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THE CABINET OFFICE

NEW SOUTH WALES

25 SEP 2003

TCO/09608 - IRB

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

Dear Mr Hinton

Please find attached the NSW Government submission on the Preliminary Findings of the Productivity Commission's Draft Report on the Evaluation of the Mutual Recognition Agreement (MRA) and the Trans Tasman Mutual Recognition Arrangement (TTMRA).

Thank you for the opportunity to comment on the Draft Report. If your officers have any queries in relation to the NSW submission, they may contact Ms Nazli Munir on 02 9228 4981 or nazli.munir@mail.cabinet.nsw.gov.au.

Yours sincerely

Roger B Wilkins
Director-General

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EVALUATION OF THE MUTUAL RECOGNITION SCHEMES

DRAFT RESEARCH REPORT

NSW COMMENTS TO THE PRODUCTIVITY COMMISSION

NSW generally supports the Preliminary Findings in the Productivity Commission's Draft Research Report.

NSW notes that a number of the Preliminary Findings have identified areas in which the Trans Tasman Mutual Recognition Arrangement (TTMRA) and the Mutual Recognition Agreement (MRA) could be modified or expanded, or areas in which further work might need to be undertaken. NSW supports further consideration of these areas and suggests that the COAG Committee on Regulatory Reform would be an appropriate forum for overseeing any necessary follow-up work arising from the Productivity Commission's review.

Whilst supporting in-principle the Preliminary Findings of the Productivity Commission's review, NSW makes the following comments in relation to the Draft Report:

Chapter 5 – Processes for Applying Mutual Recognition Obligations

NSW supports moves to enhance awareness of mutual recognition benefits and obligations, as well as measures to increase the flow of information between the regulatory authorities of each jurisdiction.

NSW further supports options to facilitate sharing of information across jurisdictions. Information sharing could lead to more efficient processing of applications and allow for improved information sharing across jurisdictions of disciplinary actions initiated in one jurisdiction. However, the cost and practicality of establishing and maintaining systems (see comments in relation to Preliminary Finding 5.4) requires further consideration.

Specific comments on this Chapter are as follows:

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.

The Draft Report (page 72) discusses 'fit and proper person' checks in the context of teacher registration. It suggests that the regulation and employment of teachers be separated so that registration is not delayed pending the outcome of these checks.

This is not an issue for NSW. The NSW Department of Education and Training advises that, in this State, it is the employer who undertakes the 'fit and proper person' check and not the regulatory authority. Any delays with these checks, therefore, do not impact on teacher registration in NSW, and a teacher cannot commence duty until the checks are concluded.

NSW is keen to ensure that measures to streamline registration in other jurisdictions do not undermine the protection of children and other vulnerable people.

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

NSW supports, in principle, the use of electronic databases to enhance information flows, subject to further consideration of the cost and practicality of establishing and maintaining such databases. Privacy issues would also need to be fully considered before personal data can be transferred across jurisdictions.

5.5 There are likely to be net benefits from improving the capacity of registration systems to accommodate short notice applications for registration, to allow the short-term movement of professionals across jurisdictions.

NSW agrees that registration systems could be enhanced to accommodate the short-term movement of professionals across jurisdictions, however, further consideration would be required to address issues such as:

- jurisdictional differences in professional indemnity and other insurance requirements;
- which jurisdiction would be responsible for the ongoing supervision and regulation of a professional practising in another jurisdiction;
- what measures would be needed to ensure consumer protection and maintain consumer access to dispute resolution services and legal remedies; and
- what measures would be needed to prevent such an arrangement being exploited by professionals seeking to avoid establishing a permanent local presence.

The NSW Attorney-General's Department advises that, for the legal profession, mutual recognition is partly superseded by the National Practising Certificate Scheme in relation to short-term or one-off projects. Mutual recognition is still relevant, however, if a legal practitioner permanently transfers to a new jurisdiction. It is understood that the Standing Committee of Attorneys-General is developing model national laws to remove outstanding barriers to national practice.

5.9 The efficacy of professional standards and, therefore, confidence in the mutual recognition process, is being enhanced by the trend for jurisdictions to require some degree of 'current competency' as a requirement for registration.

The Draft Report (page 79) makes this recommendation in the context of requirements in some jurisdictions that applicants must demonstrate 'current competency' or 'recency of practice' (eg. having practised some time in the last five years) in order to gain or retain registration.

The Draft Report also notes that the NSW *Nurses Act* does not require 'current competency' or 'recency of practice' for registration. NSW Health advises that the *Nurses Amendment Bill 2003*, which has now been passed by both Houses of the NSW Parliament, proposes the introduction of a thorough system by which the Nurses Registration Board may assess the competency of an applicant for registration or re-registration. The new Section 4B, to be inserted in the Nurses Act, identifies the factors necessary for a person to be "competent to practise nursing" and Schedule 1B will enable the Nurses Registration Board to hold an inquiry into an applicant's competence to practise nursing. These provisions will enable the Board to consider how recently an applicant has practised nursing.

Chapter 6 – Governance of the Mutual Recognition Schemes

Specific comments on this Chapter are as follows:

6.1 The process for removing permanent exemptions from the MRA needs clarification and could be simplified.

NSW supports the regular review of exemptions but suggests that the removal of permanent exemptions requires careful consideration to ensure that health, safety and environmental protection laws are not undermined.

6.4 There are grounds for establishing a trans-Tasman electronic list for sharing information on product recalls and bans, as an interim measure before implementing a fully integrated ban system with a uniform limited ban duration. A requirement that all product bans be subject to consideration by the relevant Ministerial Council as per the temporary exemption mechanism would prevent potential abuse of the ban option.

NSW strongly supports the sharing of information on product recalls and bans. NSW agrees that an electronic list would be an effective means of sharing information across jurisdictions but, as noted in relation to Preliminary Finding 5.4, issues such as the cost and practicality of establishing and maintaining databases require further consideration.

NSW does not support the suggestion that product bans should be subject to Ministerial Council consideration.

The NSW Office of Fair Trading advises that the primary intention of a ban is to remove a product quickly from the marketplace. Bans are frequently used to remove novelty and 'one-off' type products. A ban can later become a standard if it is a product that should be available subject to appropriate regulation. Any consideration of a proposed ban by a Ministerial Council would unacceptably delay the removal of a dangerous product from the marketplace, which could result in injury or death to a consumer.

SafeFood NSW advises that unsuitable food products are removed from the Australian market through the use of food recalls rather than product bans. Food Standards Australia New Zealand (FSANZ) coordinates and monitors food recalls in Australia, but not in New Zealand. Increased coordination and integration of electronic food recall lists, such as the Commonwealth Treasury's web-based service, would assist in the containment of unsafe food products sold in both Australia and New Zealand.

6.6 The incorporation of mutual recognition considerations into Australia's policy and regulation-making processes would be enhanced by including mutual recognition obligations in the checklist for the current regulatory impact statement requirements or guidelines that apply at each level of government.

The incorporation of mutual recognition issues into the Regulatory Impact Statement (RIS) process could be an effective way to incorporate mutual recognition into the policy development process. NSW Treasury suggests that consideration could also be given to incorporating mutual recognition issues into other policy and regulation-making processes, even where a RIS is not required (eg. legislative reviews). The feasibility and practicality of this would, however, require further consideration.

As proposed in the jurisdictions' discussion paper (page 10), consideration could also be given to the establishment of an inter-jurisdictional forum to advise on policy issues arising from mutual recognition, or to assist in the resolution of disputes.

Chapter 7 – Permanent Exemptions and Exclusions to Mutual Recognition

Specific comments on this Chapter are as follows:

7.6 The MRA permanent exemption for quarantine is justified. Quarantine requirements need to be implemented at the jurisdictional level to be effective. Policy effectiveness would be further enhanced if State and Territory regulations were made consistent with the nationally agreed policy, which is based on risk analysis.

NSW supports this Preliminary Finding. SafeFood NSW advises that it supports the MRA requirements being aligned with those of the TTMRA. SafeFood NSW advises that the TTMRA requirements are also more appropriate as they are consistent with Australia's and New Zealand's obligations unde the Agreement on Sanitary and Phytosanitary Measures of the World Trade Organisation. This Preliminary Finding is also supported by NSW Fisheries, the NSW Environment Protection Authority and the NSW National Parks and Wildlife Service.

7.9 There appears to be scope to develop uniform standards across the Australian jurisdictions in relation to ozone protection. This could ultimately enable removal of the MRA permanent exemption for ozone protection.

In the discussion preceding this Preliminary Finding, the Draft Report (page 114) uses an example about urban air quality in Sydney that confuses tropospheric ozone with stratospheric ozone. This reference should be removed and another example given.

7.16 The TTMRA permanent exemption for medical practitioners allows for some restrictions for certain non-Australian and non-New Zealand trained doctors. There are public health grounds for this permanent exemption to be retained at this stage. Consideration should be given to its removal at the next review.

NSW supports this Preliminary Finding, and notes the comment that consideration could be given to its removal at the next review. As noted in the original NSW Submission (page 7), further consideration could be given to aligning approval requirements and educational competency standards. If this occurred prior to the next review, it might facilitate the removal of the permanent exemption.

The Draft Report (page 122) refers to Commonwealth legislation that restricts access to Medicare provider numbers. NSW Health advises that there are some exemptions to this legislation, such as the Targeted Inland Recruitment Scheme, which are supported as they provide opportunities for the continued filling of hospital-based posts and positions in rural areas of workforce shortage.

Chapter 8 – Special Exemptions under the TTMRA

Specific comments on this Chapter are as follows:

8.2 When either country is developing a new set of standards for any product, there would be benefit in consultations with counterparts in the other country. In this way, impacts on production, mutual recognition and trade can be identified early. Clear reasons would need to be given for a non-harmonised outcome.

NSW supports consultation during the development of standards, particularly in areas in which differences have delayed work towards harmonisation.

The NSW Office of Fair Trading is concerned, however, that any higher level of formalised consultation does not unnecessarily delay the regulation-making process in the important area of consumer and product safety.

The NSW Ministry of Energy and Utilities advises that all gas appliance Australian standards are developed through Standards Australia with the capability for full consultation with New Zealand. The Ministry advises that the adoption of joint Australian and New Zealand Standards, recognised in each jurisdiction's legislation, would greatly assist in the mutual recognition of such appliances.

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.***

8.5 In Australia the fragmentation of responsibilities across agencies in relation to hazardous substances, industrial chemicals and dangerous goods impedes progress towards achieving mutual recognition or harmonisation with New Zealand.

NSW supports these Preliminary Findings. SafeFood NSW advises, however, that the Australia New Zealand Food Treaty specifically excludes the specification of Maximum Residue Levels (MRLs) for agricultural and veterinary chemicals in food. Australia and New Zealand have different standards as to safe MRLs, which can lead to problems when some foods (eg. herbs and spices) are imported into Australia under the TTMRA. Further harmonisation of MRL standard setting processes via a cooperation program would, therefore, assist in this regard.

WorkCover NSW advises that moving agricultural and veterinary products from the permanent exemption list to the Cooperation Program on Hazardous Substances, Industrial Chemicals and Dangerous Goods would be consistent with the *Occupational Health and Safety (Dangerous Goods) Act 2003* (NSW), which creates a single regime for the regulation of all hazardous substances, industrial chemicals and dangerous goods.

WorkCover also notes that the National Occupational Health and Safety Commission (Australia) is trying to address fragmentation of regulatory responsibilities through consultation with State and Territory regulators.

NSW notes that in December 2000, the Workplace Relations Ministerial Council endorsed the National Standard for the Storage and Handling of Dangerous Goods. As all States and Territories agreed to implement the National Standard, this may address some of the concerns in relation to fragmentation.

In addition, a COAG Review of Hazardous Materials is currently being undertaken under the auspices of the National Counter-Terrorism Committee. The COAG Review will examine the risk of hazardous goods being used in a terrorist attack. Creation of a special exemption for agricultural and veterinary chemicals might enable changes arising from the COAG Review to be incorporated into a national or trans-Tasman regulatory regime.

8.12 – 8.16 Extending the current period for special exemptions

NSW supports the proposed three-year extension of the special exemptions as it is understood that a number of differences between Australian and New Zealand standards have hampered harmonisation or mutual recognition of standards for motor vehicles, gas appliances and children's car restraints.

The NSW Ministry of Energy and Utilities advises that the Australian approach to energy labelling of gas appliances is currently under review. The Ministry suggests that the outcome of this review could, wherever possible, be adopted by all jurisdictions, including New Zealand.

Chapter 9 – Scope of the Schemes

Non-traditional forms of occupational regulation

There are a number of 'partially registered' occupations where, for example, registration is required in some jurisdictions but not in others. The Draft Report discusses non-traditional forms of occupational regulation, such as co-regulation and negative licensing (pages 12-15 & 183-185) and notes these may present a barrier to the movement of people between jurisdictions. The Draft Report, however, does not contain any specific recommendations in relation to partially registered occupations.

As proposed in the jurisdictions' discussion paper (page 10), consideration could be given to expanding the scope of the TTMRA and MRA to encompass deregulated or partially registered occupations, or developing other options to address impediments to mobility in these occupations. NSW would support further work to determine whether this could 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 the TTMRA or MRA.

Definitional issues

As noted in its original submission to the Review, NSW is concerned that the TTMRA and MRA could be undermined by jurisdictional differences in interpreting equivalence of occupations. This is discussed in the Draft Report (pages 12-15), but there are no specific Preliminary Findings in relation to this issue. NSW would support further work to resolve such differences. Further work could also be undertaken to resolve any problems arising from broader/narrower interpretations of mutual recognition itself.

The Administrative Appeals Tribunal (AAT) cases referred to in the Draft Report tend to focus on equivalence of *activities* carried out, rather than equivalence of occupational *standards*. Further work may be required to ascertain the desirability and feasibility of harmonising occupational standards or developing national standards as a means of addressing disputes under TTMRA and MRA.

Specific comments on this Chapter are as follows:

9.7 – 9.9 Use of goods

NSW strongly supports further work to ascertain the feasibility of extending the TTMRA and MRA to cover regulations governing the use of goods, where they have the effect of preventing or restricting the sale of goods. NSW suggests, however, that retention of some restrictions will be justified on health, safety or environmental grounds, particularly where restrictions would be required to accommodate local conditions (eg. climate-based differences).

A survey of use-based regulations in one of the larger Australian jurisdictions would be an appropriate, low cost method for identifying the extent of use-based regulatory impediments to trade. However, given that the scope of New Zealand use-based regulations could differ substantially from the regimes generally in place in Australian jurisdictions, it might be desirable to also undertake such an exercise in New Zealand.