, regulators and employers. It is too early to say whether such certainty will continue into the future, when declarations require updating as registration categories evolve.

It is not yet possible to measure whether the declarations will have a positive long-term impact on geographic mobility of the occupations covered. It would be useful for existing or new bodies charged with monitoring mutual recognition to evaluate periodically the operation of Ministerial Declarations, and compare it with that of 'traditional' mutual recognition.

National licensing is not a universal answer

National licensing, which imposes uniform standards across Australia, is often perceived as the ultimate means of increasing labour mobility. Some occupations

(for example, persons performing high risk work and tax agents) have already moved to national licensing. Many health professions will be nationally licensed by 1 July 2010, and COAG is close to an intergovernmental agreement on national licensing for a range of other occupations.

The Commission acknowledges the advantages of national licensing over mutual recognition in terms of labour mobility. By removing differences in standards and scope of activities, a single national licence avoids many sources of friction under mutual recognition. The Commission also notes that national licensing in Australia offers New Zealand regulators the prospect of dealing with a single trans-Tasman counterpart for the mutual recognition of some occupations. A case in point is medical practitioners, one of the professions that will soon be nationally licensed in Australia. This development will create opportunities for dialogue about trans-Tasman mutual recognition of medical practitioners, currently exempted under the TTMRA. The Commission recommends that mutual recognition apply to Australia- and New Zealand-trained practitioners, and that overseas-trained practitioners be covered by a special exemption.

The advantages of national licensing notwithstanding, it will be some time before this regime is implemented, so that mutual recognition is needed in the meantime. Moreover, mutual recognition will continue to have an important role for those occupations not covered by national licensing.

Awareness, expertise and oversight could be improved

It is evident that firms and individuals are not making full use of the mutual recognition schemes, and that regulators are not always applying mutual recognition consistently or appropriately. Previous reviews also found these problems and attributed them to low public awareness, insufficient regulator expertise, and inadequate oversight (monitoring and enforcement) by governments. COAG responded by initiating awareness-raising measures, clarifying who is responsible for oversight, and establishing an intergovernmental group — the Cross-Jurisdictional Review Forum (CJRF) — to monitor and recommend scheme improvements. However, the problems have persisted.

A major factor limiting the effectiveness of previous reforms has been the decentralised nature of the schemes. This has made the schemes easier to implement, and has kept administration costs low. However, it has also meant that responsibility for ongoing oversight has been spread across several bodies, each with ill-defined or narrow responsibilities. The pre-eminent mutual recognition body, the CJRF, has had only a limited role. It cannot, for example, provide legal

interpretation or offer a dispute resolution mechanism. Ministerial Councils and appeals tribunals — which can provide clarification, review and redress — have been little used, partly because the mechanisms to access them are not always clear, and partly because of cost. Options available to stakeholders in the goods area are even more limited than in the occupations area.

To address these problems, COAG should agree to establish two specialist units — one for goods and the other for occupations — to monitor and provide a centralised source of advice on the schemes within Australia. The units should be funded by contributions from all Australian jurisdictions, support the CJRF, and be located in the Commonwealth Departments of Innovation, Industry, Science and Research (for goods) and Education, Employment and Workplace Relations (for occupations). The functions of the two units should include the provision of a 'complaints-box' service and a dispute resolution mechanism for simple matters. Use of these functions would ensure the CJRF is aware of problems with the schemes' operation. The units would also facilitate greater use of appeals mechanisms by interested parties and of the Ministerial Council referral process by regulators. Finally, the units should be responsible for reinvigorating awareness-raising initiatives, facilitating regulators' annual updating of Ministerial Declarations of occupational equivalence, and annual testing of regulators to confirm their expertise.

International developments benefit mutual recognition

The Commission examined recent bilateral free trade agreements (FTAs) entered into separately by Australia and New Zealand. Those FTAs have implications for the TTMRA in particular. Overall, the Commission judges that the FTAs, as currently implemented, will not harm, and may enhance, the operation of mutual recognition across the Tasman. For example, the risk is low that FTAs will cause lesser-quality products to enter Australia or New Zealand, because the FTAs do not lower existing standards for goods.

Nonetheless, in order to minimise potential risks and maximise opportunities, it is important that future international trade and cooperation initiatives consider the implications for the mutual recognition framework.

The TTMRA may benefit from non-FTA international trade developments linking Australia and New Zealand in areas related to mutual recognition. The two countries have recently struck the Agreement on Mutual Recognition of Securities Offerings and the Treaty on the Trans-Tasman Court Proceedings and Regulatory Enforcement. Provisions of these two trans-Tasman instruments are innovative and have the potential to strengthen and extend the operation of mutual recognition. For

example, the treaty on legal proceedings provides for improved enforcement mechanisms that could benefit compliance under the scheme.

Future directions for mutual recognition

Mutual recognition in Australia and New Zealand is currently subject to a range of restrictions that limit its potential. Some of these restrictions appear to be contrary to the aim of the schemes of removing impediments to economic mobility, and consideration should be given to their elimination. This could result in greater economic integration and cooperation between jurisdictions than is currently possible under the schemes.

Use of goods regulations should be mutually recognised

At present, mutual recognition extends only to the ability to sell a good in other jurisdictions. How that product is sold, used or transported, by whom and in what context, are forms of economic activity from which mutual recognition is excluded, explicitly or implicitly. That is, individual jurisdictions retain the right to enforce laws imposing specific requirements in those areas. This prerogative is justified, in most cases, by protection of the public and the environment within a defined geographic area.

Nonetheless, local requirements can create barriers to trade, which should only be erected on solid net public benefit grounds. The Commission considers that 'use of goods' requirements, insofar as they prevent or restrict the sale of a good, should be brought within the scope of mutual recognition. This measure would help eliminate unnecessary impediments to trade, where local requirements do not meet the public interest conditions already defined in the Acts.

The extension of mutual recognition to encompass use of goods would be facilitated by other measures the Commission recommends, around the provision of formal avenues for clarification, negotiation and dispute resolution. This would go some way toward addressing issues confronting operators, arising from inconsistencies across jurisdictions in use of goods regulation.

Service provision across borders should be unfettered

Mutual recognition of occupations is limited to the act of licensing individual suppliers of occupational and professional services. However, 'manner of carrying on' requirements imposed by jurisdictions — such as how the services are

delivered, in what premises, and with what guarantees — apply beyond the point of registration and are an exception to mutual recognition.

The Commission considers that extending mutual recognition to some 'manner of carrying on' requirements warrants consideration. At the moment, individuals or businesses seeking to provide services into a second jurisdiction face having to duplicate their operations across the border in terms of: registration; principal office; trust fund; complaints process; and fidelity fund. This creates unnecessary compliance costs for service providers, particularly those operating in border towns, servicing customers via the internet or providing short-term services on a 'fly in, fly out' basis. The particular needs of these 'cross-border' businesses could be accommodated better within mutual recognition laws.

One option is to allow most aspects of 'service provider' requirements imposed by one jurisdiction to be mutually recognised by another. This would avoid the risk that regulatory duplication and heterogeneity create impediments to the mobility of services. Under this model, similar to the forthcoming EU framework for a single internal market for services, a business providing services across a border would continue to be regulated, in the main, by its home jurisdiction. However, host jurisdiction requirements would continue to apply in limited cases, justified by community interest.

An overall assessment

Mutual recognition — under both the MRA and TTMRA — has served the Australian and New Zealand economies well. As a low-cost, decentralised means of dealing with interjurisdictional differences in regulations and laws, mutual recognition has reduced the costs of both goods and labour mobility. However, many of the gains have been captured and fulfilment of the full potential of the schemes is now stymied by ambiguities and omissions in the Acts, and by weaknesses in their implementation. There is also a strong case for extending the coverage and scope of the schemes, given the many changes that have occurred in the goods and labour markets over the past decade or so. Amending the MRA and TTMRA and strengthening their architecture along the lines suggested in this report should now be accorded a high priority.

Findings and recommendations

4 Economic impacts of mutual recognition

FINDING 4.1

The Mutual Recognition Agreement (MRA) and the Trans-Tasman Mutual Recognition Arrangement (TTMRA) have increased the mobility of goods and labour around Australia and across the Tasman.

- *In the goods area, mutual recognition has led to lower regulatory compliance costs for firms arising from jurisdictional differences. There is some evidence that this has contributed to the expansion of interstate and trans-Tasman trade.*
- *Increased labour mobility and reduced wage dispersion are consistent with the expected effects of mutual recognition of occupational registration.*

5 Registration of occupations

FINDING 5.1

In contrast with the majority view among stakeholders, coregulatory arrangements appear likely to fall within the coverage of the mutual recognition schemes if the elements required for mutual recognition (authorisation under legislation conferred by a local registration authority) are present.

RECOMMENDATION 5.1

The mutual recognition Acts should be amended to make clear whether or not the schemes cover coregulatory, de facto and negative licensing arrangements.

FINDING 5.2

Although many study participants raised concerns about lower occupational standards causing harm, the limited data provided did not offer conclusive evidence of systemic problems affecting an entire occupation in a given jurisdiction. This does not mean that such problems cannot arise. Furthermore, the evidence

highlights the fact that lower standards can, on occasion, allow poorly qualified practitioners to operate. It is important that an effective mechanism exists for dealing with the harm that does, or might, stem from lower standards.

FINDING 5.3

The mechanism of referring a concern about the standards required for registration in an occupation to a Ministerial Council appears never to have been used. It is possible that this reflects a lack of awareness that could usefully be addressed through initiatives to improve regulator expertise.

RECOMMENDATION 5.2

The mechanisms through which the Administrative Appeals Tribunal and the Trans-Tasman Occupations Tribunal can be approached to make a declaration on occupational standards should be clarified.

RECOMMENDATION 5.3

The mutual recognition Acts should be amended to create a mechanism for regulators and other interested parties to approach the Administrative Appeals Tribunal and the Trans-Tasman Occupations Tribunal for advisory opinions.

FINDING 5.4

A regulator may test whether an applicant under mutual recognition has met the registration requirements of his or her home jurisdiction, but cannot refuse the application if the applicant has been registered in error. Consideration should be given to a mechanism that would permit regulators to legally reject an application in this situation.

RECOMMENDATION 5.4

The mutual recognition Acts should be amended to allow criminal record checks, if they are required of local applicants.

RECOMMENDATION 5.5

The mutual recognition Acts should be amended to make clear the types of condition (for example, around local knowledge or recency of practice requirements) that registration authorities may impose at the time of registration.

FINDING 5.5

Mutual recognition would work more effectively if a point of contact existed where individuals could cheaply and easily obtain advice about their rights under the schemes.

FINDING 5.6

Legal advice indicates that an Australian registration authority can probably not impose ongoing requirements (for example, around training or criminal record checks) on people who are registered under mutual recognition, but that a New Zealand authority might not be similarly constrained. However, there is ambiguity around this issue in each of the three mutual recognition Acts that could usefully be clarified.

RECOMMENDATION 5.6

The mutual recognition Acts should be amended to make it clear that requirements for ongoing registration, including further training, continuing professional development and criminal record checks, apply equally to all registered persons within an occupation, including those registered under mutual recognition.

RECOMMENDATION 5.7

The mutual recognition Acts should be amended to define undertakings and provide that they are transferable between jurisdictions.

RECOMMENDATION 5.8

The mutual recognition Acts should be amended to ensure that information on nondisciplinary or remedial action can be shared between jurisdictions, where such action arises from a regulator's concern about an individual's fitness to practise.

FINDING 5.7

There is evidence that a significant minority of regulators do not comply with their obligations under the mutual recognition schemes. Initiatives to enhance regulators' awareness in this area could address this issue.

RECOMMENDATION 5.9

Consideration should be given to extending the Ministerial Declarations to occupations regulated in New Zealand.

RECOMMENDATION 5.10

Relevant New Zealand regulators should be included in consultations around the development of national licensing systems in Australia.

6 Temporary exemptions

RECOMMENDATION 6.1

The foreshadowed new Australian consumer product safety regime should include provisions to ensure it is closely integrated with the temporary exemption processes under the MRA and TTMRA. In particular, the new consumer law should ensure that:

- ***when an interim product ban is imposed on a good under Australia's new consumer product safety regime, the MRA does not apply to that good until the ban is either resolved by a Commonwealth decision or lapses — in order to avoid duplication and inconsistency between the product safety regime and the temporary exemption process under the MRA***
- ***when an interim product ban is imposed by any Australian jurisdiction, the temporary exemption process under the TTMRA is automatically invoked and the resultant temporary exemption for the relevant jurisdiction is automatically revoked when the interim product ban ends***
- ***if and when an interim product ban within Australia is resolved by a national permanent ban, a national temporary exemption under the TTMRA is automatically invoked for Australia.***

7 Special exemptions

RECOMMENDATION 7.1

Following completion of the five year work plan for industrial chemicals in 2009, Australian and New Zealand Governments should consider converting the TTMRA special exemption for hazardous substances, industrial chemicals and dangerous goods into a permanent exemption, and/or applying mutual recognition to some areas. This should involve a cost–benefit analysis, based on a realistic assessment of the likelihood of achieving mutual recognition or harmonisation in the foreseeable future, given the slow progress to date.

RECOMMENDATION 7.2

The New Zealand Government should advise the Australian Government within three months of receiving this report whether the foreshadowed trans-Tasman regulatory regime for therapeutic goods is likely to be enacted by the New Zealand Parliament within the following nine months. If it advises that enactment is unlikely within this period, therapeutic products should be granted a permanent exemption from the TTMRA as soon as possible. If it advises that enactment is likely, but the parliaments fail to enact the legislation within twelve months of governments receiving this report, a permanent exemption should also be adopted as soon as possible.

RECOMMENDATION 7.3

The TTMRA special exemption for road vehicles should remain because there are opportunities for Australia and New Zealand to harmonise their vehicle standards and associated procedures in advance of, and in some cases to a greater extent than, the harmonisation expected to eventually be achieved at a global level. To ensure that the special exemption delivers results, the Australian and New Zealand Governments should develop a reinvigorated cooperation program for road vehicles that has clear objectives and deadlines, and is supported by a clear intent to reduce impediments to trans-Tasman trade in vehicles.

FINDING 7.1

The Commission notes the progress made by the Australian and New Zealand Governments towards harmonised regulations for natural gas appliances. It supports the move towards a permanent exemption for 'nonuniversal' LPG appliances, subject to a cost–benefit analysis of the change.

RECOMMENDATION 7.4

Because of the different historical paths of Australian and New Zealand spectrum allocation and use, a permanent exemption should be considered for short-range and spread-spectrum devices, once opportunities for harmonisation of standards are exhausted. A special exemption should remain where there is a possibility of harmonisation of spectrum allocation, including for the high frequency citizen band, in-shore boating devices and digital electrical cordless telephones. Devices likely to become obsolete in the near future should also remain as a special exemption until the exemption is no longer needed.

RECOMMENDATION 7.5

The TTMRA legislation should be amended so that special exemptions can have a maximum duration of three years, and can be extended for one or more further periods, each not exceeding three years. This reform should be reflected in the administrative procedures that governments use when considering special exemption rollovers, including that cooperation reports only need to be prepared every three years.

8 Scope of mutual recognition — goods

RECOMMENDATION 8.1

Consideration should be given to narrowing the permanent exemption for risk-foods from the TTMRA to include only those for which harmonisation of risk-food lists and equivalence of import-control measures are not achievable in the long term. Other risk-foods should be reclassified as a special exemption. Efforts should be made to achieve equivalence of import-control systems and third-country arrangements through a cooperation program, undertaken by a trans-Tasman working group, consisting of regulatory bodies and policy officials.

RECOMMENDATION 8.2

The permanent exemption for ozone-protection legislation should be removed from the MRA. Governments should also consider removing the ozone-protection exemption from the TTMRA, subject to both countries aligning their respective regulatory systems while ensuring consistency with international obligations.

RECOMMENDATION 8.3

A new provision should be included in the Trans-Tasman Mutual Recognition Acts which would allow, through regulation, exempted legislation to be moved from Schedule 2 (permanent exemptions) to Schedule 3 (special exemptions).

RECOMMENDATION 8.4

The exceptions for goods in the mutual recognition Acts should be retained.

Impediments to trade arising from the exceptions should be dealt with via direct negotiation with regulators on a case-by-case basis. A central point of contact should be made available to facilitate this process.

RECOMMENDATION 8 5

The implications of regulation for mutual recognition should feature as one of the factors to be taken into consideration in jurisdictions' respective regulatory guidelines.

FINDING 8.1

Use of goods requirements have the potential to unnecessarily impede the sale of goods across jurisdictions. Provisions in the Acts appear to exclude use requirements from the scope of mutual recognition.

FINDING 8.2

The Acts currently provide for mutual recognition as a defence to a prosecution in relation to the sale of goods. Even if the mutual recognition Acts had explicitly covered use of goods requirements, the existing provisions would not have provided an adequate mechanism for sellers of goods to challenge a use requirement, given that it is unlikely that a prospective user would buy the product in the first instance.

RECOMMENDATION 8.6

Requirements relating to the use of goods, insofar as they prevent or restrict the sale of goods, should be explicitly brought into the scope of the mutual recognition schemes.

An exception should be made where mutual recognition of use provisions could expose persons in another jurisdiction to a real threat to health or safety or cause significant harm to the environment.

RECOMMENDATION 8.7

An effective, accessible administrative mechanism should be made available to sellers of goods, regulators and other interested parties (including industry and consumer associations) to obtain information and guidance on the application of the mutual recognition legislation to individual cases, and to assist in the resolution of disputes.

RECOMMENDATION 8.8

A judicial mechanism should be made available for sellers of goods and other interested parties to:

- ***obtain advisory opinions from a body such as the Administrative Appeals Tribunal***

- ***appeal regulator decisions to enforce requirements where the parties believe mutual recognition should apply.***

RECOMMENDATION 8.9

The existing mechanism for referral of issues relating to jurisdictional requirements for goods standards to Ministerial Councils should be extended to all issues of significant dispute relating to goods.

9 Exemptions and extensions — occupations

RECOMMENDATION 9.1

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

RECOMMENDATION 9.2

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

FINDING 9.1

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

FINDING 9.2

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

FINDING 9.3

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

FINDING 9.4

Following the implementation of the Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement, Australian jurisdictions and New Zealand could conduct a comprehensive and transparent stocktake of their legislation, similar to the mutual evaluation process under the European Union Services Directive. This stocktake would aim to identify major barriers to service provision across borders, and could be initiated and managed by the Cross-Jurisdictional Review Forum.

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

10 Mutual recognition in the wider context

FINDING 10.1

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

FINDING 10.2

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

- *Opportunities arise if the cooperation agreement extends recognition or harmonisation to the mutual recognition partner, or if the agreement provides a platform for discussions between the mutual recognition partner and the third country.*
- *Risks arise if the cooperation agreement results in lower quality goods being sold or less qualified persons carrying on occupations in the free trade partner that subsequently flow into the mutual recognition partner.*
- *Opportunities can be increased and risks can be mitigated if Australia and New Zealand consider mutual recognition implications when future cooperation agreements are negotiated.*

RECOMMENDATION 10.1

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

FINDING 10.3

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

11 Awareness, expertise and oversight

RECOMMENDATION 11.1

COAG should strengthen its oversight of the mutual recognition schemes by agreeing to establish two specialist units — one for goods and the other for occupations — to monitor and provide advice on the operation of the schemes within Australia.

The functions of the two units should include:

- ***advising COAG, regulators and the public on technical aspects of the schemes***
- ***providing a 'complaints-box' service that enables the public to alert COAG about problems with the schemes' operation, and to facilitate greater use of existing appeals mechanisms by the public and the referral process by COAG when disputes cannot be resolved through mediation by the specialist units***
- ***raising public awareness and regulator expertise on the schemes. This should include the provision of separate users' guides for the public and regulators, a website, and seminars targeted at relevant industry associations, professional associations, trade unions, policy makers and regulators***
- ***administering an internet-based practical test that relevant officials in regulatory agencies would have to undertake annually to confirm they have sufficient expertise to administer the mutual recognition schemes***
- ***for the occupations unit, facilitate regulators' annual updating of the Ministerial Declarations of occupational equivalence.***

The administrative arrangements for the two units should be as follows:

- ***the units should be funded by contributions from all Australian jurisdictions, and support COAG's Cross-Jurisdictional Review Forum***
- ***the goods unit should be located in the Commonwealth Department of Innovation, Industry, Science and Research***
- ***the occupations unit should be located in the Commonwealth Department of Education, Employment and Workplace Relations.***

RECOMMENDATION 11.2

Occupation-registration authorities should be required to report annually on their administration of the mutual recognition schemes. This should include data on the number registered under mutual recognition, compared with total registrations, and information about complaints and appeals. Such reports should be provided to the specialist occupations unit mentioned in recommendation 11.1.

RECOMMENDATION 11.3

The Cross-Jurisdictional Review Forum should report annually to COAG on its work program and achievements. This reporting should be done through COAG's Senior Officials' Group.

12 The next steps for mutual recognition

RECOMMENDATION 12.1

The state and territory jurisdictions should consider ways to make amending the mutual recognition legislation more flexible. The legislative mechanisms to amend the state Mutual Recognition Acts and the Trans-Tasman Mutual Recognition Acts could allow the Commonwealth to amend the legislation with approval from the jurisdictions.

1 About the review

This commissioned study is a five-yearly review of the Mutual Recognition Agreement (MRA) and the Trans-Tasman Mutual Recognition Arrangement (TTMRA). Previous reviews were undertaken by the Council of Australian Governments' (COAG) Committee on Regulatory Reform in 1998 (CRR 1998) and by the Productivity Commission in 2003 (PC 2003).[1]

This document is the final report of the 2008 review of mutual recognition schemes. Its findings were presented to Australian Heads of Government and the New Zealand Prime Minister in early February 2009. Within three months of that date, in accordance with the study's terms of reference, a report responding to the Commission's findings is to be presented to Australian Heads of Government and the New Zealand Prime Minister by the Cross-Jurisdictional Review Forum.

1.1 What the Commission has been asked to do

Under the terms of reference, the Commission has been asked to:

- assess the coverage, efficiency and effectiveness of the MRA and TTMRA since their last review in 2003
- consider how administrative provisions can be amended and/or enhanced to support more efficient operation of the MRA and/or TTMRA
- examine whether any components of overseas models of mutual recognition or any other changes might be made to enhance the functioning of the MRA and TTMRA
- explore any possible implications for the operation of the TTMRA arising from participating jurisdictions' bilateral engagement with third countries.

The word 'coverage' in the terms of reference is interpreted by the Commission as including the goods and occupations subject to mutual recognition. But it is also given a broader meaning to indicate the 'scope' of the two schemes — the range of laws, regulations and activities that are within reach of mutual recognition.

[1] Part IV of the MRA provided for the first review of the scheme. Part XII of the TTMRA subsequently established five-yearly reviews of both the MRA and the TTMRA schemes.

'Effectiveness' measures how well the mutual recognition schemes achieve their intended outcome. 'Efficiency', in its broadest sense, refers to how well resources are used to benefit the whole community. Efficiency is affected by how well the MRA and TTMRA are managed, and the degree to which they cause goods and labour to be allocated to uses that generate the greatest net benefit to Australia and New Zealand. Net, rather than gross, benefit is the key indicator of efficiency, because the MRA and TTMRA impose compliance and administration costs that offset the potential efficiency gains generated by the schemes.

Undertaken by the Australian Productivity Commission, this review has been conducted independently of the Australian and New Zealand Governments, in accordance with the *Productivity Commission Act 1998* (Cwlth). Also in keeping with its Act, the Commission has performed this review using open, transparent and public processes, and with overarching concern for the wellbeing of the Australian and New Zealand communities as a whole, rather than just the interests of any particular industry or group.

1.2 This review is timely

Most pieces of legislation reflect the political, economic and social circumstances that existed at the time that they were drafted. For this reason, periodic review of legislation to ensure its relevance is desirable. This is particularly warranted when the environment in which the laws or regulations operate is changing rapidly.

In recent times, reform of the regulatory burdens faced by Australian businesses has gained greater momentum, at Commonwealth and at state and territory level (box 1.1). In particular, there has been rising emphasis on reforms to facilitate the emergence of a so-called 'seamless national economy':

> You know what actually hit me between the eyes, was this single undiluted call from the business community and those in our economic working group saying, 'what we want most of all is a single, seamless national economy'. That is, a single national market. Whether it's in labour, product, carbon, electricity, water. Because the costs of doing business nationally in what is still a relatively small economy by global standards are too great. (Rudd 2008a)
>
> By moving towards a seamless national economy through the reform of business and other regulation, COAG's reforms will make it easier for businesses and workers to operate across State and Territory … borders. These reforms will make life simpler for businesses and consumers, while continuing to provide the necessary protections and access for consumers and the community. (COAG 2008d)

Box 1.1 **Recent business regulation reform in Australia**

In 2005, the Australian Government appointed the Taskforce on Reducing Regulatory Burdens on Business to examine regulatory burdens in the Australian economy and identify practical options for alleviating the compliance burden on business. The focus of that review was on Australian Government regulation, but it identified burdens arising from the overlap of Australian Government regulations with those of other jurisdictions within Australia. The Taskforce handed its report to the Australian Government in January 2006.

Beginning in 2006, Australian states and territories, through the Council of Australian Governments (COAG), have committed to reviewing many regulatory 'hot spots'. This term refers to key areas of regulation where inconsistencies and duplication create the most compliance costs for business.

The list of hot spots identified by COAG has progressively expanded since 2006 and now includes the following areas: rail safety regulation; national trade licensing; payroll tax harmonisation; health workforce; occupational health and safety laws; national trade measurement; chemicals and plastics regulation; development assessment arrangements; building regulations; environmental assessment and approval processes; business name, Australian Business Number and related business registration processes; personal property securities; consumer product safety; standard business reporting; food regulation; a national mine safety framework; electronic conveyancing; upstream petroleum regulation; maritime safety; wine labelling; directors' liability reform; financial services delivery; trustee companies; mortgage credit and advice; margin lending; and non-deposit taking institutions.

In December 2007, COAG formed the Business Regulation and Competition Working Group to accelerate and deliver the regulatory hot spots agenda. Since that time, governments have agreed to specific actions across all areas of the agenda.

Major reforms set in train by COAG under the 'seamless national economy' objective include:

- uniform national legislation on occupational health and safety
- Ministerial Declarations on equivalence between skills-shortage trades
- national licensing of some trades
- national business name and Australian Business Number registration
- national consumer policy framework
- national building code
- national electronic conveyancing system (COAG 2008b).

Some reforms, such as Ministerial Declarations and national licensing of trades, have direct implications for mutual recognition (chapter 5). Others, like the national consumer policy framework, have an indirect bearing (chapter 6).

This review of mutual recognition is timely, given the impetus towards building a seamless national economy. Under the MRA, Australian states and territories mutually recognise compliance with each others' laws for the *sale of goods* and the *registration of occupations*. This allows goods that can be lawfully sold in one jurisdiction to be sold in other jurisdictions without having to satisfy additional requirements. Similarly, people registered to practise an occupation in one jurisdiction are entitled to practise an equivalent occupation in other jurisdictions, after notifying the local occupation-registration body.

The aim of the MRA is, ultimately, to remove regulatory impediments to the mobility of goods and labour around Australia. Such impediments emerge as a result of the costs imposed on people and businesses by the duplication and potential inconsistency created by multiple jurisdictions enacting separate laws and regulations. As long as these impediments remain, a 'patchwork economy', rather than a 'seamless economy', prevails.

The TTMRA extends the principles of mutual recognition to economic relationships between Australian jurisdictions and New Zealand. In that respect also, the timing of this review is appropriate. Governments of Australia and New Zealand are actively pursuing the creation of a single economic market between the two countries, building on the free trading environment fostered by the 1983 Closer Economic Relations Trade Agreement. That agreement removed many of the tariff barriers that existed at the time. The implementation of the TTMRA, in 1998, removed many of the nontariff barriers to the movement of goods, services and people across the Tasman. Nonetheless, some impediments remained, and it is useful to take stock of the progress achieved since 2003 in their removal through mutual recognition. It is also useful to examine the future of the schemes in light of other international regulatory and trade developments that have recently occurred, involving Australia and New Zealand, but also other countries and other trading blocks.

1.3 Other reviews in this area

This review of mutual recognition schemes is the latest in a series of studies the Productivity Commission has recently completed in areas related to the COAG regulatory reform agenda. This series includes:[2]

- potential benefits of the National Reform Agenda (February 2007)
- review of road and rail freight infrastructure pricing (April 2007)
- review of the Australian consumer product safety system (December 2007)
- annual review of regulatory burdens on business: primary sector (December 2007)
- review of Australia's consumer policy framework (April 2008)
- review of chemicals and plastics regulation (July 2008)
- annual review of regulatory burdens on business: manufacturing and distributive trades (August 2008)
- annual review of regulatory burdens on business: upstream petroleum (oil and gas) sector (December 2008)
- performance benchmarking of Australian business regulation: quantity and quality (December 2008)
- performance benchmarking of Australian business regulation: cost of business registrations (December 2008).

Several of these studies cover one or more aspects of mutual recognition.

Outside of the Productivity Commission, mutual recognition has also been the subject of a recent report by the Allen Consulting Group, commissioned by COAG and examining the effects of Ministerial Declarations on the equivalence of some occupations (ACG 2008).

1.4 Conduct of the study

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. The review was also advertised in some major newspapers in both Australia and New Zealand.

[2] These publications are available electronically at www.pc.gov.au/publications.

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.

Roundtable discussions were held with interested parties in Canberra and Wellington to further assist the production of the final report.

A total of 97 submissions were received since this review was announced, from a variety of groups within, and related to, mutual recognition. These groups included industry organisations, unions, professional groups and other government agencies.

Appendix A provides details of the individuals and organisations that participated in the study through submissions, visits and/or appearances at roundtables.

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 this report is structured in the following way:

- The next two chapters set the scene by providing an overview of the history and architecture of the mutual recognition schemes (chapter 2), together with an analysis of their rationale and how this study's terms of reference have been interpreted and applied (chapter 3).
- This is followed, in chapter 4, by an assessment of the economic impact of the schemes, in both the occupations and the goods areas.
- Chapters 5 to 9 evaluate in some detail the operation of the schemes, as they apply in a range of areas pertaining to occupations and goods. Those chapters respond specifically to the study's terms of reference regarding effectiveness, efficiency, coverage and administrative provisions.
  - Because the Commission has interpreted the term 'coverage' as extending to issues of scope, chapters 8 and 9 also contain a discussion of possible extensions to the mutual recognition schemes.
- In chapter 10, the schemes are considered in the wider context of Australia's and New Zealand's growing bilateral engagement with third countries. That chapter also examines features of other international legislative instruments linking Australia and New Zealand, that could serve to reinforce the operation of the schemes.

- The final two chapters discuss practical ways to strengthen the operation of mutual recognition in Australia and New Zealand, including through awareness promotion, better oversight and legislative change.
  - Readers who would like to jump straight to the 'to do' list of legislative, regulatory and administrative changes recommended by this review are directed to chapter 12.
- A series of appendices provides greater detail in some areas — including on overseas models of mutual recognition and types of registration — together with various technical and legal information underpinning the rest of the report.

2 Overview of the mutual recognition schemes

Key points

- The mutual recognition schemes were designed to remove barriers to interjurisdictional flows of goods sold and workers employed in registered occupations.
- Broadly speaking, the schemes mean that goods sold in one jurisdiction may be sold in other jurisdictions without meeting further requirements, and that people registered in occupations in one jurisdiction are entitled to registration in equivalent occupations in other jurisdictions.
- The schemes are not all-encompassing: services are not included; a range of state-based regulations are the subject of exceptions; some national regulations are excluded; and some laws and goods (and one occupation) that otherwise fall within the scope of the schemes are exempted from their effect.
- Monitoring of the schemes and efforts to ensure compliance appear to be weak.
- Previous reviews concluded that the schemes were working reasonably well, but identified a range of issues preventing realisation of their full benefits.

2.1 Background to mutual recognition

During the late 1980s, microeconomic reform emerged as a major element of Australia's economic strategy. Policy initiatives were introduced in a wide range of areas, with the goal of improving the efficiency and competitiveness of Australian industry. The Mutual Recognition Agreement (MRA) emerged from one of these initiatives.

In a speech to the Press Club in July 1990, Prime Minister R.J. Hawke drew attention to the 'burden of different rules and regulations and requirements' between Australian states and territories (Hawke 1990, p. 2). Contrary to the intention of the Australian Constitution to create a seamless national economy through the removal of barriers to trade between states, non-tariff barriers in the form of regulatory variation had given rise to eight distinct markets.

Among examples of impediments to the mobility of goods and services were: requirements for manufacturers to use different packaging for goods sold in different states; and the need for professionals and tradespeople to obtain a licence if they sought to work outside their home state. Prime Minister Hawke also made reference to the fact that, in 1992 (with the creation of the European Union), there would be fewer barriers to trade between members of the European Economic Community than between Australian states.

Prime Minister Hawke emphasised the need for better cooperation between Australian governments. Experience suggested this would be critical to effective reform. As the Industries Assistance Commission observed:

> Existing mechanisms to promote cooperation between governments have met with only limited success. Australia's poorly coordinated rail systems and the inordinate delays in progress towards uniformity in state regulations in areas such as road transport and food are testimony to that. (IAC 1989, p. 5)

Prime Minister Hawke set in train a number of Special Premiers' Conferences to advance the reform agenda. In August 1990, when senior officials first met to give substance to the policy directions flagged in July of that year, mutual recognition was put on the table (Sturgess 1994). Separately, the Industry Commission also proposed mutual recognition as a solution to the issues raised by Prime Minister Hawke (IC 1990, pp. 84–6).

The attraction of mutual recognition lay in the fact that it allowed 'all regulations throughout Australia to coexist, while reducing the current adverse impacts of those regulatory differences' (CRR 1991, p. 2). The time consuming and difficult task of achieving uniform standards was avoided.

The October 1990 Special Premiers' Conference endorsed the mutual recognition concept and, as a result, a Commonwealth–State Committee on Regulatory Reform (the CRR), chaired by New South Wales, was formed to design a mutual recognition scheme for Australia.

A framework for the scheme was approved at a Special Premiers' Conference in July 1991 and, following consultation on a discussion paper (CRR 1991), final agreement was reached at a Special Premiers' Conference in November 1991. On 11 May 1992, the Commonwealth, state and territory governments signed the *Intergovernmental Agreement on Mutual Recognition* (MRA), committing the parties to:

> … establish a scheme for implementation of mutual recognition principles for goods and occupations for the purpose of promoting the goal of freedom of movement of goods and service providers in a national market in Australia. (MRA, p. 1)

The scheme took effect, following the passage of legislation, from 1 March 1993.

It is noteworthy that the MRA is silent on aspects of trade in services that do not involve occupational registration. The architects of the MRA considered including services, but excluded them on the grounds that 'a large number [were] already regulated at Commonwealth level or under uniformity agreements. Examples include corporations law, banking and finance, nonbank financial institutions, insurance, securities, telecommunications and transport. State differences were most evident in the regulation of labour or occupations — hence, the decision to focus on mutual recognition of occupations' (Wilkins 1995, p. 4). However, interstate variations in regulations governing the delivery of services remain an impediment to cross-border and short-term services provision — an issue taken up in chapter 9.

The MRA committed the parties to consideration of a similar scheme with New Zealand.

Australia and New Zealand have a long history of initiatives to reduce barriers to trade, beginning with the first preferential trade agreement in 1922. The Australia–New Zealand Closer Economic Relations Trade Agreement (CER), which took effect in 1983, committed the countries to working towards a comprehensive free trade area. By the mid-1990s, tariff barriers had been virtually eliminated and many non-tariff barriers had been reduced, but 'in some areas, significant regulatory impediments, usually in the form of product standards, conformance assessment requirements for mandatory standards or occupational registration remain' (COAG and NZ Government 1995, p. 17). In April 1995, the Council of Australian Governments (COAG) and the New Zealand Government released a discussion paper on a trans-Tasman mutual recognition scheme to address these regulatory impediments. Following negotiations, an *Intergovernmental Arrangement Relating to Trans-Tasman Mutual Recognition* (TTMRA) was signed in 1996 and came into force on 1 May 1998.

The TTMRA is closely modelled on the MRA and also excludes services. While the *1988 CER Protocol on Trade in Services* led to free trade in many services, a few exemptions remain. Some of these exempted services — for example, postal services, coastal shipping and third party insurance in Australia — are under consideration for inclusion in some form (Crean and Goff 2008). While the *Protocol* enables service providers from New Zealand to supply most services in Australia (and vice versa) free of tariffs and quotas, regulations covering the manner of service provision act as a continuing impediment to trade in services. This issue is considered in more detail in chapter 9.

In addition to committing signatories to enacting mutual recognition legislation, the MRA and the TTMRA play an important role in specifying the mechanisms for resolution of disputes around the requirements that should be met by goods being sold or for registration in an occupation.

2.2 Legislative underpinnings

Mutual recognition was implemented in Australia using an unusual approach:

> The states and territories chose to implement the mutual recognition scheme through national scheme legislation, either referring their power to enact mutual recognition legislation to the Commonwealth Government, or adopting the Commonwealth legislation (pursuant to s. 51(xxxvii) of the Commonwealth Constitution). (CRR 1998, s. 1.2)

The Commonwealth passed the *Mutual Recognition Act 1992* (Cwlth) (MR Act) in December 1992. The states and territories began implementing the scheme in late 1992, with Western Australia the last jurisdiction to join, in late 1995.

The states and territories only agreed to the implementation of the MR Act. Amendment of this legislation requires the agreement of all jurisdictions participating in the scheme. The process of agreement, however, differs between jurisdictions. The territories and three states have referred the power to amend the legislation to the Commonwealth, as long as those states and territories approve the changes. The other three states have reserved the amendment power and would need to pass any amendments to the MR Act through their parliaments.

Legislation to give effect to the TTMRA was passed by Australia and New Zealand in 1997. The Australian states and territories subsequently passed legislation adopting the Commonwealth Act or referring power to the Commonwealth to enact the trans-Tasman mutual recognition legislation, with Western Australia the last state to join the scheme in 2007. In the case of the TTMRA, only the territories have referred the power to amend the legislation to the Commonwealth. All of the state jurisdictions require amendments to be passed through their parliaments.

The MRA and TTMRA legislation generally override any other state, territory or national legislation in both Australia and New Zealand. Section 6(2) of the MR Act states that the Act 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 Act. Section 5 of the *Trans-Tasman Mutual Recognition Act 1997* (Cwlth) (TTMR Act (Cwlth)) provides that the Act has effect, despite anything in any other Commonwealth law enacted before the commencement of the Act. It also provides that any Commonwealth law made after the commencement of the Act is to be construed as having effect subject to the Act, except where that law expressly overrides the Act. Section 5 of the *Trans-Tasman Mutual Recognition Act 1997* (NZ) (TTMR Act (NZ)) provides that every law of New Zealand must, unless otherwise expressly provided, be read subject to the Act. 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 MR Act and TTMR Acts. However, the practical effect of this provision may be minimal, as most local governments do not regulate the 'sale' or 'registration' activities that are covered by current mutual recognition requirements.

2.3 Mutual recognition principles and processes

The architects of the MRA opted for a 'broad-brush approach rather than try to recommend to the Premiers that they should begin a comprehensive review of each piece of legislation and regulation' (Sturgess 1994, p. 17). They sought a scheme that required minimal bureaucratic oversight and infrequent amendment. These goals were achieved through two models — one for goods and one for occupations.

The principle for goods

In the case of goods, the principle of mutual recognition is that goods produced in or imported into one jurisdiction, and that may lawfully be sold in that jurisdiction, may be sold in a second jurisdiction without meeting the requirements of that jurisdiction with respect to:

- the goods themselves (for example, their production, quality or composition)
- the way goods are presented (for example, their packaging, labelling or age)
- inspection of goods
- the location of production of goods
- any other requirement relating to sale that would prevent or restrict, or would have the effect of preventing or restricting, the sale of goods (MR Act, s. 10).

On the last point, the architects of the Australian mutual recognition model hoped that s. 10(e) would act to remove 'indirect barriers to the sale of goods, that is, all those regulations relating to "possession" or "use" of goods, which do not directly prohibit sale, but can have the effect of doing so' (Wilkins 1995, p. 5). Wilkins, who was involved in developing the model, commented:

> I am hopeful that [s. 10(e)] will be interpreted by the Courts in the spirit of the legislation, to pick up a broad range of indirect barriers to interstate trade. Section 10(e) is something of a 'wild card' — it gives some uncertainty but also some scope for a jurisprudence to build up, not unlike the law generated under the Treaty of Rome. (Wilkins 1995, pp. 5–6)

The effectiveness of this section is discussed in more detail in chapter 8.

Operation of the mutual recognition principle removes the need for any authorisation process to sell goods in any other jurisdiction. Moreover, a producer or importer in one jurisdiction who is prosecuted for not meeting the standards of another jurisdiction can use the mutual recognition principle as a defence.

As a safeguard to consumers, a good that does not comply with the standards of a jurisdiction in which it is offered for sale must be labelled with state or country of origin information. This requirement was added in response to consumer concerns that a jurisdiction might opt for unacceptably low standards to attract business investment. It was anticipated that the potential for a negative 'brand name' to develop as a result of labelling would deter a jurisdiction from going down this path.

A few classes of goods and laws are exempt from mutual recognition. They are described in section 2.4 below.

The principle for occupations

Initially, the architects of mutual recognition intended that the same mutual recognition principle would apply to goods and occupations. In other words, anyone registered in an occupation in one jurisdiction would be permitted to carry out that occupation in another jurisdiction.

Two factors caused the emergence of a different principle. First, the scope of activities registered in some occupations, that is, the tasks that can be undertaken, varies between jurisdictions. A carpenter's licence in Victoria, for example, covers carpentry and joinery activities; separate licences are required for each set of activities in New South Wales (MR Act *Ministerial Declaration 9/12/2007*). Second, regulatory authorities manage the conduct of many occupations through codes of conduct and disciplinary procedures. To monitor provision of labour services effectively, these authorities need to know who is practising in their jurisdictions.

In the case of occupations, therefore, the principle of mutual recognition means that *registration* in an occupation in one jurisdiction is sufficient grounds for registration in the *equivalent* occupation in another jurisdiction. Anyone in a registered occupation wishing to work in a different jurisdiction needs to notify the relevant registration authority in that jurisdiction (with the exception of occupations for which registration is nationally recognised) and, with that notification, is *deemed* to be registered. When working in the second jurisdiction, the person has to comply with all regulations in that jurisdiction relating to how the occupation is conducted, for example, with respect to insurance, trust funds and registration fees.

Registration

The term registration covers a broad range of employment authorisations. Under the MR Act (and its trans-Tasman counterpart), it is defined to include:

> … the 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. (MR Act, s. 4.1)

A key element of this definition is that the authorisation is *legislated*. A discussion of the activities covered by registration is presented in chapter 5.

A list of occupations registered in Australian states and territories and New Zealand is provided at appendix F. While the MRA covers occupations registered in Australian jurisdictions, it only has practical effect where individuals must register in each jurisdiction in which they work. This is not the case for occupations that are licensed nationally; for example, auditors and commercial pilots in Australia. Nor is this the case for occupations in which licences granted by a state or territory are recognised nationally — for example, crane or hoist operator licences and some maritime licences. Of course, where New Zealand licenses these occupations, the TTMRA applies.

Equivalence

Registered occupations are equivalent between jurisdictions if 'the activities authorised to be carried out under each registration are substantially the same … conditions may be imposed on registration … so as to achieve equivalence' (for example, MR Act, s. 29). Equivalence is discussed in more detail in chapter 5.

Deemed registration

To apply for registration in a second jurisdiction, an individual has to forward details of his or her registration in the home jurisdiction to the registration authority in the second jurisdiction and give consent to that authority requesting information relevant to his or her application from authorities of any jurisdiction.

So as not to impede mobility, an individual who applies for registration under mutual recognition is immediately entitled to work in the second jurisdiction. That is, he or she has deemed registration. Requirements of the jurisdiction in areas like insurance, fidelity funds and trust accounts must be met by deemed registrants.

Upon notification, the registration authority has one month to either grant or refuse the application, or it can postpone a decision for up to six months if: the information

provided in support of the application is incomplete or inaccurate; the circumstances of the applicant change materially; or the occupation for which registration is sought is not equivalent to the occupation carried out in the home jurisdiction. An applicant is entitled to substantive registration if the registration authority does not respond within a month.

2.4 Scope and coverage of the schemes

Although the cultures, economies and political institutions of the Australian states and territories and New Zealand are reasonably similar, the mutual recognition principles are not all-encompassing. As noted above, the MRA and TTMRA are silent on services. In terms of goods and occupations, state-based regulations governing how goods are sold or occupations are practised within jurisdictions are *exceptions* to the mutual recognition principles.[1] In addition, a number of national regulations, such as in the areas of taxes and customs controls, are *excluded* from the TTMRA. These exceptions and exclusions limit the scope of the mutual recognition schemes. For various reasons, at the time the schemes came into force, it was felt that some laws and goods (and one occupation) that did fall within the scope of the mutual recognition principles should be *exempted* from their effect, permanently or temporarily. These exemptions define the current coverage of the schemes. Figure 2.1 summarises the 'architecture' of the schemes.

Discussion of exceptions, exclusions and exemptions follows, with details summarised in figures 2.2 and 2.3.

Exceptions

Exceptions to the mutual recognition schemes reflect jurisdictions' desire to retain the right to regulate aspects of the sale of goods to protect the environment and the health and safety of residents.

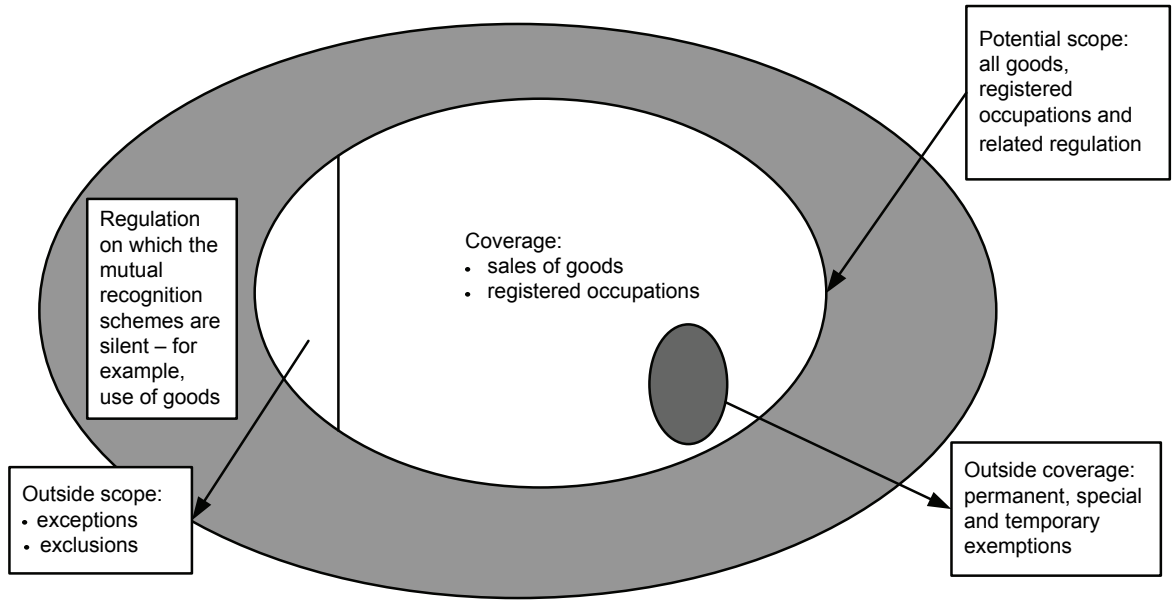
Exceptions relating to goods are identical under the MR Act and TTMR Acts and cover laws that (MR Act, s. 11):

- regulate the manner of sale of goods or the manner in which sellers conduct or are required to conduct their business in the jurisdiction (and include laws, for example, relating to the persons to whom goods may or may not be sold and the registration of sellers)

1 'State', as used in this context, refers to Australian states and territories and New Zealand.

- relate to the transportation, storage or handling of goods, provided those laws apply equally to goods produced in or imported from other Australian jurisdictions and New Zealand and are directed at health and safety concerns
- relate to the inspection of goods, provided: inspection is not a prerequisite for sale; and the laws apply equally to goods produced in, or imported from, other Australian jurisdictions and New Zealand, and are directed at health and safety concerns.

Figure 2.1 **Architecture of the mutual recognition schemes**



In terms of occupations, laws that regulate the manner of 'carrying on' an occupation (for example, with respect to insurance requirements, codes of conduct and disciplinary procedures) are exceptions to the MR Act and TTMR Acts, provided they:

- apply equally to all people carrying on, or seeking to carry on, the occupation
- 'are not based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation' (TTMR Act (Cwlth), s. 16(2)).

Exceptions are discussed in more detail in chapters 8 (goods) and 9 (occupations).

Exclusions

Schedule 2 of the TTMR Act (Cwlth) (and schedule 1 of the TTMR Act (NZ)) details those laws excluded from the scheme. They fall within the categories of

customs controls and tariffs, intellectual property, other international obligations, and taxation and business franchises.

The rationale for exclusions appears clear. Flows of goods and labour would be disrupted, and the sovereignty of Australia and New Zealand would be compromised, if the areas under exclusion were subject to mutual recognition. If taxes were not excluded, for example, Australian tax rates might have to be mutually recognised along with the goods to which they apply — New Zealand consumers could then face different taxes on the same good, depending on whether it originated in Australia or New Zealand.

Exclusions are examined in greater detail in chapter 8.

Exemptions

Three classes of exemptions exist in the schemes — permanent and temporary exemptions (found in both the MRA and TTMRA), and special exemptions (TTMRA only). The composition of permanent and temporary exemptions differs between the MRA and TTMRA.

Permanent exemptions

Parties to the MRA and TTMRA permanently exempted a range of goods and laws from the schemes on the grounds that mutual recognition would inappropriately override jurisdictional sovereignty. Firearms, fireworks, gaming machines and pornographic material are exempted from the MRA. If these goods had not been exempted, for example, Victoria could ban the sale of fireworks, but application of the principle of mutual recognition would mean that, if they were able to be produced (or imported into) and sold in another jurisdiction, they could also be sold in Victoria — thus, the ban would be legally unenforceable.

Laws outside the coverage of the schemes relate to: quarantine; endangered species; ozone protection; weapons; indecent material; beverage containers in South Australia; and Tasmanian laws on the possession, sale or capture of abalone, crayfish or scallops of a certain minimum size. In addition, under the TTMRA, laws relating to fireworks, agricultural and veterinary chemicals, certain risk-categorised food and gaming machines are permanently exempted.

On the occupations side, a permanent exemption applies to medical practitioners.
Permanent exemptions from the mutual recognition schemes are examined in chapters 8 (for goods) and 9 (for medical practitioners).

Figure 2.2 **Scope and coverage of the MRA**

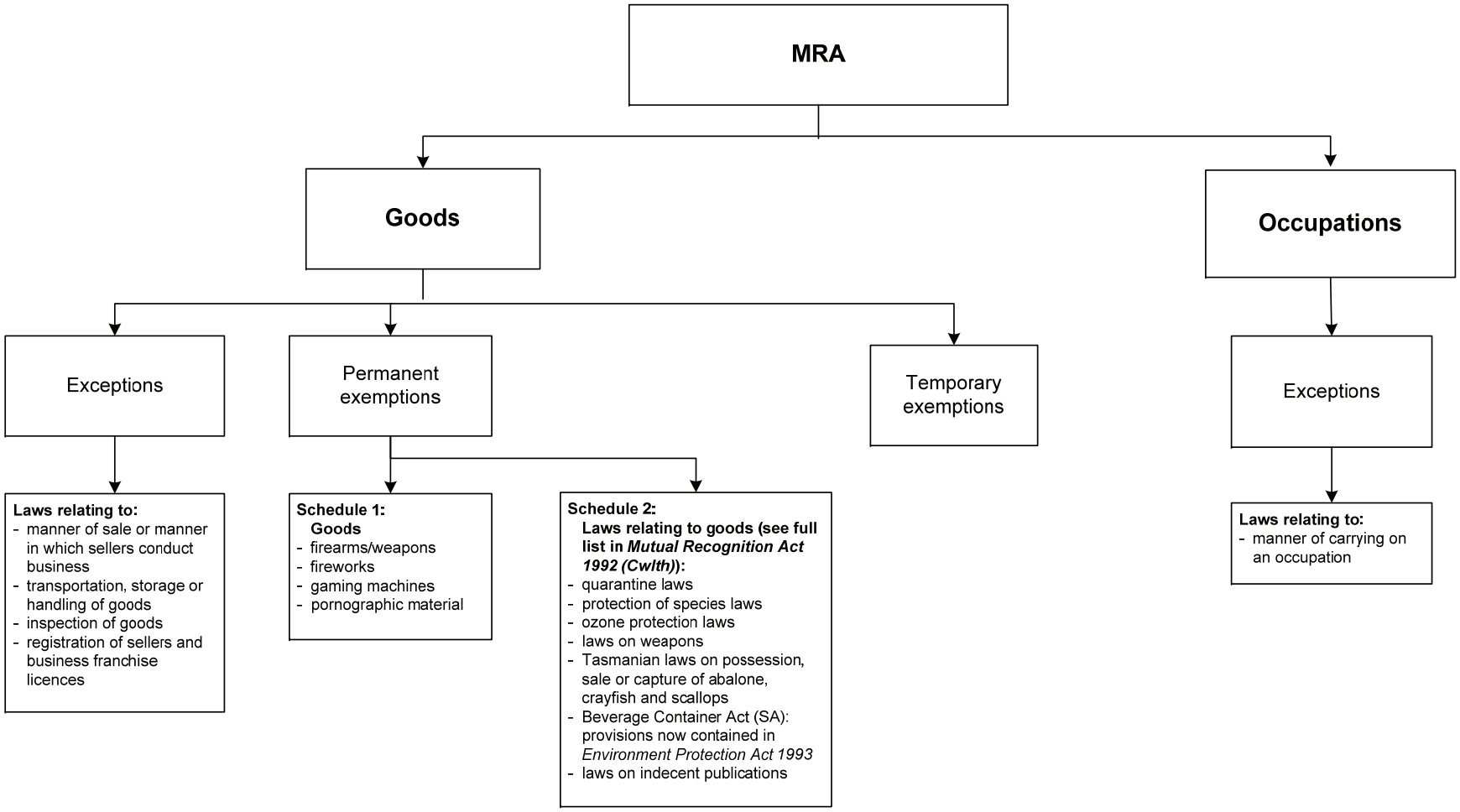
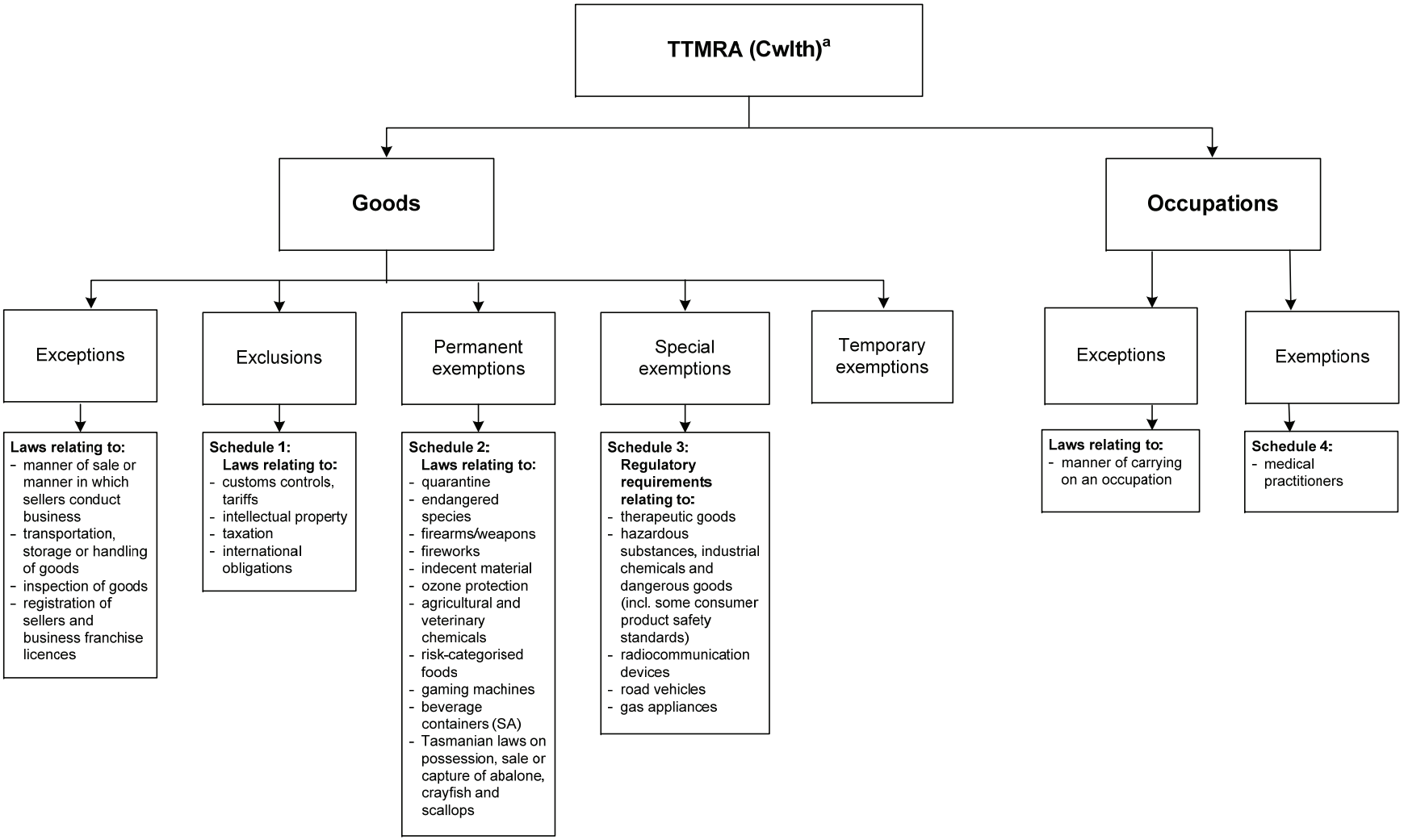


Figure 2.3 **Scope and coverage of the TTMRA**



a The permanent exemptions and exclusions are slightly different in the TTMRA (NZ)

Temporary exemptions

To take account of concerns that goods might pose a risk to consumers or the environment, provision for a jurisdiction to temporarily exempt a good was included in the schemes. A temporary exemption permits a jurisdiction to ban the sale of a good, without the ban being rendered ineffective because the good remains on sale in other jurisdictions in which it is produced or into which it is imported.

The MRA and the TTMRA set out the processes to be followed with respect to temporary exemptions. The jurisdiction that creates a temporary exemption must refer it to the Ministerial Council responsible for goods of that type. The Ministerial Council is then required to determine whether a standard should apply and, if so, what the standard should be. Agreement from at least two-thirds of the members of a council (excluding members who are not party to the relevant scheme) is required for a standard to be accepted. It is then applicable in all jurisdictions.

A temporary exemption lasts for 12 months. Under the TTMR Acts, an additional 12 month period is allowed for implementation of the decision of a Ministerial Council.

Temporary exemptions are discussed in chapter 6.

Special exemptions

At the time the TTMRA came into force, there were five categories of goods for which Australian and New Zealand regulations differed significantly, but for which mutual recognition or harmonisation of regulations seemed attainable in due course. Special exemptions apply for these goods (therapeutic goods; hazardous substances, industrial chemicals and dangerous goods; electromagnetic compatibility and radiocommunications; road vehicles; and gas appliances).

In 1999, the hazardous substances, industrial chemicals and dangerous goods special exemption was amended to include a range of consumer products.

Cooperation programs involving Australian and New Zealand regulatory agencies were established to determine whether: (i) mutual recognition was appropriate for goods under special exemption; (ii) relevant regulations could be harmonised; or (iii) the goods should be permanently exempted from the TTMRA. These programs remain active, but consumer product safety standards, except those relating to children's car restraints, have been harmonised or mutually recognised and the

relevant goods have been removed from the special exemption for hazardous substances, industrial chemicals and dangerous goods.

A special exemption applies for 12 months, but can be rolled over for another 12 months with the agreement of two-thirds of jurisdictions participating in the TTMRA.

Special exemptions are considered in chapter 7.

2.5 Dispute resolution processes

In the case of goods, as noted above, a person prosecuted for an offence relating to the sale of a good can use as their defence that the mutual recognition principle applies.

No specific appeals process for goods producers, distributors or importers is designated in the mutual recognition legislation. If a retailer refuses to stock a product on the grounds that it does not meet the standards of the jurisdiction in which it is offered for sale, the supplier of the good has no avenue to appeal or challenge that decision, except through the courts.

In the case of occupations, any person whose interests are affected by a decision made by a registration authority can appeal to the Administrative Appeals Tribunal (AAT) or Trans-Tasman Occupations Tribunal (TTOT) for a review of that decision. The Tribunals can make an order that a person registered in an occupation in one jurisdiction is, or is not, entitled to registration in that occupation in another jurisdiction (MR Act, s. 31(1)).

Declarations on equivalence of occupations

Declarations by tribunals

After reviewing a decision made by a registration authority, the AAT or TTOT can make a declaration that occupations in two jurisdictions are not equivalent. In making a declaration, a tribunal has to be satisfied that either:

- the activities covered by registration in the two jurisdictions are not substantially the same (even with the imposition of conditions), or
- irrespective of whether or not the activities are substantially the same, the standards required for registration in the first jurisdiction would expose people in

the second jurisdiction to a real threat to their health or safety (MR Act, s. 31(2)(b)(ii)).

A declaration about the standards applying in a jurisdiction must be referred to a Ministerial Council by the jurisdiction in which the declaration applies. The referral process is described below.

Ministerial Declarations

Declarations on the equivalence of activities covered by registration can also be made by Ministers from two or more jurisdictions, by notice in the Gazette. A recent COAG initiative to achieve full and effective mutual recognition for occupations requiring vocational training has utilised this provision of the MR Act. This initiative is discussed in more detail in chapter 5.

Referrals of concerns about standards

In addition to describing the process for resolution of standards issues raised by the temporary exemption of a good, the MRA and the TTMRA outline a referral process applicable to both goods and occupations. Any jurisdiction can refer a question about the standard applying in another jurisdiction to a good or the practice of an occupation to the Ministerial Council responsible for that good or occupation.

A council has 12 months to examine the standard that should apply. A standard can be defined with the agreement of at least two-thirds of the members of a council (excluding those not party to the scheme under which a referral is sought), and is then applicable in all participating jurisdictions.

The good or occupation in question remains subject to mutual recognition while the council deliberates on the appropriate standard.

A summary of the processes through which disputes about differences in the activities covered by, or standards required for, registration is presented at figure 2.4.

2.6 Monitoring and compliance systems

Under the MRA, participating jurisdictions agreed that Heads of Government would monitor the effectiveness of the scheme and make resolutions on its continued operation. As part of this process, Ministerial Councils can be asked to report on the effectiveness of the scheme. The MRA also commits Heads of Governments to

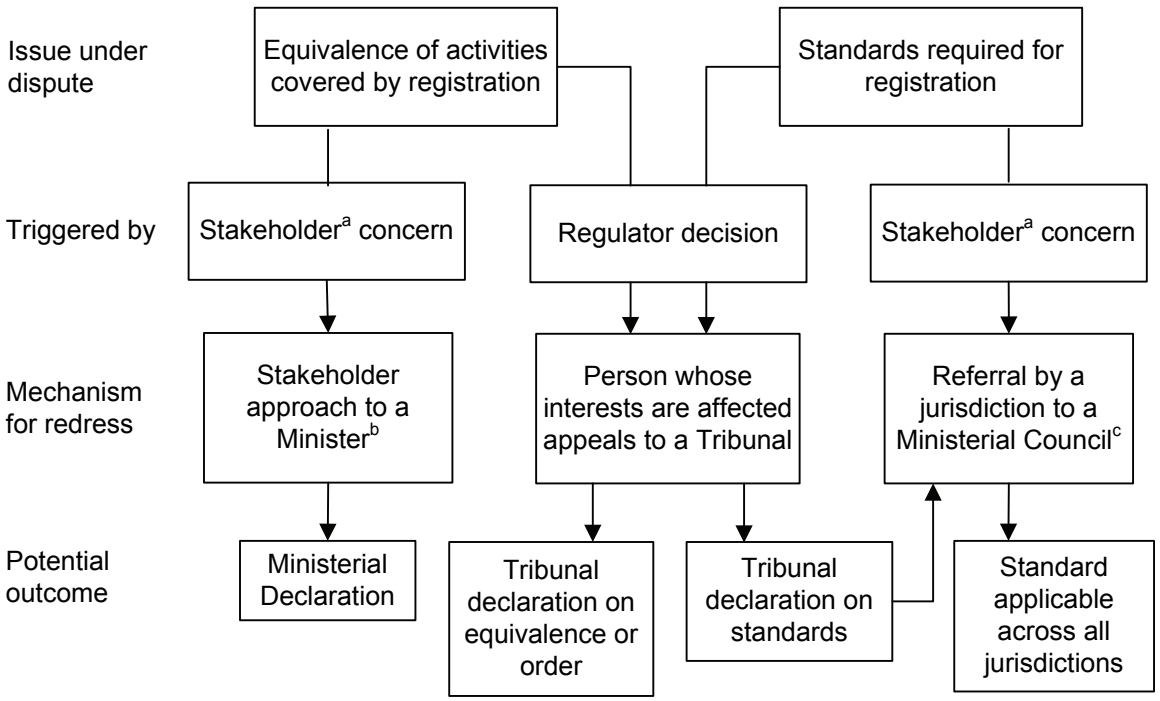
requesting the Ministerial Council on Vocational Education, Employment and Training (and its successors):

> … to monitor the overall implementation of the scheme so far as it relates to occupations and report to Heads of Government on its effectiveness. (MRA, para. 7.1.4)

Paragraphs 12.2.1 and 12.2.2 of the TTMRA require Heads of Government of the participating parties to monitor the effectiveness of the TTMRA and make resolutions on the future operation of the Arrangement. They also enable Ministerial Councils to report on the effectiveness of the Arrangement in their particular area of responsibility and of the Arrangement overall.

It is unclear whether Ministerial Councils have undertaken any monitoring work.

Figure 2.4 **Summary of dispute resolution processes**
Occupations



[a] Stakeholders might include regulators, individuals or any other interested party. [b] Stakeholders could approach any Minister and, in theory, any Minister could negotiate a declaration with a Minister in another jurisdiction. [c] Referrals are made to the Ministerial Council responsible for the occupation in question.

The Cross-Jurisdictional Review Forum

In December 2002, COAG and New Zealand agreed to a two-stage review of the mutual recognition schemes (COAG 2002). Stage one involved a Productivity

Commission study of the benefits of the schemes and scope for improvements (PC 2003); and stage two, a report to COAG on the Commission's findings by the Committee on Regulatory Reform (CRR). In an interim report to COAG, the CRR recommended the establishment of a Cross-Jurisdictional Review Forum (CJRF), comprising representatives from all jurisdictions party to the MRA and TTMRA, to provide advice to COAG on the Commission's findings. One of the CJRF's recommendations was that it be given an ongoing role:

> … in receiving and sharing information and promoting broader policy discussion on areas that are considered to be limiting the effectiveness of existing mutual recognition arrangements, including noncompliance, and potential areas of expanding the scope of the arrangements. In addition, a CJR Forum member from each jurisdiction will be the point of contact for mutual recognition matters in their jurisdictions. (CJRF 2004, p. 7)

This role is reflected in the proposed terms of reference for the Forum (CJRF 2004, appendix E). It is unclear whether these terms of reference were accepted.

In response to a Productivity Commission finding that 'responsibilities for oversight, monitoring and enforcement should be clarified and restated' (PC 2003, p. 104), the CJRF provided information on line agencies responsible for mutual recognition in each jurisdiction (CJRF 2004, appendix G). It is unclear how active these agencies are with respect to mutual recognition. A search on the term 'mutual recognition', for example, on the websites of a selection of these agencies — the Departments of Premier and Cabinet in New South Wales, South Australia and Western Australia — and the ACT government site, in early October 2008, returned no matches.

2.7 Recent developments

Despite initiatives like the MRA and microeconomic reform, over the past two decades 'Australia has experienced a dramatic rise in the volume and reach of regulation, in response to a variety of social, environmental and economic issues' (Regulation Taskforce 2006, p. i). A broad range of reforms has been initiated by COAG since early 2006 to reduce the costs of Australia's regulatory burden and promote greater integration. More recently, Prime Minister Rudd expressed strong support for the concept of a seamless national economy — 'a single national regulatory framework across all markets' (Rudd 2008b).

Among the COAG reforms commenced since early 2006 have been initiatives to achieve:

- 'the effective implementation of full mutual recognition of skills qualifications across Australia' (COAG 2006a, p. 1)
- national accreditation and registration of health professionals (COAG 2008c)

- a national licensing system for specified occupations (primarily those requiring vocational education or training) (COAG 2008d) — with an intergovernmental agreement due with COAG in early 2009 (Licensing Line News 2008)
- regulatory reform in a further 25 areas (COAG 2008d), including consumer product safety, food regulation and business name and related business registration processes.

When COAG met on 29 November 2008, the Australian Government committed $550 million over five years to support the implementation of this reform agenda (COAG 2008f).

The implications of these reforms for the mutual recognition schemes are drawn out as appropriate in the rest of the report.

2.8 Previous reviews

Part IV of the MRA provides for the first review of the scheme, which was carried out by the CRR in 1998. Part XII of the TTMRA subsequently establishes five-yearly reviews of both the MRA and the TTMRA schemes. As mentioned above, the Productivity Commission reviewed the two schemes in 2003 (PC 2003). Two other reviews of the MRA have been conducted outside the formal review process (Government of Western Australia 1997; ORR 1997).

The Mutual Recognition Agreement

In early 1997, the Office of Regulation Review published a preliminary assessment of the impact of the MRA. 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).

Western Australia reviewed the operation of the MRA in 1997 to determine whether its adoption of the Commonwealth Act should be continued. Conclusions from the review included that: a lack of quantitative data hampered analysis of the impact of the MRA; qualitative evidence supported the notion of positive effects on employment mobility, the creation of national goods markets and the elimination of costs for businesses; and mutual recognition had been a stimulus for the creation of national standards for goods and occupations. The review concluded that it was in Western Australia's interest to remain part of the mutual recognition scheme (Government of Western Australia 1997).

A review by the CRR in 1998 (CRR 1998) 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. Most related to either a lack of national consistency of regulations and standards, or the scope for expanding mutual recognition.

2003 review of the MRA and TTMRA

In 2003, the Productivity Commission concluded that a lack of data and problems in disentangling the effect of mutual recognition from other factors complicated assessment of the effectiveness of the MRA and TTMRA. However, the Commission concluded, in part based on discussions with interested parties, that both schemes had contributed to their objectives.

The Commission recommended a number of changes to the operation, coverage and scope of the schemes. Among suggested changes were initiatives to improve: awareness; mobility of people in registered occupations; and monitoring and enforcement of the schemes.

3 Rationale for the schemes and approaches to their assessment

Key points

- The main rationale for the introduction of the MRA and TTMRA was to remove barriers to goods and labour mobility caused by cross-border differences in regulations. Removal of these impediments was expected to lead to a wide range of benefits, including greater consumer choice, lower business costs, and more efficient regulation.
- The first-round benefits of mutual recognition come from the initial reduction in firms' compliance costs and workers' accreditation expenses, and the increased consumption, output and employment thus promoted. In time, a range of other benefits may emerge, such as from increased 'regulatory competition' between jurisdictions.
- There are also costs associated with mutual recognition. For example:
  - some parties may be adversely affected (such as less efficient firms because of increased competition from other jurisdictions)
  - jurisdictions will have less scope to tailor regulations to reflect local conditions and preferences, standards might be undermined by 'jurisdictional shopping and hopping', joint decision-making procedures may make it slower and more difficult to implement regulatory reforms, and there could be increased government expenditure to administer mutual recognition arrangements.
- The Commission has been asked to assess the mutual recognition schemes for their coverage, efficiency and effectiveness. These terms are interpreted as follows:
  - coverage refers to which goods and occupations are subject to the schemes, as well as the nature of the regulations covered
  - effectiveness measures how well the mutual recognition schemes achieve their stated objectives
  - efficiency refers to how well resources are used to benefit community wellbeing, which includes the extent to which outputs are produced at the least possible cost.
- Key issues for this study are whether the mutual recognition schemes generate a net benefit for the community, and what reforms could make the net benefit larger.

This chapter provides a foundation for the analysis in subsequent chapters by outlining the rationale for the Mutual Recognition Agreement (MRA) and

Trans-Tasman Mutual Recognition Arrangement (TTMRA), and how the Commission has interpreted the assessment criteria in the terms of reference.

3.1 Rationale for the schemes

While similar in many respects, regulations in Australia and New Zealand often differ. Regulations also differ between jurisdictions within Australia, for historical reasons and because individual states (and territories) have the power under the Australian Constitution to regulate many areas independently.[1] The main rationale for introducing the MRA and TTMRA was to remove the barriers that such regulatory differences create for goods and labour mobility:

> The principal aim of mutual recognition [within Australia] is to remove artificial barriers to interstate trade in goods and the mobility of labour caused by regulatory differences among Australian states and territories. (Free, R. (Minister for Science and Technology) 1992, Second Reading Speech, Mutual Recognition Bill, Australian House of Representatives, Hansard, 3 November, p. 2432)
>
> The principal aim of mutual recognition [between Australia and New Zealand] is to remove impediments to trans-Tasman trade in goods and the mobility of labour caused by regulatory differences among Australian jurisdictions and New Zealand. (McGauran, P. (Minister for Science and Technology) 1996, Second Reading Speech, Trans-Tasman Mutual Recognition Bill, Australian House of Representatives, Hansard, 4 December, p. 7624)
>
> [The TTMRA] provides a simple, low-cost and low-maintenance mechanism for overcoming unnecessary regulatory impediments to trade in goods and the movement of skilled practitioners between Australia and New Zealand. (MED 2007)

Regulatory differences have the potential to discourage goods and labour mobility by burdening firms and individuals with regulatory duplication and inconsistency when they venture beyond their home jurisdiction. The cost implications of regulatory differences, and their economic implications, have been extensively studied in the context of non-tariff barriers to international trade in goods. Such barriers, which are analogous to the barriers created by those interjurisdictional differences targeted by mutual recognition, have been shown to reduce the gains from trade between countries and, hence, the welfare of those countries' inhabitants (box 3.1).

[1] The territories' authority to legislate was granted by the Commonwealth under its constitutional powers.

Box 3.1 **Economic effects of reducing non-tariff barriers to trade in goods**

Trade in goods between different countries or jurisdictions can face both *tariff* and *non-tariff* barriers. Tariff barriers generally take the form of ad valorem or specific (that is, lump sum) taxes on goods crossing borders. Non-tariff barriers can be in the form of limits, or 'quotas', on the quantity of imports allowed into a country. They can also be in the form of national or local regulations acting as 'behind-the-border' barriers. International trade negotiations taking place since World War II under the auspices of the General Agreement on Tariffs and Trade and the World Trade Organisation have achieved substantial reductions in tariff barriers to trade between countries.

Similar progress has not occurred with respect to 'behind-the-border' barriers. These barriers comprise a range of technical, regulatory and administrative requirements which, singly or in combination, can serve to increase the price of imported goods. Non-tariff barriers can arise from regulation covering: sanitary and phytosanitary restrictions; testing and certification standards; labelling and packaging requirements; and food additive rules. Because they can impact disproportionately on local producers and foreign firms, these regulations can, at times, very effectively insulate domestic markets from foreign competition. While this is not the purpose of most regulation, the potential exists for disguised protection measures.

Given the diversity of non-tariff barriers, their measurement is difficult. A number of methods have been devised, such as counts of barriers, restrictiveness indexes, and analysis of international trade patterns or price gaps. Relying on the last approach, Bradford (2006) calculated that non-tariff barriers on imports of food for final consumption are high in most OECD countries. In the case of Australia, he estimated that such barriers added 20 per cent on average to the price of imported food, compared with 4 per cent on average for tariff barriers. Indeed, Bradford found that, along with Japan, Australia is the major OECD country where non-tariff barriers on final food imports are highest in proportion to total protection. He attributed these relatively high non-tariff barriers to 'overly strict quarantine laws'.

By introducing a wedge between lower world prices and higher domestic prices, non-tariff barriers have a detrimental effect on output, consumption and welfare, in both the protected country and its trade partners. Bradford estimated that multilateral removal of all non-tariff barriers by the eight major OECD countries he modelled would increase global GDP by 0.4 percentage points, or US$90 billion in 1997 values. According to his modelling, Australia's GDP would rise by 0.06 percentage points if it unilaterally removed its non-tariff barriers on final food imports, and by 0.6 percentage points in the event of a multilateral removal of those barriers.

Source: Bradford (2006).

Governments in Australia and New Zealand concluded that the additional burden created by regulatory differences between and within their countries was largely unnecessary for controlling what goods could be sold and who could practise an occupation. This was because each jurisdiction's regulations generally met

community expectations, and those expectations did not differ markedly across the jurisdictions. Thus, the governments were prepared to mutually recognise compliance with each others' laws:

> The underlying premise for mutual recognition [within Australia] is that the existing regulatory arrangements of each state or territory generally provide a satisfactory set of standards. Thus, on implementation of mutual recognition, no jurisdiction will be inundated with products that are inherently dangerous, unsafe or unhealthy, nor will there be an influx of inadequately qualified practitioners. (Free, R. (Minister for Science and Technology) 1992, Second Reading Speech, Mutual Recognition Bill, Australian House of Representatives, Hansard, 3 November, p. 2432)
>
> The [TTMRA] scheme reflects the high degree of confidence which exists between Australia and New Zealand in respect of each other's regulations, regulatory systems and decision-making processes. (McGauran, P. (Minister for Science and Technology) 1996, Second Reading Speech, Trans-Tasman Mutual Recognition Bill, Australian House of Representatives, Hansard, 4 December, p. 7627)
>
> The [TTMRA] illustrates the degree of maturity and trust that has developed in the relationship between New Zealand and Australia. (Luxton, J. (Minister for Commerce) 1997, Second Reading Speech, Trans-Tasman Mutual Recognition Bill, New Zealand Parliament, Hansard, 14 August, p. 3731)

If jurisdictions achieve the same outcomes despite having different regulations, then there could be a strong case on compliance and administrative cost grounds to rationalise those regulations into a uniform set of laws. However, Australia's experience prior to the MRA had been that regulatory uniformity was either unachievable or, if achievable, prohibitively slow to negotiate.

> Historically, government, business and industry thought that uniform national regulation was the answer to ameliorating the barriers to free trade which were a product of the existence of multiple regulatory environments across the [Australian] states and territories. However, the Australian experience of uniform national regulation is that the process is either not achievable in the context of the existence of the independent sovereign states of Australia, or if achievable, prohibitively slow. (COAG 1998b)

In light of this experience, governments concluded that mutual recognition was more likely to deliver timely and widespread reductions in the burden associated with regulatory differences than were attempts to make regulations uniform across jurisdictions.

The version of mutual recognition adopted by Australia and New Zealand can be viewed as being towards the lower end of a spectrum in terms of its cost to negotiate, establish and maintain. Its establishment did not require jurisdictions to make significant changes to their standards or establish a centralised bureaucracy

for administration and enforcement.[2] It is particularly 'light handed' for goods, largely relying on case law for enforcement. Further up the spectrum is harmonisation, because it tends to be more difficult to negotiate and implement harmonised standards.[3] The architects of the MRA and TTMRA anticipated that the schemes would encourage greater harmonisation in the longer term (COAG and New Zealand Government 1995; CRR 1991).

Uniformity is at the upper end of the spectrum because, as evidenced by Australia's experience, it tends to be the most difficult to negotiate and implement. Nevertheless, there are cases where governments have concluded that uniformity would deliver the greatest net benefit to the community, as evidenced by recent Australian initiatives on national occupational licensing (chapter 5).

Another way of thinking about mutual recognition was outlined by Ergas (2008) at a recent conference on federalism (box 3.2).

Evidence used to support implementation of mutual recognition

Ideally, the case for mutual recognition would have been based on a comprehensive quantification of the unnecessary additional costs created by regulatory differences (and the net benefit from moving to mutual recognition). In practice, advocates of mutual recognition largely relied on the in-principle argument that regulatory differences create unnecessary burdens, supported by anecdotal evidence (COAG and New Zealand Government 1995; CRR 1991; Mumford 2004). While this standard may not be indicative of the broader picture, it does illustrate the potential significance and waste of unnecessary regulatory burdens. For example:

> … manufacturers were often required to put different labels and use different packages for the same products. Each [Australian] state also had different design requirements for water meters. There were three different definitions of bread, Queensland bread

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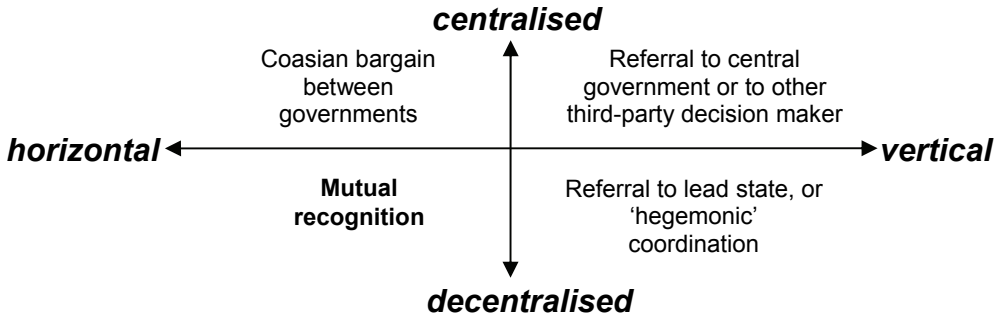
2 One of the architects of the MRA, Roger Wilkins, contrasted this with the European Union's approach to mutual recognition. He noted that the architects of the MRA 'were familiar with the application of the [mutual recognition] concept in the … European Union … that … involved an extensive bureaucratic administration and its effectiveness was dependent on the issuing of directives to ensure that minimum essential standards would apply. Those directives were subject to a variety of interpretations and required close monitoring and enforcement. We wanted a more straightforward, low maintenance approach in Australia, given the relative homogeneity of our states and territories' (Wilkins 1995, pp. 3–4). The current European approach to mutual recognition is summarised in appendix C of this report.

3 When proposing the TTMRA, governments defined harmonisation as 'the process whereby different standards or regulations in two or more jurisdictions are aligned. This does not mean that standards need to be identical in each jurisdiction, but rather that they are consistent or compatible to the extent that they do not result in barriers to trade.' (COAG and New Zealand Government 1995, p. 5).

producers of half-sized loaves could not sell them into NSW, as their sale was prohibited in NSW. One state demanded that margarine be sold only in a package shaped like a cube … (ORR 1997, p. 6)

Box 3.2 **Approaches to regulatory cooperation in a federal system**

At a recent conference on federalism, Ergas (2008) used the following diagram to outline four different approaches to regulatory cooperation in a federal system. The four options were characterised as lying in a two-dimensional space defined by the degree of centralisation and vertical/horizontal cooperation between different tiers of government.



Mutual recognition was described as being decentralised and largely involving cooperation between governments at the same tier. Ergas noted the following advantages and disadvantages of the four options he identified:

	Coasian bargain	*Referral to central government*	*Mutual recognition*	*Referral to lead state*
Advantages	Most effective when small number of roughly balanced units with two-way spillovers.	Most effective when spillovers are very large and widespread, but complex side payments are needed.	Allows consumers and producers to 'vote with their feet'.	Can reduce transaction costs (for example, avoid duplication of analysis).
Disadvantages	Invites 'hold-ups' and 'hold-outs', and induces strategic voting with inefficient outcomes.	Outcomes highly dependent on decision rule and can be inferior to no harmonisation.	Can create high transaction costs from multiple overlapping rules and concerns about race to the bottom.	Bias arising from restricted range of interests taken into account.

Comprehensive quantification of the problem created by regulatory differences (and its solution) would have been difficult because it had to be based on the *incremental* cost imposed by regulatory differences, netting out costs that would have occurred regardless. Unfortunately, financial record keeping by firms is not primarily set up to enable compliance costs to be disentangled in this way. Similarly, government accounts may not be well suited to identifying incremental administrative costs. Nor

is it always straightforward to measure the incremental burden individuals face.

The barriers to quantification were evident not only when the MRA and TTMRA were proposed, but also in subsequent evaluations of the schemes (COAG 1998b; ORR 1997; PC 2003). This was particularly apparent for goods, because mutual recognition operates in a more decentralised way for goods than it does for occupations. However, past evaluations do provide examples of where progress has been made in removing barriers to cross-border commerce. Most notably, the ORR (1997) identified specific improvements in the four years after the MRA was first applied, although these may not be entirely attributable to mutual recognition (table 3.1).

The 1998 review of the MRA used the ORR's analysis as its primary evidence to support continuation of the scheme for goods (CRR 1998). For occupations, the 1998 review cited general comments from professional associations indicating that it had become easier for registered practitioners in the medical, veterinary and legal professions to obtain registration in other jurisdictions. Occupation-registration bodies were quoted as having improved their communication with counterparts in other jurisdictions.

In the 2003 review of the MRA and TTMRA, the Commission noted that its assessment was constrained by a lack of data and problems in disentangling the effect of mutual recognition from other factors (PC 2003). However, anecdotal evidence indicated that there had been improvements since the previous review, most notably in resolving the issues underpinning special exemptions. The Commission reported that all consumer-product safety standards (except child restraints for cars) had been aligned, and that electromagnetic compatibility requirements had been harmonised, making it no longer necessary to have exemptions for those areas of regulation.

Table 3.1 **Examples of improvements in the initial four years of the MRA**

Product	*Relevant regulators*	*Trade barrier*	*Change from 1993 to 1997*
Bread	Various regulators	Different standard sizes	Non-standard sizes can be sold
Eggs	State/territory egg boards	Different grading and stamping requirements	Deregulation of the egg market continued
Dried fruits	State/territory dried fruit boards	Different grading requirements	Accelerated the negotiations for national standards
Abattoir meats	State/territory health departments or meat authorities	Some jurisdictions such as Queensland required a fee to be paid and/or permission from a regulator before meat could be sold	No longer need permission or have to pay a fee
Game meat	State/territory departments of health, meat authorities or equivalent	Interstate meat could not be sold. Production often banned within jurisdictions	These meats are now sold in NSW, Victoria and Queensland following agreement about uniform minimum standards. But production still banned in some states, such as NSW
Oysters	State/territory fisheries departments	In NSW, interstate oysters had to be soaked (depuration) for 36 hours before sale	This requirement has been dropped
Fruit and vegetables	Various regulators	Fruit and vegetables imported into Queensland had to meet grading and packing requirements before sale permitted	Queensland Act repealed in 1993
Pressure vessels	Various regulators, NSW Workcover Authority etc	State/territory regulatory authorities differed on the design, construction and testing of equipment	National standards developed and in process of being implemented through legislation in various state/territories
Packaging & labelling	Various regulators	Different requirements	National standards being developed
Consumer products	State/territory departments of consumer affairs or equivalent	Product bans	Cases where bans have been removed, such as repeal of NSW product safety regulation for safety footwear

Source: ORR (1997).

Anticipated impacts of the schemes

Those who proposed the MRA and TTMRA claimed that the mutual recognition schemes would deliver a wide range of benefits.[4] Rather than simply listing these claims, it is instructive to outline the reasoning behind them. This can be done by considering how the schemes change the incentives faced by firms and workers. By reducing regulatory duplication and inconsistency affecting cross-border movements of goods and labour, the MRA and TTMRA will tend to:

- reduce the price that firms need to charge in order to cover the costs of selling a product into another jurisdiction
- lower the compensation that workers need in order to cover the costs of obtaining accreditation in another jurisdiction.[5]

Precisely how parties respond to this change in incentives depends on numerous factors — such as firms' production technologies, workers' willingness to move, and consumers' preferences — but, in broad terms, it will trigger a series of effects that could improve the wellbeing of each jurisdiction's community as a whole.

The first-round benefits will come from the initial reduction in firms' compliance costs and workers' accreditation expenses, and the greater consumption, output and employment this stimulates. This is illustrated in box 3.3 using a simplified model for goods. The actual distribution of benefits across different groups is undoubtedly more complex than represented in the model. Firms could profit by:

- retaining some of the reduction in compliance costs to increase profit per unit of existing output
- increasing sales volume by passing some of the fall in compliance costs on to consumers as lower prices, which may also generate greater economies of scale
- workers sharing with employers part of the decline in their cross-border accreditation costs.

Workers could gain by:

- retaining part of the savings from their lower accreditation costs
- increased employment as firms increase their sales volumes

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4 The claimed benefits were outlined by CRR (1991) and COAG and New Zealand Government (1995) in discussion papers proposing the MRA and TTMRA, respectively.

5 The term accreditation means official recognition by an occupation-registration body that a person meets the requirements to practice an occupation. Employers may pay the cost of accrediting a worker in a new jurisdiction directly to the relevant occupation-registration body, and so the compensation required to cover this cost might not pass through the worker's hands.

- employers sharing part of the reduction in their compliance costs with employees as higher wages.

Consumers could benefit due to:

- lower prices on their initial level of consumption as firms and workers share part of the decline in their compliance/accreditation costs with consumers
- increased consumption (including deferred consumption in the form of savings) in response to lower prices and greater earnings from employment and the ownership of firms.

However, while the first-round impacts could make each jurisdiction's community as a whole better off, it does not follow that everyone will gain. One of the principal architects of the MRA — Gary Sturgess (1994), then Director General of the NSW Cabinet Office — argued that the main beneficiary, at least in the early stages, would be small firms, because they find it much harder to deal with cross-border differences in regulations.

Another notable distributional impact may be that less-efficient firms experience falling sales and prices in the face of increased competition from other jurisdictions (illustrated in box 3.3). This does not necessarily provide a case against mutual recognition, since the community as a whole would gain, but it may justify using some of the gains to foster structural adjustment (for example, through the retraining of unemployed workers).

In time, a range of other benefits may also emerge (box 3.4). These could involve ongoing structural reform and so might deliver more significant benefits in the longer term than do the first-round impacts (CRR 1991). Most notably, mutual recognition is likely to encourage greater 'regulatory competition' between jurisdictions to find ways of reducing compliance and accreditation costs while still meeting community expectations through regulation.

Mutual recognition is likely to encourage greater regulatory competition because it gives firms the opportunity to supply goods to multiple jurisdictions while only complying with the standards of the jurisdiction with the lowest compliance costs. Individuals may also stimulate regulatory competition because mutual recognition makes it easier for them to move to jurisdictions with lower accreditation costs.

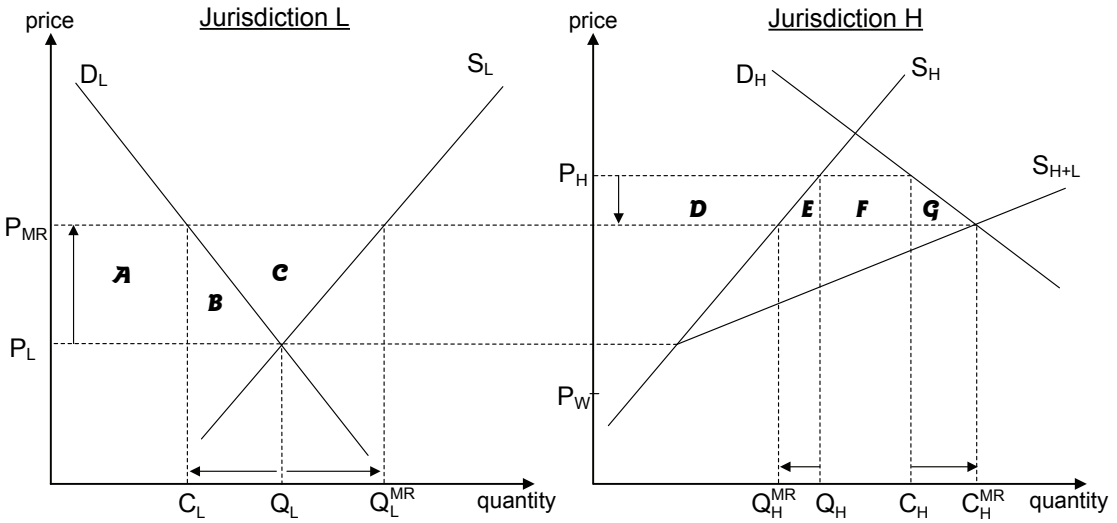
Box 3.3 **First-round impacts of mutual recognition in goods markets**

The first-round impacts of mutually recognising goods standards can be illustrated with a simplified partial-equilibrium model as shown below. It is assumed that the relevant good is identical regardless of who produces it, there are two jurisdictions — L and H — considering mutual recognition, and the rest of the world is willing to sell them the good for a constant per-unit return of P_W (small economy assumption).

If every jurisdiction had unique goods standards and this increased the cost of others exporting into its market, 'foreign' firms would need to set their export prices to recover this extra cost. For example, the rest of the world may need to charge P_H to get a net return of P_W (the world price) from exporting to jurisdiction H. Consumption in H would then be C_H, of which Q_H would be supplied by domestic firms, and the remainder ($C_H - Q_H$) imported from the rest of the world (based on where the P_H line intersects the demand and supply curves, D_H and S_H). If there was a similar regulatory barrier to the rest of the world exporting to jurisdiction L, that jurisdiction would neither import nor export the good, and all consumption would be met by the local output of Q_L at price P_L.

Suppose jurisdictions L and H mutually recognised each other's goods standards, so that there was no longer an additional cost in exporting to each other's markets. Jurisdiction L would then be able to export to H for a lower price than the rest of the world. This would change the supply curve in jurisdiction H to S_{H+L}, which would lead to the price in L and H converging towards P_{MR}. Consumers in H would increase their consumption to C_H^{MR}. Firms in L would export ($Q_L^{MR} - C_L$) to H (equal to H's imports of $C_H^{MR} - Q_H^{MR}$).

Both jurisdictions would gain overall, but the distributional impacts would differ. In jurisdiction H, consumers would gain from a lower price and increased consumption (this gain would have a value equal to area ***D***+***E***+***F***+***G***), but local firms would lose due to lower prices and output (area ***D***). The net benefit in jurisdiction H would have a value equal to area ***E***+***F***+***G***. Conversely, consumers in jurisdiction L would lose because they pay a higher price and consume less (loss of area ***A***+***B***) but firms would achieve a higher price and output (gain of area ***A***+***B***+***C***). As a result, there would be a net benefit in jurisdiction L equal to area ***C***. In principle, the losers in each jurisdiction could be compensated by redistributing benefits so that no group is worse off.



Box 3.4 **Longer-term benefits from mutual recognition**

In addition to the first-round impacts of mutual recognition, a variety of other beneficial changes may emerge over time. They include:

- greater competition among firms that will increase ongoing pressure on them to find innovative ways to further reduce costs and prices, improve quality, and gain a competitive edge
- increased sales volumes due to lower prices and the contraction of less-efficient competitors that may enable firms to capture further economies of scale, with some of the resulting reduction in per-unit costs potentially being passed on to consumers as more price reductions and to workers as further wage increases
- more competition among workers that will provide added impetus for them to find ways to lift their productivity and improve the range and quality of services they provide
- lower barriers to cross-border movements of goods and labour that could enable consumers, workers and employers to enjoy greater choice and variety
- the abovementioned factors may also make economies more flexible and resilient to adverse shocks.

Advocates of the MRA and TTMRA have also noted that the mutual recognition schemes increase 'regulatory competition' between governments by giving firms and workers greater discretion over which jurisdiction's regulatory regime they comply with. Over time, this could deliver sizeable ongoing benefits to the community by creating:

- increased pressure on governments to find ways to reduce the compliance and accreditation costs associated with meeting community expectations through regulation (this effect could be significant because it may affect regulations that also apply to goods and workers that do not cross borders)
- increased discipline on jurisdictions contemplating new regulations to ensure there would be a net benefit to the community
- improved cooperation and dialogue between regulators across jurisdictions.

Sources: Carroll (2006); COAG and New Zealand Government (1995, 2006); CRR (1991); Sturgess (1993, 1994).

One of the anticipated benefits of regulatory competition was that it would create greater impetus to harmonise regulations where there were genuine concerns about mutually recognising different jurisdictions' standards. However, harmonisation may also be sought for less worthy motives. It could enable governments to avoid the pressure of regulatory competition, extend overly onerous and costly (gold-plated) regulations to all jurisdictions through a 'race to the top', and reduce the scope for policy innovation. This provides a potential rationale for maintaining mutual recognition over the longer term, rather than regarding it as an interim step on the path to uniform regulations across all jurisdictions.

While there are likely to be benefits from mutual recognition, there are also costs to consider. For example:

- jurisdictions will have less scope to tailor regulations to reflect local conditions and preferences, particularly if it would increase compliance/accreditation costs beyond those of other jurisdictions
- firms and workers may have an incentive to engage in jurisdiction 'shopping and hopping' — the practice of using the jurisdiction with the easiest or cheapest standards to enter markets in other jurisdictions — that reduces the quality and/or safety of goods and services supplied. To some extent, this risk was addressed in the design of the mutual recognition schemes[6]
- joint decision-making procedures associated with the mutual recognition schemes could make it slower and more difficult to implement regulatory reforms within a given jurisdiction
- in order to benefit from mutual recognition, firms and workers will have to incur the cost of becoming informed about the relevant procedures, and complying with them
- governments will incur additional administration costs, such as to fund coordinating bodies, and to cover the costs of employing officials for the purpose of implementing mutual recognition procedures and attending intergovernmental meetings
- regulators may not implement mutual recognition arrangements appropriately.

An assessment of mutual recognition, therefore, needs to weigh up not only the benefits, but also the associated costs. This issue is discussed further below in the context of assessing efficiency, but it should be noted that some of the abovementioned costs — such as the additional administration costs for governments and information costs for individuals — are likely to be relatively small.

6 When designing the MRA, governments sought to prevent a 'race to the bottom' in goods standards by allowing individual jurisdictions to temporarily exempt products from mutual recognition for up to 12 months, and gave Ministerial Councils the authority to make such exemptions permanent by a two-thirds majority vote, thus preventing a 'rogue' jurisdiction from undermining standards (Sturgess 1993, 1994). Similarly, one jurisdiction can refer concerns about occupational standards in another to a Ministerial Council for a determination based on a two-thirds majority vote (COAG and New Zealand Government 2006).

3.2 Interpretation and application of assessment criteria

The terms of reference for this study require the mutual recognition schemes to be assessed for their coverage, efficiency and effectiveness. The Commission's interpretation and application of these criteria are outlined below.

Coverage

The word 'coverage' is interpreted as referring, strictly speaking, to the question of what goods and occupations are subject to mutual recognition. But it is also interpreted as meaning the broad 'scope' of the two schemes — the range of laws, regulations and activities that are within reach of mutual recognition.

As noted in chapter 2, the mutual recognition schemes cover most occupations for which some form of legislation-based registration is required. In contrast, there is an extensive system of exemptions for goods, involving three separate types — permanent, temporary and special exemptions. In addition, the categories of exceptions and exclusions ensure that certain laws — including in relation to how goods are sold and occupations are practised — are not subject to mutual recognition.

The Commission's 2003 review examined the coverage of the MRA and TTMRA, and in most cases concluded that existing arrangements were largely appropriate. However, a number of changes were suggested, and it was noted that others may be warranted, depending on post-2003 developments. Thus, it is timely for this study to revisit the issue of coverage. This is done by considering whether potential changes to coverage would improve the effectiveness and efficiency of the schemes, including in areas already subject to mutual recognition.

Effectiveness

Effectiveness measures how well the mutual recognition schemes achieve their stated objectives. As noted previously, governments stated that their principal aim was to remove impediments to cross-border goods and labour mobility caused by regulatory differences. This was expected to lead to the wide range of benefits mentioned above, such as greater consumer choice, lower business costs, and more efficient regulation.

A key basis for judging effectiveness is, therefore, the extent to which goods and workers cross borders without being burdened with regulatory duplication and

inconsistency. In some cases, this is relatively straightforward to observe directly. For example, the records of occupation-registration bodies could be used to measure the share of workers from other jurisdictions who register under mutual recognition, and so avoid regulatory duplication and inconsistency. However, such detailed records are unlikely to exist in the goods area.

Various indirect indicators are also used in this study because it is often difficult to directly observe the extent of the incremental regulatory burden from crossing borders. In this regard, the mutual recognition schemes are judged to be more effective, the greater the extent to which:

- regulators comply with their obligations under the mutual recognition schemes
- firms and workers are aware of, and able to assert, their rights under the schemes (including through appeals mechanisms)
- there are no design flaws in the mutual recognition schemes (such as ambiguous legislative wording) that could unintentionally allow regulatory duplication and inconsistency to persist.

Another basis for judging effectiveness is the extent to which the expected benefits of mutual recognition are realised. Relevant indicators include changes in:

- cross-border movements of goods and labour
- interjurisdictional competition among firms, and associated reductions in business costs and prices, and gains in product quality and innovation
- level of consumer choice
- the prevalence of inappropriate or overly costly regulations
- cross-jurisdiction cooperation and dialogue among regulators.

In examining such indicators, it is important to isolate the impact of mutual recognition from changes caused by other factors. This study is concerned with the *incremental* impact of the MRA and TTMRA, above what would have occurred regardless of the schemes' existence.

Efficiency

Efficiency, in its broadest sense, refers to how well resources are used to benefit the wellbeing of the community as a whole. This broad interpretation is known as 'economic efficiency' and has three components — the degree to which outputs are produced at least possible cost, resources are allocated to uses that generate the greatest community wellbeing at a given point in time, and over time (box 3.5).

Box 3.5 **Components of economic efficiency**

Economic efficiency is about maximising the wellbeing of the community. It requires satisfaction of three components.

Productive efficiency is achieved when output is produced at minimum cost. It includes technical efficiency, which refers to the extent to which, in the production of any good or service, it is technically feasible to reduce any input without decreasing the output, and without increasing any other input.

Allocative efficiency is about ensuring that the community gets the greatest return (very broadly defined) from its scarce resources. A nation's resources can be used in many different ways. The best or 'most efficient' allocation of resources is the one that contributes most to community wellbeing.

Dynamic efficiency refers to the allocation of resources over time, including allocations designed to improve economic efficiency and to generate more resources. This can mean finding better products and better ways of producing goods and services, which may involve investments in education, research, development and innovation. Dynamic efficiency can also refer to the ability to adapt efficiently to changed economic conditions, a capacity for optimally modifying output and productivity performance in the face of economic 'shocks'.

For the purpose of this study, the community is defined to comprise both Australia and New Zealand. Thus, efficiency is assessed collectively for the Australian jurisdictions and New Zealand, while noting differences in the impacts on, and the preferences and interests of, individual jurisdictions.

The MRA and TTMRA have the potential to improve efficiency (and hence community wellbeing) by:

- reducing the resources needed to meet community expectations through regulation (by cutting the waste of unnecessary regulatory duplication and inconsistency and, in the longer term, by fostering best-practice regulation)
- encouraging goods and labour to be allocated to uses more highly valued by the community (by lowering regulatory barriers to goods and labour mobility).

This potential will only be realised if the benefits the community derives from the mutual recognition schemes outweigh the associated costs. As noted previously, the costs of mutual recognition include a loss of autonomy that limits jurisdictions' capacity to tailor regulations to reflect local conditions and preferences, joint decision-making procedures that may make it slower and more difficult to implement regulatory reforms within a given jurisdiction, and the added expenditure to fund coordination bodies and personnel.

Some of the benefits and costs cannot be readily quantified because there is no associated market with observable prices, or the beneficiaries or losers are diffuse. For example, it is difficult to put a financial value on the loss of regulatory autonomy associated with mutual recognition. Therefore, the quantitative analysis in this study is supported by a qualitative assessment of some aspects of the schemes. For example, the Commission notes there has been long-standing community and political support in Australia and New Zealand for initiatives that integrate their economies, even in cases where this has involved some loss of autonomy.

The terms of reference for this study direct the Commission to not only assess the overall efficiency of the MRA and TTMRA, but also to consider how administrative provisions can be changed to support more efficient operation of the schemes. The annual rollover of TTMRA special exemptions is mentioned as an example. This is considered in chapter 7 as part of the analysis of special exemptions. Potential efficiency improvements to other administrative provisions are considered throughout the report, including for occupation registration in chapter 5, temporary goods exemptions in chapter 6, and governance in chapter 11.

4 Economic impacts of mutual recognition

Key points

- In principle, mutual recognition in the goods market will result in lower compliance costs for businesses operating across jurisdictions.
  - Anecdotal evidence suggests that, where it is effectively applied, the compliance costs avoided or reduced through mutual recognition can be substantial.
- Mutual recognition schemes also promote the development of joint standards between jurisdictions and between Australia and New Zealand, which may result in economic gains.
- Reduced compliance costs can contribute to more open and competitive markets and improved goods mobility, although evidence on these impacts is limited.
  - Increased trade flows are consistent with the proposition that mutual recognition improves the interjurisdictional mobility of goods. However, it is difficult to distinguish between the effect of mutual recognition and other factors that influence trade across borders.
- The costs of registering for an occupation in another jurisdiction have decreased under mutual recognition.
- Problems with equivalence of occupations, differences in registration coverage and regulator expertise limit the realisation of the benefits of mutual recognition.
- The inability of a number of occupation-registration authorities to provide data hampers the assessment of the effectiveness and efficiency of the mutual recognition schemes.
- Available evidence supports the expectation that mutual recognition contributes to more efficient labour markets.
  - Labour mobility of practitioners in registered occupations increased between 1996 and 2006.
  - Wages of people working in registered occupations are less dispersed than they were prior to the introduction of mutual recognition.

The mutual recognition schemes are intended to remove barriers to interjurisdictional trade in goods and the mobility of labour caused by regulatory inconsistencies and duplication across jurisdictions. Their broad application means that the potential impact of mutual recognition is significant. A large number of

firms stand to gain from effective use of these schemes. In 2006-07, there were over 30 000 businesses operating in more than one state or territory, representing roughly 2 per cent of all Australian businesses (ABS 2007a). Moreover, the Commission estimates that multi-state businesses contributed over 20 per cent of the turnover of all businesses nationally in that year.[1] This suggests that a significant proportion of Australia's output may be covered by mutual recognition.

The potential reach of mutual recognition is similarly large for occupations. Around 18 per cent of employed Australians and 16 per cent of employed New Zealanders work in registered occupations.

In order to assess the impacts of mutual recognition, it is first necessary to consider the effectiveness of mutual recognition in reducing compliance costs that arise from jurisdictional variations in product regulation and occupational registration requirements. Section 4.1 examines the available evidence on these direct impacts.

The broader economic impacts on the goods and labour markets of reduced compliance costs through mutual recognition — including changes in interstate and trans-Tasman trade and labour mobility — are then examined in sections 4.2 and 4.3. Other labour market impacts are also explored, including possible wages convergence across jurisdictions over time.

The Commission has used available evidence of impacts on Australian and New Zealand markets, drawing on the views of study participants and, where possible, quantitative evidence of changes in trade and labour flows. However, quantification of the economic impacts is hampered because of difficulties associated with:

- identifying businesses, employers and registered workers using the schemes
- estimating the proportion of businesses' total compliance costs attributable to jurisdictional differences in regulation
- disentangling the effects of mutual recognition from other factors that explain variation in goods and labour mobility.

4.1 Impact on compliance costs

The first section includes evidence of compliance costs associated with product regulation, the views of study participants about regulatory inconsistencies across jurisdictions, and the effect of mutual recognition on standards development. The second section includes a discussion of compliance costs associated with occupational registration.

1 Businesses include both producers of goods and service providers.

Compliance with product regulation

Mutual recognition provides a means to reduce regulatory impediments to trade by reducing compliance costs and, therefore, the price that firms charge to recover the cost of selling a product in another jurisdiction. There are a number of mechanisms through which effective mutual recognition of product regulation can result in lower compliance costs than would otherwise exist.

- Firms that sell their products in more than one jurisdiction avoid multiple grading, packaging and labelling requirements.
- Firms do not have to meet multiple product safety standards for the same product in different jurisdictions, for example, consumer safety standards for children's toys. This means that the designs, components or technical features of products do not have to be modified by firms in order to comply with multiple standards.
- Firms do not have to comply with various processes for testing, certification or conformance assessment of products or production equipment.
- Firms may enjoy lower storage and depreciation costs when mutual recognition reduces or eliminates delays in regulatory approval to sell goods, resulting in shorter times to markets and, therefore, lower inventory-carrying costs.
- Mutual recognition can avoid the indirect costs of complying with regulation, for example, lost sales or product damage as a result of delays in seeking regulatory approval from regulators in more than one jurisdiction.

The importance of mutual recognition in reducing compliance costs holds more weight for some goods exporters than others. The avoidance of lengthy conformance assessment processes is particularly important for firms wishing to sell products with short lifespans (for example, due to rapid technological development). Additional costs of testing and inspection due to different jurisdictional requirements are likely to be significant for specialist manufacturers that export a large number of small consignments (OECD 2000). Finally, large national retailers will reap productivity gains from being able to warehouse homogeneous products in a central location.

The Commission has obtained only limited evidence on the impacts of mutual recognition on compliance costs associated with product regulation, although a number of study participants expressed general support for the schemes. In those cases where mutual recognition schemes have been used successfully by firms selling interstate or across the Tasman, the impacts of mutual recognition have been substantial. Anecdotal evidence suggests that the costs of complying with different regulations relating to the sale of goods can be high (box 4.1). It is likely that the

bulk of reductions in compliance costs resulting from mutual recognition occurred in the initial period following the introduction of the schemes, with the elimination of requirements to comply with multiple jurisdiction-specific regulations for a large range of goods. In more recent years, reductions in compliance burdens through mutual recognition are likely to have been relatively smaller and more incremental.

Box 4.1 **Anecdotal evidence of regulatory costs**

The costs associated with pre-sale testing, conformance assessment and product recalls can be substantial. Examples of these are laboratory testing fees, costs of transporting samples interstate or overseas, administration costs and forgone sales resulting from regulatory delays. Submissions to the Commission's review of Australia's consumer policy framework (PC 2008f) indicated that the costs of interstate regulatory differences in consumer policy can be considerable. This is due to costs associated with additional training, legal advice, modifications to information technology systems and deflection of management time. One company pointed out that a single change by a jurisdiction to an apparently 'minor' regulation for just one product cost $1 million to implement.

Accord Australasia (2008) noted that one of its members estimated the cost to relabel a product because of a unique Australian requirement at approximately 50 cents per unit. Based on the number of units sold in Australia in 2006, the additional costs to industry in any one year could be as high as $65 million. Other Accord Australasia members advised that labelling changes can be costed and range from $25 000 to $75 000, depending on the type, quality or extent of packaging. The fees for submitting an application as part of new chemical assessments undertaken by Australia's National Industrial Chemical Notification Assessment Scheme, vary between $2534 and $14 970, depending on the nature of the application, while the cost of generating data to support the application is frequently of the order of $100 000–200 000 (PC 2008b).

Although regulations relating to hazardous substances, industrial chemicals and dangerous goods are exempt from the TTMRA, these examples illustrate the magnitude of potential costs for exporters of such products to Australia in the absence of mutual recognition being applied.

A number of participants in this study expressed support for the mutual recognition schemes as a valuable mechanism to avoid unnecessary compliance costs arising from variations in jurisdictional regulation. For example, Accord Australasia stated:

> MRA [Mutual Recognition Agreement] and TTMRA [Trans-Tasman Mutual Recognition Arrangement] can be highly effective tools which form a suite of government measures to eliminate costly and unnecessary duplication. This could be particularly effective in areas where there is limited cross-border impact because of the small number of companies operating across more than one jurisdiction. For these areas of regulatory control it may be simpler to mutually recognise individual jurisdictional regulatory controls rather than go down the path of harmonisation. (sub. 39, p. 4)

However, the Coles Group favoured harmonisation over mutual recognition as a means of reducing compliance costs:

> Coles supports the use of the MRA and the TTMRA as a short-term alternative way for governments to reduce regulatory impediments on business. However, in the long term, Coles would prefer harmonisation of regulation across all states and territories of Australia and between Australia and New Zealand. This would limit unnecessary compliance costs, reduce the risk of business non-compliance and ensure consumers have uniform rights and product standards across all jurisdictions. (sub. 46, p. 1)

Some study participants provided examples of inconsistencies in product regulation across jurisdictions, suggesting that mutual recognition schemes have not been completely effective or well applied in a number of cases (box 4.2).

Box 4.2 Examples of regulatory inconsistencies

In general, barriers to interstate and trans-Tasman mutual recognition are minimised where there is harmonised regulation, and where approvals or conformity assessments made by regulators (or accredited third-party conformity assessment bodies) are recognised as equivalent across jurisdictions.

A number of submissions provided examples of inconsistent regulation across jurisdictions. The Coles Group (sub. 46) stated that it must contend with regulatory inconsistencies across the states and territories in safety standards for products, such as flammable candle holders and monkey bikes (small motorised children's bikes), and labelling requirements, for example, fire-hazard labels on children's nightwear and limited daywear.

In the context of the TTMRA, mutual recognition of conformance assessment for some electrical appliances has not been effective, due to Australian regulators and retailers favouring Australian approvals over New Zealand certification (Fisher & Paykel, sub. 54 and pers. comm., 4 August 2008). This means that, for New Zealand suppliers of some electrical goods, Australian regulators may require retesting of their products, retailers may not stock them or consumers may be disinclined to buy them.

Cadbury Schweppes (sub. DR61) stated that, although weights and measures regulations are reasonably similar across Australian jurisdictions, there are often significant differences in the interpretation and enforcement of the regulations by each state and territory. These differences, to a large extent, will be overcome as a result of national weights and measures legislation to be implemented in 2010. However, Cadbury Schweppes emphasised that, as part of the national legislation, Australia should adopt the same Average Quantity System model as New Zealand, in addition to compatible weights and measures regulations.

Continued regulatory differences might be justified, in some cases, on the basis of jurisdiction-specific or environmental factors. The Plumbing Industry Advisory Council noted:

> With regard to plumbing products, while Australia and New Zealand are harmonising standards, there are still significant differences. Further, because Australia has some unique circumstances, such as water shortages and an increased requirement to use renewable energy, there are regulatory differences regarding hot water services such as solar. These jurisdictional differences reflect different policy objectives and this needs to be considered and accommodated as part of any mutual recognition. (sub. 49, p. 2)

Development of standards

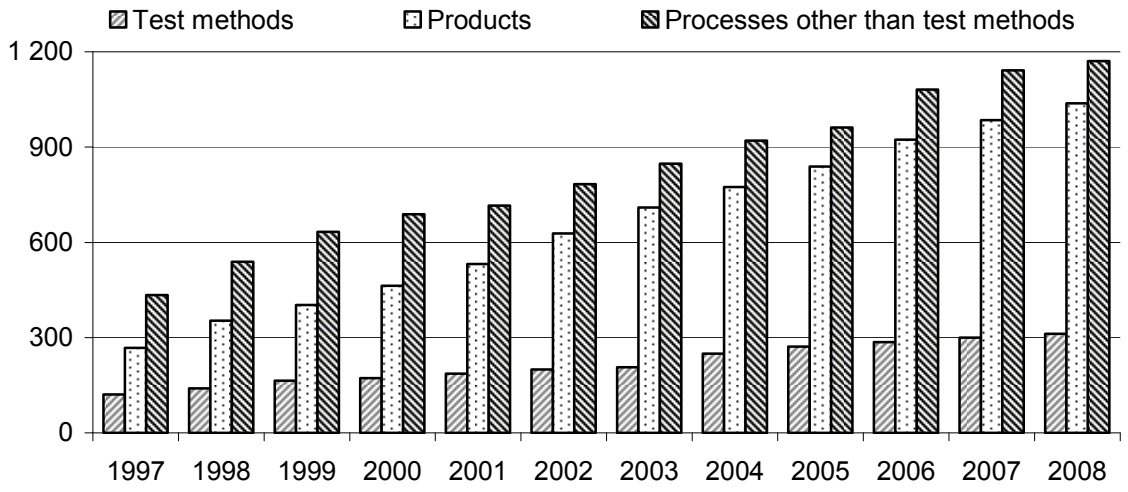
Regulatory competition can drive greater efforts to harmonise regulations through cooperation and dialogue between regulators. This has provided an avenue for mutual recognition to facilitate the development and adoption of joint standards (or the alignment of one country's standards with those of the other). Standards include technical standards (product related) and those relating to conformance assessment procedures (testing and other methods). Examples of joint standards include common compliance marks, such as those approved for electrical products or national product safety standards. Standards Australia and Standards New Zealand commented:

> The TTMRA requires a greater discipline on regulators contemplating the introduction of joint Standards, regulations and registration requirements and encourages greater cooperation between regulatory authorities … AS/NZ Standards are allowing for trade to take place effectively across the Tasman — they are an essential, but sometimes overlooked, mechanism to drive progress towards a SEM [single economic market]. (sub. 47, pp. 3–4)

The number of joint or aligned Australia–New Zealand standards has grown by over 200 per cent from 1997 to 2008 (figure 4.1), which includes a large increase in product-related standards.[2]

[2] The Australia–New Zealand standards include those that are cited in Acts or regulations making them either legally mandatory standards, or an acceptable means of compliance with legislation, but not the only method of meeting specified legislative criteria (voluntary standards).

Figure 4.1 **Australia–New Zealand joint or aligned standards, 1997–2008[a]**



a The number of aligned standards is generally small, relative to joint standards. The number of standards in each year includes both mandatory and voluntary standards issued that year. Some standards may have come into force subsequent to the date of issue. The number of standards in each year may contain a small number of duplicate standards, that is, standards that are cited in more than one regulation.

Source: Standards New Zealand (unpublished data).

Harmonisation of regulations through the adoption of common standards improves the feasibility of applying mutual recognition and, therefore, the capacity to reduce regulatory burdens due to jurisdictional differences. As well as reducing such burdens, standards may have broader benefits (box 4.3). However, the development and application of joint standards does not necessarily reduce compliance costs overall (discussed further below).

Box 4.3 **Broader benefits of standards**

Standards define the characteristics of products that make them suitable for use or consistent with offerings from other producers (Swann 2000). Standards applied to goods and production systems can produce benefits including:

- improved consumer confidence and lower search and transaction costs by providing consumers with benchmarks for the quality of products
- reduced costs through economies of scale where standards facilitate mass production of certain goods (PC 2006b)
- greater interoperability or compatibility between different parts of a product (Temple, Witt and Spencer 2004)
- the removal of technical barriers to trade between jurisdictions that adopt common standards.

Another potential benefit of standards, when developed efficiently — such that they achieve their purpose at minimum compliance cost to industry — and implemented in a timely way, is that they contribute to the diffusion of knowledge and encourage innovation. This is because standards provide information to producers about how to make better products or improve production systems or processes. Swann (2000, p. 24) argued that, as well as limiting variety by defining norms for technologies in markets, standardisation helps to achieve credibility, focus and critical mass in markets for new technologies thus supporting 'innovation-led growth'. On the other hand, standardisation might impede innovation if it reduces a producer's ability to maintain exclusive property rights to new products or processes for a period sufficient to recoup the effort and investment necessary to produce the innovation.

Evidence on trans-Tasman regulatory cooperation

The New Zealand Government (sub. 53) commented that close regulatory cooperation generated by the TTMRA continues to facilitate mutual recognition and the alignment of regulatory regimes. Effective regulatory coordination has been achieved in the areas of electrical safety and gas appliances, including the development of trans-Tasman Minimum Energy Performance Standards (MEPS) and Mandatory Energy Performance Labels that are compatible with both Australian and New Zealand markets. That said, concerns have been raised about delays in standards development imposing unavoidable costs on industry, particularly those to do with MEPS (PC 2008a).

By 2003, standards for consumer goods were aligned, with the exception of child restraints for motor vehicles. This was achieved through the development of joint Australia–New Zealand standards, and in other cases by mutual recognition (PC 2003).

The Australian Communications and Media Authority (sub. 13) noted there has been considerable progress in harmonising technical standards and regulatory requirements for electromagnetic compatibility and radiocommunications devices, which are subject to a special exemption from the TTMRA. This has been facilitated by cooperation between Australian and New Zealand authorities as part of the TTMRA cooperation program (chapter 7). In contrast, there are examples of divergence of standards, such as those applied to road vehicles either imported into or manufactured in Australia, and those applied in New Zealand. This has created obstacles to achieving mutual recognition of standards and, hence, realising potential trade benefits.

The extent of harmonisation or uniformity of standards for some products has meant that regulatory cooperation has, in a sense, moved beyond mutual recognition. Nonetheless, where trans-Tasman standards apply, mutual recognition can coexist with and complement those standards. Adherence to the standards — even those cited in legislation — is often not the only means of compliance with the legislation (Standards New Zealand, pers. comm., 19 August 2008).

Complementarity of standards and mutual recognition make it difficult to ascertain whether increased trade flows are a reflection of the former or the latter. Trans-Tasman trade data do not distinguish between standardised goods and mutually recognised ones. In the European Union, 75 per cent of products traded embody harmonised standards (appendix C). This proportion is likely to be lower for trans-Tasman trade. However, based on the observed growth in the number of joint or aligned Australia–New Zealand standards (figure 4.1), the proportion of trans-Tasman trade involving standardised goods is probably growing.

Challenges in developing joint standards

As discussed, development of joint standards can assist in reducing the regulatory burden due to jurisdictional differences in regulation. However, harmonisation of regulations in some instances involves a 'race to the top' among jurisdictions, which results in the most onerous and costly regulatory regime being uniformly applied. It is often the case that standards cite other standards, so that to comply with one standard, producers may have to comply with one or more other standards. Further, where joint standards do not replace multiple existing sets of standards, but rather simply add to the overall stock of standards, then this is likely to have the effect of increasing compliance costs for those businesses operating across jurisdictions.

In general, increases in the volume of joint Australia–New Zealand standards, as illustrated in figure 4.1, will result in lower regulatory burdens that arise from jurisdictional differences only if these standards:

- remove the need to comply with separate Australian and New Zealand standards
- do not combine the trade-restrictive elements of both Australian and New Zealand standards.

Increases in the volume of standards are also likely to reflect the emergence of new products and technologies, as well as improvements in risk analysis and testing methods (Standards Australia and Standards New Zealand, sub. DR88). As such, they may not be associated with a greater burden.

Concerns have been raised that, increasingly, joint standards incorporate onerous regulatory requirements that are more compatible with one regulatory regime over another, or that create challenges for standard-setting bodies. The New Zealand Government stated that:

> Joint (AS/NZS) standards provide a technical underpinning for trans-Tasman regulatory alignment. However, there are some challenges to increasing their use. For example, some joint standards contain large amounts of material defining regulatory requirements, such as enforcement procedures and penalties, which may not be equally applicable in both countries. This has the potential to:
>
> - make New Zealand regulations more difficult to structure and draft because the joint standards may be more focused on the Australian legal and industry environment
> - make the processes of updating regulation, including for the purposes of regulatory alignment, slower than necessary because, in some cases, the standard would need to be amended before it could be adopted in full in legislation
> - place expectations on standards development committees that they may not be well equipped to deal with (for example, that they have regulation drafting expertise). (sub. 53, p. 7)

However, Standards Australia and Standards New Zealand noted that:

> It is not the intention of standards to impose unnecessary costs of onerous requirements on industry: it is the layer applied over the top of standards (the technical regulation layer) that potentially burdens industry with legal and administration requirements which can be onerous and costly. (sub. DR88, p. 2)

The New Zealand Government suggested that standard-making challenges could be overcome by appropriate Australian and New Zealand representation on joint standards development committees, by ensuring that the standards are suitable for use in both countries and the need for country-specific standards is minimised.

Costs associated with occupational registration

The primary rationale for applying mutual recognition to occupational registration is to allow workers registered in one jurisdiction to be registered in an equivalent occupation in other jurisdictions, without the need for further assessment of their qualifications, skills or experience. In doing so, mutual recognition aims to remove impediments to labour mobility caused by regulatory differences, or duplication, in assessment and registration of occupations across jurisdictions.

Registration of an occupation aims to protect the community by ensuring the quality and safety of the services provided by practitioners of that occupation. In any jurisdiction, costs associated with occupational registration faced by individuals, their employers or local registration authorities include:

- direct training costs associated with meeting qualification requirements
- opportunity costs of meeting these and other registration requirements
- assessment and certification of qualifications, experience and training
- application and renewal licensing fees
- time costs associated with completing application procedures.

When registered workers move between jurisdictions (or operate in two jurisdictions), a number of costs may be duplicated. Movement of labour between jurisdictions may be inhibited if these costs are large enough. Mutual recognition aims to facilitate labour mobility by removing some of these costs. In order to gauge the effectiveness of mutual recognition, it is necessary to consider which compliance costs are affected as a result of mutual recognition.

Reduced compliance costs under mutual recognition

There is evidence that mutual recognition removes some compliance costs associated with additional training, time spent on processing of applications, and certification and accreditation costs. It is important to note that application and renewal fees are duplicated for workers registered in more than one jurisdiction but are not affected by mutual recognition.

Effective mutual recognition is likely to reduce costs associated with registered workers moving between jurisdictions, because it removes the potentially significant costs of additional training. Under mutual recognition, additional training requirements cannot be imposed on workers seeking registration who are already registered in an equivalent occupation in another jurisdiction. This removes both the direct costs of additional training, such as tuition fees, and the indirect opportunity costs of training.

The costs of additional training are likely to be high where there are notable differences in training requirements between jurisdictions and there is movement of workers into the jurisdiction with the higher training requirements. For example, there are substantial differences in the training requirements faced by valuers in different jurisdictions. In the absence of the TTMRA, a valuer from New South Wales wishing to practise in New Zealand would be faced with an extra year of full-time study, as well as requiring three years of practical experience.[3]

Effective mutual recognition can substantially reduce administration and time costs associated with assessment and certification of qualifications and licences, because occupational registration in one jurisdiction is sufficient indication that a worker is qualified to work in another jurisdiction. In its response to the Commission's survey of occupation-registration authorities (appendix D), the Queensland College of Teachers recognised these benefits, stating that 'mutual recognition is a very efficient way of registering an applicant as we are not required to assess their qualifications'.

Similarly, the Medical Practitioners Board of Victoria noted:

> The [Mutual Recognition] Act facilitates trans-border registration and expedited transfer of practitioners by not requiring them to wait for Medical Board approval of an application in order to begin practice should they move between States. Further, the expedited transfer of eligible medical practitioners would be unnecessarily impeded/delayed if the provision was not available. (sub. 28, p. 1)

In its survey response, the Podiatrists Registration Board of Victoria stated that 'registration through mutual recognition for this Board is less cumbersome'. While the majority of survey comments referring to the administrative workload associated with mutual recognition argued that it reduced the administrative burden on regulators, a minority of responses explicitly stated otherwise. For example, the NSW Psychologists Registration Board stated that the mutual recognition process 'is labour intensive for staff'.

Mutual recognition is likely to lead to substantial savings with respect to the validation and accreditation of qualifications for interjurisdictional migrants. Claiming registration in one jurisdiction as a valid basis for registration in another removes the unnecessary duplication of accreditation and assessment fees that would otherwise apply.

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3 The Australian Property Institute (sub. 41) stated that a property valuer in New South Wales requires an Advanced Diploma in Property (Valuation). In contrast, a property valuer in New Zealand requires 'a degree equivalent academic qualification and has at least 3 years practical experience' (Valuers Registration Board of New Zealand, sub. 6, p. 2).

Empirical evidence quantifying these savings is limited, although the costs of accrediting the qualifications of skilled migrants may be broadly comparable. The Joint Standing Committee on Migration (JSCM 2006) reported the assessment fees faced by overseas skilled workers seeking registration in Australia. Examples include:

- total accreditation costs of $8400 for veterinarians
- assessment fees for physiotherapists entering Western Australia of $3355 (WA Department of Health 2006)
- costs of licence recognition and registration requirements for electricians of over $1000[4]
- fees of around $5000 and $5310, respectively, for optometrists and dentists.

Using these figures as benchmarks, and based on the fact that mutual recognition removes the need for the accreditation of the qualifications of interstate migrants seeking registration, the potential savings in accreditation costs for these occupations amounted to around $6.1 million in 2006.[5]

Deemed registration delivers further benefits to interjurisdictional migrants registering under mutual recognition (chapter 5). Using this provision of the mutual recognition schemes, applicants can immediately begin work as a registered worker, thereby reducing the time lost waiting for application approval. The time savings associated with mutual recognition were widely noted among submissions. The Queensland Nursing Council, for example, stated that mutual recognition allows:

> ... nurse or midwifery applications from other states, territories and New Zealand to be processed in a timely manner and enable practice in Queensland immediately ... there are no delays for employment once a decision is made to apply for a licence in Queensland. (sub. 16, p. 1)

Impediments to reducing compliance costs under mutual recognition

The extent to which reductions in compliance costs are realised under mutual recognition is contingent on a number of factors, including:

- the treatment of licence equivalence across jurisdictions
- the partial regulation of some occupations

4 In addition to these fees, the 'capstone' test requires electricians seeking registration in Victoria to undertake an examination that takes between six and eight hours (EEOZ 2008).

5 This estimate is based on the interstate movement of 495 veterinarians, 280 physiotherapists, 1222 electricians, 66 optometrists and 110 dentists in the year preceding the 2006 Census (ABS unpublished data).

- problems relating to regulator expertise and public awareness.

Maximising the reduction in compliance costs can be difficult. The greatest overall reductions in compliance costs are achieved by targeting occupations that have both significant potential savings in compliance costs and sufficient interjurisdictional labour mobility to justify pursuing equivalence.

Effective mutual recognition is more attainable with occupations that have smaller interjurisdictional differences in scope and licensing regimes. That is, where occupations are closely aligned, mutual recognition can be relatively straightforward.

However, compliance cost savings are likely to be small in these instances. Indeed, in some cases regulator agreement about equivalence led to the development of mutual recognition without the need for specific legislation. For example, survey responses from both the Surveyors Board of Queensland and the Surveyors Board of the Northern Territory pointed out that the mutual recognition of registered surveyors between states and territories has been operating in some form for over 100 years (appendix D). In this context, the implementation of mutual recognition legislation is not likely to affect compliance costs.

Conversely, the largest reductions in costs through mutual recognition are likely to be in occupations where there are problems in identifying equivalent licences across jurisdictions, thereby restricting the operation of effective mutual recognition. In such cases, achieving effective mutual recognition can be a difficult and costly exercise, but there is potential for greater reduction in compliance costs if it is achieved. Maximum payoff from mutual recognition of occupations is likely to be realised for those occupations with greater differences in licence scope across jurisdictions and have sufficient potential interjurisdictional labour mobility to justify action.

However, achieving equivalence is often a difficult task. For example, the Air Conditioning and Mechanical Contractors' Association (AMCA, sub. 30, p. 2) noted that 'there is no universally accepted definition of what are the skills/competencies required to be a plumber'. One implication of this is that a 'registered plumber in Western Australia cannot be registered in Victoria without additional training' (AMCA, sub. 30, p. 2). As around 1050 plumbers either relocated from New Zealand to Australia or moved between Australian jurisdictions in 2005-06, the benefits of achieving clear equivalence could be significant.

Attempts to align definitions have met with limited success. A recent report by the Allen Consulting Group (ACG 2008) noted that, while equivalence tables for carpenters and joiners are eight pages in length, regulatory differences between

jurisdictions mean that equivalence tables for plumbers are nearly 90 pages in length. This suggests that while there are potential savings in compliance costs through implementation of mutual recognition, regulatory differences prevents these savings from being realised.

Partial regulation of occupations similarly limits the potential for cost savings (chapter 5). For example, motor mechanics and repairers are only required to be licensed in New South Wales and Western Australia, meaning that a mechanic moving from another state may experience difficulty in having his or her qualifications recognised, and is likely to need to undergo full accreditation (PC 2008a). Moreover, this has the potential to impose additional costs to the extent that it encourages the introduction of regulatory requirements in jurisdictions that did not previously register an occupation.

Similarly, the way in which teachers are registered in New South Wales has prevented the effective operation of mutual recognition. In New South Wales, accreditation requirements only apply to teachers who commenced teaching after September 2004. As mutual recognition applies to occupations that 'may be carried on only by registered persons', the NSW Government (sub. 55, p. 12) stated that 'the [accreditation] scheme falls outside of the definition of "occupation"' as defined under the MRA, and that mutual recognition does not apply to teachers in that state.

In order to achieve mutual recognition of teachers in New South Wales, a series of individual, bilateral agreements with a number of jurisdictions have been put in place. Although the cost of these additional arrangements is not known, they do not have the comprehensive coverage of mutual recognition and are less effective. For instance, although registration of teachers from Queensland is recognised in New South Wales, this is not reciprocated.

Other features of licensing arrangements may also restrict the realisation of compliance cost savings. Auctioneers' licences, for example, are issued by the courts in New Zealand, meaning that there is no central point of contact to coordinate distribution of licences or information.

A lack of expertise relating to mutual recognition obligations on the part of local registration authorities can also hamper the realisation of reduced compliance costs. This study's survey of occupation-registration authorities revealed widespread differences in levels of mutual recognition knowledge and expertise, ranging from a lack of awareness of obligations to a willingness to ignore these obligations (appendix D). Problems include:

- not applying mutual recognition where it would be appropriate
- attaching additional qualifications or conditions not required of local applicants.

These problems are discussed in more detail in chapter 5.

It is difficult to gauge the severity of these problems, although the survey of occupation-registration authorities suggested a lack of clear understanding of what mutual recognition involves and when it should be applied. Problems with the record keeping of local authorities impedes their ability to consider mutual recognition as an issue — many organisations had difficulty in completing the survey simply due to the fact that they did not keep records about mutual recognition.

4.2 Impacts on goods markets

The possible effects of mutual recognition on national and trans-Tasman goods markets include lower costs to business, improved goods mobility through trade, greater choice and increased competitiveness.

Goods mobility

It is difficult to isolate the effects of mutual recognition on goods mobility from other factors explaining variations in trade flows over time. Trends in interstate and trans-Tasman trade can provide useful background information, but it is only circumstantial. The analysis of trade flows in this section, therefore, does not attempt to quantify the impacts of mutual recognition on trade independent of other explanatory factors.

Interstate trade

Using estimates of exports and imports by jurisdiction obtained from the Monash Multi-Regional Forecasting (MMRF) model database, the Commission has derived estimates of interstate trade (table 4.1).[6] Between 2001-02 and 2005-06, interstate trade as a share of gross state product increased for all states and territories. Comparable data for the previous decade are unavailable, which makes the role of mutual recognition in this trend difficult to ascertain.

6 Although these estimates are imputed rather than observed, they appear to be robust. Estimates of gross state product based on the MMRF database are similar to those calculated by the ABS. Moreover, ABS estimates of interstate trade for Queensland — the only jurisdiction for which such estimates based on survey data are available — are reasonably close to those extracted from the MMRF database.

Table 4.1 **Interstate trade, Australia, 2001-02 and 2005-06[a]**
Per cent

	NSW	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
Interstate trade as a share of GSP								
2001-02								
Exports	9.4	18.8	12.6	27.1	13.0	31.4	19.5	4.2
Imports	13.6	9.1	17.3	15.5	16.4	32.4	32.8	30.4
Total trade	**23.0**	**27.9**	**29.8**	**42.6**	**29.4**	**63.8**	**52.3**	**34.6**
2005-06								
Exports	11.9	21.4	12.3	33.5	15.8	37.2	26.6	4.0
Imports	15.3	10.2	19.6	16.8	19.5	40.3	37.0	39.7
Total trade	**27.2**	**31.6**	**31.9**	**50.3**	**35.2**	**77.4**	**63.6**	**43.8**
Average annual growth in interstate trade[b]								
2001-02 to 2005-06	5.3	5.0	5.2	5.3	7.7	6.7	6.8	7.1

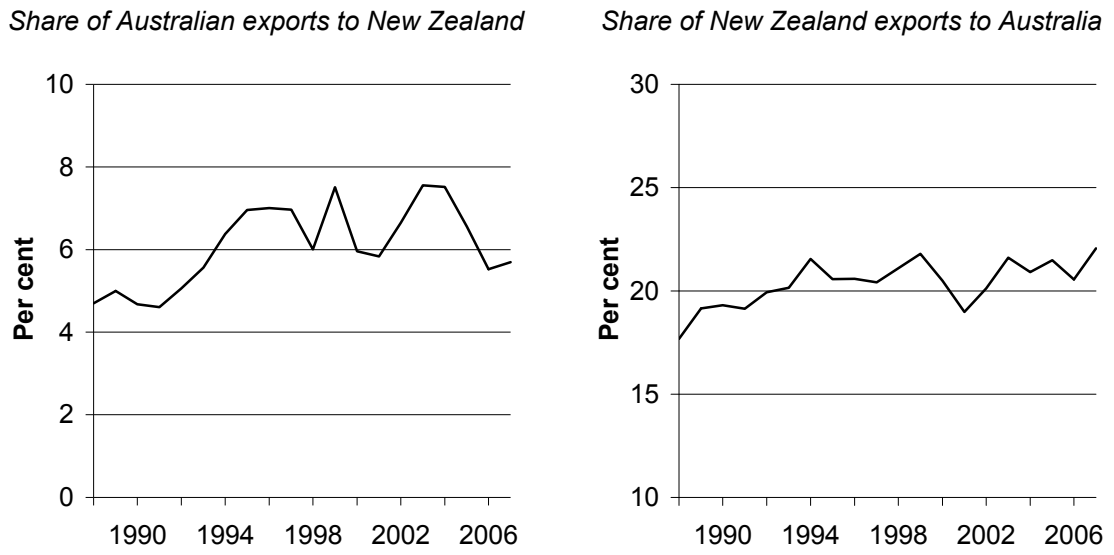
[a] Estimates of interstate trade are derived using the MMRF model database. Total interstate trade is exports plus imports (to and from other jurisdictions, not including New Zealand or overseas). Ratios have been multiplied by 100 to express them in percentage terms. [b] Data for 2001-02 are adjusted to 2005-06 dollars using GSP deflators.

Sources: ABS (2007b); MMRF model database; Productivity Commission estimates.

Trans-Tasman trade

Since the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) came into force in 1983, the value of trans-Tasman trade in goods has increased at an average annual rate of 9 per cent (Austrade 2008). Under ANZCERTA, both countries have sought to harmonise a range of non-tariff measures that impede the free flow of goods and services, including quarantine, customs arrangements, standards and business laws. The TTMRA, as just one aspect of this trade agreement, is not an exclusive mechanism through which trade barriers have been lowered and, consequently, not the only reason trade volumes have increased over time. The value of Australia's exports of goods to New Zealand as a proportion of total Australian goods exports (similarly for New Zealand) has fluctuated over time (figure 4.2). Nonetheless, both shares have been on a slight upward trend.

Figure 4.2 **Trans-Tasman trade, 1988–2007[a]**



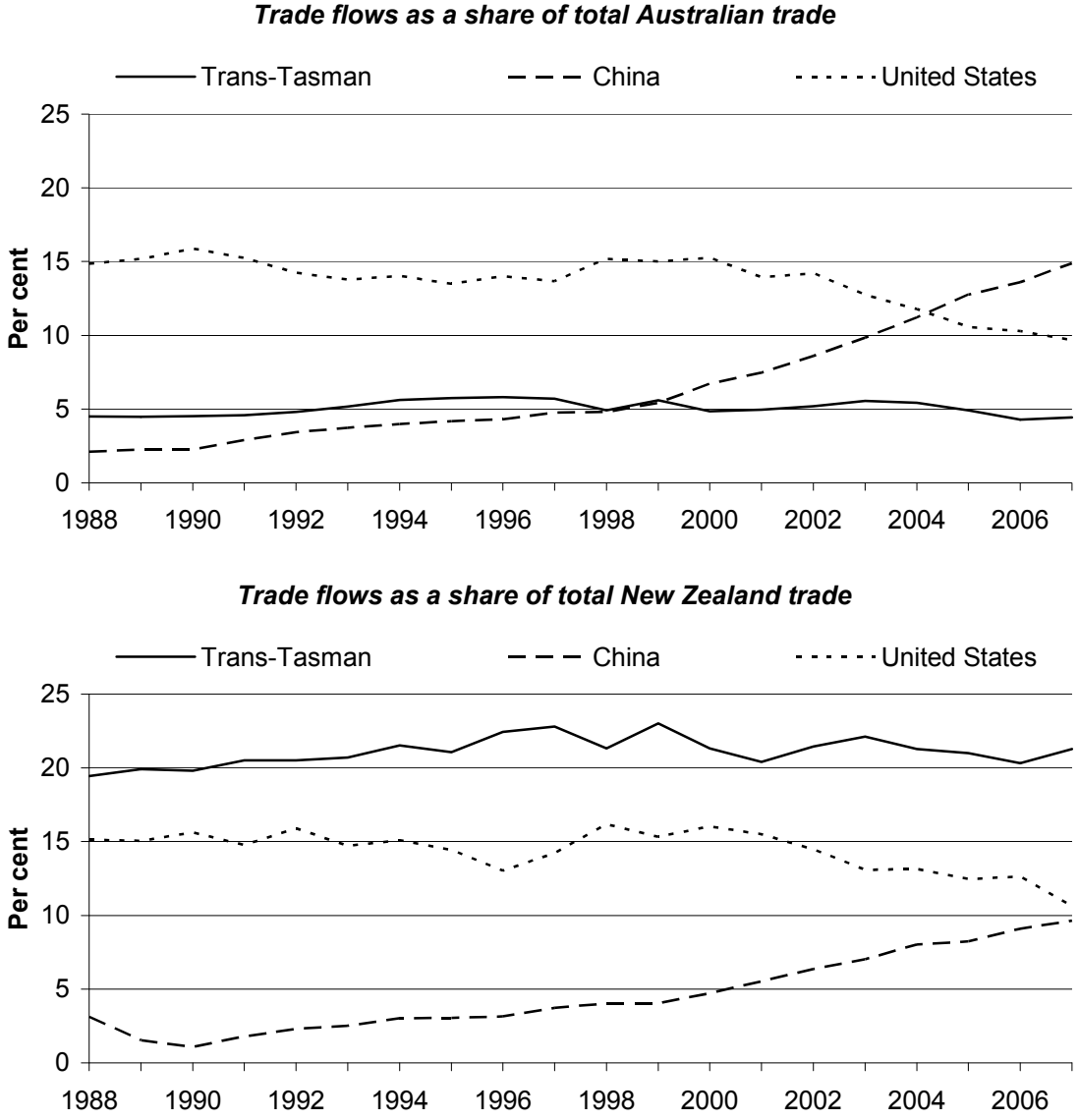
a The figures represent the value of trans-Tasman exports as a proportion of the total exports of each country by Standard International Trade Classification (SITC) revision 3.

Source: WITS (World Integrated Trade Solution) database.

The importance of trans-Tasman trade relative to other bilateral trade flows is depicted in figure 4.3. Trans-Tasman trade as a share of total trade for both Australia and New Zealand has remained relatively constant over time. It represents a higher share of New Zealand's total trade compared with its trade with either China or the United States. However, both Australia's and New Zealand's bilateral trade flows with China have increased substantially over the last five years.

Of the top five traded goods between Australia and New Zealand, some are subject to exemptions under the TTMRA (table 4.2). Motor vehicles, which are subject to a special exemption, have consistently been one of New Zealand's largest imports from Australia. Growth in motor vehicle imports is facilitated by New Zealand's acceptance of various international standards for motor vehicles, including Australian standards (chapter 7). In other words, New Zealand has unilaterally applied mutual recognition to car imports from Australia.

Figure 4.3 **Comparison of trans-Tasman and other bilateral trade flows, 1988–2007[a]**



a The figures represent the value of bilateral trade (gross exports plus gross imports by SITC revision 3) as a share of total trade.

Source: WITS (World Integrated Trade Solution) database.

New Zealand cheese exports have also increased in trade value over recent years. In addition to demand factors, this might reflect the elimination of some certification arrangements due to Australian and New Zealand regulators agreeing on equivalence of both countries' export dairy systems (chapter 8).

Table 4.2 **Top five trans-Tasman exports in 2000, 2003 and 2007[a]**

		2000	*2003*	*2007*
Exporting country	*Rank*	*Product*	*Product*	*Product*
Australia	1	Petroleum oils	Motor vehicles	Petroleum oils, not crude
	2	Motor vehicles	Petroleum oils, not crude	Motor vehicles
	3	Aluminium oxide	Aluminium oxide	Petroleum oils, crude
	4	Crude oil	Medicaments [b]	Medicaments [b]
	5	Medicaments [b]	Petroleum oils, crude	Aluminium oxide
New Zealand	1	Crude oil	Petroleum oils, crude	Petroleum oils, crude
	2	Timber	Timber	Gold
	3	Gold	Gold	Cheese
	4	Chemical wood pulp	Cheese	Wine
	5	Live horses	Refrigerators, freezers	Timber

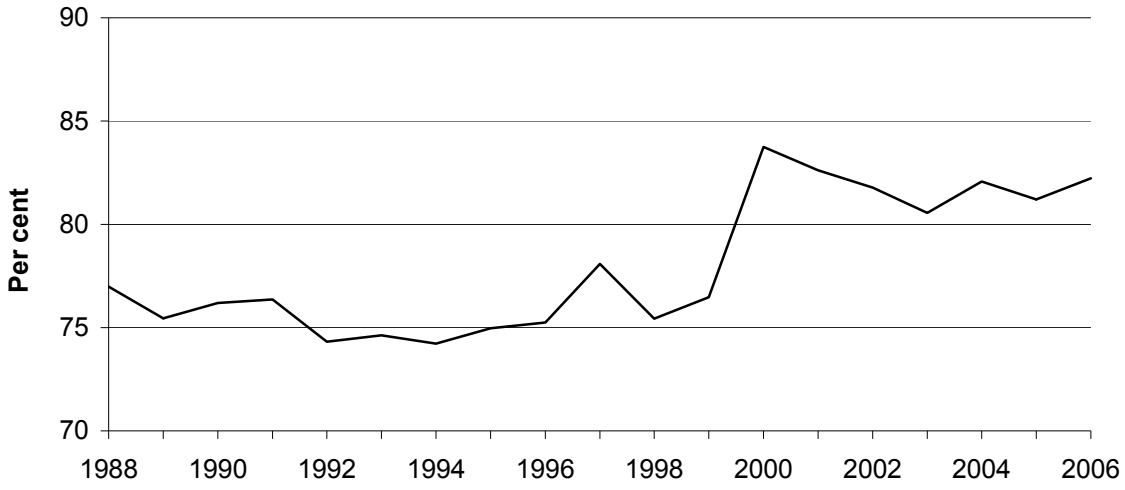
a List of commodity items classified by the Harmonised System (HS) 4-digit level, ranked by value of trade. **b** Medicaments refer to medicinal substances used to treat or prevent disease.

Source: Statistics New Zealand (2007a).

Trade in goods not subject to permanent or special exemptions as a share of total trade value is depicted in figure 4.4. The share increased significantly between 1999 and 2000, reflecting the reclassification of a number of consumer goods, previously subject to special exemptions, which were made non-exempt after 1999 due to the alignment of standards for most products (as noted in section 4.1). It is not possible to infer from this that the TTMRA has independently caused higher trade flows for non-exempt goods. However, the consistently large value share of trans-Tasman trade that is non-exempt serves to illustrate the importance of maximising the effectiveness of the TTMRA in reducing costs to exporters. The New Zealand Ministry of Economic Development also commented that the large share of trans-Tasman trade in goods not subject to exemption is a strong indication of the importance of the TTMRA for bilateral trade:

> Notwithstanding the difficulty of determining a counterfactual, in the context of a bilateral trade relationship worth $16 billion per year, it can reasonably be inferred that the low cost solution to regulatory differences which the TTMRA provides is acting as an important enabler of trade. (sub. DR89, p. 2)

Figure 4.4 **Trans-Tasman trade in goods not subject to exemption[a]**



a The figure represents the value share of total trans-Tasman trade (exports and imports from Australia to New Zealand) in commodity groups not subject to exemption from the TTMRA. This excludes commodities in the following exemption categories: chemicals; gas appliances; risk-categorised food; firearms and explosives; radiocommunications devices; road vehicles; therapeutic goods (including pharmaceuticals, medicaments and therapeutic devices); and specific consumer goods which were subject to an exemption until 1999.

Source: Productivity Commission estimates based on WITS (World Integrated Trade Solution) database.

Other impacts on goods markets

In theory, mutual recognition should promote price convergence, all things being equal, by reducing regulatory impediments to trade. Prices charged for similar goods in different jurisdictions might both converge and decline over time if:

- businesses pass on reductions in compliance costs to consumers
- greater trade opportunities lead to economies of scale being achieved
- removal of impediments to trade leads to more competitive markets resulting in downward pressure on average prices.[7]

However, similar effects could be expected from other forms of deregulation, so that it is not possible to apportion any price variations to mutual recognition. Further, observed variations in prices reflect demand as well as supply shifts, which makes causal analysis difficult. In any event, there is a paucity of information on average retail prices of goods, which rules out isolating the effects of mutual recognition on price convergence. For example, investigation of price convergence

7 However, as noted in chapter 3, convergence might involve a price increase in the 'low cost' jurisdiction and a price fall in the 'high cost' jurisdiction.

using available price indices is not realistic, because indices include the prices of both tradeable and non-tradeable goods.

Another potential impact of mutual recognition is that, by reducing regulatory impediments to trade, it opens up markets and potentially increases the number of competing businesses or suppliers. More competitive markets spur innovation and product differentiation, thereby providing consumers with greater product choice. Little information is available on the extent of these potential impacts of mutual recognition.

4.3 Labour market impacts

The impact of mutual recognition on labour markets is limited by the extent to which it reduces compliance costs; the use of it as a means of registration; and by the mobility of labour. This section examines the importance of mutual recognition in the context of occupation registration in Australia and New Zealand. It goes on to consider the possible impacts that mutual recognition has had on the mobility of labour and the convergence of wages.

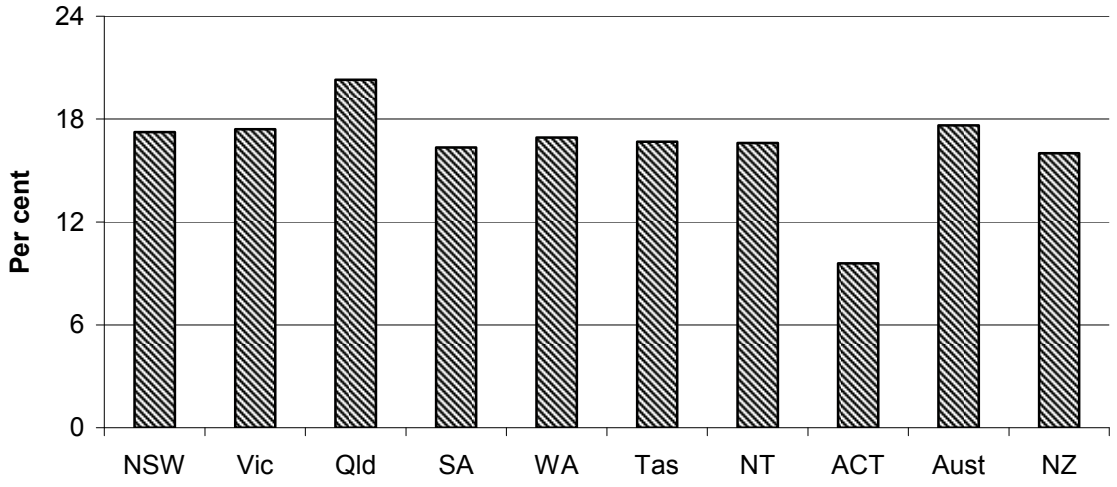
How important is mutual recognition?

An indicator of the potential importance of mutual recognition in facilitating movement of labour is the proportion of people employed in registered occupations. Across Australia, around 18 per cent of employed people work in occupations (identified in appendix F) that are subject to registration requirements (figure 4.5). In New Zealand, the percentage of employed people potentially affected by the TTMRA is slightly less than Australia at 16 per cent. Mutual recognition has little, if any, direct implications for those working in occupations for which registration is not required.

While registered occupations account for a reasonable share of employment, data on the actual use of mutual recognition as a means of obtaining registration are limited. In order to address this deficiency, the Commission conducted a survey of occupation-registration authorities across Australia and New Zealand so as to:

- quantify the use of mutual recognition
- obtain views from regulators on the importance and effectiveness of mutual recognition.

Figure 4.5 **Employment in registered occupations as a percentage of total employment, 2006[a]**



a Registered occupations include occupations licensed nationally or in individual jurisdictions.

Sources: ABS (*Census of Population and Housing, 2006*, unpublished data); Statistics New Zealand (2006).

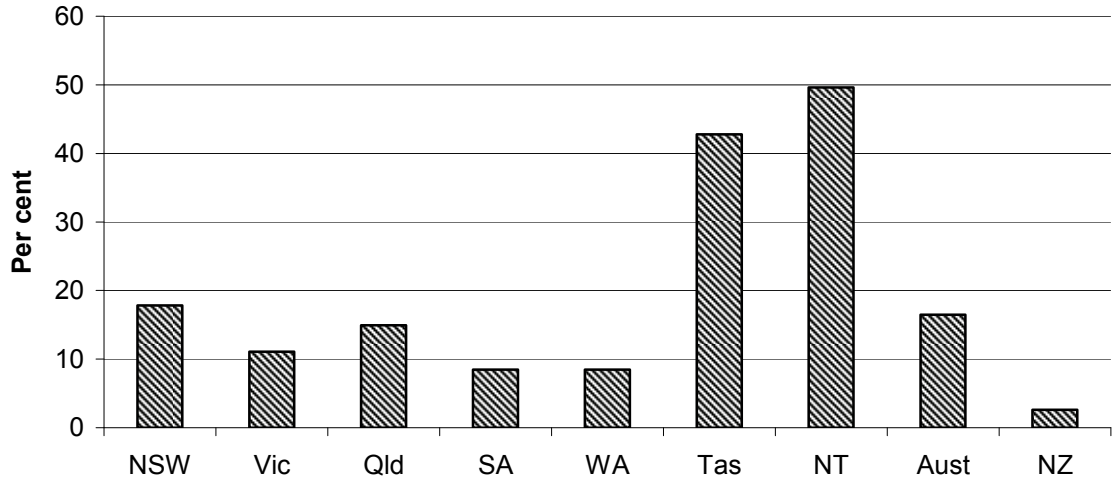
While it is recognised that authorities face resource constraints, the survey response rate of just over 50 per cent suggests that mutual recognition is not a major focus for many registration authorities.

Of the responses that were received, the inability of a number of occupation-registration authorities to provide data hampered the assessment of the effectiveness of the mutual recognition schemes. A number of survey participants were unable to provide information on the use of mutual recognition as a means of registering occupations for which they are responsible. Moreover, one state registration body was not able to provide data on the total number of workers registered — both conventionally or under mutual recognition — in all building, electrical, air conditioning and refrigeration, and plumbing occupations.[8]

Despite data limitations, it is possible to obtain some impression of the use of mutual recognition. Figure 4.6 shows that jurisdictions appear to use mutual recognition differently, with mutual recognition registrations as a proportion of total registrations varying considerably. The data suggest that mutual recognition is more important for smaller jurisdictions. Survey comments suggested that this is likely to be the case where jurisdictions do not have training facilities required for specific occupations and rely on trained practitioners from other states to fill vacancies.

8 This organisation did, however, offer to collate the data in return for a processing fee of $10 per record.

Figure 4.6 **Mutual recognition registrations as a percentage of new registrations, by jurisdiction, 2007[a]**



[a] Data for the Australian Capital Territory are not included as they are based on a single response, and not representative of the use of mutual recognition in that jurisdiction. Total registrations in South Australia do not include 4283 'Responsible Person' and 'Sensitive Person' licences issued.

Source: Productivity Commission survey of occupation-registration authorities (appendix D).

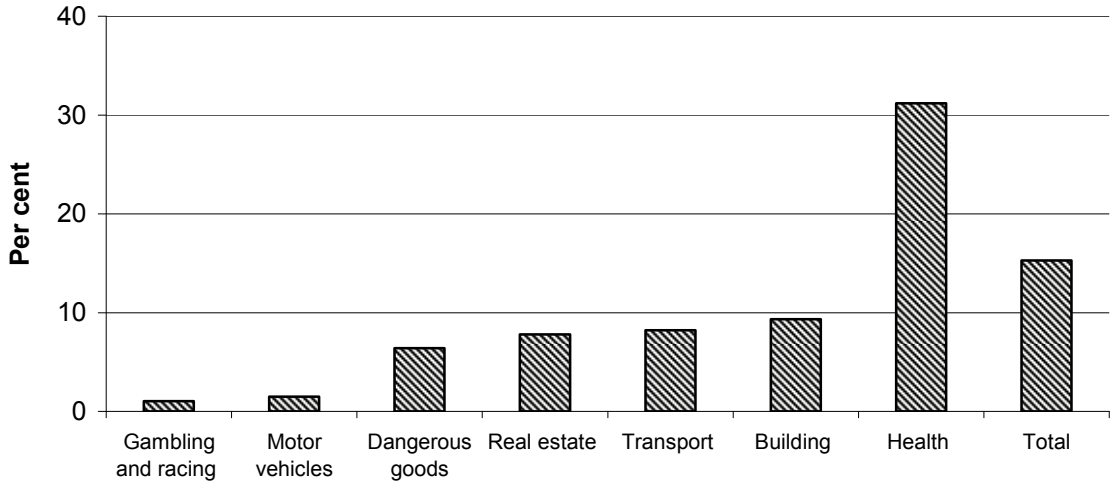
Mutual recognition does not appear to be widely used in New Zealand, with just under 5 per cent of reported registrations conducted under the TTMRA. While the survey requested information about TTMRA registrations in Australia, this was not widely available.

Similarly, the use of mutual recognition varied considerably by occupation, with the greatest proportion of registrations occurring in real estate, transport, building and health occupations (figure 4.7).

Mutual recognition and labour mobility

By reducing some costs associated with relocation, mutual recognition may increase labour mobility, as registered workers are effectively freed up to seek employment opportunities in other jurisdictions without further training or accreditation requirements.

Figure 4.7 **Mutual recognition registrations as a percentage of all new registrations — by broad occupational group, 2007**



Source: Productivity Commission survey of occupation-registration authorities (appendix D).

It is important to recognise that registration compliance costs are just one of many factors affecting the mobility of labour. That is, any increase in labour mobility observed since the MRA and TTMRA were introduced cannot be ascribed solely to those changes. A worker's decision to relocate is likely to be affected by a number of factors, including:

- the expected income from work, which is affected by both expected wages and the probability of finding and maintaining employment
- the relative costs of living, in particular those associated with housing
- regional differences that affect quality of life (Debelle and Vickery 1998).

Other costs include transport costs, income losses during migration and potential social and psychological costs. These costs suggest that migration can be interpreted as an investment, since the present costs have to be offset by future returns on migration. Costs are therefore inversely related to the probability of migrating.

Other regulations and policies that impede either the movement of workers, their ability to obtain work or their relative financial position are also likely to influence the decision to relocate. For example, while Australia and New Zealand have a long-standing agreement allowing their citizens unrestricted movement across borders, social security arrangements restricting the access of New Zealand citizens to the Australian welfare system may affect their mobility (Shah and Long 2007).

Despite the broad range of factors that may affect labour mobility, participants in the survey of occupation-registration authorities expressed the opinion that mutual

recognition of registration did facilitate greater movement of labour. For example, the Nurses and Midwives Board of Western Australia commented that mutual recognition 'increases mobility of nurses and midwives within Australia and New Zealand'.

Economic benefits of improved mobility

To the extent that mutual recognition improves interjurisdictional labour mobility for registered occupations, it can be expected to result in economic benefits by virtue of promoting a more efficient allocation of workers across jurisdictions. For example, while relocation decisions within New Zealand labour markets are shown to be complex and multi-faceted, recent research by Morrison et al. (2008) confirms the importance of mobility as an equilibrating mechanism within the labour market.

In order to gauge the magnitude of the potential economic benefits that mutual recognition could deliver through improved mobility in Australia, a hypothetical general equilibrium modelling exercise was conducted.

This exercise assumed that, without mutual recognition, workers in registered occupations are immobile between jurisdictions within Australia. The introduction of mutual recognition is assumed to make labour mobility perfectly responsive to interjurisdictional differences in wages. The effects on the Australian economy of a 'natural resources boom' were then simulated under both mobility settings. The results show that, even when represented through such extreme changes in labour mobility, mutual recognition is likely to have relatively small effects on the wider economy. However, the effects at jurisdictional level could be significant with improved mobility of workers contributing to growth in gross state product in the 'boom jurisdictions', and also leading to a more equal distribution of the gains from the resource boom between jurisdictions (box 4.4 and appendix E).

Changes in labour mobility

Interstate labour mobility has remained relatively stable over the period that mutual recognition has been in operation. Between 1996 and 2006, the proportion of workers moving interstate only declined slightly, from 1.90 per cent to 1.86 per cent of the total workforce. There has, however, been a large increase in the *number* of workers relocating, with a disproportionate increase occurring in occupations that are either fully registered or partially registered.

The Australian Census of Population and Housing provides a useful source of information about the composition of Australian employment and, in particular, labour mobility. Data from the 1996, 2001 and 2006 censuses were used to assess labour mobility over the period in which mutual recognition has been operating.

Box 4.4 A general equilibrium analysis of improved labour mobility

The Commission used computable general equilibrium modelling to examine the potential magnitude of, and the mechanisms behind, the economic effects of improved mobility of workers in mutually recognised occupations. The simulations replicated the 'resources boom' that recently affected parts of Australia (modelled as a 10 per cent increase in export prices for mining commodities). The modelling estimates the upper bound of the effects of mutual recognition, based on the extreme assumption that MRA has made registered workers perfectly mobile, from a baseline of zero mobility.

Economywide effects

Removing barriers to mobility of registered workers resulted in economywide gains in real output and average real wages. For example, perfect labour mobility of registered workers adds about 0.3 of a percentage point to the baseline growth of real gross domestic product of 2.1 per cent.

Effects by jurisdiction

A commodity price boom increases the demand for labour and capital in jurisdictions that rely on production and export of commodities, such as Western Australia, Queensland and the Northern Territory. Improved mobility of workers means that workers from other jurisdictions can relocate to the 'boom' jurisdictions. This relocation facilitates significant growth in gross state product (GSP) relative to the baseline scenario — adding 10.7 percentage points to baseline GSP growth of 9.1 per cent in Western Australia; 5.2 percentage points to baseline growth of 4.6 per cent in Queensland; and 6.3 percentage points to baseline growth of 4.1 per cent in the Northern Territory. Conversely, remaining jurisdictions experience a net loss of workers and a reduction in their GSP. However, labour mobility reduces growth in GSP per capita in the boom jurisdictions and increases it in the remaining states and territories. This is primarily because the relocation of workers increases the share of capital in aggregate output in the source jurisdictions and reduces it in the boom jurisdictions. The baseline growth in GSP per person changes by between 0.0 and 0.4 percentage points, depending on the jurisdiction.

Effects on wages of registered workers

Following a resources boom, the wages of workers in most occupations rise. Removing barriers to labour mobility improves resource allocation and further increases the average real wage in most occupations, but the effects are relatively small. Labour mobility also facilitates a more equal distribution of gains in the wages of registered workers across jurisdictions, by moderating the growth in real wages in boom jurisdictions and increasing the growth of wages in other jurisdictions. For example, the growth in the wages of registered professional workers:

- falls from 16.7 per cent to 4.4 per cent in Western Australia and from 8.8 per cent to 4.3 per cent in Queensland
- increases from 1.6 per cent to 4.1 per cent in New South Wales; from 0.3 per cent to 4.1 per cent in Victoria; and from -0.1 per cent to 4.1 per cent in South Australia.

Labour mobility with respect to mutual recognition is defined as employed people who moved state or territory in the year before the census, or employed people born in New Zealand who had arrived in Australia within that year. This means that employed people who entered Australia via New Zealand, but were not born there, are not distinguished in these figures. Despite their importance as a source of registered workers for the Australian labour market, migrants from overseas who arrived in the year before the census are not included as they are not subject to mutual recognition.

Occupation information contained in the censuses, and the list of registered occupations in appendix F, enables an estimate to be made of the number of people employed in Australia in:

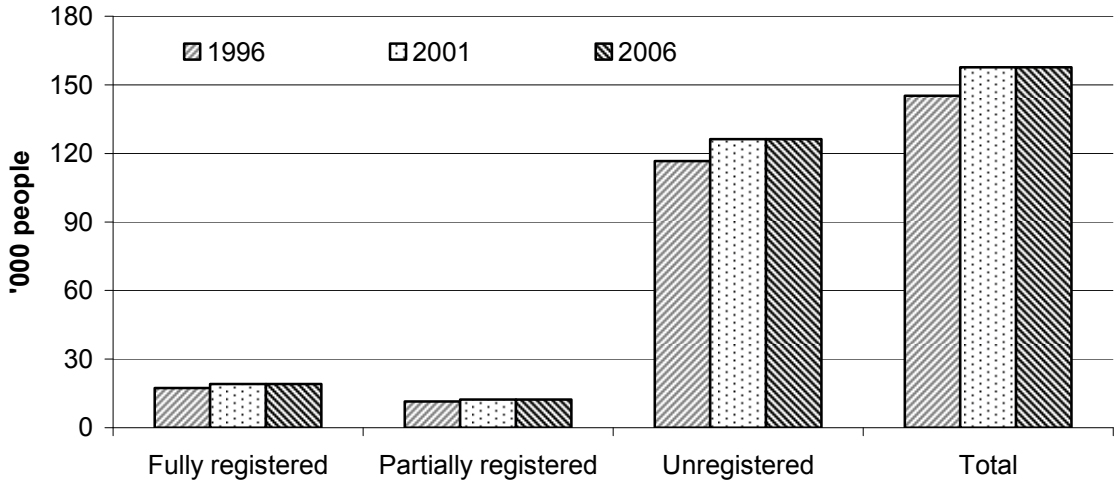
- fully registered occupations, where registration is required for that occupation in all Australian jurisdictions
- partially registered occupations, where registration is required in at least one Australian jurisdiction
- unregistered occupations, where registration is not required in any Australian jurisdiction.

Employed people who had moved to another jurisdiction within the year preceding the 1996 census numbered around 145 000 (figure 4.8). By 2006, this number had increased to around 169 000, an increase of about 16.5 per cent. Between 1996 and 2006 there was a small shift in the composition of the mobile workforce, with the proportion of fully registered workers increasing from 11.9 to 12.9 per cent. The proportion of employed people moving between jurisdictions working in partially registered occupations increased from 7.9 to 9.0 per cent.

Labour mobility in fully and partially registered occupations increased by around 26 and 33 per cent, respectively, over the period between 1996 and 2006 (table E.2 in appendix E). This represents an increase from around 28 700 per year in 1996 to approximately 37 000 fully and partially registered workers in 2006 (table E.1 in appendix E). In contrast, mobility among unregistered workers increased at less than half the rate for occupations subject to registration (13.4 per cent), but the total number of unregistered workers relocating each year is much greater, given that they comprise around 80 per cent of total employment.

Figure 4.8 **Labour mobility by occupation-registration status**

Employed people who moved jurisdiction in the previous year[a]



[a] Includes New Zealand-born people who arrived in the preceding year.

Source: ABS (*Census of Population and Housing*, 1996, 2001 and 2006, unpublished data).

Shift-share analysis of interstate labour mobility

The observation that the increase in annual labour mobility between the 1996 and 2006 censuses was proportionally greater for registered occupations, than for unregistered occupations is not sufficient evidence to conclude that mutual recognition has increased the mobility of labour. The observed increase in mobility could also be due to an increase, over this time period, in labour demanded by industries that employ relatively more registered workers. If the geographic distribution of those industries differed from that of all industries, greater mobility of registered occupations would ensue. Alternatively, an increase in the mobility of registered workers could reflect a general increase in demand.

To help distinguish between the mobility effects of mutual recognition and those of structural economic change, changes in labour mobility can be decomposed into three components using a technique known as 'shift-share' analysis (described in more detail in appendix E). This analysis is conducted using data from the 1996, 2001 and 2006 Australian censuses.

The shift-share approach is used to examine changes in the interjurisdictional mobility of people employed in all 19 Australian and New Zealand Standard Industrial Classification industries, working in either fully registered, partially

registered or unregistered occupations at the time of the census.[9] For each occupational group/industry pair, changes in annual mobility between 1996, 2001 and 2006 are compared with:

- the economywide change in mobility across all industries and occupational groups.
- the change in the mobility for that occupational group, across all industries.

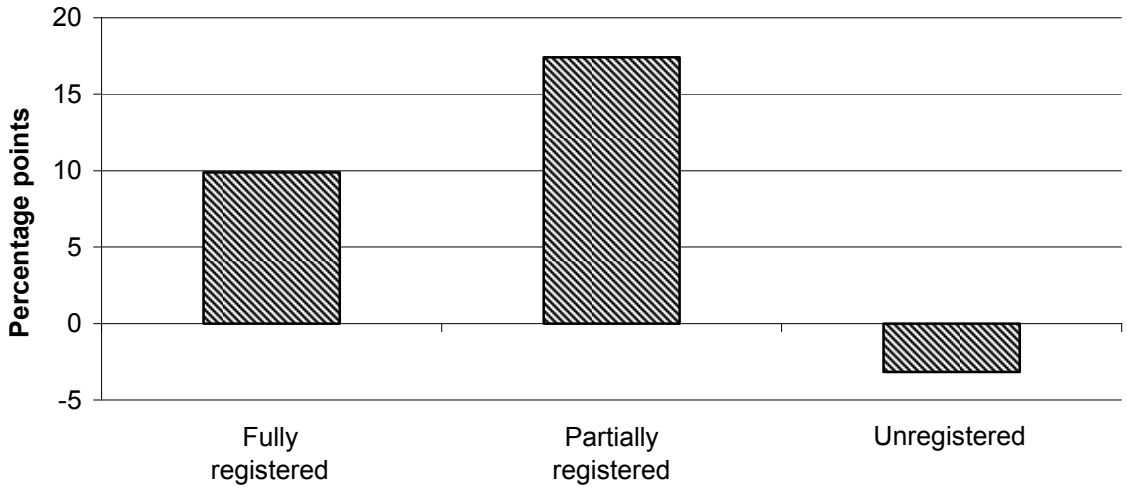
That is, for each occupational group/industry pair, the model decomposes the change in mobility levels over two points in time into three components:

- a 'national change' component, reflecting the overall percentage change in labour mobility across all industries and occupations
- an 'occupational mix' component, reflecting proportional changes in the mobility of people working in occupations with different registration requirements, relative to the total change in mobility (figure 4.9)
- an 'industry' component, reflecting proportional changes in the mobility of people working in occupations with different registration requirements within a particular industry, relative to the change in mobility for that occupational group as a whole in the economy.

Results from decomposing the changes in mobility over time into these components are consistent with the expectation that mutual recognition has increased the labour mobility of registered occupations, relative to unregistered occupations. These results suggest that the national growth in proportional labour mobility between 1996 and 2006 has been due entirely to people working in fully and partially registered occupations (figure 4.9). For other occupations, the percentage change in annual mobility between 1996 and 2006 has been negative, that is, the proportion of the population of unregistered workers who move each year has decreased over that period.

9 The shift-share analysis in this report and the analysis presented in the Commission's 2003 evaluation of mutual recognition schemes are not comparable. The analysis presented here decomposes differences in the *changes* in labour inflows, whereas the previous analysis decomposes differences in the *levels* of labour inflows.

Figure 4.9 **Occupational mix effect, 1996–2006[a]**



[a] For each occupational group, the change in the occupational mix is the difference between the proportional change in mobility levels between 1996 and 2006 for that occupational group (across all industries) and the proportional change in mobility for all occupation groups and industries over the same period (appendix E).

Source: Commission estimates using ABS (*Census of Population and Housing*, 1996, 2001 and 2006, unpublished data).

The change in the occupational mix of labour mobility shown in figure 4.9 may be thought of as the difference between the percentage change in mobility for an occupational group and the percentage change in national mobility. This is the extent to which the increase in mobility for one group is greater than the increase in mobility for all groups. For example, the proportional increase in mobility for fully-registered occupations between 1996 and 2006 was around 27 per cent, while the national proportional increase in mobility was around 17 per cent (table E.2 in appendix E). This results, in figure 4.9 in a compositional swing of 10 percentage points towards fully registered occupations.

While mobility rates for all occupations requiring registration increased at a rate greater than the average between 1996 and 2006, the bulk of this increase appears to have occurred between 2001 and 2006, well after the introduction of mutual recognition (table E.3 in appendix E). The difference between the change in mobility for fully registered occupations and the change in mobility for all occupation groups increased from around 2 per cent between 1996 and 2001 to around 7 per cent between 2001 and 2006 (table E.3). Similarly, there was little difference in the change in mobility for partially registered occupations and the change in mobility for all occupations between 1996 and 2001. However, between 2001 and 2006, that difference rose to be approximately 17 percentage points.

Labour mobility by industry

The shift-share analysis also shows that the greater than average mobility of people working in fully and partially registered occupations was not even across all industries. This suggests that, if mutual recognition is responsible for increased mobility, the effect is not uniform across industries.

Industries that benefited disproportionately from the high increases in mobility of registered workers include finance and insurance; property and business services; and electricity, gas and water (table E.4 in appendix E). Mobility of workers in fully registered occupations in the electricity, gas and water industry increased by around 109 per cent between 1996 and 2006, which was 82 percentage points above the total increase for fully registered workers for all industries. However, the increase in labour mobility in the electricity, gas and water industry was large across all occupational groups. This suggests that mobile registered workers may have been attracted to that industry due to an increase in its overall labour demand, rather than an increase in its demand for specific skills.

Interestingly, given the relatively high use of mutual recognition by health professions (table D.2), mobility of registered workers towards health and community services increased at a lower rate than did mobility of registered occupations as a whole. This is consistent with the slight decline in the proportion of registered workers in that industry — in 1996, around 35 per cent of health workers were fully registered, whereas by 2006, this percentage had decreased to about 32 per cent.

Trans-Tasman labour mobility

As with interstate labour mobility, movement of labour across the Tasman is subject to a number of influences, and disentangling the effects of mutual recognition from these other influences is difficult. This is largely due to the fact that trans-Tasman migration amounts for a relatively small proportion of the total workforce in either country. Despite this, there is evidence to support the expectation that trans-Tasman labour mobility — particularly from New Zealand to Australia — is significant and encouraged by the TTMRA.

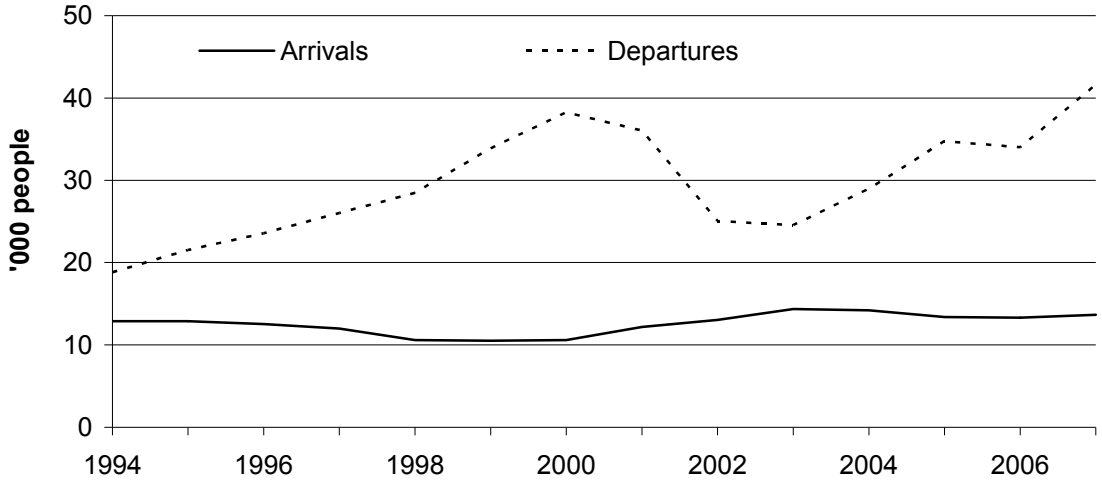
Available evidence suggests that the impact of mutual recognition on the New Zealand labour market is small in terms of the labour market as a whole, but important in terms of labour market flows. In 2007, permanent and long-term arrivals into New Zealand from Australia numbered around 13 500. This level of migration has been relatively stable while the TTMRA has been in place, ranging between 10 500 and 14 000 per year (figure 4.10). Of these long-term arrivals, 76 per cent were of ‘working age’ (between 15 and 64) and 38 per cent were

non-New Zealand citizens. Given that New Zealand census data suggest that around 320 000 workers were employed in registered occupations in 2006, the total number of working age arrivals from Australia would increase the number of registered workers by less than 3.3 per cent if they were all to work in registered occupations.[10]

Survey data support the idea that, while mutual recognition plays a small role in the New Zealand labour market, it is important in terms of labour flows. As shown in figure 4.6, mutual recognition registrations made up nearly 5 per cent of all new registrations in New Zealand in 2007. Survey responses suggest that the TTMRA impacts for New Zealand centre on specific occupations, particularly in the health sector.

Conversely, employment has long been recognised as a significant motivation for migration from New Zealand to Australia, with relative labour market conditions playing an important role in determining rates of migration, particularly from New Zealand to Australia (Brosnan and Poot 1987; Zoladkiewicz 2007). Of those planning to move from New Zealand to Australia, nearly 47 per cent cite employment as the main reason for relocating (Statistics New Zealand 2007c).

Figure 4.10 **Trans-Tasman migration, 1994–2006[a]**



a Permanent and long-term arrivals from and departures to Australia.

Source: Statistics New Zealand (2007b).

10 Figure 4.5 shows that registered workers comprise around 16 per cent of employed persons in New Zealand in 2006. If a similar percentage of working age long-term migrants were registered, this would suggest that around 1700 registered workers, or around 0.5 per cent of the registered workforce in New Zealand, migrate from Australia each year. This level of impact on the stocks of workers is similar to that of New Zealand workers in the Australian labour market, where the inflow makes up less than 0.2 per cent of the total number of registered workers in Australia.

Over the course of the TTMRA's operation, there has been an increase in recent migrants from New Zealand working in either fully or partially registered occupations. In 1996, employed people who were born in New Zealand and had arrived in Australia the previous year numbered around 1900. By 2006, this number had increased to just under 3500, representing an increase in the proportion of New Zealand migrants working in registered occupations from 17.9 to 21.4 per cent. Over the same time, the movement of unregistered workers from New Zealand has increased by around 50 per cent, from about 8400 to 12 500 (ABS unpublished data).

The inflow of workers from New Zealand comprises around 10 per cent of the total labour mobility associated with registered workers in Australia. That is, 2200 New Zealand-born migrants who were employed in registered occupations in 2006 arrived in the preceding year. The inflow of registered workers from New Zealand comprises less than 0.2 per cent of the total number of registered workers in Australia.

The quality of the data supplied by local registration authorities in Australia makes it difficult to draw any conclusions about the use of the TTMRA in Australia. However, census data show that around 75 per cent of New Zealand migrants working in fully-registered occupations do so in the construction, transport and storage; property and business services; or health and community services industries. In these industries, inflows from New Zealand comprise between 11 and 15 per cent of the total mobility for registered occupations.

Impact on wages

In theory, removing the costs associated with the movement of labour should result in an increasing similarity in the wages received by workers in a given occupation across jurisdictions, as workers face lower barriers to relocating in search of higher wages. Using data from the Household, Income and Labour Dynamics in Australia panel survey, Andrienko (2008) provides support for this hypothesis, by demonstrating positive returns to relocation within Australia, particularly for lower wage earners. The search for higher wages should, all else equal, result in a trend towards wage equalisation, over time.

The convergence of wages across jurisdictions can therefore be regarded as an indirect indicator of increased efficiency in the allocation of labour. Conversely, a lack of convergence can indicate the persistence of interjurisdictional labour immobility (HM Treasury 2007; McKissack et al. 2008). While interjurisdictional wage differences are affected by a number of factors — for example, industry

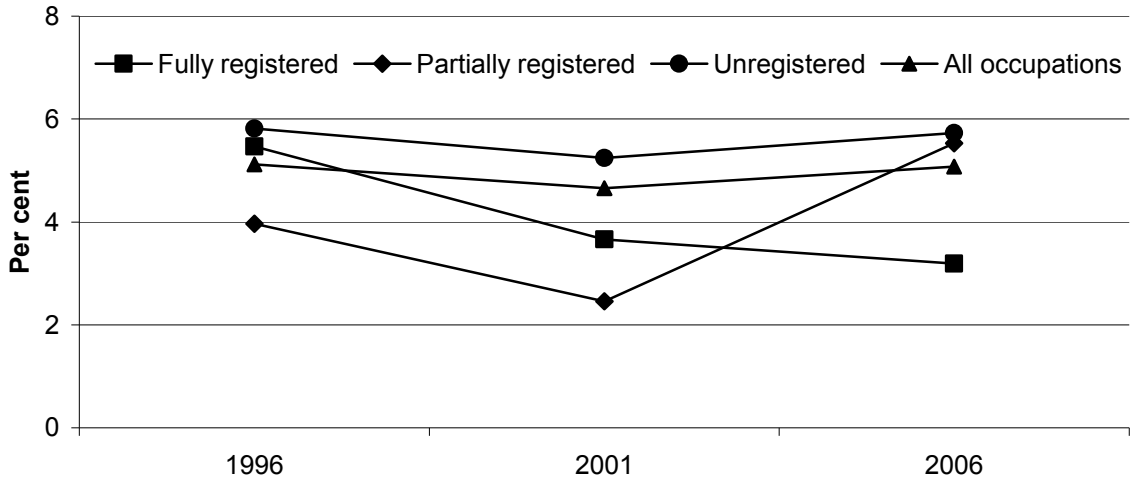
composition, cost and quality of living and employment levels — convergence of wages is consistent with the removal of impediments to the movement of labour.

Wage convergence may be conceptualised as a reduction in the dispersion of wages across jurisdictions over time (Maza and Villaverde 2006). If an indicator of dispersion is shown to have decreased over time, then it can be inferred that wages have converged.

Figure 4.11 shows the coefficient of variation for average wages for Australian jurisdictions, by type of occupation. The coefficient of variation for a given occupation is the standard deviation of average wages over all jurisdictions, divided by the national average for that occupation. It is a measure of wage dispersion relative to the average wage.

Figure 4.11 **Convergence of wages across jurisdictions, by occupation-registration status**

Coefficient of variation[a]



[a] Coefficient of variation is the standard deviation of the mean wage in each jurisdiction expressed as a proportion of the national mean (Villaverde 2004). The proportion is shown as a percentage. The average wage for each jurisdiction is the average of individuals' incomes divided by hours worked (for employed persons who worked 35 or more hours) for each age/sex categories within that jurisdiction. The Australian Capital Territory is excluded due to significant differences in the occupational structure of the workforce. Further detail is provided in appendix E.

Source: Productivity Commission estimates based on ABS (*Census of Population and Housing*, 1996, 2001 and 2006, unpublished data).

The dispersion of wages received by those working in registered occupations clearly decreases between 1996 and 2006, indicating wage convergence. Wage levels in registered occupations coming together in this way is consistent with the uptake of mutual recognition over this time period; reduced impediments to the mobility of labour; and an increase in the movement of workers in registered occupations. This

convergence provides support for the expectation that mutual recognition facilitates more efficient allocation of labour market resources across Australia.

4.4 Conclusion

Assessing the economic impact of the mutual recognition schemes has been difficult because of a lack of relevant data on users of mutual recognition (particularly for goods) and the compliance costs avoided through use of the schemes (that is, what would have been the additional costs in the absence of the schemes).

What information is available supports the view that mutual recognition reduces barriers to interjurisdictional movement of goods. However, available data on growth of interstate and trans-Tasman trade reflects multiple forces affecting Australian and international markets. It has not been possible to distinguish these broader effects from the effects of mutual recognition. It is likely that the MRA and TTMRA have had positive effects but that these have been overshadowed by other factors influencing trade across borders. Nonetheless, the limited anecdotal evidence available suggests that the schemes have been beneficial to trade.

There is relatively more evidence of the positive effects of mutual recognition on labour mobility. The available data suggest that there has been strong growth in labour mobility across fully and partially registered occupations over the period that mutual recognition has been in place. As with goods, it is not possible to attribute these changes exclusively to mutual recognition. Rather, it is more appropriate to conclude that observed increases in the labour mobility of registered workers, and the convergence of wages in registered occupations, are developments that are consistent with the expected outcomes from mutual recognition.

FINDING 4.1

The Mutual Recognition Agreement and the Trans-Tasman Mutual Recognition Arrangement have increased the mobility of goods and labour around Australia and across the Tasman.

- *In the goods area, mutual recognition has led to lower regulatory compliance costs for firms arising from jurisdictional differences. There is some evidence that this has contributed to the expansion of interstate and trans-Tasman trade.*
- *Increased labour mobility and reduced wage dispersion are consistent with the expected effects of mutual recognition of occupational registration.*

5 Registration of occupations

Key points

- Mutual recognition of registered occupations works reasonably well, but a range of issues prevent realisation of the full benefits of the schemes.
- Notwithstanding the time mutual recognition has been in force, uncertainty about the types of occupational regulation covered by the schemes remains. The extent of the coverage of the schemes should be clarified.
- Many study participants expressed concern about the potential for harm to stem from variations in occupational standards. The Commission could not identify systemic problems in any occupation on the basis of the limited evidence provided. However, it is clear that variations in standards can, occasionally, allow poorly qualified practitioners to operate. It is important that an effective mechanism exists for dealing with the harm that does, or might, stem from variations in standards.
- Regulators are very sensitive about performing criminal record checks, and do not always mutually recognise tests done elsewhere. Because community expectations demand a high standard in this area, an effective approach to resolving regulators' concerns in relation to criminal record checks is needed.
- Greater clarity on a range of other provisions of the mutual recognition legislation would improve the effectiveness of the schemes.
  - The legislation is ambiguous with respect to the conditions that can legitimately be imposed to achieve equivalence.
  - It is unclear whether ongoing requirements, for example, relating to continuing professional development, can be included as a condition of renewal for registrations granted under mutual recognition.
  - Definitions of undertakings and disciplinary action would resolve uncertainty about the types of information that may be shared between jurisdictions.
- Differences between jurisdictions in the scope of activities covered by licences have the potential to impede mutual recognition and labour mobility. Ministerial Declarations have gone some way towards resolving this problem.
- National licensing will reduce, but not eliminate, the need for mutual recognition.
- Efforts should be made to include New Zealand in the Ministerial Declarations, as well as in discussions about national licensing.
- A more accessible process for appealing regulator decisions is needed.
- Regulator expertise around mutual recognition could be significantly improved.

Previous reviews of the mutual recognition schemes concluded that they were working reasonably well for registered occupations, but identified a range of issues preventing realisation of the full benefits of the schemes (CRR 1998; PC 2003). This conclusion still holds. A range of issues affecting the effectiveness of the schemes is considered in this chapter. Additional issues relating to occupations are discussed in chapter 9 and appendix F, in the context of possible extensions to the schemes.

5.1 Registration arrangements covered by the schemes

Coregulation

Under the mutual recognition legislation, a registered occupation is defined as one for which some form of authorisation (for example, licensing, approval or certification) is required by or under legislation.

By this definition, a range of regulatory approaches, including coregulation and de facto and negative licensing, arguably give rise to 'registered' occupations. Coregulation, when used in this report, means 'government endorsement, usually by legislation, of a private organisation, [that is] a professional association which is responsible for regulating the conduct and standards of its members' (VEETAC 1993, p. xi). De facto registration arises when legislation authorises people who meet certain requirements to practise an occupation, without further reference to a registration authority (CRR 1998). Negative licensing 'refers to legislation detailing what is not acceptable in the operation or activities of an occupation and providing sanctions for unsatisfactory conduct' (VEETAC 1993, p. xii).

These three 'light-handed' regulatory approaches have generally been assumed to lie outside the coverage of the mutual recognition schemes (for example, VEETAC 1993 and CRR 1998). Some submissions to this study reflected this view. The New Zealand Institute of Chartered Accountants, for example, called for an extension of 'the schemes to those occupations registered under coregulation' (sub. 36, p. 2). The Australian Property Institute, for its part, assumed that the de facto licensing regimes for valuers in South Australia and Tasmania mean that valuers from those jurisdictions are not covered by mutual recognition (sub. 41).

But uncertainty prevails. As the NSW Government noted, '[t]he broad framing of this definition [of registration] can cause confusion over whether negative licences and coregulation should be considered as registration for the purposes of the MRA and TTMRA' (sub. 55, p. 9).

While many types of regulation arguably give rise to registered occupations, the mutual recognition principle for occupations is that a person registered in one state is entitled to registration in an equivalent occupation in another state after notifying the *local registration authority* of that state. This could be interpreted to mean that registration approaches that do not involve a local registration authority are not covered by the mutual recognition legislation.

Most people tend to have a traditional scheme in mind when they think of registration, that is, a scheme in which the local registration authority is a statutory registration board. Legal advice on the *Mutual Recognition Act 1992* (MR Act) and the *Trans-Tasman Mutual Recognition Act 1997 (*Cwlth*)* (TTMR Act (Cwlth)) from the Australian Government Solicitor (AGS) is, however, that 'any entity, whether created by statute or not, may be a registration authority, provided its function is "conferred by legislation"' (appendix B). Similar advice was provided with respect to the *Trans-Tasman Mutual Recognition Act 1997 (*NZ*)* (TTMR Act (NZ)) by the Crown Law Office in New Zealand (Crown Law). This suggests that some coregulatory arrangements fall within the scope of the schemes. The advice also indicates that the registration authority need not be a registration board. An example of a registration arrangement involving a statutory registration authority that is not a board is presented in box 5.1.

Box 5.1 **Responsible service of alcohol certificates**

From 1 January 2004, liquor licensing regulations in New South Wales provide that:

> A staff member of licensed premises must not sell, supply or serve liquor by retail on the premises unless the staff member holds a recognised RSA [responsible service of alcohol] certificate. (Liquor Regulation 2008 (NSW), s. 41).

Legal advice from the AGS is that this requirement under legislation creates a registered occupation for the purposes of mutual recognition. The local registration authority is the NSW Casino, Liquor and Gaming Control Authority. According to the legal advice, the Authority holds this role because RSA certificates are granted by an approved training provider on behalf of the Authority (appendix B).

In other words, because there is a requirement for registration under legislation (an RSA certificate) and training providers grant that registration on behalf of the NSW Casino, Liquor and Gaming Control Authority, the Authority becomes 'the authority in the state having the function conferred under legislation of registering persons' (MR Act, s. 4).

The Commission's view, therefore, is that coregulatory arrangements are likely to meet the requirements of registered occupations for mutual recognition purposes if all the other mutual recognition elements are present. In the case of de facto and negative licensing schemes, the lack of a registration authority within the meaning of the mutual recognition Acts means that mutual recognition probably does not

apply. The questions of whether mutual recognition might, or could, extend to de facto and negative licensing schemes are considered in appendix F.

FINDING 5.1

In contrast with the majority view among stakeholders, coregulatory arrangements appear likely to fall within the coverage of the mutual recognition schemes if the elements required for mutual recognition (authorisation under legislation conferred by a local registration authority) are present.

While the Council of Australian Governments' (COAG) national licensing initiative will lead to consistent registration approaches for many occupations, clarification of the coverage of the mutual recognition schemes would provide useful guidance until the national approaches are established, or for those occupations that do not move to national licensing.

RECOMMENDATION 5.1

The mutual recognition Acts should be amended to make clear whether or not the schemes cover coregulatory, de facto and negative licensing arrangements.

Arrangements involving practising certificates or licences

Practitioners in some occupations must hold more than one form of authorisation before they can provide services to the public. Plumbers in New Zealand, for example, must be registered and hold a current practising licence:

> … registration once granted is for life unless the registration authority removes this by way of disciplinary order or the registrant requests that his or her name be removed [from the register]. (Plumbers, Gasfitters and Drainlayers Board, sub. DR70, p. 3)

Practising licences for New Zealand plumbers need to be renewed annually.

Multiple authorisations raise the possibility that the requirements of the mutual recognition legislation apply only to some forms of authorisation. However, the legislation makes it clear that this is not the case. Section 4(2) of the TTMR Act (NZ), for example, provides that:

> If an individual is required by or under law to have more than 1 form of authorisation … to carry on an occupation, registration includes each form of authorisation that any relevant local registration authority grants.

5.2 Differences in occupational standards

A key element of mutual recognition, as it applies to occupations, is that registration in one jurisdiction is sufficient grounds for registration in an equivalent occupation in another under mutual recognition. Differences in the occupational 'standards' — qualifications, skills and experience — required to obtain (and retain) registration are not grounds to reject an application. In other words, the jurisdictions that participate in the mutual recognition schemes have agreed to recognise each others' standards, even though they may be different (box 5.2).

Box 5.2 **Variation in approaches to regulating valuers**

Of all the registered occupations in Australia and New Zealand, valuers possibly exhibit the largest variation in regulatory approach. Four jurisdictions employ a traditional registration model (New Zealand, New South Wales, Queensland and Western Australia). South Australia, Tasmania and Victoria (the latter for government valuation work only) operate de facto regimes, while '[t]he two Territories have never had legislation covering the licensing of valuers' (Australian Property Institute, sub. 41, p. 7).

Within each approach, the standards that must be met to carry on employment as a valuer range from the 'let the market rule' approach in the Australian territories that prescribes no standards, to the current New Zealand approach. The latter includes requirements that applicants: are at least 23 years old; of good character and repute; demonstrate a reasonable standard of professional competence; possess a minimum three-year university degree in valuation; and have the equivalent of three years full-time practical experience in the preceding ten years.

As in the 2003 review (PC 2003), differences in occupational standards remain a key source of concern for study participants. Some study participants, especially regulators, expressed misgivings about the potential risk of harm to property, health and safety from lower standards in some jurisdictions (box 5.3).

The evidence of harm provided to the Commission was anecdotal, and did not point to systemic problems that would affect an entire occupation in a given jurisdiction. However, given the limited data available, the Commission cannot discount the possibility that lower standards have caused, or might cause, harm to the public Moreover, while examples provided appeared to be more akin to 'one bad egg' scenarios, at least one highlighted the potential for lower standards to allow, on occasion, the emergence of such scenarios. The ACT Health Registration Boards reported that:

> Some … jurisdictions allow a person to maintain their registration by payment of an annual fee, regardless of competence. The ACT recently received an application for

registration from a NSW registered podiatrist who had not practised at all for 20 years and who had done no CPD [continuing professional development] either. (sub. 44, p. 1)

The mutual recognition effects of this example are twofold. First, it is important to note that if there is a legitimate cause for concern about this podiatrist practising in the ACT under mutual recognition, this same concern should arise in NSW if the podiatrist decided to practise in that jurisdiction. The difference is that the application to register under mutual recognition has brought this risk to the attention of the ACT registration authority.[1] The second mutual recognition effect is that the risk that arises as a result of the NSW regime is being exported to the ACT.

It might be argued that one of the advantages of mutual recognition is that it will bring risks that arise because of differences in standards to light. The means of addressing issues of health, safety and protection of the environment under the schemes should address not just the individual risk of a particular applicant for registration, but also the regulatory regime that is the source of the risk.

Box 5.3 **Variations in standards**

The Valuers Registration Board of New Zealand was concerned that 'public protection is likely to be compromised' by the lower academic and practical requirements for registration in New South Wales (sub. 6, p. 2). On this point, the Valuers Registration Board of Queensland raised the possibility of 'significant cost to the community through the inevitable lowering of standards within the valuation profession' (sub. 19, p. 4).

Concerns have also been raised about the registration of psychologists. The New Zealand Psychologists Board reports that it was 'confident that the standard set in New Zealand for registration as a psychologist is necessary for the protection of the public. This is a case, however, where there are apparently different assessments of risks to the public in a certain Australian jurisdiction' (sub. 25, p. 2).

In commenting on jurisdictions' differing requirements for registration, the Real Estate Institute of New Zealand suggested that '[a]ll attempts to lower eligibility requirements must be resisted … or this will undermine the consumer protection elements already existing in the various pieces of legislation in the different jurisdictions' (sub. 26, p. 2).

The Commission considers that it is very important that effective mechanisms exist for dealing with standards that are so low that the public or the environment are placed at risk of harm from poorly qualified practitioners. The following section presents suggestions for improving this element of the schemes, and raises concern about the options open to a regulator who uncovers an error in another regulator's

1 The question of whether New South Wales would allow a podiatrist with such out-of-date skills to practice has not been tested.

registration processes. Two specific standards-related concerns — 'shopping and hopping' and criminal record checks — are then discussed.

FINDING 5.2

Although many study participants raised concerns about lower occupational standards causing harm, the limited data provided did not offer conclusive evidence of systemic problems affecting an entire occupation in a given jurisdiction. This does not mean that such problems cannot arise. Furthermore, the evidence highlights the fact that lower standards can, on occasion, allow poorly qualified practitioners to operate. It is important that an effective mechanism exists for dealing with the harm that does, or might, stem from lower standards.

Avenues through which concerns can be addressed

Concerns about lower occupational standards

As a first option, regulators or jurisdictions concerned about lower occupational standards can engage in dialogue with their counterparts in other jurisdictions. Ideally, such dialogue would result in the discovery of some common ground, whereupon mutual recognition could resume to both jurisdictions' satisfaction. If regulator dialogue does not resolve concerns, two formal mechanisms exist.

First, the MRA and the TTMRA contain processes for referring concerns about occupational standards to Ministerial Councils for resolution. A Ministerial Council must 'endeavour to determine, within 12 months … whether or not agreed standards … should be set with respect to the carrying on of the occupation' (MRA, para. 4.8.1). Determination of a standard requires a vote in favour by two-thirds of jurisdictions participating in the relevant mutual recognition scheme. A recommendation on standards is then made to Heads of Government. Unless at least one-third of the Heads of Government reject the recommendation within three months, participating jurisdictions are deemed to have agreed to implement any recommended standard as soon as practicable.

It appears that these processes have never been used. This may indicate a lack of awareness among regulators about the referral mechanism — possibly stemming from the location of this mechanism in the MRA and TTMRA, and not the mutual recognition legislation. If this is an issue, it should be addressed by the initiatives to enhance regulator expertise discussed in chapter 11.

FINDING 5.3

The mechanism of referring a concern about the standards required for registration in an occupation to a Ministerial Council appears never to have been used. It is possible that this reflects a lack of awareness that could usefully be addressed through initiatives to improve regulator expertise.

Second, the mutual recognition legislation allows for a tribunal — the Administrative Appeals Tribunal (AAT) in Australia or the Trans-Tasman Occupations Tribunal (TTOT) in New Zealand — to make a declaration that occupations are not equivalent on standards grounds. The wording of the MR and TTMR Acts is very similar, the main difference being the jurisdiction referenced. The TTMR Act (NZ), for example, provides that the TTOT can make a declaration if it is satisfied that:

> … [an] activity or class of activity, if carried on by an individual not conforming to the appropriate standards, could reasonably be expected to expose persons in New Zealand to a real threat to their health or safety or could reasonably be expected to cause significant adverse effects on the environment in New Zealand. (s. 30(1)(b)(ii))

This said, the mechanism through which concerns about occupational standards are brought before a tribunal is not clear. The schemes provide only that a *person whose interests are affected* may apply to a tribunal for a review of a decision made by an Australian regulator (*Administrative Appeals Tribunal Act 1975* (Cwlth), s. 27), and that *an applicant* may apply for a review of a decision by a New Zealand regulator (TTMR Act (NZ), s. 42).

It could be argued that, in allowing the tribunals to rule on occupational standards following application for a review of the registration decision, the mutual recognition legislation permits regulators to refuse registration when they have significant concerns about the occupational standards applied by the applicant's home jurisdiction. But, as noted above, the general intent of the mutual recognition legislation is to preclude refusal of an application on a standards grounds. This ambiguity in the legislation should be clarified.

The Commission also considers that the mutual recognition schemes would work more effectively if regulators and other interested parties were permitted to seek advisory opinions from the tribunals in situations of this type (and, indeed, on any issue where the intent of the mutual recognition legislation is in doubt). A similar suggestion is made with respect to goods in chapter 8.

RECOMMENDATION 5.2

The mechanisms through which the Administrative Appeals Tribunal and the Trans-Tasman Occupations Tribunal can be approached to make a declaration on occupational standards should be clarified.

RECOMMENDATION 5.3

The mutual recognition Acts should be amended to create a mechanism for regulators and other interested parties to approach the Administrative Appeals Tribunal and the Trans-Tasman Occupations Tribunal for advisory opinions.

Registration processing errors

The Commission received legal advice from both Crown Law in New Zealand and the AGS that a regulator may recheck or audit whether an applicant met the registration requirements of the first jurisdiction (appendix B). However, the legal advice also states that an individual's failure to meet the requirements of the first jurisdiction is not grounds for the second jurisdiction to refuse to register him or her.

To address this problem, registration authorities could agree, either informally or more formally through a mechanism such as a Memorandum of Understanding, that a first jurisdiction will take timely action if any discrepancy is found by a second jurisdiction. Registration in the first jurisdiction can be cancelled, suspended or conditions or undertakings imposed so that the second jurisdiction can follow suit under either MR Act s. 33 or TTMR Acts s. 32.

Another solution lies in the way registration processes are structured. For example, registration authorities could require applicants under mutual recognition to declare that they have met the registration requirements of the first jurisdiction and are validly registered. If applicants do not meet these requirements, the second jurisdiction can use its powers under MR Act s. 23, TTMR Act (Cwlth) s. 22 or TTMR Act (NZ) ss. 22 and 20(6) to refuse registration on the grounds that the applicant provided false or misleading information.

The mutual recognition Acts could be amended to include a declaration of this type in the written notice that applicants for registration under mutual recognition must provide to local registration authorities (MR Act s. 19, TTMR Act (Cwlth) s. 20 and TTMR Act (NZ) s. 19).

FINDING 5.4

A regulator may test whether an applicant under mutual recognition has met the registration requirements of his or her home jurisdiction, but cannot refuse the

application if the applicant has been registered in error. Consideration should be given to a mechanism that would permit regulators to legally reject an application in this situation.

Specific concerns about occupational standards

'Shopping and hopping'

The term 'shopping and hopping' denotes the practice of registrants seeking initial registration in the jurisdiction perceived to have the easiest or cheapest registration system, then using mutual recognition to move to the jurisdiction in which they wish to work. A number of study participants expressed concern about this practice, and suggested that 'shopping and hopping' has become more frequent as information and communication technology have facilitated the spreading of information on variation in registration requirements.

In an important sense, 'shopping and hopping' is a desired outcome of mutual recognition of occupations, reflecting its role in promoting regulatory competition between jurisdictions. If workers can gain registration more cheaply and easily by registering with one jurisdiction and then invoking mutual recognition, there are gains to the economy, provided the jurisdiction of first registration does not set standards so low that registered workers can cause harm to the public or the environment.

The Commission suspects that some claims about 'shopping and hopping' reflect a desire on the part of some participants with vested interests to erect barriers to entry to practitioners from other jurisdictions.

A requirement that applicants for registration under mutual recognition be required to remain within the registering jurisdiction for 12 months to reduce 'shopping and hopping' was supported by some study participants (for example, Physiotherapy Board of New Zealand, sub. 7, p. 2; Dental Council of New Zealand, sub. 48, p. 1; New Zealand Psychologists Board, sub. DR 71, p.1). However, it was also argued that a requirement of this type would increase the administrative costs of the schemes and impose higher regulatory burdens on genuine applicants (NSW Government, sub. 55, p. 15). The Commission is also concerned that a residency requirement would work against the mobility of people seeking to provide services in more than one jurisdiction. The increasing importance of cross-border and short-term service provision is discussed in chapter 9.

In addition, the Commission notes that any initiative to limit 'shopping and hopping' would be unlikely to address some participants' key concerns. The Physiotherapy Board of New Zealand, for example, raised the concern that it is

registering more physiotherapists each year, but that New Zealand continues to face shortages. Many of the new registrants move immediately to Australia, having only registered in New Zealand because the process is considerably cheaper and more convenient. As the Board noted, physiotherapists in Australia earn higher wages and Australian employers recruit actively in New Zealand. A residency requirement will not address skill shortages in New Zealand, if wages are the key factor in physiotherapists' decision about where to practise.

On balance, inclusion of a residency requirement in the mutual recognition schemes is not supported.

Criminal record checks

Criminal record checks appear to be a particularly sensitive issue for regulators. These checks, for example, underlay concerns about licences for security sensitive ammonium nitrate raised with the Commission during its study of chemicals and plastics regulation (PC 2008b) (box 5.4). One regulator told the Commission that its registration arrangements lay outside the coverage of the mutual recognition schemes because they involve criminal record checks and, in essence, that these were too important to mutually recognise. Other regulators mutually recognise registrations from other jurisdictions but nonetheless require applicants to undertake a criminal record check as a condition of registration.

The Commission can see nothing in the mutual recognition schemes that supports these approaches. Character and being 'fit and proper' are two of the qualifications mentioned in the legislation that can give rise to a registered occupation for mutual recognition purposes (for example, TTMR Act (Cwlth), s. 4). Furthermore, the legislation stipulates that registrants under mutual recognition must abide by the laws of the host jurisdiction governing the practice of an occupation, unless those laws are based on the attainment of a qualification or experience relating to fitness to carry on the occupation. In other words, criminal record checks cannot legally be required of registrants under mutual recognition.

Some study participants argued that regulators should be able to run their own checks because of the potential for an offence to have been committed after a check was undertaken in another jurisdiction (for example, Australian Teacher Regulatory Authorities, sub. 31). Participants also expressed concern about the fact that regulators in some jurisdictions are more limited in the information that they can seek on individuals than their counterparts in other jurisdictions. 'For example, provisions differ regarding the type of offences and whether and to what extent "spent" convictions are revealed' (Australian Teacher Regulatory Authorities, sub. 31, p. 2).

Box 5.4 **Security sensitive ammonium nitrate (SSAN) licensing issues**

In 2004, COAG agreed to a set of principles for the regulation of ammonium nitrate to address the security risks associated with the potential illegitimate use of this substance. The agreed principles were to guide the states and territories in their regulation of ammonium nitrate, given that the control of dangerous goods and explosives is their responsibility. Currently, in most cases, anyone who manufactures, imports, transports, sells or uses ammonium nitrate requires a licence.

To the extent that use of security sensitive ammonium nitrate (SSAN) reasonably constitutes an individual's occupation, SSAN licences could be subject to mutual recognition. If the use is, instead, more in the nature of a 'tool', or one of the elements required to carry out an occupation, then it may not be subject to mutual recognition as a registered occupation in its own right (appendix F contains further details on this issue).

As the Commission noted in its recent report on chemicals and plastics regulation (PC 2008b), SSAN regulations in some jurisdictions include provisions for licence recognition, but approaches vary. Victoria has explicit, comprehensive provisions regarding mutual recognition of security clearances and licences in its regulations. Other jurisdictions have capacity within their regulations to recognise each other's licences on a temporary basis. This variation in approach appears to relate to concerns about criminal record checking.

In a submission to the Commission's report on chemicals and plastics regulation (PC 2008b), the SA Government stated that its capacity to recognise security clearances from other jurisdictions is currently inoperable because other jurisdictions do not have systems in place to:

> … ensure any change of security status of the individual licensed in the primary jurisdiction would be immediately transferred to the secondary licensing jurisdiction ([that is,] South Australia). (SA Government 2008, p. 3)

The Commission recommended harmonisation of critical licensing elements, including background checking and standards for probity of individuals, in order to reduce the compliance and administration costs of duplicating these processes for operators in multiple jurisdictions.

Regulator concerns about criminal record checks, as reflected by the approach to SSAN licences, suggest the need for change in their treatment in the mutual recognition schemes.

The frequency of regulator refusal to mutually recognise criminal record checks suggests a need to change the status of these checks within the mutual recognition schemes. If there is widespread agreement that these checks should be allowed, then the Commission considers that the schemes should reflect that view. However, any amendment to the Acts to allow regulators to require criminal record checks of applicants for registration under mutual recognition would need to ensure those checks did not slow registration processes and, hence, labour mobility. The

Commission considers that checks should occur during the deemed registration period and that they should only occur if they are also required of local applicants.

Responses to the Commission's draft report suggest that there is widespread support for removal of criminal record checks from the coverage of the schemes. One study participant also suggested that checks of civil records and spent convictions be permitted (Australian Property Institute, sub. DR 78). The Commission's view is that these checks should be permitted, but only to the extent that they are relevant to the occupation in question.

RECOMMENDATION 5.4

The mutual recognition Acts should be amended to allow criminal record checks, if they are required of local applicants.

5.3 Conditions — confusion over what is permitted

Mutual recognition entitles a person registered in one jurisdiction to practise an *equivalent* occupation in another jurisdiction. Equivalence occurs if 'the activities authorised to be carried out under each registration are substantially the same' (MR Act, s. 29(1)). Where the scope of activities authorised differs across jurisdictions, regulatory authorities can impose conditions in order to achieve equivalence. Around 10 per cent of respondents to a survey the Commission conducted of occupational regulators reported that they used conditions to achieve equivalence (appendix D).

The mutual recognition schemes contain a number of provisions that, read together, limit conditions on licences to restrictions on the *activities* that licence holders can carry out (for example, ss. 5(2)(4), 16(2)(b) and 28 of the TTMR Act (Cwlth)). There is evidence, however, of confusion about the types of conditions that may be imposed, and of regulators imposing conditions that go to the qualifications of licence applicants under mutual recognition (box 5.5).

The Commission acknowledges that regulators' confusion in regard to conditions may stem, in part, from a lack of clarity in the legislation regarding the criteria for equivalence, and the types of condition that can legitimately be imposed. Legal advice from both Crown Law in New Zealand and the AGS supports the view that the mutual recognition legislation is not clear about the types of conditions that regulators may apply to registrants under mutual recognition (appendix B).

RECOMMENDATION 5.5

The mutual recognition Acts should be amended to make clear the types of condition (for example, around local knowledge or recency of practice requirements) that registration authorities may impose at the time of registration.

Box 5.5 **Not all conditions are mutual recognition compliant**

The New Zealand Government reported that:

> Feedback from some New Zealand registration authorities suggests that acceptance of equivalence, and the use of conditions to achieve equivalence, are 'grey areas' in the practical application of the regime. Some authorities have reported being uncertain about whether an Australian and a New Zealand occupation are equivalent and when conditions might be imposed on registration. (sub. 53, p. 15)

In responding to a survey of registration authorities conducted by the Commission:

- the Plumbers Licensing Board of Western Australia reported that it requires plumbers from New Zealand to undertake a practical assessment because they do not hold the same level of training with respect to drainage plumbing. If successful at the assessment stage, New Zealanders are granted a licence conditional on completing a familiarisation course within six months of the licence being granted
- the Nurses and Midwives Board of Western Australia noted that it places conditions on nurses and midwives who do not meet the Board's five-year recency of practice requirement.

5.4 Scope differences — impeding labour mobility?

Licensing regimes sometimes differ significantly across jurisdictions. This is illustrated by the recent exercise to develop Ministerial Declarations that identify the conditions under which licences in priority trades across Australian jurisdictions are equivalent (discussed in section 5.8 below). The information covering plumbing licences, for example, runs to nearly 90 pages because of the variation between jurisdictions in the number of licences and scopes of activities covered by those licences.

Differences in the activities covered by licences complicate the task for registration authorities of granting licences under mutual recognition. There is evidence that authorities have not always fully executed their responsibilities in this regard (box 5.6).

Box 5.6 **Different licence scopes impede mutual recognition**

A range of stakeholders commented on the impact of licensing differences on mutual recognition:

> … settlement agents licensed in Western Australia [are] being denied registration in those state and territory jurisdictions where the legislation has created equivalency issues. (Settlement Agents Supervisory Board of Western Australia, sub. 5, p. 2)
>
> It would appear that the confusion in connection with the principles of equivalence is leading to the adoption of a conservative approach that in some states unnecessarily restricts access to comprehensive optometric care. (Optometrists Association of Australia, sub. 42, p. 5)
>
> Mutual recognition is complex, and the differing licensing and testing regimes which exist across all Australian jurisdictions means that finding equivalence and demonstrating it is difficult for the tradesperson. (Plumbing Trades Employees Union, sub. 43, p. 2)
>
> The Mutual Recognition principle works well, [except] it appears to fail when the incoming jurisdictional requirements are different from the originating state, especially when the licence categories [do not] match exactly. (NT Department of Justice, Licensing, Regulation and Alcohol Strategy, response to Commission's survey of registration authorities)

In some instances, differences in licensing regimes may reflect jurisdictions' initiatives to improve labour market flexibility and address skills shortages. Some trade licences, for example, may cover subsets of the full range of skills relating to a trade. Because the training underpinning these licences can be acquired relatively quickly, licences of this type might help ease skill shortages. Whatever the reasons, differences in the scope of licences have the potential to impede the operation of mutual recognition. As a number of study participants observed, mutual recognition works better the greater the degree of licence harmonisation between jurisdictions (for example, Tasmanian Department of Treasury and Finance, sub. 34; Optometrists Association of Australia, sub. 42).

By establishing requirements for equivalence, the Ministerial Declarations have, at least in part, resolved the problems faced by regulators of many occupations. Ongoing application and maintenance of the Declarations will be needed to keep these problems at bay. Potential concerns in this regard are discussed in section 5.8.

However, the use of conditions to achieve equivalence has the potential to create an impediment to labour mobility. The effect of conditions is to limit the activities a licence holder can perform. This may make a person with a licence restricted by conditions less attractive to employers than someone with a 'full' licence. As the NSW Government noted, '[t]he use of restrictions in jurisdictions where they are not usually applied creates confusion and uncertainty for both administrators and consumers' (sub. 55, p. 11).

On the other hand, some employers may favour a person with restricted registration on cost grounds. That is, they may only require the activities covered under the restricted registration and the holder of that registration may represent a cheaper option than someone with a full licence.

Another potential problem arises when the scope of a licence in one jurisdiction is narrower than in another. People may be reluctant to migrate to the more restricted environment if they are precluded, post-migration, from using their full skill set. As the Optometrists Association of Australia noted:

> … optometrists are less inclined to practise in jurisdictions that do not allow them to practise to the full extent of their capabilities. All the optometry schools in Australia are on the east coast: the limitations on their practising in, for example, Western Australia discourages young graduates from moving to restrictive jurisdictions. (sub. 42, p. 3)

Greater commonality of licensing requirements between jurisdictions is required to address problems arising from differences in the scope of licensed activities. Moves to national licensing (discussed in section 5.8) will help in this regard.

In summary, differences between jurisdictions in the scope of activities covered by licences have the potential to impede mutual recognition and labour mobility. By clarifying equivalence between licences, Ministerial Declarations have gone some way towards resolving this problem. However, agreement on national licensing categories is required to address fully the potential impediments to labour mobility associated with interjurisdictional licence variations.

5.5 Mutual recognition machinery — working well?

Information gathering and privacy concerns

Some stakeholders raised a concern around identity checking of applicants for registration under mutual recognition. The Physiotherapists Board of Western Australia was:

> … concerned that physiotherapists seeking registration in Western Australia pursuant to the MRA are not required to establish their identity or to have their identity independently confirmed [and that] [t]his deficiency in the process allows for the possibility of identity theft and for the Board to register a person who is not, in reality, qualified as a physiotherapist. (sub. 1, p. 1)

Similarly, the Teachers Board of South Australia had ‘concerns about the provision of certified evidence of proof of identity and proof of qualifications. This is

currently outside mutual recognition requirements and is an issue that must be addressed given the potential for identity fraud' (sub. 35, p. 5).

These concerns appear to be unfounded. There is no provision in the mutual recognition legislation that precludes a regulator from checking the identity of an applicant for registration.

Issues with deemed registration

Study participants raised two issues relating to deemed registration.

First, the Valuers Registration Board of New Zealand claimed that '[t]here is no recourse against the non-equivalent valuer for work undertaken during the deemed registration period, even if registration is refused because the valuer's registration is not considered to be equivalent' (sub. 6, p. 4).

It is not clear what the basis for this claim is, given that the mutual recognition legislation specifies that individuals with deemed registration 'may not carry on the occupation in the second state without complying with any requirements regarding insurance, fidelity funds, trust accounts and the like that are designed to protect the public, clients, customers or others' (MR Act, s. 27(3)(a) and, in slightly different wording, TTMR Act (NZ), s. 26(1)(e)). These protections would continue to apply following a decision not to register a valuer under mutual recognition.

Second, the Builders Registration Board of Western Australia suggested that 'it is possible for a builder to make a substantial impact on consumers and the building industry in a one month period' (sub. 40, p. 2) and that deemed registration should be abolished to remove this risk to consumers. The Board also raised the possibility of a potential for legal problems 'if a builder with deemed registration enters into contracts but is subsequently refused substantive registration' (sub. 40, p. 3).

The Commission has no evidence of events of this type having occurred since the mutual recognition schemes were implemented. It would appear, therefore, that the risk is too low to merit abolition of deemed registration.

Accessibility of the appeals process

People whose application for registration under mutual recognition is refused by a regulator can apply to the AAT or TTOT for a review of that decision. This process is of little assistance, however, to people who do not get as far as applying because initial contact with a regulator left them with a belief that they were not eligible for mutual recognition. The Commission was contacted by someone in this situation

during the course of this study. On the basis of information provided by the Commission, the person approached the regulator again and successfully argued that her circumstances were covered by mutual recognition.

In the light of the evidence that mutual recognition has not been working as effectively as it might have, the number of applications for a review of decisions concerning mutual recognition is surprisingly low. Since the MRA took effect in 1993, the AAT has received about 65 applications for review of a decision of a registration authority, or an average of five a year. The TTOT has received five applications since 2002. It is noteworthy that applications to the AAT from professionals have outnumbered applications from other occupations in a ratio of about 2.5 to 1. This calls into question the accessibility of the tribunal appeals process for members of other occupational groups.

It may be that the costs of appealing to the AAT or TTOT deter potential applicants. While the filing fee for an appeal to the AAT costs $639, for example, many applicants retain legal representation, even for a matter that is resolved in the early stages. This significantly increases the potential cost of an appeal.

The capacity of individuals to dispute or appeal regulator decisions could be improved by the creation of a standing unit with good knowledge of the mutual recognition schemes. This unit could provide advice to individuals and regulators about their rights and obligations, and assist in resolving simpler matters. This suggestion is taken up in chapter 11. In addition, as discussed in chapter 8, the unit should include a mediation function which would provide a lower cost means of resolving disputes. Steps would have to be taken to ensure information about this body was readily available to anyone searching for assistance with mutual recognition issues.

FINDING 5.5

Mutual recognition would work more effectively if a point of contact existed where individuals could cheaply and easily obtain advice about their rights under the schemes.

An anomaly around requirements for continued registration?

The MR Act provides that:

> (4) Continuance of registration is otherwise subject to the laws of the second state, to the extent to which those laws:
>
> > (a) apply equally to all persons carrying on or seeking to carry on the occupation under the law of the second state; and

(b) are not based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation. (MR Act, s. 20(4))

A similar provision exists in the TTMR Act (Cwlth).

As noted by the NSW Government, this provision leaves open the possibility that 'a licence holder who was granted their licence under mutual recognition arguably cannot generally be required to undertake training at anytime during which they hold that licence' (sub. 55, p. 13). This view is supported by legal advice from the AGS, to the effect that ongoing conditions, including those relating to further study and upgrading of professional skills are probably not permitted, although the MR Act and TTMR Act (Cwlth) are ambiguous (appendix B).

The wording of this provision also suggests that criminal record checks conducted as a prerequisite for registration renewal cannot be required of registrants under mutual recognition, even if such checks are required of other registrants as a condition of continued registration.

Provisions in the TTMR Act (NZ) governing continuance of registration are worded slightly differently. An individual:

(c) Keeps or loses his or her entitlement to registration or renewal of registration in accordance with any law dealing with registration of that kind, to the extent that any such law —

(i) Applies equally to all individuals carrying on or seeking to carry on the occupation under the law of New Zealand; and

(ii) Does not require an individual carrying on or seeking to carry on that occupation under the law of New Zealand to have any particular qualification **before doing so**. (emphasis added) (TTMR Act (NZ), s. 17(2))

Crown Law's advice on the question of whether ongoing requirements can be imposed on people registered under mutual recognition noted the potential for conflicting interpretations of the TTMR Act (NZ):

… a New Zealand court may find, that those requirements are likely to meet the definition of 'qualification' [within the meaning of the mutual recognition legislation] … and therefore cannot be imposed … However, I consider that there are circumstances where a New Zealand court would accept that ongoing requirements can be imposed. (appendix B, Crown Law advice, para. 67-8)

On balance, Crown Law was of the opinion that a New Zealand court would determine that an ongoing requirement designed to circumvent the goal of the TTMRA was prohibited, but one that: applied equally to all registrants; targeted public safety; and did not involve significant compliance costs, could be imposed.

It may be that the Australian and New Zealand legislation differ sufficiently that courts in each country will make different findings on the question of whether an ongoing requirement can be imposed. Nonetheless, the fact that Crown Law cites two possible interpretations of the TTMR Act (NZ) suggests that there is ambiguity in the legislation that could usefully be clarified.

FINDING 5.6

Legal advice indicates that an Australian registration authority can probably not impose ongoing requirements (for example, around training or criminal record checks) on people who are registered under mutual recognition, but that a New Zealand authority might not be similarly constrained. However, there is ambiguity around this issue in each of the three mutual recognition Acts that could usefully be clarified.

If the legislation does mean that ongoing training or criminal record checks cannot be required of individuals who obtain registration via mutual recognition, but are deemed necessary for other registrants, then the legislation runs contrary to community interest. There does not appear to be a good argument for exempting people who gain registration under mutual recognition from ongoing requirements, provided regulators apply those requirements equally to all registration holders.

This issue was canvassed in the 2003 review, with the Commission suggesting that '[c]larity may emerge over time as contentious cases are heard by the AAT and TTOT' (PC 2003, p. 97). It does not appear that the tribunals have been asked to review a decision involving this issue. Given the reservations expressed above about the effectiveness of the tribunals as an appeal mechanism, an alternative approach to resolving this issue is desirable.

RECOMMENDATION 5.6

The mutual recognition Acts should be amended to make it clear that requirements for ongoing registration, including further training, continuing professional development and criminal record checks, apply equally to all registered persons within an occupation, including those registered under mutual recognition.

Clarity on undertakings and disciplinary action could be improved

Study participants from the health professions identified two further areas in which the mutual recognition legislation appears to lack clarity, with the potential for public harm — undertakings and the meaning of disciplinary actions.

Section 27 of the MR Act (and similar sections of the TTMR Acts) sets out the rights and obligations of individuals with deemed registration. These include the provision that a person may carry on his or her occupation 'subject to any conditions or undertakings applying to the person's registration in the first state, unless waived by the local registration authority of the second state' (MR Act s. 27(2)(c)).[2]

However, undertakings are not mentioned in the sections of the mutual recognition Acts covering disciplinary action (s. 33 of the MR Act and s. 32 of the TTMR Acts). The MR Act (s. 33) provides that if a person's registration in one state is cancelled, suspended or 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 another state is affected in the same way'. The TTMR Acts are worded slightly differently but have similar effect. As the Medical Practitioners Board of Victoria noted:

> … section 33 [of the MR Act] … does not provide that undertakings are to be given in the second state in the manner in which they are in the first state. Therefore, the situation may arise, where a medical practitioner has given undertakings in one jurisdiction and if that practitioner also holds registration in a second jurisdiction, the undertakings (which were given in the first state) do not automatically apply to the registration he/she holds in the second state. (sub. 28, p. 1)

The absence of the term 'undertakings' from s. 33 (or s. 32 of the TTMR Acts) leaves open the possibility that an individual's scope of practice could be limited in one jurisdiction, but unlimited in other jurisdictions.

Legal advice from the AGS is that legally binding undertakings constitute conditions, those that are not legally enforceable do not. In the opinion of Crown Law, an undertaking may be imposed as a condition of registration if it 'restricts or limits the person's ability to carry out an authorised activity' (appendix B, para. 2.3.3).

Given that undertakings are used when practitioner performance is substandard, the Commission considers that jurisdictions should be able to exchange information on all undertakings, whether legally binding or not. Furthermore, if a person is willing to give undertakings in one jurisdiction, he or she should be willing to give them in another.

The Nurses and Midwives Board, New South Wales (sub. 10, p. 2) suggested that '[t]he public would be protected if all information regarding complaints, practise, character, health, convictions etc could be shared with registering authorities in all other participating jurisdictions'. The Commission agrees with this suggestion.

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2 The wording in the TTMR Act (NZ) is slightly different, but has similar effect.

RECOMMENDATION 5.7

The mutual recognition Acts should be amended to define undertakings and provide that they are transferable between jurisdictions.

A related issue about the use of the term 'disciplinary grounds' was raised by the Australian Medical Council:

> All Medical Boards conduct a variety of regulatory programs, in addition to their complaints and disciplinary systems. These programs include health or impairment programs, and programs designed to address questions of substandard performance. On a literal reading of Section 33 of the Mutual Recognition Act, it could be argued that conditions or sanctions imposed as a result of Health or Performance programs (which are described as nondisciplinary or remedial) would not automatically apply in other jurisdictions. However as a practical matter, medical boards take a broad view of the word 'disciplinary' in this provision, and are prepared to apply all conditions across jurisdictional boundaries. (sub. 37, p. 3)

As with undertakings, the Commission supports the notion that jurisdictions should be able to exchange information about nondisciplinary or remedial action.

RECOMMENDATION 5.8

The mutual recognition Acts should be amended to ensure that information on nondisciplinary or remedial action can be shared between jurisdictions, where such action arises from a regulator's concern about an individual's fitness to practise.

5.6 Regulator expertise and public awareness could be improved

Regulator expertise

While most regulators appear to have sufficient expertise to fulfil their obligations under the mutual recognition schemes, a significant minority do not.

A lack of expertise is suggested, for example, by the absence of information about mutual recognition on a regulator's website. The mutual recognition legislation contains the provision that:

> It is the duty of each local registration authority to prepare and make available guidelines and information regarding the operation of [the scheme] in relation to the occupations for which the authority is responsible. (for example, MR Act, s. 39(2))

In some instances, regulators' websites contain no reference to mutual recognition. In others, there may be an application form, or reference to mutual recognition in a form, but no guidelines or information on the schemes. Further evidence of a lack of expertise comes from examples that illustrate that some regulators do not comply with their mutual recognition obligations (box 5.7).

Box 5.7 Not all regulators fulfil their mutual recognition obligations

> … it appears that while skills and experience have been mutually recognised, persons are being refused registration under mutual recognition in other jurisdictions on the grounds that they do not meet those jurisdictions' character checks. (Tasmanian Department of Treasury and Finance, sub. 34, p. 4)
>
> … [t]he NSW Board has experienced difficulties with applicants for registration under the mutual recognition scheme where some interstate physiotherapy registration Boards have not advised registration Boards in other jurisdictions of conditions placed on a physiotherapists registration. (NSW Physiotherapists Registration Board, sub. 3, p. 1)
>
> … [t]he ANMC [Australian Nursing and Midwifery Council] notes that there have been instances in some jurisdictions, in clear contradiction of the legislation, whereby applicants have lodged their application but their application has not been considered for several months, rather than the legislative requirement of one month. (Australian Nursing and Midwifery Council, sub. 17, p. 1)
>
> The result of a survey of State Marine Authorities in late 2005 indicates there is no consistent approach to considering the mutual recognition of Australian/New Zealand marine qualifications across jurisdictions, and that marine authority obligations under the TTMRA may not be fully implemented in all cases. (Queensland Treasury, sub. 52, p. 3)

Moreover, an evaluation by Allen Consulting Group (ACG 2008) of the COAG initiative to achieve full and effective mutual recognition in certain occupations (discussed in section 5.8) concluded that improved regulator expertise was a key output from the exercise, suggesting that there were problems before the exercise commenced:

> Many regulators reported an improved understanding of the principles and purpose of mutual recognition as a result of their participation in occupational Action Groups. Some regulators admitted that they had realised they were not correctly fulfilling their obligations under the Act. For example, one regulator reported recognising qualifications rather than equivalent licences. Several other regulators reported applying additional processes that were not consistent with the purpose of mutual recognition. (ACG 2008, p. 26)

Lack of regulator expertise was a key issue raised by the Commission's 2003 review. Evidence of ongoing problems identifies this as an area in continuing need of attention. This point is taken up again in chapter 11.

FINDING 5.7

There is evidence that a significant minority of regulators do not comply with their obligations under the mutual recognition schemes. Initiatives to enhance regulators' awareness in this area could address this issue.

Public awareness

In a survey of registration authorities for this study, the Commission asked regulators for their opinion on the awareness of potential registrants of mutual recognition. Many regulators reported that applicants were aware of the existence of mutual recognition, but not the details of the process.

Evidence on public awareness was also collected recently by the ACG. It concluded that '[t]here is a low level of awareness in industry bodies and among employees of mutual recognition initiatives, including rights under mutual recognition and available information sources' (ACG 2008, p. 25).

Sustainable strategies to develop and maintain awareness of mutual recognition should be implemented. Potential strategies are canvassed in chapter 11.

5.7 Local knowledge requirements

Some study participants expressed concern that individuals can register under mutual recognition without first having gained relevant local knowledge (box 5.8).

On the issue of local knowledge requirements, the Commission supports the conclusion of the 1998 review (CRR 1998), reiterated by the 2003 review (PC 2003, p. 94), 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'. These other requirements should be interpreted as covering local knowledge, where necessary for the satisfactory practice of an occupation.

The mutual recognition legislation makes it clear that a registrant under mutual recognition must comply with the laws of a host jurisdiction that govern the work of practitioners in his or her occupation. The Commission suggests that, as a matter of good practice, registration authorities should provide information about local conditions and laws to applicants for registration under mutual recognition.

Box 5.8 **A lack of local knowledge troubles some regulators**

There is a wide range of specific legislation to each of Australia and New Zealand that affects the valuation of property. For example, there is no equivalent in Australia of the Resource Management Act or the Treaty of Waitangi. There is no requirement under TTMRA for a registered valuer to become conversant or to remain conversant with changes to legislation. (Valuers Registration Board of New Zealand, sub. 6, p. 4)

New Zealand has a unique mix of cultures. Although European and Maori populations are still predominant, we have very rapidly growing populations of Asian and Pacific peoples. The Board is concerned about the lack of any requirement for TTMRA applicants to provide evidence of cultural competence relevant to the jurisdiction where they intend to practise. (New Zealand Psychologists Board, sub. 25, pp. 2)

Whilst the applicants under TTMRA in New Zealand may receive conditions … this does not address their knowledge of the legislation that REINZ [Real Estate Institute of New Zealand], as the prescriber of the real estate profession's qualifications, believes are prerequisites to holding a license. Therefore the licensing regulator must also have the capacity to impose conditions on an applicant to address this gap of requisite knowledge. (Real Estate Institute of New Zealand, sub. 26, p. 3)

5.8 Recent COAG initiatives relevant to occupations

Review of occupations licensed in only one or two jurisdictions

In May 2008, after reviewing Australia's consumer policy framework, the Commission recommended that COAG's Business Regulation and Competition Working Group (BRCWG):

> … should instigate and oversee a review and reform program for industry-specific consumer regulation that … would [among other things] identify and repeal unnecessary regulation, with an initial focus on requirements that only apply in one or two jurisdictions. (Productivity Commission 2008f, p. 97)

The BRCWG work program announced in July 2008 included a review focused on trades licensed in only one or two jurisdictions (COAG 2008d). As part of this initiative, New South Wales is reviewing the need for licensing in 11 selected occupations (NSW Department of Premier and Cabinet 2008).

Ministerial Declarations

In response to government and industry concerns about skill shortages, COAG, in February 2006, set in place an initiative to achieve full and effective mutual

recognition of selected trades occupations. The initiative was subsequently extended to all vocationally trained registered occupations.

This initiative led to the development of a set of tables for the selected occupations that describe the conditions under which occupations are equivalent across jurisdictions. These form the basis of a set of Ministerial Declarations around equivalence, and have been published on a licence recognition website to provide information to licence holders seeking to move jurisdictions.[3]

As noted above, ACG evaluated this work in 2008. It concluded that the equivalence tables have assisted regulators in making decisions on licence applications under mutual recognition — regulators have granted more licences with conditions as a result (ACG 2008).

Maintaining the currency of the tables will be an issue. An annual protocol for updating the tables has been developed and is being refined. The updating process will work most effectively if regulators come together on a regular basis. There would be benefits from this process, including a greater awareness of regulatory moves in other jurisdictions and, potentially, a shift towards greater harmonisation. It is not yet clear how the updating process will be coordinated. This issue is addressed in chapter 11.

There is evidence that some regulators have customised the tables. It appears that:

> … there are cases where processing officers consider the matrices to be incorrect and are applying exclusions and/or conditions. (NSW Government, sub. 55, p. 15)

Unilateral modification of licence categories or customising of equivalence conditions defeats the purpose of Ministerial Declarations.

This raises a key issue in this area — the effective operation of mutual recognition relies on individuals operating consistently, albeit in relative isolation. An effective appeals mechanism would reduce concern that licence seekers are not being treated equally or as the mutual recognition Acts dictate. This issue is also considered further in chapter 11.

The Ministerial Declarations only cover Australian jurisdictions. Provision for the making of Declarations exists within the TTMR Acts. As noted by the Real Estate Institute of Australia:

> The effective operation of the TTMRA would be enhanced by Ministerial Declarations being extended to include New Zealand licensing. (Real Estate Institute of Australia, sub. 8, p. 3).

3 The website can be accessed at: http://www.licencerecognition.gov.au.

The New Zealand Government was also in favour of such an extension:

> … in the longer term, it would be worthwhile exploring the feasibility and implications of extending to New Zealand the current Australian process of Ministerial Declarations of equivalence for licensed occupations as a means of providing additional certainty for registering authorities and those seeking registration. (sub. 53, p. 15)

RECOMMENDATION 5.9

Consideration should be given to extending the Ministerial Declarations to occupations regulated in New Zealand.

National licensing

There have been significant moves towards national licensing of some occupations since the Commission's 2003 review. In April 2006, the Australian Safety and Compensation Council released a *National Standard for Licensing Persons Performing High Risk Work* (ASCC 2006). All jurisdictions have now adopted that standard. As a consequence, licences held by people engaged in high risk work (including crane and hoist, load shifting and pressure equipment operators) are now nationally recognised.

Following a recommendation made by the Commission in a study of the health workforce (PC 2005), COAG has agreed to an *Intergovernmental Agreement for a National Registration and Accreditation Scheme for the Health Professions* (COAG 2008c). The Agreement committed jurisdictions to establishing a national registration scheme for the nine health professions currently registered in all jurisdictions (physiotherapy, optometry, nursing and midwifery, chiropractic care, pharmacy, dental care, medicine, psychology and osteopathy) by 1 July 2010.

In July 2008, COAG agreed to the development of a national licensing system in a range of other occupations including: air conditioning and refrigeration mechanics; building; electrical; land transport; maritime; plumbing; and property agent occupations (COAG 2008d). The regulation impact statement for this initiative was released for public comment in early October 2008, and the intergovernmental agreement is due with COAG in early 2009.

National schemes will address many of the problems raised by study participants, including those associated with variations in the standards required for registration and in the scope of activities covered by licenses. While there may be problems with the implementation of these schemes — such as defining a joint standard — these will not be mutual recognition problems.

Study participants expressed mixed views about the proposed systems (box 5.9).

National licensing raises a question over the ongoing role of mutual recognition. Because it will be some time before national licensing is implemented in some areas and because it will not have universal coverage of occupations, mutual recognition will still be needed. It seems unlikely that national licensing will be appropriate for occupations registered in only a few jurisdictions, or cost effective for small occupations or those for which cross-border relocations are not large.

Unless or until New Zealand is brought into the schemes, the TTMRA will remain important. New Zealand stakeholders are watching the moves towards national licensing with interest. As the New Zealand Government noted:

> … there could … be value in assessing the feasibility of Australian and New Zealand registering authorities working closely together as Australia's national frameworks are developed, to ensure that trans-Tasman implications are fully understood, and that the new frameworks in Australia and those in New Zealand are as closely aligned as possible. (sub. 53, p. 16)

Given the importance of regulator cooperation to the operation of the TTMRA, engagement of New Zealand regulators in the development of new systems in Australia appears highly desirable.

RECOMMENDATION 5.10

Relevant New Zealand regulators should be included in consultations around the development of national licensing systems in Australia.

Box 5.9 Input from study participants on national licensing

Some participants were positive about proposed national systems:

> The REIA [Real Estate Institute of Australia] preferred model is a national licence system for real estate professionals. (Real Estate Institute of Australia, sub. 8, p. 3)
>
> The [Australian Property] Institute would strongly support the option of a national licensing system provided the issues of educational and experience requirements were resolved … Successful implementation of such is critical to eliminating the current inadequacies caused by Mutual Recognition. (Australian Property Institute, sub. 41, p. 13)
>
> The current system of Ministerial Declarations appears to be cumbersome … A national licensing system could provide a solution. (Plumbing Trades Employees Union, sub. 43, p. 4)
>
> Notwithstanding the benefits provided by Ministerial Declarations, most of the occupations covered by the declarations raise a range of difficulties associated with lack of consistency of approach by the different states … These difficulties are expected to be ameliorated by the introduction of national licensing. (NSW Government, sub. 55, p. 17)

Others expressed reservations about national licensing:

> ... there is a concern that some of the unique features of registration within Western Australia (for example, specialty title in psychology) could be lost under the new scheme … it is important that the new scheme … be consistent with the current state legislation that sets a more stringent standard. (Western Australian Department of Health, sub. 20, p. 1)
>
> ... many of these variations [in legislative provisions and administrative practices] appear to have arisen in response to particular local/jurisdictional issues and it is unclear how the new national arrangements will accommodate these 'local' needs/responses within a nationally consistent framework. (Australian Medical Council, sub. 37, p. 3)

Some saw value in alternative approaches:

> Every jurisdiction in Australia has different legislation governing their building industry and there is a need for some uniformity in order for the principle of mutual recognition to deliver successful outcomes … The [Builders Registration] Board supports a national harmonised framework regulated by individual jurisdictions. (Builders Registration Board, Western Australia, sub. 40, p. 3)
>
> A national licensing framework may not always be the most appropriate and efficient means to approach cross jurisdictional harmonisation, particularly in small industries or where this is little movement of licence holders across jurisdictions. In such circumstances, mutual recognition may prove to be the most efficient and cost effective approach to facilitating labour mobility. (Queensland Treasury, sub. 52, p. 4)
>
> … centralising registration functions … is more beneficial to some occupations than others. In some cases, some local registration related functions may be required for certain occupations ... The Land Transport Division of DIER [the Division] has stated that the primary benefit from national licensing of land transport occupations would be consistency in skills and eligibility criteria. However, the Division stated that this could be achieved more cost effectively through improved harmonisation … implementation costs and associated impacts of moving to a national licensing system for land transport occupations would be very significant. (Tasmanian Department of Treasury and Finance, sub. 34, pp. 2-3)

6 Temporary exemptions

Key points

- Individual jurisdictions can temporarily exempt a good from the MRA and/or TTMRA, provided it is on health, safety or environmental grounds. This triggers a review process that, within 12 months, has to lead to one of three outcomes — harmonised standards, a permanent exemption, or a return to mutual recognition.
- Jurisdictions often ban a good without also invoking a temporary exemption from mutual recognition, despite this making a ban unenforceable on goods sourced from another jurisdiction in Australia or New Zealand. This has not caused major problems to date, possibly because goods suppliers are unaware of their rights under mutual recognition, or are reluctant to exercise those rights.
- Australian jurisdictions recently agreed to implement a new regulatory regime that will essentially lead to a national system for consumer product bans and standards.
- Australia's new regulatory regime for consumer product safety should include provisions to ensure that it is closely integrated with the temporary exemption processes under the MRA and TTMRA:
  - when an interim product ban is imposed on a good under Australia's new consumer product safety regime, the MRA should not apply to that good until the ban is resolved by a Commonwealth decision or lapses, in order to avoid duplication and inconsistency between the product safety regime and the temporary exemption process under the MRA
  - when a product ban is imposed by an Australian jurisdiction, the temporary exemption process under the TTMRA should be automatically invoked
  - if and when an interim product ban within Australia is resolved by a national permanent ban, a national temporary exemption under the TTMRA should be automatically invoked for Australia.
- The combination of the new Australian consumer-protection regime and abovementioned reforms would largely address concerns about:
  - governments banning products without also invoking a temporary exemption from mutual recognition
  - ineffective procedures for resolving temporary exemptions
  - the lack of a joint Australian approach to initiating TTMRA temporary exemptions.

Individual jurisdictions can temporarily exempt a good from the MRA and/or TTMRA, provided it is on health, safety or environmental grounds. Within

12 months, the relevant COAG Ministerial Council must make a decision on whether the temporary exemption will be resolved by harmonising standards, creating a permanent exemption, or reverting to mutual recognition (COAG and New Zealand Government 2006). If no action is taken, the temporary exemption lapses after 12 months and mutual recognition resumes by default.

This chapter considers potential reforms to enhance the efficiency and effectiveness of administrative procedures associated with temporary exemptions. The most significant issue in this regard is whether changes are required to harmonise temporary exemption procedures with Australia's foreshadowed new national consumer product safety regime.

6.1 Procedures for resolving temporary exemptions

In 2003, the Commission found that there were grounds for considering options to streamline how the issues underpinning temporary exemptions were resolved (PC 2003). Guidelines were subsequently developed requiring COAG Ministerial Councils to decide 'within approximately' the first eight months of a temporary exemption whether it would be resolved by mutual recognition, harmonisation, or a permanent exemption (COAG 2006c, p. 2). The guidelines also note that there is a presumption that Ministerial Council decisions can be implemented in most cases within the 12-month period allowed for a temporary exemption.

However, participants in this study expressed concerns about how rapidly the issues underpinning temporary exemptions are resolved. A commonly cited example was fruit and confectionery flavoured cigarettes. In 2006, the SA Government amended its tobacco regulations to enable such cigarettes to be banned, on the grounds that they lure young people into smoking.[1] In order to prevent their supply from other jurisdictions under mutual recognition, the SA Government also invoked a temporary exemption under the MRA and TTMRA.[2] This triggered procedures for the relevant COAG Ministerial Council to consider whether there should be a permanent exemption in all jurisdictions. In May 2007, the Ministerial Council on Drug Strategy (MCDS 2007) agreed to a permanent exemption, but it was not implemented.

1 *Tobacco Products Regulation (Prohibited Tobacco Products) Amendment Act 2006* (SA), which came into operation on 31 October 2006.

2 Mutual Recognition (South Australia) (Temporary Exemptions) Variation Regulations 2006, and Trans-Tasman Mutual Recognition (South Australia) Variation Regulations 2006, both gazetted on 9 November 2006.

The SA Government's temporary exemption for fruit and confectionery flavoured cigarettes lapsed without resolution in November 2007 after the maximum allowed period of 12 months. To address its concerns, the SA Government subsequently imposed conditions on the manner of sale of cigarettes, which is outside the scope of the MRA and TTMRA. In particular, it banned the retail display of fruit and confectionery flavoured cigarettes, including price boards and price tickets.[3] Shortly after this measure came into effect, all Australian states and territories agreed to ban the sale of fruit and confectionery flavoured cigarettes by December 2009 (MCDS 2008). This avoids the need to obtain a permanent exemption from the MRA, since fruit and confectionery flavoured cigarettes will no longer be able to be lawfully sold in any Australian jurisdiction. To avoid the need for a permanent exemption from the TTMRA, the Australian Government has agreed to investigate banning the importation of such cigarettes.

The Tasmanian Government had a similar experience to the SA Government, and this led it to argue that a longer time period should be allowed to resolve the issues underpinning a temporary exemption:

> … it is Tasmania's view that the time period for which [temporary] exemptions can be granted needs to be extended. Tasmania was recently confronted with the same situation as in South Australia regarding the prohibition of the sale of fruit and confectionery flavoured cigarettes. As a result, additional legislation was required to assist in achieving the objective of the bans, which resulted in additional administrative and implementation costs being borne by the State. It is considered that a two-year extension period under both the MRA and TTMRA would be more feasible and would also overcome the issues around trying to obtain an extension under the TTMRA, which is a very time consuming and cost prohibitive process. (Tasmanian Department of Treasury and Finance, sub. 34, p. 2)

The Commission is not convinced that the example of fruit and confectionery flavoured cigarettes demonstrates that there is a case for lengthening the duration of temporary exemptions. The relevant COAG Ministerial Council made a decision within about six months, which could have been implemented within the 12-month time limit despite the cross-jurisdiction coordination required to enact a new permanent exemption. It appears that the necessary coordination did not occur because some governments were unwilling to act in a timely manner, reflecting their view that fruit and confectionery flavoured cigarettes were not yet creating concerns in their jurisdiction. This coordination problem is not unique to mutual recognition. It could also hinder efforts to implement the foreshadowed national ban on the sale of fruit and confectionery flavoured cigarettes by December 2009.

3 Tobacco Products Variation Regulations 2008, gazetted on 10 April 2008.

Allowing a longer time period for temporary exemptions would give jurisdictions more time to coordinate their actions, but it would also reduce the pressure on governments to implement agreements they have made about temporary exemptions in a timely manner. Moreover, a longer time limit for temporary exemptions would be inconsistent with Australia's foreshadowed new national consumer product safety regime, which will effectively resolve differences between Australian jurisdictions in less than the 12 months permitted for resolving temporary exemptions (detailed in the following section).

The Commission understands that another factor preventing the implementation of the agreed permanent exemption for fruit and confectionery flavoured cigarettes was a reluctance by some parties to set a precedent. To date, the temporary exemption process has not led to a permanent exemption being enacted for any good. This appears unfortunate in the case of fruit and confectionery flavoured cigarettes, given that all jurisdictions agreed on health grounds that the product should not be sold, and have since reconfirmed this in their commitment to a national sales ban. There are sound reasons for having hurdles to getting a permanent exemption (such as the required regulatory impact analysis) to prevent a proliferation of unjustified trade barriers, but these hurdles should not prevent permanent exemptions that are justified in the sense that they would make the community better off.

6.2 Interaction with Australia's product safety regime

As the Commission noted in its 2003 review, individual jurisdictions can impose product bans and safety standards to remove goods from the market that are deemed unsafe, or to impose requirements on goods before they may be sold. In Australia, both the Commonwealth and individual states and territories can impose product bans and safety standards. In New Zealand, bans and standards are imposed at a national level only.

However, goods regulated under product bans or safety standards continue to be subject to the MRA and TTMRA, unless the regulating jurisdiction also invokes a temporary exemption under the mutual recognition schemes. A temporary exemption is not automatically created as a result of a jurisdiction imposing a ban or standard. To invoke a temporary exemption under the MRA or TTMRA, a jurisdiction must gazette a temporary exemption regulation under its own Mutual Recognition Act or Trans-Tasman Mutual Recognition Act. Alternatively, it can do so under its legislation relating to the area for which the exemption is being sought (COAG and New Zealand Government 2006).

Failure to invoke a temporary exemption under mutual recognition legislation means that the goods that the jurisdiction has sought to ban or restrict may still be lawfully sold in that jurisdiction under the mutual recognition principle if they are lawfully sold in another participating jurisdiction (PC 2003). If the regulating jurisdiction is an Australian state or territory, it must take out a temporary exemption under both the MRA and TTMRA, to render the ban or standard legally effective.

As observed in the Commission's 2003 review, however, jurisdictions often impose product bans and safety standards without also invoking a temporary exemption under mutual recognition. It appeared that these bans are often practically effective — despite not being legally effective — as manufacturers and importers tend not to make use of the mutual recognition defence. This may be due to either reluctance to pursue the matter or a lack of awareness of mutual recognition (PC 2003).

There is evidence to suggest that this is continuing to occur, resulting in ban orders and safety standards that are inconsistent across jurisdictions, despite the existence of mutual recognition. For example, the Coles Group (sub. 46) reported that New South Wales, Victoria and Western Australia currently have in place inconsistent ban orders applying to the sale of candleholders, while other Australian jurisdictions do not have similar restrictions. The Coles Group also cited the example of 'monkey bikes' (scaled-down motorcycles), which were banned in Victoria in 2005 unless they complied with five specified safety requirements. Similar bans were introduced in South Australia, Queensland and Tasmania in 2006, and in New South Wales in 2007.

The imposition of product bans and standards by individual jurisdictions without the concurrent use of the temporary exemption process has the potential to undermine both the operation of mutual recognition and consumer product safety laws. Recognising this, the Commission's 2003 review supported the introduction of procedures to integrate processes for product bans and temporary exemptions. In particular, the Commission advocated that when a jurisdiction imposes a product ban, it should have the effect of automatically activating a temporary exemption under the MRA and TTMRA (PC 2003). In its response to the Commission's review, the Cross-Jurisdictional Review Forum (CJRF 2004) recommended that the Ministerial Council on Consumer Affairs (MCCA) report to COAG on the feasibility of integrating the banning and temporary exemption processes.

In its 2006 review of Australia's product safety regime, the Commission reiterated the concern that jurisdictions were 'rarely' seeking temporary exemptions under mutual recognition, instead using unilateral bans and standards to effectively restrict products (PC 2006b, p. 313). As a result, inconsistent mandatory product standards and bans were taking hold, despite the existence of the mutual recognition schemes.

To combat this, the Commission made a series of recommendations for the establishment of a new Australian consumer product safety system, under which permanent bans and standards could only be imposed at a national level (PC 2006b).

A new national consumer product safety regime is currently being developed for Australia, broadly based on the recommendations in the Commission's 2006 review. Under the new regime, announced by the MCCA in May 2008:

- the Commonwealth will assume responsibility for making permanent product bans and standards
- Australian states and territories will retain their power to issue interim product bans. However, these interim bans will apply for 60 days only, unless extended (by 30 days and then for a further 30 days, making a total of 120 days maximum) by approval of the Commonwealth Minister for Consumer Affairs
- jurisdictions wishing to propose a permanent ban or standard would, under the new system, refer the matter to the Australian Competition and Consumer Commission (ACCC), which would make a recommendation to the Commonwealth Minister and to the MCCA
- the ACCC and the state and territory regulators will share responsibility for enforcement of product safety regulations (MCCA 2008a).

This proposed product safety regime comes in the context of a new national approach to consumer policy in Australia, as recommended by the Commission in its 2008 review of Australia's consumer policy framework (PC 2008e) and broadly supported by the Australian Government (MCCA 2008a). This new national framework has been foreshadowed to include a nationally harmonised, generic consumer law to apply in all Australian jurisdictions, and to be jointly enforced by the ACCC and state and territory consumer regulators (MCCA 2008a).

The reforms are expected to be fully implemented by the middle of 2010, following endorsement by COAG at its July 2008 meeting (MCCA 2008b). Full details of the new product safety regime are yet to be determined. It appears that the broad structure of the new arrangements will be developed first, as part of an intergovernmental agreement between the Commonwealth and the Australian states and territories.

New Zealand has welcomed Australia's foreshadowed new product safety regime (MCCA 2008a), which, if it has the effect of reducing differences in standards between Australian jurisdictions, would be likely to lead to reduced compliance costs for New Zealand exporters to Australia. The New Zealand Government has

not committed to joining the new regime, but the New Zealand Ministry of Economic Development noted that:

> … New Zealand is an active participant in Australasian product safety policy development through its membership of the MCCA and its supporting officials committees. Both the New Zealand consumer regulator (the Ministry of Consumer Affairs) and its enforcement agency the New Zealand Commerce Commission (NZCC) are participants in these fora. The NZCC has also signed [a general cooperation agreement with the ACCC (the agency largely responsible for administering Australia's new arrangements), designed to facilitate coordination between the two bodies] (ACCC 2008). These deep levels of interaction should support [continuing trans-Tasman cooperation after the new Australian product safety regime is implemented]. (sub. DR89, p. 11)

Two possible tensions between Australia's foreshadowed new product safety regime and the mutual recognition schemes are worth noting. First, under the MRA and TTMRA, temporary exemptions must be resolved within 12 months by harmonising standards, creating a permanent exemption, or reverting to mutual recognition. As noted in section 6.1, the COAG guidelines for resolving temporary exemptions state that a decision should be made 'within approximately' the first eight months so as to allow time to implement the decision (COAG 2006c, p. 2). In contrast, Australia's foreshadowed new product safety regime will require a decision to be made on whether there will be a permanent ban or new mandatory standard within a maximum of 120 days.

Second, under the MRA and TTMRA, the decision to resolve a temporary exemption must be made by the relevant COAG Ministerial Council. A temporary exemption is resolved by imposing a permanent exemption, introducing a new standard or other form of harmonisation, or by requiring mutual recognition to apply. A two-thirds majority of the relevant Ministerial Council must agree for the decision to be binding. Under Australia's new product safety regime, the decision to create a permanent ban or mandatory standard will be made by the Commonwealth Minister (Commonwealth Treasury, Canberra, pers. comm., 21 August 2008).

The two differences above imply that the Commonwealth Minister would make a decision on how to resolve an interim ban well in advance of a Ministerial Council determination on any related temporary exemption. This is assuming a temporary exemption has been taken out to give legal effect to the product ban. A potential advantage of this is that the product safety system would enable differences in standards between jurisdictions — at least, within Australia — to be resolved more quickly than would occur under mutual recognition.

However, duplication and inconsistency could potentially arise. Once the Commonwealth Minister has made a decision to resolve an interim product ban, it

would be unnecessary and duplicative for the same issue to go through Ministerial Council consideration under the temporary exemption process, as far as the MRA (but not the TTMRA) is concerned. Further, as Ministerial Councils comprise representatives from all participating jurisdictions, and not the Commonwealth alone, a Ministerial Council determination under the MRA could conflict with, and thus undermine, the earlier Commonwealth decision.

This analysis suggests that the MRA temporary exemption process may be unnecessary, and even counterproductive, for goods subject to interim bans under the proposed new Australian consumer product safety system. To prevent duplication and inconsistency, the Commission supports the close integration of the temporary exemption process under the MRA with the new Australian consumer product safety regime. Specifically, the MRA temporary exemption process should not be used when a good is made subject to an interim product ban under the new product safety regime, so as to prevent duplication and inconsistency.

One way to achieve this would be to include a provision in the Commonwealth legislation for the new product safety regime that states that, from the time an interim ban is imposed by an Australian jurisdiction until the time it is either resolved by Commonwealth decision or lapses, the MRA should not apply to that good.[4] This would have the effect of exempting the good from the MRA for the period of the interim ban, without invoking the MRA temporary exemption process. As a result, the possibility of duplication or a conflict between a Commonwealth Ministerial decision and a Ministerial Council determination would be avoided.

However, the TTMRA temporary exemption process would still be relevant under the new Australian product safety regime. This is because decisions made under the Australian product safety system to resolve interim bans by harmonisation or a permanent ban would not apply to New Zealand, and so would not prevent non-compliant goods being lawfully sold in Australia under the TTMRA.

To ensure the TTMRA temporary exemption process is used every time a product ban is imposed, the Commission supports an 'automatic trigger' as suggested in previous reviews (PC 2003, 2006b). It is equally important to ensure that a TTMRA temporary exemption is revoked — and mutual recognition reinstated — if an interim product ban that triggered the exemption lapses without the creation of a permanent national ban or new mandatory standard. These two objectives could be

4 The recommendation here is to integrate the revised temporary exemption process with the new Australian consumer product safety regime. Integration could also be achieved by making suitable changes to the mutual recognition legislation. However, as the consumer product safety regime is still being developed, there is legislative risk in anticipating the outcome of the new regime by requiring all jurisdictions to make changes to the existing mutual recognition legislation.

achieved by a provision in the Commonwealth legislation for the new product safety regime that explicitly refers to the TTMRA temporary exemption process. The provision should state that any notice declaring an interim product ban must also:

- invoke a TTMRA temporary exemption
- include a 'sunset clause' stating that when the interim product ban ends, the related TTMRA temporary exemption should also end.

New Zealand could create a similar automatic trigger (and sunset clause, if relevant) for product bans it imposes by amending its own consumer product legislation.

Finally, if an interim ban imposed by an Australian jurisdiction under the proposed new regime is resolved by a national permanent ban, the Commonwealth would need to invoke a national temporary exemption to prevent non-compliant goods being sold in Australia under the TTMRA. To ensure this occurs, Australia's new product safety legislation should require that a regulation imposing a national ban also invoke an Australian national temporary exemption under the TTMRA. The resultant temporary exemption could then be resolved in the usual way.

The New Zealand Ministry of Economic Development was concerned that the new system of Australian product bans, combined with the Commission's proposed 'automatic trigger' for TTMRA temporary exemptions, have the potential to create new product standards that are inconsistent with the principle of mutual recognition. Consequently, it cautioned that the proposed automatic trigger would require further consideration once details of Australia's new consumer product safety regime are determined:

> The consequences of automatic invocation of [a] temporary exemption under the TTMRA need to be carefully explored in relation to the development of both permanent bans and product safety standards, bearing in mind the importance of ensuring that the application of the mutual recognition principle remains as comprehensive as possible. (Ministry of Economic Development, sub. DR89, p. 4)

Having the temporary exemption process automatically activated under the TTMRA does, however, have the advantage that it makes New Zealand a participant in discussions to resolve an interim product ban. This advantage is not necessarily shared with alternative means of exempting a banned product from the TTMRA, such as through customs or import bans.

At the roundtables for this study, some participants expressed a concern that the proposed harmonisation of MRA and TTMRA temporary exemption processes with Australia's foreshadowed national consumer product safety regime would not apply to goods regulated under separate product-specific legislation. This includes food,

electrical goods and therapeutic products. In such cases, Australian and New Zealand Governments will need to remain cognisant of their mutual recognition obligations when considering product bans or new standards.

Despite the distinct regulatory regime for food, the Australian Quarantine and Inspection Service (AQIS) noted that there was a possibility that Australia's foreshadowed new consumer product safety regime may have unintended consequences for food regulation:

> The envisaged consumer product safety regime and its dovetailing with the (proposed) changes to the TTMRA and its legislation may have some unforseen difficulties in the case of food regulation. Unless there [are] rigorous criteria for promulgating a ban, it may be possible for a jurisdiction, under (say) strong political pressure, to ban a product, or class of products, such as GM [genetically modified] food, for which enforcement of the ban is difficult if not impossible. We assume the criteria for invoking a ban will be determined by the consumer product safety regime.
>
> A further complication is that banning food products from entering the country is not legally enforceable under the Commonwealth *Imported Food Control Act 1992*. AQIS has no legal power to prevent banned products from entering Australia from New Zealand or anywhere else. To implement a ban at the border, options other than relying on the Imported Food Control Act may need to be in place.
>
> There may be other regulatory areas where national import controls do not allow implementation of bans. (AQIS, sub. DR83, p. 3)

These issues are broader than mutual recognition. They should be considered by governments as part of their current efforts to design the foreshadowed new consumer product safety regime.

RECOMMENDATION 6.1

The foreshadowed new Australian consumer product safety regime should include provisions to ensure it is closely integrated with the temporary exemption processes under the MRA and TTMRA. In particular, the new consumer law should ensure that:

- ***when an interim product ban is imposed on a good under Australia's new consumer product safety regime, the MRA does not apply to that good until the ban is either resolved by a Commonwealth decision or lapses — in order to avoid duplication and inconsistency between the product safety regime and the temporary exemption process under the MRA***
- ***when an interim product ban is imposed by any Australian jurisdiction, the temporary exemption process under the TTMRA is automatically invoked and the resultant temporary exemption for the relevant jurisdiction is automatically revoked when the interim product ban ends***

- ***if and when an interim product ban within Australia is resolved by a national permanent ban, a national temporary exemption under the TTMRA is automatically invoked for Australia.***

6.3 TTMRA option of an implementation period

Unlike the MRA, a temporary exemption under the TTMRA can be extended for up to an additional 12 months. This can only be granted for the purpose of providing sufficient time to implement a ministerial council's decision on how a good will be treated once a temporary exemption expires.

For it to have effect, such an implementation period requires the support of two-thirds of the jurisdictions.[5] It is invoked by a regulation made under the Commonwealth and New Zealand TTMRA Acts (COAG and New Zealand Government 2006).

In principle, this inconsistency between the MRA and TTMRA is undesirable because it could lead to diverging approaches to the treatment of goods. Few participants commented on this issue. The NSW Government (sub. 55) expressed a preference for consistency, suggesting that the optional 12-month implementation period apply to both the MRA and TTMRA. The New Zealand Government noted that the administrative process for obtaining approval for an implementation period could be onerous because the decision has to be made within seven months of a temporary exemption being invoked:

> While the TTMRA provides a process for extending temporary exemptions for a further 12 months, the process may be unnecessarily administratively onerous and time consuming, requiring consideration by a Ministerial Council and approval by Heads of Government. The requirements of this process mean that the decision to extend a temporary exemption practically needs to be taken within the first 6-7 months of it coming into effect. (sub. 53, p. 12)

But this timing is broadly in line with the guidelines for resolving temporary exemptions, which require ministerial councils to decide 'within approximately' the first eight months of a temporary exemption whether it would be resolved by mutual recognition, harmonisation, or a permanent exemption (COAG 2006c, p. 2). This, combined with the limited use of the implementation option under the TTMRA, has led the Commission to conclude that changes are not warranted.

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5 *Trans-Tasman Mutual Recognition Act 1997* (Cwlth), s. 47(7) and *Trans-Tasman Mutual Recognition Act 1997* (NZ), s. 87(2)(b).

The Commission understands that a temporary exemption under the TTMRA for electric water heaters is the only example of the implementation-period option being used. The exemption was initiated by New Zealand and reflected differences in the Minimum Energy Performance Standards adopted by Australia and New Zealand (PC 2003). The New Zealand Government invoked the exemption in February 2003 and it was extended for a further 12 months, ending in February 2005. The extension was used to allow the two countries sufficient time to align their regulatory regimes. This was achieved by late 2005, when a joint Australia–New Zealand standard for electric heaters was implemented (Standards Australia and Standards New Zealand 2005).

6.4 Joint Australian approach to initiating TTMRA temporary exemptions

The TTMRA does not have a formal mechanism for Australian states and territories to jointly initiate temporary exemptions on goods imported from New Zealand. As a result, when a New Zealand good is of concern to all states and territories, they each have to invoke their own temporary exemption.[6] This imposes unnecessary administrative costs on each jurisdiction and will tend to take longer to implement than a single national temporary exemption, increasing the time period for which the goods of concern may lawfully be sold in Australia under the TTMRA.

This issue was addressed in the Commission's 2003 review with respect to 'niche market' opportunities the TTMRA provides for food products:

> 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 country of origin labelling … (PC 2003, p. 137)

Niche markets have developed because, although food standards are set by a trans-Tasman agency (FSANZ), not all of the standards apply to both Australia and New Zealand. When all Australian states and territories want to invoke a temporary exemption on health, safety or environmental grounds to prevent a niche market developing for food imported from New Zealand, they each have to invoke their own temporary exemptions. This is because the states and territories, rather than FSANZ or a national Australian regulator, are responsible for enforcing food standards.

6 This is not the case if the relevant regulatory requirements for the good are administered by the Australian Government, which can invoke temporary exemptions that apply nationally.

AQIS noted that niche market opportunities continue to exist for food exported from New Zealand to Australia, such as in the Red Bull 'sport' drink case:

> The Red Bull issue was created because the Australian standards deemed the product illegal, but in New Zealand Red Bull was legal under the dietary supplements regulations. As the product was not considered high risk in Australia it was subject to the TTMRA and able to be imported from New Zealand without any valid regulatory action by Australian jurisdictions, but could not be made in, or directly imported into Australia.
>
> Although the countries have a joint food standard setting system, New Zealand, under the Joint Food Standards Treaty, can opt out of any one of the standards if it chooses. There are many instances where food standards differ between the countries. In addition to variation in food standards between the countries, the New Zealand Dietary Supplements legislation deems many products legal in New Zealand that are considered illegal in Australia.
>
> So, similar situations to that which created the Red Bull case continue. (sub. DR83, p. 2)

The New Zealand Government observed that the TTMRA also enables Australians to export niche products (pet foods and animal feeds) to New Zealand:

> There are a number of product groups in the agricultural, horticulture and livestock production areas that are … traded in significant quantities under the provision of the TTMRA. These include animal feeds, pet foods and fertilisers. There are risk-management issues associated with this trade, particularly because of the differing laws governing the manufacture, quality, labelling, acceptable claims, across New Zealand, the Commonwealth, and the states and territories. This was highlighted last year when it became clear that pet foods and animal feeds that could be sold in Australia would not meet New Zealand requirements … but were legally able to be sold in New Zealand under the TTMRA. (sub. 53, p. 10)

In 2003, the Commission found it would be simpler to obtain temporary exemptions for food products under the TTMRA if states and territories allowed FSANZ to jointly obtain them on their behalf (PC 2003). Governments rejected this on the grounds that FSANZ is a standards-setting body, rather than a regulator (CJRF 2004). The governments also noted that the Australia New Zealand Food Regulation Ministerial Council could consider cases where foods pose a health risk and recommend a temporary exemption, if necessary.

No participants in the current review expressed concerns about the lack of a mechanism for Australian jurisdictions to jointly initiate temporary exemptions on goods imported from New Zealand. However, two participants — Cadbury Schweppes (sub. 2) and the Complementary Healthcare Council of Australia (sub. 33) — claimed that Australian industry is disadvantaged by the presence of niche markets for food-type dietary supplements. Both expressed concern that such products, which do not conform to Australian standards, can be sold in Australia by

New Zealand manufacturers but not manufactured in Australia for domestic sale, putting Australian industry at a disadvantage relative to its New Zealand counterparts.

Proposed reforms to New Zealand dietary supplements regulations will mean that food-type dietary supplements will be regulated separately from therapeutic-type supplements under a new Supplemented Food Standard (chapter 7). The Commission understands that the long-term objective is for food-type dietary supplements to be regulated under the Australia New Zealand Food Standards Code. If this results in the application of uniform standards to both Australian and New Zealand producers, any unlevel playing field would be removed. In the interim, where differences in standards raise public health and safety concerns in relation to some products, jurisdictions could consider obtaining a temporary exemption from the TTMRA.

To some extent, the Commission's abovementioned recommendation to harmonise processes for temporary exemptions and consumer product bans, will address concerns about the lack of a mechanism for Australian jurisdictions to jointly initiate temporary exemptions. This is because Australia's foreshadowed new consumer product safety regime will involve a coordinated national system for product bans. However, as also noted above, the new product safety regime will not directly affect food or therapeutic products, as they are regulated under product-specific regimes. As a result, the lack of a joint Australian approach to temporary exemptions will remain for these goods. In its 2003 review, the Commission suggested a solution to this problem for food was for the states and territories to permit FSANZ to obtain temporary exemptions on their behalf. However, this suggestion was not taken up and so it appears that Australian jurisdictions concluded that concerns about the lack of a joint temporary exemption process for food are not sufficient to warrant changes.

7 Special exemptions

Key points

- The following goods were given a 'special exemption' from the TTMRA at its inception because governments needed more time to decide whether mutual recognition, harmonisation or a permanent exemption would apply in the longer term:
  - hazardous substances, industrial chemicals and dangerous goods
  - therapeutic goods
  - road vehicles
  - gas appliances
  - radiocommunications devices.
- With ten years having passed since the TTMRA came into force, governments should consider reducing the extent of special exemptions by adopting:
  - a permanent exemption for hazardous substances, industrial chemicals and dangerous goods, given that fundamental differences are likely to remain in how Australia and New Zealand control the risks posed by those products
  - mutual recognition for natural gas appliances, given the progress towards harmonising regulations
  - a permanent exemption for 'nonuniversal' LPG appliances, since differences in LPG composition between the two countries make it difficult to achieve mutual recognition or harmonisation without compromising public safety
  - after opportunities for harmonisation have been exhausted, a permanent exemption for remaining short-range and spread-spectrum radiocommunications devices.
- Special exemptions should continue for:
  - therapeutic products and road vehicles, given the prospects for harmonisation (although therapeutic products should have a permanent exemption if legislation for a harmonised trans-Tasman regime cannot be passed in the next 12 months)
  - radiocommunications devices that are expected to soon become obsolete, or where future harmonisation is considered likely.
- Governments should improve the cost effectiveness of administering any remaining special exemptions by increasing the maximum allowable period between rollovers (and associated reporting requirements) to three years.

As noted in chapter 2, some goods were given a 'special exemption' from the Trans-Tasman Mutual Recognition Arrangement (TTMRA) when it was established. This category was used for cases where Australia and New Zealand were hopeful that greater integration could be achieved, but recognised that further work was required. Each special exemption has a multi-year work program (termed a 'cooperation program') that aims ultimately to resolve the outstanding issues by mutual recognition, harmonisation or a permanent exemption.

Five areas remain subject to special exemptions:

1. hazardous substances, industrial chemicals and dangerous goods
2. therapeutic goods
3. road vehicles
4. gas appliances
5. radiocommunications devices.

The issues associated with each of these special exemptions are examined in this chapter. The chapter concludes by considering the overarching administrative issue of annual rollovers for special exemptions.

7.1 Hazardous substances, industrial chemicals and dangerous goods

Background

The issues underpinning the special exemption for hazardous substances, industrial chemicals and dangerous goods — collectively termed 'industrial chemicals'[1] in this chapter — primarily concern requirements for:

- notification and assessment of industrial chemicals[2]

[1] Industrial chemicals include: dyes; solvents; adhesives; laboratory chemicals; chemicals used in mineral and petroleum processing, refrigeration, printing and photocopying; paints and coatings, as well as chemicals used in the home, such as weed killers, cleaning products, cosmetics and toiletries.

[2] This includes notification and assessment requirements for domestic poisons. It does not include agricultural and veterinary products, which are permanently exempted from the TTMRA (chapter 8), and therapeutic goods, which are subject to a separate special exemption (section 7.2). Strictly speaking, New Zealand applies assessment and approval requirements for industrial chemicals, rather than notification and assessment.

- industrial chemical classification, labelling, packaging and safety data sheets.[3]

Efforts to resolve the issues underpinning the industrial chemicals special exemption are managed through a cooperation program. Australia's lead agency for the industrial chemicals cooperation program is the Office of the Australian Safety and Compensation Council (OASCC).[4] In New Zealand, this responsibility lies with the Environmental Risk Management Authority (ERMA).[5] Both the OASCC and ERMA are assisted by various other agencies — such as government departments for agriculture and health — due to the diversity of issues associated with chemicals regulation.

The Productivity Commission's 2003 review of the mutual recognition schemes found that various deficiencies in Australia's chemical regulations — particularly duplication and inconsistency between different agencies and jurisdictions — were a major obstacle to achieving mutual recognition with New Zealand (PC 2003). The Commission recently reviewed Australia's chemicals regulations and recommended a national approach to overcome the problems with existing arrangements (PC 2008b). A key aspect of the recommended reforms was a new governance framework that clearly divides responsibilities between numerous agencies and jurisdictions according to task (such as standard setting) and area (such as workplace safety). In contrast, New Zealand has a single agency (ERMA) to deal with most assessment and standard-setting functions, no states to which tasks are delegated, and fewer regulators to administer and enforce the regulations.

In response to the Commission's recommendations, Australian heads of government agreed in early October 2008 that 'improved and better coordinated governance structures are required' for Australian chemicals regulation (COAG 2008d, p. 7). They directed the Ministerial Taskforce on Chemicals and Plastics Regulatory Reform to develop a governance structure for their consideration at the next COAG meeting in November 2008. The heads of government also directed relevant Ministerial Councils to report in November 2008, through the COAG Business Regulation and Competition Working Group, on responses to specific

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3 These standards vary in Australia according to whether a chemical is to be used in a workplace or home. Safety data sheets specify the properties of a chemical and the measures that should be taken to reduce the risk of injury.

4 The OASCC is located in the Australian Department of Education, Employment and Workplace Relations. It supports the Australian Safety and Compensation Council which is a group of representatives from national, state and territory governments; industry; and unions tasked with leading and coordinating national efforts to develop policy for occupational health and safety.

5 ERMA is an autonomous Crown entity created under the *Hazardous Substances and New Organisms Act 1996* (NZ). Its main role is to make decisions on applications to import, develop, or field test new organisms, or to import or manufacture hazardous substances.

recommendations made by the Commission. It was subsequently announced at the November 2008 COAG meeting that:

> Recognising the need for greater coordination and oversight in chemicals and plastics regulation, COAG agreed to a new governance structure for chemicals and plastics reform. COAG also responded to the recommendations of the Productivity Commission Research Report on Chemicals and Plastics Regulation, with further reforms to be considered in 2009. (COAG 2008f, p. 9)

Consistent with the Commission's recommendations, the new governance structure announced by COAG included the establishment of the Standing Committee on Chemicals to coordinate policy formulation, oversee regulatory arrangements, and make recommendations to Ministerial Councils (COAG 2008g). An interim response to other specific recommendations made by the Commission was also released following the November 2008 COAG meeting, indicating the governments' commitment to pursuing the reform of Australian chemicals regulation (COAG 2008b).

The Commission's recommended reforms to chemical regulations did not extend to New Zealand, and so that country would retain its distinctive regulatory regime, unless it chose to align itself closely with Australia's reformed arrangements.

Developments in the special exemption since the 2003 review

This section outlines key developments with the industrial chemicals special exemption since the last mutual recognition review in 2003, and considers the implications for how the exemption should be resolved.

Notification and assessment of industrial chemicals

In 2004, a five year work plan was established under the auspices of the industrial chemicals cooperation program to resolve issues underpinning the TTMRA special exemption for industrial chemicals. The work plan largely focuses on notification and assessment arrangements, and is primarily undertaken by ERMA and Australia's NICNAS (National Industrial Chemicals Notification and Assessment Scheme).[6] A key element of the work plan has been a comparison of arrangements in both countries. The Australian Government Department of Health and Ageing (DOHA) noted that this exercise revealed fundamental differences in the regulatory regimes:

[6] NICNAS is responsible for administering Australia's national notification and assessment requirements for industrial chemicals. It is located in the portfolio of the Australian Government Department of Health and Ageing.

- Australia assesses all new chemicals and priority existing chemicals, both hazardous and nonhazardous …
- New Zealand assesses only hazardous chemical substances as identified by the manufacturer or importer
- the definition of 'hazardous' is not the same for Australia and New Zealand, with New Zealand adopting the GHS [Globally Harmonised System for Classification and Labelling of Chemicals] definition which currently is more conservative than the Australian workplace classification (currently aligned with European Union definitions)
- NICNAS, like [regulators in] all other OECD countries, but unlike New Zealand, is a chemical-entity based scheme (that is, not product registration). New Zealand assess products as well as chemical entities
- New Zealand must have regard in their assessment for the principles of the Treaty of Waitangi with the legislation requiring an assessment to provide any known and possible adverse effects throughout the life cycle of the hazardous substance (or new organism) on the relationship of Maori and their culture and traditions
- differences between the New Zealand and Australian ecosystems may result in different risk assessment outcomes. (sub. 38, p. 1)

DOHA also expressed a concern that New Zealand does not require the notification and/or assessment of some chemicals that, while technically classified as nonhazardous, are not necessarily safe:

> Furthermore, notwithstanding the difference in definition of 'hazardous', some nonhazardous chemicals (substances) are not subject to notification and/or assessed in New Zealand but do require notification and/or assessment in Australia. Mutual recognition would allow these chemicals (substances) to be sold in Australia without the need for the risk assessment deemed necessary. Even if a chemical is classified as nonhazardous in Australia, it may still be recommended that certain safety and risk information be required — 'nonhazardous' does not necessarily mean safe for all purposes. Australia's regulatory system covers the broad spectrum of chemicals where nonhazardous substances still require labelling for consumers. (sub. 38, p. 1)

This illustrates the difficulties that would be likely to arise if mutual recognition was applied while there are still fundamental differences in what Australia and New Zealand consider to be appropriate ways to control chemical-related risks. Community expectations about those risks are such that achieving wholesale mutual recognition seems unlikely, unless it is accompanied by a high degree of regulatory harmonisation, if not uniformity.

DOHA claimed another barrier to mutual recognition is that it could jeopardise Australian trade with third countries:

> … the differences between countries as noted in the analysis of both NICNAS and ERMA … are such that to move towards mutual recognition could, in some

> circumstances, jeopardise Australia's trading position, particularly noting Australia's trade in chemicals with South-East Asia, the EU and North America. (sub. 38, p. 2)

Accord Australasia claimed that there would be significant benefits from removing cosmetics from the industrial chemicals special exemption, and that this is feasible because the relevant regulations are now closely harmonised between Australia and New Zealand:

> Since the Australian Government finalised its reforms to cosmetic products at the therapeutic interface in September 2007 and New Zealand introduced the Cosmetic Products Group Standard on 1 July 2006, the regulatory controls for cosmetic products are now closely harmonised and there is a strong case for TTMRA to apply to this class of consumer goods. The application of TTMRA for this class of low-risk, fast-moving consumer products will have significant benefits in facilitating trade and reducing unnecessary barriers. (sub. 39, p. 2)

However, cosmetics are subject to Australia's notification and assessment regime for industrial chemicals, and so the abovementioned differences identified by NICNAS and ERMA are relevant. Nevertheless, Accord Australasia argued that:

> Both Australia and New Zealand have the same regulatory objective for industrial chemicals in the protection of public health, OHS and the environment. The different approaches to achieving these regulatory outcomes should not be used as an excuse not to mutually recognise ...
>
> Cosmetic products provide an ideal opportunity for both governments to demonstrate their commitment to TTMRA ...
>
> We therefore question the dismissal of this proposal … on the basis that cosmetics are subject to Australia's notification and assessment regime … can the regulator and the PC not see the current benefit and real opportunity for the free trade of goods such as soap across the Tasman, since soap, as a cosmetic product is regulated as part of the industrial chemicals regime? (sub. DR92, pp. 1–2)

The Commission considers that the best way of resolving this matter is through a cost–benefit analysis of whether the industrial chemicals special exemption should continue beyond the end of the five year work plan in 2009 (discussed further at the conclusion of this section of the chapter and reflected in the resulting recommendation).

The new regulatory regime that the Commission recently recommended for Australia would largely maintain the abovementioned regulatory differences between Australia and New Zealand, assuming New Zealand retained its approach. Nevertheless, the industrial chemicals work plan has identified some potential for the two countries to at least partially harmonise their notification and assessment processes regarding:

- chemical inventories

- ‘low regulatory concern’ chemicals
- scenarios for ‘controlled-use’ approvals (NICNAS 2008).

Furthermore, NICNAS and ERMA have a memorandum of understanding that facilitates cooperation in their industrial chemical notification and assessment activities.

Chemical classification, labelling, packaging and safety data sheets

The Australian Government Department of Education, Employment and Workplace Relations (DEEWR, sub. 57) and the New Zealand Government (sub. 53) noted that a key step towards resolving the industrial chemicals special exemption will be for Australia to implement the Globally Harmonised System for Classification and Labelling of Chemicals (GHS).[7] The GHS was developed under the auspices of the United Nations, and provides an internationally-agreed system for the classification of chemicals and the communication of hazards through labels and safety data sheets.

No country has fully implemented the GHS, although New Zealand has made the most progress, and the European Union began phasing in the GHS in December 2008 over a period of about seven years:

> The new European regulation on classification, labelling and packaging which is based on the GHS came into effect on 1 December 2008; the deadline for substance classification according to the new criteria is 1 December 2010 whereas for mixtures the deadline is 1 June 2015. (DEEWR, sub. DR90, p. 2)

New Zealand has applied the hazard-classification aspects of the original version of the GHS to all sectors, and is now updating its arrangements to the latest revised edition (New Zealand Government, sub. 53). In Australia, the Australian Safety and Compensation Council (ASCC) has proposed that the GHS (first revised edition) be adopted as part of a new national framework for regulating chemicals in workplaces.[8] Progress in finalising this proposal has been slow, and its implementation would involve a long phase-in period:

> Work on the new workplace chemicals framework has been ongoing for several years, and while significant progress is being made, this has occurred slowly … Once a new GHS-based national standard for workplace chemicals has been declared … GHS implementation in Australia would not actually occur until the new standard has been

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7 This was also identified as a major prerequisite in the 2003 review of the MRA and TTMRA.

8 The OASCC’s proposal does not apply to domestic poisons, or agricultural and veterinary chemicals used solely in homes.

> adopted into, or given effect by, the relevant state and territory legislation and regulations. This process can take a number of years to occur. (DEEWR, sub. 57, p. 3)

In 2006, a draft regulation impact statement (RIS) supporting the ASCC's proposal was released for public comment (ASCC 2006). The Commission examined the RIS as part of its recent review of Australia's chemical regulations, and concluded that the benefits of adopting the GHS in the immediate future were overstated. Implementing the GHS now would impose significant costs on industry without offsetting trade benefits, due to the limited adoption of the GHS by other countries. The Commission recommended that a further RIS should be prepared when some of Australia's key trading partners, such as China and the United States, have commenced implementing GHS-based regulatory regimes for workplace chemicals (PC 2008b).

There has been even less progress in applying the GHS to domestic poisons and agricultural and veterinary (agvet) chemicals in Australia. New Zealand has a GHS-based code of practice for labelling agvet chemicals, but the use of GHS label elements (such as pictograms) is not mandatory, and the code allows for alternative approaches to labelling. A major issue for Australia is that domestic poisons and agvet chemicals are currently classified and labelled according to the risk they pose (taking into account the probability of harm and the magnitude of the consequences), whereas the GHS only identifies hazards (potential for harm).

Application of the GHS to domestic poisons is currently being considered as part of the abovementioned five year work plan for industrial chemicals under the TTMRA. In Australia, this is being managed by DOHA in cooperation with state and territory governments, and with New Zealand as a participant in discussions. December 2009 is the target date for a decision on how the GHS would be applied to domestic poisons and agvet products (NICNAS 2008). DOHA observed that this work has already led it to conclude that there is little prospect of mutual recognition being achieved with New Zealand in relation to the GHS for domestic poisons:

> … work in regard to the implementation of the … GHS has demonstrated that [its] adoption … in Australia is likely to require different approaches [compared to New Zealand] to classification and labelling for consumer chemicals that reflect different legislative arrangements (eg state/territory framework for poisons scheduling), differences in risk-management approaches and the need to align with trading partners. Consequently, the Department of Health and Ageing also sees little likelihood of mutual recognition being achieved in relation to the GHS in the consumer-chemical sector. (sub. 38, p. 2)

The New Zealand Government (sub. 53, p. 9) claimed that Australia's current consideration of how to apply GHS classification criteria 'creates an opportunity to harmonise the assessments relating to the intrinsic hazardous properties of …

[domestic and agvet] chemicals'. However, DOHA cautioned that the GHS itself is not intended to harmonise regulations between countries:

> While the GHS will help to bring about international harmonisation in regard to chemicals classification and some elements of labelling, it is not an objective of the GHS to bring about harmonisation in the overall approach to chemical regulation. The GHS is specifically not intended to harmonise risk assessment procedures or risk management decisions and therefore regulatory approaches between countries, given the varying national priorities and chemical use situations that may exist, will continue to differ. (sub. DR64, p. 2)

Conclusion

The industrial chemicals cooperation program has made progress in a range of areas, particularly in establishing greater cooperation between regulators on process issues. However, the cooperation program has also revealed fundamental differences in how Australia and New Zealand control chemical-related risks. Wholesale mutual recognition seems unlikely unless it is accompanied by a high degree of regulatory harmonisation, if not uniformity.

Some areas — particularly the GHS classification and labelling of workplace chemicals — are already in the process of being harmonised, but this is expected to take several years (which is desirable from Australia's perspective, given the limited adoption of the GHS by its major trading partners). Harmonisation of many other important areas appears unlikely in the foreseeable future, unless New Zealand is prepared to align itself closely with the reformed regulatory regime Australia adopts following the Commission's recent review of chemical regulations.

The five year industrial chemicals work plan is due to be completed in 2009. Given that there is no prospect of significant mutual recognition or harmonisation being achieved by that time, the Australian and New Zealand Governments should then critically examine the case for moving to a permanent exemption (but possibly with mutual recognition for selected products) rather than continuing the special exemption. This should involve a cost–benefit analysis comparing a permanent exemption with a continuation of the special exemption, and possibly combining these options with the application of mutual recognition to selected products such as cosmetics. The Commission does not favour a further extension of the special exemption unless it is supported by such an analysis, since the history of the cooperation program, and fundamental differences between the countries' regulations, suggests that wholesale mutual recognition or harmonisation is unlikely in the foreseeable future.

DEEWR questioned the need for a cost–benefit analysis of a permanent exemption:

> Such a change would be purely administrative in nature, and would result in no change to the existing regulatory arrangements nor have an additional compliance burden on Australian business. A cost–benefit analysis is unlikely to yield any useful information to inform such a decision. Further, it is unclear who would be responsible for undertaking the analysis, and how such a cost–benefit analysis would be funded. (DEEWR, sub. DR90, p. 2)

However, the abovementioned reservations that Accord Australasia expressed about the treatment of cosmetics suggest that there would be costs as well benefits in either maintaining the special exemption or moving to a permanent exemption. Such issues need to be assessed in a systematic way, rather than continuing the special exemption by default on the implicit assumption that the as yet ill-defined benefits outweigh the similarly unknown costs. A cost–benefit analysis may also enable governments to make an informed decision that some elements of the regulation of hazardous substances, industrial chemicals and dangerous goods are best retained in the special exemption category, while others are recategorised as a permanent exemption or subjected to mutual recognition. Accord Australia's suggestion that mutual recognition apply for cosmetics is one possible outcome. Responsibility for undertaking and funding the cost–benefit analysis should lie with the Ministerial Council overseeing the industrial chemicals special exemption.

Moving to a permanent exemption is unlikely to change significantly the timing of Australia's adoption of the GHS, as the TTMRA does not seem to have been a major consideration. A more important determinant of when Australia adopts the GHS should be its implementation by major trading partners.

A permanent exemption need not have adverse consequences for the cooperative arrangements Australian and New Zealand regulators have established on process issues. DOHA noted that such arrangements exist between Australia and New Zealand for agvet products, despite there being a permanent exemption for those products:

> … it would seem timely and appropriate to consider a permanent exemption being applied thereby placing notification and assessment of industrial chemicals on the same footing as agricultural and veterinary [agvet] chemicals, where, despite this permanent exemption, the level of cooperation between Australia and New Zealand on issues relating to agvet chemicals has not diminished. A similar position in regard to industrial chemicals would be anticipated under a 'permanent exemption' status. (sub. 38, p. 2)

Shifting to a permanent exemption would also eliminate the administrative costs associated with rolling over the special exemption annually. As detailed below in section 7.6, the administrative process for obtaining rollovers is onerous and time consuming.

Following completion of the five year work plan for industrial chemicals in 2009, Australian and New Zealand Governments should consider converting the TTMRA special exemption for hazardous substances, industrial chemicals and dangerous goods into a permanent exemption, and/or applying mutual recognition to some areas. This should involve a cost–benefit analysis, based on a realistic assessment of the likelihood of achieving mutual recognition or harmonisation in the foreseeable future, given the slow progress to date.

7.2 Therapeutic goods

Background

Therapeutic goods comprise medicines and therapeutic devices (for example, hearing aids, prosthetics and walking frames). They are of benefit to the community, but they also pose risks for the health and safety of consumers and for suppliers, institutions and health professionals advising on their use. This, combined with information failures that make it difficult for individuals to make fully-informed decisions about their use, provides a case for regulating therapeutic goods.

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 in the TTMRA. Australia's concerns about New Zealand's limited regulatory regime for therapeutic goods have been central to the creation and continuation of the special exemption. Particular areas of concern were:

- complementary medicines and medical devices, for which the former New Zealand Government admitted it had 'minimal regulation' compared with Australia (King 2006)
- dietary supplements, which Australia regulates as either medicines or foods, but which New Zealand regulates as a distinct category.

In 2001, the Australian and New Zealand Governments agreed in-principle to harmonise the vast majority of therapeutic product regulations, and to establish a joint therapeutics agency as a means of achieving such harmonisation (ANZTPA 2003). The joint therapeutics agency was expected to regulate therapeutic products manufactured in Australia and New Zealand and/or traded

between the two countries to ensure they met appropriate standards of quality, safety and effectiveness (PC 2003). This agency was intended to replace both the Therapeutic Goods Administration in Australia (TGA) and Medsafe (New Zealand's therapeutics regulatory agency).

The New Zealand Institute of Economic Research (NZIER) was commissioned by the two governments to undertake a cost–benefit analysis of a joint regulatory scheme and agency (box 7.1). NZIER found that, while the proposed scheme would yield only modest net economic benefits, it would offer medium to long-term nonquantifiable benefits from combining the regulatory capacity of the two countries (NZIER 2000).

At the time of the Commission's 2003 review, it was expected that a treaty to establish the joint agency would be signed by 2004 and that the joint agency would begin operating in 2005. In light of this, the Commission recommended extending the special exemption for therapeutic goods without requiring annual rollovers until the middle of 2006. It was expected that, by this time, it would be possible to identify a realistic timeframe for removing or reducing the exemption (PC 2003).

Developments since the 2003 review

Some progress was made towards the creation of a joint therapeutics agency in the years since the Commission's 2003 review. As anticipated, Australia and New Zealand signed a treaty in December 2003 to establish a joint regulatory scheme for therapeutic products and a joint therapeutics agency to oversee the scheme (King and Worth 2003).

The joint regulatory scheme would require all therapeutic products to undergo safety approval and licensing before they were allowed to be sold. Therapeutic products were defined broadly to include over-the-counter and prescription medicines, complementary medicines (including dietary supplements and herbal medicines) and medical devices, as well as blood, blood products and cellular and tissue therapies (King 2006).

While the treaty established the high-level framework for the joint regulatory scheme and joint agency, it required both countries to pass legislation in order to give effect to the new arrangements (King 2006). In preparation for this, a Therapeutic Products Interim Ministerial Council — consisting of the Australian Parliamentary Secretary for Health and the New Zealand Minister for Health — was established to facilitate the creation of the joint regulatory scheme and joint agency (TGA 2004).

Box 7.1 **Cost–benefit analysis of a joint therapeutics agency**

In July 2000, the New Zealand Institute of Economic Research (NZIER) was commissioned by the Australian and New Zealand Governments to undertake the regulation impact analysis for a joint Australia–New Zealand therapeutics agency. NZIER's task was to assess the likely costs and benefits for Australia and New Zealand of establishing the joint agency.

For Australia, NZIER was required to assess costs and benefits relative to the status quo, namely Australia's current therapeutics regulatory regime, which the Institute assessed as 'much stronger' than that of New Zealand (NZIER 2000, p. iii).

For New Zealand, however, NZIER was directed to assess costs and benefits not relative to the current regulatory regime — which NZIER described as 'unsustainable', with only 'limited regulatory oversight' of complementary medicines and medical devices (NZIER 2000, p. iii) — but relative to each of two counterfactual scenarios:

- a more comprehensive regulatory regime in New Zealand for medicines, medical devices and complementary medicines
- the above option, but in a way that permits New Zealand to unilaterally recognise some other countries' certification of therapeutic goods.

In its analysis, published in October 2000, NZIER found that the proposed joint agency would yield only modest net economic gains for both countries. One reason for this was that the proposed joint agency would mainly affect therapeutic goods approved and supplied for the New Zealand market only, and these goods would not represent a large proportion of the total market for therapeutic goods in both countries. Another factor affecting the result was that the costs and benefits for New Zealand were assessed relative to a more stringent New Zealand regulatory regime, rather than to the existing regime.

NZIER estimated transitional costs for both countries from a joint agency at about A$3 million per year and about A$10 million in total, which it noted could be met mainly by government, although with possible partial cost recovery from industry.

However, NZIER anticipated additional benefits in the medium to longer term from combining the regulatory capacity of the two countries. This is achieved by pooling the 'high-level' knowledge and expertise required for approval and registration of therapeutic goods — expertise that it argued is 'in short supply globally' (NZIER 2000, p. ix). NZIER (2000, p. iv) concluded that these 'nonquantifiable medium-term public benefits' from a joint agency would 'dominate the quantifiable economic gains'.

NZIER acknowledged that its analysis was largely qualitative, seeking to identify the direction and relative scale of costs and benefits rather than quantifying them. It attributed this to data constraints and difficulties in measuring or valuing some of the costs and benefits.

Source: NZIER (2000).

Some key decisions of the Interim Ministerial Council in 2004 and 2005 were to:

- include blood and blood products under the joint regulatory scheme (TGA 2004)
- create a new joint expert committee to coordinate reviews of medicine labelling, with the aim of working towards common standards (TGA 2004)
- include medical devices within the scope of the joint regulatory scheme, with independent conformity assessment of these devices (King and Worth 2004)
- appoint a joint expert advisory committee on therapeutic goods standards in preparation for the new regulatory scheme, with the committee given the task of creating harmonised standards for therapeutic products (King and Pyne 2005a)
- confirm that the new trans-Tasman agency would be known as the Australia New Zealand Therapeutic Products Authority (ANZTPA) and defer the agency's start-up date — previously set for 1 July 2006 — to enable extensive public consultation (King and Pyne 2005b).

The consultation process took place in three phases over 2006 and 2007, and was designed to gather public and industry views on the draft rules for the joint regulatory scheme (ANZTPA 2006).

Following these extensive preparations, the Therapeutics Products and Medicines Bill was tabled for introduction into the New Zealand Parliament in December 2006 (King 2006). Its Australian equivalent, the Therapeutic Products Bill, was released as an exposure draft for public comment in April 2007 (Mason 2007).

Progress came to a halt in July 2007, however, when the New Zealand Government announced that it would not be proceeding with the Therapeutics Products and Medicines Bill. The Government cited insufficient parliamentary support for the legislation (King 2007). Opposition to the bill came from minor party members of Parliament, including the Greens, the National Party and ACT New Zealand (Health Freedom New Zealand 2007a).

Opposition to the legislation reflected a public campaign in New Zealand against the proposed joint regulatory scheme. The main issue of contention was the inclusion of complementary medicines in the new regulatory scheme, which would have introduced more stringent regulatory controls on herbal and traditional medicines, medical devices and dietary supplements produced in New Zealand. Health Freedom New Zealand, which led the campaign, dubbed the legislation the 'Anti-Vitamin Bill' and warned New Zealanders that the proposed scheme would lead to price increases of between 30 and 100 per cent for vitamins and herbal supplements, as the more stringent regulations would increase costs to suppliers (Health Freedom New Zealand 2007b). Health Freedom New Zealand (2007b) also

expressed concerns that up to 60 per cent of supplements would disappear from the New Zealand market due to excessive compliance costs.

The former New Zealand Government stated that it remained committed to establishing the joint scheme and therapeutics agency, with the Therapeutics Products and Medicines Bill remaining on its Parliamentary Order Paper (New Zealand Government, sub. 53). A new government was formed in New Zealand following the November 2008 election, but it is unclear at this stage whether it will retain the approach of its predecessor. Its Ministry of Economic Development (sub. DR89) simply noted that the Commission's draft report had made a recommendation regarding the special exemption for therapeutic goods.

Interim arrangements

Both Australia and New Zealand decided to unilaterally reform their domestic regulatory regimes while implementation of a joint therapeutics regulatory regime remains postponed.

Prior to the recent change of government, New Zealand prepared reforms to its dietary supplements regulations that involved the regulatory separation of products New Zealand classifies as food-type and therapeutic-type dietary supplements (NZFSA 2008a). Under the proposed arrangements, food-type dietary supplements — such as sports drinks — would be taken out of New Zealand's dietary supplements regulations and, instead, regulated under a new Supplemented Food Standard. Therapeutic-type dietary supplements — such as vitamin tablets — would continue to be regulated as dietary supplements, but suppliers would be required to register their products on a database to be operated by Medsafe (NZFSA 2008b).

This appeared to represent a move towards the registration and administration of therapeutic-type dietary supplements as therapeutic products by Medsafe, even though they would still be regulated as dietary supplements. The former New Zealand Government (sub. 53, p. 26) referred to the changes as 'interim arrangements' intended to 'facilitate, or at the least not compromise' the resumption of negotiations towards a joint therapeutics scheme with Australia.

According to the Complementary Healthcare Council of Australia (CHC) (sub. 33), some industry representatives have taken these developments to suggest that therapeutic-type dietary supplements would eventually become regulated as complementary medicines in New Zealand under therapeutic product legislation, as in Australia. The CHC expressed concern that, under the new arrangements for food-type dietary supplements, many of these supplements currently imported into Australia from New Zealand would no longer be able to be marketed as 'foods'.

Barring an amendment to the joint Australia–New Zealand food standards code, such supplements would be regarded as therapeutic goods and would therefore become exempt from the TTMRA, raising compliance costs to Australian businesses importing these New Zealand products for supply to the Australian market (CHC, sub. 33).

Australia is also initiating domestic regulatory reforms to its therapeutic products regime. While the joint regime was being negotiated with New Zealand, Australia postponed a series of regulatory reforms, with the intention of implementing them as part of the new regime (CHC, sub. 33). With the postponement of negotiations on the joint scheme, Australia has decided to progress those reforms on its own. Public consultations have commenced on reforming regulations for prescription and complementary medicines, over-the-counter medicines, and medical devices in Australia.

The Commission supports Australia and New Zealand's efforts to progress regulatory reforms unilaterally while negotiations for a joint therapeutics scheme are postponed. The unilateral reforms are likely to strengthen each country's regulatory regime. In the case of Australia, delaying reforms imposes costs on local producers — who face regulatory uncertainty — as well as on consumers, who may be exposed to the risk of unsafe therapeutic products. Progressing the reforms, seen as long overdue, would offer local manufacturers and suppliers to the Australian market greater certainty about the regulatory environment, as well as improving protection for local consumers.

Options for dealing with the special exemption

The Commission maintains that a joint scheme and therapeutics agency would be the preferred means of resolving the special exemption in the long term. The available evidence on costs and benefits would support this view (box 7.1). However, there are various possible options for dealing with the special exemption in the interim. These are set out below.

Continue to roll over regardless of the fate of the joint regime

Under this 'business-as-usual' scenario, the special exemption for therapeutic goods would continue to be rolled over even in the event that there was negligible progress towards either harmonisation or mutual recognition. This would involve the continued preparation of cooperation reports outlining any progress made and the case for another rollover of the special exemption.

Retain special exemption, without cooperation reports, until negotiations are resumed

The recent election of a new parliament and government in New Zealand may provide a basis for the Australian and New Zealand Governments to reopen negotiations on the foreshadowed joint regime for therapeutic goods.

Until negotiations resumed, there would be little point in continuing to produce regular cooperation reports on the progress made in resolving the special exemption. Waiving the requirement to produce cooperation reports until negotiations resumed would also significantly reduce the administrative cost of continuing to roll over the special exemption. Such a change would not require legislative amendment because cooperation reports are only required under the administrative arrangements for rollovers (detailed in section 7.6).

It could be argued that the requirement to roll over the special exemption should also be waived until negotiations resume. However, in section 7.6 below the Commission recommends a general change to the rollover arrangements so that rollovers are only required every three years. It would be highly undesirable for a period of more than three years to pass without the Australian and New Zealand Governments having reached agreement on whether or not to resume negotiations on the joint regulatory regime (and indeed to complete the negotiations).

Industry groups stressed that the postponement of negotiations had created considerable uncertainty, and it was important that a time limit be placed on governments to remove that uncertainty, even if it forced governments to abandon the concept of a trans-Tasman regulatory regime:

> The CHC considers industry is continuing to bear the cost of meeting two different regulatory systems and supports the reinstatement of a joint regulatory scheme between Australia and New Zealand. However, the CHC strongly suggests that this occur within an appropriate time period for the best interest of the complementary medicines industry ...
>
> If the joint regulatory agency is agreed to by both governments, an appropriate deadline for implementation must be established. The CHC suggests that if the deadline is not met by either party, the concept of the joint regulatory scheme be abandoned and plans for therapeutic goods to fall under permanent exemption be initiated. (CHC, sub. DR69, pp. 1–2)
>
> The Australian and New Zealand Governments should resume negotiations to establish a joint regulatory scheme for therapeutic products, with a joint agency to administer the scheme, as a matter of urgent priority … The two governments should agree on a time limit within which agreement must be reached; within that period, the special exemption for therapeutic goods should continue ... Beyond that period, however, a

permanent exemption should be put into effect. (Australian Self-Medication Industry Inc, sub. DR60, pp. 1–3)

DOHA (sub. DR64) noted that the Australian Government is unwilling to resume negotiations unless the New Zealand Government can provide it with some certainty that the legislation for a joint regulatory regime would be passed by the New Zealand Parliament. DOHA also cautioned that a resumption of negotiations might delay reforms that Australia has recently decided to implement independently, which by implication would prolong industry uncertainty. This concern was reflected in views expressed by industry:

> ASMI [Australian Self-Medication Industry Inc] believes that Australia should not delay further adopting the best of the ANZTPA proposed reforms on an Australia-only basis. Further, we do not believe the Australian Government should delay these reforms until the New Zealand position is clear. We should press ahead now. (ASMI, sub. DR60, p. 2)

> During the consultation period under Trans-Tasman harmonisation, the introduction in Australia of a number of policy and legislative changes to improve the current therapeutic goods regulatory system was delayed as they were to be addressed under the new regulatory scheme — the CHC considers there is now an urgency to address these issues. The CHC considers it essential this work be progressed in an Australia only environment if a supported commitment cannot be made by the New Zealand Government. (CHC, sub. DR69, pp. 1–2)

However, a resumption of negotiations might not necessarily require a significant delay in reforms already underway. DOHA (sub. DR64) noted that Australia's recently initiated reforms are essentially ones that were agreed as part of the trans-Tasman regulatory regime. Furthermore, both countries have committed to implementing their recently initiated reforms in a way that is consistent with the intent of the joint regime:

> Since the postponement of negotiations Australia and New Zealand have proceeded with domestic regulatory reforms. Health Ministers of the two countries have agreed that this work should proceed in a manner that would be consistent with minimising trade barriers as envisaged for the joint regulatory scheme.
>
> In Australia, these reforms have essentially implemented the initiatives agreed during the ANZTPA negotiations. (DOHA, sub. DR64, p. 2)

On this basis, it seems that each country's reforms could largely continue as planned at a domestic level without significantly hindering the prospect of achieving agreement on a trans-Tasman regime at a later date. This view does, however, depend on how New Zealand proceeds with its proposed regulatory separation of food and therapeutic-type dietary supplements.

Narrow the scope of the special exemption

Rather than try to achieve regulatory harmonisation for the whole range of therapeutic products, it might be simpler to work towards mutual recognition or harmonisation for the less contentious products, while retaining the special exemption — or seeking a permanent exemption — for the remaining areas.

Complementary medicines and dietary supplements (and probably also medical devices) have been sticking points. Australia will not accept products in these categories that do not meet its more stringent requirements, while New Zealand has faced domestic opposition to the prospect of stricter regulations on these products.

As a result, it might be appropriate to accept that progress is not possible for these product areas, at least at the present time, and to move towards a limited permanent exemption for these products. Efforts could instead be directed towards achieving mutual recognition or harmonisation for the other categories of therapeutic products, including over-the-counter and prescription medicines, blood and blood products, and tissue and cellular therapies.

Study participants did not favour such a piecemeal approach to achieving harmonisation:

> ASMI is firmly of the view that the ANZTPA regulatory scheme must cover all products which make a therapeutic claim, as that term is currently defined in Australian legislation. We will not support any scheme to 'exempt' or 'exclude' dietary supplements, or any other class or group of therapeutic products. (ASMI, sub. DR60, p. 2)
>
> Complementary medicines are fully integrated into the Australian system and their removal would put at risk the integrity of a joint therapeutic products regulatory scheme ...
>
> If either party to the [Australia New Zealand Therapeutic Products Authority] Treaty sought to exclude complementary medicines, then renegotiation of the Treaty may be required.
>
> This option would also increase the complexity of the joint scheme as the agency would be required to enforce different rules in each country and medicines would need to be carefully categorised for trade purposes. (DOHA, sub. DR64, p. 3)

Seek a permanent exemption for all therapeutic products

Alternatively, Australia and New Zealand might decide that therapeutic products is an area in which they have such different views that it would be easier to make the whole range of products a permanent exemption from the TTMRA. A permanent exemption could be implemented administratively through regulation, rather than

requiring legislative change, and would only require the support of two-thirds of the jurisdictions.[9]

The advantage of this approach is that it might be simpler than determining which products to harmonise and which to exempt. It would also remove the requirement for annual rollovers, reducing administrative costs. However, this approach would lessen the pressure for governments to achieve progress, and would result in the two countries forgoing potential benefits of mutual recognition in product areas where mutual recognition or harmonisation might have been achieved.

DOHA (sub. DR64) favoured a permanent exemption for all therapeutic goods, noting that this would reduce industry uncertainty and government administration costs without necessarily ruling out the possibility of a trans-Tasman regime in the future. It also considered that, by simplifying the bilateral relationship, a permanent exemption may encourage narrower forms of harmonisation in the interim:

> A permanent exemption:
>
> - would not require repeal of the ANZTPA Treaty, and negotiations to establish a joint agency could recommence at any time
> - may simplify the bilateral therapeutic goods regulatory relationship and may encourage cooperation efforts short of full harmonisation
> - would present the least administrative burden of the options identified, and does not require an alteration to the current operation of the TTMRA
> - would provide certainty for industry and allow domestic reforms to go ahead immediately in each country.
>
> A permanent exemption does not imply that the Australian and New Zealand Governments have abandoned the goal of harmonised therapeutic products regulation. The TTMRA provides a framework for either country to seek removal of the exemption once current concerns have been addressed. (DOHA, sub. DR64, p. 3)

For instance, the Australian and New Zealand Governments could explore harmonisation in the areas of therapeutic-product labelling, prescription regulations, and the scheduling of medicines.

Conclusion

Of the possible approaches canvassed above, the Commission considers that it would be in the interest of both Australia and New Zealand to attempt to resolve the special exemption through harmonisation under a joint regulatory scheme, rather

9 *Trans Tasman Mutual Recognition Act 1997* (Cwlth), s. 45; and *Trans Tasman Mutual Recognition Act 1997* (NZ), s. 83.

than immediately move to a permanent exemption for some or all therapeutic products. The recent election of a new parliament and government in New Zealand provides an opportunity to resume negotiations on a joint regulatory regime. As a result, the Commission supports the approach of retaining the special exemption in the short term to allow for the possibility that agreement can be reached.

There should, however, be a strict time limit placed on the New Zealand Government to indicate that passage of the required legislation is likely, and for both countries' parliaments to enact the legislation. If these time limits cannot be met, a permanent exemption should be adopted as soon as possible in order to remove the uncertainty industry currently faces. Given the advanced stage that negotiations reached before they were postponed, the New Zealand Government should be able to indicate within three months of receiving this report whether it is likely to secure passage of the necessary legislation within the following nine months. If it advises that enactment is likely, the Australian and New Zealand Parliaments should enact the resulting agreed legislation within twelve months of governments receiving this report. Implementation of the joint regime should then occur as soon as possible.

RECOMMENDATION 7.2

The New Zealand Government should advise the Australian Government within three months of receiving this report whether the foreshadowed trans-Tasman regulatory regime for therapeutic goods is likely to be enacted by the New Zealand Parliament within the following nine months. If it advises that enactment is unlikely within this period, therapeutic products should be granted a permanent exemption from the TTMRA as soon as possible. If it advises that enactment is likely, but the parliaments fail to enact the legislation within twelve months of governments receiving this report, a permanent exemption should also be adopted as soon as possible.

7.3 Road vehicles

Road vehicles sold in Australia and New Zealand are subject to a range of standards. The rationale for road vehicle standards is twofold:

- consumers find it difficult to obtain and interpret technical information about models being considered for purchase
- the costs borne by vehicle owners do not always fully reflect the burden they impose on others (such as from pollution and accidents).

However, the development and application of vehicle standards also has costs, and so governments need to be mindful that these do not outweigh the benefits to the community as a whole.

One way in which governments can limit the costs of vehicle standards is to harmonise their requirements with those of other countries. A high proportion of road vehicles are sold in a different country from that in which they are manufactured. As a result, countries that maintain unique vehicle standards to achieve the same outcomes as their trading partners are likely to create unnecessary regulatory duplication and inconsistency. Uniqueness makes it more costly for governments to develop and administer standards, and add to the costs incurred by vehicle suppliers, which will in turn be passed on to consumers.

Governments around the world, including those of Australia and New Zealand, have recognised the potential benefits of harmonising vehicle standards across countries. At a multilateral level, the United Nations Economic Commission for Europe (UNECE) has been the primary forum through which harmonisation of vehicle standards has been pursued (box 7.2). Australia and New Zealand participate in the UNECE but have also been pursuing bilateral harmonisation through a TTMRA cooperation program for road vehicles.

Because of the potential for economic benefit resulting from common road vehicle requirements, Australian and New Zealand governments have sought either mutual recognition or harmonisation. The special exemption was accorded under TTMRA due to the desire to overcome significant differences in road vehicle regulation. While Australian exports to New Zealand are not affected by these differences — because of New Zealand acceptance of Australian regulations — it is not clear how trade in components from New Zealand to Australia have been impeded by the lack of mutual recognition (box 7.3).

Given that around 80 per cent of all light vehicles sold in Australia in 2007 were imported (FCAI 2008), harmonisation with other countries' standards could result in substantial economic benefit, by avoiding the need for costly adjustments to the standards of imported vehicles. New Zealand, which recognises a number of standards and imports virtually all of its cars, already realises this benefit to a large extent. New Zealand consumers can access cars produced to a range of acceptable standards and, hence, reap the benefits of larger production runs and innovations of international manufacturers.

The rest of this section outlines Australia and New Zealand's current approach to vehicle standards, their progress in harmonising standards through UNECE and TTMRA processes, and the Commission's assessment of should happen in relation to the road vehicle special exemption.

Box 7.2 United Nations Economic Commission for Europe (UNECE) World Forum for Harmonisation of Vehicle Regulations

Both New Zealand and Australia are active participants in the United Nations Economic Commission for Europe (UNECE) World Forum for Harmonisation of Vehicle Regulations, the pre-eminent forum for the development of vehicle standards. This forum aims to initiate and pursue actions aimed at the worldwide harmonisation, or development, of technical regulations for vehicles, with the specific aim of reducing duplication of conformance procedures.

The UNECE began as a forum to harmonise European regulations, resulting in the UNECE Agreement 1958. The 1958 Agreement currently has 38 signatories including Australia, New Zealand, the European Union and Japan. APEC has also agreed that the UNECE should be the forum for the region to debate the alignment of road vehicle standards.

The principal objective of the 1958 UNECE Agreement is to eliminate the need for duplicate conformance assessment. This is achieved by a country 'applying' all or any of the UNECE standards. In applying a UNECE standard, a country agrees to accept products that have been assessed by a conformance assessment body accredited by the country manufacturing and/or supplying the product. A country that has applied a particular standard, also has the right to issue approvals or accredit third-party conformity assessment to that UNECE standard. The United States and Canada have not applied standards under the 1958 Agreement as they have a policy of not accepting certification done in other countries.

UNECE members made another agreement in 1998, which runs parallel to the 1958 Agreement, providing for the development of Global Technical Regulations (GTRs). The GTRs Agreement does not provide for the mutual recognition of certification of automotive products, allowing the United States and Canada to play an active role in development of global vehicular standards. The GTR forum establishes a global process for the joint development of GTRs for vehicles and components.

New Zealand acceded to the GTRs Agreement in 2001, and Australia in 2008. As noted in the Road Vehicles 2007 Joint Annual Cooperation Report, the GTRs Agreement has become the global centre of discussions about vehicle regulations, such that 'in time there will no longer be a need for bilateral or regional mutual agreements on vehicle standards' (DITRDLG and MED 2007, p. 3).

Source: DITRDLG and MED (2007); UNECE (2005).

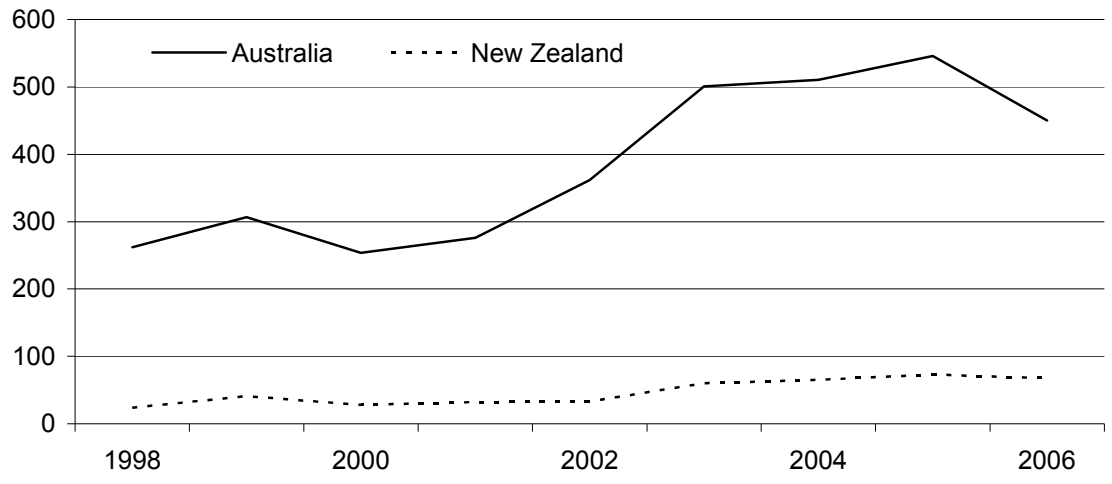
Box 7.3 **Trans-Tasman automotive trade**

The degree to which trans-Tasman trade in vehicles may have been hampered by the lack of mutual recognition is unclear. In particular, as New Zealand unilaterally recognises Australian standards, Australian exports to New Zealand are unaffected by the exemption. As the figure below shows, the period since the introduction of the TTMRA has seen an increase in the value of trade in vehicles between the two countries, with gross exports from Australia increasing by over 70 per cent. Exports to New Zealand currently comprise around 16 per cent of all automotive exports from Australia (Bracks 2008).

The 2003 review of the mutual recognition schemes noted that New Zealand manufacturers commonly experience problems in accessing the Australian market (PC 2003). While exports of automotive components from New Zealand to Australia have increased over the period of the TTMRA, they still amount to less than $US 70 million per annum.

Trans-Tasman exports of road vehicles and vehicle parts

Gross exports ($US million)



Source: World Integrated Trade Solution (WITS) database (accessed 25 July 2008).

Road vehicle standards in New Zealand

New Zealand currently accepts all road vehicles and components that comply with Australian, Japanese, United States or UNECE standards. That is:

> … the overall policy is to provide a range of standards covering vehicles from the main four safety-conscious standards-setting regimes from which New Zealand's vehicles are sourced. (Land Transport New Zealand 2008a, p. 2)

This policy facilitates the supply of vehicles to New Zealand consumers at a lower cost than otherwise, while providing a level of vehicle standards acceptable to the community. It also benefits Australian motor vehicle exporters because they are not required to comply with standards unique to New Zealand.

The range of road vehicle standards currently accepted in New Zealand are expected to converge with UNECE standards over the long term, allowing for effective harmonisation between the New Zealand and Australian approaches to motor vehicle standards. However, the New Zealand Government (sub. 53, p. 23) pointed out that the international convergence of standards is 'at a very early phase and it would be very difficult to estimate when it may be completed'.

New Zealand also accepts compliance certification by other countries where it has confidence in that country's certification procedures. This includes conformity assessments carried out in Australia. The New Zealand approval process is based on a whole-vehicle approach, whereby a new model of motor vehicle must be certified as complying with one of the accepted suites of standards.

Road vehicle standards in Australia

All vehicles manufactured in or imported into Australia need to conform to a set of national standards — referred to as Australian Design Rules (ADRs) — that provide a comprehensive range of performance and design requirements for motor vehicle safety. ADRs are developed by the Department of Infrastructure, Transport, Regional Development and Local Government (DITRDLG) in consultation with a range of stakeholders.

Australian Design Rules and the UNECE standards

Australia became a signatory to the 1958 UNECE Agreement in 2000, and has sought to harmonise ADRs with UNECE standards. In 2008, Australia also acceded to the 1998 UNECE Agreement on Global Technical Regulations. Currently, over 70 per cent of the ADRs are consistent with UNECE standards. This understates the extent of harmonisation because some of the remaining 30 per cent of ADRs have been superseded by ADRs that are consistent with UNECE standards. However, there are a number of significant ADRs that continue to impose unique Australian requirements on manufacturers, such as for child restraints (ADR 34) and frontal impact (ADR 69). The Commission understands that the Australian Government

has no plans to harmonise some of these requirements, such as child restraints, with UNECE standards.[10]

It is unclear what environmental or public health benefits Australia gains from having unique ADRs that differ from UNECE, Japanese or US standards. Discrepancies between ADRs and other standards accepted internationally can result in additional requirements being imposed upon automotive products beyond what is necessary to improve safety. While it is not possible in the context of this study for the Commission to make judgements about the need for unique Australian standards, any differences between Australian and widely accepted international standards for road vehicles need to be rigorously justified on either safety or environmental grounds because of their potential to create barriers to trade.

Such barriers to trade potentially disadvantage automotive producers and consumers alike, in both Australia and New Zealand. The Federal Chamber of Automotive Industries noted that compliance with unique local standards can impose a 'cost penalty' on Australian automotive manufacturers, leading to a 'significant disadvantage in an export market' (FCAI 2006, p. 2). In its submission to the Commission's 2002 review of automotive assistance, Ford Australia (2002) noted that compliance with unique ADRs costs those supplying vehicles to the Australian market around $1–2 million for each model, without adding any safety benefits.

Car buyers are also disadvantaged by what amounts to a barrier to trade. As unique ADR requirements are imposed on all vehicles being sold in Australia, the cost penalties associated with the differences in standards are to some extent passed on to the consumer. These ADR requirements apply to both second-hand and new vehicles imported into Australia. Increased car prices reduce the level of income available to be spent on other goods and services, in turn discouraging investment and employment in industries that supply those goods and services.

Compliance and certification in Australia

Each model of a particular vehicle design to be either imported into, or manufactured in, Australia has to be certified as complying with the relevant ADRs.

The certification process in Australia is administered by Vehicle Safety Standards (VSS) in DITRDLG. Manufacturers demonstrate compliance with ADRs by submitting details of vehicle design and results of various tests specified under the

[10] The special exemption for motor vehicle child restraints is currently listed under the hazardous substances special exemption in schedule 3 of the TTMRA legislation. In the context of other changes being made to the TTMRA, child restraints should be transferred to the road vehicles special exemption.

ADRs. These tests can be carried out within Australia or overseas in certified testing facilities. Audits of both the testing facility and the manufacturing process are also conducted by VSS, to ensure that vehicles are constructed to the production design and that tests are carried out correctly. A physical inspection of a new model before it goes on sale is also conducted to ensure registration requirements are met.

Certification is contingent on a new model meeting the entire suite of ADRs. For ADRs harmonised with UNECE standards, Australia accepts test reports and certifications approved to those UNECE standards from other countries signatory to the 1958 Agreement. However, as certification in Australia is based on whole-vehicle approvals, audits of the manufacturing process and the test facilities are still required to ensure compliance with Australian regulations (PC 2003).

Imports of second-hand vehicles

Australia and New Zealand approach the regulation of imported second-hand vehicles differently.

Australian imports

Australian imports of second-hand vehicles are restricted by a mix of industry and transport policy. As the 2008 Bracks Review noted:

> All used vehicles built on or after 1 January 1989 need to qualify under the Specialist and Enthusiast Vehicle Scheme [SEVS] or the Registered Automotive Workshop Scheme [RAWS] and be certified as complying with the Australian Design Rules applicable at the time of the imported vehicle's manufacture ... Used vehicles attract a tariff of 10 per cent for passenger vehicles and 5 per cent for light vehicles and 4WDs, in addition to a non-*ad valorem* tariff of $12,000. Vehicles imported under the two schemes do not attract the non-*ad valorem* tariff. (Bracks 2008, p. 33)

Special interest second-hand vehicles aimed for niche markets and imported under the low-volume SEVS or RAWS schemes are assessed as conforming to the relevant ADRs on a vehicle-by-vehicle basis. The Australian Government's rationale for vehicle-by-vehicle assessment is that the condition of second-hand vehicles is difficult to determine, and there may be quarantine risks associated with bringing vehicles in from certain areas.

In addition to conformance assessment, imported second-hand vehicles that are not on the special interest list are subject to a $12 000 tariff. The 1999 Review of the Motor Vehicles Standards Act described the tariff as being:

> … expressly provided for the purpose of limiting the numbers of used vehicles imported into Australia in full volume to give effect to industry policy. (Review Task Force 1999, p. 106)

As the Commission has noted previously, this tariff essentially prohibits the importation of second-hand cars that do not qualify for either scheme (PC 2002, 2008).[11]

The cost to consumers of effectively prohibiting large-scale importation of second-hand vehicles through the combination of vehicle-by-vehicle inspections, ADR requirements and the $12 000 tariff is likely to be significant, and any benefits from such a policy need to be clearly demonstrated.

New Zealand imports

Second-hand cars can be imported into New Zealand from a number of countries, with around 95 per cent of these originating in Japan.

Importing used vehicles involves a number of compliance steps including: quarantine and border control, certification of ownership and legal entitlement, verification that the vehicle met required standards at the date of manufacture, compliance with safety and emissions requirements, and verification of the condition of the vehicle (Land Transport New Zealand 2008b). After completing these steps, the vehicle is then issued with a warrant of fitness, which has to be renewed on a six-monthly or yearly basis, depending on the age of the car.

Restrictions on importing second-hand vehicles to New Zealand are relatively relaxed compared to Australia, with consumers benefiting from an increased range of vehicles and lower prices. This is evidenced by the fact that imports of used vehicles comprised around 61 per cent of new car registrations in New Zealand during 2007 (Land Transport New Zealand 2007). However, increased access to second-hand cars from other countries is accompanied by a diminished autonomy regarding vehicle standards, and an increase in the number of vehicles that may be less suited to local conditions. As international standards converge and the UNECE becomes more widely accepted, these problems are likely to become less significant.

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11 The 2002 Review of Automotive Assistance found that there was merit in retaining the $12 000 tariff, but only because its removal would destabilise other adjustment measures (PC 2002).

Cooperation program

The Australian and New Zealand Governments established a TTMRA cooperation program covering all road vehicle standards, with the clear intention of promoting mutually acceptable standards and common conformance and certification requirements. Annex 4 of the TTMRA specifies the goals of the cooperation program for road vehicles as being to establish a harmonised set of trans-Tasman vehicle standards based, at least in part, on UNECE standards:

> Australia and New Zealand will embark on a program aimed, where appropriate, at harmonising Australian and New Zealand standards with the internationally recognised UNECE standards, or those national or regional standards that are agreed by the Parties, and at developing consistent conformance assessment and certification requirements in both countries. This body of internationally harmonised standards is intended to form the basis of a set of trans-Tasman road vehicle standards. It is intended that, as far as possible, all vehicles would be certified against these trans-Tasman standards. All road vehicles certified as meeting these standards will be able to be freely traded between Australia and New Zealand. (TTMRA 1998, Annex 4, p. 40)

It is important to recognise that this commitment to removing impediments to trans-Tasman trade in road vehicles and their components was, in 1998, agreed upon in the context of New Zealand's acceptance of multiple standards and imports of used vehicles, with imports of second-hand vehicles increasing rapidly in New Zealand:

> The program of importing used vehicles into New Zealand (mainly from Japan) which began to have effect in 1987 when the percentage of used imports in new registrations in New Zealand rose from about 5 per cent to about 13 per cent. The levels of used imports rose again to about 50 per cent over the next three years and at present about two-thirds of the newly registered light vehicles are used imports. (Newstead and Watson 2005, p. 2)

That is, both parties agreed to seek mutually acceptable road vehicle standards in the full knowledge that New Zealand already accepted the importation of second-hand vehicles from Japan.

However, there has been little progress in developing a set of mutually acceptable trans-Tasman standards. The justification for this lack of progress appears to be the expectation that future prospects for mutual recognition or harmonisation rest on the convergence of the ADRs and other international standards. As the New Zealand Government noted:

> ... the full or partial removal of road vehicles, their components and systems from the scope of the [TTMRA special] exemption would be difficult, and its success and impact may depend on the progress of the work carried out at the WP.29 [UNECE World Forum for Harmonisation of Vehicle Regulations, Working Party 29] on global harmonisation. (sub. 53, p. 23)

Similarly, the 2007 Joint Annual Cooperation Report stated that:

> … the objectives of TTMRA could be best served by both parties pursuing a program with the regulations adopted by [UNECE]'. (DITRDLG and MED 2007, p. 1)

With the focus on international convergence, currently there seems to be little occurring in the way of active cooperation between Australia and New Zealand. This lack of bilateral cooperation pending international convergence creates potential for divergence in trans-Tasman automotive standards resulting from country-specific regulatory and technological developments. Two recent examples are:

- the development of New Zealand fuel economy standards for all new and used light vehicles entering the fleet (Bracks 2008). This is likely to have implications for the Australian automotive industry, given that the New Zealand market absorbs a significant proportion of Australian automotive exports
- the introduction of vehicle security measures such as microdots — aimed at minimising vehicle theft — which are proposed for all vehicles imported into New Zealand.

An effective cooperation program with a well-defined strategy for facilitating trans-Tasman automotive trade and promoting consistency in Australian and New Zealand motor vehicle standards and conformance procedures can:

- provide a mechanism to ensure coordination of policy developments and a means of preventing further differences in standards from emerging
- remove barriers to trans-Tasman trade in vehicles by Australia considering the range of standards already accepted in New Zealand.

Further, as was noted in the 2003 review of the mutual recognition schemes, there remains potential for mutual recognition of conformance assessment. This would involve New Zealand manufacturers obtaining approval in New Zealand for components they produce, via administrative processes run by the New Zealand Government, and having that approval recognised in Australia without further testing or evaluation.

Future directions

There are three broad policy options for achieving harmonisation and hence resolving the special exemption:

- New Zealand only accepts vehicles that meet Australian standards.
- Australia accepts third-country standards recognised by New Zealand.

- Australia and New Zealand use the TTMRA cooperation program to negotiate harmonised requirements.

The exclusive adoption of Australian standards by New Zealand would adversely affect New Zealand consumers and exporters by raising the cost of trade with third countries.

Australian acceptance of third-country standards recognised by New Zealand would be a major policy shift for Australia. In the 2003 review of the MRA and TTMRA, the Commission concluded that the associated benefit would be of limited duration because the requirements of many of Australia and New Zealand's trading partners were converging on UNECE standards in any case. As a result, it was thought that the interests of both countries would be best served by focusing on international harmonisation through the UNECE. In hindsight, it is apparent that the goal of multilateral harmonisation is a long-term one that will take some time to achieve. The New Zealand Government (sub. 53) observed that the convergence of international standards is still at an early stage, and it is unclear when the major international automotive standards will converge. Indeed, Australia may never fully converge with international standards because, as noted previously, it is committed to retaining some unique ADRs, such as for child restraints.

The Commission has, therefore, concluded that there is merit in Australia and New Zealand continuing to explore opportunities to harmonise their vehicle standards and associated procedures through the TTMRA cooperation program, rather than relying solely on the UNECE process. As suggested by the New Zealand Government (sub. 53), the respective differences in regulations applying to child restraints could be an area where the cooperation program could progress beyond the expected UNECE convergence.

Continuing the special exemption also emphasises harmonisation as a common policy goal, and reinforces the commitment to harmonisation of standards that New Zealand and Australia have under both UNECE and TTMRA. There are still impediments to trans-Tasman trade in vehicles and their components, and without a formal, structured, and effective dialogue between the two regulators, there remains the possibility of unilateral measures leading to a divergence of standards.

The need for an effective program of cooperation is demonstrated by the tendency for divergence in the absence of a structured dialogue between Australian and New Zealand regulators. This is evidenced by New Zealand pursuing unilateral changes such as fuel economy standards and security measures, which are not mentioned in either the 2007 or 2008 cooperation reports. Indeed, the two most recent cooperation reports show little evidence of progress and are remarkably similar in content, suggesting an absence of communication and cooperation.

To avoid the development of different vehicular standards, a reinvigorated cooperation program needs to be implemented, featuring clear objectives and deadlines by which they can be met, and supported by a clear intention to reduce impediments to trans-Tasman trade in vehicles.

It is important to remember that the cooperation program was initiated with the purpose of facilitating either mutual recognition or harmonisation, and that the underlying premise of mutual recognition is that the existing regulatory arrangements for each party are acceptable to the other. Persistence with standards and conformance procedures that are not mutually acceptable contradicts this premise, and requires strong justification on public health or environmental grounds.

RECOMMENDATION 7.3

The TTMRA special exemption for road vehicles should remain because there are opportunities for Australia and New Zealand to harmonise their vehicle standards and associated procedures in advance of, and in some cases to a greater extent than, the harmonisation expected to eventually be achieved at a global level. To ensure that the special exemption delivers results, the Australian and New Zealand Governments should develop a reinvigorated cooperation program for road vehicles that has clear objectives and deadlines, and is supported by a clear intent to reduce impediments to trans-Tasman trade in vehicles.

7.4 Gas appliances

Gas appliances improperly designed or produced can lead to gas poisoning, fire, burns and asphyxiation, sometimes with fatal consequences. Combined with information failures that make it difficult for consumers to identify unsafe appliances, these dangers provide a case for regulation.

This area was originally made a special exemption under the TTMRA due to differences between Australian and New Zealand compliance regimes for gas appliances, and to accommodate Australia's concerns about the safety and effectiveness of New Zealand's less stringent regulatory regime. Another reason for the special exemption was the difference in liquefied petroleum gas (LPG) composition between the two countries, which led to safety concerns about mutual recognition of some LPG appliances.

The cooperation program covering gas appliances was expected to identify and implement the changes that would enable mutual recognition to be extended to

these products. In recent years, satisfactory progress has been made towards bridging the regulatory gap between the two countries.

Background

Australia's regulatory regime for gas appliances includes mandatory requirements to protect health, safety and the environment, and for energy efficiency, fitness for purpose and labelling. Australian regulations require laboratory testing against appliance specifications and standards, and independent third-party certification and labelling prior to sale (DTEI 2005).

In contrast, at the time of the TTMRA's inception, New Zealand had a system of voluntary compliance and post-market surveillance only (PC 2003). In 2002, New Zealand introduced a new compliance system for gas appliances, involving mandatory supplier declarations. Under this system, suppliers of gas appliances are required to post declarations of compliance on the Energy Safety New Zealand website and produce supporting documentation upon request. However, pre-sale certification by a third party was not made mandatory and so the new regime was not harmonised with Australia's requirements (PC 2003).

Without mutual recognition or harmonisation, New Zealand manufacturers and suppliers seeking to export gas appliances to Australia are required to obtain third-party conformity assessments by accredited conformity assessment bodies. In their submissions to the previous review, the Gas Appliance Suppliers Association of New Zealand and Fisher & Paykel claimed that conformity assessments are a significant barrier to trans-Tasman trade in gas appliances (GASA 2003; Fisher & Paykel 2003). New Zealand exporters incur the cost of sending each appliance model to Australia for testing and approval before it can legally be sold there. Appliances imported by New Zealand from third countries must also be tested and certified again before they can be sold in Australia (PC 2003).

There are safety concerns about mutual recognition for some LPG appliances due to differences in LPG composition between Australia and New Zealand. Australia uses LPG that is predominantly propane, while New Zealand uses LPG that is a mixture of propane and butane. According to the 2007 cooperation program report for gas appliances (GTRC 2007a), the problem arises because some LPG appliances built to burn propane-based LPG become hazardous when used with propane-butane LPG, and vice versa. It is impractical for either country to change its LPG supply (New Zealand Government, sub. 53) and, as a result, this is an area of the special exemption that has remained unresolved.

In the early years of the TTMRA, this difference was recognised by the Gas Technical Regulators Committee (GTRC) — a forum for gas regulators from all Australian jurisdictions and New Zealand) — as a safety issue mainly for LPG cabinet heaters, which are portable heaters containing an LPG cylinder. In contrast, GTRC (2007a) expressed concern that the incompatibility would affect all LPG appliances. However, recent work on a regulation impact statement (RIS) for a permanent exemption for LPG appliances — discussed in the next section — suggests that the safety risk will not affect 'universal' LPG appliances, which are able to be used with both types of LPG supply.

In its 2003 review of the MRA and TTMRA, the Commission found that only modest progress had been made towards enabling gas appliances to become subject to mutual recognition. It suggested extending the special exemption for gas appliances for a maximum of three years, without the need for annual rollovers, but with a project plan to be submitted to COAG in the interim. That plan — accompanied by annual progress reports — would focus on key issues such as unflued heaters, and the effectiveness of New Zealand's new compliance regime (PC 2003).

In its response to the Commission's review, the CJRF (2004) rejected the idea of extending special exemptions without annual rollover requirements, because it would require all jurisdictions to coordinate legislative changes, which would be administratively cumbersome.

Developments since the 2003 review

By 2005, Australian gas regulators — comprising a majority of GTRC members — were expressing support for the special exemption for gas appliances to be made permanent (DTEI 2007). They considered that New Zealand's new scheme of mandatory declarations of compliance with general safety standards, without pre-sale third-party certification and labelling as in the Australian system, did not offer sufficient safety assurance to be compatible with mutual recognition or harmonisation. Australia maintained the view that mutual recognition for gas appliances would not be appropriate unless New Zealand made major changes to its regulatory regime (DTEI 2005).

New Zealand undertook an extensive review of its gas appliance regulatory regime during 2006 and 2007, including consultation with industry and with Australian regulators. The review culminated in the release of a proposed new set of gas regulations for New Zealand in December 2007 (Energy Safety 2007).

The draft regulations signal New Zealand's move towards a more rigorous safety compliance regime for gas appliances, including a system of third-party pre-sale certification. Under the proposed third-party certification system, a manufacturer or supplier of a gas appliance must obtain a safety certificate from a recognised conformity assessment body (Energy Safety 2007). Conformity assessment bodies would need to be recognised under the Joint Accreditation System of Australia and New Zealand, the accreditation body appointed by the Australian and New Zealand Governments and responsible for providing accreditation of conformity assessment bodies. The draft regulations also include a system of common labelling across Australia and New Zealand.

The proposed changes to the New Zealand gas appliances safety regulations are expected to become law on 1 July 2009. It is anticipated that the changes will be fully implemented by the end of a transition period of 18 to 24 months (the exact period to be determined by a forthcoming ministerial decision). The special exemption for gas appliances is likely to be extended until the changes are fully implemented.

In the case of LPG appliances, the GTRC considered that mutual recognition or harmonisation would not be possible due to the difference in LPG composition between Australia and New Zealand. Consequently, in the 2007 cooperation program report for gas appliances, the GTRC (2007a) agreed to seek a permanent exemption from the TTMRA for LPG gas appliances.

However, permanently exempting LPG appliances from the TTMRA would impose costs on trans-Tasman exporters. Under the current special exemption, for example, Stainless Tanks and Pressure Vessels (sub. 27) reported that it has to arrange for every model of its Australian-manufactured LPG cylinders to be extensively tested and inspected in New Zealand prior to sale. A permanent exemption would limit the prospects of those duplicated costs ever being reduced. Nevertheless, these costs must be considered against the potential safety hazards associated with mutual recognition of some LPG appliances, or the costs of harmonising LPG composition between Australia and New Zealand.

The New Zealand Ministry of Economic Development (sub. DR89) noted that New Zealand regulates LPG cylinders under its hazardous substances regulations, rather than its gas-appliance regulations. As a result, it argued that LPG cylinders should be included in the special exemption for hazardous substances, industrial chemicals and dangerous goods, rather than the special exemption for gas appliances. It appears that LPG cylinders are not currently being considered by the cooperation program for either special exemption, and so its classification is unclear. The governments should work to resolve this matter.

The Department of Resources, Energy and Tourism has prepared a RIS for the proposed permanent exemption of LPG appliances. The RIS was released for public comment by the Ministerial Council on Energy in September 2008, following consideration by the GTRC. The RIS considered the costs and benefits of mutual recognition, harmonisation and permanent exemption of LPG appliances, and noted that the GTRC had concluded that a permanent exemption would be the only feasible solution. The Commission understands that public comments on the RIS have since led to a narrowing of the range of LPG appliances to be permanently exempted, so that universal LPG appliances that can safely receive either form of LPG supply will be mutually recognised. Thus, the permanent exemption would apply only to 'nonuniversal' LPG appliances for which the different types of LPG composition pose a safety risk.

It is expected that the implementation of both the proposed New Zealand regulations for natural gas appliances and a permanent exemption for nonuniversal LPG appliances would lead to the removal of the special exemption for gas appliances (New Zealand Government, sub. 53).

FINDING 7.1

The Commission notes the progress made by the Australian and New Zealand Governments towards harmonised regulations for natural gas appliances. It supports the move towards a permanent exemption for 'nonuniversal' LPG appliances, subject to a cost–benefit analysis of the change.

7.5 Radiocommunications devices

Background

Radiocommunications devices such as wireless computer networks, mobile and cordless phones, radios, electronic paging devices and some therapeutic devices serve an increasing range of useful purposes in modern life. These devices operate via radio waves within the radiofrequency spectrum — the range of different frequencies of electromagnetic radiation capable of supporting radiocommunications.

Regulation of the use of the radio spectrum is necessary to ensure that different sections of the spectrum are allocated for specific purposes, and that the likelihood of signals from different devices interfering with one another is minimised. Interference between radiocommunications devices can reduce the performance of

these devices, but also has the potential for severe consequences, particularly when the health and safety of people are dependent on the functioning of these devices.

In developing the TTMRA, it was recognised that there were historical differences between Australia and New Zealand in the technical standards and regulatory requirements for electromagnetic compatibility (EMC) and radiocommunications. In particular, there were differences in the parts of the radio frequency spectrum allocated to different devices.[12] These differences could result in interference problems if devices compliant with regulations in one country were used in the other.

A special exemption from the TTMRA for radiocommunications devices was therefore granted, to allow the two countries to address their differences and to develop harmonised regulatory arrangements where possible. This allows the economic benefits from harmonisation and mutual recognition of standards to be realised, while protecting public health and safety.

Cooperation program

The Australian Communications and Media Authority (ACMA) and the New Zealand Ministry of Economic Development (MED) are responsible for implementing the joint cooperation program in their respective countries. This cooperation program has been particularly successful in achieving harmonisation of standards where possible, exhibiting 'a high degree of proactive regulatory cooperation and coordination supported by a clear appreciation of the objectives of the TTMRA' (CJRF 2004, p. 36).

The high level of cooperation between trans-Tasman spectrum regulators has led to a number of achievements, including:

- the development and use of common compliance marking (box 7.4)
- the narrowing of the scope of the special exemption through the harmonisation of electromagnetic compatibility requirements
- the partial harmonisation of radiocommunications standards and regulatory arrangements.

[12] The frequency within the radiofrequency spectrum at which radiocommunications devices operate is often hardwired into the devices themselves, meaning that they cannot operate at different frequencies. Changing the allocated frequency would render these devices obsolete and would require that they no longer be used, so as to avoid potential interference problems. The cost of changing the allocated spectrum for some devices is likely to outweigh the benefits of harmonisation.

Box 7.4 **Common compliance marking — the 'C-tick'**

In managing their respective radiofrequency spectrums, the Australian Communications and Media Authority (ACMA) and the Radio Spectrum Management Group of the New Zealand Ministry of Economic Development have implemented a scheme to ensure that radiocommunications products meet appropriate mandatory standards before such products are placed on both the Australian and New Zealand markets.

Suppliers of radiocommunications products to the Australian or New Zealand market, for which mandatory standards apply, must affix a label to their product indicating electromagnetic compatibility. The label comprises a 'C-Tick' logo and a unique supplier identification number, as shown below.

The compliance marking is intended to indicate that the product complies with the applicable standard and establishes a traceable link between a product and the supplier responsible for placing it on the Australian or New Zealand markets. ACMA (sub. DR75) noted that the C-tick is widely recognised and understood within the electrical and communications industry.

Example of 'C-tick' logo with unique supplier identification

Source: ACMA (2006, sub. DR75).

Electromagnetic compatibility (EMC)

A key outcome of the cooperation program has been the harmonisation of electromagnetic compatibility regulatory schemes, to the extent that 'products which comply with specific regulatory requirements in one country can be supplied into the other country without additional regulatory intervention' (ACMA and MED 2005, p. 3). The 2004-05 joint annual cooperation report noted that the special exemption for the labelling of radiocommunications devices was no longer required for this aspect of the cooperation program. As a result, requirements for the labelling of electromagnetic goods were removed from the special exemption.

Despite the fact that EMC labelling requirements are no longer subject to the special exemption, the cooperation program is important in ensuring ongoing harmonisation in this area. Both Australian and New Zealand regulators have agreed to continually review the EMC arrangements to ensure that regulations remain both harmonised and up to date with industry requirements. The close

cooperation between the regulators allows relevant standards to be updated in both countries simultaneously (ACMA and MED 2005).

However, ACMA (sub. DR75) expressed concern that removing the special exemption for EMC labelling had the unintended consequence of allowing EMC goods subject to labelling schemes of a third country to be sold within Australia, without allowing ACMA to first consider the appropriateness of these schemes. In particular, New Zealand has recognised the China Compulsory Certification (CCC) mark, as part of the New Zealand–China Free Trade Agreement. The combination of the NZ–China FTA and the TTMRA means that the CCC mark can effectively be used as a substitute for the C-tick label within Australia. This issue is considered further in chapter 10.

Differences in radiocommunications standards

The special exemption for radiocommunications devices covers a large range of different devices, which can be broadly grouped into 34 categories. Requirements applying to the majority of these categories have now been harmonised on the basis of a set of common standards and labelling requirements (New Zealand Government, sub. 53).

Historical differences in the allocation and use of the radio spectrum between Australia and New Zealand have precluded harmonisation of radiocommunications standards in seven categories of devices:

- digital electrical cordless telephones (DECT)
- personal handyphone services
- short-range devices
- digital modulation transmitters (spread spectrum devices)
- high frequency citizen band (HF CB)
- in-shore boating radio services
- cordless telephones using the medium and high frequency bands.

ACMA considered that there are good prospects for the harmonisation of standards for the HF CB, in-shore boating radio services and DECT. In relation to the other nonharmonised categories, it noted that:

> [Personal Handyphone Services] and cordless telephones (other than DECT) are regarded by both Australia and New Zealand as technologies which are likely to become obsolete in the near term and not considered to be a valuable focus of harmonisation activity. (ACMA, sub. 13, p. 3)

There is little prospect for harmonisation in the broad areas of short-range and spread spectrum devices, and there was agreement that these exempted categories 'potentially could be transferred to a permanent exemption in the longer term' (New Zealand Government, sub. 53, p. 25). ACMA (sub. DR75) agreed, stating that historical differences in spectrum allocation meant that harmonisation is unlikely, and that 2013 would be an appropriate time to consider whether all prospects for harmonisation have been exhausted.

Future directions

The radiocommunications devices under the special exemption fall into three broad categories:

- Devices for which historical differences in the spectrum allocation mean future prospects for harmonisation are limited, such as short-range and spread spectrum devices. However, regulators are still developing options for resolving some of these differences, and permanently exempting these devices would be premature. Once opportunities for harmonisation of standards are exhausted, a permanent exemption should be sought for the remaining nonharmonised devices. This option should be considered in the next review of the TTMRA in 2013.
- Devices for which complete harmonisation is a possibility and the special exemption should be continued. This applies to HF CB, in-shore boating radio services and DECT devices.
- Devices subject to the special exemption and are likely to become obsolete in the near future. The special exemption for these devices should continue until obsolescence occurs, after which the special exemption should be removed.

RECOMMENDATION 7.4

Because of the different historical paths of Australian and New Zealand spectrum allocation and use, a permanent exemption should be considered for short-range and spread-spectrum devices, once opportunities for harmonisation of standards are exhausted. A special exemption should remain where there is a possibility of harmonisation of spectrum allocation, including for the high frequency citizen band, in-shore boating devices and digital electrical cordless telephones. Devices likely to become obsolete in the near future should also remain as a special exemption until the exemption is no longer needed.

7.6 Annual rollovers

The legislation underpinning the TTMRA requires special exemptions to be 'rolled over' every 12 months if they are to remain in force, and each rollover has to be approved by at least two-thirds of the Heads of Government.[13] In addition, the governments have agreed that a rollover will only be granted after Heads of Government have received a report from the relevant regulators outlining progress made with the cooperation program and why a 12-month extension is needed (box 7.5).

The terms of reference for this study mention annual rollovers as an area where administrative provisions might be amended and/or enhanced to support more efficient operation of the TTMRA.

The Commission understands that the current rollover process can last up to eight months, starting around August each year with the drafting of cooperation reports for each of the special exemptions, and ending in April the following year with rollovers being implemented through regulation. Thus, there can be as little as four months between implementation of the current rollover and the start of procedures to obtain the next. The lengthy process can be attributed in large part to a requirement to consult all relevant regulators, government departments, ministers and Heads of Government before granting a rollover. Another factor is the legislative requirement that at least two-thirds of jurisdictions endorse any rollover. In practice, this has meant that a draft regulation to roll over the special exemptions is first circulated to Australian states and territories to endorse in their gazettes before that regulation can be implemented by the national governments of Australia and New Zealand.

In 2003, the Commission found that the annual rollover process had been cumbersome and resource intensive, and that there was agreement among government officials that it had not served a useful purpose (PC 2003). As a result, the Commission favoured extending the prevailing special exemptions for more than 12 months without requiring annual rollovers. This was subsequently rejected by the jurisdictions on the grounds that they would all have to amend their legislation and pass the amendments around the same time:

> The [CJRF] … considered this approach and found that extending cooperation

[13] Under s. 48(2) of the *Trans-Tasman Mutual Recognition Act 1997* (Cwlth), the duration of a special exemption is limited to 12 months, but can be extended in whole or part by one or more further periods each not exceeding 12 months. Under ss. 48(4)-(5), such an extension is implemented as a regulation made by Australia's Governor-General, and has to be endorsed by at least two-thirds of the jurisdictions. Equivalent requirements are prescribed in s. 82 of the *Trans-Tasman Mutual Recognition Act 1997* (NZ).

programs without the need for annual rollovers, would in fact create further administrative burden, as each jurisdiction would need to amend its legislation and ensure passage of the amendments through the respective legislatures around the same time. The [CJRF] concluded that because of the legislative difficulty involved, the current special exemption system of annual rollovers and progress reports should remain in place. (CJRF 2004, p. 34)

Box 7.5 **Process required for annual rollovers**

The legislation underpinning the TTMRA does not prescribe a process for how governments should consider whether a special exemption is rolled over for an additional 12 months. Such a process is, however, mentioned in the intergovernmental agreement that led to enactment of the TTMRA:

> Regulatory authorities will, through the relevant [COAG] Ministerial Council(s), provide to heads of government an annual cooperation report outlining progress made and the program and timelines for further work. The reports will also nominate the sections of the relevant laws … for which special exemption is no longer required. If a special exemption is to be maintained in order to undertake further work, the report will provide heads of government with supporting evidence for such a continuation. A cooperation report will be due three months before the first anniversary of the date of commencement of the [TTMRA] and subsequently at 12-month intervals until the cooperation program has been completed. (Trans-Tasman Mutual Recognition Arrangement, s. 9.3.1)

The official users' guide to the mutual recognition schemes provides additional detail on the process used to consider annual rollovers:

> Three months before each 12-month special exemption period expires, the regulatory authorities responsible for pursuing the various cooperation programs must submit to heads of government a jointly-agreed annual cooperation report through the relevant ministerial council. The chair of the relevant Ministerial Council should write to the Prime Minister of Australia enclosing the cooperation report which will then be passed on to the heads of government of the other participating parties. The report should set out the progress that has been achieved over the previous year in progressing the cooperation program and, if relevant, provide a justification as to why a further 12-month extension to the special exemption period is needed. In addition, the report should:
>
> - list any laws or parts of laws currently on the special exemption schedule which can be removed
> - set out a timetable for the completion of the cooperation program.
>
> On the basis of the progress achieved and the timetable for completion, heads of government decide whether a further 12-month special exemption period should be granted. Cooperation reports will need to be submitted annually until the cooperation program is completed. (COAG and New Zealand Government 2006, pp. 29–30)

However, the jurisdictions did agree that cooperation reports would only be required every three years for the radiocommunications special exemption (although rollovers still have to be approved annually):

> Acknowledging the constraints facing the early resolution of the cooperation program

> [for radiocommunications] and the desire to reduce the administrative burden of annual reporting, it is recommended that the special exemption be continued with annual rollovers, and that detailed reporting under the cooperation program be extended to a three-year cycle rather than the current one-year cycle. (CJRF 2004, p. 37)

It appears that this was possible because the legislation underpinning the TTMRA does not require the production of cooperation reports. As noted in box 7.5, governments agreed to have cooperation reports as part of the process for considering rollovers, but did not prescribe this in legislation.

The Commission acknowledges that governments have a legitimate concern about the cost of changing the maximum allowable time between special exemption rollovers. Legislative amendments would have to be coordinated in ten jurisdictions at the same time (Australian Commonwealth, Australia's six states and two territories, and New Zealand). This is because the Australian states implemented the TTMRA in a way that does not authorise the Commonwealth to make amendments to the TTMRA's design unless the changes have been enacted by state parliaments.[14] Similarly, the territories made a request in their TTMRA legislation that the Commonwealth obtain their approval for any changes to the TTMRA's design. Sturgess (1993) noted that Australia implemented mutual recognition in this way because the states were concerned about the Commonwealth gaining the power to pass further legislation in the area and establish a bureaucracy to regulate the states.

Participants in this study indicated that the cost effectiveness of the annual rollover process remains doubtful, and that this problem is becoming more acute because the remaining special exemptions involve difficult issues that require more than 12 months to achieve notable progress. As a result, there was some support for extending the period between rollovers from one year to three years (Department of Education, Employment and Workplace Relations, sub. 57; New Zealand Government, sub. 53; Queensland Government, sub. 52).

While it may be costly to amend the TTMRA legislation, this could be mitigated by enacting changes to the special exemption provisions as part of a package of other

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[14] The TTMRA was implemented by the states referring their power to the Commonwealth in a relatively unusual way under s. 51(xxxvii) of Australia's Constitution. The Commonwealth was only authorised by the states to apply the *Trans-Tasman Mutual Recognition Act 1997* (Cwlth) as it existed at the time of referral. The Act does allow its schedules to be changed by regulation, but the purpose of the schedules is primarily to list which goods or laws are not subject to mutual recognition, rather than to specify the TTMRA's design. Furthermore, the Act requires changes to its schedules to be endorsed by all jurisdictions (or at least two-thirds in the case of rolling over a special exemption in whole or part), rather than just the Commonwealth (unless it is a special exemption that has expired).

reforms recommended throughout this report. The large fixed cost of coordinating legislative amendments in ten jurisdictions would then be spread across a broader range of issues, and so there is more likely to be a net benefit from changing the rollover requirements (NSW Government, sub. 55).

If governments are still unwilling to amend the legislative provisions for special exemption rollovers, they should at least consider reducing the frequency of cooperation reports, as has already occurred for radiocommunications. As noted above, cooperation reports are only prepared for radiocommunications every three years. However, this option is inferior to amending the legislation because it still involves making a regulation every 12 months to roll over the radiocommunications special exemption.

It is difficult to determine the most appropriate length of time between special exemption rollovers. A balance has to be struck between providing sufficient time for progress to occur, and not providing so much time that governments resolve the issues underpinning a special exemption at an unreasonably slow pace. In practice, the time required will vary between issues, so it is hard to prescribe a one-size-fits-all rule. However, administrative simplicity favours prescribing a uniform time limit in the legislation. This should not prevent governments from developing cooperation programs with deadlines for achieving milestones, and that aim to remove a special exemption before it would have to be rolled over. The Commission has concluded, given the difficult issues associated with the remaining special exemptions and the views of officials who handle special exemptions, that three years is an appropriate period to prescribe between rollovers.

The Commission's proposal was favourably received by participants at the roundtables for this study, and in submissions commenting on the draft report (for example, ACMA, sub. DR75; DEEWR, sub. DR90; DOHA, sub. DR64; New Zealand Ministry of Economic Development, sub. DR89). However, the New Zealand Ministry of Economic Development (sub. DR89, p. 6) suggested that 'some form of annual reporting should be retained to maintain discipline and drive progress'. This could simply be implemented at an administrative level, rather than through regulation, but it has the drawback that it would reduce the administrative benefits of the Commission's proposal. Furthermore, it does not appear that annual reporting under existing arrangements has done much to 'maintain discipline and drive progress'. The most recent cooperation reports for road vehicles and therapeutic goods do not convey the impression that annual reporting has facilitated significant progress on the relevant special exemption. Conversely, notable progress has been made on the radiocommunications special exemption, despite cooperation reports only being produced every three years in that case.

RECOMMENDATION 7.5

The TTMRA legislation should be amended so that special exemptions can have a maximum duration of three years, and can be extended for one or more further periods, each not exceeding three years. This reform should be reflected in the administrative procedures that governments use when considering special exemption rollovers, including that cooperation reports only need to be prepared every three years.

8 Scope of mutual recognition — goods

Key points

- Permanent exemptions are appropriate in cases where it is not feasible or cost effective to apply mutual recognition. However, there is scope to remove or reduce the coverage of the permanent exemptions for risk-categorised foods and ozone protection.
  - The permanent exemption for risk-categorised foods could be narrowed, subject to further efforts to achieve equivalence of import-control systems and third-country certification arrangements.
  - The permanent exemption for ozone-protection legislation could be removed in light of recent amendments to Australia's regulations for ozone protection and synthetic greenhouse gas management.
- The exceptions enable jurisdictions to respond to specific risks to health, safety and the environment arising from the way in which goods are sold, transported, stored and handled.
  - Inconsistencies in regulation across jurisdictions have the potential to contribute to unnecessary compliance burden, particularly for national operators.
  - These issues could be addressed through avenues other than mutual recognition, such as negotiation with regulators on a case-by-case basis, and greater coordination between jurisdictions in regulatory design and implementation.
- Indirect barriers to the sale of goods, such as use of goods requirements, are not adequately addressed in the Acts.
  - Use of goods requirements, insofar as they restrict the sale of goods, could be explicitly brought into the scope of mutual recognition, with constraints addressing health, safety and environmental concerns.
- Effective and accessible dispute resolution and appeals mechanisms for goods should be available for sellers, regulators and other interested parties. Such mechanisms would also facilitate a body of guidance material on the application of the legislation to specific questions relating to goods.

The terms of reference of this review ask the Commission to assess the coverage of the Mutual Recognition Agreement (MRA) and the Trans-Tasman Mutual

Recognition Arrangement (TTMRA). The Commission has interpreted this as requiring an assessment of the permanent exemptions, exceptions and exclusions under the mutual recognition schemes. Together, these provisions restrict the reach of mutual recognition to certain goods, activities, occupations and laws. That reach is further restricted by the fact that the schemes are silent on some areas of economic activity (for example, trade in services). Consistent with the objectives of the Australian model of mutual recognition, the coverage of mutual recognition should not be unnecessarily limited. Therefore, in this chapter, the Commission has examined each of the permanent exemptions, exceptions and exclusions, based on an assessment of their rationale and the potential benefits from amending, narrowing or deleting some provisions. It has also examined some areas on which the schemes are silent.

In addition, the Commission has considered options for improved dispute resolution mechanisms to apply to goods-related matters in general.

8.1 Permanent exemptions

Permanent exemptions have been applied, in both the MRA and TTMRA, to goods and activities (or laws relating to them) for which mutual recognition would undermine individual jurisdictions' sovereignty, including in matters of public standards, protection of the local environment and giving precedence to the preferences of local citizens. Permanent exemptions are contained in Schedules 1 and 2 of the *Mutual Recognition Act 1992* (Cwlth) (MR Act). There are four permanent exemptions for goods under Schedule 1 — firearms/weapons, fireworks, gaming machines and pornographic material. The permanent exemptions under Schedule 2 cover a number of legal instruments relating to quarantine laws, environment protection, ozone protection, weapons, fireworks, indecent publications, container deposit requirements and Tasmanian laws relating to the possession, sale or capture of abalone, crayfish and scallops (figure 2.2). The permanent exemptions under the *Trans-Tasman Mutual Recognition Act 1997* (Cwlth) (TTMR Act (Cwlth)) cover the same goods as those under the MR Act, with the addition of several other categories of goods, including agricultural and veterinary chemicals and risk-categorised foods (figure 2.3). Similar provisions are contained in the permanent exemptions and exclusions Schedules under the *Trans-Tasman Mutual Recognition Act 1997* (NZ) (TTMR Act (NZ)).

A review of the permanent exemptions is undertaken in this section, covering the rationale for each exemption, the views expressed by study participants and the potential for removing exemptions.

Import food control Act (risk-categorised food)

Within Australia, food standards are developed by Food Standards Australia New Zealand (FSANZ) under the *Food Standards Australia New Zealand Act 1991* (Cwlth). The food standards are meant to be uniformly adopted by all states and territories under the Food Regulation Agreement of 2000. Therefore, the MRA does not play a major role in regards to food traded across jurisdictional borders within Australia. The only permanent exemption relating to food is that for Tasmanian laws relating to the possession, sale or capture of abalone, crayfish and scallops.

As a result of the TTMRA, Australia and New Zealand agreed to relax border controls for food traded across the Tasman. The only food products from New Zealand subject to inspection and certification arrangements upon entry to Australia under the Import Food Inspection Scheme (formerly the Imported Foods Program) are those on a jointly agreed list of foods that are considered to have the potential to pose a risk to public health — so-called 'risk-categorised' food.

As set out under Schedule 2, part 2, of the TTMR Act (Cwlth), the operation of Australia's *Imported Food Control Act 1992* (Cwlth) (IFC Act), to the extent that it deals with risk-categorised food, is subject to a permanent exemption. Food is determined to be risk categorised where it has the potential to pose a high or medium risk to public health. Inspection of imported foods is carried out by the Australian Quarantine and Inspection Service (AQIS), with the frequency of inspection depending on the risk category assigned to the food and, in some cases, the compliance records of exporters. An amendment to the Imported Food Control Order 2001 in April 2007 simplified the risk categorisation of imported foods from three to two categories, as recommended in a review of the IFC Act (DAFF 2007). The two inspection categories — risk and surveillance foods — are determined by FSANZ. Over time, a number of food products have been moved from the risk foods to the surveillance foods category. The exclusions under Schedule 1 of the TTMR Act (NZ) include laws relating to customs and tariffs to the extent that they prohibit or restrict imports. This includes prescribed foods (high-risk foods) under the *Food Act 1981* (NZ), which are subject to import procedures and requirements determined by the New Zealand Food Safety Authority (NZFSA).

In 2003, the Commission found that the IFC Act could be removed from the list of TTMRA permanent exemptions only when:

- there was reciprocal treatment of Australian food imported into New Zealand
- there were effective procedures in place for maintaining the high-risk food list
- existing and projected third-country issues were dealt with effectively.

In its report to the Council of Australian Governments (COAG) in 2004, the Cross Jurisdictional Review Forum (CJRF) supported the Commission's finding and noted that work on these issues was being progressed by a trans-Tasman working group comprising the NZFSA, FSANZ and AQIS (CJRF 2004).

Harmonisation of risk-food lists

The working group has developed and agreed to criteria for assessing risk food. Based on these criteria, FSANZ and NZFSA agreed to review each category of risk food and its corresponding hazard to determine whether it is a medium or high risk for imported-food purposes.[1] A review of Australia's imported-food risk list, completed by FSANZ in 2007, confirmed the appropriateness of most existing tests for high-risk foods. This was based on evidence of contamination with particular hazards and, in most cases, evidence that these hazards caused illness in humans. Key considerations in reviewing the risk-food list were the existence of post-import mitigation strategies and whether inclusion in the risk list would be an effective strategy to manage risk. The NZFSA is currently finalising its review of the New Zealand risk-food lists.

FSANZ advised the Commission that Australia and New Zealand's lists of high-risk products have been harmonised to the extent possible, with the exception of one microbiological test for a dairy product (Salter, M., pers. comm., 1 August 2008). The New Zealand Government argued that:

> Both countries will need to maintain exempt risk lists for imported foods exempted for third-country purposes, but these lists should be limited to those foods where there are substantial differences in the import standards, rather than all foods currently captured by the general risk category. (sub. 53, p. 8)

This would effectively require the creation of a separate trans-Tasman list for those risk-food products for which harmonisation remains unachievable. The TTMRA permanent exemption for these products should remain. The risk-foods subject to either permanent or special exemption would not include those foods for which agreement has already been reached on equivalence of domestic systems and third-country arrangements.

[1] Risks associated with food include disease-causing microbiological and chemical contamination, for example, salmonella or *E.coli*. Because of the nature of the food or the processing conditions, some foods are more predisposed to contamination and represent a higher risk to human health.

Equivalence of import-control systems and third-country arrangements

There has been limited progress towards equivalence of import-control systems for some products. Australia and New Zealand have agreed on equivalence of their export-dairy systems, which will eliminate the certification requirements for soft cheese exports to New Zealand (DAFF 2007). The New Zealand Ministry of Economic Development (sub. DR89) advised that there are foods for which equivalence of domestic systems has been agreed, or it is anticipated will be agreed in the near future, including dairy, peanuts and shellfish. In practice, some foods are already subject to mutual recognition. However, for other risk foods, there are still significant differences in import policies which hinder achieving equivalence of Australian and New Zealand import-control systems. A problematic area is the difference between the import-control measures adopted by both countries for Bovine Spongiform Encephalopathy (BSE) in beef and beef products.

In 2003, concerns were raised that Australia's import controls for some risk foods from third countries could be bypassed where New Zealand does not routinely inspect all foods other than those regarded as high risk. AQIS (sub. DR83) commented that there may be impacts on food inspection functions as an indirect consequence of more comprehensive two-way trade arrangements with third countries. Imported food inspection arrangements for trade between Australia and New Zealand should be taken into account when developing broad trade arrangements with third countries. Therefore, consideration of these implications is required at the ministerial or policy level.

The trans-Tasman working group has yet to overcome a number of problems before equivalence of import-control systems and resolution of third-country issues can be achieved. Ongoing efforts would be likely to have greater impetus if progressed through a cooperation program under a special exemption, with participation at both the policy and regulatory level. This could provide further opportunities for stakeholders on either side of the Tasman to develop confidence in both countries' approaches — both at the border and prior to export — to managing risks associated with imported risk food, including from third countries.

RECOMMENDATION 8.1

Consideration should be given to narrowing the permanent exemption for risk-foods from the TTMRA to include only those for which harmonisation of risk-food lists and equivalence of import-control measures are not achievable in the long term. Other risk-foods should be reclassified as a special exemption. Efforts should be made to achieve equivalence of import-control systems and third-country arrangements through a cooperation program, undertaken by a trans-Tasman working group, consisting of regulatory bodies and policy officials.

Country of Origin Labelling

While not currently subject to exemption from mutual recognition, there exists areas of non-alignment of food standards, with potential implications for the coverage of the schemes. A number of aspects of the Food Standards Code are not followed by New Zealand, for example, food safety, wine production, primary production and processing standards and Country of Origin Labelling. This is permitted under Annex D of the agreement between Australia and New Zealand (the Food Standards Code) which allows for New Zealand to vary food standards adopted across Australia, based on specific geographical, environmental, trade or cultural grounds.

Country of Origin Labelling (CoOL) is an area where frequent concerns have been raised about New Zealand opting out of Australian standards. Currently there is a temporary arrangement in place for mandatory CoOL to apply in Australia. According to the Australian Government, this requirement is designed to enable consumers to make informed choices (DOHA 2008). In New Zealand, there has been a long-standing provision under fair trading legislation for voluntary CoOL. Mandatory CoOL is not supported by New Zealand, as it is not seen as relevant to the issue of food safety and is potentially trade restrictive — to the extent that it is considered inconsistent with international obligations under the WTO Agreement on Technical Barriers to Trade (NZFSA 2005). In 2003, the Commission noted that tracing the origins of imported food can be difficult and costly, particularly for New Zealand, because it cannot produce the range of ingredients that Australia does and must import more ingredients for processed food (PC 2003). Until recently, only packaged foods in Australia were required to display CoOL. In 2006, a mandated standard to apply to unpackaged food (requiring the display of a label) was introduced despite a regulation impact statement (RIS) indicating that there were substantial costs which outweighed the consumer benefit (PC 2008a). In its response to the report of the Regulation Taskforce in 2006, the Australian Government agreed to a review of CoOL requirements, including a full cost–benefit analysis within three years of implementation.

At present, Australia and New Zealand continue to maintain different positions towards this aspect of food regulation. By virtue of the TTMRA, New Zealand products can enter the market without complying with the Australian CoOL standard. Some participants — Cadbury Schweppes (sub. 2) and the Coles Group (sub. 46) raised concerns related to CoOL as an area of inconsistency in product regulation. Permanent exemption of CoOL requirements from the TTMRA would remove the differential treatment of Australian and New Zealand producers. Such a proposal should be subject to a cost–benefit test as part of a separate RIS process. Given Australian Ministers' policy justification for mandatory CoOL, a permanent exemption could not be sought on public health and safety grounds. Moreover,

exempting mandatory CoOL standards from the TTMRA would be contrary to the provisions of the Food Standards Code, which allows New Zealand to opt out of specific Australian standards and, therefore, is not likely to be supported. Based on this, the Commission does not consider that there is scope to omit CoOL from the coverage of the TTMRA.

Cadbury Schweppes (sub. DR61) suggested that a common label could be permitted for the same product manufactured in both countries, with a declaration that the good is 'made in Australia and/or New Zealand'. This would be similar to EU common labelling requirements. Cadbury Schweppes argued that, because its product labelling includes the company name and consumer contact details, product traceability is not a problem. The Commission considers that this proposal could provide a means to overcome the inconsistency in product regulation. However, examination of this proposal should weigh up the costs and benefits, particularly in light of the failure of mandatory CoOL to pass a cost–benefit test in Australia.

Ozone protection

In 1989, Australia ratified the 1987 Montreal Protocol which aims to promote international cooperation in developing and implementing specific measures to control the consumption and production of ozone-depleting substances (ODS). The *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cwlth) controls the manufacture, import and export of all ODS and their synthetic greenhouse gas replacements (SGG). This includes the purchase, sale, handling, storage and disposal of these substances. Under the Act, all licences to import or export ODS are conditional on the licensee only importing or exporting substances from a country that has ratified the Montreal Protocol and subsequent amendments (DEWHA 2008).

New Zealand is also a signatory to the Montreal Protocol and meets its obligations to phase out chemicals that deplete the ozone layer through the *Ozone Layer Protection Act 1996* (NZ) and associated regulations. As New Zealand does not produce ODS, it meets its obligations through import controls.

In 2003, the Commission found that there was scope for Australia to develop uniform national standards for ozone protection, consistent with international standards. This would enable removal of the exemptions for ozone-protection legislation from the MRA and TTMRA.[2] The CJRF accepted the Commission's finding, but noted that scope to remove the exemption would be constrained by the

[2] Ozone-protection legislation is included in Schedule 2 (permanent exemptions) of the TTMR Act (Cwlth) and in the list of category 3 exclusions under the TTMR Act (NZ).

requirement for both countries to fulfil their respective international commitments under ozone treaties (CJRF 2004). To this end, it was suggested that Australia and New Zealand hold annual consultations on the possibility of achieving consistent national standards and arrangements.

The Ozone Protection and Synthetic Greenhouse Gas Management Regulations 1995 (Cwlth) (as amended in 2003 and 2005) allow the Australian Government to implement uniform national end-use controls for ODS and SGG to meet environmental objectives. This includes use of these substances in the refrigeration and air-conditioning and fire-protection industries, for control of methyl bromide as a feedstock to create other chemicals and use as a fumigant for quarantine, preshipment and approved critical uses. These end-use controls were formerly subject to different state and territory controls. The regulations may also extend to other end uses of these substances including the aerosol, solvents and foams sectors, currently regulated by state and territory governments. The regulations replace state and territory ozone-protection legislation and a number of states intend to repeal their ozone-protection regulations (DEWHA 2008).

To administer the regulations, the Australian Government has appointed industry associations to establish and operate systems for handling licences and trading authorisations in the refrigeration and fire-protection industries, which are the major users of ODS and SGG. The regulations govern licensing requirements only to the extent that they are intended to meet environmental objectives under the Act by minimising emissions. The end-use controls set minimum skill standards for technicians who handle these substances and are, in the main, aligned with trade qualifications.

However, the work of technicians, where it does not involve handling of ODS and SGGs, is not regulated under the national system. Some state and territory registration bodies will continue to regulate other aspects of occupational licensing in the air-conditioning, refrigeration, mechanical services and fire-protection industries (chapter 5). Requirements for supervisor or contractor licences and occupational health and safety, for example, would remain subject to mutual recognition.

The Tasmanian Department of Treasury and Finance (sub. 34) noted that, as responsibility for ozone-protection regulation has been transferred from the states and territories to the Australian Government, the need for the permanent exemption should be reviewed by the Australian Government.

The NSW Government (sub. 55) had no in-principle objection to the removal of the permanent exemption from the MRA, subject to the Australian Government broadening its regulation to include areas currently regulated by the states and

territories. It considered that the permanent exemption under the TTMRA should remain in place until such time as Australia and New Zealand's regulatory regimes could be demonstrated to be equally effective.

The Australian Department of Environment, Water, Heritage and the Arts (sub. DR85) gave in-principle support for removing the exemption from the MRA and the TTMRA, subject to both countries aligning their respective regulatory systems. However, it commented that Australia and New Zealand have different approaches to meeting obligations under the Montreal Protocol, including timeframes for phasing out the use of ODS. It is expected that Australia will cease importing hydrochlorofluorocarbons (HCFCs) for use in Australia some years before New Zealand. Further, the Department was not aware of significant impediments to labour or trade flows that arise from differences in Australia and New Zealand's regulatory regimes for ozone protection.

The Air Conditioning and Mechanical Contractors Association of Australia favoured retaining the permanent exemption:

> [The Association] does not believe there are any factors that would lead to the view that the situation should alter. New Zealand may have slightly different requirements. If they do, then the permanent [exemption] must remain. However, given that the release of synthetic greenhouse gases is a global issue it is likely that New Zealand will agree with the current Australian approach. (sub. 30, p. 3)

In its submission to the draft report (sub. DR89), the New Zealand Ministry of Economic Development raised concerns that removing the permanent exemption for ozone-protection legislation under the TTMRA would appear to be in conflict with the Commission's recommendation to move the hazardous substances special exemption to a permanent exemption. If ozone-protection legislation were to be brought within the scope of the TTMRA, products sold across the Tasman which contain ODS or SGGS would only be required to meet one country's requirements relating to end-use controls on these substances — but only to the extent that these requirements are intended to meet environmental objectives consistent with commitments under the Montreal Protocol. However, some products may still be subject to both countries' laws relating to hazardous substances, which are subject to special exemption under the TTMRA. For example, New Zealand manufacturers of aerosol cans are required to comply with regulations relating to compressed gases.

Notwithstanding this, the New Zealand Government (sub. 53) indicated that it supports moves to resolve matters underpinning the need for the TTMRA permanent exemption for ozone-depleting gases. However, it considered that the permanent exemption should remain until regulators in both countries have aligned

the necessary regulatory processes, which is being facilitated by ongoing cooperative efforts.

RECOMMENDATION 8.2

The permanent exemption for ozone-protection legislation should be removed from the MRA. Governments should also consider removing the ozone-protection exemption from the TTMRA, subject to both countries aligning their respective regulatory systems while ensuring consistency with international obligations.

Other permanent exemptions

There is no strong justification for changing the other permanent exemptions. However, in some cases, there has been progress towards developing consistent regulation. The views of study participants are noted in the following discussion.

Agricultural and veterinary chemicals

Agricultural and veterinary (agvet) chemicals (and products) are subject to a permanent exemption from the TTMRA.[3] In 2003, the Commission found that governments should consider adding agvet chemicals to the special exemption for hazardous substances, industrial chemicals and dangerous goods (rather than keeping the existing permanent exemption). A report was subsequently prepared by a working group for the COAG Primary Industries Ministerial Council, which concluded that the permanent exemption should remain due to significant differences between Australia and New Zealand in their environments, agricultural production systems, and what constitutes 'good agricultural practice'. The report did, however, lead to a memorandum of understanding between the relevant Australian and New Zealand regulators, and an associated work program to harmonise their assessment procedures and share information.[4] The New Zealand Government noted that this has been beneficial:

> Significant savings to the veterinary pharmaceutical industry have been achieved via mutual recognition of Australian and New Zealand compliance programs governing veterinary pharmaceutical manufacture, creating benefits for manufacturers in both countries and reducing redundant auditing for companies manufacturing product for both countries. Significant savings are about to be achieved via registration of certain

3 Schedule 2, part 2 of the TTMR Act (Cwlth) permanently exempts application of that Act to the Agricultural and Veterinary Chemicals Act 1994 (Cwlth) and Agricultural and Veterinary Chemicals Code Act 1994 (Cwlth).

4 The relevant regulators are the Australian Pesticides and Veterinary Medicines Authority, the New Zealand Food Safety Authority and the Environmental Risk Management Authority in New Zealand.

> veterinary medicine products on the basis of regulatory assessment reports and registration decisions for the same by APVMA. This will make a greater range of products available to the New Zealand public and the livestock industry. Final details are being worked out to provide a secure and efficient pathway for the transfer of assessment reports and decisions. Furthermore, registration information requirements are currently being compared to eliminate unnecessary differences in order to facilitate complementary applications for registration. (sub. 53, p. 9)

The New Zealand Government (sub. 53) supported the retention of the exemption for agvet chemicals, given the different conditions in Australia and New Zealand. However, it considered that there is opportunity to work towards narrowing the scope of the exemption through implementation of the Globally Harmonised System for the Classification and Labelling of Chemicals (GHS). Australia is currently considering the application of the GHS to agvet chemicals as part of proposed changes to its workplace regulations and arrangements for scheduling domestic poisons (APVMA 2008; NICNAS 2008). However, the Commission recently recommended in a study of Australia's chemical regulations that Australia delay GHS implementation until there is wider adoption by its major trading partners and a RIS demonstrates the potential for net benefits (PC 2008b).

The Commission supports the retention of the permanent exemption for agvet chemicals, and the efforts of Australian and New Zealand regulators to harmonise their assessment procedures and share information. There are grounds, given substantial differences between Australian and New Zealand environments and agricultural production systems, for retaining the permanent exemption for agvet chemicals under the TTMRA. This should not, however, prevent the regulators from continuing to explore ways to harmonise their processes and share information.

Quarantine

The permanent exemption under Schedule 2 of the MR Act 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
- it would have a long-term and substantially detrimental effect on the whole or any part of the state (in reference to a state or territory of Australia).

Laws relating to quarantine are also subject to permanent exemption under Schedule 2 of the TTMR Acts.

In 2003, the Commission found that the MRA permanent exemption for quarantine laws was justified as quarantine requirements need to be implemented at the jurisdictional level to be effective. The equivalent TTMRA permanent exemption was justified on the basis that risk variations between Australia and New Zealand warranted different regulation.

There are significant negative externalities that can result from ineffective quarantine policy. A justification for exempting quarantine from mutual recognition arrangements is that the nature of quarantine requirements can vary significantly between regions and jurisdictions. On the other hand, multiple quarantine risk-management regimes can unnecessarily impede agricultural trade where control measures are not commensurate with actual levels of risk or hazard types. Moreover, jurisdictional border controls may not accord with variation in biosecurity risks across regions.

The New Zealand Government (sub. 53) observed that Australia and New Zealand maintain a collaborative relationship on quarantine matters that extends beyond development of joint food standards to include production and processing standards. Meat products derived from cattle, sheep and deer, for example, do not require import permits to enter Australia if the meat is fit for human consumption. There are no quarantine certificates required for exports of these products (of Australian or New Zealand origin) in either direction. The New Zealand Government considered that, given the trust and history of cooperation on standards development between the two countries, there is scope to agree on equivalence of food-processing measures which would effectively manage biosecurity risks:

> New Zealand would welcome the Commission's views on whether a working group should be established to examine the quarantine exemptions and assess whether the production and processing regimes in both countries are of a standard that any quarantine risks associated with selected animal products are, for instance, sufficiently removed at the point of production and would support forgoing quarantine clearance into the other country. For pests and diseases where both countries have the same health status no quarantine measures are necessary. (sub. 53, p. 10)

Previous quarantine reviews have suggested that new techniques for food preservation and processing can provide import-control measures that are more effective in verifying product safety than traditional end-product inspection and testing (DAFF 1998). These issues were examined as part of the Beale Review of quarantine and biosecurity matters, commissioned by the Australian Government in 2008. The review encompassed pre-border, border and post-border measures for managing biosecurity risks.

The Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) protocol includes a commitment of both countries to work towards advancing the harmonisation of quarantine standards and procedures and adoption of common inspection standards and procedures. Under ANZCERTA principles, both countries can impose quarantine requirements provided they are not used as a means of arbitrary or unjustified discrimination, or a disguised restriction on trade.

The Commission understands that there is ongoing collaboration between Australia and New Zealand on quarantine procedures via consultative groups under ANZCERTA. The Consultative Group on Biosecurity Cooperation (CGBC), comprises three technical working groups in the areas of animal and plant health, and operations. AQIS (sub. DR83) considered that the CGBC, given its established procedures, would be a suitable forum for resolving technical differences that impede harmonisation of quarantine requirements. This forum might provide opportunities for removing the quarantine exemption under the TTMRA in the future. The Commission, therefore, sees no need for an additional body, such as suggested by the New Zealand Government, to be created.

Fireworks, gaming machines, pornographic materials and classification of publications, films and computer games

In 2003, the Commission found that different preferences across jurisdictions provided grounds for retaining the MRA and TTMRA permanent exemption for the sale of fireworks and gaming machines. In contrast, the Commission found there was a case for harmonising laws that would enable removal of all or part of the MRA permanent exemption for pornographic material and classification of publications, films and computer games. However, it recommended that the permanent exemption should be retained if harmonisation could not be achieved between the various Australian jurisdictions. The Commission also found that, on the grounds of sovereignty and differences in approaches between Australia and New Zealand, the TTMRA permanent exemption for pornographic material and classified publications, films and computer games should be retained.

No participants in the current review advocated removing these permanent exemptions, and the Commission is not aware of any moves towards harmonisation since 2003 in these areas. However, the New Zealand Government favoured relabelling the exemptions for gaming machines and indecent and pornographic material:

> New Zealand supports the continuation of these exemptions but with some minor wording changes to clarify the exemptions. In relation to the 'gaming machine' exemption, we would suggest that the exemption be reclassified as 'gambling equipment' … equipment that is a gaming machine in one jurisdiction is not necessarily

> deemed to be a gaming machine in others. It is also partly because New Zealand currently has a Gambling Amendment Bill underway that would narrow the formerly very wide gaming definition … New Zealand suggests the exemption [for indecent or pornographic material] be reclassified as 'any material that is subject to or potentially subject to restrictions or prohibition on availability under censorship legislation'. (sub. 53, p. 11)

The coverage of the permanent exemptions is defined by the provisions of the laws exempted under the TTMRA rather than by the broad classification of goods assigned to the exemption category. Generally, the gaming machine acts and regulations in each jurisdiction define gaming machines broadly to include both 'gaming machines' and 'gaming equipment'. In a practical sense, any amendments to clarify the exemption categories should be undertaken as part of the broad package of regulatory amendments recommended as part of this review.

South Australian container deposit legislation

South Australia's container deposit scheme operates under provisions of the *Environment Protection Act 1993* (SA), which is exempted from both the MRA and the TTMRA.[5] Under the scheme, consumers are charged a deposit when they purchase a particular item, which is partly refunded when the item is returned to a specified waste collection or treatment facility. To comply with the scheme, all beverage sellers who wish to sell beverages in South Australia must incur additional labelling costs. The inclusion of South Australia's container deposit legislation in mutual recognition schemes would undermine the operation of the container deposit scheme because invoking mutual recognition would mean that beverage manufacturers avoid relabelling their products and compliance with the scheme.

In 2003, the Commission found that, in view of the strong support for the scheme by both the SA Government and community, it was unlikely that the permanent exemption for the container deposit legislation in the MRA could be removed. There has been recent debate regarding the merits of deposit-funded schemes. The PC (2006c) found that container deposit schemes were a very costly mechanism for recovering beverage resources and reducing litter. Nonetheless, the WA Government recently indicated its intention to introduce container deposit legislation, and other states have commissioned studies on the potential for introducing such schemes. In addition, a national container deposit legislation scheme was discussed at a meeting of Australian environment ministers in April 2008 (comprising Commonwealth, state and territory ministers). An agreement was made to investigate options for reducing container waste (PC 2008a). At this stage,

5 The *Beverage Container Act 1975* (SA) was repealed by Schedule 2 of the *Environment Protection Act 1993* (SA) in 1995.

given the continued support for the legislation in South Australia and differing preferences for such schemes in other jurisdictions, it remains unlikely that the permanent exemption could be removed. However, if national legislation were to be developed, this may provide scope to consider removing the exemption in the future.

To ensure that amendments to South Australia's container deposit legislation are reflected in the MRA, the list of permanent exemptions under Schedule 2 of the MR Act should be updated to replace the *Beverage Container Act 1975* (SA) with the *Environment Protection Act 1993* (SA), part 8, division 3 (relating to beverage containers).[6]

The remaining areas of permanent exemptions are:

- firearms and other prohibited weapons
- endangered species
- Tasmanian laws relating to abalone, crayfish and scallops.

There have been no views in relation to these permanent exemptions expressed in submissions or through consultations. These exemptions should be retained on the grounds that protecting the environment and public safety often requires variation in state and territory laws and regulations.

Process for amending permanent exemptions

The MR Act and the TTMR Acts provide for permanently exempted laws to be amended or replaced by a participating jurisdiction, provided this does not increase the coverage of the exemption. However, the addition of new laws to the list of permanent exemptions under Schedule 2 of the Acts requires the agreement of all jurisdictions (box 8.1). To date, no additional permanent exemptions have been sought, largely because jurisdictions have found alternative ways to resolve regulatory differences. It is likely that in most cases, any new permanent exemptions will be created for laws that were previously subject to a special exemption.

Under s. 45 of the TTMR Act (Cwlth), the Governor-General of Australia may amend make regulations amending the schedule of permanent exemptions. Under s. 83 of the TTMR Act (NZ), the Governor-General of New Zealand may make

6 Under s. 14(3) of the MR Act, a law described in Schedule 2 includes any amendment or replacement of that law (unless otherwise stated), but only to the extent that the amendment or replacement deals with the same subject matter.

regulations amending Schedule 2, on the recommendation of the Minister, provided that no fewer than two thirds of the participating jurisdictions have endorsed the proposed regulations. The Act provides that an individual jurisdiction can unilaterally remove or reduce the coverage of a permanent exemption, as it applies to that jurisdiction.[7] The corresponding process under the MR Act is less explicit. The Governor-General of Australia may amend the permanent exemption schedules, but only after all jurisdictions gazette the amendment and request the amendment be made.[8] In 2003, the Commission found that the process for removing permanent exemptions from the MRA needed to be clarified and simplified. It has been clarified, to an extent, in the users' guide to the MRA and the TTMRA (COAG and New Zealand Government 2006).

Box 8.1 Requirements for adding permanent exemptions

The relevant COAG Ministerial Council needs to seek the unanimous agreement from the heads of governments for a new permanent exemption. To add a new permanent exemption, the Chair of the Ministerial Council writes to the chair of COAG (the Australian Prime Minister), applying for a permanent exemption. Heads of government agreement is achieved by each jurisdiction gazetting a notice to that effect.

Heads of government may take into account such matters as they consider relevant when considering whether or not a new permanent exemption should be granted. If a permanent exemption is sought, therefore, the jurisdiction(s) requesting the exemption need to provide a rigorous risk analysis and demonstrate that less trade-restrictive options have been considered (COAG 2008i).

Adding new permanent exemptions to the MRA or TTMRA should only be considered where all other options to protect against identifiable risks to public health and safety have been demonstrated to be less cost effective. The creation of unnecessary permanent exemptions has the capacity to undermine the objectives of mutual recognition. The requirement for unanimous agreement to introduce new permanent exemptions is therefore appropriate.[9] In contrast, the process for removing permanent exemptions should be more flexible. Opportunities for removing or reducing the coverage of permanent exemptions should not necessarily be limited to those arising from the five-yearly reviews of the mutual recognition schemes.

7 Under s. 45 of the TTMR Act (Cwlth), if a regulation only omits or reduces the extent of an exempted law of a state, then the regulation need only be endorsed by that state.

8 Section 47(2) of the MR Act.

9 However, amendments to the special exemptions schedule under the TTMR Act (Cwlth) can be made with the endorsement of no less than two thirds of the participating jurisdictions (s. 48(5)).

As discussed above, the Commission considers there is scope to reclassify a subset of risk-categorised foods as a special exemption. There is currently no process stipulated in the TTMR Acts to move legislation from permanent exemptions to special exemptions where circumstances change such that mutual recognition or harmonisation of regulations may be attainable in the future. Legal advice suggests that a clause, similar to s. 48 of the TTMR Act (Cwlth), could be included in the Act, which would allow the Governor-General to make regulations to move legislation from permanent exemption to special exemption, with the endorsement of all participating jurisdictions.

RECOMMENDATION 8.3

A new provision should be included in the Trans-Tasman Mutual Recognition Acts which would allow, through regulation, exempted legislation to be moved from Schedule 2 (permanent exemptions) to Schedule 3 (special exemptions).

8.2 Exclusions

Schedule 1 of the TTMR Acts specifies laws that are excluded from mutual recognition. These laws relate indirectly to the sale of goods and would be unintentionally affected by the application of mutual recognition principles. They include laws relating to:

- customs controls and tariffs — to the extent that the laws provide for the imposition of tariffs and related measures (for example, anti-dumping and countervailing duties) and the prohibition or restriction of imports
- intellectual property — to the extent that the laws provide for the protection of intellectual rights
- taxation and business franchises — to the extent that the laws provide for the imposition of taxes on the sale of locally produced and imported goods in a non-discriminatory way (for example, business franchise and stamp duties)
- specified international obligations — to the extent that the laws implementing those obligations deal with the requirements relating to the sale of goods (as listed in Schedule 1, part 2(4) of the TTMR Acts).

There has been no scope, since the inception of the TTMRA, to remove or reduce the coverage of the exclusions. However, intellectual property is an area where there have been efforts to coordinate regulatory processes between Australia and New Zealand.

Intellectual property

Intellectual property rights (IPR) provide creators of intellectual property exclusive rights for a certain period of time to the commercial benefits that result from their creative endeavours. IPRs protect against 'free-riding' by way of copying or imitation. One social benefit from protecting intellectual property is to reward creative work or investment in the development of new technology, thus providing incentive to finance research and development. IPRs can be in the form of copyrights and related rights or industrial property, including patents, trademarks and designs.

Trademarks are generally territorial rights (national or regional). Therefore, individual jurisdictions maintain national or regional trademark registries. For owners of trademarks that conduct business across countries or jurisdictions, it is highly desirable that registration procedures are common to all national and regional trademark registers, as this increases the efficiency of administration processes and minimises transaction costs.

Laws relating to the protection of intellectual property were excluded from the TTMRA so as not to undermine the system by which patent rights are allocated on a regional basis (PC 2003). If mutual recognition were to apply to intellectual property rights, this would mean that, for example, a product that is subject to an IPR in Australia but not in New Zealand, could be freely sold in Australia, thus undermining the intention of the IPR. In 2003, the Commission found that the exclusion for intellectual property should be retained. At the time, patents law and practices were evolving, including in relation to international agreements.

International agreements may facilitate the development of common regulatory regimes for intellectual property. Australia and New Zealand are both signatories to multilateral intellectual property agreements, including the Paris Convention and the agreement on Trade-Related Aspects of Intellectual Property. Both countries are currently members of, or are taking steps to join, the Singapore Treaty on the Law of Trademarks and the Madrid Agreement Concerning the International Registration of Marks (WIPO 2008).

Trans-Tasman coordination on intellectual property rights

As part of efforts to promote a single trans-Tasman economic market, a joint work program was announced in 2004, between IP Australia and the New Zealand Ministry of Economic Development, to explore options for closer coordination of processes for granting and registering intellectual property rights. The work program was to fulfil the mandate in the 2000 CER (Closer Economic Relations)

Memorandum of Understanding on the coordination of business law with the objective of reducing compliance costs and regulatory barriers to doing business across the Tasman. Coordination arrangements were to encompass patents, trade marks, plant varieties and the regulation of patent and trade-mark attorneys.

The Commission understands that discussions as part of this work program have focused on coordination rather than harmonisation of patents and trademarks legislation and processes. This has included the examination of patents and trademarks applications, development of cross-jurisdiction application forms and administrative procedures for registering trademarks (where laws that determine the grounds for registration are the same). The discussions have not included consideration of mutual recognition of Australian and New Zealand intellectual property rights. Moreover, the New Zealand Ministry of Economic Development (Wardle, G., pers. comm., 13 August 2008) considered that the preference of both countries for policy independence in this area would not make removing the exclusion feasible.

The Institute of Patent and Trademark Attorneys (IPTA) (sub. 22) noted that, to achieve the most benefit from the TTMRA, the intellectual property laws of Australia and New Zealand should be harmonised to the greatest extent possible. In IPTA's view, specific provisions of New Zealand and Australian patent law adversely affect the ability of Australian patent attorney firms to conduct business in New Zealand.[10] One example is provisions which prohibit mixed partnerships from acting as patent attorneys.

As part of a CER Ministerial Forum joint statement in August 2008, both the Australian and New Zealand Ministers for Trade announced a continuation of the work program under the Memorandum of Understanding on Business Law Coordination. This will encompass coordination on intellectual property issues relating to patents, including standards for patent and trademark attorneys. The intellectual property regime in New Zealand is currently undergoing change, with new patents legislation proposed in 2008 and a review of trade marks regulations nearing completion. The New Zealand Patents Bill will align rules for regulating these professions in Australia and New Zealand.

The Commission does not consider that there is scope to remove the exclusion for intellectual property from the TTMRA in the foreseeable future, because to do so would undermine both countries' intellectual property regimes, which are based on

10 In New Zealand, patent attorneys operate under the *Patents Act 1953* (NZ) and are granted registration by the Intellectual Property office of New Zealand. The requirements for registration under Australian patents law were amended by the Patents and Trademarks Amendment Legislation Regulations 2008 (Cwlth).

systems of regionally-defined rights. Moreover, there are differences between Australian and New Zealand intellectual property legislations. Progress in relation to trans-Tasman alignment of intellectual property regimes should continue under the auspices of the current consultation arrangements and in accordance with international treaties, which are continuing to evolve in this area.

8.3 Exceptions applying to goods

Mutual recognition is based on the premise that goods that meet community expectations in one jurisdiction should be acceptable in other jurisdictions. However, it was acknowledged in the design of the mutual recognition schemes that jurisdictions may wish to impose regulations related to the manner in which goods are sold, transported, stored or handled, in order to address certain environmental or social concerns within their own geographic area. Some examples include: special requirements for the storage and display of perishable items according to climatic conditions; and restrictions on the sale of alcohol in areas within jurisdictions where alcohol abuse is considered a risk.

Under the current mutual recognition framework, therefore, businesses that sell into a jurisdiction are required to comply with any laws of that jurisdiction that relate to: the manner of sale of goods; the transport, storage and handling of goods; and the inspection of those goods, subject to certain constraints. These laws, collectively referred to as 'exceptions', are addressed in s. 11 of the MR Act, s. 12 of the TTMR Act (Cwlth) and s. 11 of the TTMR Act (NZ).

Examples of areas of regulation relating to the manner of sale of goods contained in the Acts are:

- the contractual aspects of the sale of goods (for example, contractual arrangements between the seller and purchaser of a good)
- the registration of sellers or other persons carrying on occupations (for example, liquor licences)
- requirements for business franchise licences (for example, tobacco licences)
- the persons to whom goods may or may not be sold (for example, the sale of liquor to minors)
- the circumstances in which goods may or may not be sold (for example, health/hygiene requirements). (COAG 1998a, p. 21)

This exception under mutual recognition applies to all manner of sale laws, as long as those laws apply equally to goods produced in or imported into a jurisdiction.

The second exception covers laws relating to the transport, storage and handling of goods, as long as they apply equally to both locally produced or imported goods, and are directed at matters affecting health and safety, or protecting the environment.

The third exception deals with inspection of goods, and applies as long as: inspection is not a prerequisite to the sale of the goods; the laws apply equally to both locally produced and imported goods; and the laws are directed at matters affecting health and safety, or protecting the environment. In effect, the inspection provisions provide the regulatory machinery needed to enforce the other exceptions.

Issues with the exceptions

Manner of sale

Study participants cited a number of examples of inconsistencies across jurisdictions in requirements relating to the manner of sale of goods. Examples from the Coles Group are presented in box 8.2. The number of product classes to which specific manner of sale requirements apply is relatively limited. However, the inconsistencies can foster complexity and increase costs, particularly for national operators.

It is difficult to ascertain the relative significance of these issues in terms of compliance costs for large retailers. Nonetheless, in cases where variations in requirements are not directed at jurisdiction-specific circumstances and deliver no additional benefit to the community, compliance creates unnecessary costs. These costs are likely to be passed on to the consumer through higher prices or limited choice where product lines are dropped to minimise the compliance burden.

However, the application of mutual recognition to manner of sale regulations does not appear to offer an effective solution to the compliance cost issues raised by study participants.

If manner of sale laws were not explicitly excluded from the scope of mutual recognition, they would effectively be brought into scope by a provision in the Acts, such as s. 10(e) of the MR Act, which states that any other requirement relating to sale that would prevent or restrict the sale of a good into another jurisdiction, or have the effect of doing so, does not need to be complied with. That is, all laws relating to the manner of sale of a good in its jurisdiction of origin would have to be recognised by other jurisdictions. Moreover, the absence of such laws in the first

jurisdiction would preclude any similar law from applying to the sale of its goods in the second jurisdiction.

In practice, this would mean that retailers could face a number of sets of manner of sale requirements, depending on the origins of the goods. For example, restrictions on the sale of flavoured essence containing more than 10 per cent ethanol to consumers under the age of 18 apply in New South Wales but not in Victoria. The possibility could arise, therefore, that some Victorian flavoured essence products are sold in New South Wales according to Victorian regulations, that is, with no age restrictions. Flavoured essences originating in New South Wales, on the other hand, would have to comply with local regulations. This would render New South Wales' regulations ineffective.

Other manner of sale regulations specify the way in which certain products — such as tobacco — are displayed, advertised and promoted within an outlet. Overriding these laws via mutual recognition, according to the origin of the good, could result, for example, in certain displays and signage being permitted for some cigarettes but not others, within the one store.

These outcomes would generate greater complexity and confusion for consumers, regulators and retailers than the current exceptions under mutual recognition. It would also compromise jurisdictions' ability to regulate for location-specific risks to health, safety and the environment. In many cases, manner of sale regulations are akin to those relating to 'manner of carrying on an occupation', which are excluded from mutual recognition for similar reasons (chapter 9).

That said, there are likely to be cases where jurisdictions have imposed varying regulatory requirements, perhaps inadvertently, to address similar risks and achieve common desired outcomes. In these cases, there is scope to reduce unnecessary compliance costs for business. A possible approach is discussed below.

Box 8.2 **Exceptions issues — Coles Group examples**

Coles Group provided examples of situations where differences in manner of sale regulations can add to compliance costs.

- Regulations regarding the sale, supply and display of tobacco products vary in each state. Additional compliance costs are imposed as retailers must adjust kiosk design, training, store policies, and health warning signage to meet the different requirements in each state.
  - The ACT has recently prescribed that price tickets for tobacco must be in Times New Roman font, which is inconsistent with national ticketing standards.
- There are different requirements across the states relating to the sale of spray paint. Due to the added complexity of meeting different requirements, retailers may decide not to sell these products.
- As of 1 January 2009, flavoured essence with more than 10 per cent ethanol will no longer be able to be sold to consumers under 18 years of age in New South Wales. This will necessitate software changes to identify the products and prompt an age check at the point of sale. Staff training will also be required. Coles noted it would be an expensive undertaking to comply with regulations specific to one state only and for products that generally sell for under $1.
- In New South Wales, knives are not permitted to be sold to customers under the age of 16.
- Retailers in Victoria must segregate pet food from food for human consumption in the storeroom, and ensure specific signage is displayed in stores.
- Retailers in New South Wales and Western Australia cannot easily bag fresh produce for quick sale at a reduced price. These states define this as a 'packaged product' and as such, expect full labelling compliance, including price per kilo, net weight, total price and so on. As a result of this added complexity, these products are often disposed of.

In some cases, variation in regulations across jurisdictions was such that Coles would drop a product from all stores rather than attempt to comply with each set of regulations.

Source: Coles Group (Melbourne, pers. comm., 24 October 2008).

Transport, storage and handling

In response to stakeholder concerns, jurisdictions have been taking action to address inconsistencies in transport, storage and handling regulation during recent years. In general, harmonisation has been the preferred approach. Steps towards harmonisation have been taken, with varying degrees of progress made to date. Within Australia, requirements for transporting goods by road and rail have been harmonised to a large extent. However, there are still a number of aspects for which

variation across jurisdictions remains, such as in the transportation of explosives. There are greater inconsistencies in storage and handling regulation. Progress has been made in achieving national consistency in the classification of hazardous substances and dangerous goods, and in labelling and Material Safety Data Sheet regulation. This will facilitate harmonisation of storage and handling requirements for some goods.

Regulation in these areas is often concerned with materials such as explosives and hazardous substances, which can pose serious risks to people and the environment. Due to the potential for confusion and conflict created by different requirements, as well as problems with requirements that are not compatible with local circumstances, the current treatment of transport, storage and handling regulation under the mutual recognition Acts is regarded as appropriate by the Commission. That is, they should remain as exceptions to mutual recognition, subject to the conditions that they are directed at matters of health, safety or the environment, and that they apply equally to local and imported goods.

That said, there is scope to clarify the operation of this exception, which effectively brings any transport, storage and handling requirements not in accordance with the conditions above into the scope of mutual recognition. The extent to which stakeholders in general draw on the conditions to challenge a jurisdiction's additional or varying requirements is not known. However, evidence provided by Coles about some jurisdictional inconsistencies (for example, governing the storage of pet food in Victoria) suggests that most local requirements go unchallenged (box 8.2).

The NSW Government noted, in the context of the conditions applying to the transport, storage and handling and inspections exceptions, that:

> Many of the concerns about the way in which mutual recognition legislation interacts with product safety requirements could be addressed if these general [exceptions] were more clearly articulated in the legislation and better understood among regulators and industry. (sub. 55, p. 3)

It suggested that examples could be considered for these exceptions, noting that examples were provided in the legislation for manner of sale requirements.

While greater clarity concerning the types of requirements that do and do not need to be complied with under mutual recognition would improve the operation of the schemes, the inclusion of examples in the Acts has the potential to create complexity and uncertainty. Guidance would best be obtained through interpretation of the provisions. Central points of contact in Australia and New Zealand could provide an avenue for operators and other interested parties to query whether mutual recognition applies to any regulation, including whether or not a regulation meets the conditions for exceptions set out in the Acts.

The way forward

While extension of the mutual recognition legislation is not a viable solution to the problems created by variations across jurisdictions in the areas of regulation covered by the exceptions, the Commission believes that sellers and other interested parties could usefully negotiate with regulators on a case-by-case basis. Central points of contact in the Australian and New Zealand governments could be made available to facilitate this process. This would provide additional regulatory scrutiny and a further impetus for coordination amongst jurisdictions where the demand exists, without compromising the ability of each to respond to specific risks to health, safety and the environment. This service could be one of the functions of the 'one-stop shop' described in the context of dispute resolution mechanisms in section 8.5 and chapter 11.

These points of contact could provide valuable feedback to jurisdictions to inform better regulatory coordination. Such a function has merit over a more resource-intensive regulatory review by jurisdictions, as the market — given the prospect of a resolution — is well-placed to identify those requirements that impede trade.

In the European Union, a systematic regulatory review is underway as part of its Services Directive (appendix C), via a process of 'mutual evaluation'. The Directive aims to remove legal and administrative barriers to achieving a single market for services. As part of the process of mutual evaluation, each member state is required to screen its own stock of regulations governing services, against the criteria established by the European Court of Justice — that requirements be non-discriminatory, justified by a general interest objective, suitable for the objective pursued, and proportionate. Regulations that do not meet these criteria will be abolished by EU countries. National reporting of the results of mutual evaluation will be subject to a 'peer review' by other member states and stakeholders at the end of 2009.

Such a formal process of review would not be warranted for the Australian and trans-Tasman markets for goods, given that few goods appear to be covered by local requirements. Nevertheless, jurisdictions should systematically consider the implications of their own regulation for national goods markets as a matter of good regulatory practice. Specifically, in those areas of regulation not founded on national standards or principles, jurisdictions should seek to restrict differences in regulatory requirements to where they are justified by local circumstances. Requirements should be proportionate and non-discriminatory. While jurisdictions routinely recommend cross-jurisdictional consultation as part of their guidelines for

regulation impact statements, mutual recognition could be specified as one of the factors to be taken into consideration as part of this process.

RECOMMENDATION 8.4

The exceptions for goods in the mutual recognition Acts should be retained.

Impediments to trade arising from the exceptions should be dealt with via direct negotiation with regulators on a case-by-case basis. A central point of contact should be made available to facilitate this process.

RECOMMENDATION 8.5

The implications of regulation for mutual recognition should feature as one of the factors to be taken into consideration in jurisdictions' respective regulatory guidelines.

8.4 A possible extension to the Acts

Use of goods

Under the current mutual recognition schemes, goods provisions relate only to the sale of goods. Other goods-related regulations covering the use of goods are not explicitly included within the scope of mutual recognition. That is, the law is silent in this area. For simplicity, references in this section are to part 2 of the MR Act. Identical provisions are contained in the TTMR Acts.

Use of goods regulations dictate specific conditions under which a good may or may not be used, including bans on 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, combinations of chemicals)

- the **extent** of the use (say, maximum or minimum quantities)
- the **method** of the use (for example, aerial spraying as opposed to handheld spraying of a chemical). (PC 2003, pp. 240–41)

The relevant issue for mutual recognition is whether or not use of goods regulations dictate particular characteristics of goods in a way that prevents or restricts the sale of goods coming from other jurisdictions. Evidence from study participants suggests that there are occasions when this is the case (box 8.3).

According to one then-member of the Committee on Regulatory Reform (CRR), the Committee was mindful of the need to strike a balance between removing indirect barriers to trade and preserving certain laws needed to protect health, safety and the environment:

> The Committee also spent some time working through the issue of whether mutual recognition should apply to indirect barriers to the sale of goods, that is, all those regulations relating to 'possession' or 'use' of goods which do not directly prohibit sale but can have the effect of doing so. The concern of members of the committee was to find the dividing line between those laws which had a genuine purpose — an example being Queensland laws proscribing possession of commercial fishing nets of a particular size which had been enacted for the purposes of protecting fisheries resources — and those laws which were more protectionist in nature. We came up with Section 10(e) [of the MR Act], which I am hopeful will be interpreted by the courts in the spirit of the legislation, to pick up a broad range of indirect barriers to interstate trade. Section 10(e) is something of a 'wild card' — it gives some uncertainty but also some scope for a jurisprudence to build up, not unlike the law generated under the Treaty of Rome. (Wilkins 1995, pp. 5–6*)*

Section 10(e) of the MR Act is one element of a list of 'requirements that do not need to be complied with' under mutual recognition and reads:

> … 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 second State. (MR Act, s. 10(e)).

Box 8.3 **Use of goods issues — participants' examples**

No restrictions have been specified under the Mutual Recognition Agreement on the sale of gas appliances within Australia. However, there are inconsistencies related to the recognition of certification for sale, installation and use of appliances across jurisdictions. The Queensland Government referred to this issue in its submission:

> All states require gas appliances to be certified or approved by a recognised body before they can be installed/used. Technically, in some states an unapproved gas appliance may be able to be sold but cannot be used until certified/approved.
>
> The issue is that an appliance approved/certified in one jurisdiction is not automatically approved for use in another. The appliance has to be certified/approved by a body recognised by the other jurisdiction. If the first approving body is not recognised in the other jurisdiction, the appliance has to be recertified by another body acceptable in the new state. In simple terms, if an appliance can be sold in and used in one jurisdiction, then it should be able to be sold and used in all jurisdictions. (sub. 52, p. 1)

Express Coaches, a New South Wales-based supplier of buses, identified differing road use provisions across jurisdictions as a factor undermining mutual recognition:

> Certain New South Wales use specifications mean that buses built for use in New South Wales are not fit for operation in other states. For example, a shipment sent to Western Australia had to have the school flashing lights (a requirement in New South Wales) removed before they could be used on the road in that jurisdiction.
>
> Western Australia is the only jurisdiction that requires seat belts on buses (as opposed to lap belts that are required elsewhere). While the buses can legally be sold in Western Australia, they cannot be registered for use without modification. (Express Coaches, pers. comm., 14 March 2008)

Fisher & Paykel, a New Zealand-based manufacturer of home appliances, raised a use of goods issue in its submission to the 2003 review and again in its submission to this study (sub. 54). Specifically, certain products supplied by Fisher & Paykel (washers, dishwashers and fridges) are controlled on a 'connection to the plumbing basis' rather than a sale basis. That is, plumbing certification is required by local water authorities in Australia, and Australian laboratory approval is needed to obtain the certification (although Fisher & Paykel understood that US/EU certification may now be allowed under certain circumstances). Because this requirement is based on use rather than sale, it is currently outside the TTMRA.

Cadia Valley Operations provided an example to the Commission's 2007 review of regulatory burdens (PC 2007) concerning a vehicle fitted out as an ambulance and approved for use at the company's mining operation in Western Australia that was off the road for seven weeks because the NSW Roads and Traffic Authority would not accept the Western Australian compliance plate.

Despite the CRR's expectations, no body of jurisprudence has built up, and there is no evidence that the relevant sections of the MR or TTMR Acts have been tested as anticipated. This does not necessarily indicate an absence of indirect barriers to

trade, and could instead be a reflection of the limited scope for the legislation to be interpreted as anticipated. Two features of the Acts might explain this outcome:

- the legislation has been drafted in such a way that the types of requirement that should not restrict the sale of goods are confined to those 'relating to sale' (MR Act, s. 10(e)). It is unlikely that a legal interpretation of this provision would conclude that it covers requirements relating also to the use of goods
- the mechanism for invoking the provisions for a defence to a prosecution is largely unworkable for use of goods issues in any case, because a sale would first need to take place for a prosecution to arise in relation to the subsequent use of the good. As the user, and not the seller, of the good would face prosecution, in all likelihood, that user would not have purchased the product in the first instance. Placing the onus on the user is likely to have constrained the operation of the Acts in this respect, even if use requirements had been explicitly included.

FINDING 8.1

Use of goods requirements have the potential to unnecessarily impede the sale of goods across jurisdictions. Provisions in the Acts appear to exclude use requirements from the scope of mutual recognition.

FINDING 8.2

The Acts currently provide for mutual recognition as a defence to a prosecution in relation to the sale of goods. Even if the mutual recognition Acts had explicitly covered use of goods requirements, the existing provisions would not have provided an adequate mechanism for sellers of goods to challenge a use requirement, given that it is unlikely that a prospective user would buy the product in the first instance.

Proposed approach to use of goods issues

In the Commission's 2003 review (PC 2003), it was suggested that central agencies collect examples of use of goods issues and that, after a couple of years, an advisory group examine these issues to determine whether they represented a barrier to trade that merited policy action. The CJRF agreed to this recommendation but it appears there has been little progress in this regard. Given the amount of time that has elapsed and the lack of progress in what would have represented only a preliminary step towards addressing this issue, a more direct course of action may be appropriate at this point.

In order to reflect more accurately the intentions of the schemes — that goods that can be sold lawfully in one jurisdiction not have their sale restricted in another jurisdiction — while addressing jurisdictions' health, safety and environmental

concerns, the existing mutual recognition arrangements should be modified as follows:

- The 'requirements that do not need to be complied with' (MR Act, s. 10) should explicitly include use of goods requirements insofar as they restrict the sale of goods. This extension should be constrained in a way that addresses health, safety and environmental concerns.
- An effective process for accessing advice and resolving disputes on interpretation of the legislation should be available for both industry, regulators and any other interested parties.

A proposal for advisory and dispute resolution mechanisms is described in section 8.5. Potential approaches to constraining the application of a use of goods provision are discussed next.

Mitigation of risks to public safety and the environment

The NSW Government, in supporting an extension of the schemes to include use of goods regulations, pointed to a potential need for a mechanism to protect public safety and the environment, and referenced the EU and Canadian approaches:

> The coverage of goods under the MRA and TTMRA could be broadened to also include use of goods regulations as the EU mutual recognition schemes do, but such a broadening of scope may require an 'out' on public benefit grounds, such as is present in the EU. The analysis of the Canadian [Agreement on Internal Trade] suggested a similar approach to the mutual recognition of use of goods regulations. (sub. 55, p. 25)

It is important that there is provision in the Acts for regulations legitimately directed at health, safety and environmental protection to continue to be enforceable. That said, consideration should be given to the criteria that constrain a regulator's ability to enforce a particular requirement. The following principles, applied under the EU scheme (appendix C), could be considered in the new provisions. Under that regime:

> [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
> - it gives effect to that objective in the manner least likely to impede the free movement of goods. (Goddard 2003, pp. 7–8)

Alternatively, guidance can be found elsewhere in the mutual recognition Acts. Section 31(2) of the MR Act deals with circumstances in which a tribunal may make a declaration concerning equivalence of occupations, including that occupational registration in one state should not entitle a registered person to operate in another state where:

> The activity or class of activity, if carried out by a person not conforming to the appropriate standards, could reasonably be expected to expose persons in the other state to a real threat to their health or safety or could reasonably be expected to cause significant environmental pollution … (MR Act, s. 31(2)(b)(ii))

In Cleary v Nurses Board of the Northern Territory, the Administrative Appeals Tribunal (AAT) interpreted this section of the Act as follows:

> 49. … The Tribunal would need particularly strong evidence before it could be satisfied that registration in one state should not entitle registered persons to carry on a particular activity or class of activity in the other state.
>
> 50. In particular, strong evidence would be required that any activity or class of activity could reasonably be expected to expose persons in the second state to a real threat to their health or safety. This is strong language. It is not sufficient to raise the possibility of a risk. There is inherent in the use of the words 'real threat' a sense of imminent peril. That danger must arise directly from the fact of registration in the second State. (*Cleary v Nurses Board of the Northern Territory* 1996, N94/1199 AAT No. 10942)

The application of similar constraints for use of goods regulations could encourage scrutiny of differences in approach to similar problems across jurisdictions. The advisory opinion and dispute resolution mechanisms discussed below (section 8.5) would then support regulators and sellers in determining the reach of mutual recognition under the new provisions.

Existing exemptions mechanisms could also be utilised to mitigate concerns about risks to the public and the environment. Critical regulations that, if overridden by mutual recognition, could pose unacceptable risks to health, safety or the environment, could be identified by regulators and added as temporary exemptions in the first instance. All existing exemptions and exclusions would continue to be observed. Use of goods requirements that do not play a part in restricting the sale of the good would be out of reach of mutual recognition.

A broadening of the scope of mutual recognition in this way should also be considered in the context of the national consumer policy framework, which would need to take into account not only standards of goods issues, but also use of goods issues.

RECOMMENDATION 8.6

Requirements relating to the use of goods, insofar as they prevent or restrict the sale of goods, should be explicitly brought into the scope of the mutual recognition schemes.

An exception should be made where mutual recognition of use provisions could expose persons in another jurisdiction to a real threat to health or safety or cause significant harm to the environment.

8.5 Advisory and dispute resolution mechanisms

No formal appeals bodies for the sale of goods are mentioned in the mutual recognition Acts. Instead, the Acts explicitly provide for mutual recognition as a defence to a prosecution for an offence. That is, matters involving the sale of goods can be heard in the courts where a prosecution has arisen for an offence against a local law, and the defendant may claim that the mutual recognition principle applies. These provisions serve a clear purpose and should be retained. For simplicity's sake, references in this section are to s. 12 of the MR Act. Similar provisions are found in the TTMR Acts.

Current defence provisions are reactive and inadequate

As discussed, in the case of use of goods regulations, in order for a seller to invoke the defence provisions, the user of a good would need to be willing to attract a prosecution for contravening a requirement relating to the use of a product. But, under these circumstances, a prospective user would be unlikely to purchase the product in the first place. The existing defence provisions do not meet the needs of sellers or consumers facing a use of goods issue.

More generally, the defence to a prosecution mechanism offers limited scope for businesses to test the validity of any decision by a regulator to enforce a particular requirement before risking prosecution. The opportunity to find out whether mutual recognition applies arises only after a court has passed judgement on whether an offence has been committed. Obtaining a ruling on mutual recognition would depend on that seller's willingness to rely on the mutual recognition defence and risk an unfavourable judgement. It is difficult to imagine that many businesses would readily use this avenue to obtain a legal interpretation of the legislation.

Reflecting on the early operation of the MRA, one of its architects noted in relation to the use of the exceptions by regulators to exclude interstate goods:

> … [W]e are dealing with small businessmen who are not in a position to mount expensive legal challenges ... Quite apart from the legal costs involved, these are small businesses whose success is determined by the continuous involvement of the entrepreneur who established them. They have no time to become involved in bureaucratic or legalistic games. (Sturgess 1994, p. 30)

Overall, there is no evidence that the defence provisions have been used and, consequently, there is no jurisprudence to provide guidance on the application of the legislation to specific questions. Although case law offers potential collective benefits, the private costs (and risks) to individual firms and consumers are likely to be too high for those benefits to be fully realised.

An advisory mechanism would be useful

Apart from legal interpretation, the current schemes lack an easy avenue for regulators and other interested parties to seek informed advice on elements of the schemes about which they might be uncertain.

The Coles Group noted the lack of a central point of contact or avenue through which to escalate issues arising from conflicting state-based regulations (pers. comm., Melbourne, 24 October 2008). Coles said that it usually seeks advice from the relevant COAG Ministerial Council or the relevant Minister or government department in the particular jurisdiction, but this can be time consuming when having to approach as many state or territory government departments as there are conflicting sets of regulations. Coles also noted that, as there is no ultimate arbiter between jurisdictions, it can be costly to pursue an issue.

In some cases, businesses may refrain from stocking a product when there is significant variation in requirements across jurisdictions. Coles Group noted, for example, that it tends to avoid carrying an item if it is not permitted in all jurisdictions (pers. comm., Melbourne, 24 October 2008).

In other cases, businesses elect to comply with multiple sets of regulations. Fisher & Paykel (sub. 54), for example, said that it chooses to obtain additional certification for installation of certain appliances.

Both the Coles Group and Fisher & Paykel outcomes appear contrary to the intentions of mutual recognition. In its submission to the Commission's 2003 review (PC 2003), the New Zealand Government questioned whether, in relation to goods matters:

> … 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? (NZ Government 2003, p. 18)

The EU system offers examples of the types of response mechanisms for goods-related matters that could be established. The European Commission recently agreed on a package of reforms following a public consultation in 2006, which included the establishment of 'Product Contact Points' to provide information on national technical rules to businesses and to national authorities in other member states. National SOLVIT centres have been operating in member states since 2002 to provide a nonjudicial mechanism for citizens and businesses to access advice and resolve disputes relating to the application of Internal Market Law generally. In addition, operators in that market have the option of making formal complaints and using the courts to obtain a judgement (appendix C).

Improved advisory and dispute resolution mechanisms are needed

The existing mechanism for obtaining a ruling on a dispute (that is, via the courts) appears to offer little scope for obtaining guidance or simple resolution of goods matters — it is costly and not easily accessed. There is an argument for the establishment of a more effective administrative mechanism whereby sellers, other interested parties and regulators of goods can obtain advice, and escalate matters in cases where the application of mutual recognition is uncertain.

An option for a dispute resolution mechanism was put forward in the Commission's 2003 review (PC 2003), in the form of an advisory forum made up of representatives from each jurisdiction. It was proposed that the forum would provide policy guidance on issues where the proper operation of mutual recognition with respect to goods appeared to be impeded, and make recommendations on how the issues might be resolved. The CJRF was formed following the 2003 review (chapter 11), but its role does not extend to supporting a dispute resolution mechanism.

An avenue for escalation of goods matters would preferably include the following nonjudicial and judicial features:

- Information provision — a 'one-stop shop', or central point of contact for sellers, regulators and other interested parties, which would provide information and general guidance on the interpretation of the MR and TTMR Acts. As a body of interpretive material builds up, answers to frequently asked questions could be published electronically.
- A liaison and mediation service — through the 'one-stop shop', such a service would provide for low-cost resolution of disputes that sellers (or other interested parties) and regulators have not been able to settle independently.

- A legal avenue for dispute resolution — this would enable parties to obtain advisory opinions from a body such as the AAT. They would also have a right of appeal in response to a regulator's formal decision to enforce a requirement. Ideally, this option would only be taken up if the matter had proven impervious to mediation.
- Referral to a committee — unresolved or test case matters could be referred to the relevant COAG Ministerial Council to obtain a ruling.

The administrative aspects of the dispute resolution mechanism described above should, where possible, use existing governance frameworks in both Australia and New Zealand, to avoid the need to establish extensive new bureaucracy. Specifically, information provision and mediation functions related to both the MR and TTMR schemes could be performed by 'one-stop shops', or dedicated units within appropriate agencies in both countries. Indeed, the New Zealand Ministry of Economic Development is already active in promoting understanding of the TTMRA by government agencies and other stakeholders, and is supportive of formalising and extending its role to include a number of the other functions proposed here:

> This role has been performed for some time in New Zealand by MED, resulting in the accumulation of expertise in matters relating to [the] TTMRA. Many government agencies now refer to MED for advice or assistance in the early stages of their policy development to ensure that mutual recognition implications are well understood and factored in to their policy proposals. Australian policy proposals are also referred to MED by relevant New Zealand counterpart agencies for assessment of TTMRA implications.
>
> … The [proposed] establishment of a TTMRA-specific enquiry point which is predominantly used by individuals seeking information to assist with registration processes has been well received by both registering authorities and individuals seeking registration. (Ministry of Economic Development (NZ Government), sub. DR89, pp. 8-9)

Potentially, the proposed 'one-stop shops' could provide a liaison and coordination role, taking in a range of cross-jurisdictional regulatory issues. A proposal for the Australian unit is taken up in chapter 11.

The legal aspects of the dispute resolution mechanism would be similar to that for occupations, and the mandates of the existing tribunals — the AAT and the Trans-Tasman Occupations Tribunal — could be extended to goods-related matters. The relevant tribunal could be used to provide advisory opinions on particular matters, in the first instance. Parties would then have the option to appeal a regulator's continued enforcement of a requirement in contradiction of the advisory opinion, via the tribunal. Implementation of these options would require changes to the mutual recognition Acts (chapter 12).

Further, provision for participating parties to refer jurisdictional requirements relating to goods standards to the relevant Ministerial Council exists under the MRA and TTMRA. This avenue could be extended to include other issues of dispute relating to goods, for example, around use of goods regulations. Referrals could originate from the proposed 'one-stop shops', or from individual regulators. Matters referred to a Ministerial Council would more appropriately include those with broad implications for the application of mutual recognition laws.

Singly or in combination, these options would provide resolution of individual matters for businesses, individuals and regulators, and extend the range of interpretive material on goods issues. The foreseeable outcomes would be greater certainty for all interested parties, and enhanced benefits of mutual recognition in relation to the mobility of goods. An administrative advisory and mediation service would provide a low (public and private) cost mechanism for achieving these outcomes.

The avenue for appeal through a judicial body would be a more costly option. For example, it would mean that regulators would have to provide information about any decision in writing. Further, a growing body of interpretative material may also inject additional complexity into the operation of mutual recognition, which might itself be costly. However, these costs must be balanced against the cost of the current uncertainty to sellers and users which, in the Commission's view, has undesirable consequences for the operation of a seamless market for goods.

RECOMMENDATION 8.7

An effective, accessible administrative mechanism should be made available to sellers of goods, regulators and other interested parties (including industry and consumer associations) to obtain information and guidance on the application of the mutual recognition legislation to individual cases, and to assist in the resolution of disputes.

RECOMMENDATION 8.8

A judicial mechanism should be made available for sellers of goods and other interested parties to:

- ***obtain advisory opinions from a body such as the Administrative Appeals Tribunal***
- ***appeal regulator decisions to enforce requirements where the parties believe mutual recognition should apply.***

RECOMMENDATION 8.9

The existing mechanism for referral of issues relating to jurisdictional requirements for goods standards to Ministerial Councils should be extended to all issues of significant dispute relating to goods.

9 Exemptions and extensions — occupations

Key points

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

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

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

9.1 The permanent exemption for medical practitioners

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RECOMMENDATION 9.1

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

RECOMMENDATION 9.2

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

9.2 Is universal registration essential to mutual recognition?

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

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

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

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

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

FINDING 9.1

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

9.3 Mutual recognition of business registration

A registration taxonomy

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

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

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

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

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

Mutual recognition of sole trader licences

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

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

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

> … where licences to perform work may be granted to individuals according to conditions at least one of which relates to the 'attainment or possession of some qualification' then that work, providing it amounts to an 'occupation, trade, profession or calling', would constitute an occupation for the purposes of the mutual recognition

regime, even where the other licence conditions do not relate to the 'attainment or possession of some qualification'. (AGS advice, presented at appendix B)

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

FINDING 9.2

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

Mutual recognition of other business licences

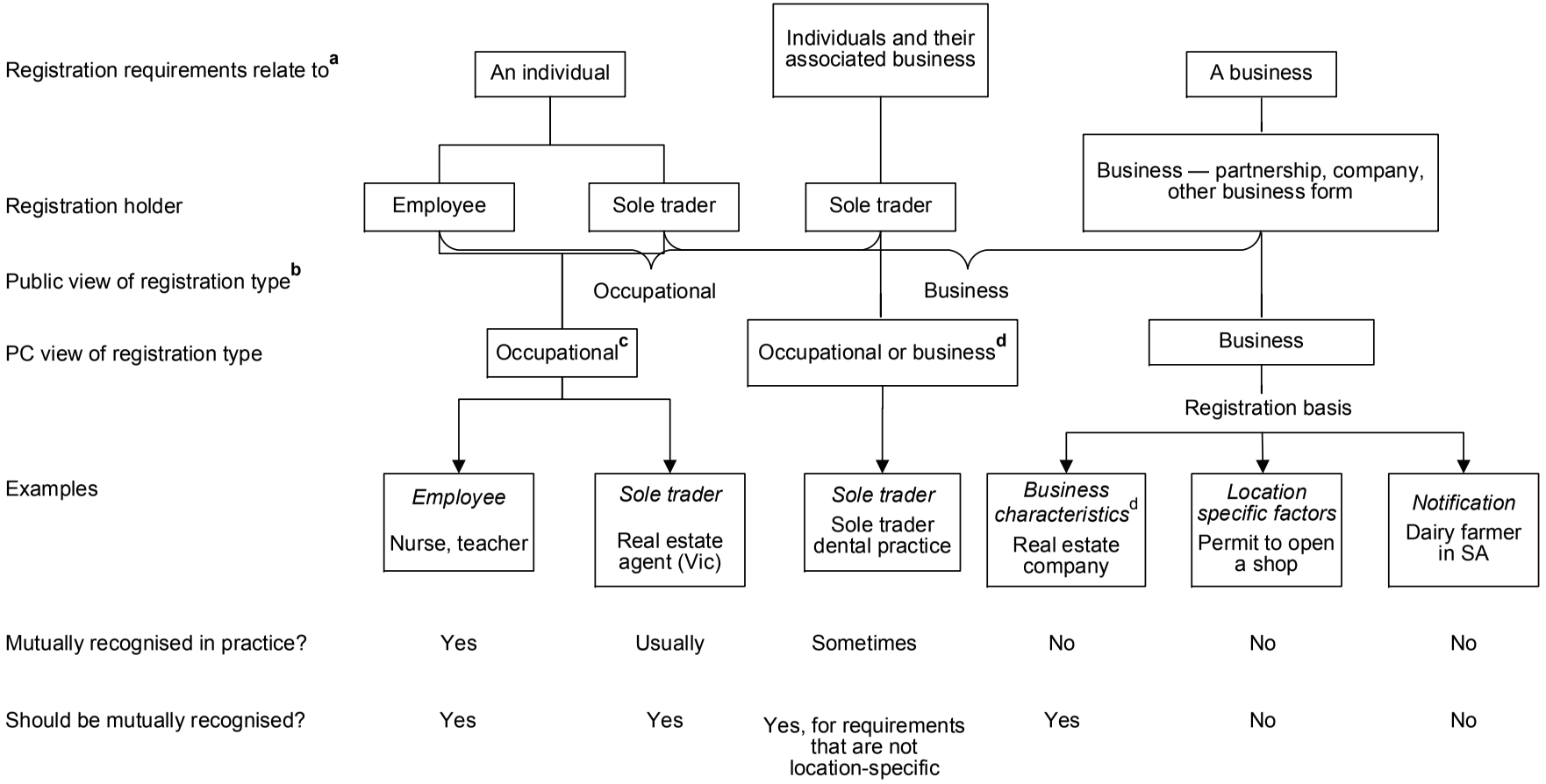
Three classes of business registration associated with business entities that are not individuals can be identified (in reality, registration may involve elements of more than one of these classes):

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

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

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

Figure 9.1 **A registration taxonomy**



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

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

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

> A business seeking industry-specific registration to operate in all states and territories would potentially need to:
>
> - complete up to eight different application forms
> - supply up to eight different packages of supporting material, some of which would be duplicated across jurisdictions and some of which would be unique to a given jurisdiction
> - possibly complete a number of police checks and advertise the applications in a number of major newspapers
> - pay up to eight different application and licence fees. (PC 2008d, p. XXV)

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

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

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

FINDING 9.3

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

9.4 Cross-border and short-term service provision

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

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

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

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

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

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

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

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

> At present, the TTMRA focuses on [the permanent] movement of service providers, rather than on cross-border [or short-term] provision of services. This approach does not address the increasingly common situation of a person who practises a registered occupation in country A seeking to provide the relevant services to persons in country B, without becoming resident in country B or establishing a place of business in country B.
>
> Where a service provider registered in country A is entitled to registration in country B under the TTMRA, it follows that there is no issue as to the qualification or fitness of the service provider to provide the service. A requirement to seek registration in country B before providing services in that jurisdiction creates a barrier to trade in services, and gives rise to compliance costs for businesses which may be significant compared with potential profits from occasional cross-border service delivery. (sub. 53, p. 17)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Trade in services — the international experience

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

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

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

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

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

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

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

Source: OECD (2008).

The way forward

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

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

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

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

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

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

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

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

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

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

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

(a) an argument has been made that the fact that they are not so covered is limiting the effectiveness of existing mutual recognition arrangements; or

(b) the Cross-Jurisdictional Review Forum considers that there is value in exploring the potential scope to expand the Arrangement. (CJRF 2004, appendix E)

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

Box 9.2 **Legislative specificity creates impediments to trade**

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

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

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

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

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

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

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

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

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

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

FINDING 9.4

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

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

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

10 Mutual recognition in the wider context

Key points

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

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

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

10.1 Bilateral engagement with third countries

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

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

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

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

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

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

> A loophole existed until recent times whereby optometrists with membership of the British College of Optometrists could gain registration in New Zealand, bypassing the examination and accreditation processes that all other applicants for registration in Australia and New Zealand were required to undergo. This had several effects. British optometrists were able to become registered in Australia and New Zealand without any confirmation of their competence or the adequacy of their training while Australian and New Zealand optometry graduates and optometrists from every other country were required to demonstrate competency.
>
> The second effect was that through European Union arrangements, optometrists from other European countries, in which standards of optometric practice were regarded as inadequate in Australia and New Zealand, could become members of the British College of Optometry, then gain registration in New Zealand, which entitled them to automatic registration in Australia. (Optometrists Association Australia, sub. 42, p. 6)

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

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

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

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

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

The US–Australia Free Trade Agreement

Background

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

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

AUSFTA cooperation provisions with potential to impact on mutual recognition partners

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

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

Box 10.2 **AUSFTA aims and expected outcomes for Australia**

The aims of the Agreement are to:

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

Expected AUSFTA outcomes can be summarised as follows:

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

Source: DFAT (nd).

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

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

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

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

The New Zealand–China Free Trade Agreement

Background

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

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

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

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

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

NZ–China cooperation provisions with potential impacts

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

The general cooperation provisions that may impact on occupations include:

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

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

The aims of the Agreement are to:

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

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

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

Source: MFAT (2008).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FTA impacts relevant to mutual recognition schemes

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

Goods

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

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

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

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

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

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

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

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

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

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

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

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

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

Occupations

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

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

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

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

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

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

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

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

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

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

FINDING 10.1

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

Enhancing the opportunities and mitigating the risks of FTAs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FINDING 10.2

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

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

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

RECOMMENDATION 10.1

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

10.2 Recent Australia and New Zealand mutual recognition initiatives

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

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

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

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

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

The primary objectives of the MRSO are to:

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

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

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

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

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

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

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

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

Source: MED (2008).

Impact of MRSO on the mutual recognition schemes

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

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

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

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

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

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

Background

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

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

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

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

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

Impacts on the mutual recognition schemes

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

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

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

The following outcomes for the treaty partners are expected:

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

Source: McClelland and Dalziel (2008).

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

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

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

FINDING 10.3

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

11 Awareness, expertise and oversight

Key points

- Evidence presented in earlier chapters indicates that firms and individuals are not making full use of the mutual recognition schemes, and that regulators are not always applying mutual recognition consistently or appropriately.
- Previous reviews also found these problems and attributed them to low public awareness, insufficient regulator expertise and inadequate oversight (monitoring and enforcement) by governments.
- Governments responded to the previous reviews by undertaking awareness-raising initiatives, clarifying who is responsible for oversight, and establishing an intergovernmental group of officials — the Cross-Jurisdictional Review Forum (CJRF) — to monitor and recommend scheme improvements.
- These initiatives have not been entirely successful because:
  - insufficient resources and expertise have been devoted to ongoing monitoring of the schemes
  - the enforcement role envisaged for COAG (Council of Australian Governments) Ministerial Councils and appeal tribunals has been limited due to the under-resourced monitoring by governments, and the cost and low public awareness of appeal mechanisms
  - individual regulators face barriers to building up and maintaining expertise on mutual recognition matters.
- To address these problems, COAG should agree to establish two specialist units — one for goods and the other for occupations — to monitor and provide advice on the operation of the schemes within Australia. The functions of the units should include:
  - advising COAG, regulators and the public on technical aspects of the schemes
  - providing a 'complaints-box' service that enables the public to alert governments about problems with the schemes, and facilitates greater use of appeals mechanisms
  - administering an internet-based test of regulators to confirm their expertise on mutual recognition matters
  - facilitating regulators' annual updating of Ministerial Declarations of occupational equivalence
  - designing and delivering awareness-raising initiatives.
- The specialist units should support the CJRF and be located in the Australian Government Departments of Innovation, Industry, Science and Research (for goods), and Education, Employment and Workplace Relations (for occupations).

Evidence presented in earlier chapters indicates that firms and individuals are not making full use of the mutual recognition schemes, and that regulators are not always applying mutual recognition consistently or appropriately. These problems were also identified in the 2003 review (PC 2003), and to a lesser extent in the 1998 review (CRR 1998). The problems were attributed to limited public awareness of the schemes, insufficient regulator expertise, and inadequate oversight (monitoring and enforcement) by governments.

In this chapter, the Commission considers why changes made in response to the 1998 and 2003 reviews were not entirely successful in addressing the abovementioned problems. It is argued that a major factor has been the design of the mutual recognition schemes, particularly their decentralised governance arrangements.[1] No case is found for moving to a far more centralised system, as exists in the European Union, but various reforms are recommended to ensure that the 'light-handed' model used by Australia and New Zealand is more effective.

11.1 Design of the schemes and past reforms

The Australian and New Zealand model of mutual recognition is inherently decentralised, with administration and enforcement largely delegated to many existing regulators in each jurisdiction. This reflects the intention of the architects of the Mutual Recognition Agreement (MRA) and Trans-Tasman Mutual Recognition Arrangement (TTMRA) to have a 'low-maintenance' system that does not establish a new bureaucracy or require repeated updating (Sturgess 1993, 1994). The Commission considers this to be a commendable aspect of the schemes because it has made them easier to implement and has kept administration costs low.

However, the decentralised approach has also led to little government coordination (within and across jurisdictions) to ensure that regulators act in accordance with their mutual recognition obligations, and that firms and individuals are aware of and exercise their rights. In essence, the architects of the mutual recognition schemes envisaged this would occur through the development of case law (including the appeals mechanism for occupations), the referral of specific standards to COAG (Council of Australian Governments) Ministerial Councils, and a broad

[1] For the purpose of this study, the term 'governance arrangements' refers to how the responsibilities of, and relationships between, different bodies and jurisdictions are organised to form the system of mutual recognition across Australia and New Zealand.

commitment by heads of government (supported by COAG Ministerial Councils) to monitor the effectiveness of the schemes.[2]

Shortly after the MRA came into force, one of its principal architects — Gary Sturgess, then Director General of the NSW Cabinet Office — conceded that experience up to that time had revealed that there was a case for governments to take a more 'hands-on' approach regarding monitoring and awareness raising:

> When we were designing the mutual recognition model I used to speak about it as a form of 'low-maintenance regulation' because it was intended to chug away quietly, bringing down … barriers between states without the need for a great deal of effort from within government … But it now seems that mutual recognition does require a bit more maintenance than I imagined at the time ...
>
> I strongly support the monitoring role that has been suggested by Commonwealth and state officials, though it is less than clear which body should be given responsibility for this … What does matter, both in relation to goods and occupations, is that some agency is given the responsibility for promoting and explaining to small business what mutual recognition means and in publishing cases of intransigence by government authorities and hopefully shaming them into change. (Sturgess 1994, p. 31)

The need for greater government involvement was confirmed in the 1998 and 2003 reviews of the mutual recognition schemes. The 1998 review recommended that governments consider a coordinated awareness-raising campaign, establish a forum for occupation-registration authorities to discuss and resolve mutual recognition issues, and refer concerns about occupation-registration requirements in particular jurisdictions to the relevant COAG Ministerial Council. It appears little was done in response to these recommendations.

In the 2003 review, the Commission also concluded that there was a case for governments to take a more active role (PC 2003). This was based on evidence that the effectiveness of the MRA and TTMRA had been hampered by limited public awareness of the schemes, insufficient regulator expertise, and a lack of monitoring and enforcement by governments (box 11.1).

To deal with these issues, the Commission's 2003 review recommended:

- an awareness-raising campaign aimed at regulators, policy advisers, industries and professions on the obligations and benefits of mutual recognition
- a clarification and restatement of who is responsible for oversight, monitoring and enforcement. The Commission noted that monitoring and compliance would

[2] As detailed in chapter 2, the intergovernmental agreements for the MRA and TTMRA contain clauses in which the heads of government made a commitment to monitor the effectiveness of the mutual recognition schemes, assisted by relevant COAG Ministerial Councils, and in light of this make resolutions on the future operation of the schemes.

be enhanced by each jurisdiction's coordinating agency taking active responsibility for mutual recognition matters

- the establishment of an intergovernmental group of officials to consider issues arising from the operation of the mutual recognition schemes, particularly for goods. The issues to be considered were to include the extension of mutual recognition to use-of-goods requirements, based on evidence gathered by jurisdictions through a complaints process (PC 2003).

Box 11.1 **2003 findings on awareness, expertise and oversight**

In the 2003 review of the mutual recognition schemes, the Commission found:

- occupation-registration authorities did not always grant individuals their full rights under mutual recognition, seemingly because of inadequate regulator expertise and/or limited awareness among applicants of their rights
- for goods, there was evidence of poor awareness among retailers and consumers, and inadequate expertise among regulators. For example, regulators repeatedly imposed product bans under consumer-protection laws that could be overridden by mutual recognition because the regulator failed to invoke an associated temporary exemption
- appeals mechanisms were rarely used (particularly for goods), possibly because of the costs involved
- heads of government and COAG Ministerial Councils did little monitoring of the mutual recognition schemes, contrary to commitments made in the Mutual Recognition Agreement and Trans-Tasman Mutual Recognition Arrangement
- there were few mechanisms for enforcement of mutual recognition obligations and decisions, and inadequate accountability where jurisdictions did not meet mutual recognition obligations.

Source: PC (2003).

The Commission's recommended reforms were largely accepted by the jurisdictions. An information campaign was undertaken, targeted primarily at regulators, but also including the secretariats of COAG Ministerial Councils, policy makers, industry, and registered occupations. This involved a series of workshops and seminars for government agencies and occupation-registration authorities (New Zealand Government, sub. 53), the production of an updated version of the official users' guide for the mutual recognition schemes (COAG and New Zealand Government 2006), and the provision of information on government websites.

A statement of who was responsible for oversight, monitoring and enforcement under the mutual recognition schemes was provided in the official users' guide, which is available on the COAG website.

The jurisdictions also agreed that an intergovernmental group of officials — the Cross-Jurisdictional Review Forum (CJRF) — would have an ongoing role 'in receiving and sharing information and promoting broader policy discussion on areas not covered by the mutual recognition schemes and evaluating whether this is limiting the effectiveness of the schemes' (CJRF 2004, p. 13). The CJRF comprises central-agency representatives from each government, who act as the point of contact for mutual recognition matters within their jurisdiction.

11.2 Why have past efforts been unsuccessful?

It is evident from previous chapters that the abovementioned efforts have not been entirely successful in addressing problems with public awareness, regulator expertise, and government oversight. Indeed, the 2003 findings summarised in box 11.1 could equally describe the current situation.

What has changed since 2003 is that the problems have become more apparent to policy makers and regulators as a result of efforts to develop Ministerial Declarations of equivalent occupations in Australia. That process highlighted deficiencies in regulators' expertise on mutual recognition matters, inconsistent application of the MRA and TTMRA, limited accountability when regulators do not meet their obligations, and a low level of awareness among applicants of their rights. Nevertheless, the problems continue, as evidenced by the inconsistent implementation of Ministerial Declarations across jurisdictions (chapter 5).

In the case of goods, efforts since 2003 to reform Australia's product safety regulations have drawn greater attention to the common practice of regulators (and firms and individuals) to overlook mutual recognition obligations and rights when products are banned under consumer-protection laws (PC 2003, 2008f; chapter 6).

The question therefore has to be posed — why have past efforts had such limited success? This is considered by looking, in turn, at awareness, expertise and oversight.

Public awareness

In essence, public awareness raising to date has involved the official users' guide and provision of information on government websites.

Having a users' guide is a good idea, but the current version seems better suited to technical specialists in regulatory agencies and government departments, rather than

the public. It is unclear whether any market research was undertaken to ensure that the guide would meet the needs of individuals and firms.

The key mutual recognition websites appear to be those maintained by COAG and the New Zealand Government, and in the case of mutual recognition for licensed trades, the Australian licence recognition website. Again, it is unclear whether any market research was undertaken on these websites, but the first two seem best suited to policy makers and regulators. A key feature of those sites is access to a downloadable copy of the users' guide.

As noted in chapter 2, the Commission found that a search for the term 'mutual recognition' on the websites of the NSW, SA and WA Premiers' departments returned no results. This was also the case for the ACT Chief Minister's departmental website. Similarly, in chapter 5 it was noted that the websites of some occupation-registration authorities contain no reference to mutual recognition. The websites of various other occupation-registration authorities were found to refer to mutual recognition in a form, but had no guidelines or information on the mutual recognition schemes.

For goods, mutual recognition tends to operate silently in the background because there is no registration requirement similar to occupations. This makes it more difficult to maintain public awareness. The New Zealand Government noted that awareness was a problem among Australian electrical retailers:

> An example of lack of awareness of the legal provisions of the TTMRA is in the electrical and electronic products area where many traders in Australia are unwilling to sell product from New Zealand that does not have Australian markings and documentation. Consequently, some New Zealand suppliers seek to gain Australian 'approvals' rather than seeking to enforce the provisions of the TTMRA. The example points to a possible need for further communication of the intent, principles and provisions of the TTMRA to retailers and consumers. (sub. 53, p. 20)

With regard to occupations, the Osteopathic Society of New Zealand (OSNZ) noted:

> The OSNZ has feedback from potential entrants to the profession that they are mostly unaware, or unclear, as [to] the MRA and TTMRA. … The OSNZ are of the opinion that an improvement to awareness would be of benefit. (sub. 9, p. 2)

Even if the users' guide and websites were perfect, it would be unrealistic to expect that there would ever be widespread public awareness of mutual recognition. The reality is that mutual recognition does not interest most firms or individuals unless they are about to sell goods or move across a border. The key issue is to make sure that the information is accessible to members of the public when they need it, and that bodies they would consult (such as industry associations, trade unions, and

government agencies) are conduits for accurate information. It is unclear whether this is happening at present. One industry association — Accord Australasia (sub. 39) — praised the information provided in the users' guide, but thought it needed to be promoted more effectively.

Publicity campaigns are unlikely to be sufficient in isolation to ensure that the mutual recognition schemes are effective. They need to be complemented by regulator expertise, and government monitoring and enforcement. As discussed below, these have clearly been inadequate.

Regulator expertise

The mutual recognition users' guide and associated websites have probably been useful in helping regulators to gain expertise. In addition, governments conducted workshops and seminars following the 2003 review to inform regulators about the mutual recognition schemes (New Zealand Government, sub. 53). However, the impact of these efforts is likely to have diminished with time. Another issue may be that central agencies in Australian states and territories do not have the expertise or resources to provide such workshops and seminars.

Even if campaigns to improve regulator expertise were sound, individual regulators face an 'economies-of-scale problem' that can be a major barrier to them building up and maintaining the necessary expertise. Mutual recognition is one of many issues regulators need to consider, and possibly not very often. This works against building up and maintaining expertise on mutual recognition matters in specific agencies, particularly smaller ones, such as some occupation-registration authorities.

The Australasian Teacher Regulatory Authorities (ATRA) noted that a central advisory agency would be helpful in addressing this problem:

> ATRA sees it as a problem that there is no central agency which can advise on interpreting and applying mutual recognition legislation and that it is therefore up to each jurisdiction to obtain its own legal advice on these matters. This has the potential to result in differing legal interpretations on operational aspects relating to the implementation of mutual recognition legislation. (sub. 31, p. 4)

ATRA members from the Queensland College of Teachers (sub. 32) and Teachers Registration Board of South Australia (sub. 35) expressed similar views.

Another approach would be for regulators to obtain specialist advice, as needed, from external lawyers or other specialists. For example, the Valuers Registration Board of Queensland noted that it relies on external legal advice to supplement its 'working knowledge' of mutual recognition:

> It is very difficult for the Valuers Registration Board (with a limited budget and a permanent staff of 1.5 persons) to maintain knowledge and currency of its mutual recognition obligations without incurring additional expense. It engages external legal advisors to provide advice if any issue arises. (sub. 19, p. 4)

However, many regulators do not appear to be taking advice from external specialists, given the problems noted in section 11.1. Cost is probably a factor. Another is that government oversight of the schemes is weak, so regulators do not have a strong incentive to obtain the necessary advice (externally or in-house) to apply mutual recognition consistently and appropriately. This problem is discussed further in the next section.

Government oversight

Responsibility for oversight of the mutual recognition schemes ultimately rests with the heads of government, coordinated through COAG (including the New Zealand Government for TTMRA matters). To carry out this function, the heads of government are supported by various bodies, including COAG Ministerial Councils and government departments in their jurisdiction (box 11.2).

A significant weakness of these governance arrangements is that responsibility for *ongoing* oversight of the mutual recognition schemes has not been assigned to bodies that have sufficient resources and expertise to carry out this function. Where enforcement powers do exist, particularly with COAG Ministerial Councils and appeals tribunals, the process is reactive rather than proactive.

While the post-2003 changes regarding oversight were well-intentioned, unfortunately they did not go far enough. In particular, setting up the CJRF for ongoing monitoring was a good idea, but its members (typically from central agencies in each jurisdiction) have not had sufficient resources or expertise to make much of an impact. For example, the CJRF (2004) had planned to gather information on how use-of-goods requirements were affecting mutual recognition, with the intention that this would promote policy discussion and inform the 2008 review.[3] Little appears to have been done in this regard.

Within Australian states, Premiers' departments are typically assigned responsibility for oversight. However, as Carroll foresaw:

> The ability of [Premiers'] departments to undertake the extensive, expensive and time-consuming task of monitoring the activities of all relevant agencies is limited … (Carroll 1995, p. 43)

3 The CJRF made this commitment in response to finding 9.8 of the 2003 review.

Box 11.2 **Governance arrangements for the MRA and TTMRA**

Heads of government are ultimately responsible for oversight of the MRA and TTMRA. This is coordinated through the Council of Australian Governments (COAG), including New Zealand for the TTMRA.

The COAG **Committee on Regulatory Reform (CRR)** — a standing committee of officials from central agencies in each jurisdiction — was initially appointed to oversee the operation of the mutual recognition schemes on behalf of the heads of government and report to them as appropriate. However, the CRR continues to exist in name only, having been inactive for some time.

The CRR's oversight role has effectively shifted to the **Cross-Jurisdictional Review Forum (CJRF)**. The CJRF was initially established to advise heads of governments on the findings of the 2003 review of the schemes. Its responsibilities were soon expanded to the ongoing tasks of monitoring the operation of the MRA and TTMRA, making recommendations on matters that may be limiting the effectiveness of the schemes, and promoting broader policy discussion in areas where the schemes could be extended. The CJRF comprises representatives (usually from central agencies) who act as the point of contact for mutual recognition matters in each jurisdiction. In theory, the CJRF reports to heads of government through the CRR. In practice, the CJRF either reports directly to heads of government or through the COAG Senior Officials' Group, which comprises the heads of central agencies in each jurisdiction. The NSW Government provides a secretariat for the CJRF.

A **central agency** in each jurisdiction — typically the treasury or head of government's department — is responsible for overall oversight of the schemes in that jurisdiction.

Government departments/regulators in each jurisdiction are responsible for administering and enforcing particular aspects of the schemes, such as registering a specific occupation under mutual recognition.

Appeals tribunals can review decisions made by occupation-registration authorities under the MRA and TTMRA. This function is carried out by the Administrative Appeals Tribunal in Australia and the Trans-Tasman Occupations Tribunal in New Zealand.

COAG Ministerial Councils can be called upon to make decisions on how a specific good or occupation is to be treated under the MRA and TTMRA. When a TTMRA issue arises, New Zealand has full membership and voting rights on the relevant ministerial council.

Sources: CJRF (2004); COAG and New Zealand Government (2006); Mutual Recognition Agreement; Trans-Tasman Mutual Recognition Arrangement.

COAG Ministerial Councils have had little impact because the referral process has not been used, and they are not taking the initiative to monitor the schemes, contrary to commitments in the Mutual Recognition Agreement and Trans-Tasman Mutual Recognition Arrangement.

Appeals tribunals and courts are rarely called upon to adjudicate disputes. As a result, they have not provided the discipline on regulator behaviour that the schemes' architects had envisaged. This is evident from:

- the problems identified in chapter 5 regarding inconsistent and inappropriate application of mutual recognition requirements by occupation-registration authorities
- the common practice noted in chapter 6 of consumer-product regulators failing to invoke a temporary exemption when banning a product.

For goods, the need to appeal to a court probably discourages many firms and individuals from challenging breaches of mutual recognition requirements (chapter 8). The lack of legal challenges in cases where product bans are not accompanied by a temporary exemption seems to support this view. Firms may conclude that it is cheaper to just comply with goods standards in other jurisdictions, or to comply by default with the most stringent standard across all jurisdictions. For example, the New Zealand Government noted:

> … many traders in Australia are unwilling to sell [electrical and electronic] products from New Zealand that do not have Australian markings and documentation. Consequently, some New Zealand suppliers seek to gain Australian 'approvals' rather than seeking to enforce the provisions of the TTMRA. (sub. 53, p. 20)

Alternatively, firms may decide not to sell a good in another jurisdiction, rather than bear the cost of either meeting that jurisdiction's standard or using the courts to gain access under mutual recognition.

The solution to these problems is not to set up a new central bureaucracy to monitor and discipline regulators. The barriers that regulatory differences pose to cross-border movements of goods and labour across Australia and New Zealand are not sufficiently large that a centralised bureaucracy would deliver a net benefit. Instead, the Commission favours strengthening the existing 'light-handed' arrangements, as discussed in the next section.

11.3 The way forward

The recommendations that the Commission has made in previous chapters — such as the alignment of temporary exemption procedures with Australia's foreshadowed national product safety regime — will partially address problems with awareness, expertise and oversight. However, the Commission considers that there is also a need for reforms that target these issues more directly.

The key to the Commission's proposal is to strengthen governance arrangements so that there is effective oversight of the schemes' operation, but without incurring the significant costs of a large central bureaucracy. This can be done by building on the existing oversight architecture of the CJRF, COAG Ministerial Councils, and appeals tribunals. It would involve COAG appointing two specialist units — one for goods and the other for occupations — to monitor and provide advice on the operation of the MRA and TTMRA within Australia (the jurisdictions where most concerns appear to lie). The New Zealand Ministry of Economic Development (MED) (sub. DR89) noted that it already performs a similar function in New Zealand, particularly by educating and advising government departments and regulators.

The MED could continue its role (although possibly with greater resources devoted to assisting the public) as a complement to the proposed Australian units. To minimise overlap between the MED and proposed Australian units, individuals, businesses and government agencies should be encouraged to direct queries about the operation of the TTMRA to the body in their home country in the first instance. Where appropriate, the home-country body could pursue such queries with its equivalent in the other country on behalf of the querying party, or direct the querying party to a specific contact in the other country's body. It would also be useful for the MED and proposed Australian units to develop protocols — possibly formalised in a memorandum of understanding — for how they would coordinate their actions on TTMRA issues.

Both of the specialist units proposed by the Commission should support the CJRF, reflecting its role as adviser to COAG on the mutual recognition schemes. The specialist units could also provide technical advice to regulators and general advice to the public. This would be a means of dealing with the economies-of-scale problem regulators face in maintaining expertise, and the public have in developing awareness of the schemes. CJRF members will of course still be able to draw on other sources of advice, including line agencies and regulators in their jurisdiction.

The specialist units could provide a 'complaints-box' service that enables the public to alert the CJRF about problems with the schemes' operation, and to facilitate greater use of existing appeals mechanisms by the public and the referral process by COAG. For the public, this would provide a lower-cost option than appeals tribunals and the courts, in the first instance. The units could initially provide (general only) advice and, in the case of simpler matters, possibly pursue them with the relevant regulator on an informal basis (but with no power to make rulings).

As recommended in chapter 8, the units should also include a mediation function that provides a lower-cost means of resolving disputes than the use of the courts and appeal tribunals. If resolution cannot be reached, the units could facilitate greater

use of the courts and tribunals, by giving the public advice on how to proceed. That is, the units would effectively have an intermediary role for the appeals mechanisms. The Administrative Appeals Tribunal (sub. DR95) noted that, as it has its own means of alternative dispute resolution, implementation of this recommendation may require governments to consider whether parties will be compelled to use the dispute resolution service of the specialist units before applying to the Tribunal.

The CJRF should delegate the design and delivery of awareness-raising to the proposed specialist units. The Commission suggests that separate users' guides be prepared for the public and regulators, websites be reviewed for their usefulness to users, and that a new series of seminars be held, targeted at relevant industry associations, professional associations, trade unions, policy makers and regulators.

Issues for the occupations unit

The specialist unit for occupations could address concerns about the sustainability of Ministerial Declarations of occupational equivalence. As noted in chapter 5, a recent study undertaken for the COAG Skills Recognition Steering Committee raised concerns about how the Ministerial Declarations will be kept up-to-date in the future. That study, by the Allen Consulting Group (ACG 2008), recommended that a mutual recognition unit be established in the Australian Government Department of Education, Employment and Workplace Relations (DEEWR) to facilitate the updating of Ministerial Declarations (box 11.3).

A protocol currently exists for the annual updating of Ministerial Declarations (COAG 2008f) in which CJRF members and individual jurisdictions are responsible for coordinating changes, and DEEWR is largely responsible for processing and gazetting changes. This is not significantly different from what the Commission and the Allen Consulting Group have proposed.

Another function the specialist occupations unit could have is to administer an internet-based practical test that relevant officials in occupation-registration agencies would have to undertake annually to ensure that they have sufficient expertise to administer the mutual recognition schemes. This would provide an additional measure to maintain regulator expertise.

Box 11.3 **Allen Consulting recommendations on sustaining mutual recognition for occupations**

The Australian Government, on behalf of the COAG Skills Recognition Steering Committee, commissioned an evaluation of recent initiatives to improve mutual recognition of occupational licences across Australia. The evaluation, prepared by the Allen Consulting Group (ACG 2008) found that the sustainability of the initiatives would be aided by:

- establishing a mutual recognition unit in the Australian Government Department of Education, Employment and Workplace Relations (DEEWR) to provide a central source of advice on occupation-related aspects of the MRA and TTMRA, facilitate meetings of occupation-registration authorities from different jurisdictions, and administer the updating of Ministerial Declarations
- annual updating of Ministerial Declarations of occupational equivalence undertaken collectively by relevant occupation-registration authorities from all jurisdictions, and facilitated by the DEEWR unit
- timing state and territory variations to occupational licensing arrangements to coincide with annual meetings of occupation-registration authorities, and to take effect at the same time as the annual update of the Ministerial Declarations
- meetings of occupation-registration authorities also being used as a forum to maintain regulator understanding and awareness of their obligations regarding Ministerial Declarations.

Source: ACG (2008).

Location and funding of the units

An important issue is where to locate the specialist units. One option would be for the NSW Government to house them in the secretariat it provides for the CJRF. Alternatively, they could be located in the Commonwealth Departments responsible for occupation and goods-related aspects of the mutual recognition schemes — DEEWR and the Department of Innovation, Industry, Science and Research (DIISR) respectively.[4] The NSW Government noted:

> … the Commonwealth's Department of Innovation, Industry, Science and Research has a pivotal role as a repository of information on the mutual recognition of goods and the coordination of related matters, including the special exemption rollover process.

4 Under the Commonwealth's Administrative Arrangements Order, the Governor General has assigned administration of the Commonwealth's responsibilities for occupational provisions of the MRA and TTMRA legislation to the Minister overseeing DEEWR, and the goods-related provisions to the Minister overseeing DIISR.

> However, there is currently no equivalent body providing such a function in relation to mutual recognition of occupations at a national level in Australia …
>
> New South Wales considers that there is merit in examining the option of establishing a new, national body to coordinate occupational mutual recognition at a national level. This body could be part of an existing Commonwealth agency such as the Department of Education, Employment and Workplace Relations ...
>
> It may be appropriate for such a body to assume the CJRF's secretariat function that is currently performed by New South Wales, and responsibility for coordinating the annual update process for Ministerial Declarations. (sub. 55, pp. 20–1)

Consistent with this view, the Commission favours locating the specialist units in DEEWR (for occupations) and DIISR (for goods). DIISR has built up and maintained expertise on the goods side through, among other things, its ongoing coordination of annual rollovers for special exemptions. To date, there has not been an equivalent ongoing administrative role for occupations, and so the resources that DEEWR has devoted to occupation-related aspects of the MRA and TTMRA has varied over time in response to specific issues. The most notable recent example was the establishment of a Skills Recognition Taskforce in DEEWR to assist with the development of Ministerial Declarations of occupational equivalence across Australian jurisdictions (chapter 5). The Commission understands that the Skills Recognition Taskforce has since shifted its focus from mutual recognition to the establishment of national licensing, due to the finalisation of Ministerial Declarations and the setting of new priorities by COAG. Nevertheless, DEEWR remains responsible for administering the occupation-related aspects of the MRA and TTMRA legislation at the Commonwealth level, reflecting its role as the lead agency for workplace policy at the national level. It therefore has a base of expertise and an ongoing role on workplace matters on which to build a specialist unit for occupation-related aspects of the MRA and TTMRA.

Governments in Australia will need to reach an agreement on how the proposed specialist units would be funded. The administration of the MRA and TTMRA within Australia is not purely a Commonwealth responsibility. On the contrary, the states and territories often implement the mutual recognition schemes in their jurisdiction, and have reserved the right in some cases to veto changes to the schemes. It is therefore appropriate that the states and territories have a 'financial stake' in the specialist units — rather than allowing them to be solely funded by the Commonwealth — to ensure that the units have a strong connection to all governments that implement the schemes within Australia.

COAG should strengthen its oversight of the mutual recognition schemes by agreeing to establish two specialist units — one for goods and the other for occupations — to monitor and provide advice on the operation of the schemes within Australia.

The functions of the two units should include:

- ***advising COAG, regulators and the public on technical aspects of the schemes***
- ***providing a 'complaints-box' service that enables the public to alert COAG about problems with the schemes' operation, and to facilitate greater use of existing appeals mechanisms by the public and the referral process by COAG when disputes cannot be resolved through mediation by the specialist units***
- ***raising public awareness and regulator expertise on the schemes. This should include the provision of separate users' guides for the public and regulators, a website, and seminars targeted at relevant industry associations, professional associations, trade unions, policy makers and regulators***
- ***administering an internet-based practical test that relevant officials in regulatory agencies would have to undertake annually to confirm they have sufficient expertise to administer the mutual recognition schemes***
- ***for the occupations unit, facilitate regulators' annual updating of the Ministerial Declarations of occupational equivalence.***

The administrative arrangements for the two units should be as follows:

- ***the units should be funded by contributions from all Australian jurisdictions, and support COAG's Cross-Jurisdictional Review Forum***
- ***the goods unit should be located in the Commonwealth Department of Innovation, Industry, Science and Research***
- ***the occupations unit should be located in the Commonwealth Department of Education, Employment and Workplace Relations.***

Reporting requirements

As noted in chapter 4, there are significant deficiencies in the record keeping of occupation-registration authorities that make it difficult to assess the effectiveness of the mutual recognition schemes. To address this issue, occupation-registration authorities should be required to report to the recommended specialist occupations unit on their administration of the mutual recognition schemes. This should include

data on the number registered under mutual recognition, compared to total registrations, and information about rejections, complaints and appeals.

The Victorian Department of Justice (via the Victorian Department of Premier and Cabinet, sub. DR96) cautioned that such reporting requirements would impose an administrative burden on regulators. This is a valid concern, which governments should address by ensuring that the reporting requirements do not extend beyond the provision of a small amount of data that regulators would reasonably be expected to collect anyway in order to monitor their operations.

RECOMMENDATION 11.2

Occupation-registration authorities should be required to report annually on their administration of the mutual recognition schemes. This should include data on the number registered under mutual recognition, compared with total registrations, and information about complaints and appeals. Such reports should be provided to the specialist occupations unit mentioned in recommendation 11.1.

At present, there does not appear to be a formal requirement for the CJRF to report regularly to COAG on its activities. Introducing such a requirement would provide added impetus for the CJRF to set specific goals and make progress, supported by the recommended specialist units. This reporting could be done through COAG's Senior Officials' Group, which comprises the heads of central agencies from each jurisdiction (COAG 2007). This would also be an opportunity to explicitly acknowledge that the CJRF is no longer supervised by COAG's Committee on Regulatory Reform, since the latter body has effectively ceased to exist (box 11.2).

RECOMMENDATION 11.3

The Cross-Jurisdictional Review Forum should report annually to COAG on its work program and achievements. This reporting should be done through COAG's Senior Officials' Group.

12 The next steps for mutual recognition

Key points

- Administrative actions and legislative changes are urgently needed to remedy ambiguities and omissions in the mutual recognition legislation, as well as to enable the schemes to reach their full potential.
- Changes needed to the legislation and the underlying mutual recognition agreements include:
  - amendments to the schemes' permanent and special exemptions schedules to reflect progress achieved through the cooperation programs since the last review
  - amendments to clarify the meaning of the legislation and to reflect any modifications agreed by jurisdictions in relation to allowable conditions or scope
  - provisions to ensure the schemes are implemented effectively for stakeholders, with mechanisms to address concerns about regulatory differences, to provide legal and administrative redress and for dispute resolution.
- In the longer term, information is needed in relation to the costs and benefits associated with expanding the coverage of the Acts to such matters as: de facto and negative licensing; recognition of the 'tools' that form part of a registered occupation; and cross-border and short-term services provision.

Mutual recognition is one of the important regulatory tools used to meet the objectives of the Closer Economic Relations agenda between Australia and New Zealand. It has also been a key element of Australian efforts to lower barriers to interstate trade, and the schemes have had an important part to play in the more recently articulated 'single economic market' and 'seamless national economy' agendas of the Australian and New Zealand Governments. This report provides recommendations for clarifying what the schemes now cover and amending the Acts to ensure that the existing mutual recognition framework fulfils its potential. It also identifies changes that could, in the future, extend the coverage of the schemes to allow further aspects of goods, registered occupations and services regulation to be mutually recognised. However, before these possible extensions can be considered, a cost-benefit analysis is required.

This chapter summarises the main proposals contained in previous chapters that will require changes to the mutual recognition schemes. The summary is designed to be a 'one-stop shop' where stakeholders can view the 'to-do' list resulting from this

report. The first part of the chapter identifies actions that can be taken immediately to clarify what the schemes currently cover and to improve the administrative procedures and governance of the schemes. The second part of the chapter sets out actions that are urgently required if the schemes are to meet their objectives, but that will take longer to implement because they involve changes to the mutual recognition legislation and the agreements underlying the schemes. The last part of the chapter identifies the proposals to be considered when thinking about what mutual recognition may look like in the future.

12.1 Improving understanding and governance

The recommendations and findings that can be acted on in the short term are identified in box 12.1. The actions that should be initiated immediately fall generally into two categories. The first involves informing stakeholders about what the mutual recognition schemes cover and the second sets out administrative changes that can be made to improve the operation of the schemes.

There are a range of options for conveying the information and supporting the administrative changes outlined in this part, including such initiatives as a revised mutual recognition users' guide and an internet-based practical test for regulators as proposed in chapter 11. Other actions will require coordinated and cooperative initiatives from goods regulators and occupation-registration authorities in the various jurisdictions.

Informing stakeholders

The first steps involve informing the regulators and the public about what has been ascertained in this report about the current coverage and scope of the schemes. The Commission sought legal advice from the Australian Government Solicitor (AGS advice) in relation to the *Mutual Recognition Act 1992* (Cwlth) (MR Act) and the *Trans-Tasman Mutual Recognition Act 1997* (Cwlth) (TTMR Act (Cwlth)). The New Zealand Ministry of Economic Development provided advice that was sought from New Zealand Crown Law (Crown Law advice) related to the *Trans-Tasman Mutual Recognition Act 1997* (NZ) (TTMR Act (NZ)).

The AGS and the Crown Law advice (legal advice) is referred to throughout this report. It provides guidance in relation to the current legislative position for some of the contentious issues that hinder the operation of mutual recognition (appendix B). Although the final decision on the interpretation of the Acts lies with the courts, there is an absence of case law on important issues. The legal advice obtained for this report provides some confidence about what laws related to goods and

occupations are actually covered under mutual recognition. The advice also provides insights into the flexibility and coverage of the schemes' dispute procedures, and confirms that some of the provisions of the Acts are ambiguous.

Box 12.1 **Recommendations and findings that require immediate action**

Recommendation or finding	*Description of action*
Informing stakeholders	
Finding 5.1	Notify regulators that coregulation may be within mutual recognition.
Finding 5.2	Raise regulator awareness of mechanisms for resolving concerns about variations in occupational standards.
Finding 5.3	Raise awareness of process to refer issues to Ministerial Councils.
Finding 5.5	Provide information on stakeholders' rights under the schemes.
Finding 5.6	Inform regulators that there are questions about whether ongoing training requirements apply to mutual recognition registrants.
Finding 5.7	Raise regulator awareness of mutual recognition obligations.
Recommendation 8.5	Regulatory guidelines should require that mutual recognition implications be considered when designing regulatory regimes.
Finding 9.2	Provide information that some business licences are likely to fall within the schemes.
Administrative actions and consultation	
Recommendation 5.9	Consider extending Ministerial Declarations to New Zealand registered occupations.
Recommendation 5.10	Consultation for Australia's national licensing process should include New Zealand regulators.
Recommendation 6.1	Ensure foreshadowed national consumer product safety regime in Australia is integrated with mutual recognition legislation.
Recommendation 8.4	Establish central contact point to facilitate direct negotiation between regulators and interested parties over trade impediments.
Recommendation 8.7	Establish mechanisms for guidance on application of schemes and for dispute resolution.
Recommendation 10.1	Consider mutual recognition implications in all international agreements.
Recommendation 11.1	Establish two specialist units to provide efficient and effective oversight and monitoring of mutual recognition in Australia.
Recommendation 11.2	Annual reporting by registration authorities to specialist units.
Recommendation 11.3	Annual reporting by the Cross-Jurisdictional Review Forum to the Council of Australian Governments.

The Commission has found that regulators and other stakeholders need to be more aware of their rights and obligations under mutual recognition (findings 5.5 and 5.7). Information about the results of this report can be provided without delay to registration authorities in the areas of allowable conditions; the scope and coverage of the schemes; and existing mechanisms to address concerns about differences in standards.

Conditions

The Commission recommends that the MR Act, the TTMR Act (Cwlth) and the TTMR Act (NZ) (Acts) be amended to remedy the ambiguity that exists in relation to both registration and ongoing conditions (recommendation 5.5). In the meantime, however, regulators should not rely on legislative uncertainty to take action contrary to the likely interpretation of the Acts. To do so would incur the risk of acting outside their legislative authority. Guidance should be provided on the following:

- At the time of registration, legal advice suggests that registration conditions related to what the legislation defines broadly as 'qualifications' are unlikely to be allowed, although the wording of the Acts is somewhat ambiguous. Regulators are now more aware that conditions placed on registration should not require additional training, tests or experience. There is more regulator resistance to giving up requirements such as criminal record checks and conditions related to specialist or local knowledge. These requirements, however, do fall within the definition of 'qualifications' under the Acts.
- Once a person is registered under mutual recognition, the person is subject to the law of the second jurisdiction as long as two conditions are met. As discussed in chapter 5, the law in the second jurisdiction must apply equally to all registered persons and the law must not relate to qualifications in certain ways. The differences between the wording of the New Zealand and Australian Acts may result in different outcomes. Although there is ambiguity in the provisions of both TTMR Acts, regulators should be informed of the likely interpretation that applies under their own legislation.

Scope and coverage

The Commission also recommends the legislation be clarified in relation to what registration types are covered under the Acts (recommendation 5.1). The legal advice suggests that the mutual recognition schemes have a wider application than is commonly understood and that registered occupations may include authorisations or approvals given by regulators for a broad range of activities. Information should be provided on the following:

- The schemes may apply even if there is no statutory body in charge of registration. Professional bodies and other coregulation entities may be registration authorities under the Acts if they have legislative authority to approve people to carry on particular activities based on criteria that make them 'fit and proper' to do so (finding 5.1).
- There is no need for legislation to require registration authorities to keep a list or register of approved persons in order for an occupation to be a 'registered

occupation' under the Acts. This means that mutual recognition may cover occupations that regulators now consider outside the schemes because the legislation does not specify a register, or perhaps does not describe the approval process as registration.

- Business licences that include a requirement related to a qualification are likely to be 'registered occupations' if the licence is granted to an individual (finding 9.2). The responsible service of alcohol example used in the AGS advice illustrates this interpretation. As a result, the activities authorised in the first jurisdiction will be authorised in the second, if there is an equivalent licence. This also means that regulators should carefully scrutinise the business licences they administer to ensure that they are meeting their obligations under mutual recognition.

There are actions that regulators can take related to concerns about differences in standards and compliance for both goods and occupations. Standards issues can be raised between jurisdictions in an effort to harmonise requirements or reach common ground. Informal or formal agreements between regulators can ensure information sharing procedures and compliance mechanisms are in place before problems arise. Regulators should also be informed about what mechanisms already exist to address issues (finding 5.2). Guidance should be provided about the following:

- An undertaking can be enforced in a second jurisdiction if it falls within the definition of a 'condition' under the Acts. The AGS and Crown Law advice take slightly different views of when an undertaking is a condition. Although the New Zealand threshold may be slightly lower, it is clear that a legally binding undertaking can be enforced in a second jurisdiction. If registration authorities want to use undertakings as an effective compliance and enforcement mechanism, they can ensure all undertakings are legally binding, and agree to share information about undertakings and conditions in a timely way whenever disciplinary investigations or proceedings are started. Note, the Commission has recommended that the Acts be amended to clarify the definition of undertaking (recommendation 5.7).
- Occupation-registration authorities are able to recheck that mutual recognition applicants meet the requirements of the first jurisdiction. If a discrepancy is found, however, the fact that the applicant should not have been registered in the first jurisdiction is not, in itself, sufficient reason to refuse to register the person in the second jurisdiction. The Commission suggests that this outcome be reconsidered when the legislative changes are made (finding 5.4).

Administrative actions and consultation

As well as providing information and guidance for stakeholders, some of the recommendations and findings from this report can be addressed at the administrative level with consultation or changes to systems and procedures:

- Australian regulators should consider including New Zealand in the Ministerial Declarations and national licensing initiatives (recommendations 5.9 and 5.10).
- Regulators and policy-makers from both countries should ensure that mutual recognition implications are taken into account:
  - in Australia's foreshadowed national consumer product safety regime to ensure integration with the mutual recognition schemes (recommendation 6.1)
  - when negotiating international agreements to mitigate possible risks to mutual recognition partners (recommendation 10.1).
- Specialist units should be established within the Department of Education, Employment and Workplace Relations and the Department of Innovation, Industry, Science and Research, with revised reporting requirements, to ensure there is effective oversight and monitoring of the recommendations and findings of the report (recommendations 11.1, 11.2 and 11.3).
- These units should be contact points for guidance on stakeholder rights and obligations under the schemes. The units will facilitate communication and resolution of mutual recognition issues between regulators and participants, and establish mechanisms for dispute resolution if communication between parties is unsuccessful (finding 5.5, recommendations 8.4 and 8.7).

12.2 Legislative changes

This section discusses the changes recommended by the Commission that are urgently needed to remedy ambiguities and omissions in the Acts, as well as enable the schemes to reach their full potential. These changes will inevitably have a longer gestation than those outlined in section 12.1 because the proposals require legislative and related changes. The various findings and recommendations will require amending the schedules or provisions of the Acts, changing the underlying agreements — the Mutual Recognition Agreement (MRA) and the Trans-Tasman Mutual Recognition Arrangement (TTMRA) — taking administrative actions or some combination of these. The actions identified fall within three broad categories:

- narrowing the current exemptions
- clarifying what the Acts are intended to cover

- making the schemes work more effectively.

Boxes 12.2 and 12.3 list the findings and recommendations that are intended to achieve these outcomes. Note, there maybe some repetition between the boxes for findings and recommendations that relate to both immediate actions and legislative change.

Narrowing and amending current exemptions

The first set of legislative changes narrows or adds exemptions using the processes described in chapters 7 and 8. These proposals do not require Parliaments to pass legislation and do not change the underlying agreements. Box 12.2 includes changes to the schedules of the Acts that can be achieved by gazettal in each jurisdiction:

- The special exemptions for 'nonuniversal' liquefied petroleum gas appliances should be converted to a permanent exemption, subject to a cost–benefit analysis. Other changes from special to permanent exemption should be considered, including for hazardous substances, industrial chemicals and dangerous goods, and for some radiocommunications devices (finding 7.1, recommendations 7.1 and 7.4).
- The special exemptions for therapeutic goods, road vehicles and radiocommunications devices that may be harmonised in the future should continue to be rolled over, although therapeutic products should have a permanent exemption if the legislation for a harmonised trans-Tasman regime cannot be passed in the next 12 months (recommendations 7.2, 7.3 and 7.4).
- The laws relating to ozone protection should be removed from the permanent exemption schedule in the MRA, and consideration should be given to removal of ozone protection laws from the TTMRA (recommendation 8.2).
- Consideration should be given to moving some permanent exemptions — including risk-foods that have the potential to be harmonised and third-country trained medical practitioners — from the permanent exemption to the special exemption schedule (recommendations 8.1 and 9.1).
- The permanent exemption for Australia- or New Zealand-trained medical practitioners should be removed and mutual recognition should apply (recommendation 9.2).

There are two further recommendations concerning the exemptions. The first relates to the fact that there is currently no authority in the TTMR Acts for moving permanent exemptions into the special exemption schedules, for the purpose of bringing those areas into a cooperation program. The second relates to the proposal to change the timeframe for rolling over special exemptions from a maximum of

one year to a maximum of three years. Implementing these recommendations will mean amending the TTMR Acts and, therefore, they are discussed in the section below dealing with amendments to the Acts to clarify and improve the schemes.

Box 12.2 **Recommendations and findings that require changes to the schedules of the Acts**

Recommendation or finding	*Description of action*
Schedule changes (gazetting by the jurisdictions)	
Finding 7.1	Move the special exemption for 'nonuniversal' liquefied petroleum gas appliances to a permanent exemption subject to a cost–benefit test.
Recommendation 7.1	Consider changing the special exemption for hazardous substances, industrial chemicals and dangerous goods to a permanent exemption and/or applying mutual recognition to some products.
Recommendation 7.2	Change the special exemption for therapeutic goods to a permanent exemption unless the legislation for a trans-Tasman regime is passed within 12 months of governments receiving this report.
Recommendation 7.3	Rollover the special exemption for road vehicles.
Recommendation 7.4	Rollover the special exemption for some radiocommunications devices and change some to a permanent exemption.
Recommendation 8.1	Change the permanent exemption for some risk-foods to a special exemption.
Recommendation 8.2	Remove the permanent exemption for ozone protection from the MRA and MR Act and consider removal from the TTMRA and TTMR Acts.
Recommendation 9.1	Change the permanent exemption for third-country trained medical practitioners to a special exemption.
Recommendation 9.2	Remove the permanent exemption for New Zealand- and Australian-trained practitioners and allow mutual recognition to apply.

Clarifying the scope and coverage of the schemes

Based on legal advice, the Commission is recommending that the legislation be clarified and that better advice and mechanisms for redress be provided for stakeholders affected by the schemes. Box 12.3 sets out the findings and recommendations that, if implemented, will lead to minor or substantial revisions to the legislation. The discussion in this section and the next is not meant to pre-empt any policy or drafting decisions made by officials and regulators. However, where implementing a recommendation will clearly involve changes to certain provisions of an Act, these are identified in an attempt to clarify what effect the amendments would have.

Box 12.3 **Recommendations and findings that require changes to the Acts and underlying agreements**

Recommendation or finding	*Description of action*
Amendments to the Acts for clarification purposes	
Recommendation 5.1	Clarify types of registration covered by the schemes.
Recommendation 5.5	Clarify what conditions are allowed on registration.
Amendments to increase the effectiveness of mutual recognition	
Finding 5.2	Ensure mechanisms exist for resolving concerns about variations in occupational standards.
Recommendation 5.2	Clarify mechanisms through which tribunals can be approached for a declaration on occupational standards.
Recommendation 5.3	Include a mechanism to allow tribunals to provide advisory opinions to registration authorities and other interested parties.
Recommendation 5.4	Allow criminal record checks for registration where appropriate.
Finding 5.4	Consider allowing rejection of a mutual recognition applicant who does not meet registration requirements in their home jurisdiction.
Recommendation 5.6	Allow ongoing requirements such as professional development and criminal record checks if required for all registrants.
Recommendation 5.7	Allow undertakings to be transferable between jurisdictions.
Recommendation 5.8	Allow information on nondisciplinary or remedial action to be shared in some cases.
Recommendation 7.5	Allow special exemption rollover to be a maximum of three years.
Recommendation 8.3	Process needed in TTMR Acts for changing permanent exemptions to special exemptions.
Recommendation 8.6	Include use of goods requirements that prevent or restrict the sale of goods in the mutual recognition schemes, subject to limitation.
Recommendation 8.8	Provide for an advisory opinion or review of regulator decisions to be obtained from tribunals in relation to goods.
Recommendation 8.9	Allow referral to Ministerial Councils for all significant issues related to goods, not just standards.
Finding 9.1	Consider allowing mutual recognition for schemes that do not require universal registration.
Recommendation 12.1	Consider simplification of mutual recognition amendment process.

The first group of recommended changes in box 12.3 arises from the need to clarify the Acts in relation to some outstanding issues. This group of legislative amendments mirrors some of the more immediate solutions identified in the first section of this chapter related to information sharing and raising awareness. Changes to the underlying agreements and legislation are necessary only where wording is ambiguous or where the clear meaning of words does not reflect the apparent intent of the schemes:

- Amendments are needed to address uncertainty in relation to occupation-registration conditions. The likely interpretation is that conditions and regulatory requirements related to qualifications are not allowed at the time of registration. This likely interpretation should be made clear in the Acts. In

relation to ongoing conditions, the amendments should ensure that character checks and ongoing professional development are allowed (recommendations 5.4–5.6).

- The mutual recognition Acts have wider coverage than is commonly understood in relation to some business licences, coregulation and the fact that a formal list of registered persons is not required. There are no recommendations to amend these provisions of the Acts, since the legal advice did not raise issues of uncertainty. However, it may be useful for the jurisdictions to consider whether the interpretation is consistent with the intention of the schemes and to clarify the Acts further, if necessary (recommendation 5.1).

Making the schemes work more effectively

Several of the changes recommended for the schemes in previous chapters are important in order for the schemes to achieve their objectives more fully. There are two types of proposals outlined in this report that are directly focused on improving the schemes. One is to make the permanent and special exemptions work better. The other is directed at providing compliance and redress mechanisms. Although some of these changes will involve amending the Acts and the underlying agreements, other changes in this category can be implemented through administrative mechanisms.

Changes to make the permanent and special exemptions work better

The following changes related to permanent and special exemptions will require amendments to the TTMR Acts:

- A legislative mechanism is needed to allow permanent exemptions listed in schedule 2 of the TTMR Acts to be moved to the special exemption schedule 3. This action is recommended for third-country trained medical practitioners (recommendation 9.1) and risk-foods (recommendation 8.1) to reflect work by regulators to narrow the scope of permanent exemptions and to allow the remaining areas of concern to be the subject of cooperation programs. The mechanism should be consistent with the other methods of changing exemption schedules, and similar to TTMR Act (Cwlth) s. 48 or TTMR Act (NZ) s. 82. This change will also mean a change in Part XIII of the TTMRA (recommendation 8.3).
- A change is needed to allow the special exemption rollover period to be extended from up to one year to up to three years. Amendments will be needed to both the TTMR Acts and the TTMRA (recommendation 7.5).

Changes to address gaps in the legislation

The Commission is recommending some legislative changes that address stakeholder concerns and allow the schemes to be more flexible in meeting the objectives of mutual recognition:

- Amendments to address regulator concerns about health and safety risks. The Commission proposes:
  - allowing criminal record checks for mutual recognition applicants for registration in a second jurisdiction if those checks are required for all applicants (recommendation 5.4)
  - allowing ongoing requirements such as professional development and criminal records checks for mutual recognition registrants (recommendation 5.6)
  - permitting undertakings to be transferrable between jurisdictions (recommendation 5.7)
  - allowing information related to nondisciplinary or remedial actions for registered persons to be shared between jurisdictions in some cases (recommendation 5.8). This proposal will be similar to those needed to ensure regulators have access to information about undertakings, and whether an applicant meets the requirements of the first jurisdiction. These changes could assist enforcement and compliance mechanisms
  - consideration of amendments to allow authorities to refuse to register an applicant who does not meet the registration requirements of the home jurisdiction (finding 5.4).
- Amendments to include use of goods requirements that restrict or prevent the sale of goods should be included under mutual recognition, unless the requirements apply equally to goods produced in or imported into the second jurisdiction, and they are directed at matters affecting health and safety of persons, or at protecting the environment in that jurisdiction, subject to limitations (recommendation 8.6).
- Amendments to ensure that mutual recognition applies to registered occupations in cases where it is not compulsory for all persons carrying on the occupation to be registered. This will mean that the definition of 'occupation' will change so that not only registered persons can carry out authorised occupations. This change will allow mutual recognition to apply, for example, to new registration or licensing schemes that 'grandfather' the rights of persons already working in the occupation (finding 9.1).

Compliance, enforcement and redress

Previous chapters have identified weaknesses in the MR and TTMR Acts related to the redress, compliance and decision-making mechanisms for sellers, users, registered persons, regulators and Ministerial Councils. Regulators and other stakeholders need better procedures with which to identify issues, and obtain a determination on those issues that will then be put into effect. For parties other than regulators, changes are proposed to provide people with both legal and administrative remedies when mutual recognition is not working effectively for them. The changes directed at regulators are intended to address the need for a determination about the application of the schemes, for both individual cases and for representative or generic circumstances (test cases).

Providing legal redress and appeal mechanisms for individuals and determinations for regulators will require amendments to the MR and TTMR Acts and the underlying agreements:

- An amendment is needed to allow regulators and other interested parties access to an administrative mechanism to obtain information and guidance on the application of the mutual recognition legislation, and to assist in the resolution of disputes (recommendation 8.7).
- Judicial mechanisms are needed in the MR and TTMR Acts to provide a determination on whether mutual recognition applies to the sale of goods in particular situations (recommendation 8.8):
  - For sellers or interested parties other than a regulator — this may mean adding a provision to the Acts requiring a decision to be made by a regulator before the need for a prosecution arises. This will allow a seller or interested party to apply for a review of the decision to an administrative appeals tribunal or similar body.
  - For a regulators — this would mean adding a provision that allows an administrative appeals tribunal or a similar body to give an advisory opinion on the matter referred to it. As an example, under s. 59 of the *Administrative Appeals Tribunal Act 1975* (Cwlth), the MR and TTMR Acts could provide for the Administrative Appeals Tribunal and the Trans-Tasman Occupations Tribunal to give such opinions, along with calling for evidence and holding hearings as appropriate.
- Changes to the underlying agreements are needed to ensure that jurisdictions may refer matters relating to all issues of significant dispute pertaining to goods to the appropriate Ministerial Council (recommendation 8.9).
- Amendments are needed pertaining to occupations:

  - Regulators and other interested parties should have wider access to Tribunals for declarations on equivalency of occupations and standards related to health, safety and the environment (recommendation 5.2).
  - The Acts should give Tribunals the power to give advisory opinions for occupations, similar to that suggested for goods (recommendation 5.3). A registration authority or other regulator may need to apply for an advisory opinion on whether mutual recognition applies to an applicant for registration in particular circumstances (finding 5.2).
- Although it is important that users of mutual recognition have avenues for legal redress, access to tribunals and courts is not an effective remedy for those situations that need immediate or even timely action. An alternative to legal action should also be provided for sellers, users and applicants for registration. Administrative remedies will require dispute resolution mechanisms and the development of a central point of contact for information about how and when mutual recognition applies to particular situations (chapters 5, 8 and 11).
- State TTMR Acts should be changed to simplify the amendment process by allowing the Commonwealth to amend the legislation if the jurisdictions approve those changes (recommendation 12.1).

12.3 Longer-term considerations

Possible extensions to the schemes

The terms of reference for this report include assessing whether there is room for improvement in the coverage of the mutual recognition schemes. There are some areas that could be regarded as 'natural' extensions to the existing schemes, while others are 'new' to the schemes. Both could further the objectives of mutual recognition, but the benefits and costs of making the changes are unclear. Chapter 9 and appendix F discuss areas where the Commission has formed a view, and those that need further study, respectively. Box 12.4 identifies the relevant findings and possible extensions. Progressing these extensions would involve gathering information on the issues identified, and on the costs and benefits of applying mutual recognition to the following areas:

- business licences that would be mutually recognised if approved for an individual (finding 9.3)
- cross-border and short-term service provision (finding 9.4)
- new types of registrations, including de facto and negative licensing (appendix F)

Box 12.4 **Possible future extensions**

Finding or issue	*Description of action*
Finding 9.3	Consider mutual recognition of business licences where a similar licence for an individual would be mutually recognised.
Finding 9.4	Consider conducting a stocktake of legislation that poses significant barriers to cross-border and short-term service provision and consider including mutual recognition of cross-border and short-term services in the schemes if justified by the stocktake results.
Appendix F issues	Consider impacts of including further types of registration and recognition of 'tools' that are part of a registered occupation.

- requirements related to a registered occupation that are separate authorisations for either 'tools' needed for carrying on the occupation, or discrete tasks or activities that form part of the occupation. An example of this is the firearms licence required for authorisation as a firearms instructor (appendix F).

The process for legislative changes for states' and territories' MR Acts

This chapter has discussed the legislative changes that will be needed if the recommendations in this report are implemented. The process for changing the schedules to the MR and TTMR Acts is for the jurisdictions to agree and to gazette the changes to the schedules. This process is described in other chapters (chapters 2, 7 and 8).

The implementation of some recommendations, however, will require amendments to the Acts, the MRA and the TTMRA. The Australian Department of Foreign Affairs and Trade and the New Zealand Ministry of Foreign Affairs and Trade will lead the process for amending the TTMRA and this is discussed in more detail in chapter 10.

The process for amending the mutual recognition legislation is the responsibility of the jurisdictions and it is cumbersome, particularly for the TTMR Acts of the states and territories. Since each jurisdiction amends its own legislation, changes to the Acts entails some or all of the states passing new legislation and, in all cases, involves approval from each jurisdiction (chapter 2).

If the mutual recognition schemes are to meet the needs of the jurisdictions effectively, there should be flexibility in the legislative process so that changes agreed by the jurisdictions can be made as efficiently as possible. All of the legislation needs to change in the same way, at the same time, for mutual recognition to work as intended.

The most common amendment process for most of the states' and territories' MR Acts is to refer the powers to amend the Acts to the Commonwealth, but reserve the right for states to approve the changes before they are made. This process ensures the right of every jurisdiction to participate in, and agree to, any change in the MR Acts but does not require the state parliament to pass legislation to make the change.

Changes to the TTMR Acts also require approval by all jurisdictions, but for most of the states there is no referred power to allow the Commonwealth to amend the legislation for all jurisdictions. This means that those states have to commit the additional time and resources to pass the legislation through their parliaments. If the objective is to ensure no changes can be made to legislation without state approval, this objective would still be met if the amendment power was referred to the Commonwealth. The additional requirement that each state pass identical amended legislation would appear unnecessary.

If the recommendations for legislative change in this report are implemented, there is an opportunity for states to reconsider the various mechanisms for amending the MR and TTMR Acts. Any changes designed to make the amendment process more efficient could occur at the same time as the other changes identified in this chapter.

RECOMMENDATION 12.1

The state and territory jurisdictions should consider ways to make amending the mutual recognition legislation more flexible. The legislative mechanisms to amend the state Mutual Recognition Acts and the Trans-Tasman Mutual Recognition Acts could allow the Commonwealth to amend the legislation with approval from the jurisdictions.

A List of submissions, visits and consultations

Table A.1 **List of submissions**

Individual or organisation[a]	*Submission number*
Australian Medical Council	37
Accord Australasia	39, DR92
ACT Health Registration Boards	44
Administrative Appeals Tribunal	DR95
Air Conditioning and Mechanical Contractors Association	30
Architects Accreditation Council of Australia	11
Architects Board of Western Australia	12
Australasian Teacher Regulatory Authorities	31
Australian Communications and Media Authority	13, DR75
Australian Dental Association Inc	DR93
Australian Dental Council	DR91
Australian Institute of Architects	DR79
Australian Institute of Building Surveyors	DR80
Australian Institute of Conveyancers	21, DR84
Australian Nursing and Midwifery Council	17, DR65
Australian Osteopathic Association	15
Australian Property Institute	41, DR78#
Australian Quarantine and Inspection Service	DR83
Australian Self Medication Industry Association	DR60
Builders Registration Board of Western Australia	40
Cadbury Schweppes Pty Ltd	2, DR61
The Coles Group	46
Communications Electrical Plumbing Union (CEPU) Plumbing Division	43
Complementary Healthcare Council of Australia	33, DR69
Dental Council of New Zealand	48
Dental Technicians Registration Board of New South Wales	DR63
Department of Education, Employment & Workplace Relations (Australian Government)	57, DR90
Department of Environment Water Heritage and the Arts (Australian Government)	DR85
Department of Health – Western Australia	20
Department of Health & Ageing (Australian Government)	38, DR64
Department of Premier & Cabinet (Victorian Government)	DR96
Department of Treasury and Finance - Tasmania	34
Fisher & Paykel Appliances	54
ForestWorks	DR77

(Continued next page)

Table A.1 (continued)

Individual or organisation[a]	*Submission number*
Johnston, Adam	DR58
Institute of Patent and Trade Mark Attorneys	22
Land Valuers Licensing Board – Western Australia	45
Medical Council of New Zealand	DR67
Medical Practitioners Board of Victoria	28
Medical Technology Association of Australia	DR62
Ministry of Economic Development (New Zealand Government)	DR89
New South Wales Government	55
New South Wales Physiotherapists Registration Board	3
New Zealand Government	53
New Zealand Institute of Chartered Accountants	36, DR97
New Zealand Institute of Chartered Accountants - Sydney Branch	23
New Zealand Institute of Valuers	18, DR73
New Zealand Psychologists Board	25, DR71
New Zealand Retailers Association Inc	50
New Zealand Society of Physiotherapists	14
Nurses and Midwives Board of New South Wales	10
Nursing Council of New Zealand	51, DR74
Optometrists Association Australia	42
Osteopathic Society of New Zealand	9, DR86
Physiotherapists Registration Board of Western Australia	1
Physiotherapy Board of New Zealand	7, DR82
Plumbers, Gasfitters and Drainlayers Board	29, DR70
Plumbing Industry Advisory Council	49
Queensland College of Teachers	32
Queensland Government	52, DR66
Queensland Nursing Council	16
Real Estate Institute of Australia	8, DR87
Real Estate Institute of New Zealand	26, DR72
Royal Australasian College of Dental Surgeons	DR59
Royal Institution of Chartered Accountants	DR94
Settlement Agents Supervisory Board	5
Short, Leonie	DR68
Speech Pathology Australia	4
Stainless Tanks and Pressure Vessels Pty Ltd	27
Standards Australia and Standards New Zealand	47, DR88
Teachers Registration Board of South Australia	35
Valuers Registration Board of New Zealand	6, DR76
Valuers Registration Board of Queensland	19, DR81#
Veterinary Council of New Zealand	24

[a] An asterisk (*) indicates that the submission contains confidential material NOT available to the public. A hash (#) indicates that the submission includes attachments.

Table A.2 **List of visits and consultations**

Location/Interested parties

Canberra

Accord Australasia
Attorney-General's Department (Australian Government)
Australian Communications and Media Authority
Australian Nursing and Midwifery Council
Australian Property Institute
Australian Quarantine and Inspection Service
Australian Self Medication Industry Association
Biosecurity Australia
Chief Ministers Department (ACT Government)
COAG Secretariat
COAG Skills Recognition Taskforce
Communications Electrical Plumbing Union
Complementary Healthcare Council
Department of Finance and Deregulation (Australian Government)
Department of Foreign Affairs and Trade (Australian Government)
Department of Health and Ageing (Australian Government)
Department of Infrastructure, Transport, Regional Development and Local Government (Australian Government)
Department of Innovation, Industry, Science and Research (Australian Government)
Department of Premier and Cabinet (New South Wales Government)
Department of Premier and Cabinet (Victorian Government)
Department of Prime Minister and Cabinet (Australian Government)
Department of Resources, Energy and Tourism
Food Standards Australia New Zealand
Master Builders Australia
Medicines Australia
National Electrical Contractors Association
New South Wales Office of Fair Trading
Plumbing Trade Employees Union
Queensland College of Teachers
Queensland Treasury
Real Estate Institute of Australia
Royal Australian Institute of Architects
Royal Institute of Chartered Surveyors
Therapeutic Goods Administration
Valuers Registration Board of Queensland
Wilkins, Roger

Sydney

Administrative Appeals Tribunal
Australian Osteopathic Association
COAG Cross-Jurisdictional Review Forum (CJRF)
Department of Premier and Cabinet (New South Wales Government)

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Table A.2 (continued)

Location/Interested parties

Sydney (continued)
Ministry of Economic Development (New Zealand Government)
National Industrial Chemicals Notification and Assessment Scheme
New South Wales Bar Association
New South Wales Office of Fair Trading

Melbourne
Australian Chamber of Commerce and Industry
COAG Skills Recognition Steering Committee
Consumer Affairs Victoria
Department of Health and Ageing (Australian Government)
Department of Premier and Cabinet (New South Wales Government)
Department of Premier and Cabinet (Victorian Government)
Department of Treasury (Victorian Government)
Ergas, Professor Henry
Lloyd, Professor Peter
Ministry of Economic Development (New Zealand Government)
National Electrical and Communications Association
The Coles Group
Victorian Business Licensing Authority

New Zealand
Australian High Commission
Dental Council of New Zealand
Employers and Manufacturers Association
Energy Safety (New Zealand Government)
Environment and Risk Management Authority (New Zealand Government)
Fisher & Paykel Appliances
Gas Association of New Zealand Inc
Goddard, David
Immigration Advisers Authority
International Accreditation New Zealand
Land Information New Zealand
Master Plumbers, Gasfitters and Drainlayers
Ministry for the Environment (New Zealand Government)
Ministry of Agriculture and Forestry (New Zealand Government)
Minister of Commerce (New Zealand Government)
Ministry of Consumer Affairs (New Zealand Government)
Ministry of Economic Development (New Zealand Government)
Ministry of Foreign Affairs and Trade (New Zealand Government)
Ministry of Health (New Zealand Government)
Ministry of Justice
Ministry of Transport (New Zealand Government)
New Zealand Council of Legal Education

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Table A.2 (continued)

Location/Interested parties
New Zealand (continued)
New Zealand Council of Trade Unions
New Zealand Food Safety Authority
New Zealand Institute of Chartered Accountants
New Zealand Institute of Valuers
New Zealand Podiatrists Board
New Zealand Psychologists Board
New Zealand Retailers Association
New Zealand Society of Physiotherapists
New Zealand Treasury
Nova Gas
Nursing Council of New Zealand
Osteopathic Society of New Zealand
Physiotherapy Board of New Zealand
Radio Spectrum Management (New Zealand Government)
Real Estate Institute of New Zealand
Royal Institution of Chartered Surveyors
Standards New Zealand
Valuers Registration Board of New Zealand
Veterinary Council of New Zealand
Wellington Chamber of Commerce

Table A.3 **List of survey responses**

Organisation	*Jurisdiction*
Biosecurity Queensland	Qld
Business Licensing Authority	Vic
Chiropractors Registration Board	NSW
Dental Board of New South Wales	NSW
Dental Council of New Zealand	NZ
Dental Prosthesists Registration Board of Tasmania	Tas
Dental Technicians Registration Board	NSW
Department for Transport, Energy and Infrastructure	SA
Department of Consumer and Employment Protection (Energy Safety)	WA
Department of Employment and Industrial Relations	Qld
Department of Health and Families	NT

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Table A.3 (continued)

Organisation	*Jurisdiction*
Department of Justice (Private Investigator and Security Guard Licensing)	NZ
Department of Justice, Licensing, Regulation and Alcohol Strategy	NT
Department of Mines and Energy	Qld
Department of Primary Industries and Water	Tas
Department of Racing Gaming and Liquor	WA
Department of Regional Development, Primary Industry, Fisheries and Resources	NT
Energy Safe Victoria	Vic
Health Professions Licensing Authority	NT
HLB Mann Judd	WA
Immigration Advisers Authority	NZ
Institution of Surveyors SA Division	SA
Law Society of New South Wales	NSW
Medical Board of Queensland	Qld
Medical Board of South Australia	SA
Medical Council of New Zealand	NZ
Medical Radiation Practitioners Board of Victoria	Vic
Midwifery Council of New Zealand	NZ
New South Wales Maritime	NSW
New Zealand Psychologists Board	NZ
New Zealand Teachers Council	NZ
Northern Territory Architects Board	NT
Northern Territory Police Force (Firearms Policy and Records Unit)	NT
Nurses and Midwives Board of New South Wales	NSW
Nurses and Midwives Board of Western Australia	NT
Nursing Board of Tasmania	Tas
Office of Consumer and Business Affairs	SA
Office of Liquor, Gaming and Racing	Qld
Office of the Health Practitioner Registration Boards	Qld
Office of Fair Trading (Business Licensing)	NSW
Optical Dispensers Licensing Board of New South Wales	NSW
Optometrists Registration Board	NSW
Optometrists Registration Board of Victoria	Vic
Osteopaths Registration Board of Victoria	Vic
Pharmacy Board of Victoria	Vic
Physiotherapists Registration Board of New South Wales	NSW
Physiotherapists Registration Board of Victoria	Vic
Physiotherapy Board of New Zealand	NZ
Physiotherapy Board of South Australia	SA
Planning in South Australia (South Australian Government)	SA
Plumbers Licensing Board	WA
Plumbers, Gasfitters and Drainlayers Board	NZ
Podiatrists Registration Board	NSW
Primary Industries and Resources – South Australia	SA

(Continued next page)

Table A.3 (continued)

Organisation	*Jurisdiction*
Property Agents Board	Tas
Psychologists Registration Board of New South Wales	NSW
Psychologists Registration Board of Victoria	Vic
Queensland College of Teachers	Qld
South Australian Registration Boards	SA
Supreme Court of New South Wales	NSW
Surveyors Board of Queensland	Qld
Surveyors Board of the Northern Territory	NT
Surveyors Registration Board of Victoria	Vic
Valuers Registration Board of Queensland	Qld
Veterinary Board of Tasmania	Tas
Veterinary Board of the Northern Territory	NT
Veterinary Council of New Zealand	NZ
Victorian Institute of Teaching	Vic
Wilson Management and Administration Pty Ltd	Tas
Workplace Standards Tasmania	Tas

B Legal advice

The Commission sought legal advice from: the Australian Government Solicitor (AGS) in relation to the Mutual Recognition Act 1992 (Cwlth) *and the Trans-Tasman Mutual Recognition Act 1997* (Cwlth); *and from New Zealand Crown Law (Crown Law)*[1] *in relation to the Mutual Recognition Act 1992* (NZ)*. The Commission asked a series of questions related to issues raised by participants. The advice was requested for the purposes of this review only and is not intended to contribute advice about particular circumstances or for particular stakeholders. It is also important to note that lawyers may give advice on the interpretation of statutes, but the court is the final arbitrator of what legislation means and how it applies in particular circumstances.*

Part 1 of this appendix includes the questions asked by the Commission and the advice given by the AGS. Part 2 includes the advice from Crown Law.

Part 1 — AGS response to request for advice on intra-Commonwealth and trans-Tasman mutual recognition schemes

1. Thank you for your letter of 2 September 2008 seeking advice concerning the operation of the intra-Commonwealth and trans-Tasman mutual recognition regimes as established under the *Mutual Recognition Act 1992* ('MRA') and the *Trans-Tasman Mutual Recognition Act 1997* ('TTMRA') (collectively, 'the mutual recognition scheme').
2. We note that the questions annexed to your letter of 2 September were revised in the document attached to your email of 3 September 2008. The question numbers and questions to which we refer below are derived from the latter document.

[1] The New Zealand Ministry of Economic Development and Ministry of Foreign Affairs and Trade coordinated the request for legal advice in New Zealand.

3. To avoid repetition, references are made to the relevant provisions of the MRA, with the relevant provision of the TTMRA cited in a footnote where necessary.

Background

4. The following background is derived from the section headed 'Background' in the document attached to your email of 3 September.

5. The MRA is the Commonwealth legislation that implements the *Agreement between the Commonwealth of Australia, the State of New South Wales, the State of Victoria, the State of Western Australia, the State of South Australia, the State of Tasmania, the Australian Capital Territory, and the Northern Territory of Australia, Relating to Mutual Recognition* ('MR Agreement'). As parties to the MR Agreement, each State enacted legislation referring powers to the Commonwealth Parliament under s 51(xxxvii) of the Constitution to enact the MRA.

6. The TTMRA is the Commonwealth legislation that implements the *Arrangement between the Australian Parties: the Commonwealth of Australia; the State of New South Wales; the State of Victoria; the State of Western Australia; the State of South Australia; the State of Tasmania; the Australian Capital Territory; the Northern Territory of Australia; and New Zealand, Relating to Trans-Tasman Mutual Recognition* ('TTMR Arrangement'). As for the MRA, the States enacted legislation referring powers to the Commonwealth Parliament under s 51(xxxvii) of the Constitution to enact the TTMRA. New Zealand has its own *Trans-Tasman Mutual Recognition Act 1997* ('NZ TTMRA').

7. The legislation and agreements that make up the mutual recognition arrangements being reviewed by the Productivity Commission include:

   – the MR Agreement

   – the legislation that implements the MR Agreement including the MRA and each State and Territory Mutual Recognition Act

   – the TTMR Arrangement

   – the TTMRA, the NZ TTMRA and each State and Territory Trans-Tasman Mutual Recognition Act.

8. The first review of the scheme was carried out in 1998 as provided for in Part VII the MR Agreement. Part XII of the TTMR Arrangement subsequently established five yearly reviews of both the MRA and the TTMRA schemes.

The Productivity Commission was commissioned to do the 2003 review and is now undertaking a further review.

9. The two previous reviews and the initial findings of the current review suggest that parts of the MRA, the NZ TTMRA and the TTMRA need to be clarified, either by legislative change or by better information about the interpretation of the Acts. The parts of these Acts that are of greatest concern to submitters and regulators are reflected in the questions below.

Questions and short answers

10. Your questions, and our short answers, are as follows:

Q3 *Does the 'registration' required by or under legislation for a particular occupation mean that there must also be a legislative requirement for a formal register or list of persons authorised to carry out the occupation?*

A3 No.

Q4 *Under what circumstances can new legislative regimes for goods that represent health and safety risks or that harmonise business licences give rise to new occupations that fall under the MRA and TTMRA?*

A4 In our view, wherever a legislative regime requires persons to hold a qualification as a condition of doing some kind of work, that regime would generate an occupation capable of falling within the mutual recognition principle, providing that the work is capable of being regarded as an 'occupation, trade, profession or calling'.

Q5(a) *Are issues of local or specialist knowledge or language requirements able to be included as conditions?*

A5(a) Probably not, although the Acts are ambiguous. In our view, legislative amendment to eliminate this ambiguity should be considered.

Q5(c) *Is the second jurisdiction allowed to re-check or audit whether the applicant actually met the requirements in the first jurisdiction?*

A5(c) Yes, but failure to meet such a requirement is not itself a valid basis for refusing to register a person in the second jurisdiction.

Q5(d) *If a person who is being investigated gives undertakings to the first jurisdiction where he or she is registered, may the undertakings be imposed as conditions on registration in a second jurisdiction?*

A5(d) Yes, provided the undertakings are legally enforceable.

Q6 *Clarification is sought in relation to on-going requirements that may be imposed on persons registered under mutual recognition. In particular, are on-going conditions or requirements for further study and upgrading of professional skills allowed?*

A6 Probably not, although the Acts are ambiguous.

Q8 *What characteristics take 'business' licences outside the mutual recognition schemes as they relate to occupations? Note the TTMRA uses the term in Schedule 1(1)(c) and (5) but the exclusion relates only to taxes and duties and the NZ Act does not refer to business licences.*

A8(a) A licensing regime under which licences to perform work may be granted to individuals according to conditions at least one of which relates to 'the attainment or possession of some qualification' gives rise to an 'occupation', even where the other licence conditions relate to 'business' matters.

Q8(c) *Are there models of co-regulation of occupations that will be registered occupations under the MRA and TTMRA? For example, could an occupation be a registered occupation for the purposes of the Acts if legislation required that individuals must be members of a statutory body before being authorised to carry out an occupation (for example as a Chartered Accountant or Registered Engineer)?*

A8(c) Yes.

Q8(d) *Could an occupation be a registered occupation for the purposes of the MRA and TTMRA if legislation required that individuals must be members of a professional body before being authorised to carry out an occupation, but the professional body is not a statutory body?*

A8(d) Yes.

Reasons for advice

Question 3 — Does the 'registration' required by or under legislation for a particular occupation mean that there must also be a legislative requirement for a formal register or list of persons authorised to carry out the occupation?

11. The mutual recognition principle for occupations entitles a person who is 'registered' in one jurisdiction ('the first jurisdiction') in respect of a particular occupation to be registered in another jurisdiction ('the second jurisdiction') for the equivalent occupation, provided the person notifies the local registration authority of the second jurisdiction of certain prescribed matters.[2]

12. 'Registration' is defined in the MRA and the TTMRA[3] as follows:

> ***registration*** includes the 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.

13. The essence of this very broad definition is the notion of legal authorisation to carry on a particular occupation. Hence, to be 'registered' for the purposes of the mutual recognition scheme is to be authorised to carry on an occupation.

14. Such authorisation need not, in our view, entail the operation of a formal register containing the names of all authorised persons, although it probably does require the keeping or issuing of a record of the authorisation. The requirement for a record would be satisfied by the issue of a licence by the registration authority, and probably also by the stamping of a document to be held by the authorised person. It is unlikely, however, that there could be a registration in the relevant sense without the creation of any record of the authority's decision to authorise. Accordingly, provided there is a record of the authorisation, a person who is authorised to carry on an occupation in a participating jurisdiction is entitled to the benefit of the mutual recognition principle under the MRA and the TTMRA even if no register of authorised practitioners of that occupation is kept in that jurisdiction.

Question 4 *— Under what circumstances can new legislative regimes for goods that represent health and safety risks or that harmonise business licences give rise to new occupations that fall under the MR Act and TTMR Act?*

Context — Some business licences include separate requirements for qualifications for employees or persons carrying out activities related to the licence. Note also that MR Act section 18(2) and TTMR Act section 17(2) relate to registration within other registration regimes. As an Australian example, State liquor licences require

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2 MRA, s 17; TTMRA, s 16.

3 MRA and TTMRA, s 4.

employees (and all other individuals) who sell alcohol to obtain a Responsible Sale of Alcohol (RSA) certificate. Although these people are registered and approved under legislation to sell alcohol, the approvals are not widely recognised between jurisdictions. The regulations related to the RSA may form a useful example for focussing your advice. The relevant regulations are regulations 39-44 in the New South Wales Liquor Regulations 2008 and regulations 14AD and 14AG in the Western Australia Liquor Control Regulations 1989.

15. 'Occupation' is defined in the MRA and the TTMRA4 as follows:

> ***occupation*** means an occupation, trade, profession or calling of any kind that may be carried on only by registered persons, where registration is wholly or partly dependent on the attainment or possession of some qualification (for example, training, education, examination, experience, character or being fit and proper), and includes a specialisation in any of the above in which registration may be granted.

16. This definition extends beyond the traditional professions to include 'an occupation … or calling of any kind' carried on by 'registered persons' for which some form of qualification is required. As noted above, the definition of registration encompasses any form of legal authorisation.

17. While work cannot be an 'occupation' unless it is subject to legal authorisation, work does not constitute an occupation unless it otherwise constitutes 'an occupation, trade, profession or calling'. The dictionary meaning of 'occupation' is 'one's habitual employment; business, trade or calling'.[5] The expressions 'trade', 'profession' or 'calling' also connote work performed on an ongoing or habitual basis. It does not matter whether or not the work fits into a pre-existing and recognised category (such as 'doctor' or 'electrician'), although the reference in the definition to 'an occupation … or calling' suggests that there must at least be some particular function or category by reference to which registration is granted. It also does not matter that the work is described in general terms, such as 'food handler'.

18. However, the performance of a discrete individual task, such as signing a certificate or activating a machine, may not be an occupation in the relevant sense, particularly if the activity is performed irregularly.

19. Health and safety legislation or business licence legislation may well impose an authorisation requirement on an activity that is otherwise an 'occupation, trade, profession or calling', and make that activity an 'occupation' within the meaning of the MRA and TTMRA. However, if the activity is in the nature of a discrete task it may not be an occupation, even if it cannot be performed

4 MRA and TTMRA, s 4.

5 Macquarie Dictionary, online edition.

without a legal authorisation. If an individual task is required to be performed regularly, it may become difficult to tell whether it should be treated as an occupation rather than a series of tasks. It would be necessary to consider the facts in each case. By way of example, a Justice of the Peace who occasionally witnesses or certifies the execution of documents is probably not carrying on an occupation in doing so. On the other hand, a Notary Public, a substantial proportion of whose daily work consists of witnessing or certifying documents, probably would. Similarly, where the authorisation relates only to the activation of a machine, it is unlikely to constitute an occupation, unless the person authorised actually spends the bulk of his or her working time activating machines. To take the example of a forklift driver, if the driver's authorisation relates only to switching on the forklift, then there is no occupation in the relevant sense, because the switching on of the forklift comprises only a small part of driver's work. If the authorisation includes switching on the forklift along with the other activities that comprise the driver's work, then in our view there would be an occupation.

20. Accordingly, we consider that, wherever a legislative regime requires a person to hold a qualification as a condition of doing some kind of work, and that work constitutes 'an occupation, trade, profession or calling', then the work would amount to an 'occupation' for the purposes of the mutual recognition scheme.

21. In the 'context' part of this question you raise the case of a person required under State regulations to hold a Responsible Sale of Alcohol ('RSA') certificate. To take the NSW example, the *Liquor Regulation 2008* (NSW) ('the Liquor Regulation') (reg 41) provides:

> A staff member of licensed premises must not sell, supply or serve liquor by retail on the premises unless the staff member holds a recognised RSA certificate.

22. In our view, work consisting of the sale, supply or service of liquor constitutes an 'occupation, trade, profession or calling'. There is a legislative requirement (i.e. the Liquor Regulation) that this work may only be carried on by registered persons (i.e. those who hold RSA certificates). Accordingly, we consider that people engaged in the sale, supply or service of liquor in NSW are carrying on an occupation for the purposes of the mutual recognition regime. The relevant 'local registration authority' in this case is the NSW Casino, Liquor and Gaming Control Authority ('the Authority'). 'Local registration authority' is defined in the MRA[6] as follows:

6 In s 4; TTMRA, s 4.

local registration authority of a State for an occupation means the person or authority in the State having the function conferred by legislation of registering persons in connection with their carrying on that occupation in the State.

23. Regulation 39 of the Liquor Regulation states that RSA certificates are granted 'by an approved training provider, on behalf of the Authority'. Accordingly, the Authority has the function of registering persons to carry on the occupation in NSW.

Question 5(a) *— Are issues of local or specialist knowledge or language requirements able to be included as conditions for registration?*

Context — There are some professions that have recognised that the TTMR Act does not allow the registration of a person to be conditional on additional qualifications. Examples of this in New Zealand include: the legal profession recognises that even though New Zealand and Australian laws are different mutual recognition applies; Australian engineers/architects practice in New Zealand without additional requirements relating to New Zealand being more earthquake prone than Australia. It would be useful if your advice on this question considers at least one specific example of what might be specialist knowledge to assist your discussion. The MR Act and TTMR Act Users' Guide (Users Guide) includes an example on page 12 that may be useful.

24. The local registration authority in the second jurisdiction may impose the following types of conditions on the registration of a person under the mutual recognition scheme:

- conditions that apply to the person's registration in the first jurisdiction (MRA, s 20(5); TTMRA, s 19(5));
- conditions necessary to achieve equivalence between occupations in the two jurisdictions (MRA, ss 20(5) and 29(2); TTMRA, ss 19(5) and 28(2)) ('occupational equivalence conditions'); and
- other conditions, provided they are not more onerous than would be imposed in similar circumstances (having regard to the applicant's qualifications and experience) if registration were effected other than under the mutual recognition scheme (MRA, s 20(5); TTMRA, s 19(5)) ('general conditions').

25. Conditions that apply to the person's registration in the first jurisdiction have no bearing on the present question. The extent to which the other types of conditions allow for the imposition of requirements relating to local or specialist knowledge or language proficiency is considered below.

Occupational equivalence conditions

26. Can a registration authority impose an occupational equivalence condition that requires a person to demonstrate local or specialist knowledge or language proficiency ('a local or specialist knowledge requirement')? In our view, although there is a reasonable contrary argument, the authorities suggest that such a condition could not be imposed.

27. The mutual recognition principle only operates where registration is sought 'for the equivalent occupation'. Section 29 of the MRA[7] sets out the general principles for determining whether occupations are equivalent. In substance, it provides that equivalence is to be determined by reference to the 'activities authorised to be carried out under the registration'. If the authorised activities are substantially the same, there is equivalence. If they are not substantially the same, s 29(2) of the MRA[8] provides that conditions may be imposed 'so as to achieve equivalence between occupations'. A condition imposed in order to achieve equivalence between occupations is logically anterior to the existence of an equivalent occupation. Accordingly, such a condition is not subject either to the mutual recognition principle or to the exception to that principle.[9]

28. If the occupation in the second jurisdiction encompasses more authorised activities than the occupation in the first jurisdiction, then, theoretically, the imposition of conditions may address this difference in either of two ways. First, the conditions may restrict the range of activities that an applicant may undertake in the second jurisdiction so that they conform to the activities for which the applicant has authorisation under his or her registration in the first jurisdiction. In our view, conditions of this sort may be validly imposed under s 29(2) of the MRA.

29. Alternatively, equivalence could be achieved by imposing conditions that make registration in the second jurisdiction contingent on the applicant possessing qualifications or experience that demonstrate competence in the relevant additional activities. To take the example of pest controllers to which you refer in the 'context' part of this question, equivalence could be achieved by imposing a requirement on applicants from States with cooler climates to show that they have qualifications in, or experience with, the use of chemicals that control termites.

30. The words of s 29(2) are, *prima facie*, broad enough to encompass this approach. However, the case law suggests that the power to impose conditions

7 TTMRA, s 28.

8 TTMRA, s 28(2).

9 MRA, s 17(2); TTMRA, s 16(2).

of equivalence is a power to specify the activities that may be carried out under the registration.[10] AGS has generally taken the view that a condition relating to qualifications or experience probably cannot be described as a condition specifying the activities that may carried out under the registration, and, therefore, that such a condition would appear to be precluded by the authorities. Nevertheless, given the open-ended wording of s 29(2), we consider that there remains at least a reasonable argument that conditions of this sort may be imposed. Should that argument be accepted, conditions imposing a local or specialist knowledge requirement could be imposed provided they are directed towards achieving equivalence between occupations.

31. In light of the discussion above, we consider that the proper scope of the power to impose occupational equivalence conditions under s 29 of the MRA[11] remains unclear, although on the present state of the authorities a narrower construction (that would preclude the imposition of local or specialist knowledge requirements) should probably be preferred. In the absence of a clear pronouncement by an appellate court, this ambiguity can only be resolved by amending the legislation. In our view, legislative amendment should be considered.

General conditions

32. Can a registration authority impose a general condition imposing a local or specialist knowledge requirement? In our view, the Acts provide no clear answer to this question, although the better view is probably that such a condition could not be validly imposed.

33. As noted above, the mutual recognition principle in s 17(1) of the MRA[12] entitles a person who is 'registered' in the first jurisdiction in respect of a particular occupation to be registered in the second jurisdiction for the equivalent occupation, provided the person notifies the local registration authority of the second jurisdiction of certain prescribed matters. On the other hand, s 20(5) of the MRA[13] allows the local registration authority to impose general conditions on registration, provided that they are not 'more onerous than would be imposed in similar circumstances (having regard to relevant

10 *Re Rowe and New South Wales Police Service* (1997) 47 ALD 442 at 444; *Board of Examiners under the Mines Safety & Inspection Act 1994 (WA) v Lawrence* (2000) 100 FCR 255 at 275-6 per French J.

11 TTMRA, s 28.

12 TTMRA, s 16(1).

13 TTMRA, s 19(5).

qualifications and experience)' if registration were effected other than under the mutual recognition scheme.[14] Both provisions are in Part 3 of the MRA/TTMRA and are expressed to the 'subject to this Part'.[15] It is, therefore, unclear which provision was intended to be paramount.

34. If a local or specialist knowledge requirement is a condition of registration for all persons carrying on the relevant occupation in the second jurisdiction, then the imposition of a condition requiring an applicant from another jurisdiction to meet that requirement would not be 'more onerous than would be imposed in similar circumstances ... if it were registration effected apart from this Part'. It could be argued, therefore, that s 20(5) operates as an exception to the mutual recognition principle that authorises the imposition of such a condition. Certainly, there is nothing in the wording of s 20(5) itself to suggest that the power to impose conditions is limited other than by the prohibition on discriminatory conditions.

35. Alternatively, it may be argued that the power to impose conditions is subject to the mutual recognition principle and its exceptions. Subsection 17(2) of the MRA[16] provides that laws regulating the manner of carrying on an occupation in the second jurisdiction apply, so long as those laws 'are not based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation'. Similar provision is included in s 20(4) in relation to continuance of registration in the second jurisdiction. Also, s 20(1) provides that a person is entitled to be registered in the second jurisdiction 'as if the law of [the second jurisdiction] expressly provided that registration in [the first jurisdiction] is a sufficient ground of entitlement to registration'. It can reasonably be argued that these provisions indicate that s 20(5) does not authorise the imposition of conditions which require a person to comply with any requirements that are additional to the requirements for registration in the first jurisdiction.

36. Assuming that ss 17(2), 20(4) and 20(1) do not have the effect of limiting the scope of s 20(5) in this way, there is a reasonable argument that the general principles of statutory interpretation would have that effect. A provision must be interpreted in its legislative context, and a construction that would promote the purpose or object underlying the Act must be preferred to a construction

14 MRA, s 20(5); TTMRA, s 19(5).

15 MRA, s 17(1) (mutual recognition principle) and s 20(6) (power to impose conditions); TTMRA, s 16(1) (mutual recognition principle) and s 19(6) (power to impose conditions).

16 TTMRA, s 16(2).

that would not promote that purpose or object.[17] Further, a statutory power must be exercised for the purpose for which it is conferred.

37. Section 3 of the MRA sets out the principal purpose of the Act, which is to enact legislation 'for the purpose of promoting the goal of freedom of movement of goods and service providers in a national market in Australia. Section 3 of the TTMRA provides that the Act's principal purpose is to enact legislation 'for the purpose of recognising within Australia regulatory standards adopted in NZ regarding goods and occupations'. These purposes are also reflected in the long titles of the MRA: 'An Act to provide for the recognition within each State and Territory of the Commonwealth of regulatory standards adopted elsewhere in Australia regarding goods and occupations'; and the TTMRA: 'an Act to provide for the recognition within Australia of regulatory standards adopted in New Zealand regarding goods and occupations'.

38. The effect of mutual recognition schemes in general was described by French J in *Board of Examiners under the Mines Safety & Inspection Act 1994 (WA) v Lawrence* (2000) 100 FCR 255 at 257 ('*Lawrence*'), in these terms:

> ... mutual recognition schemes ... involve an effective transfer, at least in part, of regulatory authority from one jurisdiction, the home, to another, the host. The recognition they require is of the equivalence or compatibility or, at least acceptability, of the home jurisdiction's regulatory system. Mutuality mandates reciprocal and simultaneous reallocation of authority. Mutual recognition schemes involve the reconciliation of trade and regulatory objectives ...

39. In light of the above, a more restrictive construction of the power to impose conditions under s 20(5) is arguably more consistent with the purposes of the mutual recognition scheme.

40. However, although this construction is probably more likely to be accepted by a court, the Acts' failure to state clearly whether the power to impose conditions is subject to the mutual recognition principle, or vice versa, makes it difficult to express a firm conclusion. This is clearly a matter with potentially significant implications for the operation of the mutual recognition scheme. In our view, consideration ought to be given to amending the MRA and the TTMRA to eliminate this ambiguity.

Question 5(c) *— Is the second jurisdiction allowed to re-check or audit whether the applicant actually met the requirements in the first jurisdiction?*

Context — Although some jurisdictions recognise that they cannot impose additional requirements on applicants for registration under the TTMR Act, they

17 See *Acts Interpretation Act 1901*, s 15AA.

would like to be able to be able to verify for themselves those things that the first jurisdiction required for registration. In particular, some jurisdictions have requirements that the person has no criminal convictions but they accept a self declaration as evidence. A second jurisdiction may want to confirm the requirement by doing a police check.

41. The mutual recognition regime places no restrictions on the ability of the second jurisdiction to *check or investigate* whether an applicant has met the requirements of registration in the first jurisdiction.[18] However, should the registration authority of the second jurisdiction reach the view that an applicant has not met the requirements of registration in the first jurisdiction, then, unless the non-compliance goes to the accuracy of one of the matters to be dealt with in the notice under s 19(2)[19] (and hence to the grounds on which the authority may refuse registration under s 23(1)[20]), the non-compliance cannot be relied on as a basis for refusing to grant registration to that person in the second jurisdiction.

42. The second jurisdiction's inability to 'look behind' the first jurisdiction's registration was confirmed by French J in *Lawrence* (at 281-2):

> It is registration for an occupation in the State of original qualification that is the subject of recognition, not examination for that occupation. The objective of mutual recognition is to allow the legal entitlement to carry on an occupation in one State to be recognised and the like legal entitlement for an equivalent occupation conferred in the second State. To say this is to simply restate the effect of the mutual recognition principle in s 17:
>
> > " ... a person who is registered in the first State for an occupation is, by this Act, entitled after notifying the local registration authority of the second State for the equivalent occupation:
> >
> > (a) to be registered in the second State for the equivalent occupation;
>
> …
>
> It is perhaps useful to refer back to the Second Reading Speech which stated the guiding principle in relation to mutual recognition of occupational qualifications thus:
>
> > "If someone is assessed to be good enough to practise a profession or occupation in one State or Territory, then they should be able to do so

18 Indeed, s 19(h) of the MRA provides that an applicant must give consent to:

> the making of inquiries [sic] of, and the exchange of information with, the authorities of any [participating jurisdiction] regarding the person's activities in the relevant occupation or otherwise regarding matters relevant to the notice.

19 TTMRA, s 18(2).

20 TTMRA, s 22(1).

anywhere in Australia." (Australia, House of Representatives, *Debates* (1992), p 2433)

For occupations which are substantially the same it was said:

> "Local registration authorities will be required to accept the judgment of their interstate counterparts of a person's educational qualifications, experience, character or fitness to practice." (Australia, House of Representatives, *Debates* (1992), p 2433).

The underlying premise, it was acknowledged, is that "the existing regulatory arrangements of each State or Territory generally provide a satisfactory set of standards" (at 2433).

43. It follows that it is an essential feature of the mutual recognition regime that the second jurisdiction must accept the first jurisdiction's judgment that a person has satisfied the requirements for carrying on the relevant occupation. Neither the MRA nor the TTMRA provides any recourse if the second jurisdiction considers that the first jurisdiction 'got it wrong'.

Question 5(d) *— If a person who is being investigated gives undertakings to the first jurisdiction where he or she is registered, may the undertakings be imposed as conditions on registration in a second jurisdiction?*

Context — The MR Act and TTMR Act allow conditions imposed on a person in the first jurisdiction to be included in the second jurisdiction's registration. However, when a person is being investigated, some jurisdictions require undertakings from the person in relation to what activities can be carried out during the investigation. There are two types of questions that arise: one is about whether undertakings can be considered 'conditions'; and the other is about whether the undertakings or conditions from the registration in the first jurisdiction can be imposed by the second jurisdiction after the person is already registered in the second jurisdiction.

44. This question raises two issues: (a) whether undertakings given by a person being investigated constitute 'conditions' for the purposes of the mutual recognition scheme; and (b) whether undertakings/conditions connected with a person's registration in the first jurisdiction can be imposed by the second jurisdiction after the person has already been registered in the second jurisdiction.

45. We assume that a person 'being investigated' is either the subject of disciplinary (or criminal or civil) proceedings or that the investigation is made in anticipation of such proceedings.

Do undertakings given by a person being investigated constitute 'conditions' for the purposes of the mutual recognition scheme?

46. Section 33 of the MRA (s 32 of the TTMRA) relevantly provides:

> (1) If a person's registration in an occupation in a State:
>
> (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 another State is affected in the same way.
>
> …
>
> (4) This section has effect despite any other provisions of this Part.

47. 'Conditions' are defined in the MRA and the TTMRA[21] as follows:

> ***conditions***, when used in relation to occupations, means conditions, limitations or restrictions.

48. Where a person registered in respect of an occupation in a jurisdiction gives *binding* undertakings (we assume to the registration authority in that jurisdiction), and those undertakings limit or restrict any aspect of the person's entitlement to carry on the occupation in that jurisdiction, then, in our view, those undertakings constitute 'conditions' for the purposes of the mutual recognition scheme.

49. Accordingly, where a person gives binding undertakings 'in anticipation of criminal, civil or disciplinary proceedings', then that person's registration in the relevant jurisdiction is 'subject to a condition' for the purposes of s 33(1) of the MRA and s 32(1) of the TTMRA. This means that the person's registration in the second jurisdiction is 'affected in the same way', i.e. subject to the same undertakings.

50. Where the undertakings are *not binding*, in the sense that they are not legally enforceable, we consider that they are unlikely to constitute conditions. This is because, in our view, a 'limitation' or 'restriction' involves a legally enforceable curtailment of a person's scope for action.

21 MRA and TTMRA, s 4.

Can undertakings/conditions connected with a person's registration in the first jurisdiction be imposed by the second jurisdiction after the person has already been registered in the second jurisdiction?

51. The mutual recognition regime appears to draw a distinction between the initial registration of a person in the second jurisdiction, which may be the subject of conditions, and the continuance of that registration, which is subject to the law of the second jurisdiction.

52. Section 20 of the MRA (s 19 of the TTMRA) relevantly provides:

> (3) Once a person is registered on that ground [i.e. registration in the first jurisdiction], the entitlement to registration continues, whether or not registration (including any renewal of registration) ceases in the first State.
>
> (4) Continuance of registration is otherwise subject to the laws of the second State, to the extent to which those laws:
>
> (a) apply equally to all persons carrying on or seeking to carry on the occupation under the law of the second State; and
>
> (b) are not based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation.

53. The effect of this provision is, in our view, to place the terms on which a person *continues to be registered* in the second jurisdiction (as distinguished from the terms on which the person is registered *in the first place*) within the ambit of the laws of the second jurisdiction concerning the relevant occupation. This conclusion is consistent with the Explanatory Memorandum for the Mutual Recognition Bill,[22] which relevantly states:

> **Clause 20 - Entitlement to registration and continued registration**
>
> 21. The clause provides that once a person lodges a notice under clause 19 in the second State the person is entitled to be registered in the equivalent occupation and the entitlement continues (even if the registration in the first State ceases) so as to enable renewal of registration in the second State. *Continuance of registration is otherwise subject to the law of the second State.*
>
> (Emphasis added)

54. Subject to our observations below, the registration authority of the second jurisdiction loses the capacity to impose conditions on a person once registration in that jurisdiction has been granted. Any further restrictions or limitations on a person's entitlement to carry on the relevant occupation is a matter for the relevant law in that jurisdiction.

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[22] The Explanatory Memorandum for the Trans-Tasman Mutual Recognition Bill is in the same terms.

55. However, s 33 of the MRA[23] is expressly stated to have effect 'despite any other provisions of this Part'. 'This Part' is Part 3, which also includes s 20 of the MRA.[24] In our view, this means that s 33 operates as an exception to the general rule that continuance of a person's registration is subject to the law of the second jurisdiction. This conclusion is consistent with the Explanatory Memorandum for the Mutual Recognition Bill,[25] which relevantly states:

> **Clause 33 - Disciplinary action**
>
> 38. The clause provides that if a person's registration in an occupation in a State is cancelled or suspended, or subject to a condition, on disciplinary grounds or as a result of or in anticipation of criminal, civil or disciplinary proceedings, the person's registration in an equivalent occupation in another State is affected in the same way (whether or not the registration in the other State was effected under the proposed Act). The local registration authority of the other State may in such cases reinstate the registration or waive conditions if it thinks it appropriate.

56. It is also consistent with paragraph 5.2.3 of the TTMR Arrangement, which states:

> 5.2.3 — The Local Registration Authority may suspend or terminate Registration if it becomes aware that a person has had his or her Registration suspended or terminated in any jurisdiction or is otherwise personally prohibited from practising as a result of criminal, civil or disciplinary proceedings in any jurisdiction.

57. Although paragraph 5.2.3 talks of a person being prohibited from practising as a result of proceedings (as opposed to having given undertakings in anticipation of such proceedings), it is clear that the local registration authority may take such action *after* the relevant person has been registered in that jurisdiction.

58. The effect of the s 33 of the MRA was considered in *Schulz v Medical Board of Queensland* [2001] FCA 1771. Kiefel J held that s 33(1) of the MRA provides for the automatic imposition of the same condition, or other disciplinary action, where a person's registration has been rendered subject to that condition in another State. Clearly, this includes circumstances where the condition is imposed after registration in the second State.

59. Accordingly, we consider that binding undertakings given 'in anticipation of criminal, civil or disciplinary proceedings' in the first jurisdiction

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23 TTMRA, s 32.

24 TTMRA, s 19.

25 The Explanatory Memorandum for the Trans-Tasman Mutual Recognition Bill is in the same terms.

automatically apply to the person's registration in the second jurisdiction even where that person has already been registered in the second jurisdiction.

Question 6 *— Clarification is sought in relation to on-going requirements that may be imposed on persons registered under mutual recognition. In particular, are on-going conditions or requirements for further study and upgrading of professional skills allowed?*

Context — MR Act section 20 and TTMR Act section 19 may limit on-going requirements for training and further experience. Some jurisdictions question whether they can require persons registered under mutual recognition to accumulate further qualifications even if they require all other registered person to do so.

60. In our view, a registration authority may only impose conditions at the time of registration. We base this conclusion on the words of s 20(5),[26] which speaks of a registration authority imposing conditions 'on registration', and also on s 20(4),[27] which provides that 'continuance of registration is otherwise subject to the laws of the second' jurisdiction. The effect of these provisions, taken together with the balance of s 20, is to establish a distinction between initial registration in the second jurisdiction (at which point conditions may be applied by the registration authority) and the continuation of registration in the second jurisdiction (which is governed by the laws of that jurisdiction).

61. This means that if a registration authority wanted to impose ongoing conditions, including conditions relating to further study or upgrading of professional skills, it could only do so at the time of registration. Such a condition need not entail an immediate obligation to do something. For example, it could simply take the form of a requirement to comply with the continuing education requirements prescribed by the relevant professional body from time to time.

62. However, in our view, such a condition would be problematic for the same reasons described in our answer to question 5(a) above concerning local or specialist knowledge requirements. In particular, a condition of this sort would be vulnerable to the argument that it constitutes a requirement 'based on the attainment or possession or some qualification or experience relating to fitness to carry on the occupation' as per s 17(2)(b)[28]. Moreover, even if such a requirement were imposed by a law of the second jurisdiction rather than under a condition, that requirement would be vulnerable to the same argument,

26 TTMRA, s 19(5).

27 TTMRA, s 19(4).

28 TTMRA, s 16(2)(b).

albeit based on the prohibition in s 20(4)(b).[29] Accordingly, we consider that there is a substantial risk that an ongoing requirement of the sort contemplated by your question would be invalid, whether imposed under a condition or by a law of the second jurisdiction.

Question 8(a) *— What characteristics take 'business' licences outside the mutual recognition schemes as they relate to occupations?*

Context — It is common practice that if a licence or registration is called or considered a 'business licence', it is not considered to be a registered occupation that falls under the mutual recognition regime. Some legislative authorisations will authorise corporations and firms as well as individuals to carry out certain activities. Other legislative authorisations are intended to regulate the manner of carrying out the activities. Your advice is sought on whether either or both of these elements are decisive in determining if the activities licensed can be considered a registered occupation? If registration to carry on activities can authorise both individuals and businesses, does this mean the individuals registered to carry on the activities do not fall under the Acts simply because there are also businesses registered?

Consider a hypothetical example where one jurisdiction requires an individual to obtain a particular training certificate to be licensed as an electrician (electrician licence). This type of licence is widely understood to be a registered occupation. In this example there is another type of licence relevant. A licensed electrician who wants to contract with a client and work on his or her own behalf on a commercial building doing electrical work valued at over $50,000 must have a contractor licence in the jurisdiction where the work is taking place (contractor licence). Some of the contractor licence requirements relate to manner of carrying out the activities and some relate to qualifications such as a project management course. This type of licence is commonly understood to be a business licence and therefore exempt from mutual recognition. Your advice is sought on several issues related to this example.

Assume in the first case, that the legislation was such that the licence was only related to and required for individuals, would the contractor's licence be a registered occupation under the TTMR Act?

Assume in the second case, that the legislation changed to also require a contractor licence for businesses entities as well as for individuals. The licence requirement for project management training in the case of a business would relate to the person managing the work on behalf of the business. Does the fact that the requirement for a licence extends to both individuals and firms mean that an individual with a contractor licence is not covered under the TTMR Act?

[29] TTMRA, s 19(4)(b).

63. We have framed our answer to this question by reference to the two scenarios described in the 'context' part of the question.

Scenario 1

64. It is an essential element of the definition of 'occupation' that registration to carry on the relevant type of work is 'wholly or partly dependent on the attainment or possession of some qualification'. In our view, where licences to perform work may be granted to individuals according to conditions at least one of which relates to 'the attainment or possession of some qualification' then that work, providing it amounts to an 'occupation, trade, profession or calling' would constitute an occupation for the purposes of the mutual recognition regime, even where the other licence conditions do not relate to 'the attainment or possession of some qualification'.

65. In the present scenario, the contractor's licensing regime imposes various conditions on the granting of a licence to perform electrical work valued at over a certain amount. In our view, the performance of such work is 'an occupation, trade profession or calling' of some kind. One of those conditions requires applicants to have completed a project management course. This means that the granting of a licence (i.e. 'registration') to carry on 'an occupation, trade profession or calling' is partly dependent on the attainment or possession of some qualification (i.e. the project management course). Accordingly, we consider that such a licensing regime would relate to work that constitutes an occupation for the purposes of the mutual recognition scheme.

Scenario 2

66. In our view, the fact that a licensing regime applies to both individuals and corporations does not place it beyond the scope of the mutual recognition scheme. The starting point for any analysis must be whether there is an 'occupation' that can be carried on by an individual. If so, an individual registered to carry on that occupation is entitled to the benefit of the mutual recognition principle, regardless of whether or not corporations may also be registered to carry on the relevant occupation.[30]

Question 8(c) *— Are there models of co-regulation of occupations that will be registered occupations under the MR Act and TTMR Act? For example, could an occupation be a registered occupation for the purposes of the Acts if legislation*

[30] This is implicit in the Administrative Appeals Tribunal's decision in *Re Stott and Police Service (NSW)* (2005) 41 AAR 464.

required that individuals must be members of a statutory body before being authorised to carry out an occupation (for example as a Chartered Accountant or Registered Engineer)?

Context — Assume a statutory body acts as the registration authority that approves individuals for membership based on qualifications and other legislative criteria. There is a New Zealand example related to accountants and auditors. The references to the legislation are for your information only, in case you are interested in seeing the provisions. The Institute of Chartered Accountants of New Zealand Act 1996 (ICANZ Act) establishes ICANZ as a statutory body. To describe him/herself as an accountant or auditor in New Zealand, a person must meet minimum criteria as set out in legislation. To be chartered accountant, an accountant or auditor must be approved as a member of ICANZ. For the purposes of this example, assume this means ICANZ is the registration authority for chartered accountants and that chartered accountancy is a registered occupation.

In addition, New Zealand also has requirements under legislation that authorise only certain people to act as 'auditors' for companies and for issuers of securities. One category of persons qualified to be auditors is chartered accountants (i.e. member of ICANZ). The Registrar of Companies and the Securities Commission are therefore the regulators related to auditors for companies and issuers but they rely on ICANZ to ensure the auditors (i.e. chartered accountants) meet the criteria. Does a 'co-regulation' model such as this affect whether 'auditor' is a registered occupation?

67. An occupation entails the doing of some activity that 'may only be carried on by registered persons'. The definition of 'registration' includes 'any … form of authorisation … required by or under legislation for carrying on an occupation'. The definition does not stipulate that authorisation may only be granted by a particular entity or by one entity alone. In our view, the definition is broad enough to include a situation where registration to carry on an occupation involves authorisation by one body, and the granting of an authorisation by that body is partly or wholly conditional on authorisation by another body. In these circumstances registration is still required to carry on the occupation. The involvement of multiple entities in the process of authorisation does not alter this.

68. However, the definition of registration implies that there be some positive approval or authorisation (and a record of such). Legislation merely prohibiting a person from performing some activity unless they possess a particular qualification is probably insufficient to constitute 'authorisation … required by or under legislation' in the relevant sense.

69. In the example you give, the fact that the Registrar of Companies and the Securities Commission rely on the Institute of Chartered Accountants to

determine whether a person is a chartered accountant (and, therefore, possesses the qualifications necessary to be an auditor) does not detract from the need for authorisation in order to carry on the occupation of auditor. Provided an entity is required under statute actively to approve or authorise a person to perform the activity (as opposed merely to being able to prevent a person performing the activity if the person has not met a qualification requirement), we can see no reason why a 'co-regulation' model such as this would prevent an activity from constituting an occupation under the mutual recognition scheme.

Question 8(d) *— Could an occupation be a registered occupation for the purposes of the MR Act and TTMR Act if legislation required that individuals must be members of a professional body before being authorised to carry out an occupation, but the professional body is not a statutory body?*

Context — In the case of the professional body that is not established under legislation, assume the professional body approves members based on qualifications and other criteria. For example, assume that ICANZ was not a statutory body but that the NZ Companies Act and Securities Act still allowed members to qualify as auditors.

As noted above, the definition of 'registration' includes 'any … form of authorisation … required *by or under legislation* for carrying on an occupation'. In other words, authorisation must be required by statute, not authorisation by a statutory body. We can see no reason, therefore, why a professional body not established by legislation could not perform the authorisation. Moreover, such an arrangement is consistent with the definition of 'local registration body', which is 'the person or authority in the [jurisdiction] having the function *conferred by legislation* or registering persons in connection with their carrying on that occupation in the [jurisdiction]'. Any entity, whether created by statute or not, may be a registration authority, provided its function is 'conferred by legislation'.

Part 2 — Crown Law response to request for advice on trans-Tasman mutual recognition schemes

Introduction

1. You have sought Crown Law advice on matters pertaining to interpretation issues that arise from the Trans-Tasman Mutual Recognition Act 1997 ("TTMRA"). This advice was sought in connection with a request from the Australian Productivity Commission. Crown Law's advice of 3 November 2008 in response to your request was published in the Productivity Commission's draft report. As a result of feedback to the Commission and to MED about the issues in the draft report, you asked me to review Crown Law's advice in relation to the question set out as paragraph 2.4 below. I have done so and provide you with this consolidated opinion that includes the revisions to our response to that question.

2. Specifically, you have asked that I address the questions set out below. I have also summarised, in brief, my answers to each of the specific questions. My detailed reasoning follows in the body of this advice.

   2.1 Does the "registration" required by or under legislation for a particular occupation mean that there must also be a legislative requirement for a formal register or list of persons authorised to carry out the occupation?

   No, this is not required by the TTMRA, although the practical reality is that a formal register or list of persons will probably exist in most cases.

   (see paragraphs 13 to 16 below)

   2.2 Can legislative regimes that require authorisations to carry out activities related to the manner of sale, or the manner of carrying out a business related to a particular type of good give rise to new occupations that fall under the TTMRA, and if so, in what circumstances?

   Yes, if the activity constitutes a calling, occupation, profession or trade, subject to registration that is dependent on the attainment or possession of some qualification.

   (see paragraphs 17 to 26 below)

   2.3 What conditions can be included to achieve equivalence in occupations?

   2.3.1 Are issues of local or specialist knowledge or English language requirements able to be included as conditions?

   Probably not, although the legislation is not entirely clear.

   (see paragraphs 34 to 40 below)

2.3.2 Is the second jurisdiction allowed to re-check or audit whether the applicant actually met the requirements in the first jurisdiction?

Yes.

(see paragraphs 41 to 46 below)

2.3.3 If a person who is being investigated gives undertakings to the first jurisdiction where he or she is registered, may the undertakings be imposed as conditions on registration in a second jurisdiction?

Yes, if that undertaking restricts or limits the person's ability to carry out an authorised activity.

(see paragraphs 47 to 54 below)

2.4 Clarification is sought in relation to on-going requirements that may be imposed on persons registered under mutual recognition. In particular, are on-going conditions or requirements for further study and upgrading of professional skills allowed as long as this is a requirement for all registered persons?

The answer of a New Zealand court to this question will depend on the precise nature of the ongoing requirement and the particular factual context of the case before it. A court would be influenced, crucially, by the alignment of the requirement with the objectives of the TTMRA as well as by the nature of the public purpose it may have.

(see paragraphs 55 to 69 below)

2.5 The review is considering whether to recommend that the mutual recognition schemes be expanded in scope. Clarification is sought on whether the TTMRA now covers such things as business licences and occupations under co-regulation models. I note at the outset that my advice is premised on the basis that the focus of the TTMRA is on the individual and not on businesses (albeit this is not stated expressly in the legislation). That being so, I consider that any desire to expand the scope of the TTMRA to unequivocally cover business licences (should this be what is desired) will require legislative amendment.

2.6 In response to your particular queries:

2.6.1 What characteristics take 'business' licences outside the mutual recognition schemes as they relate to occupations?

Licences will fall outside the TTMRA if the requirements for the licence do not meet the definitions of "occupation", "registration", and "qualification" in the legislation.

(see paragraphs 71 to 92 below)

2.6.2 Are there models of co-regulation of occupations that will be registered occupations under the TTMRA?

Yes. The fact that a process for regulation of a particular occupation is governed by two entities does not mean that the mutual recognition principles relating to occupation in the TTMRA do not apply.

(see paragraphs 93 to 98 below)

2.6.3 In a different kind of co-regulation model, could an application be a registered occupation for the purposes of the TTMRA if legislation required that individuals be members of a professional body (recognised but not created under statute) before being authorised to carry out an occupation?

Yes. It does not matter if the professional body is not itself created by statute, if the statute requires authorisation to be given by that professional body.

(see paragraphs 99 to 101 below)

Background

3. This advice is sought by you in connection with interpretation issues that arise from the TTMRA and the Review of Mutual Recognition Schemes ("Review") that is currently being undertaken by the Australian Productivity Commission ("Commission").

4. The TTMRA is the New Zealand legislation that implements the Arrangement between the Australian Parties: the Commonwealth of Australia; the State of New South Wales; the State of Victoria; the State of Western Australia; the State of South Australia; the State of Tasmania; the Australian Capital Territory; the Northern Territory of Australia; and New Zealand, relating to Trans-Tasman Mutual Recognition ("the Arrangement").

5. The Commission is reviewing not only the New Zealand TTMRA, but also all the legislation and agreements making up the mutual recognition schemes within Australia.

6. Clause 12.1.1 of Part XII of the Arrangement called for regular reviews of the operation of the Arrangements and its related legislation. I understand that the first review of the mutual recognition schemes implementing the Arrangement was carried out in 1998. Part XII of the Arrangement requires five yearly reviews to be carried out of the mutual recognition schemes. The Commission was tasked with undertaking the 2003 review and is now carrying out the present review.

7. The two previous reviews, and the initial findings of the current review, suggest that parts of all the legislative schemes implementing the Arrangement need to be clarified, either by legislative change or the provision of better information about the interpretation of the TTMRA and other Australian legislation.

8. Your questions as set out above reflect those parts of the Acts that are of greatest concern to submitters to the review and to regulators.

Trans-Tasman Mutual Recognition Act

9. I note at the outset that it is my task in this opinion to advise you on what the statute provides. If the legislation does not adequately reflect what was intended by the policy behind the Arrangement, then that is a matter for legislative amendment. Treaties and other instruments of international law, like the Arrangement, can only have force in domestic law to the extent they are incorporated in legislation: New Zealand Airline Pilots' Association Inc v Attorney-General [1997] 3 NZLR 269(CA); Ashby v Minister of Immigration [1981] 1 NZLR 222 (CA).

10. The Arrangement came into effect on 1 May 1998 and is a non-treaty arrangement between the Commonwealth, State and Territory Governments of Australia and the Government of New Zealand. The Arrangement is described on the Ministry of Economic Development's website as the cornerstone of a single economic market between the two countries, a powerful driver of regulatory co-ordination and integration, and as the key instrument for developing an integrated Trans-Tasman economy and a seamless market place as envisioned by the Australia and New Zealand Closer Economic Relations Trade Agreement signed in 1983.

11. The Arrangement is implemented in New Zealand via the TTMRA. Some key (broad) features of the TTMRA are:

    11.1 Every law in New Zealand must, unless it or the TTMRA expressly provides otherwise, be read subject to the TTMRA (s 5(1)).

    11.2 The Trans-Tasman mutual recognition principle in relation to goods, the Trans-Tasman mutual recognition principle in relation to occupations, and the provisions of the TTMRA may be taken into consideration in proceedings of any kind and for any purpose (s 5(2)).

    11.3 The TTMRA implements the Trans-Tasman mutual recognition principle in relation to goods, namely that, subject to the TTMRA, goods produced in or imported into an Australian jurisdiction, that may be lawfully sold in the Australian jurisdiction either generally or in particular circumstances, may be sold in New Zealand, either generally or in particular circumstances, without the necessity for compliance with any of the requirements relating to sale that are imposed by the law of New Zealand (s 10(1)).

    11.4 The TTMRA implements the Trans-Tasman mutual recognition principle in relation to occupations, namely that, subject to the TTMRA, an individual who is registered in an Australian jurisdiction for an occupation is entitled,

after giving notice to the local registration authority for the equivalent occupation:

11.4.1 to be registered in New Zealand for the equivalent occupation; and

11.4.2 pending such registration, to carry on the equivalent occupation in New Zealand.

(s 15(1))

12. I note here that there have only been a handful of New Zealand cases that have referred to the TTMRA, and those that have were not of relevance to your queries.

Answers to specific queries

Formal register required?

13. This question is concerned with the requirements for registration. Section 4(1) of the Act provides:

> "In this Act, registration means the admission, approval, certification (including, without limitation, the issue of practising certificates), licensing, registration, or any other form of authorisation, of an individual required by or under law for carrying on an occupation. "

14. The meaning of registration in the Act is broad and goes beyond its ordinary meaning. The term registration is referred to within the definition itself. In my opinion the ordinary meaning of registration does imply the keeping of a list or register. Black's law Dictionary (8th ed) defines registration as: "the act of recording or enrolling".

15. However, as noted above, registration as defined at s 4 extends the ordinary meaning and includes terms such as "approval" and "any other form of authorisation" which may not necessarily require the keeping of a register at all, never mind one that is formal in the sense that it has legal status.

16. Accordingly, I do not believe that registration under the Act requires there to be a formal register of persons authorised to carry out an occupation. In my opinion, all that is required in order to meet the definition of registration under the Act is a legislative-based authority to carry out the occupation. As a matter of practicality, however, it is likely that even if not required to do so as a matter of law, a body responsible for approving registration will keep a record of those persons it had granted authorisation to.

New occupations

17. This question is concerned with whether legislative regimes giving authorisation to carry out certain activities, can create new occupations for the purposes of the Act.

18. The meaning of occupation is provided for at s 2 of the Act:

> "Occupation –
>
> (a) Means a calling, occupation, profession, or trade of any kind that may be carried on only by individuals subject to registration, if registration is wholly or partly dependent on the attainment or possession of some qualification;
>
> …

19. It is thus tied back into the definitions of "registration" and "qualification".

20. Qualification is defined at s 2 of the Act:

> Qualification means –
>
> (a) A specific course of education or training;
>
> (b) A specific examination;
>
> (c) A suitable character (including, without limitation, being a fit and proper person); or
>
> (d) A specific qualification, other than a qualification referred to in any of paragraphs (a) to (d), relating to fitness to carry on an occupation

21. All occupations will be covered by the Act, unless specifically exempt (s 84). Currently, the only occupation that is exempt under the Act is medical practitioners (Schedule 4).

22. Given the broad definition of occupation and qualification at s 2, I believe there will be situations where the carrying out of a particular type of activity (one that does not fit within a traditionally recognised occupation) will be an occupation for the purposes of the Act.

23. This can be seen by considering the hypothetical example you give in relation to this question, in respect of the retail sale, supply and service of liquor by a staff member of a licensed premises.

24. Under r 41 of the Liquor Regulations 2008 a staff member must not sell alcohol unless he or she holds a recognised Responsible Sale of Alcohol ("RSA") certificate. An RSA certificate is a certificate granted by a training provider approved by the licensing authority (r 39). Regulation 44 provides that a licensee must keep a register of all holders of a RSA certificate.

25. In my opinion, the retail sale, supply and service of liquor would meet the definition of occupation as defined by the Act. The activity of selling, supplying or serving liquor by the staff member would constitute an occupation (being his or her temporary or regular employment). The occupation is subject to registration (it has legislative authority for its certification, being the RSA certificate provided for at r 41) and registration of the occupation is dependent on attaining a qualification (the completion of the approved training course at r 39).

26. Accordingly, my answer to question 2 is yes, an activity will be an occupation for the purposes of the Act, so long as the activity constitutes a "calling, occupation, profession of any kind" and is subject to registration that is dependent on the attainment of a qualification.

Conditions to achieve equivalence

27. The TTMRA allows a second jurisdiction (i.e. New Zealand) to impose conditions on the registration (whether it be deemed or substantive) of an applicant from the first jurisdiction (an Australian jurisdiction) in order to achieve equivalence in occupations between the jurisdictions (s 14(2)(a), s 20(3)(a) & s 25(2)(a)).

28. "Conditions" is defined by s 2 of the Act to, in relation to occupation, mean conditions, limitations or restrictions.

29. "Equivalent occupation" is defined by s 14 of the Act:

> (1) For the purposes of this Act, and subject to subsection (2), an occupation for which individuals may be registered in an Australian jurisdiction is taken to be an equivalent occupation to an occupation for which individuals may be registered in New Zealand if the activities authorised to be carried out under each registration are substantially the same.
>
> (2) Subsection (1) is subject to –
>
> (a) The fact that equivalence of occupations between New Zealand and an Australian jurisdiction may be achieved by the imposition of conditions on deemed registration or registration; and
>
> (b) Any declaration made and in force under section 30 or section 31.

30. Also relevant is s 15, which sets out the Trans-Tasman mutual recognition principle in relation to occupations.

31. In order to determine equivalence of occupations then, one must compare the activities authorised to be carried out under each occupation. If the occupations are not considered to be equivalent, then conditions on registration (whether it be deemed or substantive) can be imposed in order to achieve equivalence.

32. For example, if the occupation in the second jurisdiction carries out a narrower range of authorised activities than that of the first jurisdiction, conditions can be imposed by the second jurisdiction to restrict the activities carried out by the individual from the first jurisdiction, in order to achieve equivalence between the jurisdictions.

33. In light of s 14 of the Act (the meaning of equivalent occupations) and s 15 of the Act (the principle in relation to occupations) it is my view that any condition that is imposed by the second jurisdiction can only limit or restrict the carrying out of an authorised activity, and cannot have wider application. By this I mean that if the second jurisdiction registration covers more activities than the first jurisdiction registration, the registering authority in the second jurisdiction can only impose conditions to limit the applicant to carrying out only those activities covered by registration in the first jurisdiction. In other words, the registering authority could not add conditions related to additional requirements that the applicant would need to obtain in order to undertake the "extra" activities in the second jurisdiction.

Local or specialist knowledge or English language requirements

34. The long title of the TTMRA states it is an Act to provide for the recognition in New Zealand of regulatory standards adopted in Australia regarding goods and occupations. The Arrangement states its purpose and objectives at page 2. Its purpose is to give effect to a scheme implementing mutual recognition principles between the Parties relating to the sale of goods and the registration of occupations, consistent with the protection of public health and safety and the environment. 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 rescue compliance costs for business.

35. Whether or not the legislation allows conditions as to local or specialist knowledge or English language requirements to be imposed is not clear. However, bearing in mind the context and purpose of the Act as set out above, I believe a more restricted approach to the imposition of conditions is mandated by the legislation.

36. It is clear that the TTMRA does not require jurisdictional requirements for registration in respect of a particular occupation to be the same. This can be seen from s 15(2) of the Act, which states that a New Zealand law that requires an individual seeking to carry on an occupation to have a particular qualification, does not apply to an individual from an Australian jurisdiction seeking registration in New Zealand. Likewise, s 16 (b) of the Act states that no law of New Zealand can require an applicant to have any particular qualification before carrying on or seeking to carry on that occupation. Furthermore, at s 20(4) and s 25(3), no condition imposed by a second jurisdiction may be more onerous than a condition that the first jurisdiction would impose in similar circumstances, having regard to relevant qualifications.

37. I have examined the extent to which such extra special requirements could conceivably come within the definition of "qualification" in s 2 of the TTMRA (see

above at paragraph 20). If such requirements could be said to be "qualifications" then the effect of s 15(2) is that such special requirements could not be included as a condition to registration (outside of the limited circumstances set out in s 20(3)). I do consider that such requirements would likely fall within the s 2 definition of "qualification", which is quite broad. That being so, s 15(2) prevents such requirements being imposed as conditions.

38. Further, the s 15 mutual recognition principle in relation to occupations is expressly stated in s 16 of the TTMRA not to affect the operation of any laws of New Zealand "that regulate the manner of carrying on an occupation in New Zealand" so long as those laws:

38.1 Apply equally to all individuals carrying on or seeking to carry on the occupation under New Zealand law; and

38.2 Do not require an individual carrying on or seeking to carry on that occupation under the laws of New Zealand to have any particular qualification before doing so.

39. Given my view then that specialist requirements would constitute "qualifications" under s 2, I consider that it is more than likely that s 16(b) also precludes the imposition of special requirements (to the extent, of course, that such requirements are imposed by New Zealand law). Such requirements would also be likely to be in breach of s 20(4) and s 25(3).

40. For the above reasons, it is probable that local or specialist knowledge, or an English language requirement, would not be able to included as conditions, although the legislation is not entirely clear.

Re-check and audit of requirements

41. My answer to question 2.3.2 above is yes, a local registration authority can re-check or audit whether the applicant actually met the requirements of the first jurisdiction.

42. Section 19 (2)(i) provides that an applicant seeking registration must give written notification to the local registration authority and one of the requirements of the notification is that the applicant must give his or her consent to the making of inquiries of, and the exchange of information with, the authorities of any participating jurisdiction regarding the applicant's activities in the relevant occupation or occupations or otherwise regarding matters relevant to the notice.

43. I believe the authority provided for in s 19(2)(i) is broad enough to allow the second jurisdiction to re-check whether the applicant actually met the registration requirements of the first jurisdiction. The legislation is not, however, entirely clear as to what the second jurisdiction is then able to do if it discovers that the applicant is registered in the first jurisdiction by means of mistake or fraud. Because the TTMRA proceeds on the basis that registration in the first jurisdiction entitles an applicant to registration in the second jurisdiction for an equivalent occupation (s 15(1)) then, in my view, the registering authority in the second jurisdiction cannot refuse registration

on the grounds that registration in the first jurisdiction was wrongly obtained. One option to deal with this situation would be some kind of liaison between the registering authorities in the two jurisdictions in an attempt to have the first jurisdiction impose conditions on the registration while it was investigated.

44. I also note the provisions of the TTMRA relating to information exchange between the relevant registering authorities, which may be of assistance in dealing with this situation. In this regard, I draw your attention to:

44.1 Section 19(2)(i) which allows an applicant to give consent to the making of inquiries of, and the exchange of information with, the authorities of any participating jurisdiction regarding the applicant's activities in the relevant occupation or otherwise regarding matters relevant to the notice to the registering authority; and

44.2 Section 33 which provides that the local registering authority must provide information to the equivalent authority if there is "actual or possible disciplinary action against the individual."

45. Finally, I note that at the time of registration the local registering authority is given discretion to postpone or refuse registration if there are statements or information in the notice from an applicant that is false or misleading (see sections 21 and 22 TTMRA).

46. I note for completeness that if a re-check or audit by the second jurisdiction revealed that the applicant did **not** actually have registration at all in the first jurisdiction, then of course the second jurisdiction could refuse to register the applicant.

Undertakings

47. You have broken down question 2.3.3 above into the following parts:

47.1.1 Whether undertakings can be considered conditions?

47.1.2 Whether the undertakings or conditions from the registration in the first jurisdiction can be imposed by the second jurisdiction after the person is already registered in the second jurisdiction?

48. "Condition" in relation to occupation, at s 2 of the Act means conditions, limitations or restrictions. In addition, the Oxford Concise Dictionary (9th ed) provides the following definitions:

> Condition: 1. a. stipulation; something upon the fulfilment of which something else depends. 5. conditional clause.
>
> Limitation: 1. the act or instance of limiting; the process of being limited. 3. a limiting rule or circumstances.
>
> Restrictions: 1. the act or an instance of restricting; the state of being restricted. 3. a limitation placed on action.

49. "Undertaking" is defined in the Oxford Concise Dictionary as "a pledge or promise and in Blackman's Law Dictionary as "a promise, pledge, or engagement."

50. In my opinion, if the undertaking given by an individual restricts or limits his or her ability to carry out an authorised activity, it will be a condition for the purposes of the TTMRA.

51. Section 32 of the Act provides:

> 32 Disciplinary action
>
> (1) If an individual's deemed registration or registration for an occupation in an Australian jurisdiction –
>
> (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 individual's deemed registration or registration for the equivalent occupation in New Zealand is affected in the same way.
>
> (2) Despite subsection (1), the local registration authority may reinstate any cancelled or suspended deemed registration or registration or waive any such condition if it thinks it appropriate to do so in the circumstances.
>
> (3) This section extends to registration effected apart from this Act.
>
> (4) This section has effect despite any other provisions of this Act.

52. Therefore in accordance with s 32(1) if an individual subject to disciplinary action gives an undertaking to the first jurisdiction where he or she is registered, and that undertaking restricts or limits his or her ability to carry out an authorised activity, the undertaking will be a condition that is automatically imposed by virtue of s 32(1).

53. I believe the wording of s 32 is broad enough to allow the condition to be imposed after registration has been granted, whether that be deemed registration or substantive registration.

54. Section 32 does not use restrictive language that limits the imposition of conditions to only being allowed either before or on registration. More particularly, at subsection (2) the provision refers to the reinstatement of cancelled or suspended

registration, which must mean the individual has already been registered by the second jurisdiction.

On-going requirements on persons registered

55. Under this heading, you seek clarification in relation to on-going requirements that may be imposed on persons registered under mutual recognition. In particular, you ask whether on-going conditions or requirements for further study and upgrading of professional skills are allowed as long as this is a requirement for all registered persons.

56. You state that the context for this query is that s 17(2)(c) of the TTMRA may limit on-going requirements for training and further experience, and some jurisdictions have questioned whether they can require persons already registered under TTMRA to accumulate further qualifications or training if they require all other registered persons to do so.

57. The scheme and purpose of the TTMRA is important in assessing how a New Zealand court would view the imposition of ongoing requirements. I understand, from discussion with officials at the Ministry of Economic Development and the Ministry of Foreign Affairs and Trade, that officials' understanding of the policy intention of the Arrangement, and the legislation at the time it was passed, militated against the power to impose ongoing requirements.

58. The TTMRA implements the underlying Arrangement which has, as its objective:

> "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 business."

59. As stated, the Trans-Tasman mutual recognition principle in relation to occupations is that, subject to the TTMRA, an individual who is registered in an Australian jurisdiction for an occupation is entitled, after giving notice to the local registration authority for the equivalent occupation, to be registered in New Zealand for the equivalent occupation and, pending such registration, to carry on the equivalent occupation in New Zealand (s 15(1)).[31]

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[31] Note that "local registration authority" is defined in s 2 of the TTMRA as:

"(a) Except in relation to barristers and solicitors, -
  (i) Means the person in New Zealand having the function conferred by law of registering individuals in connection with their carrying on of a particular occupation in New Zealand; and
  (ii) If more than 1 person has the function described in subparagraph (i) in relation to a particular occupation, including each such person; and

(b) In relation to barristers and solicitors, means -

59.1 Thus:

59.1.1 For the purposes of the TTMRA, an occupation for which individuals may be registered in an Australian jurisdiction is taken to be an equivalent occupation for which individuals may be registered in New Zealand if the activities authorised to be carried out under each registration are substantially the same (s 14(1)).

59.1.2 The Trans-Tasman mutual recognition principle in relation to occupations means that no law in New Zealand requiring an individual seeking to carry on that occupation to have any particular qualification before doing so applies to any individual who is registered in an Australian jurisdiction for an occupation and who gives proper notice to the local registration authority for the equivalent occupation (s15 (2)).

60. Section 14(2) provides that subsection (1) is subject to:

60.1 the fact that equivalence of occupations between New Zealand and an Australian jurisdiction may be achieved by the imposition of conditions on deemed registration or registration; and

60.2 any declaration made and in force under s 30 or s 31.

61. Section 16 provides that s 15(2) (the mutual recognition principle in relation to occupations) does not, however, affect the operation of any laws of New Zealand that regulate the manner of carrying on an occupation in New Zealand, so long as those laws:

61.1 apply equally to all individuals carrying on or seeking to carry on the occupation under the law of New Zealand; and

61.2 do not require an individual carrying on or seeking to carry on that occupation under the law of New Zealand to have any particular qualification before doing so.

62. The Trans-Tasman mutual recognition principle in relation to occupations, as set out in s 15(1), could be argued to be undermined if a registering authority could impose conditions on an applicant once they had achieved Trans-Tasman mutual recognition in New Zealand. This interpretation is supported by s 17(2), which sets out the consequences of attaining registration:

62.1 The person is entitled to renewal of registration in accordance with the law dealing with registration of that kind.

(i) In relation to admission as a barrister and solicitor, a Registrar or Deputy Registrar of the High Court; and
(ii) In relation to the issue of a practising certificate, the New Zealand Law Society."

62.2 The person is not disentitled to registration or renewal of registration solelybecause the person ceases to be registered in an equivalent occupation in an Australian jurisdiction.

62.3 The person keeps or loses the entitlement to registration or renewal of registration in accordance with any law dealing with registration of that kind, to the extent that any such law:

62.3.1 applies equally to all individuals carrying on or seeking to carry on the occupation under the law of New Zealand; and

62.3.2 does not require an individual carrying on or seeking to carry on that occupation under the law of New Zealand **to have any particular qualification before doing so** (my emphasis).

63. Further, s 32(1) provides that if a person's deemed registration or registration for an occupation in an Australian jurisdiction is cancelled or suspended, or is subject to a condition on disciplinary grounds, then the person's deemed registration or registration for the equivalent occupation in New Zealand is affected in the same way.[32]

64. As discussed above, a local registration authority is empowered, by s 20(3), to grant registration with conditions:

64.1 for the purpose of achieving equivalence of occupations; or

64.2 for the purpose of imposing on the applicant's registration in New Zealand a condition that applies to the applicant's registration in an Australian jurisdiction; or

64.3 for any other purpose relating to the implementation of the Trans-Tasman mutual recognition principle in relation to occupations.

65. The focus at all times is on promoting mutual recognition. Section 20(4), for example, precludes the local registration authority from imposing the third type of condition above, if the condition imposed may be more onerous than a condition that the local registration authority would impose in similar circumstances, having regard to relevant qualifications, if the registration occurred in another manner than under the TTMRA.

66. Likewise, s 36(1) which provides that it is the duty of each local registration authority to facilitate the operation of the occupations part of the TTMRA in relation to every occupation for which the authority is responsible and, in particular, to make use of its powers to impose conditions in such a way as to promote the Trans-Tasman mutual recognition principle in relation to occupations.

[32] Note that even in this scenario, s 32(2) allows the local registration authority to reinstate any cancelled or suspended deemed registration or registration or waive any condition if it thinks it appropriate to do so in the circumstances.

67. So, if an ongoing requirement comprising "further study and the upgrading of professional skills" (as per your question) is sought to be imposed, the Crown can argue consistent with officials' understanding of the original policy intent, and a New Zealand court may find, that those requirements are likely to meet the definition of "qualification" in s 2, and therefore cannot be imposed for the reasons discussed above.

68. However, I consider that there are circumstances where a New Zealand court would accept that ongoing requirements can be imposed under the TTRMA. Section 16 of the Act could be argued to mean that ongoing requirements on persons registered under the TTMRA *can* be imposed by the registering authority if those requirements apply to all persons registered to carry out that occupation (unless, of course, they are imposed as **conditions** of registration). The proviso in s 16(b) refers to the law not requiring an individual carrying on or seeking to carry on an occupation under the law of New Zealand to have any particular qualification **before doing so.** The use of the word *before* suggests that imposing requirements *after* registration is not precluded (subject of course to the requirements being imposed on all registered persons).

69. In my opinion, the decision of a New Zealand court is likely to depend on the precise nature of the ongoing requirement and the particular factual context of the case before it. This appears to be consistent with the conclusion of the Australian Government Solicitor in his opinion of 17 October 2008, published in the draft Productivity Commission report, on a similar question in relation to the Australian legislation.

70. In my opinion, a New Zealand court would be influenced, crucially, by the alignment of the requirement with the objectives of the TTMRA as well as by the nature of the public purpose it may have. An ongoing requirement that appears to be designed to circumvent the purpose of the TTMRA in entitling practitioners from one jurisdiction to practice in another without undue compliance costs, and that has weak public policy purposes, is likely to be decided by a court to be prohibited. An ongoing requirement that applies to all persons registered to carry out an occupation, that is in the interests of public safety and that does not impose significant compliance costs on practitioners would be likely to be decided by a court not to be prohibited.

Scope of TTMRA

71. Under the heading "scope of TTMRA", you advise that the review is considering whether to recommend that the mutual recognition schemes be expanded in scope. Clarification is therefore sought on whether the TTMRA now covers such things as business licences and occupations under co-regulation models.

72. I note that in the 2003 review, the recommendations of the Productivity Commission were that:

    72.1 Business licences should not be brought into the scope of the mutual recognition schemes as the additional complexity and conflict from mutually recognising licences were likely to outweigh the gains. It was

recognised that there are valid policy reasons to retain some hybrid business licences. However, where possible, it was recommended that occupational registration requirements should be removed from business licence requirements, especially where they represent indirect barriers to the movement of skilled people; and

72.2 Consideration needed to be given to whether co-regulation should be covered by mutual recognition.

73. I note at the outset that my advice is premised on the basis that the focus of the TTMRA is on the individual and not on businesses (albeit this is not stated expressly in the legislation). That being so, I consider that any desire to expand the scope of the TTMRA to unequivocally cover business licences (should this be what is desired) will require legislative amendment.

74. As you note, the TTMRA does not refer to business licences. You advise that there is a common assumption that if a licence or registration is called or considered a "business licence" it is not considered to be an occupation that falls under the mutual recognition regime. You state that there may be several reasons for this assumption because business licences may relate to areas that the TTMRA does not cover. Some legislative authorisations will authorise corporations and firms *as well as individuals* to carry out certain activities (see s 15, TTMRA). Other legislative authorisations are intended to regulate *the manner of carrying out* the activities (see s 16, TTMRA). You seek advice on whether either of both of these elements are decisive in determining if the activities licensed can be considered an occupation.

75. It appears that this interpretation of the TTMRA, excluding "business licences", has arisen due to the focus in the TTMRA (and in the Arrangement itself) on the "individual" (for example, see the definition of "occupation" in s 2(1), set out above at paragraph 18.

76. Likewise, s 4 has a similar focus on the individual, in its definition of "registration", set out above at paragraph 13.

77. I note that "individual" is not defined in the TTMRA, and there is nothing in the legislation that expressly states that "individuals" is intended to exclude businesses.

78. Arguably then, the general meaning of individual, could be taken to apply[33] meaning that, on the face of the statute, "business licences" are not excluded from the TTMRA. However, I do not consider this to be a strong argument and I point to those provisions in the TTMRA which do 'distinguish between "individuals" and "bodies corporate", suggesting that the latter is not intended to be included in the references to the former. For instance, s 8(1) sets out different requirements for service of a notice upon individuals and bodies corporate. I also note that the Arrangement itself, which the TTMRA implements, refers to "person."

[33] Under the canon of interpretation known as "generalia verba sunt generaliter intelligenda" or "general words are to be understood generally": see Bennion, Statutory Interpretation 15th ed), p 1168.

79. In this regard, I note that s 29 of the Interpretation Act 1999 provides that, in the absence of a statement to the contrary in a particular piece of legislation, "person" includes "a corporation sole, a body corporate and an unincorporated body." However, taking a contextual view of both the TTMRA and the Arrangement itself, it was not in my view intended that the scheme as originally set up would apply to businesses.

80. For those reasons, on balance, I do not consider it likely that the TTMRA could be interpreted to include "business licences" (and by business, I mean either a body corporate or a non-corporate business, such as a partnership).

81. To be absolutely clear one way or the other however (depending on what is desired) I recommend that the TTMRA be amended to specify whether or not "business licences" are included within the ambit of the legislation.

82. With those preliminary conclusions in mind, I now turn to consider your specific queries and examples.

Your hypothetical examples

83. The hypothetical example you give in relation to this issue is where one jurisdiction issues two kinds of licences related to electrical work.

84. The first licence requires an individual to obtain a particular training certificate to be licensed as an electrician. This certificate allows the person to do certain domestic electrical work up to a certain threshold value and is widely understood to be a registered occupation for the purposes of the TTMRA.

85. In other situations, where the value of the electrical work is greater than the threshold value, or in a commercial environment, the individual can do electrical work as an employee of an individual or firm that has the *second* type of licence.

86. The second type of licence is an electrical contractor's licence, which allows the person holding the licence to undertake higher value commercial work. This type of licence is widely understood to be a business licence and is therefore exempt from mutual recognition, in the way the TTMRA has been applied.

First assumption

87. You have asked me to assume that the requirements for the second contractor's licence includes such requirements as a fee, a certain level of indemnity insurance, a secure financial position, successful completion of a project management course and an obligation to ensure all electrical work is done by a person with an electrical licence. I have interpreted your query here as being whether the requirements for obtaining the contractor's licence mean that the occupation to which the licence relates is a registered occupation for the purposes of the TTMRA even though it is a mixture of 'qualification' related requirements and 'manner of carrying on the activities' requirements.

88. In my view, this licence would fall within the TTMRA **but only when held by an individual, not by a business.** This is due to the definition of "occupation" in s 2(1) as outlined above. Subpart (a) of that definition refers to a calling, occupation, profession, or trade that may be carried on only by individuals subject to registration, if registration is **wholly or partly** dependent on the attainment or possession of some qualification.

89. In the scenario you outline, one of the requirements for registration as an electrical contractor is successful completion of a project management course. Thus registration is **partly** dependent on the possession of a qualification, and therefore it comes within the definition of "occupation" and therefore the legislation.

Second assumption

90. You have asked me to assume that the answer to the first assumption is yes (which I have concluded is so, when the licence is held by an individual, not by a business). You then ask me to assume that the circumstances change so that the legislation in question also requires a contractor licence for businesses such as partnerships and companies (as well as individuals) that want to undertake large scale commercial electrical work. The licence requirement for project management training in the case of a *business* would relate to the person managing the work on behalf of the business.

91. You ask whether the fact that the licence is required for both individuals and firms means that an individual with a contractor licence is not covered by the TTMRA.

92. In my view, just because a licence is required for both individuals and firms, does not mean the TTMRA is excluded from application for individuals. The answer starts and ends with the definitions of "occupation" and "registration" in ss 2(1) and 4 (see points above at paragraph 88). If the individual meets those definitions, it matters not that the business is also required to obtain the licence (although not again that of course the business will not be covered by the TTMRA).

Co-regulation

93. You ask whether there are models of co-regulation of occupations that will be occupations under the TTMRA. For example, you ask whether an occupation could be an occupation for the purposes of the TTMRA if legislation required that individuals must be members of a statutory body before being authorised to carry out an occupation.

94. The context for this question assumes that a statutory body acts as the registration authority that approves individuals for membership based on qualifications and other legislative criteria (for example, accountants and auditors under the Institute of Chartered Accountants of New Zealand Act 1996).

95. To be described as an accountant or auditor in New Zealand, a person must meet minimum criteria as set out in provisions of the above Act, including approval as a member of the Institute. In addition, both the Companies Act and the Securities Act

have requirements related to auditors of companies and issuers. The Registrar of Companies and the Securities Commission are the regulators related to companies and issuers, but they rely on the Institute to ensure the auditors meet the criteria. You ask whether "co-regulation" like this would mean "auditor" is a registered occupation under the TTMRA.

96. Again, the starting and ending point for this question is the statute. In my view, the fact that a process for registration of a particular occupation is governed by two entities, does not mean that the mutual recognition principles relating to occupation in the TTMRA do not apply.

97. The reason for this is the definition of "registration" set out in s 4(1) and discussed above. That definition sets out a number of specific types of registration (admission, approval, certification, licensing, registration) before the catch all "any other form of authorisation". The key part of the definition comes next, ie "required by or under law for carrying out an occupation".

98. In other words, the key focus of the definition is on the legal requirements for authorisation, and not on the number of bodies who may be involved in that authorisation.

Different type of co-regulation model

99. Finally, you ask, in a different kind of co-regulation model, whether an occupation could be an occupation for the purposes of the TTMRA if legislation required that individuals be members of a professional body (recognised but not created under statute) before being authorised to carry out an occupation. You advise that although the professional body is not created under statute, it is given power under statute to approve and regulate its own members.

100. The context for this question is an assumption that the professional body approves members based on qualifications and other criteria. In the scenario discussed above, you ask me to assume that the Institute is not a statutory body with its own Act, but rather a professional body, and the Companies Act and Securities Act still recognise the Institute as an approved body and one of the groups of persons that qualify to be auditors are members of the Institute.

101. Again, because the focus in the definition of "registration" in s 4(1) is on what is required by law, in my view it does not matter if the professional body is not itself created by statute, if the statute requires authorisation to be given by that professional body.

Conclusion

102. My conclusions are set out at paragraph 2 above.

C Overseas models of mutual recognition

Mutual recognition, according to Nicolaïdis (1996), involves the agreement of two or more participating jurisdictions to the transfer of regulatory authority from the jurisdiction where a transaction takes place to the jurisdiction from which a product, person or service originates. The participants do this in recognition of the essential compatibility or acceptability of one another's regulatory regimes (Nicolaidis 1996). While this describes the general principle of mutual recognition, specific mutual recognition arrangements can take a variety of forms and differ widely in terms of coverage and implementation.

This appendix outlines mutual recognition arrangements in Europe, Canada and the Asia Pacific Economic Cooperation (APEC) region.[1] Sections C.1 and C.2 examine the arrangements for goods and occupations, respectively, in the European Union (EU). Section C.3 briefly covers other European countries and bilateral arrangements between European countries and third parties. Section C.4 looks at the Canadian mutual recognition model. Finally, Section C.5 considers mutual recognition arrangements in the APEC region.

C.1 European Union — goods

Goods traded within the European Union are classified as 'harmonised' or 'non harmonised'. Harmonised goods are defined as those for which one set of harmonised standards or product requirements applies throughout the European Union and replaces national product regulations. These goods represent about 75 per cent of goods traded in the European Union (New Europe 2008). The

[1] A country not considered in this chapter is the United States (US). According to Osborne (2002), the US has pursued mutual recognition and harmonisation only to a very limited extent, with regulations, standards and conformity assessment within the country being fragmented and decentralised in nature. There are limited mutual recognition aspects in the North American Free Trade Agreement between the US, Canada and Mexico. The US is also party to a mutual recognition agreement on conformity assessment with the EU, as mentioned in section C.3 of this appendix, and to APEC arrangements as mentioned in section C.5.

remaining 25 per cent are non harmonised goods, which are subject to the mutual recognition principle as described below.

Non harmonised goods

Goods that have not been harmonised across the European Union are subject to mutual recognition. Under the EU model, the mutual recognition principle requires that a product that is lawfully marketed in one EU member state be allowed to be marketed in any other member state, even if it does not fully comply with the latter jurisdiction's technical product requirements (EC 2008e).

This principle is established under the European Community Treaty and has developed through case law following the *Cassis de Dijon* decision of the European Court of Justice (ECJ) (Goddard 2003).

Articles 28–30 of the Treaty provide for the free movement of goods within the European Union by prohibiting EU member states from maintaining or imposing intra-EU trade barriers, except in special circumstances. Specifically:

- Articles 28 and 29 prohibit quantitative restrictions on imports and exports between member states, as well as any measures having equivalent effect to quantitative restrictions.
- Article 30 makes an exception for measures justified on grounds of protecting public health and safety or the environment, as long as such measures do not amount to arbitrary discrimination or a disguised restriction on trade (EC 2008b).

In the *Cassis de Dijon* case of 1979, the ECJ ruled that a product recognised and approved for sale in one member state should be allowed to be sold in any other member state, without the need for additional testing or approval. Refusal of a product on the grounds of health and safety, the environment or consumer interests is legitimate as long as the refusal is 'proportionate to the risk posed by the product and [is] applied in a non discriminatory way' (EFTA 2007, p. 3).

Based on the Treaty provisions and case law of the ECJ, the mutual recognition principle has been interpreted to outlaw any measure that restricts intra-EU trade in goods except where a measure is generally applicable to all goods, regardless of origin, and:

- it is directed at a legitimate regulatory objective (e.g. public health and safety, the environment, consumer protection)
- it is proportional to that objective

- it gives effect to that objective in the manner least likely to impede the free movement of goods. (Goddard 2003, p. 7)

European Union member states can continue to impose national product requirements, as long as they meet the criteria above (non discriminatory, directed at a legitimate regulatory goal, proportionate and not unnecessarily trade restrictive). A member state that is planning to introduce regulations in a given product sector must notify the European Commission (EC) in advance, and the EC then assesses the draft national regulation to ensure conformity with the mutual recognition requirements (EFTA 2007).

Harmonised goods

Prior to 1985, all harmonised technical product requirements were set out in legislation. A number of product sectors continue to be regulated using this approach, including chemicals, fertilisers, cosmetics, pharmaceuticals and motor vehicles (EFTA 2007). Since 1985, legislative harmonisation has been largely restricted to regulations considered essential for the protection of health, safety and the environment (Osborne 2002).

Under the more recent system, termed the 'new approach' to harmonisation, EU directives for each product sector set out both the 'essential requirements' and the 'harmonised standards' applicable to that product sector:

- The essential requirements are mandatory, and relate to health, safety, and environmental outcomes. All EU member states are required to transpose the provisions of these requirements into their national legislation and to remove any national laws that conflict with these provisions.
- The harmonised standards are voluntary, and contain technical product specifications that represent one way to achieve compliance with the mandatory essential requirements. Manufacturers may choose to follow the harmonised standards, or apply any other standards that ensure compliance with the essential requirements. Harmonised standards are created by three European standards organisations: CEN (European Committee for Standardisation); CENELEC (European Committee for Electrotechnical Standardisation); and ETSI (European Telecommunications Standards Institute) (PC 2003).

According to the EC (2008g), a large proportion of products sold throughout the European Union in more than 20 product sectors is now covered under the new approach to harmonisation, including machinery, toys, medical devices, construction products and radio/telecommunications equipment.

In many cases, EU directives require that products receive third-party certification by conformity assessment bodies before being placed on the market, to ensure they comply with all essential requirements (EC 2008g). Under the 'global approach' to conformity assessment, introduced in the early 1990s:

- products are allowed to be tested and certified in any member state
- member states are responsible for regulatory oversight of testing and certification
- member states designate as 'notified bodies' the conformity assessment bodies they consider technically competent, and notify the EC of these bodies. Only 'notified bodies' are authorised to approve products
- certified products receive a 'CE' (Conformité Européenne) mark that guarantees free movement within the European Union without further conformity assessment (Osborne 2002).

Monitoring and enforcement

Monitoring and enforcement of the EU mutual recognition and harmonisation arrangements are carried out by surveillance bodies, national courts and administrative bodies and, in some cases, by the EU authorities themselves.

Member states are responsible for the implementation and enforcement of EU legislation under national law, and national courts and administrative bodies have primary responsibility for ensuring national authorities comply with EU law (EC 2008c). Market surveillance bodies monitor products on the market, to ensure compliance with the relevant directives (PC 2003). National courts have the power to issue orders to administrative bodies and annul a national decision, as well as to order a member state to compensate an individual for losses sustained as a result of infringement of EU law (EC 2008c).

The EC encourages individuals and businesses with a complaint about infringements of EU law to seek redress at a national level, as the issue may then be dealt with more quickly and directly. However, anyone may lodge a complaint with the EC against a member state for any regulation or measure considered to be in breach of EU legislation. If the EC believes that such a breach may indeed be occurring, it can open infringement procedures against the relevant member state by issuing a 'letter of formal notice' to the member state, requesting it to submit a response on the issue believed to be the subject of the infringement (EC 2008c). The EC may then issue a 'reasoned opinion' to the member state, which sets out the reasons why it considers there to have been an infringement of EU law and calling on the member state to comply with the relevant law within a specified period.

If the member state does not comply with the reasoned opinion, the EC can refer the case to the ECJ. The ECJ takes, on average, about two years to rule on cases brought forward by the EC, and will deliver a judgment stating whether there has been an infringement of EU law. However, it does not have the power to annul a national law that is deemed inconsistent with EU law, nor to force a member state to respond to an individual's request or compensate an individual for the adverse effects of an infringement. Rather, it is up to a member state to take whatever measures it sees fit in light of an ECJ decision (EC 2008c).

As an alternative to pursuing legal proceedings, a non judicial dispute resolution mechanism known as SOLVIT is available to individuals and businesses wishing to resolve disputes relating to EU law. The service, which began operating in 2002 and is provided free of charge, is coordinated by the EC and operates through centres in each member state. To use the service, an individual or business registers a complaint with the local SOLVIT centre. This centre then works with the SOLVIT centre in the jurisdiction where the problem has occurred to address the issue, with a target deadline of 10 weeks for finding a solution. According to the EC, SOLVIT has resolved 78 per cent of cases presented to it (EC 2008i), and the service was 'widely praised' by respondents to a public consultation on the EU internal market, although respondents also claimed that it is 'under-funded and under-publicised' (EC 2006c, p. 26).

Effectiveness of the arrangement and recent reforms

The EC has claimed that mutual recognition operates generally successfully for many products (Osborne 2002). However, the EC has also noted ongoing technical obstacles to intra-EU trade. As at 2003, many businesses across the European Union still faced barriers to trade in the form of national technical regulations and conformity assessment. Approximately 6000 draft national technical regulations had been notified to the EC from 1992 to 2003, and the number of open cases in the ECJ for mutual recognition infringement had increased from 700 to nearly 1600 over that period (PC 2003).

It is unclear whether the situation has improved in the last five years. In 2006, the EC conducted a public consultation on EU single market policy. The consultation drew complaints of over-regulation and 'gold plating' at the national level, with member states 'frequently' adding national product requirements to EU-level standards on the basis of 'meeting additional environmental and social concerns' (EC 2006c, p. 11). Respondents' opinions were divided on the effectiveness of the mutual recognition arrangements — they generally felt that minimum harmonisation approaches allowed trade barriers to remain, but that stronger

harmonisation may be difficult to achieve and could lead to the imposition of excessively stringent rules (EC 2006c).

In February 2008, reflecting on the views aired in the 2006 public consultation, the EC noted that the technical barriers posed by national product requirements continue to hinder intra-EU trade (EC 2008g). It acknowledged that although, legally, member states can only refuse entry to goods lawfully sold in other member states in exceptional circumstances, in practice, the vast range of national product requirements still creates technical barriers for businesses and has led to 'substantial obstacles to the free movement of goods' (EC 2008g, p. 4). In particular, the EC noted that consultation had revealed:

- a widespread lack of awareness among businesses and national authorities of the principle of free movement of goods
- legal uncertainty about the burden of proof where a member state refuses entry to a product
- difficulty for businesses in determining, *a priori*, whether they can lawfully sell their products in another member state with different technical requirements (EC 2008g).

The EC also noted inconsistencies across the European Union in the standards of conformity assessment and market surveillance. As mentioned earlier, it is the responsibility of member states to select which conformity assessment bodies are sufficiently competent to become recognised notified bodies. According to the EC, member states differ in the methods and stringency by which they designate notified bodies. While some perform the selection process directly through their public administration, others rely on national accreditation bodies to independently evaluate the competence of conformity assessment bodies. Many, but not all, national accreditation bodies coordinate at the EU level into the EA (European cooperation for Accreditation). However, as the EC (2008g, p. 2) noted, not all notified bodies are selected by accreditation and not all accreditation bodies are members of the EA, and the resultant variation in standards of notified bodies has led to an 'unlevel playing field' for goods across the EU market.

In addition, differences in the extent of market surveillance between member states and a lack of transnational coordination means that surveillance information is not always effectively shared across jurisdictions. According to the EC, some manufacturers have taken advantage of the resulting gaps in market surveillance, and consequently there are concerns that 'large numbers of non compliant (and potentially dangerous) products reach the market each year' (EC 2008g, p. 2).

Finally, respondents to the EC's public consultation complained that the enforcement procedures for dealing with infringements of EU law were 'unacceptably slow' (EC 2006c, p. 26).

In 2007, in response to some of these concerns, the EC proposed a package of reforms to enhance the operation of the EU goods market. The reforms, approved by EU member states on 23 June 2008, seek to improve the effectiveness of market surveillance and conformity assessment, and reduce barriers to trade in non harmonised goods caused by differing national product requirements (EC 2008d). The reforms will:

- shift the burden of proof for market access from manufacturers to member states. If a member state intends to refuse entry to a product on the basis of national technical requirements, it will be required to talk to the manufacturer of the product and give detailed reasons for denying market access
- establish 'product contact points' in each member state, charged with the task of providing information on national technical rules to businesses as well as to national authorities in other member states
- introduce a common legal framework for accreditation of conformity assessment bodies at the EU level, with the EA as the basis for the new framework
- introduce new rules on market surveillance to improve coordination between jurisdictions
- clarify the meaning of the CE mark and establish it as a community collective trademark (EC 2008d, 2008g).

At this stage, it is too early to assess whether these reforms will be sufficient to address the problems affecting mutual recognition of goods in the European Union.

C.2 European Union — occupations and services

Freedom of movement of persons within the European Union is established under the European Community Treaty and in European case law. Article 39 of the Treaty provides for the free movement of workers within the European Union, without 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 all considered breaches of Article 39 (PC 2003).

Qualifications

To enhance freedom of movement of workers, the European Union also introduced mutual recognition of professional qualifications. In a parallel manner to the arrangements for goods, some occupations have had their training requirements harmonised across the European Union, while remaining occupations are subject to a general system of mutual recognition.

The current arrangements for the mutual recognition of professional qualifications are set out in Directive 2005/36/EC, which was adopted on 7 September 2005 and came into effect on 20 October 2007. This directive consolidates and replaces 15 separate EU directives covering all professional qualification recognition rules except for lawyers, activities in the field of toxic substances and commercial agents (EC 2008a).

Under Directive 2005/36/EC:

- Training requirements are harmonised across EU member states for doctors, nurses, midwives, veterinary surgeons, dentists, pharmacists and architects. As a result, there is automatic recognition of qualifications and no comparison of qualifications is permitted for the purpose of professional recognition.
- For workers in selected manufacturing, trades, personal services and other occupations listed in Annex 4 of the Directive, mutual recognition is based primarily on the level of professional experience attained, and recognition is automatic once an applicant has professional experience of the duration specified. Consequently, no comparison of qualifications is permitted for the purpose of professional recognition.
- For workers in the above category who do not have the required duration of professional experience, and for workers in non harmonised occupations, the 'general system' of mutual recognition applies. Under this system, national authorities receiving an application for professional qualification recognition from a worker of another member state first check whether the applicant's training is equivalent to that required in the home jurisdiction. If there are substantial differences in the levels of training, the next step is to assess whether the applicant's other educational and professional experience can compensate for the differences. If not, the national authority may choose to impose a 'compensatory measure' — such as an aptitude test or training period — on the applicant, to achieve equivalence (EC 2008h).

If an applicant's qualification is successfully recognised under the general system of mutual recognition, the applicant is given a certificate of equivalence under

Directive 2005/36/EC. This certificate attests that the worker has qualifications equivalent to a worker of that occupation in the home jurisdiction (EC 2008h).

Services

While the above arrangements cover mutual recognition of professional qualifications, the EU model also includes a form of mutual recognition of services. Freedom of establishment and freedom to provide services across the European Union are general rights established under the European Community Treaty. Mutual recognition of services aims to facilitate the cross-border provision and use of services by businesses throughout the European Union. It also seeks to promote the ability of EU service providers to become established in other member states (for example, through affiliates or subsidiaries). An early example of the application of the principle of mutual recognition to the provision of services in the EU was the 2000/31/EC Directive on the cross-border provision of e-commerce (EC 2000).

In 2004, the EC tabled a proposal for a new Directive on Services in the Internal Market ('Services Directive'),[2] designed to achieve a single economic market for trade in most services throughout the European Union (EC 2006a).[3] The Services Directive sought to prohibit national-level service industry regulations, except under certain circumstances. Under the directive, individuals and companies that are allowed to provide a service in one EU member state should be free to provide the same service in any other member state, with little (if any) legal or administrative restrictions. The Directive arose out of the European Union's so-called Lisbon Agenda, agreed upon in 2000 and intended to increase the economic competitiveness of the Union. Freeing up the internal market for services was regarded as holding great economic potential in that respect (box C.1).

2 Also known as the 'Bolkestein Directive', after its main proponent, Frits Bolkestein, EU Commissioner for the Internal Market at the time.

3 All services performed for an economic consideration are covered by the Directive, except for: financial services; electronic communications networks; transport and port services; healthcare and social services; audiovisual services; gambling activities; and temporary employment agencies. Some of these excluded services are covered by other European Commission directives.

Box C.1 **Economic impact of the EU Services Directive**

In the European Union (EU), services account for around 70 per cent of GDP and employment, and for 95 per cent of new jobs. Yet services only comprise 20 per cent of cross-border trade. The Services Directive, by facilitating trade in services, can be expected to have significant economic effects.

De Bruijn et al. (2008) modelled the economic impact that the Services Directive, with and without the country of origin principle (CoOP), might have on the economies of the European Union. In their approach, the impact arises as a result of the reduction in regulatory heterogeneity between countries that the Directive would foster. The authors argue that bilateral regulatory heterogeneity between two trading partners is a particularly important source of non-tariff barriers to trade in services, because producers are faced with the need to adjust their business model to operate in another market.

Using computable general equilibrium simulations, de Bruijn et al. estimate that the Directive would increase intra-EU trade in services (excluding transport, real estate and government services) by between 30 and 62 per cent (19 and 38 per cent without the CoOP). Increased trade in services would, in turn, generate positive macroeconomic effects: total EU GDP would increase by between 0.3 and 0.7 per cent, and consumption by between 0.5 and 1.2 per cent (around 40 per cent less without the CoOP). According to the authors, these effects are due to: (i) improved resource allocation; (ii) improved terms of trade; and (iii) income effects.

Significantly, the authors find that, contrary to some assertions made in the course of the public controversy surrounding the Services Directive, liberalisation of trade in services would lead 'new' European countries such as Poland and the Czech Republic to redirect their output from services to manufacturing. Thus, the possibility that the directive would result in labour services being 'dumped' on Western European countries seems unlikely.

Sources: de Bruijn et al. (2008); Single Market News (2008).

A key element of the original proposal was the 'country of origin' principle (CoOP), which holds that service providers that meet the regulatory standards of their home member state should not be required to meet alternative or additional standards in the country where the service is delivered. This principle — effectively allowing total 'home country control' — rests on the mutual recognition by member countries of each other's regulatory standards, and was regarded as a preferred alternative to lengthy harmonisation of those standards.

However, the draft Services Directive generated substantial protest and debate across the European Union (Broughton 2004; Weiler 2007; Nicolaïdis and Schmidt 2007). Particular controversy surrounded the CoOP. Critics feared that application of this principle would lead to service providers moving their operations to those member states with the least stringent social and environmental standards

(Broughton 2004). Conversely, service providers from those states might flood into other countries, where they would undercut the conditions of local providers (Nicolaïdis and Schmidt 2007).

Following this controversy, the proposed directive was substantially amended before its adoption by the European Parliament on 12 December 2006. The CoOP was removed, and the 'freedom to provide services' reiterated (Weiler 2007). Under this principle, set out in Article 16 of the amended directive, member states may continue to impose local regulations on service providers from other jurisdictions, but only where these regulations are: non discriminatory; justified for reasons of public policy, public security, public health or environmental protection; and proportional to their objectives (EC 2006a). The final version of the Directive has been described as a 'managed' form of mutual recognition of services regulation, whereby host countries retain a significant ability to regulate the provision of services by foreign providers (Nicolaïdis and Schmidt 2007).

Moreover, the directive does not affect labour laws, employment and working conditions. The treatment of foreign workers operating on a *temporary basis* in the host jurisdiction is governed by another EC Directive — the Posting of Workers Directive (PWD) — which extends to temporary foreign workers all the benefits accruing to local employees, such as minimum wages (Vogt 2005; Nicolaïdis and Schmidt 2007).[4]

Member states are required to implement the provisions of the Services Directive by December 2009 (box C.2).

4 Self-employed foreign workers are, however, exempted from the PWD.

Box C.2 **Mutual evaluation under the Services Directive**

Following the adoption of the final Services Directive, a three-year implementation process was initiated, during which member states are expected to:

- 'transpose' provisions of the Directive into national law
- set up 'Points of Single Contact' for service providers
- allow for electronic completion of all administrative procedures
- put in place a comprehensive system of administrative cooperation between national administrations
- review and adapt their administrative and legal requirements.

The last of these tasks has been termed 'mutual evaluation'. It requires, as a first stage, member states to 'conduct a screening of their legislation in order to ascertain whether requirements reserving access to certain activities to particular providers exist in their legal systems' (Messerlin 2007, p. 25). This process should result, during the implementation period, in the dismantling of national regulatory requirements that are contrary to the European Treaty's principles of freedom of establishment and free movement of services (based, in some cases, on rulings by the European Court of Justice). The requirements targeted for abolition include all discriminatory requirements (for example, place of establishment, residence, domicile or principal provision of the service activity) and some non-discriminatory requirements that can constitute a barrier to trade in services (for example, obligations to have a certain qualification to hold shares in a company or for a provider to take a specific legal form) (EC 2006a).

The systematic regulatory evaluation process now underway in all EU countries will culminate, at the end of 2009, in a series of individual national reports, summarising the results of the screening undertaken. Those reports will then be made available, in a second stage of the mutual evaluation process, to all other member states (and interested parties), for comment within six months. Depending on the results of the mutual evaluation exercise, further reform initiatives — including towards more harmonisation — may then be proposed by the European Commission.

Sources: EC (2006a); Messerlin (2007).

C.3 Other European countries and bilateral arrangements

EEA-EFTA member states

The mutual recognition arrangements in the European Union cover all countries in the European Economic Area (EEA). The EEA was established in 1994 and currently includes all 27 EU member states as well as Norway, Iceland and Liechtenstein. These latter countries constitute three of the four members of the European Free Trade Association (EFTA), with Switzerland the fourth EFTA member state. Norway, Iceland and Liechtenstein are also known as EEA-EFTA member states. The EEA allows these countries to participate in the EU internal market without requiring EU membership. Switzerland has not chosen to be part of the EEA, and has its own bilateral mutual recognition arrangements with the European Union.

For non harmonised goods, as described above, EU member states planning to introduce regulations in a given product sector must notify the EC in advance. An EEA-EFTA member state must notify the EFTA Surveillance Authority (ESA). Together with the EC, the ESA assesses the validity of the draft national product regulations.

While the general arrangements for mutual recognition of goods, services and qualifications apply to the EEA-EFTA states, certain areas of EU law do not extend to these states, or apply only in part. These include laws on veterinary and phytosanitary products, customs laws, and agricultural and fisheries laws (EFTA 2007).

Bilateral arrangements between European countries and others

The EU member states also have bilateral mutual recognition agreements with a number of third countries, including Australia, New Zealand, Canada, the United States of America (US), Japan and Switzerland (EC 2008f).

In contrast to the broad-based mutual recognition schemes in place within the European Union and Canada, these agreements are limited in terms of both scope and coverage. Specifically, they provide for mutual recognition of designated conformity assessment bodies (CABs), and do not extend to mutual recognition or harmonisation of standards or regulations. They also apply to a limited number of product sectors specified in each agreement, such as electromagnetic compatibility, telecommunications equipment, machinery and medical devices.

Each of these mutual recognition agreements sets out the conditions under which the EU member states and the third country will accept test reports and certifications issued by the other party's designated CABs.

The three EEA-EFTA member states have negotiated parallel mutual recognition agreements with the same third countries as have the EU member states, to preserve homogeneity and free movement of goods within the EEA market (EFTA 2007).

C.4 Canada

The Canadian Agreement on Internal Trade (AIT) has been in force since 1995. The Federal Government and all provincial and territorial governments are signatories to the AIT, the aim of which is to:

> … reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market. (AIT, Article 100)

The AIT includes six general rules — set out in Articles 400–407 — that prohibit governments from imposing measures that restrict trade, except in special circumstances. Articles 401 and 402 provide for equal treatment of, and free movement of, all Canadian persons, goods, services and investments. Article 403 requires that government laws and regulations do not create an obstacle to trade. However, Article 404 offers an exception for measures that have a 'legitimate objective' (such as protecting public health and safety or the environment), provided that they are not unnecessarily trade restrictive.

The six general rules apply to ten sectors of the Canadian economy,[5] and further rules governing each of these sectors are set out in the sector-specific chapters of the AIT. An eleventh sector-specific chapter, relating to the energy sector, is still under negotiation (Industry Canada 2007b).

The coverage of the AIT is limited to these ten sectors and, in this sense, the agreement has been cited as an example of 'case-by-case' liberalisation (PC 2003), compared with the MRA and TTMRA models in which all goods are included unless specifically excluded or exempted. On the other hand, the scope of the AIT in relation to goods is broader than that of the MRA and TTMRA, in that the agreement would cover regulations relating to use of goods and manner of sale (NSW Government, sub. 55). That said, like the European Union model, the AIT

5 These sectors are: procurement; investment; labour mobility; consumer-related measures and standards; agricultural and food goods; alcoholic beverages; natural resources processing; communications; transportation; and environmental protection.

provides an 'out' for jurisdictions to impose their own regulations as long as these regulations are directed at legitimate objectives. In contrast, the MRA and TTMRA require governments to seek a temporary exemption if they wish to avoid the application of mutual recognition to a particular product. For this reason, the Canadian model has been described as 'weak' next to the MRA and TTMRA (NSW Government, sub. 55, p. 23).

Chapter 7 of the AIT sets out requirements relating to labour mobility, and states that any worker qualified for an occupation in one Canadian jurisdiction should have access to employment opportunities in that occupation in any other Canadian jurisdiction (Article 701).

Approximately 20 per cent of Canadian workers work in regulated occupations or trades (Human Resources and Social Development Canada 2006a). The AIT does not provide for automatic or universal mutual recognition of occupational registration or licences. Instead, under Article 708, participating jurisdictions are required to:

- mutually recognise the qualifications of workers from other jurisdictions
- reconcile differences in occupational standards in specific regulated occupations, where this is possible.

To meet this latter requirement, governments must assess the occupational standards in their jurisdiction to determine where there is commonality with other jurisdictions, and then take steps to reconcile or accommodate differences in standards.

In the case of regulated professional occupations, many occupational regulators have found it convenient to codify these standards assessments and reconciliations in the form of occupation-specific mutual recognition agreements, although this is not required by the AIT. As at January 2007, 30 of 50 professional occupations regulated in two or more Canadian jurisdictions have created mutual recognition agreements that cover most regulated jurisdictions; 16 have agreements signed by all regulated jurisdictions, and the remaining four do not yet have mutual recognition agreements (Industry Canada 2007a). Terms and conditions stipulated in these mutual recognition agreements vary across occupations and so the establishment of such an agreement does not necessarily imply the removal of all barriers to labour mobility in that occupation (Human Resources and Social Development Canada 2001).

For regulated trades occupations, assessment and reconciliation of standards has taken place through the Interprovincial Standards Red Seal Program. This program was established to facilitate greater mobility across Canada for skilled workers by

encouraging standardisation of provincial training and certification programs. Under the Red Seal Program, qualified tradespersons who successfully complete an Interprovincial Standards Examination receive a Red Seal endorsement and can then practise their trade in any Canadian jurisdiction without further assessment. Interprovincial examinations for each trade are developed using National Occupational Analyses, which are created by industry representatives and identify the key tasks performed by workers in that trade. The Red Seal Program is administered in each province and territory under the guidance of the Canadian Council of Directors of Apprenticeship, and now covers 49 regulated trades (Human Resources and Social Development Canada 2006b).

Despite the AIT having been in force for more than a decade, there is evidence of continuing barriers to interprovincial trade in Canada. In a survey of nearly 200 Canadian companies undertaken in 2005, 94 per cent of respondents said that non-tariff trade barriers within Canada had some form of impact on their business and 41 per cent identified standards and regulations as a barrier to their ability to do business (Conference Board of Canada 2006).

A recent development has been the signing of an internal trade agreement between two Canadian provinces, Alberta and British Columbia, in April 2006. The Trade, Investment and Labour Mobility Agreement (TILMA) has the objective of creating a seamless internal market between the two provinces, which together account for over one-quarter of Canada's gross domestic product. The agreement came into force in April 2007 and is expected to be fully implemented by April 2009 following a two-year transition period (Government of Alberta and Province of British Columbia 2006).

Unlike the AIT, TILMA is comprehensive, applying to all government measures that affect trade, investment and labour mobility unless specifically exempted from the agreement. Certain areas of provincial regulation, such as taxation and water, are exempt from TILMA, as are measures aimed at protecting public health, safety and the environment (Government of Alberta and Province of British Columbia 2006). Another difference between the agreements is that TILMA provides for a binding dispute settlement mechanism whereas, under the AIT, governments are not required to implement dispute settlement findings made against them (Macmillan and Grady 2007). This feature, along with the 'all-in' approach of TILMA, has led to the claim that TILMA may eventually have a much more significant impact on internal trade for its participating jurisdictions than has the AIT (Macmillan and Grady 2007).

C.5 APEC

The Asia Pacific Economic Cooperation (APEC) group is an international forum consisting of 21 countries or areas — known as 'member economies' — in the Asia Pacific region, including Australia and New Zealand. Some examples of APEC-led mutual recognition initiatives follow.

Goods

The APEC Mutual Recognition Arrangement on Conformity Assessment of Electrical and Electronic Equipment (EEMRA) and the APEC Mutual Recognition Arrangement for Conformity Assessment of Telecommunications Equipment (APEC TEL) are examples of limited mutual recognition of selected goods undertaken at a multilateral level. Under these arrangements, discussed below, the scope of mutual recognition is restricted to conformity assessment, rather than mutual recognition or harmonisation of standards or regulations.

Electrical and electronic equipment

The APEC EEMRA was announced in September 1999. The arrangement is based on the mutual 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 EEMRA aims to reduce duplicative testing and certification, which can add time and other costs to the export of goods, and to facilitate trade more generally (PC 2003).

The EEMRA has three levels of participation:

- Part I involves information exchange, enabling participating economies to familiarise themselves with each other's regulatory systems. Member economies participating in Part I must provide — in a standardised format — information about their mandatory requirements on regulated electrical and electronic products, to assist exporters of these products in other APEC economies.
- Part II provides for product testing in the exporting country by designated test facilities, with test reports recognised by the importing country.
- Part III provides for the certification of products in the exporting country by designated certification bodies, with conformity accepted by the importing country (APEC 2008a, PC 2003).

Participation in Part I is a prerequisite for participation in either of Parts II or III.

Participation in Parts II or III requires an economy to appoint a 'designating authority', which is responsible for designating, suspending, removing suspension and withdrawing designation of test facilities and/or certification bodies in that 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.

The EEMRA is administered by a Joint Advisory Committee, which convenes representatives from each participating economy. The Committee provides a forum for discussing issues, sharing information and reaching decisions associated with the operation of the arrangement. It also plays a role in dispute resolution (APEC 1999).

As at August 2008, 16 of the 21 APEC member economies were participating in Part I (information exchange) of the EEMRA. Of these 16, five member economies were participating in Part II (mutual recognition of test reports) and four of these five were participating in Part III (mutual recognition of certification) (table C.1) (APEC 2008b).

Table C.1 **Participation in the EEMRA, by date of commencement**

APEC member economy[a]	*Part I*	*Part II*	*Part III*
Australia	1999	2002	2002
Brunei Darussalam	2003	2007	2007
Canada			
Chile	2000		
China	1999		
Hong Kong, China	2000		
Indonesia	1999		
Japan	1999		
Korea	1999		
Malaysia	1999	2006	
Mexico			
New Zealand	1999	2003	2003
Papua New Guinea			
Peru			
Philippines	1999		
Russian Federation	2000		
Singapore	1999	2002	2002
Chinese Taipei	1999		
Thailand	1999		
United States			
Vietnam	2000		

[a] Not all APEC members are participants in EEMRA. Empty cells denote non-participating APEC countries.

Source: APEC (2008b).

It should be noted that the participation of both Australia and New Zealand in all parts of the EEMRA (as indicated in table C.1) would not affect or replace the operation of the TTMRA. This is because participation in Parts II and III of the EEMRA implies mutual recognition only of conformity assessment to the importing country's own standards, not mutual recognition of each country's product standards as in the TTMRA.

Telecommunications equipment

The APEC TEL arrangement was endorsed by APEC Telecommunications and Information Industry Ministers in June 1998 and commenced in July 1999 (OFTA 2007). The arrangement provides for the mutual recognition of test results and equipment certification (based on the importing country's requirements) undertaken by accredited test facilities and conformity assessment bodies in other participating economies (ACMA 2007a).

Like the EEMRA, the APEC TEL arrangement seeks to facilitate trade among APEC member economies by streamlining testing and certification procedures and, hence, reducing the costs imposed by these procedures on exporters, importers and regulators. The arrangement extends to all equipment subject to telecommunication regulations, including wireline and wireless, terrestrial and satellite equipment. It covers electromagnetic compatibility and electrical safety aspects, as well as telecommunications aspects of this equipment (APEC 1998).

The APEC TEL arrangement has two levels of participation:

- Phase I involves the mutual recognition of test laboratories as CABs and mutual acceptance of test reports
- Phase II involves the mutual recognition of certification bodies as CABs and mutual acceptance of equipment certifications (OFTA 2007).

To participate in either or both phases of the arrangement, a jurisdiction must specify, and make available to all other participants, a list of its technical regulations relating to telecommunications equipment for which it will recognise the test reports and/or equipment certifications provided by other jurisdictions' CABs. Each participating jurisdiction appoints a 'designating authority' that is responsible for designating, listing, and limiting or withdrawing designation of CABs in that jurisdiction, and to recognise CABs in other participating jurisdictions.

Any two participating jurisdictions can then contact each other to exchange information on designated CABs and arrange for Phase I and/or II to be implemented between them. In this way, the APEC TEL arrangement has been

implemented through a series of bilateral agreements between participants to recognise each other's designated CABs in accordance with the agreement. For example, Australia has so far recognised CABs in the member economies of Canada, Chinese Taipei, Singapore and the United States, and designated Australian CABs are recognised by Canada, Chinese Taipei, Japan, Singapore and the United States (ACMA 2007b, 2008).

As of March 2008, 16 APEC member economies were participating in the APEC TEL arrangement: Australia; Canada; Chile; China; Chinese Taipei; Hong Kong; Indonesia; Japan; Korea; Malaysia; New Zealand; the Philippines; Singapore; Thailand; United States; and Vietnam (APECTEL 2008).

Occupations

Engineers and architects

The APEC Engineer Project and the APEC Architect Project are examples of limited mutual recognition of selected occupations undertaken at a multilateral level.

The projects were endorsed by the APEC Human Resources Development Working Group in 1997 and 2000, respectively. They aim to facilitate the international mobility of professional engineers and architects within the APEC region by establishing common criteria for the recognition of professional competence. Professional engineers and architects in each participating jurisdiction who are assessed as meeting these criteria are listed on the APEC Engineer Register or APEC Architect Register (APEC 2005).

Mutual recognition is limited in the sense that the arrangements do not remove the ability of participating jurisdictions to require additional assessment of registered engineers and architects before they are allowed to practise in the new jurisdiction. However, the intention is that such additional assessment would be restricted to jurisdiction-specific matters and that a period of sponsored practice in the jurisdiction may be more effective than further assessment (PC 2003).

As set out in the APEC Engineer Manual, to be eligible for registration as an APEC engineer, a person must be recognised as a professional engineer within an APEC economy, and must satisfy an authorised body in that economy that he or she has:

- completed an accredited or recognised engineering program, or assessed recognised equivalent

- been assessed within his or her 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
- maintained continuing professional development at a satisfactory level (APEC 2000).

Similar eligibility requirements for registration as an APEC architect are set out in the APEC Architect Operations Manual. A person must be recognised as a professional architect within an APEC economy, and must satisfy an authorised body in that economy that he or she has:

- completed an accredited or recognised architectural program
- gained a minimum period of post graduate practical experience, with specified requisites
- fulfilled registration, licensing or other requirements for full professional recognition in the home jurisdiction
- gained a minimum period of professional practice as a registered or licensed architect, with specified requisites (APEC 2006).

The two projects have a common framework, consisting of:

- a monitoring committee in each participating economy, responsible for administering that jurisdiction's respective sections of the Engineer and Architect Registers. Monitoring Committees consist of representatives from government, industry, educational institutions and professional bodies. They provide information on whether individuals in that jurisdiction are APEC engineers or architects, and develop and maintain assessment systems to ensure that candidates for each of the registers have complied with the set criteria.
- a central council, responsible for deciding the standards and criteria required for registration as an APEC engineer or architect and to establish operational procedures for management of the APEC registers. It comprises one voting representative from each participating economy's monitoring committee. The central council also develops and maintains standards and criteria for facilitating practice by APEC engineers or architects throughout the participating APEC economies (APEC 2005).

The APEC Engineer Register was launched in November 2000 and the APEC Architect Register in September 2005 (APEC 2005). Currently, 13 APEC member economies maintain sections of the APEC Engineer Register: Australia, Canada, Chinese Taipei, Hong Kong, Indonesia, Japan, Korea, Malaysia, New Zealand, the

Philippines, United States, Thailand and Singapore (APEC 2005). Fourteen APEC member economies maintain sections of the APEC Architect Register: Australia, Canada, China, Chinese Taipei, Hong Kong, Japan, Korea, Malaysia, Mexico, New Zealand, the Philippines, Singapore, Thailand and the United States (APEC 2006).

Australia and Japan took the implementation of the APEC Engineer Project a step further by signing a bilateral agreement to facilitate mutual recognition of registered APEC engineers in October 2003. The agreement allows engineers listed in either the Australian or Japanese sections of the APEC Engineer Register to obtain registration in the other jurisdiction (the 'host' jurisdiction), provided that they:

- agree to abide by the laws, regulations and ethical standards of the latter jurisdiction, and to meet any continuing competence requirements of the host jurisdiction
- have obtained the equivalent of one year of experience in the host jurisdiction
- declare any previous application for registration to the host jurisdiction.

Applicants must complete an application form and pay a registration fee to the host jurisdiction. The arrangement permits both Australia and Japan to retain full discretion on the registration of applicants. However, if a host jurisdiction rejects an applicant qualified under the above criteria, it must (on request) inform the applicant's home jurisdiction of the reasons for the rejection or any additional requirements (Engineers Australia 2003).

D Survey of occupation-registration authorities

D.1 Introduction

Assessment of the use of mutual recognition in terms of occupational registration is hampered by a lack of data. While some regulators' annual reports present data on registration, including the use of mutual recognition, there is no regular, comprehensive data collection.

In order to help gauge the importance and effectiveness of mutual recognition arrangements for occupational registration, the Commission conducted a survey of registration authorities in August 2008.

This survey gathered information about:

- the number of people using mutual recognition as a means of obtaining registration (compared to those obtaining registration conventionally)
- the extent to which conditions are imposed upon those registering via mutual recognition
- the number of applications for mutual recognition that are rejected
- applicants' level of awareness about mutual recognition.

In addition, the survey provided an opportunity for authorities that process mutual recognition applications to express their opinion on the functioning of the schemes.

Survey population

The survey targeted authorities responsible for registration, that is, 'the licensing, approval, admission, certification (including by way of practising certificates), or any form of authorisation, of a person required by or under legislation for carrying on an occupation' (*Mutual Recognition Act 1992* (Cwlth), s. 4).

The list of relevant authorities in each jurisdiction was constructed on the basis of advice from representatives of the Cross-Jurisdictional Review Forum (CJRF), and

other sources such as the 1995-96 Office of Regulation Review Survey of Registration Agencies (ORR 1997). Representatives of the CJRF also distributed the survey instrument at the request of the Commission (box D.1).[1]

Box D.1 **Administering the survey**

The survey was distributed to occupation-registration authorities via email. With the exception of New South Wales, representatives of the Cross-Jurisdictional Review Forum distributed the survey to individual authorities, referring participants to the Commission if they needed help with completing the survey. Participants were initially given approximately four weeks to complete the survey. At the end of that period, they were sent a reminder email, and given an additional week to submit their responses.

Survey participants were given the options of:

- completing an Excel spreadsheet and returning the survey by email
- printing a document and returning the survey by post.

A copy of the survey form can be viewed at the Commission website: www.pc.gov.au/projects/study/mutualrecognition.

Centralised information about occupation regulators appears to be limited in some jurisdictions. While some jurisdictions had a list of authorities readily available, others constructed a list at the request of the Commission. An active register of authorities responsible for occupation registration would assist, for example:

- initiatives to develop and maintain regulator expertise (chapter 11)
- communication between regulators and central agencies (for example, regarding developments in the mutual recognition schemes and relevant findings from legal proceedings)
- studies of aspects of regulators' work.

Caveats regarding survey data

It is important to note a number of caveats regarding the survey data presented in this report.

First, the population of authorities surveyed should be regarded as only broadly representative of occupation-registration authorities in Australia and New Zealand. An exhaustive list of authorities was not available at the time of the survey.

[1] The CJRF representatives distributed the survey to major registration agencies within New South Wales, and the Commission emailed surveys to other agencies within New South Wales.

Second, while the response rate among registration authorities approached to participate in the survey was just over 50 per cent, some authorities responsible for the registration of a large number of workers were unable to provide any data. For example, the Office of Fair Trading was unable to provide information about the number of people working in building, electrical, air conditioning and refrigeration, and plumbing occupations in New South Wales. Therefore, while over 50 per cent of agencies approached responded to the survey, the total number of registrations they reported for some occupations probably represents less than half of total annual registrations in those occupations across Australia and New Zealand.

Third, a number of survey responses were incomplete, meaning that the response rate for each question was not always above 50 per cent. For example, for around 10 per cent of registered occupations for which data on new registrations were supplied, regulators were unable to detail the number of new registrations granted under mutual recognition. Further, information on the number of interjurisdictional registrations conducted outside of mutual recognition was provided for only 42 per cent of occupation registration schemes for which any data were received.

Fourth, the quality of data from some regulators is open to question, an observation also made by Allen Consulting Group in a recent report that included a survey of registration authorities (ACG 2008).

D.2 Survey responses

A total of 115 responses from different registration authorities were received, providing registration data for 362 separate occupation-registration schemes.

A survey response rate of approximately 53 per cent was achieved.[2] Two factors complicated calculation of this rate.

First, the lack of a definitive list of registration authorities responsible for occupations in which mutual recognition applies meant that surveys were distributed to a number of authorities for whom the survey was not relevant. The number of different organisations to which the survey was distributed by both CJRF representatives and the Commission was used as the denominator in calculating the survey response rate. If authorities for which the survey was not applicable were excluded from the calculation, the response rate might have been higher.

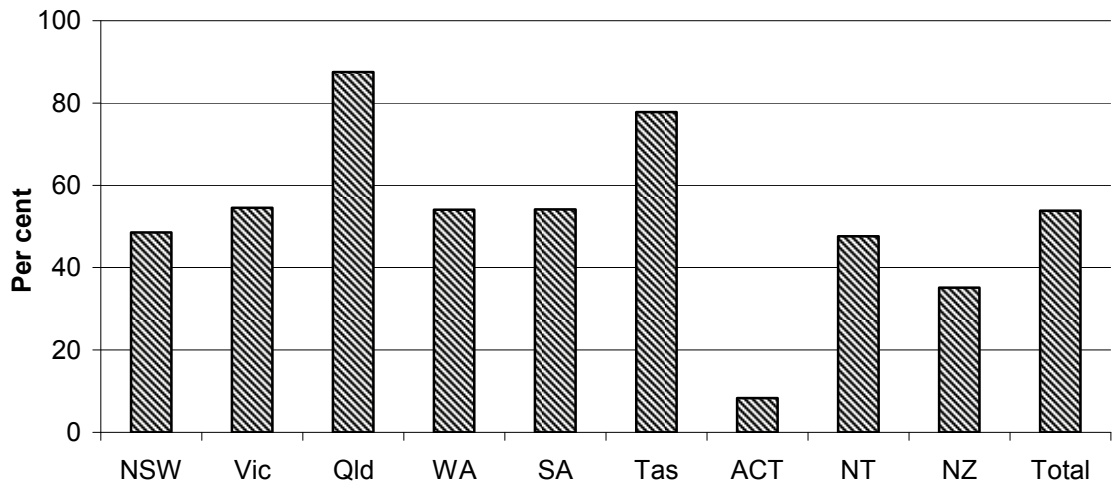
Second, survey responses that combined the responses of a number of authorities that were initially contacted were also received. For example, the Queensland Office of Health Practitioner Registration Boards returned a single survey form

2 This response rate does not include any 'responses' returned devoid of data.

containing information for a range of registration boards that were individually included in the initial survey population. In calculating the response rate for the survey, this was counted as a valid response for each of the registration boards included in the initial distribution.

Response rates and the amount of detail provided in responses varied across occupations and jurisdictions. In particular, health registration data appear to be both readily available and suitably detailed, with responses covering occupations in this area received from all jurisdictions. Authorities in Queensland returned 19 separate responses, covering over 70 registration schemes. In contrast, only one out of twelve surveys was returned by authorities in the ACT. The variation in response rates by jurisdiction is presented in figure D.1.

Figure D.1 **Response rates — survey of occupation-registration authorities**
Per cent, by jurisdiction



Source: Productivity Commission survey of occupation-registration authorities.

Additional survey responses that are received before 12 December 2008, when submissions commenting on the draft report close, will be incorporated into data presented in the final report.

D.3 Results

Number of new registrations

The total number of new registrations in the 2007 calendar year, as reported in the survey responses, is shown by jurisdiction in table D.1, and by occupational group

in table D.2. These tables include the total number of new registrations, new registrations under mutual recognition, and new registrations of people coming from other jurisdictions but that were not made under mutual recognition.

Registration authorities reported over 17 000 uses of mutual recognition as a means of occupation registration in 2007. Around 38 per cent of the mutual recognition registrations were recorded in Queensland, although this figure is inflated due to the high response rate and superior data quality from that jurisdiction. A similarly high level of mutual recognition registrations is observed in health-related occupations, although it is less evident whether or not this is due to superior data quality or higher use of mutual recognition.

Table D.1 **New registrations from other jurisdictions, by jurisdiction, 2007[a]**
Number of registrations

	Registrations from other jurisdictions		
Jurisdiction	*Mutual recognition*	*Not under mutual recognition*	*Total registrations*
NSW	2 658	1 391	88 641
Vic	2 033	79	19 621
Qld	6 548	3 179	43 894
WA	484	281	10 529
SA	989	103	11 694
Tas	880	173	2 009
ACT	345	46	526
NT	3 137	213	7 255
New Zealand	248	1 531	9 502
Total	**17 322**	**6 996**	**193 671**

a Data presented are the sum of all registrations reported for each group, regardless of whether an answer was provided for all registration categories. That is, the total number of registrations includes responses from registration schemes for which the number of registrations from another jurisdiction was not received.

Source: Productivity Commission survey of occupation-registration authorities.

Table D.2 **New registrations from other jurisdictions, by occupation group, 2007**[a]

Number of registrations

	Registrations from other jurisdictions		
Occupation group	*Mutual recognition*	*Not under mutual recognition*	*Total registrations*
Building occupations	1 352	81	20 380
Dangerous goods licences	44	10	1 328
Finance occupations	0	6	13
Gambling and racing occupations	80	57	7 774
Health occupations	12 403	5 725	39 730
Loadshifting and industrial equipment operator occupations[b]	0	0	63 284
Mining occupations	8	4	26
Motor vehicle occupations	17	0	4 482
Real estate occupations	1 095	0	17 278
Transport occupations	93	3	1 283
Other	2 230	1 110	38 093
Total	**17 322**	**6 996**	**193 671**

[a] Data presented are the sum of all registrations reported for each group, regardless of whether an answer was provided for all registration categories. That is, the total number of registrations includes responses from registration schemes for which numbers of registrations from other jurisdictions were not received. [b] Two registration authorities provided information about these occupations. One authority reported zero registrations from other jurisdictions, the other reported that the information was not available.

Source: Productivity Commission survey of occupation-registration authorities.

Importance of mutual recognition

The use of mutual recognition as a means of occupation registration relative to the total number of registrations provides an indicator of the importance of mutual recognition. Table D.3 shows the number of registrations from other jurisdictions as a proportion of total registrations for each jurisdiction, suggesting that mutual recognition may be of greater importance for the smaller jurisdictions. The proportions presented in this table are different from those implied by table D.1, because complete information on registrations from other jurisdictions was not available for all registration schemes.[3] For example, the number of mutual recognition registrations was unavailable for a number of schemes that did provide the total number of registrations.

[3] In calculating each of the percentages in table D.3, only those schemes that provided data for both the relevant denominator and numerator were used. This was because the number of mutual recognition registrations was unavailable for a number of schemes that did provide the total number of registrations.

Table D.3 **New registrations from other jurisdictions as a proportion of total registrations, by jurisdiction, 2007**

Per cent

Jurisdiction	*Mutual recognition*[a]	*Mutual recognition from New Zealand*[a]	*Registrations from another jurisdiction, not under mutual l recognition*[a]	*Ratio of mutual recognition to non-mutual recognition*[b]
NSW	12.7	0.7	1.9	1.5
Vic	11.1	1.8	1.4	7.9
Qld	14.9	1.2	13.4	1.8
WA	8.5	0.5	8.8	1.9
SA	8.5	0.4	2.7	1.6
Tas	42.8	1.3	8.4	5.1
ACT	65.6	–	8.7	7.5
NT	49.6	1.5	3.4	14.7
New Zealand	2.6	na	43.4	0.1
Total	**14.5**	**0.9**	**5.7**	**1.9**

[a] For these columns, the total number of registrations is the sum of new registrations for those registration schemes that provided valid data for both the numerator and denominator. [b] The ratio of mutual recognition registrations to registrations from another jurisdiction that were not under mutual recognition, for registration schemes that provided numerical information for both items. **na** Not applicable. – No data.

Source: Productivity Commission survey of occupation-registration authorities.

Table D.4 demonstrates the importance of mutual recognition for registrations in different occupation groups. Mutual recognition appears to be most widely used in occupations for which higher levels of interjurisdictional registration were reported generally. For example, mutual recognition registrations represent around 30 per cent of total registrations across health registration schemes that were able to provide both the number of mutual recognition and total registrations. Similarly, non-mutual recognition interjurisdictional registrations comprised around 16 per cent of all registrations for these schemes.

The use of conditions for registration under mutual recognition

The survey asked registration authorities to provide information on whether or not they impose conditions on the licences of people registering via mutual recognition in order to achieve equivalence. Of the registration schemes for which data on the number of new registrants in 2007 were provided, around 12 per cent involved the imposition of conditions on registration. Nearly half of those schemes related to the registration of health occupations, and around a quarter were related to building occupations.

Table D.4 **New registrations from other jurisdictions as a proportion of total registrations, by occupation group, 2007**

Per cent

Occupation group	*Mutual recognition*[a]	*Mutual recognition from New Zealand*[a]	*Registrations from another jurisdiction, not under mutual recognition*[a]	*Ratio of mutual recognition to non-mutual recognition*[b]
Building occupations	9.3	0.6	1.3	10.2
Dangerous goods licences	6.4	0.4	4.7	1.0
Finance occupations	0.0	0.0	46.2	0.0
Gambling and racing occupations	1.0	0.0	0.8	1.4
Health occupations	31.2	3.3	16.7	2.0
Loadshifting and industrial equipment operator occupations[c]	0.0	0.0	0.0	0.0
Mining occupations	30.8	0.0	15.4	2.0
Motor vehicle occupations	1.3	0.5	0.0	0.0
Real estate occupations	6.4	0.5	0.0	0.0
Transport occupations	8.2	0.4	0.7	27.3
Other	6.1	1.5	10.0	0.7
Total	**14.5**	**0.9**	**5.7**	**1.9**

[a] In these columns, the number of total registrations is the sum of new registrations for those registration schemes that provided valid data for both the numerator and denominator. [b] The ratio of the sum of mutual recognition registrations to the sum of non-mutual recognition registrations, for registration schemes that provided information for both the numerator and denominator. [c] Two registration authorities provided information about these occupations. One authority reported zero registrations from other jurisdictions, the other reported that the information was not available.

Source: Productivity Commission survey of occupation-registration authorities.

Of the schemes that reported imposing conditions, registrations where conditions are used comprised about 23 per cent of all mutual recognition registrations (table D.5).

Use of conditions is significant in building occupations where, for those schemes that reported the use of conditions, around 67 per cent of mutual recognition registrations involved the use of conditions to achieve equivalence. In the context of *all* reported mutual recognition registrations for building occupations — including those registration schemes that did not report the conditions — around 36 per cent of registrations involved conditions.

Table D.5 **Use of conditions to achieve equivalence, by occupation group, 2007**

Occupation group	*Registrations on which conditions imposed*	*Mutual recognition registrations in schemes imposing conditions*	*Percentage of mutual recognition registrations with conditions imposed*[a]
	No	No	%
Building occupations	487	726	67.1
Dangerous goods licences	9	9	100.0
Health occupations	339	3175	10.7
Mining occupations	2	8	25.0
Real estate occupations	34	423	8.0
Transport occupations	6	81	7.4
Other	474	1436	33.0
Total	**1351**	**5858**	**23.1**

[a] Only those registration schemes that provided numerical evidence about the use of conditions are included.

Source: Productivity Commission survey of occupation-registration authorities.

Rejections of applications under mutual recognition

Information about the number of registration applications under mutual recognition that were rejected was also requested. Valid responses to this question were received for about 80 per cent of the registration schemes for which data were provided.

Rejection of applications made under mutual recognition was not a common occurrence. In all, nine schemes rejected a total of 37 mutual recognition applications in 2007, with 15 and 12 of these in building and health occupations, respectively.

Commonly cited reasons for rejecting applications under mutual recognition included:

- lack of an equivalent occupation
- criminal convictions
- incorrect declarations made on the application form
- failure to meet recent practice requirements.

The finding that rejection of mutual recognition applications is not particularly common is consistent with the idea that workers often contact agencies prior to seeking registration under mutual recognition, and those who are not eligible then do not tend to proceed. For example, in its response, the Victorian Institute of

Teaching pointed out that, while it had not rejected many applications under mutual recognition in 2007, 28 applicants failed to complete the process.

Awareness of mutual recognition

Survey respondents' opinions on awareness about mutual recognition were sought. Occupation-registration authorities largely believed applicants to be aware of mutual recognition. Regarding applicants from other jurisdictions, registration authorities indicated that:

- around 29 per cent were very aware of mutual recognition
- around 65 per cent were somewhat aware
- about 6 per cent were not aware.

E Labour market impacts of mutual recognition

Chapter 4 presented an assessment of the impacts of the mutual recognition schemes on labour markets using several analytical tools, including a shift-share model of interstate labour mobility, an analysis of interjurisdictional wage convergence and a series of computable general equilibrium (CGE) simulations. This appendix provides further detail on the data and methodology used to perform those analyses.

E.1 Labour mobility changes

One of the purposes of the mutual recognition schemes is to remove impediments to the movement of labour between jurisdictions. Despite the fact that interjurisdictional labour mobility has increased over the period during which mutual recognition has existed (tables E.1 and E.2), that increase cannot be attributed solely to mutual recognition. As noted in chapter 4, a number of factors are likely to affect labour mobility, and isolating the effect of mutual recognition is difficult.

In an attempt to disentangle the effects of mutual recognition from other factors that may also have affected labour mobility since the inception of mutual recognition, shift-share analysis was used to examine how increases in mobility over time within an industry differ from national and occupational averages. This provided an indication of whether observed increases in mobility within an industry can be attributed to:

- a general increase in mobility, across all occupations and industries
- a specific increase in relative mobility of workers in registered or unregistered occupations, which may provide an indication of the effect of mutual recognition
- a specific increase in mobility of different groups of workers in particular industries, which may reflect changes in the demand for labour in those industries.

Data

The Australian Bureau of Statistics (ABS) supplied unpublished data on interstate labour movements from the 1996, 2001 and 2006 Australian censuses. Workers were defined as 'mobile' if they:

- were employed on the day of the census
- moved between Australian jurisdictions in the year prior to the census
- arrived in Australia within the year prior to the census, and were born in New Zealand.

The data excluded those who did not state their:

- usual residence one year before the census
- birthplace
- occupation.

Those born overseas (excluding New Zealand) and who arrived in the 12 months prior to the census were also excluded.

Using the list of occupations presented in appendix F, mobile workers were classified as employed in either fully registered, partially registered or unregistered occupations in their destination jurisdictions. Fully registered occupations refer to occupations that require mutually recognisable registration in all Australian jurisdictions, whether this is registration in each jurisdiction, or at a national level. Partially registered occupations are those that require registration in some but not all jurisdictions. Unregistered occupations are those for which there is no requirement for mutually recognisable registration in any Australian jurisdiction.[1]

Table E.1 presents the levels of labour mobility — gross number of movements between jurisdictions in the year preceding each census — for different occupation and industry groupings. Table E.2 displays changes in the level of mobility that was observed between 1996 and 2006.

The changes in labour mobility between 1996 and 2006 for different combinations of occupation and industry can be decomposed using shift-share analysis.

[1] Appendix F outlines several qualifications on such classification of some occupations, including that the scope of activities covered by registration may differ across jurisdictions. Those limitations apply to this analysis.

Table E.1 **Labour mobility levels by industry**[a]

Number of movements into a jurisdiction in the 12 months to census day, by registration status and industry 1996, 2001, and 2006

	1996				*2001*				*2006*			
Industry of destination	*Registered*	*Partially registered*	*Un-registered*	*Total*	*Registered*	*Partially registered*	*Un-registered*	*Total*	*Registered*	*Partially registered*	*Un-registered*	*Total*
Agriculture, Forestry and Fishing	130	162	4 498	4 790	160	188	4 668	5 016	117	147	3 948	4 212
Mining	426	527	2 315	3 268	294	380	1 737	2 411	589	543	2 938	4 070
Manufacturing	592	927	10 095	11 614	695	1 134	11 295	13 124	812	1 133	11 610	13 555
Electricity, Gas and Water Supply	47	50	308	405	61	96	629	786	98	123	731	952
Construction	1 865	2 180	3 318	7 363	1 934	2 495	3 357	7 786	3 207	3 814	5 183	12 204
Wholesale Trade	375	183	6 647	7 205	341	146	6 679	7 166	291	173	5 947	6 411
Retail Trade	298	262	14 888	15 448	351	333	17 245	17 929	362	319	18 166	18 847
Accommodation, Cafes and Restaurants	198	58	12 917	13 173	219	53	13 678	13 950	204	57	13 516	13 777
Transport and Storage	2 190	176	3 312	5 678	2 699	220	3 666	6 585	3 134	267	3 753	7 154
Communication Services	43	44	1 961	2 048	32	47	2 475	2 554	51	54	1 747	1 852
Finance and Insurance	745	74	5 455	6 274	1 090	74	6 197	7 361	1 059	100	5 811	6 970
Property and Business Services	1 993	780	13 173	15 946	2 717	820	17 481	21 018	2 907	1 103	16 336	20 346
Government Administration and Defence	1 500	526	16 590	18 616	1 727	539	14 521	16 787	1 965	623	17 152	19 740
Education	125	3 466	4 253	7 844	98	3 807	4 773	8 678	118	4 581	5 262	9 961
Health and Community Services	5 988	763	5 978	12 729	6 176	779	7 332	14 287	6 290	1 006	8 396	15 692
Cultural and Recreational Services	452	245	4 707	5 404	203	245	4 931	5 379	157	218	4 948	5 323
Personal and Other Services	124	768	3 778	4 670	180	774	3 969	4 923	218	756	3 942	4 916
Non-classifiable economic units	80	120	1 490	1 690	58	42	812	912	148	145	1 875	2 168
Total	17 171	11 311	115 683	144 165	19 035	12 172	125 445	156 652	21 727	15 162	131 261	168 150

[a] Industry is aggregated at the 1-digit Australian and New Zealand Standard Industrial Classification (ANZSIC) level.

Source: ABS (*Census of Population and Housing*, 1996, 2001 and 2006, unpublished data).

Table E.2 **Total change in labour mobility by registration status and industry[a]**

Change in mobility levels between 1996 and 2006

Industry[b]	*Fully registered*		*Partially registered*		*Un-registered*		*Total*	
	No	%	No	%	No	%	No	%
Agriculture, Forestry and Fishing	- 13	-10.0	- 15	-9.3	- 550	-12.2	- 578	-12.1
Mining	163	38.3	16	3.0	623	26.9	802	24.5
Manufacturing	220	37.2	206	22.2	1 515	15.0	1 941	16.7
Electricity, Gas and Water Supply	51	108.5	73	146.0	423	137.3	547	135.1
Construction	1 342	72.0	1 634	75.0	1 865	56.2	4 841	65.7
Wholesale Trade	- 84	-22.4	- 10	-5.5	- 700	-10.5	- 794	-11.0
Retail Trade	64	21.5	57	21.8	3 278	22.0	3 399	22.0
Accommodation, Cafes and Restaurants	6	3.0	- 1	-1.7	599	4.6	604	4.6
Transport and Storage	944	43.1	91	51.7	441	13.3	1 476	26.0
Communication Services	8	18.6	10	22.7	- 214	-10.9	- 196	-9.6
Finance and Insurance	314	42.1	26	35.1	356	6.5	696	11.1
Property and Business Services	914	45.9	323	41.4	3 163	24.0	4 400	27.6
Government Administration and Defence	465	31.0	97	18.4	562	3.4	1 124	6.0
Education	- 7	-5.6	1 115	32.2	1 009	23.7	2 117	27.0
Health and Community Services	302	5.0	243	31.8	2 418	40.4	2 963	23.3
Cultural and Recreational Services	- 295	-65.3	- 27	-11.0	241	5.1	- 81	-1.5
Personal and Other Services	94	75.8	- 12	-1.6	164	4.3	246	5.3
Non-classifiable economic units	68	85.0	25	20.8	385	25.8	478	28.3
Total	**4 556**	**26.5**	**3 851**	**34.0**	**15 578**	**13.5**	**23 985**	**16.6**

a Total change in mobility 1996–2006 refers to the number of people moving between jurisdictions in the year to the 2006 census less the number of people moving between jurisdictions in the year to the 1996 census. Percentage refers to the total change in mobility as a percentage of mobility levels in 1996. **b** Industry is aggregated at the 1-digit ANZSIC level.

Source: ABS (*Census of Population and Housing*, 1996, 2001 and 2006, unpublished data).

Shift-share analysis of interstate labour mobility

Method

Traditional shift-share analysis of labour mobility distinguishes between three components making up the overall change in labour mobility of occupation *j* within industry *i* (box E.1):

- A general or national change in labour mobility — this refers to a change in the mobility of workers in a given occupation and industry that is consistent with the national changes in labour mobility. As a percentage change in mobility, this component is the same across all combinations of occupation and industry.
- A change in the occupational mix refers to the difference between the change in mobility for an occupation group and the national change in mobility. In percentage terms this change is the same for a given occupation across all industries.
- An industry component — this refers to a residual component that remains after accounting for the national and occupational mix changes in labour mobility. This component identifies whether the change in the mobility of occupation *j* in industry *i* has been greater or smaller than the total change in the mobility of occupation *j* across all industries, thereby reflecting changes in labour mobility for a given occupation that is attributable to differences between industries.

Results of the shift-share analysis

Table E.3 illustrates the change in occupational mix for the three classes of occupations identified. This may be conceived of as the difference in the change in labour mobility for each occupation type and the change in mobility for *all* occupations.

Table E.3 **Change in occupational mix**

Percentage point change in mobility levels between 1996 and 2006

	1996–2001	*2001–06*	*1996–2006*
	%	%	%
Fully registered	2.19	6.80	9.90
Partially registered	-1.05	17.22	17.41
Unregistered	-0.22	-2.70	-3.17

Source: Productivity Commission estimates based on ABS (*Census of Population and Housing*, 1996, 2001 and 2006, unpublished data).

Box E.1 **Components of the shift-share model of labour mobility**

National change component

The proportional change in the level of national labour mobility (M) between time periods 1 and 2 is given by:

$$R = (M_2 - M_1)/M_1$$

This proportional change can explain part of the change in labour mobility for occupation *j* in industry *i*, namely the 'national change' component:

$$N_j^i = m_{j1}^i R$$

where m_{j1}^i is the level of mobility for those working in occupation *j* and industry *i* in period 1, and N_j^i is the change in level of mobility attributed to the national change.

Occupational mix component

The change in the occupational mix (P) for occupation group *j* is the difference between the national proportional change for that occupational group ($R_j = (M_{j2} - M_{j1})/M_{j1}$) and the national proportional change in mobility for all groups (R), multiplied by the level of mobility for occupation *j* in time period 1. That is, the change in the occupational mix component for occupation j is:

$$P_j^i = m_{j1}^i R$$

Industry component

The 'industry' component D_j^i measures the part of the change in labour mobility for an occupation *j* in industry *i*, that is specific to that industry, rather than national or occupational changes. That is:

$$D_j^i = m_{j1}^i (r_j^i - R_j)$$

where r_j^i is the total percentage change in mobility for occupation *j* in industry *i.*

Adding the components

The national, occupational mix and industry components combine to equal the total change in labour mobility for occupation *j* in industry *i.*

The percentage change in mobility for occupation *j* in industry *i* is equal to sum of the national change, the difference between the national change and occupational mix, and the difference between the occupational mix and the industry components (in percentages). That is:

$$r_j^i = (m_{j2}^i - m_{j1}^i)/m_{j1}^i = R + (R_j - R) + (r_j - R_j)$$

The total change in mobility for occupation *j* and industry *I*, in persons, is given by:

$$m_{j1}^i r_j^i = m_{j2}^i - m_{j1}^i = m_{j1}^i R + m_{j1}^i (R_j - R) + m_{j1}^i (r_j - R)$$

Source: Mulligan and Molin (2002).

The estimates of the occupational mix components for occupations that require registration support the idea that mutual recognition encourages labour mobility. Between 1996 and 2006, labour mobility for fully and partially registered occupations increased at a rate notably above the total change in labour mobility for this period. This is indicated by the positive changes in the occupational mix in table E.3. The majority of this increase appears to have occurred between 2001 and 2006. Commensurate with above-average increases in the mobility of registered occupations, the observed change in levels of mobility of unregistered workers is consistently below that for the whole of the workforce.

Table E.4 presents the industry component of labour mobility for the three different occupational groups. This reveals differences in the change in mobility associated with a specific occupational group in a particular industry, relative to the change in mobility observed for that occupation as a whole. The shift-share analysis shows that:

- across all occupation types, there was a general increase in the mobility of those working in industries such as property and business services; electricity, gas and water supply; and construction
- for industry classifications such as finance and insurance, and personal and other services, there was an increase in the mobility of workers in fully registered occupations, while the mobility of partially and un-registered workers remained relatively stable or decreased
- while the level of mobility of workers in health and community services increased by around 6 percentage points, the mobility of fully registered workers within that industry declined by around 21 percentage points. The overall increase in mobility for this sector came from a large increase in the mobility of unregistered workers.

Table E.4 **Industry component of change in occupational mobility[a]**

Percentage point change in mobility levels between 1996 and 2006

Industry	*Fully registered*	*Partially registered*	*Un-registered*	*Total*
	%	%	%	%
Agriculture, Forestry and Fishing	-36.5	-43.3	-25.7	-28.7
Mining	11.7	-31.0	13.4	7.9
Manufacturing	10.6	-11.8	1.5	0.1
Electricity, Gas and Water Supply	82.0	112.0	123.9	118.4
Construction	45.4	40.9	42.7	49.1
Wholesale Trade	-48.9	-39.5	-24.0	-27.7
Retail Trade	-5.1	-12.3	8.6	5.4
Accommodation, Cafes and Restaurants	-23.5	-35.8	-8.8	-12.1
Transport and Storage	16.6	17.7	-0.2	9.4
Communication Services	-7.9	-11.3	-24.4	-26.2
Finance and Insurance	15.6	1.1	-6.9	-5.5
Property and Business Services	19.3	7.4	10.5	11.0
Government Administration and Defence	4.5	-15.6	-10.1	-10.6
Education	-32.1	-1.9	10.3	10.4
Health and Community Services	-21.5	-2.2	27.0	6.6
Cultural and Recreational Services	-91.8	-45.1	-8.3	-18.1
Personal and Other Services	49.3	-35.6	-9.1	-11.4

a Industry is aggregated at the 1-digit ANZSIC level.

Source: Productivity Commission estimates based on ABS (*Census of Population and Housing*, 1996 and 2006, unpublished data).

E.2 Wage convergence analysis

This section details the data, methodology and results of the wage convergence analysis.

Data sources

The Commission contracted the ABS to supply jurisdiction-level data on the wages of different occupation groups.

The data supplied were derived from the 1996, 2001 and 2006 Australian censuses. Data are based on the jurisdictional average weekly income for every occupation group. From these figures, average hourly wages were calculated on the basis of an assumed 35-hour working week.

Raw income data by occupation were provided at the six-digit Australian Standard Classification of Occupations (ASCO) level, and were reclassified to unregistered,

partially or fully registered occupations using the framework in appendix F. Weighted average hourly wages were derived for each occupation class, with the weights based on the number of people employed in each occupation. Real average wages for each occupation group are presented in table E.5.

Table E.5 **Average real hourly wages, by occupation registration status[a]**

	NSW	*Vic*	*QLD*	*SA*	*WA*	*Tas*	*NT*	*ACT*	*Aust*
	$	$	$	$	$	$	$	$	$
1996 census									
Fully Registered	17.65	16.96	16.23	17.58	17.23	14.92	16.75	17.77	17.08
Partially Registered	15.35	14.54	14.38	14.20	15.80	14.83	15.67	15.86	15.00
Unregistered	13.65	13.00	12.23	12.42	13.27	11.65	13.68	16.96	13.12
Total	14.08	13.35	12.73	12.88	13.81	12.19	13.77	16.88	13.54
2001 census									
Fully Registered	17.24	16.87	15.62	16.67	16.23	15.57	16.73	17.77	16.56
Partially Registered	16.22	15.32	15.90	15.04	15.78	15.39	15.94	17.14	15.67
Unregistered	14.51	13.88	12.62	13.24	13.49	12.52	13.79	18.19	13.73
Total	14.89	14.22	13.13	13.65	13.94	13.01	14.24	18.02	14.10
2006 census									
Fully Registered	18.95	18.26	17.05	17.94	18.45	17.68	18.27	20.89	18.24
Partially Registered	17.50	16.07	16.61	15.55	17.74	16.15	18.27	18.29	16.85
Unregistered	15.84	15.17	14.08	14.16	15.19	13.54	15.31	20.14	15.16
Total	16.26	15.53	14.61	14.66	15.71	14.17	15.93	19.96	15.58

a Data adjusted to 1996 dollars using CPI deflators.

Sources: ABS (2008); Productivity Commission estimates based on ABS (*Census of Population and Housing*, 1996, 2001 and 2006, unpublished data).

Method

The coefficient of variation of average hourly wages across jurisdictions was chosen as the instrument for estimating wage convergence. Simply put, the coefficient of variation is the standard deviation of jurisdictional wages for a particular occupation class divided by the national average wage for that occupation class (box E.2). This instrument was chosen in preference to simple variance or standard deviation measures, because it is independent of units of measurement and provides a measure of dispersion that takes account of the wage growth that occurred in all jurisdictions between 1996 and 2006.

Box E.2 **Coefficient of variation**

The coefficient of variation is given by:

$$CV = \frac{\sigma}{\overline{w}}$$

where $\overline{w}$ represents the average national wage for a particular occupation class and σ is the standard deviation of jurisdictional wages for that occupation class, and is given by:

$$\sigma = \sqrt{\frac{1}{N}\sum_{i=1}^{N}(w_i - \overline{w})^2}$$

where w_i is the wage for a particular occupation class in jurisdiction *i*, and *N* is the number of jurisdictions.

Source: Villaverde (2004).

Coefficients of variation were calculated as a measure of dispersion across all jurisdictions, with the exception of the ACT.

Why was the ACT excluded from the analysis?

The ACT is excluded from the wage convergence analysis because of the substantial differences in the composition of its workforce. The composition of the workforces in the other jurisdictions is similar (table E.6). In the ACT, 54.7 per cent of those employed work either as professionals, associate professionals, or managers and administrators. This is in contrast to the other jurisdictions, where between 36.9 and 41.6 per cent of the workforce is employed in these categories. There are also noticeably fewer people working as either intermediate production and transport workers, tradespersons and related workers, or labourers and related workers in the ACT.

The differences in workforce composition mean that a comparison of wages across the broad categories of occupation-registration status is not a legitimate comparison when the ACT is included.

Table E.6 **Workforce composition, 2006 census**

By 1-digit ASCO classification

	NSW	*Vic*	*QLD*	*SA*	*WA*	*Tas*	*NT*	*ACT*	*Aust*
	%	%	%	%	%	%	%	%	%
Managers and Administrators	9.4	9.3	8.0	9.2	8.4	8.3	7.7	11.9	9.0
Professionals	20.3	20.2	16.6	18.0	18.0	17.3	18.2	28.4	19.2
Associate Professionals	11.9	11.5	12.2	12.1	12.4	11.8	13.5	14.3	12.0
Tradespersons and Related Workers	11.4	11.8	13.1	12.0	13.6	12.6	13.3	7.6	12.1
Advanced Clerical and Service Workers	3.4	3.2	3.1	2.8	3.2	2.4	2.6	2.8	3.2
Intermediate Clerical, Sales and Service Workers	16.9	16.7	17.2	16.8	16.3	17.6	16.8	17.6	16.9
Intermediate Production and Transport Workers	7.8	7.9	8.8	8.2	8.9	8.9	7.1	3.4	8.1
Elementary Clerical, Sales and Service Workers	9.3	9.6	9.7	9.4	9.1	10.0	8.3	8.6	9.4
Labourers and Related Workers	9.5	9.9	11.2	11.6	10.1	11.0	12.4	5.2	10.1

Source: ABS (*Census of Population and Housing*, 2006, unpublished data).

Results of the wage convergence analysis

Table E.7 illustrates the change in the size of the variation coefficients between 1996 and 2006, excluding and including the ACT. When the ACT is excluded, the wages of fully registered workers show clear signs of having converged over the period. Wages of partially registered workers diverged in that time, while those of unregistered workers remained relatively constant across jurisdictions.

Table E.7 **Coefficient of variation of average real wages across jurisdictions, by occupation-registration status[a]**

Year	*Fully registered*	*Partially registered*	*Unregistered*	*All occupations*
ACT excluded				
1996	5.47	3.97	5.81	5.12
2001	3.66	2.46	5.24	4.65
2006	3.19	5.53	5.73	5.08
ACT included				
1996	5.31	4.23	11.69	9.95
2001	4.29	4.04	12.49	10.75
2006	5.94	5.99	12.79	11.02

[a] Coefficient of variation is the standard deviation of the mean wage in each jurisdiction expressed as a proportion of the national mean (Villaverde 2004). The proportion is shown as a percentage. The average wage for each jurisdiction is the average of the individual income divided by hours worked (for employed persons who worked 35 or more hours) for each age/sex category (age is 5-year groups from 15-19 to 75+) within that jurisdiction.

Source: Productivity Commission estimates based on ABS (*Census of Population and Housing*, 2006, unpublished data).

E.3 Computable general equilibrium analysis of the economic effects of improved labour mobility

This section details the data, methodology and results of the computable general equilibrium (CGE) simulations undertaken in chapter 4.

Data sources

The Commission used the database of the Monash Multi-Regional Forecasting (MMRF) model (version 4) as the data source for the analysis. The database was augmented with 2006 Australian census data on interstate mobility at the ASCO one-digit level, by source and destination jurisdiction. Those data were provided on contract by the ABS.

Method

The Commission used a modified version of the MMRF model to perform this CGE analysis. The modified model contains equations representing the interjurisdictional movement of labour by source and destination jurisdiction (identical to the version of the model used in Commission reports on *Potential Benefits of the National Reform Agenda* (PC 2006a) and on *Modelling Economy-wide Effects of Future Automotive Assistance* (PC 2008c)).

Disaggregating the occupation groups

The MMRF database contains labour data by occupation at the ASCO 1-digit level of aggregation. This level of aggregation creates difficulties in modelling the impacts of mutual recognition arrangements because occupational registration is conducted at a highly-disaggregated level. In order to simulate those impacts, the labour data in the database was disaggregated into two categories — workers in registered and unregistered occupations. The disaggregation was carried out for every occupation group and every jurisdiction. The proportions correspond to the shares of fully registered and non-fully registered workers in each occupation group and jurisdiction (table E.8).

Table E.8 **Proportion of fully registered workers by occupation group and jurisdiction**

ASCO classification	*NSW*	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*NT*	*ACT*
	%	%	%	%	%	%	%	%
Managers and Administrators	7.65	7.04	9.55	8.12	6.18	10.84	8.47	4.78
Professionals	38.63	41.94	44.03	40.42	42.54	49.36	44.46	14.96
Associate Professionals	8.04	7.99	10.35	8.42	8.29	7.82	7.85	4.99
Tradespersons and Related Workers	26.48	25.68	41.94	20.78	23.20	13.55	13.03	14.29
Advanced Clerical and Service Workers	0.25	0.21	0.36	0.21	0.21	0.60	0.18	0.06
Intermediate Clerical, Sales and Service Workers	2.14	2.56	2.64	3.92	2.54	2.27	2.58	1.38
Intermediate Production and Transport Workers	34.95	33.31	36.87	36.25	32.88	36.96	36.12	33.84
Elementary Clerical, Sales and Service Workers	5.04	4.17	4.14	4.66	4.32	3.48	8.29	8.69
Labourers and Related Workers	0.52	0.00	3.43	0.00	0.00	0.00	0.00	0.00

Source: Productivity Commission estimates based on ABS (*Census of Population and Housing*, 2006, unpublished data).

Simulation details

Two simulations were conducted to analyse the effect of mutual recognition in the context of a natural resources boom:

- In the first (baseline) simulation, workers in mutually recognised occupations were assumed to be perfectly immobile between jurisdictions, while workers in

all other occupations were assumed to be perfectly mobile. This is a 'pre-mutual recognition' scenario.

- In the second simulation, interjurisdictional labour mobility was assumed to be infinite (perfect) for all occupations. This is a 'mutual recognition' scenario.

The natural resources boom was modelled as a uniform 10 per cent shock to the export prices of coal, oil, gas, iron ore, non-iron ore and other mining products.

Both simulations adopted a standard long-run closure. The main features of this closure are:

- labour supply in each occupation is fixed at the national level with changes in demand for labour in a particular occupation resulting in increases in the real wage for that occupation
- the after-tax rate of return on capital is fixed, with capital stock adjusting in response to changes in the rate of return.

In addition, in the first simulation, labour supply at the jurisdictional level was fixed for a proportion of each ASCO 1 group that corresponded to the share of registered workers in that occupation group in the relevant jurisdiction. This is intended to represent the case where mutual recognition does not operate and jurisdictions cannot draw on interstate workers in those occupations.

Results of the computable general equilibrium analysis

Tables E.9 and E.10 show the simulation results. Both the original results and the results after attribution based on the adjusted coverage of mutual recognition are presented.

Table E.9 **Impacts on Gross Domestic Product and real wages**

Percentage change relative to the database

Variable	*Simulation 1 (baseline)*	*Simulation 2 (all occupations mobile)*
	%	%
GDP	2.09	2.36
Managers and Administrators' real wages	-0.01	-0.36
Professionals' real wages	4.07	3.92
Associate Professionals' real wages	2.79	3.32
Tradespersons and Related Workers' real wages	4.09	4.69
Advanced Clerical and Service Workers' real wages	2.14	2.02
Intermediate Clerical, Sales and Service Workers' real wages	2.09	1.87
Intermediate Production and Transport Workers' real wages	4.79	6.26
Elementary Clerical, Sales and Service Workers' real wages	0.28	0.28
Labourers and Related Workers' real wages	0.00	-0.25

Source: Productivity Commission estimates.

Table E.10 **Impacts on Gross State Product and Gross State Product per person**

Percentage change relative to the database

	Simulation 1 (baseline)		*Simulation 2 (all occupations mobile)*	
Jurisdiction	*GSP*	*GSP per capita*	*GSP*	*GSP per capita*
	%	%	%	%
NSW	0.60	1.27	-1.90	1.29
Victoria	-0.53	0.70	-4.84	0.83
Queensland	4.61	3.30	9.81	3.20
SA	-0.66	0.70	-4.087	1.07
WA	9.08	5.49	19.83	5.06
Tasmania	-0.65	0.08	-1.34	0.16
NT	4.07	1.54	10.38	1.27
ACT	0.73	0.38	0.36	0.39

Source: Productivity Commission estimates.

F Scope of registered occupations

As discussed in chapter 5, the mutual recognition Acts adopt a broad definition of registration. Typically, it has been assumed that registration approaches that do not involve a statutory registration board sit outside the coverage of the Acts. Legal advice received from the Australian Government Solicitor (AGS) and the Crown Law Office in New Zealand (Crown Law) indicated that the coverage was broader — extending to some coregulatory schemes and arrangements overseen by statutory authorities that are not boards (appendix B).

This appendix looks more closely at the occupational coverage of the schemes. Occupations registered under a traditional regime in Australian jurisdictions and New Zealand are listed; the status of de facto and negative licensing schemes is explored; and a proposal for extending the coverage of the schemes to authorisations for the 'tools' or discrete tasks associated with an occupation is outlined.

F.1 The reach of traditional registration

For the 2003 review, the Commission sought advice from the Australian states and territories and the New Zealand Government on the occupations registered in each jurisdiction that were subject to mutual recognition obligations. Reflecting the majority view about the coverage of the mutual recognition schemes, the advice overwhelmingly focused on traditional registration regimes. As discussed in chapter 5, these are the regimes in which registration is overseen by a statutory registration authority. Using online sources, the Commission has updated this information (details are in table F.1, located at the end of this appendix).

Four different registration regimes have been identified in Australia:[1]

1. national registration, national recognition, national administration — for example, registration of commercial pilots and auditors
2. national registration, national recognition, state-based administration — tax agents in Australia are the only example of this regime located (and this registration system is moving to national administration)

[1] Note, in the following text, the term 'state' is short hand for 'Australian states and territories'.

3. state-based registration, national recognition, state-based administration — licences for high-risk work (for example, forklift operation and rigging) and some marine crew licences are an example of registrations that fit in this category. This regime is characterised by harmonisation of standards across jurisdictions
4. state-based registration, state-based recognition, state-based administration — for example, plumbers and nurses.

While the Mutual Recognition Agreement (MRA) covers the first three registration regimes (because the occupations concerned are registered), national recognition means the MRA has limited, if any, practical effect. There is no requirement on people working in these occupations to reregister when they change jurisdiction within Australia. Of course, the Trans-Tasman Mutual Recognition Arrangement remains relevant in each case (TTMRA).

The principle of mutual recognition — that registration in one jurisdiction is sufficient grounds for registration in a second jurisdiction — is relevant to the fourth regime.

In reading table F.1, it is important to bear in mind that:

- the scope of activities covered by registration in an occupation sometimes differs across jurisdictions — for example, conveyancers in Victoria can undertake a broader scope of work than their peers in Western Australia
- jurisdictions sometimes use different names for similar occupations — for example, Western Australia uses the term 'settlement agent' and New South Wales, 'conveyancer'. Like occupations have been grouped under one title
- detailed categories of registration for some occupations are not presented — for example, while the occupation of mine or quarry manager is included in the table, the classes of registration used in some jurisdictions are not.

F.2 De facto and negative licensing schemes

Might de facto and negative licensing be covered?

As discussed in chapter 5, some occupations are registered in the sense that practitioners are required under legislation to hold some form of authorisation, but are *probably* not currently eligible for mutual recognition because there is no local registration authority (in the meaning of the mutual recognition legislation) in their home jurisdiction.

Recapping, the mutual recognition principle for occupations is that a person registered in one state is entitled to registration in an equivalent occupation in a second state, after notifying the *local registration authority* of that state. Clearly, mutual recognition of an occupation in the second state relies on the existence of a local registration authority in that state. But do the mutual recognition schemes also require the existence of a registration authority in the first state? Legal advice from the AGS implies that they do (see, for example, appendix B, para. 14). However, the mutual recognition Acts could also be interpreted to mean that a local registration authority is only required in the jurisdiction in which mutual recognition is sought. Under that interpretation, people registered under de facto and negative licensing regimes might not be precluded from seeking mutual recognition in jurisdictions that utilise a more traditional registration approach, that is, one in which a local registration authority exists.[2]

The following text from s. 19 of the *Mutual Recognition Act 1992* illustrates this argument:

> A person who is registered in the first State for an occupation may lodge a written notice with the local registration authority of the second State for the equivalent occupation … seeking registration in accordance with the mutual recognition principle.
>
> The notice must: …
>
> - state that the person is registered …
> - give consent to the making of inquiries of, and the exchange of information with, the authorities of any State regarding the person's activities in the relevant occupation … regarding matters relevant to the notice …
> - be accompanied by a document that is either the original or a copy of the instrument evidencing the person's existing registration (or, if there is no such instrument, by sufficient information to identify the person and the person's registration).

The legislation does not explicitly require a local registration authority in the first state. In addition, the information requirements for identification of registration in the first state are broad enough to encompass de facto and negative licensing schemes. Note, the Commission has not sought legal advice on this argument.

An additional question mark sits over the status of de facto and negative licensing regimes. The AGS advised that:

> … the definition of registration implies that there be some positive approval or authorisation (and a record of such). Legislation merely prohibiting a person from

[2] Again, recapping chapter 5, de facto registration arises when legislation authorises people who meet certain requirements to practise an occupation, without further reference to a registration authority (CRR 1998). Negative licensing 'refers to legislation detailing what is not acceptable in the operation or activities of an occupation and providing sanctions for unsatisfactory conduct' (VEETAC 1993, p. xii).

> performing some activity unless they possess a particular qualification is *probably* insufficient to constitute 'authorisation required by or under legislation' in the relevant sense. (emphasis added) (appendix B, para. 68)

All in all, when the Acts are amended, it would be useful if the status of negative and de facto licensing were clarified.

Should de facto and negative licensing be covered?

An assumption that de facto and negative licensing lie outside the scope of the mutual recognition schemes raises the question of whether the goals of mobility of labour, closer economic relations and a seamless national economy could be promoted by extension of the mutual recognition principle to situations where the legislation does not provide for an 'overseer' for authorisation.

Consideration of an extension of this type was recommended when the Committee on Regulatory Reform reviewed the MRA in 1998 (CRR 1998). The CRR argued that moves to 'light-handed' regulation evident in the late 1990s (including coregulatory, de facto and negative licensing schemes) were consistent with reducing 'red tape', but also risked impeding the mobility of some service providers who would be unable to access mutual recognition.

It is also possible that the exclusion of light-handed regulatory approaches from the mutual recognition schemes has encouraged the adoption of traditional registration regimes, when less resource-intensive approaches would have met regulators' goals of consumer and environmental protection.

An extension of mutual recognition would appear to require only a small step in the case of de facto licensing. The requirements for practising an occupation set out in legislation could be mutually recognised. Information on these requirements is readily accessible online. People moving to a jurisdiction with a local registration authority could gain registration from that authority under mutual recognition by, for example:

- demonstrating compliance with the practice requirements of their home jurisdiction
- providing information on any disciplinary action against them, undertakings given or conditions on their practice
- consenting to inquiries of any relevant authorities in their home jurisdiction.

The registration process would be similar to that used for first-time registrants in the host jurisdiction, except that the requirements to be met are those of the home jurisdiction.

For people moving to a jurisdiction operating a de facto licensing regime, application of the principle of mutual recognition would mean that they could legally practise, provided they met the registration requirements of their home jurisdiction. To protect consumers in the second jurisdiction, a person could be required to notify the local authority responsible for dealing with complaints about practitioners (where such an authority exists) of any disciplinary action, conditions or undertakings to which he or she was subject.[3]

Similar arguments could be made for people moving from a jurisdiction using a negative licensing regime. In the case of negative licensing, the legislation prevents certain people from carrying on an occupation. Individuals who are not precluded from practising are implicitly authorised to carry on an occupation. This is in contrast to the registration regimes discussed above, where legislation explicitly authorises certain people to practise an occupation. Both approaches to registration, however, set the framework for who is 'fit and proper'. If negative licensing is acceptable to one jurisdiction then, under the principle of mutual recognition, it should be acceptable to other jurisdictions.

People moving to a jurisdiction using a traditional registration approach could provide their details to the local registration authority, as applicants for mutual recognition are required to do, including:

- evidence of their employment history in the occupation
- information on any restrictions on their practice
- consent for inquiries to be made of the body responsible for dealing with complaints about practitioners in their home jurisdiction.

If the coverage of the mutual recognition schemes were expanded to include light-handed regulatory approaches, any regulator with strong concerns about the standards required for registration in another jurisdiction could seek resolution of those concerns through the mechanisms discussed in chapter 5.

The mutual recognition legislation could be amended to bring de facto and negative licensing schemes within the coverage of the mutual recognition principle.

F.3 Regulation of 'tools' or discrete tasks

While the mutual recognition schemes cover occupations, authorisations required for the 'tools' of a person's work, or for discrete tasks, are not necessarily registered

[3] Notification is a step beyond the current requirements in jurisdictions without local registration authorities.

occupations in their own right. In *Rowe and New South Wales Police Service [1997] AATA 200* (para. 45), for example, the Administrative Appeals Tribunal (AAT) distinguished between the registration of an occupation and the tools needed to carry out that occupation. The AAT stated that 'registration to be able to possess and use the necessary tools of the occupation does not equate with registration for the occupation itself'. The AAT was commenting on the need for firearms instructors to hold permits to possess and use firearms, batons and handcuffs.

In legal advice provided to the Commission, the AGS noted that:

> … the performance of a discrete individual task, such as signing a certificate or activating a machine, may not be an occupation in the relevant sense … even if it cannot be performed without a legal authorisation. (para. 18, appendix B)

The AGS also noted that, '[i]f an individual task is required to be performed regularly, it may become difficult to tell whether it should be treated as an occupation rather than a series of tasks', for example:

> … a Justice of the Peace who occasionally witnesses or certifies the execution of documents is probably not carrying on an occupation in doing so. On the other hand, a Notary Public, a substantial proportion of whose daily work consists of witnessing or certifying documents, probably would. (para. 19, appendix B)

Other examples of authorisations that might be considered to cover only the tools or discrete tasks of an occupation include:

- certificates for responsible service of alcohol
- some licences for security sensitive ammonium nitrate
- licences for the possession and use of firearms.

Like registration under the mutual recognition schemes, authorisations of these types depend on the attainment or possession of a qualification (broadly defined to include character or being 'fit and proper'). By virtue of this, they appear to be candidates for mutual recognition, although they may only cover 'tools' or tasks. These 'tools' or separately authorised activities would be mutually recognised as a part of a larger registered occupation, so the mutual recognition of the parts separately from the larger registered occupation seems a logical step. If an authorisation is granted in one jurisdiction for use of a 'tool' or conduct of a task, why would that not be sufficient grounds for the granting of authorisation of a similar 'tool' or task in another jurisdiction?

Mutual recognition of 'tools' or tasks could operate along the same lines as the mutual recognition of occupations, and has the potential to reduce the compliance burden on individuals seeking to move jurisdiction or to provide services in more than one jurisdiction. It would be in the spirit of the mutual recognition legislation

and consistent with moves towards a seamless national economy within Australia and single economic market between Australia and New Zealand.

In summary, authorisations covering the 'tools' of an occupation, or the performance of some specific tasks linked to an occupation, could be brought within the coverage of the mutual recognition schemes.

Table F.1 **Traditionally registered occupations**

By jurisdiction

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	SA	*Tas*	*Vic*	*WA*
Building occupations										
Airconditioning and refrigeration mechanics[a]				✓		✓	✓	✓	✓	
Architect	✓		✓	✓	✓	✓	✓	✓	✓	✓
Bricklayer (contractor / supervisor)[a]	✓			✓	✓	✓	✓	✓	✓	✓
Builder[a]	✓		✓	✓	✓	✓	✓	✓	✓	✓
Building foundation worker[b]						✓				
Building designer / draftsperson	✓					✓	✓	✓	✓	
Building inspector / certifier			✓	✓	✓	✓	✓	✓	✓	✓
Cabinetmaker						✓				
Cable jointer[a]					✓	✓	✓			
Carpenter / joiner (contractor / supervisor)[a]	✓			✓		✓	✓		✓	
Concreting	✓			✓		✓	✓			
Construction induction card				✓		✓			✓	
Demolition contractor			✓	✓		✓				✓
Drainer[a]			✓	✓	✓	✓	✓	✓	✓	✓
Electricians[a]	✓		✓	✓	✓	✓	✓	✓	✓	✓
Electrical fitter[a]					✓	✓				✓
Electrical linesperson[a]	✓				✓	✓	✓			
Engineer										
Chartered professional	✓					✓				
Civil / structural					✓			✓	✓	
Mechanical / hydraulics					✓			✓	✓	
Electrical					✓			✓	✓	
Fire safety								✓	✓	
Building services (energy management, acoustics)								✓		
Fencing contractor				✓		✓	✓		✓	
Fire equipment tradesperson[b]						✓				
Floor finisher and coverer				✓		✓	✓		✓	
Gasfitter[a]	✓		✓	✓	✓	✓	✓	✓	✓	✓
Glazer						✓				
Hydraulic services designer						✓				
Kitchen, bathroom, laundry installer				✓		✓	✓		✓	
Metal fabricator				✓		✓	✓			
Painter and decorator				✓		✓				✓
Plasterer				✓			✓		✓	
External	✓									
Drywall						✓				
Solid						✓				
Plumber[a]	✓		✓	✓	✓	✓	✓	✓	✓	
Plumbing plan certifier			✓							

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Table F.1 (continued)

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	SA	*Tas*	*Vic*	*WA*
Property developer						✓				
Roof						✓				
Assembler or installer	✓					✓				
Tiler				✓		✓	✓		✓	
Serviceman — fire systems[a]			✓	✓		✓	✓		✓	
Shopfitter						✓				
Site classifier						✓				
Steel fixer				✓		✓				
Stone mason				✓		✓	✓			
Structural landscaping				✓		✓				
Swimming pool construction[b]			✓	✓		✓	✓		✓	
Wall and floor tiler				✓		✓	✓		✓	
Waterproofing applicator[b]				✓		✓	✓		✓	
Dangerous goods licences										
Asbestos removal contractor			✓	✓	✓	✓	✓	✓	✓	✓
Use of carcinogenic substances									✓	
Dangerous goods and explosives										
Approved handler	✓									
Test certifier	✓									
Bulk driver			✓	✓	✓	✓	✓	✓	✓	✓
Explosive power tool operator				✓						
Fumigator				✓			✓		✓	✓
Nuclear installation/ prescribed radiation activities licence		✓								
Pest management technician	✓		✓	✓	✓	✓[b]	✓	✓	✓	✓
Pyrotechnician	✓		✓	✓	✓	✓	✓	✓	✓	✓
Shotfirer / explosives blaster	✓		✓	✓	✓	✓	✓	✓	✓	✓
Finance occupations										
Audit accountant		✓								
Chartered accountant	✓									
Commodities trader		✓								
Contributory mortgage broker	✓									
Credit provider/finance broker			✓						✓	✓
Debt collector							✓	✓	✓	✓
Financial adviser		✓								
Financial market dealer		✓								
Futures dealer	✓	✓								
Insurance broker		✓								
Insurance agent		✓								
Liquidator		✓								
Stockbroker/sharebroker	✓	✓								
Tax agent		✓								

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Table F.1 (continued)

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	SA	*Tas*	*Vic*	*WA*
Gambling and racing occupations										
Bookmaker/bookmaking clerk			✓	✓	✓	✓	✓	✓	✓	✓
Bookmaker/bookmaking clerk			✓	✓	✓	✓	✓	✓	✓	✓
Gaming industry employee			✓	✓	✓	✓	✓	✓	✓	✓
Greyhound racing										
Owner / trainer				✓	✓				✓	
Public trainer				✓					✓	
Attendant				✓	✓				✓	
Harness racing										
Trainer				✓						
Driver				✓						
Stablehand				✓						
Health occupations										
Aboriginal health worker					✓					
Acupuncturist								✓	✓	
Chinese Medicine Practitioner									✓	
Chiropractor	✓		✓	✓	✓	✓	✓	✓	✓	✓
Dental hygienist	✓		✓	✓	✓	✓	✓	✓	✓	✓
Dental prosthetist			✓	✓	✓	✓	✓	✓	✓	✓
Dental specialist			✓		✓	✓	✓		✓	
Dental student							✓			
Dental technician	✓		✓	✓		✓	✓			
Dental therapist	✓		✓	✓	✓	✓	✓	✓	✓	✓
Dental therapist — school										✓
Dentist	✓		✓	✓	✓	✓	✓	✓	✓	✓
Dietician	✓									
Medical imaging technologist / diagnostic radiographer / medical radiation technologist / radiographer	✓		✓	✓	✓	✓	✓	✓	✓	✓
Radiation therapist	✓		✓			✓		✓	✓	✓
Nuclear medicine technologist	✓		✓	✓	✓	✓	✓	✓	✓	✓
Sonographer	✓									
Medical laboratory scientists	✓									
Medical laboratory technicians	✓									
Medical practitioner[g]	✓		✓	✓	✓	✓	✓	✓	✓	✓
Medical specialist	✓		✓	✓	✓	✓	✓	✓	✓	✓
Midwife	✓		✓	✓	✓	✓	✓	✓	✓	✓
Nurse practitioner	✓		✓	✓	✓	✓	✓	✓	✓	✓
Nurse										
Registered / Division 1	✓		✓	✓	✓	✓	✓	✓	✓	✓
Enrolled / Division 2	✓		✓	✓	✓	✓	✓	✓	✓	✓
Mental health/psychiatric nurse	✓		✓	✓	✓	✓	✓	✓	✓	✓

(Continued next page)

Table F.1 (continued)

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	SA	*Tas*	*Vic*	*WA*
Occupational therapist	✓				✓	✓	✓	✓	✓	✓
Optical dispenser	✓			✓			✓			
Optometrist	✓		✓	✓	✓	✓	✓	✓	✓	✓
Osteopath	✓		✓	✓	✓	✓	✓	✓	✓	✓
Pharmacist	✓		✓	✓	✓	✓	✓	✓	✓	✓
Physiotherapist	✓		✓	✓	✓	✓	✓	✓	✓	✓
Podiatrist/chiropodist	✓		✓	✓	✓	✓	✓	✓	✓	✓
Psychologist	✓		✓	✓	✓	✓	✓	✓	✓	✓
Psychotherapist	✓									
Speech pathologist						✓				
Veterinary specialist	✓		✓	✓	✓	✓	✓	✓	✓	✓
Veterinarian / veterinary surgeon	✓		✓	✓	✓	✓	✓	✓	✓	✓
Loadshifting & industrial equipment operator occupations										
Accredited assessor loadshifting etc	✓		✓	✓	✓	✓	✓	✓	✓	✓
Crane and hoist operator	✓		c	c	c	c	c	c	c	c
Tower crane	✓		✓	✓	✓	✓	✓	✓	✓	✓
Self-erecting tower crane			✓	✓	✓	✓	✓	✓	✓	✓
Derrick crane			✓	✓	✓	✓	✓	✓	✓	✓
Portal boom crane			✓	✓	✓	✓	✓	✓	✓	✓
Bridge or gantry crane			✓	✓	✓	✓	✓	✓	✓	✓
Bridge or gantry crane (3 pwr remote control)			✓	✓	✓	✓	✓	✓	✓	✓
Vehicle loading crane			✓	✓	✓	✓	✓	✓	✓	✓
Nonslewing mobile crane			✓	✓	✓	✓	✓	✓	✓	✓
Slewing mobile crane			✓	✓	✓	✓	✓	✓	✓	✓
Materials hoist (cantilever operation)			✓	✓	✓	✓	✓	✓	✓	✓
Personnel and materials hoist			✓	✓	✓	✓	✓	✓	✓	✓
Boom type elevating work platform			✓	✓	✓	✓	✓	✓	✓	✓
Vehicle mounted concrete placing boom			✓	✓	✓	✓	✓	✓	✓	✓
Diver	✓			✓		✓				
Equipment / plant inspector	✓				✓			✓		
Design verifier	✓									
Fork lift operator			c	c	c	c	c	c	c	c
Fork lift truck operator			✓	✓	✓	✓	✓	✓	✓	✓
Order picking forklift truck operator			✓	✓	✓	✓	✓	✓	✓	✓

(Continued next page)

Table F.1 (continued)

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	SA	*Tas*	*Vic*	*WA*
Load shifting equipment operator			c	c	c	c	c	c	c	c
Dozer			✓	✓	✓	✓	✓	✓	✓	✓
Dragline			✓	✓	✓	✓	✓	✓	✓	✓
Cableway/flying foxes			✓	✓	✓	✓	✓	✓	✓	✓
Excavator			✓	✓	✓	✓	✓	✓	✓	✓
Front end loader			✓	✓	✓	✓	✓	✓	✓	✓
Front end loader backhoe			✓	✓	✓	✓	✓	✓	✓	✓
Grader			✓	✓	✓	✓	✓	✓	✓	✓
Road roller			✓	✓	✓	✓	✓	✓	✓	✓
Skid steer loader			✓	✓	✓	✓	✓	✓	✓	✓
Scraper			✓	✓	✓	✓	✓	✓	✓	✓
Powder actuated tool operator	✓									
Pressure equipment operation			c	c	c	c	c	c	c	c
Boiler attendant	✓		✓	✓	✓	✓	✓	✓	✓	✓
Basic boiler operator			✓	✓	✓	✓	✓	✓	✓	✓
Intermediate boiler operator			✓	✓	✓	✓	✓	✓	✓	✓
Advanced boiler operator			✓	✓	✓	✓	✓	✓	✓	✓
Turbine operator			✓	✓	✓	✓	✓	✓	✓	✓
Reciprocating steam engine operator			✓	✓	✓	✓	✓	✓	✓	✓
Rigging work			c	c	c	c	c	c	c	c
Dogging			✓	✓	✓	✓	✓	✓	✓	✓
Basic			✓	✓	✓	✓	✓	✓	✓	✓
Intermediate			✓	✓	✓	✓	✓	✓	✓	✓
Advanced			✓	✓	✓	✓	✓	✓	✓	✓
Scaffolding			c	c	c	c	c	c	c	c
Basic	✓		✓	✓	✓	✓	✓	✓	✓	✓
Intermediate			✓	✓	✓	✓	✓	✓	✓	✓
Advanced	✓		✓	✓	✓	✓	✓	✓	✓	✓
Suspended	✓									
Mining occupations										
Driller (water bore)			✓	✓	✓	✓	✓	✓	✓	✓
Mine engineer				✓						
Mine / quarry manager / deputy	✓			✓		✓				✓
Motor vehicle occupations										
Automotive gas installer			✓	✓	✓		✓	✓	✓	✓
Motor vehicle repairer			✓	✓						✓
Motor vehicle salesperson						✓				✓
Motor vehicle trader/dealer	✓		✓				✓		✓	✓

(Continued next page)

Table F.1 (continued)

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	SA	*Tas*	*Vic*	*WA*
Motor vehicle yard manager										✓
Real estate occupations										
Agents representative					✓				✓	
Auctioneer	✓		✓	✓	✓	✓	✓	✓	✓	✓
Business agent			✓	✓	✓					✓
Conveyancer / conveyancing agent	✓			✓	✓		✓	✓	✓	✓
Land valuer	✓			✓		✓				✓
Letting agent						✓				✓
Real estate agent	✓		✓	✓	✓	✓	✓	✓	✓	✓
Real estate agency / branch manager	✓									
Real estate sales consultant / salesperson	✓			✓		✓	✓	✓		
Registered manager (Strata / Residential property manager)				✓				✓		
Transport occupations										
Aircraft maintenance engineer	✓	✓								
Airline transport pilot	✓	✓								
Air traffic controller	✓	✓								
Aviation examiner and medical examiner	✓									
Commercial pilot	✓	✓								
Commercial passenger vehicle driver (taxi, bus, hire car etc)	✓		✓	✓	✓	✓	✓	✓	✓	✓
Coxswain	✓			✓	✓	✓	✓	✓	✓	✓
Flight engineer	✓	✓								
Flight radiotelephone operator licence	✓	✓								
Flight service operator	✓									
Heavy vehicle driver	✓		✓	✓	✓	✓	✓	✓	✓	✓
Marine engine driver				✓	✓	✓	✓	✓	✓	✓
Marine engineer	✓			✓	✓	✓	✓	✓	✓	✓
Marine pilot/skipper	✓			✓	✓	✓	✓	✓	✓	✓
Marine surveyor or maritime safety inspector	✓					✓				
Master (marine)	✓			✓	✓	✓	✓	✓	✓	✓
Mate (maritime)	✓			✓	✓	✓	✓	✓	✓	✓
Motor cycle riding instructor				✓						
Motor vehicle driving instructor			✓	✓	✓	✓	✓	✓	✓	✓
Tow truck driver/operator	✓			✓		✓	✓		✓	

(Continued next page)

Table F.1 (continued)

Occupation	*NZ*	*Cwlth*	*ACT*	*NSW*	*NT*	*Qld*	SA	*Tas*	*Vic*	*WA*
Other occupational licences										
Artificial insemination supervisor				✓						
Employment agent			✓				✓			✓
Entertainment industry agent / manager				✓						
Firearms dealer	✓		✓	✓	✓	✓	✓	✓	✓	✓
Firearms instructor					✓				✓	
Hairdresser										✓
Introduction agent		✓				✓			✓	
Immigration agent	✓	✓**e**								
Legal practitioners	✓		✓	✓	✓	✓	✓	✓	✓	✓
Marriage celebrant	✓	✓						✓		
Pastoral house manager / auctioneer / salesperson						✓				
Patent attorney	✓	✓								
Pawn broker/second hand dealer	✓		✓	✓	✓	✓	✓	✓	✓	✓
Professional boxing and combat sports									✓	
Trainer, referee, promoter etc									✓	
Promoter only							✓			✓
Private investigator	✓			✓	✓	✓	✓	✓	✓	✓
Prostitution service provider (operator, approved manager)	✓					✓			✓	✓
Security guard, crowd controller**f**	✓		✓	✓	✓	✓	✓	✓	✓	✓
Stock and station agent			✓	✓						
Surveyor (land/cadastral)	✓		✓	✓	✓	✓	✓	✓	✓	✓
Taxidermist									✓	
Teacher (school)	✓			✓	✓	✓	✓	✓	✓	✓
Trade measurement services			✓	✓	✓	✓	✓	✓	✓	✓
Travel agent			✓	✓	✓	✓	✓	✓	✓	✓
Workplace health and safety officer						✓				

a For detail on the registration regimes in different Australian states and territories see http://www.licencerecognition.gov.au/. **b** See http://www.bsa.qld.gov.au/ for licence details. **c** While these occupations are registered separately by each Australian state and territory, the resulting licences are recognised nationally. **d** Victoria registers estate agents, South Australia, land agents. Registration in both jurisdictions covers business agent activities. **e** Immigration agents are coregulated in Australia. **f** Jurisdictions use different job titles for workers in the security industry. A range of licences are issued. In the interests of brevity, detail is not presented. **g** Currently a permanent exemption under the TTMRA.

Source: Productivity Commission update of information provided in 2003 by New Zealand, state and territory governments.

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