CI 2003/00475

Mr Tony Hinton
Commissioner
Productivity Commission
PO Box 80
BELCONNEN ACT 2617

Dear Mr Hinton

DRAFT REPORT OF THE PRODUCTIVITY COMMISSION 2003 REVIEW OF THE MUTUAL RECOGNITION AGREEMENT AND THE TRANS TASMAN MUTUAL RECOGNITION ARRANGEMENT - VICTORIAN COMMENTS

Consultation with all Victorian Departments has identified a number of issues in the draft report of the Productivity Commission 2003 Review of the Mutual Recognition Agreement (MRA) and the Trans Tasman Mutual Recognition Arrangement (TTMRA) that Departments and agencies wish to comment upon (see **Attachment**). Please note these comments do not represent the views of the Victorian Government; rather they are provided by Victorian agencies solely within the context of the draft report, to aid and inform discussion.

If you have any queries or require further information regarding these comments please contact Callum Ingram, Senior Policy Adviser, Government Branch, Department of Premier and Cabinet, via telephone (03 9651 1247); fax (03 9651 5071) or email him at Callum.Ingram@dpc.vic.gov.au.

Yours sincerely

TERRY MORAN
Secretary

Your details will be dealt with in accordance with the *Public Records Act* 1973 and the *Information Privacy Act* 2000. Should you have any queries or wish to gain access to your personal information held by this Department please contact our Privacy Officer at the above address.

ATTACHMENT

PRODUCTIVITY COMMISSION 2003 REVIEW OF THE MUTUAL RECOGNITION AGREEMENT AND THE TRANS TASMAN MUTUAL RECOGNITION ARRANGEMENT – VICTORIAN COMMENTS ON DRAFT REPORT.

Please note that these comments do not represent the views of the Victorian Government; rather they represent issues Victorian agencies wish to raise within the context of the draft report of the Productivity Commission's 2003 Review of the Mutual Recognition Agreement (MRA) and the Trans Tasman Mutual Recognition Arrangement (TTMRA).

Processes for applying mutual recognition obligations

Preliminary Finding 5.1

Achieving MRA and TTMRA objectives (in relation to both goods and occupations) would be assisted by jurisdictions disseminating, in a coordinated manner, information on the obligations and benefits of mutual recognition. This campaign to enhance the knowledge and awareness of mutual recognition would be directed at their own regulators, local governments, relevant industries and professional associations.

Consumer Affairs Victoria (CAV), part of the Victorian Department of Justice, agrees that achieving MRA and TTMRA objectives would be assisted by jurisdictions disseminating, in a coordinated manner, to government agencies and relevant industry groups, information on the obligations and benefits of mutual recognition. However, effective dissemination of accurate information is only likely to occur if there is active central supervision of registration authorities (see comment on *Preliminary Finding 5.10*).

Preliminary Finding 5.2

As part of the awareness campaign referred to in preliminary finding 5.1, regulatory authorities could be informed that they have scope to obtain under mutual recognition relevant information about applicants, without contravening privacy laws.

CAV notes that the draft report's suggestion that registration authorities have scope to obtain relevant information about applicants, including police checks, without contravening privacy laws (p.71) appears questionable.

The discussion of information sharing and privacy at pp.70-71 and this finding do not follow logically from the statement at the top of p.70 on the concerns of some registration authorities about the restrictions imposed on their information gathering capacity by the mutual recognition legislation itself.

Section 19(2)(h) of the *Mutual Recognition Act 1992* (Cwlth) (1992 Act) and section 18(2)(h) of the *Trans-Tasman Mutual Recognition Act 1997* (Cwlth) (1997 Act) require the applicant to consent to information being sought "regarding the person's activities in the relevant occupation or otherwise regarding matters relevant to the notice" (the notice being the application for registration). The succeeding sections headed "Entitlement to registration and continued registration", "Action following notice", "Postponement of notice" and "Refusal of registration", make very clear that only matters relevant to the notice have any bearing on the registration authority's decision on the application.

Accordingly, the only purpose for which any information obtained could be used would be to check the accuracy or completeness of the applicant's statements regarding specific issues in the notice:

- whether the applicant's registration is currently cancelled or suspended in any jurisdiction;
- whether the applicant is otherwise personally prohibited from carrying on the relevant occupation in any jurisdiction;
- whether the applicant's practice of the occupation is anywhere subject to special conditions – as a result of criminal, civil or disciplinary proceedings or otherwise; and
- whether any disciplinary investigations or proceedings are under way.

A police check would not confirm or disconfirm any of the above. Being found to have committed an offence which would disqualify one from registration in a participating jurisdiction is not the same as being personally prohibited from carrying on the relevant occupation. Whether special conditions have been imposed as a result of criminal proceedings can only be determined by enquiries with the relevant registration authority.

It is therefore difficult to see how a registration authority could request a police check on an applicant under mutual recognition.

With regard to privacy legislation, it is also worth noting that it is only another registration authority which can rely on section 37(3) of the 1992 Act or section 37(3) of the 1997 Act to furnish information normally protected by statutory obligations of confidentiality. Police and other authorities could not rely on it.

Preliminary Finding 5.3

Given that there is provision for postponement in certain circumstances, the one-month period for registration boards to check applications under mutual recognition appears to be appropriate.

CAV agrees that the one-month period for registration boards to check mutual recognition applications appears appropriate. However, the discussion again appears to be confused, or at least unnecessarily oblique. If there is no statutory basis for a registration authority dealing with an application under mutual recognition to apply its own fit and proper test (see above, *Preliminary Finding 5.2*), there are no grounds for postponing a decision to allow such a test to be completed. Section 22 of the 1992 Act and section 21 of the 1997 Act are quite unambiguous that a decision may only be postponed if:

- the information required under the mutual recognition legislation to be provided by the applicant is false or misleading; or the circumstances of the applicant have changed materially since the application; or
- the authority decides that occupational equivalence is lacking.

Preliminary Finding 5.4

Information flows among registration boards across jurisdictions would be enhanced by a greater use of electronic database registration systems with capacity for access by counter-party registration boards.

CAV agrees that greater access to each other's electronic registration databases would assist registration authorities in different jurisdictions.

It would assist further if registration obtained under mutual recognition were clearly identified in such databases. This would allow the original registering jurisdiction (which may not be the jurisdiction cited in the application) to be identified and enquiries to be made as to whether the applicant continued to be registered there (and if not, why not).

The integrity of the system would also be better safeguarded if (at least) all jurisdictions in which the applicant is known to be or have been registered were notified of any decision on a mutual recognition application in another jurisdiction.

Preliminary Finding 5.7

Jurisdictions in Australia and New Zealand continuing to work on reducing differences in relation to registration requirements, helps to address concerns (including costs incurred) of jurisdictional 'shopping and hopping'.

With reference to *Preliminary Findings 5.2, 5.4 & 5.7*, the Victorian Department of Justice notes that several areas of concern were raised in the evaluation in relation to the mobility for registered occupations which affect the legal profession. These include:

- confusion about what information is legally allowed to be disclosed or sought when someone applies for registration on the basis of mutual recognition;
- insufficient information flows between registration boards, for example in relation to incomplete disciplinary actions; and
- concerns that the entry of professionals through the 'easiest jurisdiction' might lower the overall competency of an occupation in Australia and New Zealand and lead to the 'lowest common denominator' becoming the benchmark.

The first two concerns are addressed in the national legal profession model laws by requiring the State regulatory bodies to automatically exchange certain information. For example, if a legal practitioner's practising certificate is suspended or cancelled in Victoria, the regulatory authority in Victoria must tell all other Australian legal regulatory bodies.

In relation to the concern that the lowest common denominator will become the benchmark for competency, as all jurisdictions comply with the Law Admissions Consultative Committee guidelines which set standards for admission, this is unlikely to become a problem. All States will be required to admit graduates to practice who have similar academic and practical legal training qualifications.

The Victorian Department of Human Services notes an area of general concern is the "path of least resistance" being followed by European trained practitioners in various fields, who gain British registration by virtue of European Economic Union (EEU) arrangements, then use that registration to gain registration in New Zealand, then use that registration to gain registration in Australia, via TTMRA. The draft report does not appear to give this sufficient weight, and suggests impractical suggestions such as "…minimising the differences in requirements across jurisdictions." (p.78 para 1).

The draft report acknowledges that this would be extremely difficult, but does not acknowledge that such solutions would take many, many years to evolve, and do nothing to address the short-term potential problems, especially if they involve EEU standards, etc.

Preliminary Finding 5.7 reflects a reasonable long term aim, however, it does not address the short-term concerns of occupational standards in Australia being lowered by the "forced" registration of practitioners in Australia under TTMRA guidelines, by virtue of their registration in New Zealand, which has been granted via mutual recognition arrangements between New Zealand and the United Kingdom, where United Kingdom registration has been granted via EEU mutual recognition arrangements, and the practitioner in question may never have actually practiced in either the UK or New Zealand.

Some form of minimum term of practice requirements, with no proven claims of mal-practice, etc, as a blanket requirement for occupational registration under TTMRA arrangements would be one way of addressing this issue. Proof of such practice could be in the form of a statutory declaration from the person applying for registration, and a statement of any past or current disciplinary action, or proven claims of malpractice from the previous Registration Board.

Preliminary Finding 5.10

Monitoring of, and compliance with, mutual recognition obligations is enhanced by each jurisdiction's designated coordinating department or agency taking active responsibility for mutual recognition.

CAV agrees that monitoring of, and compliance with, mutual recognition obligations would be enhanced by each jurisdiction's designated coordinating department or agency taking active responsibility for mutual recognition. Registers in each jurisdiction of the licensing/registration schemes to which mutual recognition applies could be used to actively promote accountability for mutual recognition policy and the quality of public information on mutual recognition at the licensing scheme level.

The governance of mutual recognition

Preliminary Finding 6.3

There are grounds for examining options to streamline the temporary exemption process, especially in cases where there are pressing health, safety or environmental concerns.

CAV agrees that there are grounds for examining options to streamline the temporary exemption process, especially in cases where there are pressing health, safety or environmental concerns.

CAV, however, questions the statement at p.92 that: "Product bans are exempt from mutual recognition obligations and, therefore, maintain their effectiveness regardless of the actions of other jurisdictions." The essence of the mutual recognition principle is that goods that may lawfully be sold in one participating jurisdiction may be sold in any other participating jurisdiction. The application of mutual recognition is a defence to a prosecution regarding the sale of goods in a participating jurisdiction if it is established that the defendant had no reasonable grounds not to rely on labelling on the goods at the point of sale stating that they were produced in or imported into

another participating jurisdiction (section 12 of the 1992 Act; and section 13 of the 1997 Act).

Only bans under particular provisions affecting particular goods, as specified in Schedule 3 of the TTMRA, are exempt from the TTMRA. There is no analogous schedule to the MRA.

Permanent exemptions and exclusions

Preliminary Finding 7.4

The restrictions in Australia on the sale of pornographic material are ineffective. Changes are needed, in the absence of harmonisation across jurisdictions, for implementation of a realistic national approach. Consideration could then be given to retaining or removing the permanent exemption for the MRA for pornographic material.

Preliminary Finding 7.5

The TTMRA permanent exemption for pornographic material should be retained, pending any development in relation to the MRA exemption.

The Victorian Department of Justice notes the finding in the draft report that the restrictions on the sale of pornographic material were ineffective and consideration should be given to a national approach, whether that means retaining or removing the permanent exemption which currently exists.

In Australia, both the ACT and NT allow the sale of X-rated videos. In all other States, sale is banned but purchase of these videos is not. Therefore, those in Victoria may mail order X rated videos from ACT, NT or overseas. As the evaluation notes, the permanent exemption is therefore ineffective in achieving desired social outcomes as it does not control the viewing of X rated videos.

The Victorian Department of Justice would support exploration of ways to make the mutual recognition regime more effective in relation to the sale of pornographic material.

Special exemptions under the TTMRA

Preliminary Finding 8.4

A more transparent, effective regulatory regime would result from:

- *moving agricultural and veterinary products from the permanent exemption list to the Cooperation Program on Hazardous Substances, Industrial Chemicals and Dangerous Goods, to address their risks as chemicals; and*
- *adding a new special exemption and cooperation program for this category to address their risks to food, biosecurity and livestock.*

The Victorian Department of Sustainability and Environment does not believe it would be appropriate to remove agricultural and veterinary products from the TTMRA permanent exemption list.

There were examples in the 1990s where the approvals of agricultural and veterinary products in Australia were fast-tracked on the grounds that the products had already been approved in New Zealand, with subsequent discovery that these products were

either ineffective or had adverse effects on animals and the environment in Australian conditions. Such an approach cannot be justified, given that the economic and ecological costs can be enormous.

As these products tend to be used widely throughout regional / rural areas, it is essential that they be subject to thorough scrutiny of their specific effects in Australian environmental conditions before being released for use in Australia. The variations in Australian vs New Zealand flora, fauna and environmental conditions can have very significant implications for the environmental safety of such products and their potential to be transmitted through the environment into primary produce such as meat. Contamination of such produce by agricultural and veterinary products via soil and water can in turn have serious implications for Australia's export markets - as with the famous Helix case in the 1990s which saw the loss of more than $500M sales of beef to Japan.

While it may seem "neat" to place agricultural and veterinary products into the same basket as industrial chemicals, there are very sound reasons for not doing so.

The Victorian Department of Primary Industries also does not support the proposal to remove agricultural and veterinary products from the TTMRA permanent exemption list. The agricultural and veterinary chemicals area is extremely complex and it has been determined that a careful approach needs to be taken in this area as unintended consequences may occur. Whilst they are exempted at present as a 'class', they are in fact also subject to elements of harmonisation that are occurring in other related systems.

Agricultural and veterinary chemical approval systems impact significantly on agricultural trade. Australia and New Zealand have many very different agricultural systems and the impact of complete harmonisation in this area could have adverse trading consequences on either country's production systems. Australia and New Zealand recognise international standards differently and there would be have to be considerable progress made in harmonising the approach to standards prior to the inclusion of agricultural and veterinary products in the TTMRA.

Harmonisation in other areas, especially Drugs, Poisons and Controlled Substances, also has an impact as some of the requirements in the relevant legislation (e.g. labelling) also apply to agricultural and veterinary chemicals.

Preliminary Finding 8.19

Administrative costs would be reduced by extending the special exemption on consumer product safety standards, without annual roll over requirements, until 2005 to allow the Cooperation Program to:

- *specify a way forward to harmonise or mutually recognise children's car restraints by that date and, if this is not possible, to replace the wide special exemption with a specific permanent unilateral exemption for New Zealand exports to Australia of children's car restraints; and*
- *establish a coordinated approach to recalls and bans.*

As no Victorian consumer product standards are subject to special exemption, CAV makes no comment on the finding regarding the administrative costs of the annual roll over requirements.

With regard to allowing the Cooperation Program to establish a coordinated approach to recalls and bans, CAV queries "the potential for current banning

provisions to undermine the objectives of the TTMRA" (draft report p.165), for the reasons outlined in the above comment on *Preliminary Finding 6.3*. It is also stated at p.163 that: "The Consumer Protection Acts that are now exempted from the TTMRA contain provisions for recalls and bans." Again this appears to overlook the fact that the exemptions in Schedule 3 apply only to specified provisions as they relate to (very short lists of) specified goods.

Scope of the schemes

Preliminary Finding 9.10

Business licences should be separated from occupational registration in order to remove indirect barriers to the movement skilled people. Business licences themselves should not be brought into the scope of the mutual recognition schemes as the additional complexity and conflict from mutually recognising licences are likely to outweigh the gains from freer movement.

The suggestion that any business licensing component of an occupational registration scheme be separated out, and left beyond the scope of mutual recognition, perpetuates the failure of the 1993 VEETAC Review of Partially Registered Occupations to recognise the genuine overlap between business and occupational regulation. It is disappointing that issues raised in this regard in the Consumer Affairs and Business Licensing paragraphs of the Services and Improvement in Operation and Expansion of Scope sections of the Victorian input to the review are not addressed seriously in the draft report.

One issue is the imposition of responsibilities on proprietors with regard to their employees. The draft report seems to suggest (p.181) that a requirement on the owner of a business to ensure that a qualified person be employed in a particular role is merely a device to circumvent mutual recognition by dressing up occupational regulation as business regulation. In fact, such requirements often reflect a recognition that the proprietor may not be carrying out a function involving risk to the public together with a judgment that it is most appropriate and effective to hold the proprietor responsible for the competence and/or probity of the person employed to carry out that function. The Business Licensing Authority has previously pointed out the limitations of the mutual recognition scheme where jurisdictions differ as to whether they register the relevant employees or merely require the employer to ensure they are qualified – only the employees from the registering jurisdictions can relocate using mutual recognition as the law stands.

The main area of overlap between business and occupational licensing relates to screening of business owners. In business sectors presenting high levels of probity risk, it is a reasonable regulatory approach to make eligibility to be a proprietor dependent on criminal record and solvency checks. Such checks are clearly aimed at establishing whether a person (in the language of the mutual recognition legislation) possesses the qualification of being fit and proper – whether or not the term "fit and proper" is used in the relevant statute.

The same criminal record and solvency check requirements to establish that a person is fit and proper for a practising role would clearly constitute occupational regulation for the purposes of the mutual recognition legislation, and it is not apparent why a proprietary role should be regarded differently.

However, interpretation is complicated by the fact that many of those subject to checks for a proprietary role will not be aspiring proprietors in their own right, but

directors of applicant corporations. As noted earlier, there is some uncertainty as to whether the restriction of the mutual recognition legislation's application to "individuals and occupations carried on by them" means that individual licensed proprietors under schemes which also licence corporations cannot use mutual recognition.

CAV accepts that some licensing requirements, such as suitability of premises, have no bearing on the transferable qualifications of the licensee. However, it should be possible to arrange matters so that mutual recognition clearly applies to those parts of licensing schemes which address the fitness of the person, including addressing the fitness of a corporation based on the fitness of its directors.

CAV does not underestimate the challenge this represents and acknowledges the problems raised will not always be the same from scheme to scheme. It may therefore be appropriate, as a first step, that particular corporation licensing schemes which are identified as significant to the economy be reviewed individually with a view to greater harmonisation and then brought within mutual recognition subject to appropriate conditions. The schemes for estate agents, motor car traders and travel agents would be the major candidates in the current Consumer Affairs portfolio. There should also be a process for determining whether a system of mutual recognition of corporations should apply when registration schemes are introduced for industries where entry was previously unrestricted.