NSW Government Submission to the Productivity Commission 2003 Review of the Mutual Recognition Agreement (MRA) and the Trans-Tasman Mutual Recognition Arrangement (TTMRA)

1. INTRODUCTION

The NSW Government remains committed to the principles of the MRA and TTMRA and is keen to enhance the further development and implementation of mutual recognition arrangements for the sale of goods and recognition of occupations.

The NSW Government submission:

- looks at efficiencies around the implementation of mutual recognition of the sale of goods and raises areas where further work is required;
- outlines progress in the implementation of mutual recognition of occupations in a number of professions and highlights issues for further attention;
- discusses the effective use of exemption facilities under both arrangements; and
- provides some preliminary views on extending the scope of the MRA and TTMRA and means to improve their current effectiveness.

2. BROAD OBJECTIVES

The removal of different regulatory standard requirements for goods under the MRA and TTMRA has led to a range of economic benefits for business and consumers. By requiring registration in only one jurisdiction for a product to be legally sold in all jurisdictions, mutual recognition has reduced compliance costs and allowed business to better exploit economies of scale by producing a single product for sale in all jurisdictions across Australia and New Zealand. These provisions have brought about increased competition in the market place and greater choice for consumers.
The MRA and TTMRA have proved successful in removing impediments to the free movement of skilled labour across a range of professions.

The above issues will be discussed in detail in the body of this submission. **3.**

IMPLEMENTATION ISSUES TRADE IN GOODS

Advice provided by NSW agencies suggests that while there has been significant progress in the implementation of mutual recognition across the Tasman through the TTMRA, progress has been greater under the MRA. The ability to reach national agreements has been easier than negotiating equivalent regulatory requirements across the Tasman.

Under the MRA and TTMRA most electrical products are now subject to harmonised energy labelling or Minimum Energy Performance Standards (MEPS) requirements. The MRA, however, has had greater success in negotiating equivalent regulatory regimes than the TTMRA.

Under the MRA, the following activities have contributed to the greater harmonisation of regulatory regimes for electrical product energy efficiency across Australia:

- an officer-level committee, the National Appliance and Equipment Energy Efficiency Committee (NAEEEC), chaired by the Australian Greenhouse Office (AGO), was established to facilitate co-ordination and joint funding of activities such as product check-testing, data collection and management and information dissemination (including the national website). NAEEEC reports to the Ministerial Council on Energy (MCE) through the Energy Efficiency and Greenhouse Working Group; and

- the introduction of equivalent regulatory regimes is supported by COAG's *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies*. These require a common approach to the development of and principles supporting nationally developed regulations and the use of regulatory impact statements to justify regulatory action.

Despite progress in this area, co-ordinating the timing of the introduction of equivalent regulatory requirements across jurisdictions remains difficult as the processes and lead times for the introduction of regulations vary from jurisdiction to jurisdiction.

While the TTMRA has been instrumental in the adoption of a harmonised transTasman energy labelling scheme, it has been less successful in introducing common MEPS for some products. Due to different national priorities, such as different greenhouse gas abatement objectives, the common standards and regulatory requirements have not been agreed for ballasts and electric storage water heaters.

Example:

In February 2003, New Zealand introduced MEPS for fluorescent light ballasts and domestic electric water heaters at more stringent levels than the corresponding Australian MEPS levels, and introduced a TTMRA temporary exemption for these products.

The proposed Australian MEPS levels were developed following consultation with interested parties and a national regulatory impact statement process. The Australian MEPS levels are considered to represent the optimum outcomes for Australia. New Zealand, with different greenhouse gas abatement objectives, has taken a different position with respect to optimal outcomes.

The Australian Greenhouse Office has been negotiating with the New Zealand Government in order to resolve TTMRA issues and a draft

Memorandum of Understanding has been prepared which, if adopted, should minimise differences in standards in the future. In addition, for ballasts and water heaters the TTMRA requires the Ministerial Council on Energy to endeavour to determine the appropriate course of action before the temporary exemption expires.

PRODUCT SAFETY

The MRA has led to a noticeable reduction in the number of different product safety regulations and orders throughout Australia. While progress has also been made under the TTMRA, national differences have impeded greater harmonisation.

Example:

The Electrical Regulatory Authorities Council (ERAC) and Gas Technical Regulators Committee (GTRC) have made full use of the MRA to the effect that electrical and gas appliances certified and/or sold in one state can be traded in all states and territories without further certification.
Under the TTMRA, Australian and New Zealand electrical regulatory authorities have managed to negotiate mutually agreed changes to their regulatory regimes to achieve greater regulatory alignment.
By contrast, Australian and New Zealand gas regulatory authorities have not been able to negotiate an agreed standard for safety compliance. Accordingly, gas appliances are currently subject to a special exemption from the TTMRA.
In all Australian jurisdictions, natural gas appliances are required to be certified by the Australian Gas Association (AGA) prior to sale. The scheme includes identification badging so that contractors and consumers can identify approved appliances. In New Zealand, suppliers are required to provide a safety declaration.

Due to the need to respond quickly to product safety issues, all Australian jurisdictions continue to introduce state product safety regulations and orders. The NSW Department of Fair Trading has found that where NSW has introduced new safety standards, manufacturers and importers have responded by designing and producing goods that comply.
Anecdotal evidence suggests that, once a regulatory body has specified a safety standard for a product, manufacturers and importers are reluctant to use the mutual recognition defence principles to sell products that do not meet the safety standard.
The last review of the MRA recommended that "the Ministerial Council on Consumer Affairs develop national arrangements for product recalls and product safety bans to ensure consistent approaches between jurisdictions to the banning and/or recall of dangerous products". This process is occurring through bodies such as the Consumer Products Advisory Committee.

ENVIRONMENT

The NSW Environment Protection Authority has suggested that the MRA and TTMRA have impacted on the ability to regulate for the protection of the environment.

Example:

While NSW could introduce more rigorous labelling of pesticides, under the MRA and TTMRA, pesticides imported from other jurisdictions and New Zealand would not be bound to use the NSW labelling regime.

One option for protecting local environmental standards is to place these on the TTMRA Permanent Exemption Scheme.

REGISTRATION OF OCCUPATIONS

Overall, the NSW experience with the implementation of the MRA and TTMRA in the areas of registration of occupations has been positive. Some issues that require further consideration, however, include:

- the aligning of equivalent occupations across jurisdictions;
- improving information exchange procedures between jurisdictions on new applicants; and
- different approval requirements for each jurisdiction in some occupations, such as nursing.

These issues will be discussed in more detail below.

OCCUPATIONAL LICENCES

The MRA and TTMRA are used regularly in relation to some occupations (such as real estate agents), but not others (such as motor dealers and pawnbrokers). The NSW Department of Fair Trading has found that the administrative costs associated with an application for mutual recognition are generally lower than the costs of processing an application from an individual seeking a licence for the first time.

One concern has arisen where a single licence in another jurisdiction covers what, in NSW, would be considered to be more than one occupational class of licence. Accordingly, some refinement may be required to ensure that 'equivalent' occupations are just that.

Example:
A person who holds an estate agent's licence in Victoria may apply under mutual recognition for licences to become a business agent, real estate agent and stock and station agent in NSW. This may occur even when the applicant has not carried out these activities in Victoria.

LEGAL PRACTITIONERS

Under the MRA and TTMRA, interstate and New Zealand legal practitioners can apply for a NSW practising certificate and be awarded the same rights to practise as they had in the other jurisdictions. The MRA, however, has been superseded, in part by the National Practising Certificate Scheme.

The National Practising Certificate Scheme allows legal practitioners with practising certificates from a participating jurisdiction (currently NSW, Victoria, SA, Tasmania and the NT) to practise law in another participating jurisdiction without the need to be admitted or to hold a practising certificate in that other jurisdiction. NSW has gone even further, allowing legal practitioners from non-participating jurisdictions to practise in this state.

The Scheme, however, applies only to practitioners whose principal place of practice is in another jurisdiction. That is, a practitioner who moves his or her principal place of practice to NSW must be admitted in this State and have a NSW practising certificate.

Thus, an application under the mutual recognition legislation is still required for New Zealand practitioners and where an interstate legal practitioner transfers his or her practice to NSW.

An interstate legal practitioner whose principal place of practice is in another jurisdiction, but who establishes an office in NSW can practise in this State under the National Practising Certificate Scheme. He or she must, however, give notice to the Bar Council or Law Society Council, obtain appropriate indemnity insurance for NSW and, if a solicitor, pay a contribution to the NSW Fidelity Fund.

The Standing Committee of Attorneys General (SCAG) is undertaking a project to develop model laws for a national approach to the regulation of the legal profession to further remove barriers to national practise. SCAG is considering model laws which would allow a legal practitioner to apply for a practising certificate on the basis of admission in any other Australian jurisdiction.

This would mean that a practitioner transferring his or her practice to another jurisdiction would not require admission in the jurisdiction to which he or she transfers, and would be able to obtain a practising certificate (based on his or her admission in another jurisdiction) under the relevant State or Territory legal profession legislation.

The NSW Legal Practitioners Admission Board has provided the following information in relation to the number of interstate and New Zealand practitioners admitted under mutual recognition in NSW, as compared to the number of new practitioners admitted:

Year	Interstate	New Zealand	New
1998	**297**		1341
1999	364		1440
2000	375	103	1144
2001	303	118	1483
2002	247	70	1748

The Legal Practitioners Admission Board notes that several trends are emerging:

- the number of interstate admissions under mutual recognition is now trending down, probably under the influence of the National Practising Certificate Scheme; and
- the number of trans-Tasman admissions under mutual recognition seems to be declining.

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

The Legal Practitioners Admission Board has referred to the danger of a practitioner being removed from the roll in one jurisdiction but continuing to practise because the regulatory body in another jurisdiction has not become aware of the removal. The Admission Board notes, however, that this has been partially addressed by a regulatory database now maintained by the NSW Legal Services Commissioner.

The NSW Law Society has expressed concern about mutual recognition arrangements having unintentional and unacceptable results. In support of this the NSW Law Society refers to a matter currently before the Administrative Appeals Tribunal in Queensland involving a NSW licensed conveyancer who has applied for admission as a solicitor in Queensland (where only legal practitioners can perform conveyancing work) arguing that this is the equivalent occupation.

MEDICAL PRACTITIONERS

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

Mutual recognition processes have also delivered substantial improvements in information flows between jurisdictions. These are of particular importance where a practitioner registered in more than one jurisdiction has been subject to disciplinary proceedings and sanction.

The MRA has acted as an impetus for jurisdictions to work towards implementing consistent competency standards to facilitate the free movement of doctors across state borders. There has not been a similar attempt to align competency standards across the Tasman. In fact, the medical profession is exempt from the operation of the TTMRA (Schedule 4 and s49 Trans-Tasman Mutual Recognition Act 1997 (Cth) (TTMR Act)).

All Australian jurisdictions and New Zealand, however, recognise each other's medical graduates based on the accreditation of medical schools by the Australian Medical Council.

The mutual recognition of New Zealand doctors is further hampered by Commonwealth legislation which restricts access to Medicare provider numbers. In 1996, the Commonwealth Government introduced legislative changes that limited access to Medicare provider numbers for new doctors and overseas trained doctors, including New Zealand residents. A doctor registered in Australia after 1 November 1996 is required to serve ten years before being eligible to obtain an unrestricted provider number. From 18 October 2001, a temporary resident New Zealand doctor is unable to obtain an unrestricted provider number, while a New Zealand doctor living permanently in Australia needs to wait ten years from the time he or she has became a permanent resident before obtaining a provider number.

Exemptions exist for specific programs such as the Targeted Inland Recruitment Scheme and for doctors working in areas of workforce shortage as defined by the Commonwealth Department of Health and Ageing. In these cases, doctors are provided with restricted provider numbers to work in specific local areas of need.

While registered nurses are covered by both the MRA and TTMRA, some impediments to mutual recognition still exist. Persons who practise as nurses in NSW may not be able to practise in other jurisdictions as some states assess applicants' qualifications to determine eligibility despite provisions to the contrary in the mutual recognition legislation. This includes:

- nurses who are entitled to practise mental health nursing in NSW are not able to do so in Queensland unless they can demonstrate educational qualifications to the satisfaction of the Queensland Nursing Council;
- nurses whose education program is in mental retardation nursing (developmental disability nursing) are refused registration in Western Australia; and
- nurses from NSW who practise in mental health nursing are only registered as general nurses in Western Australia, being refused registration as mental health nurses.

There may also be some unintended consequences of the MRA and TTMRA where jurisdictions are obliged to register practitioners who would not normally be eligible for registration in that jurisdiction. There may, therefore, be scope for further work to better align competency and registration requirements between jurisdictions.

Example:

Under the TTMRA persons from the Philippines who failed to meet the competency requirements for nursing registration in NSW were able to register in New Zealand, where the same assessment process does not exist. These nurses were then able to apply under the TTMRA to practise in NSW. In accordance with the TTMRA, the Nurses Registration Board was required to register them. Following representations the Nursing Council of New

Zealand has altered its processes for approving applications in that country.

OCCUPATIONS REQUIRING OVERSIGHT BY THE NSW ENVIRONMENT PROTECTION AUTHORITY (EPA)

Mutual recognition is relevant to the EPA's responsibility for matters such as:

- the licensing of the use of radiation apparatus and radioactive substances, and the accreditation of radiation experts under the *Radiation Control Act 1990* (NSW) (the RC Act); and
- the accreditation of contaminated site auditors under the *Contaminated Land Management Act 1997* (NSW).

The EPA has had some difficulties with the application of the MRA in relation to the RC Act. Some Australian jurisdictions have a much narrower interpretation of 'occupations' than NSW. They distinguish 'occupations' from 'activities' and consider that mutual recognition does not apply to the licensing of persons for the use of radioactive substances and prescribed radiation apparatus, even where an occupation cannot be carried out without a particular activity being licensed. The definition of 'occupation' may need to be clarified.

Under the MRA and TTMRA, the Administrative Appeals Tribunal may, on a review, declare that occupations carried on in two different jurisdictions are not equivalent. It is not clear, however, whether the local registration authority is permitted to refuse an application for a deemed registration on the same basis. The MRA and TTMRA appear to limit the reasons for refusal of a deemed registration to situations where the authority decides that the occupations are not equivalent on the basis that the activities involved in the occupations are not substantially the same, rather than on the basis of health, safety or environmental concerns set out in the MRA and TTMRA (ss22(1)(c), 28(1) TTMR Act; ss23(1)(c), 29(1) Mutual Recognition Act 1992 (Cth) (MR Act)).

It may be appropriate to clarify whether the local registration authority can refuse an application for deemed registration under mutual recognition on the basis of these health, safety or environmental concerns, or whether the local registration authority may impose conditions on the deemed registration under s26(5) TTMR Act (or s27(5) MR Act) requiring the person to conform to appropriate standards with respect to health, safety and the environment.

There are possible difficulties with the operation of ss33 and 37 of the MR Act. Section 33 provides that disciplinary action that affects registration in one state will affect a person's registration in another state. Section 37 provides that a local registration authority of one state must provide to the registration authority in another state information about a person's registration, disciplinary action, etc. However, s37 does not require information about disciplinary action to be automatically provided to other jurisdictions. Each local registration authority must request such information.

Example:
Agencies are concerned that they may not become aware that a contaminated site auditor's registration in another jurisdiction has been cancelled, suspended or varied on disciplinary grounds. There is no obligation on a jurisdiction to notify other jurisdictions that a site auditor's registration has been cancelled, suspended or varied, unless another jurisdiction specifically requests the information.

NSW suggests that the operation of s37 (and the equivalent provision under the TTMR Act) be examined with the aim of improving the provision of information about disciplinary action to other jurisdictions.

4. EXEMPTIONS FROM AND INCLUSIONS IN MUTUAL RECOGNITION

Exemptions are put in place to satisfy different priorities and interests of participating jurisdictions where negotiations and compromise have failed to deliver common standards and regulatory requirements.
The existence of the special exemption facility and the ability to extend exemptions, however, can reduce the incentive for jurisdictions to align standards. After five years of Special Exemption a Permanent Exemption is able to be more easily obtained with the agreement of only two-thirds of participating jurisdictions required.

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

Further example:
The TTMRA provides a Special Exemption for the *Dangerous Goods Act* and the *Occupational Health and Safety Act 2002* (NSW) to the extent that they deal with packaging and labelling of hazardous substances, industrial chemicals and dangerous goods. This Special Exemption operates on a 12-monthly basis and expired on 30 April 2003.

The Chemicals Co-operation Program has recommended that the 12-month Special Exemption be extended for a period of five years to allow for significant differences between Australian and New Zealand classification systems (relating to requirements for labelling, material safety data sheets, and packaging of relatively low-level substances such as irritants) to be resolved.
Although a five-year extension would be procedurally convenient, it could potentially undermine the objectives of the TTMRA.

The TTMRA Permanent Exemption schedule contains areas where all jurisdictions agree that mutual recognition would not be appropriate. These currently include laws relating to: quarantine; endangered species; firearms; fireworks; indecent material; ozone protection; agricultural and veterinary chemicals; and certain riskcategorised foods.
While NSW does not generally support expanding the list of Permanent Exemptions, it would be prepared to consider the inclusion of further legislation aimed at protecting the environment and the State's cultural heritage.

5. SCOPE OF MUTUAL RECOGNITION

NSW is committed to working towards securing greater harmonisation within the current scope of the MRA and TTMRA, ie. the sale of goods and registration of occupations.
There are concerns, however, that the effectiveness of the MRA and TTMRA can be jeopardised if the scope is not extended to cover the use of goods and post-sale inspection of goods.
The sale of goods permitted under the TTMRA scheme can be prevented or severely restricted if a jurisdiction imposes restrictions on the *use* rather than the *sale* of goods. For instance, New Zealand is expected to consider the introduction of new building code requirements so that hot water heating systems can only be installed in new homes if they meet New Zealand standards.
Similarly, the imposition of post-sale inspection requirements by a jurisdiction can affect the sale of products that are otherwise covered by the MRA or TTMRA. For example, NSW and Victoria require that hose attachments for the installation of washing machines meet local plumbing requirements.
Extending the current MRA and TTMRA provisions to cover the use of goods may provide a positive boost to mutual recognition in some industry sectors, but not all. There will be major areas where, due to environmental differences, mutual agreements as to the use of goods will not be reached. Building materials, pesticides and agricultural chemicals are a few areas where the local physical climate and environment will dictate regulations around the use of goods.
The 1998 review of the MRA found insufficient evidence to justify the extension of the mutual recognition regime to prevent restrictions on the use of goods. The review recommended, however, that this issue be monitored.
As stated above, NSW is aware of the potential benefits of extending the scope of mutual recognition to the use of goods. NSW supports the findings of the 1998

review, and believes that continued monitoring and exploration of the issues are required.
Similarly, with registration of occupations, NSW is committed to exploring means to further enhance the ease of skilled labour movement and service provision between jurisdictions. Current mutual recognition arrangements focus on the movement of service providers to another jurisdiction, rather than the cross-border provision of services.
In order to extend the scope of the current mutual recognition provisions, parties to the arrangements would need to consider:

- jurisdictional arrangements for regulating and disciplining professionals;
- the means by which appropriate disciplinary action can be taken against negligent or fraudulent professionals who do not have a physical presence in the jurisdiction; and
- the impact on consumer legal rights and remedies due to the difficulty of taking legal action against professionals based in another jurisdiction.

In supporting further exploration of extending the current arrangements for both goods and occupations, NSW is of the view that priority should be given to ensuring that current commitments are working effectively in the first instance.

6. OTHER WAYS TO IMPROVE EFFECTIVENESS

The COAG Committee on Regulatory Reform (CRR) has an ongoing role in ensuring the consistent application of mutual recognition principles across jurisdictions, monitoring MRA and TTMRA arrangements and reporting to Heads of Government on the operation of the scheme. The CRR is the appropriate forum to consider the outcomes of the Productivity Commission's review and make recommendations to COAG on ways to further progress the objectives of the Agreements.
The development of new regulatory proposals needs to include consideration of the MRA and TTMRA early in the development process, to ensure that any proposed regulation does not conflict with these agreements.
To ensure greater awareness of the MRA and TTMRA across government and industry, participating governments could consider greater promotion of the Agreements.
The increased trade in goods and services resulting from the MRA and TTMRA will require jurisdictions to examine means by which local consumers who purchase goods and services across borders can be protected. This requires jurisdictions to consider means by which providers of goods and services from across borders can be subject to the same disciplinary and penalty codes as local providers.

7. CONCLUSION

As outlined above, the removal of different regulatory standard requirements for goods has led to a range of economic benefits for business and consumers. Some issues, however, continue to impede harmonisation of regulatory standards. These include:

- difficulties in co-ordinating the timing of the introduction of regulatory

requirements between jurisdictions;

- different national priorities and interests; and
- differences in approaches to regulation.

In the area of recognition of occupations, further work is required to:

- align occupational licences so that mutual recognition does not confer authority for an applicant to carry on a broader range of occupations than the applicant is qualified to do;
- improve information exchange between jurisdictions on disciplinary matters, to ensure that a practitioner who is struck off by a regulatory body in one jurisdiction is unable to practise in another; and
- align approval requirements and processes so as to deter overseas practitioners wanting to apply for registration in Australia or New Zealand seeking out the easiest jurisdiction in which to gain registration before migrating to their jurisdiction of choice under the MRA and TTMRA.

The special exemption facility and the ability to extend exemptions can reduce the incentive for jurisdictions to align standards.

The facility to permanently exempt products and occupations, however, remains a necessary feature, particularly when negotiations and compromise have failed, or where it is not relevant or appropriate for other jurisdictions to have similar regulations.

Extending the scope of the MRA and TTMRA to cover the use of goods could be explored but priority should be given to ensuring that current commitments are working effectively.

Finally, the CRR will consider the outcomes of the Productivity Commission's review and make recommendations to COAG on ways to further progress the objectives of the Agreements.