EXPANDING THE SCOPE OF THE TRANS-TASMAN MUTUAL RECOGNITION ARRANGEMENT

Jurisdictions' Discussion Paper for the Productivity Commission

Issues for discussion "without prejudice"

INTRODUCTION

The Trans-Tasman Mutual Recognition Arrangement (TTMRA) came into force in 1998 with the aim of reducing regulatory barriers to trade between Australia and New Zealand. Its underpinning principles are that:

- goods that may be legally sold in Australia may be legally sold in New Zealand, and vice versa, regardless of differences in standards and other sale-related regulatory requirements; and

- a person registered to practise an occupation in any Australian jurisdiction is entitled to be registered to practise an equivalent occupation in New Zealand, and vice versa, without having to undergo further testing and examination.

The Productivity Commission is currently reviewing the TTMRA and a final report is anticipated in October 2003. The Committee on Regulatory Reform (CRR) will then examine the Productivity Commission findings and prepare recommendations for the Council of Australian Governments (COAG) by the end of the year.

On 30 May 2003, representatives from New Zealand, the Commonwealth, and Australian States and Territories met to consider some options for expanding the scope of the TTMRA. A discussion paper prepared for that meeting proposed some matters for consideration, and posed questions to facilitate discussion.

At the meeting, it was noted that many assumptions about the limitations of the TTMRA were based on anecdotal evidence, and that further work would be required to quantify the extent and impact of any problems with the current operation of the TTMRA. It was, therefore, agreed that the Productivity Commission should be requested to undertake this research, and to provide advice on the feasibility of the proposals considered at the meeting. The issues are generally within the Terms of Reference of the Productivity Commission's review, but it is acknowledged that some aspects of the paper might be outside the scope of work already undertaken by the Productivity Commission. It is also acknowledged that some of the issues canvassed in this paper have already been identified by the Productivity Commission in its recently released draft report.

Before finalising its report, the Productivity Commission is undertaking consultation and further research in relation to its preliminary findings. It would be appropriate, therefore, for this paper to be considered by the Productivity Commission as part of this process.

This paper brings together the issues canvassed in the first discussion paper, as well as issues discussed at the 30 May meeting. Whilst this paper and the meeting were focussed specifically on the TTMRA, it would be appropriate that any changes to the TTMRA also be considered in the context of Australia's Mutual Recognition Agreement (MRA).

This paper does not reflect fixed views of New South Wales or any other jurisdiction, and it is intended to highlight areas for further consideration rather than lay out a firm set of proposals.

GOODS

Use of Goods

The TTMRA is intended to remove barriers that would prevent or restrict the sale in one jurisdiction of goods which can lawfully be sold in another jurisdiction. It does this by overriding local regulatory requirements relating to *sale* of goods, where goods are produced in or imported through another jurisdiction, and they can lawfully be sold in that jurisdiction.

There are, however, some regulatory requirements relating to the *use* or *inspection of* goods that could have the *effect* of preventing or restricting the sale of the goods, thus impeding the objectives of the TTMRA. For example, NSW and Victoria require that hose attachments for the installation of washing machines meet local plumbing standards. These requirements can have the effect of restricting the sale of attachments produced in other jurisdictions, even where the attachments physically could be attached.

The European Union (EU) mutual recognition regime for goods, established by Articles 28-30 of the European Community (EC) Treaty and caselaw (in particular, the *Cassis de Dijon* decision of the European Court of justice) is broader in scope than the TTMRA. Under that regime, if a regulatory requirement impedes cross-border sales, it is invalid unless:

- it is directed at a legitimate regulatory goal (health, safety, protection of the environment, protection of consumers etc); and
- it is proportionate to that goal (ie. does not over-regulate for a risk that has only a low chance of materialising); and
- there is no other less trade-restrictive method of achieving that goal.

There is a question as to whether the scope of TTMRA should be extended along similar lines to apply to regulatory requirements that have the effect of preventing or restricting cross-border sales, such as use and inspection requirements. There would need to be some provision for such requirements to be justified by reference to local conditions, as in the EU regime.

There are also questions about how best to give effect to any such extension if they were deemed to be beneficial. Rather than override local regulatory requirements if the test is not met, and require the test to be applied by the courts, it would be possible to establish a forum/tribunal with relevant policy expertise to review such requirements, and make recommendations on whether they are consistent with the agreed test (see below for further discussion).

Questions Requiring Further Consideration by the Productivity Commission

- Are regulations pertaining to the use or inspection of goods, or other regulatory requirements, creating barriers for inter-jurisdiction trade in goods? Are there some sectors or industries in which this is more pronounced?
- Is there a need to bring regulatory requirements that have the effect of inhibiting trade in goods (eg use and inspection requirements) into the scope of the TTMRA? If so, should it be limited to particular sectors or industries, rather than a blanket inclusion/exclusion from the TTMRA?
- Should TTMRA apply in the same way as it does to requirements relating to sale, or should there be a forum with an advisory role to which such regulations could be referred?
- What might be the benefits or costs of bringing use and inspection of goods into the scope of the TTMRA?

SERVICES AND OCCUPATIONS

Cross-Border Service Provision

At present, the TTMRA focuses on movement of service providers, and requires providers to obtain registration in the new jurisdiction. It assumes a physical presence in the new jurisdiction. The TTMRA does not focus on the provision of cross-border services in a way that enables services to be provided in another jurisdiction without local registration or a physical presence in the new jurisdiction.

Consideration could be given to extending the TTMRA to facilitate the provision of cross-border services without a local presence or local registration (eg. where services are provided via the Internet). The basic idea would be that a registered person in one jurisdiction would be entitled to provide services in other jurisdictions without the need to register there, if they would be entitled to registration under the current TTMRA regime.

The National Practising Certificate Scheme for legal practitioners, which operates in some Australian States and Territories, could provide a model that could be adapted to other occupations and to trans-Tasman service providers. The scheme allows legal practitioners in participating jurisdictions to practise in another participating jurisdiction without the need to be admitted in or to hold a practising certificate from the new jurisdiction.

Any expansion to the TTMRA along these lines may be more appropriate for one-off or temporary projects, rather than for providers permanently relocating to the other jurisdiction, eg. a Queensland architect advising for a one-off project in New Zealand. Where a person relocates or establishes an office in another jurisdiction, it is reasonable to expect them to register locally, and a requirement to do so in accordance with TTMRA is unlikely to create a barrier to relocation. But a requirement to register to provide services on an occasional basis might deter a provider from competing to do so.

An extension of this kind raises issues in relation to the ongoing regulation/ supervision of providers including, for example, insurance requirements, continuing training requirements, and consumer access to complaints procedures. Three options were canvassed for ongoing regulation/supervision in this context:

(a) regulation by the home regulator under the home jurisdiction's rules, with a requirement to advise clients in other jurisdictions that the home regulatory regime applies;

(b) apply the regulatory requirements of the local jurisdiction in full, but without the need to register;

(c) apply the regulatory requirements of the local jurisdiction, but excluding any duplication of requirements, eg. overlapping insurance requirements.

Approach (a) is similar to the European Union's approach to financial services providers (coupled with convergence of domestic regulatory frameworks in this area).

Approach (c) is similar to the general approach in Europe under Articles 49 and 50 of the EC Treaty). Articles 49 & 50 give service providers from a Member State the right to provide services in another Member State without needing to be registered there, if they do not have a permanent establishment there. They provide the services subject to local regulations, but local regulations can be applied to such service providers only to the extent that they don't overlap or duplicate the home regulation, or create unjustified barriers to cross-border service provision. This approach, however, may be complex and difficult to put into practice.

There could be increased costs to the recipient of the services through doing business with a provider outside the jurisdiction, particularly where problems arise, eg. the cost of dealing with a regulator in another jurisdiction, travelling to hearings, etc. The proposal, however, would have the potential to reduce the cost of services by increasing competition.

This proposal could lead to loss of revenue for local regulatory authorities as licence/registration fees are their main source of revenue and are necessary for them to be able to undertake their compliance/enforcement role. However, if providers are regulated by their home jurisdiction (approach (a)), there would be no increased burden (or cost) on the local regulatory authority. In the case of permanent relocation or setting up of a permanent local presence, businesses would register with and be regulated by the local authority as usual.

This proposal would need to be coupled with a more effective enforcement regime in relation to sanctions for breach of regulatory requirements. There would be a need to link this to civil remedies so that, for example, an action for damages can be brought in the local jurisdiction and the judgment enforced in the home jurisdiction. The Australian domestic model for service of civil proceedings and enforcement of judgments could be used as a model in the trans-Tasman context. There would also be a need to enhance communication requirements between regulatory authorities in different jurisdictions. This could include requirements to automatically notify other jurisdictions of disciplinary action, product recalls, etc. This would ensure that appropriate action can be taken in all jurisdictions.

One of the main reasons for local registration requirements is to ensure that professionals have appropriate and adequate insurance. Issues may, therefore, arise due to the different insurance requirements of jurisdictions. Some options to address this, based on approaches (a) to (c) above, could be:

- no insistence on the same insurance requirements, but require a warning to consumers about the different regulatory requirements (it was suggested that this sort of "regulatory branding" may work better for goods than services); or

- insist that providers have the insurance coverage required by the local regulatory regime; or

- require interstate providers to "top up" their insurance to the level required by the local regulatory authority.

These options, however, may not adequately consider the role of governmentoperated compensation or guarantee schemes in some regulated occupations. For example, clients of estate agents and motor car traders in Victoria are protected through schemes funded by interest on trust monies held and licensing fees. It may be difficult to ensure that cross-border traders contribute to such schemes without bringing them fully under the local regulatory regime.

Whilst approach (a) above requires a warning to consumers, this should not be at the expense of consumer protection. The capacity of local customers to inform themselves of the full impact of engaging a non-local provider would need to be considered.

It may be appropriate to consider excluding customers who are not in a position to make an informed decision about the different regulatory regimes, eg. by limiting the regime to large businesses purchasing services, rather than individuals, as businesses would be better placed to inform themselves of the implications of the different regulatory regimes.

The proposal might raise concerns about "lowest common denominator" or public perceptions that the quality of goods/services could deteriorate. This has previously been a concern for WA, where the TTMRA legislation has been opposed by some members of Parliament on these grounds.

A paper by Gary Sturgess[1] on this issue argues that requirements that product labels state the jurisdiction of origin of a product will ensure that standards do not fall, ie. jurisdictions will ensure that standards are maintained so that there is no branding of a jurisdiction's manufacturers as substandard.

There may be greater concerns in relation to professional services than goods, as consumers may make assumptions that regulatory requirements across jurisdictions would be generally equivalent and that remedies would be available based on local experience when, in fact, this may not be the case. For example:

- problems have already occurred as a result of different conveyancing regimes for Queensland and NSW; and
- in NSW, building may be an industry where cross-border provision of services may be problematic as consumers expect a certain level of protection from NSW regulatory regimes.

Uniformity of regulatory requirements may help address some of these issues, and could also be pursued in some cases. Moves towards uniformity could focus on areas where there is already significant consistency of regulatory approaches, or in areas where benefits from uniformity appear likely to be significant. There could also be a role for a forum/tribunal (see below) to advise on where, and how, to pursue uniformity.

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[1] Gary Sturgess, "Fuzzy Law and Low Maintenance Regulation: The Birth of Mutual Recognition in Australia", address to Royal Institute of Public Administration Australia (Qld Division), Brisbane, 12 February 1993.

Questions Requiring Further Consideration by the Productivity Commission

- What is the level of demand from service providers to include cross-border service provision within the scope of the TTMRA? Are there barriers to trade arising from the existing arrangements? Should the proposal target specific occupations? Would the proposal be better targeted to internet-trading rather than physical cross-border trading?
- Would the outlined approaches effectively address requirements for ongoing supervision/regulation of cross-border service providers, including insurance requirements and contributions to compensation guarantee schemes? What other options could be considered?
- What options and other reforms would need to be considered to ensure consumer protection and consumer confidence were maintained?
- What measures would need to be considered to prevent exploitation of such an arrangement by those seeking to avoid establishing a permanent local presence?
- Would there be merit in jurisdictions harmonising their ancillary registration requirements, eg. insurance and continuing education? What other options could be considered to enhance harmonisation?
- What is the level of demand for improved processes in relation to achieving uniformity of regulatory requirements?

Automatic Registration for Registered Occupations

Currently, when a person applies to practise their occupation in another jurisdiction, they are eligible for "deemed registration". This enables them to carry on their occupation pending the granting or refusal of their application. Generally, applications are to be approved or refused within one month of an application being lodged.

To streamline the process for applicants, and to encourage registration authorities to process applications in a timely fashion, consideration could be given to replacing deemed registration with an automatic registration scheme, whereby registration authorities would have a specified period within which to set aside or attach conditions to registration.

Special arrangements would be needed for certain occupations, including teaching, where there is an overriding need to protect vulnerable members of the community. It may be appropriate to consider options to facilitate information sharing.

Questions Requiring Further Consideration by the Productivity Commission

- Does deemed registration operate in a way that discourages applicants from other jurisdictions seeking local registration? Does the "one-month rule" operate to create a bias for registration authorities to decline registration?
- Would automatic registration address these problems?
- What special arrangements would be needed for teaching and other occupations, given the overriding need to protect children and other vulnerable people?
- Are there options to facilitate the sharing of information to streamline assessment of registration applications?

Partially Registered Occupations

Some occupations are "partially registered" in that registration is required in some jurisdictions, but not others. This could impede mobility for those moving from a deregulated jurisdiction, because there is no registration in their home jurisdiction that can be recognised in the new jurisdiction. For example, some hairdressers trained in Victoria, where the industry has been deregulated, have been refused registration in NSW, where the industry is more heavily regulated, because of differences in educational requirements.

It has been suggested that, in the spirit of mutual recognition, service providers should not be penalised just because their home jurisdiction chooses not to regulate an occupation. Consideration could, therefore, be given to whether the TTMRA should be expanded to encompass partially registered occupations, or whether special provisions are required to address impediments to mobility for those engaged in partially registered occupations.

This could be achieved by making mutual recognition contingent on a demonstrated period of practice (eg. minimum two years) in a jurisdiction with no registration requirement. The proposal could apply to partially registered occupations and to occupations with negative licensing regimes. This proposal would demonstrate a service provider's ability to do the job, even if there is no occupational licence required in the home jurisdiction.

Different standards of what constitutes an "equivalent occupation" could impede mobility for some occupational groups, eg. electricians, and further work could be required in this area. There may also be a need to consider a broader definition of "regulation" so that negative, as well as positive, licensing regimes are recognised under the TTMRA.

Questions Requiring Further Consideration by the Productivity Commission

- Are there impediments to mobility for those moving from deregulated jurisdictions to jurisdictions that are more heavily regulated, which TTMRA does not address? Are there specific occupations/sectors where this is more pronounced?
- Could this be addressed by treating a demonstrated period of practice (eg. minimum two years) in a jurisdiction with no registration requirement as equivalent to registration in that jurisdiction, thus allowing a person to register in other jurisdictions under TTMRA?
- Are there other ways in which differences in regulatory or licensing systems are impeding mobility for particular occupations? Is there a need for more general work to be undertaken to reduce the number of partially registered occupations, or to streamline regulatory approaches between jurisdictions? Could such work include an evaluation of the benefits and costs of differentiated approaches to regulation (ie. some professions being partially regulated in some jurisdictions and fully regulated in others) versus standardising levels of regulation across jurisdictions?

OTHER ISSUES

TTMRA and Policy Development

Consideration could be given to developing a process whereby TTMRA issues are considered in the early stages of the policy process or when regulatory regimes are being developed/modified.

If left to the final stages, the TTMRA could be perceived as an obstacle to policy development, rather than one of several important considerations. Early identification of TTMRA issues and implications could lead to more integrated or innovative policy as it would enable alternative approaches to be considered or more fully explored. It could also identify alternatives to regulation, or alternatives that are less administratively cumbersome.

Another area of policy development which could also be given consideration is the ways in which participating jurisdictions work together on joint standards and other technical issues. The ultimate success of such work programs hinges not only on the rigour of the cooperative processes which underpin them, but also on the strength of relationships between Ministers and officials from participating jurisdictions.

Consideration could be given to whether existing processes (such as the *COAG Principles and Guidelines for Standard Setting and Regulatory Action* and regulatory impact statements) could be used or adapted as a mechanism for ensuring that TTMRA issues are identified and addressed. There could also be a role for a forum/tribunal (see below) to advise on TTMRA policy issues.

Questions Requiring Further Consideration b y the Productivity Commission

- Are TTMRA issues taken into account appropriately in policy development? Is there a need to address TTMRA issues at an earlier stage?
- What mechanisms/processes could be developed to achieve early identification of TTMRA issues?
- How and to what extent do officials from participating jurisdictions work cooperatively in jointly developing technical standards leading to harmonisation or mutual recognition, and how might these processes be enhanced?
- Would this be an appropriate role for the proposed forum (see below)?

Tribunal or Forum to Advise on Regulatory Restrictions Affecting Trade in Goods or Services

As previously discussed, the TTMRA is intended to remove regulatory barriers to trade except where they are directed at a legitimate regulatory goal.

To prevent disputes arising, or to assist in the resolution of disputes, a forum could be established to determine policy questions arising from the application of the TTMRA. The forum would be an advisory, not decision-making, body, focussing on policy questions, which the courts are less equipped to consider. Its role would be to review regulatory regimes that have the effect of impeding trade (eg. use requirements) and consider questions such as:

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

The forum could consider the materiality of the risk when considering whether a regulatory restriction is required/justified. For example, if there is a low chance of a risk materialising, then the restriction may not be justified, or may be disproportionate. The forum could also consider whether current restrictions are still required, or whether the original purpose of the restriction has now been addressed.

There may be a number of restrictions imposed at the local government level, particularly local environmental codes, which could also be considered by the forum.

As mentioned earlier, the forum could also play an advisory role in the policy development process to assist in the early identification of TTMRA issues, identify less restrictive approaches, and facilitate multi-jurisdictional work.

The forum should be low-key and low-cost, comprising senior officers from all jurisdictions. Consideration could be given to creating the forum through an inter-governmental agreement, rather than by statute. For example, the forum could take the form of an officials' group reporting to COAG or the CRR. Technical expertise could be provided by sub-groups of officials from relevant jurisdictions and agencies. It should also have discretion about whether or not a matter should be investigated. Rather than investigating every complaint, its inquiries should be targeted to areas where there is a significant economic impact from a regulatory restriction.

It may be necessary to give further consideration as to how the forum would operate in relation to the regulation of services. The European model for regulation of most services is that local laws apply except to the extent they overlap/duplicate home regulations. The proposed forum could look at the overlap/duplication, if this approach were adopted.

Questions Requiring Further Consideration by the Productivity Commission

- Would the forum be an appropriate vehicle for the consideration of policy matters related to the TTMRA? Are there disputes arising under TTMRA that are essentially matters of policy, and would an advisory forum reduce the number of disputes?
- What would be the most appropriate role and structure for the forum?
- Would the proposed forum have a role in relation to services as well as goods?

Exemptions and Cooperation Programs

There are some areas that have been excluded or exempted from the operation of the TTMRA. Some areas require further work, and cooperation programs have been established to harmonise standards before these are brought into the TTMRA.

Consideration could be given to the appropriateness of having areas exempted from the TTMRA. It could be argued that any exemptions or exclusions undermine the spirit of mutual recognition. It could, however, be countered that some exclusions are necessary to give jurisdictions discretion over factors/issues specific to each jurisdiction.

Questions Requiring Further Consideration by the Productivity Commission

- Does the existing system of exemptions and exclusions operate effectively? Should exemptions and exclusions to the TTMRA be retained? Are there ways in which they could be streamlined?
- Do cooperation programs and special exemptions facilitate harmonisation and mutual recognition? Should special exemptions continue to be rolled over on a 12-monthly basis?
- Does the TTMRA provide the flexibility for new/emerging areas to be incorporated into/excluded from its operation?
- Would the proposed forum have a role in considering the need for exemptions?