



Australian Government  
Productivity Commission

# Mutual Recognition Schemes

## Productivity Commission Draft Report

June 2015

This draft report has been prepared for further public consultation and input. The Commission will finalise its report after these processes have taken place.

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### The Productivity Commission

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

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Further information on the Productivity Commission can be obtained from the Commission's website ([www.pc.gov.au](http://www.pc.gov.au)).

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# Opportunity for further comment

You are invited to examine this draft report and comment on it by written submission to the Productivity Commission, preferably in electronic format, by **Friday 24 July 2015**. Further information on how to provide a submission is included on the study website <http://www.pc.gov.au/inquiries/current/mutual-recognition-schemes>.

The Commission is planning on holding roundtables with stakeholders to get feedback on the draft report. This feedback, along with further submissions received, will be drawn on by the Commission in preparing its final report. The final report will be presented to Australian Heads of Government and the New Zealand Prime Minister in September 2015.

## Roundtables

Tuesday 14 July 2015 — Wellington

Friday 17 July 2015 — Melbourne

## Commissioner

For the purposes of this study the Presiding Commissioner is Jonathan Coppel.

## Study contacts

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# Terms of reference

## 2014 REVIEW OF THE MUTUAL RECOGNITION AGREEMENT AND THE TRANS-TASMAN MUTUAL RECOGNITION ARRANGEMENT

I, Joseph Benedict Hockey, Treasurer, pursuant to Parts 2 and 4 of the *Productivity Commission Act 1998*, hereby request that the Productivity Commission undertake a review of the operation of the Mutual Recognition Agreement (MRA) and the Trans-Tasman Mutual Recognition Arrangement (TTMRA) since the previous review, released in 2009.

1) The Commission is to:

- a) assess the coverage, efficiency and effectiveness of the MRA and TTMRA;
- b) recommend ways to further improve the inter-jurisdictional movement of goods and skilled workers, and reduce red tape, including examining the scope for automatic mutual recognition where applicable;
- c) address matters identified by the Cross-Jurisdictional Review Forum, including, but not restricted to:
  - the nature and extent of any problem caused by use of goods requirements that restrict the sale of goods under both the MRA and TTMRA, and the costs and benefits of any solutions proposed;
  - the issues associated with extending mutual recognition to business registration requirements under the MRA or TTMRA where similar requirements would result in an individual being registered, and the costs and benefits of any options proposed; and
- d) examine, following the entry into force of the Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement, the extent to which the Agreement could facilitate the Trans-Tasman provision of services by particular occupations, based on a single registration,
  - consider how such an arrangement could operate; and
  - identify and document evidence of any occupations where there is sufficient demand for, and barriers to, cross-border service provision to merit inclusion in such an arrangement;

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- e) examine the extent to which Commonwealth regulatory agencies are aware of their obligations under the TTMRA and have implemented mutual recognition processes.
- 2) In undertaking the research study, the Commission is to consult relevant stakeholders in Australia and New Zealand, including the Cross-Jurisdictional Review Forum and to substantiate recommendations, wherever possible, with evidence relating to the scale of the problem and the estimated cost of both the problem and any solution(s) proposed. The Commission should also have regard to the approaches being taken by the Council for the Australian Federation towards ‘minimising labour impediments to improving labour mobility’, following the decision by the majority of States at COAG on 13 December 2013 to not pursue the National Occupational Licensing Scheme reform.
- 3) The Commission’s report shall be presented to Australian Heads of Government and the New Zealand Prime Minister nine months from the date of commissioning and the Commission’s report is to be published.
- 4) Within three months of receiving the Commission’s findings, the Cross-Jurisdictional Review Forum is to present to Australian Heads of Government and the New Zealand Prime Minister a Review Report responding to those findings.

J. B. HOCKEY  
Treasurer

[Received 11 December 2014]

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# Abbreviations

AAT	Administrative Appeals Tribunal
ADRs	Australian Design Rules
AMR	Automatic mutual recognition
APEC	Asia-Pacific Economic Cooperation
ASIAL	Australian Security Industry Association Limited
ASQA	Australian Skills Quality Authority
CAF	Council for the Australian Federation
CER	Closer Economic Relations
CJRF	Cross-Jurisdictional Review Forum
COAG	Council of Australian Governments
CPD	Continuing professional development
CRSBANZ	Council of Reciprocating Surveyors' Boards of Australia and New Zealand
ESV	Energy Safe Victoria
GDP	Gross domestic product
GHS	Globally Harmonised System of Classification and Labelling of Chemicals
ILO	International Labour Organisation
IP	Intellectual property
IPART	NSW Independent Pricing and Regulatory Tribunal
ISO	International Organisation for Standardisation
LPG	Liquefied petroleum gas
MRA	Mutual Recognition Agreement
NICNAS	Australian National Industrial Chemicals Notification and Assessment Scheme
NOLS	National Occupational Licensing Scheme
OECD	Organisation for Economic Co-operation and Development
TTCPRE	Trans-Tasman Court Proceedings and Regulatory Enforcement

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TTMRA	Trans-Tasman Mutual Recognition Arrangement
TTOT	Trans-Tasman Occupations Tribunal
PC	Productivity Commission
RTO	Registered training organisation
SOM	COAG Senior Officials Meeting
VET	Vocational education and training
WTO	World Trade Organisation

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# Glossary

Automatic mutual recognition (AMR)	A model of occupational registration which allows individuals to provide services beyond their home jurisdiction without having to register again under the mutual recognition schemes.
COAG Ministerial Councils	They include Ministers from the Commonwealth, states and territories and in some cases New Zealand. Such councils can be called upon to make decisions on how a specific good or occupation is to be treated under the mutual recognition schemes.
Coregulation	Coregulation involves government endorsement, usually by legislation, of a licensing scheme administered by a private-sector professional body.
De facto registration	An arrangement where legislation authorises people who meet certain requirements (such as training requirements) to practise an occupation, without further reference to a registration body.
Deemed registration	Deemed registration allows a registered person who applied for mutual recognition in another jurisdiction to carry on their occupation in that jurisdiction, pending the outcome of their application.
External equivalence	An alternative term for automatic mutual recognition. Currently used to describe Queensland's automatic mutual recognition arrangements for electricians.
Harmonisation	The alignment of different standards or regulations across jurisdictions. This does not mean that standards need to be identical in each jurisdiction, but rather that they are consistent or compatible to the extent that they do not result in barriers to trade.
Ministerial Declaration	A statutory instrument currently used in Australia to prescribe the equivalence of particular occupations. Ministers from two or more jurisdictions may jointly declare that occupations are equivalent, and may also specify or describe the conditions required to achieve equivalence.

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Mutual recognition	Mutual recognition, as defined in Australia's Mutual Recognition Agreement and the Trans-Tasman Mutual Recognition Arrangement, allows goods that can legally be sold in one jurisdiction to be sold in other jurisdictions without having to satisfy additional requirements. Similarly, people registered to practise an occupation in one jurisdiction are entitled to be registered for an equivalent occupation in other jurisdictions after notifying the local registration authority.
Negative occupational licensing	A statutory scheme that allows a person or business to practise an occupation unless they breach certain statutory requirements.
Occupational equivalence	Registered occupations in different jurisdictions are considered equivalent under the mutual recognition schemes if the activities authorised to be carried out in each jurisdiction are substantially the same.
Registration of an occupation	The licensing, approval, admission, certification (including by way of practising certificates) or any other form of authorisation, of a person required by or under legislation for carrying on an occupation.
Shopping and hopping	The practice of registering in a jurisdiction with less stringent requirements and then obtaining registration through mutual recognition in a more stringent jurisdiction.
Uniformity	A single standard or regulation that applies across all jurisdictions.

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## OVERVIEW

## Key points

- The Mutual Recognition Agreement (MRA) and Trans-Tasman Mutual Recognition Arrangement (TTMRA) are generally working well. The benefits include making it easier to do business across borders and a wider range of goods and services.
- However, the value of the schemes risks slowly being eroded due to regulators not always implementing mutual recognition as required, weak oversight, and an increase in the number of goods and related laws permanently kept outside the scope of the schemes.
- There are specific concerns with the operation of mutual recognition of occupations relating to ‘shopping and hopping’, continuing professional development, background checks and determining occupational equivalence. These issues have the potential to weaken the community’s and regulators’ trust in the schemes and undermine their legitimacy.
- This review has therefore focused on improving governance arrangements, potentially expanding coverage, and addressing irritants to the smooth operation of the schemes.
- The Commission proposes to reform the governance arrangements by:
  - strengthening the cross-jurisdictional group of officials responsible for publicising, overseeing and coordinating the schemes, including by giving it more specific responsibilities, time frames, outputs and reporting arrangements
  - improving regulator accountability in individual jurisdictions, including by setting clear expectations and annual reporting on mutual recognition matters.
- The Commission proposes the following to improve the operation of the schemes.
  - Where there are legitimate concerns about shopping and hopping, governments should make better use of existing mechanisms to address them, such as referring a jurisdiction’s registration requirements to a COAG Ministerial Council for consideration.
  - Governments should reduce ambiguity about the schemes’ scope by clearly stating that mutual recognition applies to legislation-based occupation registration regardless of whether it is administered by a government or non-government body, and that continuing professional development can be required for all persons renewing their occupational registration, including those previously registered under mutual recognition.
  - Registration bodies should be able to continue to conduct their own background checks on people seeking registration under mutual recognition.
- The Commission proposes to expand the coverage of the schemes in a few areas.
  - There is scope to narrow TTMRA permanent exemptions for road vehicles and hazardous substances, industrial chemicals and dangerous goods.
  - The Commission is seeking further information on whether mutual recognition should be extended to state business registration requirements, such as for electrical contractors.
  - However, other areas currently outside the scope of the schemes — including laws on the use of goods and the manner of carrying on an occupation — should remain so.
- There would be benefits from allowing licensed professions to provide services beyond their home jurisdiction without having to register again under mutual recognition. But this approach — known as automatic mutual recognition — has some practical challenges, and so a staged implementation is preferred, starting with professions where standards are similar across jurisdictions and the profession is large and mobile.
- The period between formal reviews of the schemes should be increased to ten years.



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# Overview

## Background

In the 1990s, governments in Australia and New Zealand agreed that they would mutually recognise compliance with each other's laws for the *sale of goods* and the *registration of occupations*. This was formalised in the:

- Mutual Recognition Agreement (MRA) between the Commonwealth, State and Territory Governments within Australia (signed by Heads of Government in 1992)
- Trans-Tasman Mutual Recognition Arrangement (TTMRA) between the Australian signatories of the MRA and the Government of New Zealand (signed by Heads of Government in 1996).

The mutual recognition schemes were one element of a broader microeconomic reform agenda aimed at improving efficiency and competitiveness by removing obstacles to trade and labour mobility within Australia and across the Tasman. In particular, separate and diverse state and territory practices regarding the sale of goods and the registration of occupations had 'balkanised' the Australian economy, impacting negatively on economic performance and community wellbeing.

The participating governments accepted that they sought similar outcomes from regulations on the sale of goods and the registration of occupations, and so mutually recognising compliance with each other's laws would not raise significant concerns. Moreover, adopting mutual recognition was seen to address regulatory differences much more promptly, and across a far wider range of goods and occupations, than could be expected from attempting to negotiate uniform laws.

## What the Commission has been asked to do

This is the third time that the Commission has been asked to review the operation of the MRA and TTMRA (previous reviews were published in 2003 and 2009). Such reviews are required every five years under the terms of the mutual recognition schemes.

As in the previous reviews, the Commission has been asked to assess the scope, efficiency and effectiveness of the schemes. An additional request for this review is to recommend ways to further advance the 'frictionless' cross-border movement of goods and skilled workers, and reduce red tape through lower-cost models of regulatory cooperation. This includes possibly allowing licensed professionals to provide services beyond their home jurisdiction without having to register again. The terms of reference ask whether such an

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approach — termed automatic mutual recognition — could be applied to service provision across the Tasman following the adoption of a new legal framework for trans-Tasman civil disputes, which makes court and tribunal hearings more like those between parties in the same country.

Overall, the Commission has found that the mutual recognition schemes are operating well. While some study participants had concerns regarding specific goods or occupations, they were few in number and do not represent systemic problems with the operation of the schemes. However, the Commission is concerned that the schemes' value risks slowly being eroded due to regulators not always implementing mutual recognition as required, weak oversight, and an increase in the number of goods and related laws permanently kept outside the scope of the schemes. Whether, and how to, address these factors has been a focus for much of the review.

## Overview of the schemes

Under the MRA and TTMRA, different approaches are used for the mutual recognition of goods and occupations.

- Goods which can be lawfully sold in one jurisdiction can also be sold in the others without having to satisfy additional requirements.
- People registered to practise an occupation in one jurisdiction are entitled to practise an equivalent occupation in other jurisdictions, after notifying the local occupation-registration authority. Deemed registration is granted initially, pending verification of the person's registration in their origin jurisdiction.

The architects of the schemes had initially intended that occupations be subject to the same mutual recognition principle as for goods. This did not occur because governments were concerned that, without a local registration requirement under the mutual recognition schemes, practitioners would be unaware of local restrictions on the scope of their work, and regulators would not know who was practising locally, complicating their compliance responsibilities.

The benefits of mutual recognition are multifarious, but are hard to quantify. They include a reduction in firms' compliance costs and workers' registration costs. In addition to these efficiency gains, closer economic integration drives competition among firms, improved product choice as well as regulatory competition between jurisdictions.

There are several hundred examples of mutual recognition agreements internationally, but the Australian and New Zealand model of mutual recognition is unique in its scope and decentralised approach to implementation. It covers about 85 per cent of trans-Tasman goods trade, and few registered occupations and related laws are explicitly kept out of scope. Nevertheless, there is a range of measures that limit the coverage of the schemes (box 1).

### Box 1 Measures that limit coverage of the schemes

There are three types of exemptions that can be used to keep specific goods outside the scope of the MRA and TTMRA.

- **Permanent exemptions** — these exist to deal with jurisdictional regulatory differences or situations where all parties to the schemes agree that mutual recognition could jeopardise public health or safety. They include general laws relating to quarantine and weapons, and specific laws covering goods such as road vehicles, fireworks and therapeutic goods.
- **Temporary exemptions** — these provide a means for jurisdictions to unilaterally ban goods for up to 12 months on health, safety or environmental grounds while the relevant COAG Ministerial Council considers whether mutual recognition, harmonisation or a permanent exemption is appropriate. No goods are currently subject to a temporary exemption under the MRA or TTMRA.
- **Special exemptions** (TTMRA only) — these are for cases where jurisdictions are hopeful that greater integration can be achieved, but recognise that further work is required. Special exemptions have to be renewed at least every 12 months until the outstanding issues are resolved by harmonisation, mutual recognition or a permanent exemption. There are currently no goods subject to a special exemption.

There are also two measures to quarantine laws from the MRA and TTMRA.

- **Exceptions** — these are laws the jurisdictions consider to be outside the intended scope of the MRA and TTMRA, including laws relating to how goods are sold, the inspection of goods, the transportation, storage and handling of goods, and laws relating to the manner of carrying on an occupation.
- **Exclusions** (TTMRA only) — these are used to exclude laws relating to the sale of goods that essentially relate to the sovereign rights of nation states, such as customs controls, intellectual property and taxation.

## Mutual recognition of registered occupations

### Coverage of occupations

The MRA and TTMRA cover occupations for which some form of legislation-based registration, certification, licensing, approval, admission or other form of authorisation is required to legally practise the occupation. For ease of exposition, the term ‘registration’ is used in the study to refer to all of these approaches.

The schemes have to accommodate a diverse range of approaches to registering an occupation because many different models are used in Australia and New Zealand. This is evident not only between different occupations, but sometimes also for the same occupation between jurisdictions.

In most jurisdictions, between 15 to 20 per cent of employed persons work in an occupation subject to registration requirements, and so could potentially use the mutual recognition schemes (figure 1). Specific occupations covered by the schemes include those

in the health, building and construction, real estate, public health and safety, transport and legal sectors.

**Figure 1 Share of total employment in registered occupations, by jurisdiction<sup>a</sup>**



<sup>a</sup> Australian data are for 2011. NZ data are for 2013.

There is little publicly available data on the extent to which individuals register under mutual recognition. To address this information gap, the Commission asked almost 180 occupation-registration bodies in Australia and New Zealand to participate in a survey. Responses were received from 100 organisations.

The survey findings offer a snapshot on the use of mutual recognition for registered occupations in 2014.

- Around 5 per cent of new occupational registrations were made under mutual recognition.
- Less than 1 per cent of mutual recognition applications were rejected, mostly because of non-compatibility of licences or lack of an equivalent occupation in jurisdictions.
- The share of new registrations made under mutual recognition was highest in Western Australia and Tasmania (almost 15 per cent).
- The relative significance of mutual recognition registrations was greatest in trades occupations (nearly 15 per cent of new registrations) and lowest for transport occupations (under 1 per cent).
- Health occupations accounted for more than half of all registrations under the TTMRA in both Australia and New Zealand, with the vast majority of these being nurses and midwives.

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## Exemption of medical practitioners

Only one registered occupation is explicitly exempted from the mutual recognition schemes — medical practitioners — and this is only the case for the TTMRA. This exemption has no practical effect on the mobility of practitioners trained in Australia or New Zealand, due to other cooperative arrangements that the regulators have adopted outside of the mutual recognition schemes. Registration boards on both sides of the Tasman apply the same requirements to graduates of Australian and NZ medical schools.

## Manner-of-carrying-on requirements

Laws governing the manner of carrying on an occupation are explicitly kept out of coverage from the mutual recognition schemes. This potentially hinders cross-border service provision. The Commission received mixed evidence on the significance of manner-of-carrying-on requirements. Many study participants noted that while such requirements have the potential to limit mobility, in practice they were not a major impediment. For those located near jurisdictional borders, however, manner-of-carrying-on requirements can be costly. Examples of additional costs for staff in border areas include having to do separate Responsible Service of Alcohol or Responsible Conduct of Gambling courses, and real estate agents operating in Albury and Wodonga being required to have separate trust funds in New South Wales and Victoria.

However, extending the scope of mutual recognition to manner-of-carrying-on requirements could introduce other costs. It raises the possibility of different individuals practising the same occupation in a given jurisdiction under different rules. It could also lead to regulations suitable for one jurisdiction being implemented in another jurisdiction where they are not relevant, due for instance to climatic differences.

Moreover, jurisdictions have already addressed some of the concerns about manner-of-carrying-on requirements without resorting to the mutual recognition schemes. For example, the NSW and Victorian regulators have agreed that a real estate agent can have their principal office in the other jurisdiction, and they are currently working together to figure out how the requirement for a local trust account can be resolved.

This approach of regulators working together to resolve the few specific examples where laws on the manner of carrying on an occupation are restricting trade and labour mobility represents a proportionate and effective response. The Commission does not think it would be worthwhile to depart from this approach. Laws on the manner of carrying on an occupation should remain outside the scope of the mutual recognition schemes.

More broadly, manner-of-carrying-on requirements would be less likely to pose a barrier to cross-border service provision if governments systematically followed established and widely accepted principles of good regulatory practice. These include ensuring that all options are considered; regulatory options taken are those with the greatest net benefit;

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regulations are reviewed over time; and government actions are proportionate to the problem they seek to address.

### Ambiguity regarding coregulated occupations

There is ambiguity about whether the mutual recognition schemes apply to legislation-based occupation registration administered by a private-sector professional body (coregulated occupations), such as for accountants. In its 2009 review, the Commission recommended amending the mutual recognition legislation to make it clear that such forms of coregulation are covered. In response, the governments acknowledged the issue but did not take any action.

The reluctance to change the mutual recognition legislation can be attributed to a cumbersome and resource intensive amendment process, particularly among Australian jurisdictions (discussed further below). Moreover, if the schemes were extended to coregulated occupations, agreement would be needed on which occupations are considered to be coregulated, what evidence was acceptable for a recognition claim, and how breaches of the recognition obligation are to be addressed. Given many regulators currently struggle to fully understand the operation of mutual recognition for occupations that are clearly covered by the schemes, extending the coverage to coregulated occupations risks adding a further layer of operational complexity.

In light of these concerns, legislative change is not warranted unless there are occupational registration bodies with broad coverage that are adversely affected by the current situation. There is little evidence that this is the case. Notably, no stakeholders from one of the largest occupations covered by a coregulatory regime — accountancy — expressed concerns about current arrangements.

The Commission considers that the net benefit of making legislative changes to resolve ambiguity about the coverage of coregulated occupations is likely to be small and possibly negative. To a large extent, ambiguity could be resolved through better information provision about the mutual recognition schemes, combined with better access to advice about the schemes. In particular, governments in Australia and New Zealand should jointly state that they view coregulated occupations as covered by mutual recognition, and they should ensure that this is reflected in the official users' guide for the schemes.

### Improving the operation of mutual recognition for occupations

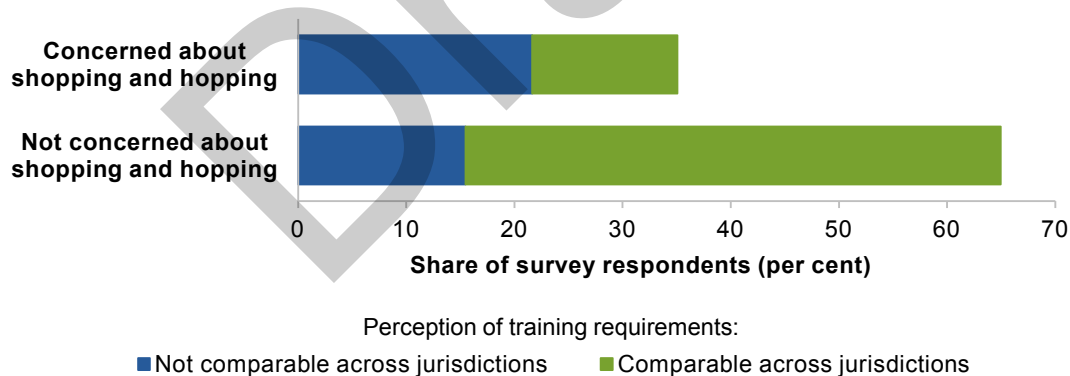
Most participants expressed support for mutual recognition, but some also raised specific concerns with the operation of the schemes relating to shopping and hopping, continuing professional development, background checks and Ministerial Declarations. These issues have the potential to weaken the community's and regulators' trust in the schemes, and undermine their legitimacy.

## Shopping and hopping

Mutual recognition, when combined with differences in occupational standards across jurisdictions, can create opportunities for shopping and hopping, which is the practice of registering in a jurisdiction with less stringent requirements in order to obtain registration through mutual recognition in a more stringent jurisdiction. The architects of the schemes saw this as potentially beneficial, because it fosters regulatory competition, provided that no jurisdiction sets requirements so low that outcomes do not meet community expectations.

The risk of, rather than the potential benefit from, shopping and hopping dominated submissions and information provided by study participants. Around 35 per cent of the occupation-registration bodies that responded to the Commission's survey were concerned about shopping and hopping. Among this group, the concerns were concentrated in occupations where registration bodies did not consider that the prerequisite training requirements are comparable across jurisdictions (figure 2). Study participants also highlighted occupations where they considered there was a risk of poor outcomes due to shopping and hopping. The occupations included contaminated land site auditors, dentists, electrical contractors, osteopaths, psychologists, real estate agents, security guards, and valuers.

Figure 2 **Shopping and hopping concerns and training comparability<sup>a</sup>**



<sup>a</sup> According to occupation-registration bodies that responded to the Commission's survey.

However, the Commission received no clear-cut evidence that the interaction between differences in regulatory requirements and the mutual recognition of occupations had led to regulatory outcomes which failed to meet community expectations. Moreover, the potential scale of shopping and hopping is limited for all but a small number of occupations. As noted above, the Commission's survey revealed that only around 5 per cent of new occupational registrations are made under mutual recognition.

Security guards are one of the few examples where mutual recognition accounts for a large proportion of registrations in some jurisdictions. Around 50 per cent of licences issued in New South Wales in recent years have been under mutual recognition to people who were



originally licensed in Queensland. A significant proportion of people who are initially licensed in Queensland are residents of south-western Sydney.

There are grounds to be worried about the risk of regulatory failure in the registration of security guards. In particular, some study participants were concerned that people registered under mutual recognition may not have adequate training to function effectively as a security guard. However, the specific issue here is not deficiencies in the mutual recognition schemes per se. Rather, the problem largely stems from shortcomings in how a few Queensland security training providers comply with established standards. This is a matter currently being examined by the Australian Skills Quality Authority.

Some registration authorities in Australia are concerned that shopping and hopping poses a sizeable risk. This has led to a variety of responses, some of which arguably breach the mutual recognition legislation (box 2). The reluctance of some regulators to implement mutual recognition as intended is an issue that needs to be addressed by improved guidance to regulators and strengthened oversight of the schemes (discussed below).

#### **Box 2      How regulators have responded to shopping and hopping risks**

Study participants informed the Commission about the following ways in which Australian occupation-registration authorities respond to shopping and hopping risks.

- The Australian Security Industry Association Limited claimed that Victoria Police delays or declines Queensland-registered applicants for a security guard licence without further investigation or assessment.
- Energy Safe Victoria stated that registered electricians whose training is not similar to that required in Victoria are only granted a supervised worker's licence.
- The Land Surveyors Licensing Board of Western Australia reported that it places conditions on surveyors registered under mutual recognition until they pass an exam.
- Mutual recognition applicants for an electrical-contractor licence in Western Australia have to complete training delivered by one of three approved providers, which takes a minimum of five days face-to-face instruction and costs at least \$880.

There are a number of options which could be formally adopted to limit the risks associated with shopping and hopping. These include the following.

- Requiring people to reside in the jurisdiction where they first register for a period of say 12 months before seeking registration elsewhere under mutual recognition.
- Attaching additional requirements on service providers from other jurisdictions to protect public health, security or the environment, on the grounds that registration requirements in the person's origin jurisdiction are inadequate.
- Refusing to recognise the qualifications of an individual who undertakes training in one jurisdiction, registers in another jurisdiction and then seeks to have their registration recognised in the jurisdiction where they trained.



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The Commission is not convinced that any of these three options are worth pursuing. They would add to the cost of administering mutual recognition and, in the case of the first option, hinder the cross-border movement of short-term residents who have a genuine reason for moving.

The schemes as they stand have the flexibility to limit the incidence, should it arise, of harmful shopping and hopping. For example, there is a formal mechanism for jurisdictions to refer concerns about the registration requirements for an occupation to a Ministerial Council for resolution. Registration authorities are also able to impose conditions on a registrant to ensure equivalence with local requirements. If it is not practical to do this in a way that addresses a threat to health, safety or the environment, registration can be refused.

### Continuing professional development

A requirement to have undertaken continuing professional development (CPD) cannot be imposed when a person first registers under mutual recognition. This is consistent with the principle that jurisdictions mutually recognise compliance with each other's laws.

In contrast, a CPD requirement can be imposed when a person seeks to renew their registration, if the renewal occurs in New Zealand. In Australia, ambiguous legislation and a lack of case law has led some to argue that people originally registered under mutual recognition are also exempt from any future CPD requirements when renewing their registration. It is hard to justify treating people originally from another jurisdiction differently from longer-term residents when they renew their registration.

This issue could be addressed by amending the Australian mutual recognition legislation. But, as noted earlier, the process is cumbersome and resource intensive and may result in other changes that dilute the schemes. The Commission therefore prefers an approach where the governments jointly state the intention of the legislation is to allow CPD requirements to be applied equally to all persons when renewing their registration, and publicise this in the users' guide for the schemes. This would effectively be an instruction to regulators. In time, the Commission would expect case law to further develop and, if uncertainty regarding a regulator's right to treat workers equally when renewing their registration persists, then the option of changing the legislation would need to be considered.

### Background checks

Background checks — including police checks, criminal history checks and working-with-children checks — cannot legally be required for people registering under mutual recognition. However, registration authorities for occupations such as teaching and nursing openly admit that they ignore this restriction on the grounds that the community holds them responsible for protecting children and other vulnerable groups, and so this cannot be delegated to another jurisdiction through mutual recognition.

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In principle, a harmonised system of background checking across jurisdictions could address this issue. Indeed, efforts to achieve this for working-with-children checks were initiated through COAG in 2009. However, this has been hampered by a lack of resources and, more fundamentally, the relevant working group has stated that there is insufficient evidence to identify a best-practice screening model.

Against this background, and a community expectation that local authorities are responsible for protecting vulnerable groups, there is not a strong case for requiring the mutual recognition of background checks. Rather, for occupations where background checks are necessary and are routinely required of local applicants, registration bodies should be able to continue to conduct their own checks on people seeking registration under mutual recognition. If this approach is successfully challenged in the relevant tribunals in the future, governments should amend the mutual recognition legislation.

### Determining occupational equivalence

Determining what is an ‘equivalent’ occupation across jurisdictions — and therefore who is entitled to registration under mutual recognition and under what conditions — is a recurring issue for registration authorities. For many occupations, regulators and individuals can refer to statutory instruments — called Ministerial Declarations — which detail the equivalence of a registered occupation in one Australian jurisdiction with those in the other jurisdictions. These are presented in a user-friendly format on a website maintained by COAG. There is some evidence that the Ministerial Declarations have assisted registration authorities in making decisions on licence applications under mutual recognition.

However, the effectiveness of the declarations has been constrained by a failure to keep them up to date. This can pose considerable difficulties for regulators who are legally required to implement the declarations, even when they are out of date. It becomes particularly problematic when it is impossible for regulators to adhere to the declaration, such as when a licence class no longer exists. Updating the Ministerial Declarations was initiated recently, but progress has been slow. Governments should update all the Ministerial Declarations as a matter of urgency and when this work is completed, they should consider extending the declarations to include New Zealand.

## Automatic mutual recognition for occupations

The terms of reference ask the Commission to consider a model of occupational registration — called automatic mutual recognition (AMR) — which would allow individuals to provide services beyond their home jurisdiction without having to register again. AMR is analogous to the system for driver licences, where a person licensed to drive in their home jurisdiction can drive in other jurisdictions without having to obtain an

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additional licence. In effect, it would apply the same mutual recognition principle to occupations as that applying to the sale of goods.

The AMR model is suitable for individuals who work beyond their home jurisdiction on a temporary or occasional basis. The economic rationale for adopting AMR is less evident for people moving permanently to a new jurisdiction, particularly if they intend to practise solely in their new jurisdiction. In these circumstances, as with a drivers licence, it is reasonable to expect people to transfer their registration to their new place of residence. The existing mutual recognition legislation makes this a straightforward process.

In recent years, AMR has become an option for Australian veterinarians wishing to temporarily work in any other jurisdiction, apart from Western Australia, the ACT and the Northern Territory. AMR also applies for Australian electricians temporarily working in New South Wales, Victoria and Queensland. NZ electricians are eligible for AMR under Queensland's arrangements.

The recent adoption of a new legal framework for trans-Tasman civil disputes — which makes court and tribunal hearings more like those between parties in the same country — has increased the scope for AMR between Australia and New Zealand. This is relevant because one of the features of an effective system of AMR is that consumers are confident that accessible remedies are available if a substandard service is supplied by a provider from another jurisdiction.

## **Potential benefits from automatic mutual recognition**

The cost saving from AMR could be material for individual licensees. For example, a Queensland-registered electrician would otherwise have to pay a registration fee of almost \$400 to temporarily work in Victoria.

However, the aggregate benefits would be relatively small, at least initially. Estimates prepared for COAG in 2013 suggest that only around 5 per cent of electrical, plumbing and property professionals residing in Australia's eastern mainland states had a licence in multiple jurisdictions. The aggregate annual cost of holding multiple licences was estimated to be about \$2.7 million for electricians, \$1.4 million for plumbers and gasfitters, and \$2.3 million for property occupations. Over time, the potential benefits may grow as individuals use the opportunity to register in a lower-cost jurisdiction, remote provision of services becomes increasingly common, and populations in border areas increase.

## **Implementation issues**

Study participants who commented on AMR were mostly from occupation-registration bodies. They were typically concerned that, without a requirement to register locally, the capacity of regulators to protect consumers will be undermined. This is because they depend on registration fees to fund enforcement activities, and without a formal

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registration requirement they will have no knowledge of people practising in their jurisdiction under AMR.

While it is likely that the link between local registration and service provision is weakened under AMR, the Commission considers that a loss in regulator revenue caused by AMR could be handled, where significant, through changes to the regulator's funding model and is unlikely to outweigh the wider benefits. Experience to date for electricians and veterinarians suggests that these are not insurmountable problems.

The impact of AMR on compliance activity is an area that would need to be addressed. For instance, where it is necessary for a regulator to be aware of who is practising an occupation locally, a simple online notification by the visiting practitioner before they undertake work should be sufficient. Further details on the practitioner, if required, could be accessed under an information sharing arrangement among regulators.

For some occupations, a more challenging hurdle to wider adoption of AMR is the significant disparity in regulatory goals and processes. For example, some jurisdictions take a lighter-handed approach to regulating the practise of an occupation because they have stricter requirements for initial training. This has not been an issue for electricians or veterinarians because the tasks they are licensed to do in one jurisdiction are similar to those allowed in others, and required qualifications are highly comparable. Without a certain degree of harmonisation, visiting service providers may be unsure about what they are authorised to do, and be unfamiliar with local conditions and practices.

The Commission supports the model of AMR as a flexible, low cost way of facilitating trade and labour mobility while minimising the regulatory burden. The Commission is, however, mindful of the practical challenges associated with its implementation, especially in those occupations where health and safety considerations are material, and qualifications vary significantly between jurisdictions.

A staged implementation, starting with those professions where the degree of harmonisation in standards is high and the profession is large and mobile, such as electricians and plumbers is preferred. Drawing out and responding to the lessons learned from the early adopters of AMR would also help boost public and regulator confidence that the integrity of the regulatory framework would continue to be upheld under AMR and at a lower overall cost to the community.

To this end, the Commission supports the ongoing work of the Council for the Australian Federation (CAF) to expand the use of AMR. However, progress to date by the CAF has been slow. The State and Territory Governments should give it higher priority.

## Mutual recognition of goods

The Commission has found no notable concerns with the operation of mutual recognition for those goods covered by the schemes. While some irritants in the schemes' orderly

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functioning were identified, they are not major matters and can be handled through existing mutual recognition procedures or through other forms of regulatory cooperation. Accordingly, this review has focused on the scope to expand the coverage of goods.

## Scope to expand the coverage of goods

While the vast majority of goods are within the scope of the schemes, the number of goods subject to a permanent exemption has grown since the last review. Most notably, the following categories of products were added to the list of TTMRA permanent exemptions in April 2010:

- hazardous substances, industrial chemicals and dangerous goods
- therapeutic goods
- road vehicles
- gas appliances
- radiocommunications devices.

These goods were previously kept outside the scope of the TTMRA by renewing a special exemption every 12 months. Hence, the change has had little practical effect, apart from avoiding the administrative cost associated with renewing special exemptions. It has nonetheless lowered the level of scrutiny regarding the ongoing rationale for exemptions from the TTMRA.

Other goods and related laws added to the list of permanent exemptions since the last review are Australia's tobacco-related laws (due to the enactment of plain packaging legislation), South Australia's legislation prohibiting the sale of drug paraphernalia, Western Australia's weapons and firearms legislation, and the Northern Territory's container deposit scheme.

Most of the permanent exemptions relate to goods where there are wide and seemingly irreconcilable differences of view on what regulators should achieve. Therapeutic goods are a good example of this, with efforts over more than a decade to establish a trans-Tasman regulator recently abandoned. Another example is risk-categorised foods, where the two countries have worked together to the point where they agree that any further narrowing of regulatory differences is unlikely to be achievable.

In light of these entrenched differences in regulatory approach, there is not a strong case for removing most of the permanent exemptions. However, regulatory cooperation to minimise barriers to trade in these areas would still be beneficial. For example, the NZ Government considers that it would be more productive for the two countries to instead focus on harmonising broader risk-assessment processes used for quarantine and biosecurity regulations. The Commission agrees.

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## Road vehicles

One permanent exemption that is hard to justify is road vehicles under the TTMRA. In essence, this exemption exists because Australia has been unwilling to accept vehicles which do not meet its unique standards. In contrast, New Zealand has unilaterally accepted vehicles that meet standards applying in Australia and many other countries. New Zealand also allows the wholesale importation of second-hand vehicles, provided they satisfy trusted standards and have an accurately documented history, whereas Australia places significant restrictions on used vehicle imports.

There would be few benefits for New Zealand in removing the TTMRA permanent exemption for road vehicles, given that it already allows the sale of vehicles which can be lawfully sold in Australia. For Australia, there is a risk that solely removing the exemption would encourage vehicle imports to be routed through New Zealand in order to bypass Australia's more restrictive standards.

It would be more efficient for Australia to remove the road vehicle exemption together with broader reforms that allow direct imports of vehicles meeting international standards. This includes allowing parallel imports of new vehicles — new vehicles imported by parties other than a local distributor authorised by the manufacturer — and imports of used vehicles.

## Hazardous substances, industrial chemicals and dangerous goods

There is also scope to narrow the TTMRA permanent exemption for hazardous substances, industrial chemicals and dangerous goods. Past assessments justified exempting these goods from the TTMRA due to fundamental differences in how Australia and New Zealand control chemical-related risks. However, recent policy developments in both countries are likely to significantly reduce these differences.

The Australian and NZ Governments have both adopted the Globally Harmonised System for Classification and Labelling of Chemicals. Australia has also announced planned reforms to the National Industrial Chemicals Notification and Assessment Scheme, which will streamline the assessment process for industrial chemicals, increase utilisation of international assessment materials and adopt a more risk-based approach to assessment of chemicals. Similarly, New Zealand is currently legislating a new system of workplace health and safety laws modelled on the approach used in Australia.

Given recent regulatory changes, including Australia's move to a more risk-based approach to assessing chemicals, there is a sound case to reconsider removing the permanent exemption on hazardous substances, industrial chemicals and dangerous goods and to upgrade regulatory cooperation between the relevant agencies. There is also a strong case to immediately narrow the scope of the permanent exemption to exclude cosmetic and toiletry products.



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## Use-of-goods requirements

The terms of reference ask the Commission to consider cases where a good can be exported to another jurisdiction and sold under mutual recognition but cannot be legally used. This possibility arises because jurisdictions often have different requirements on how goods are used, and these are distinct from laws on the sale of goods. Such use-of-goods requirements are not subject to the MRA and TTMRA.

The Commission found only two examples where use-of-goods requirements have led to concerns about the ability to sell a product under mutual recognition. Given the limited evidence of a problem, there is no case for expanding the scope of the schemes to cover use-of-goods requirements. Where an issue arises with how goods have to be used, it should be dealt with through dialogue and cooperation between the relevant jurisdictions.

## Mutual recognition and business registration

The Commission has been asked to consider extending mutual recognition to business registration requirements. This issue arose in the 2009 review because some registration requirements are based on the characteristics of both an individual and their associated business, which leads to vagueness about whether the registration is a form of occupational registration subject to mutual recognition. One example was a NSW business licence for property agents, which required applicants to have an ‘appropriate’ qualification and be a ‘fit and proper’ person.

Since the last review, Australia has introduced a national business registration regime, which would have largely reduced the need for mutual recognition of business registrations. Moreover, Australia and New Zealand are considering a single entry point for business registration, and the mutual recognition of business and company numbers. However, study participants raised concerns about states and territories imposing their own business registration requirements for architects, builders, electrical contractors and security providers.

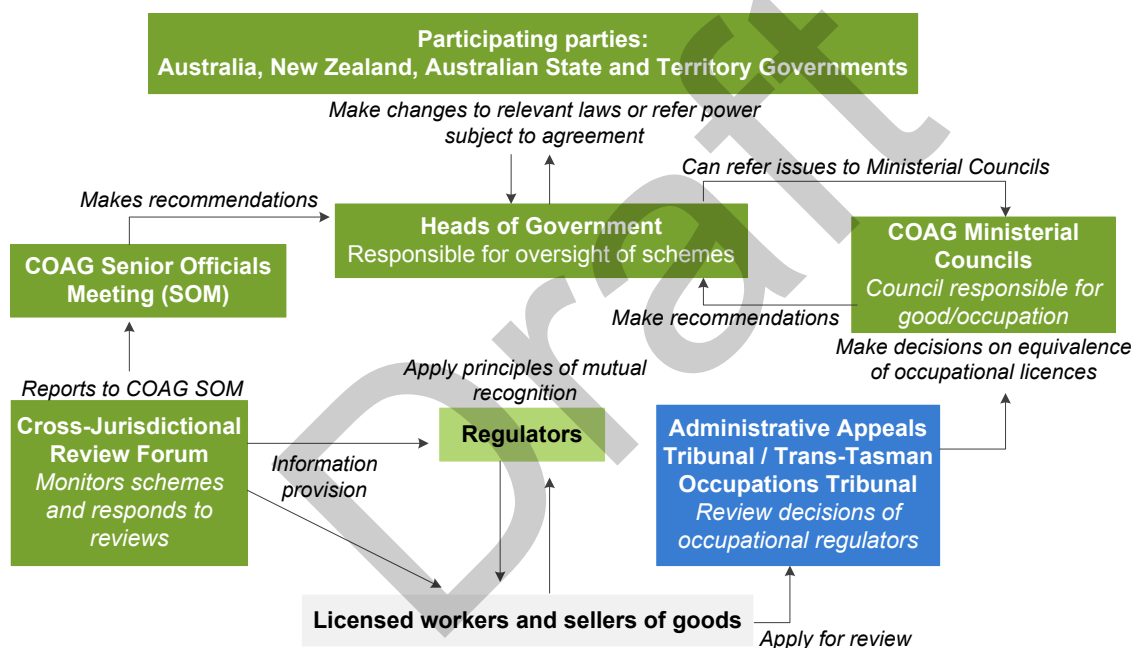
There is an in-principle case for extending mutual recognition to business registration requirements, given that this would reduce costs and promote greater competition by interstate providers. But the Commission has, for this draft report, been unable to ascertain the extent of the problem caused by differing business registration requirements, and whether this is best addressed through mutual recognition. The Commission is seeking further information on the extent of the problem and possible remedies.

More broadly, and as recommended in past regulatory reviews, there is scope to streamline the information required from businesses to obtain licences, potential to reduce the renewal frequency for some licences, and opportunities to combine licences that groups of businesses frequently need. Progress on these fronts would generate net benefits, and leverage the value from the mutual recognition schemes.

## Improving governance arrangements

The mutual recognition schemes involve many different parties and are inherently decentralised, with administration and compliance largely delegated to individual regulators in each jurisdiction (figure 3). The schemes' architects also gave a number of central bodies — including the Administrative Appeals Tribunal, Trans-Tasman Occupations Tribunal, COAG Ministerial Councils and central government departments — important oversight and coordination roles. There is also a Cross-Jurisdictional Review Forum (CJRF) so that jurisdictions can collectively oversee the schemes and coordinate their actions.

Figure 3 **Governance arrangements for the MRA and TTMRA**



This decentralised approach to overseeing the schemes is more straightforward and less resource intensive to administer. However, even the limited oversight and coordination roles envisaged for the central bodies have not always proven effective. The CJRF and central government departments in individual jurisdictions have typically taken a very ‘hands-off’ approach, and the tribunals and Ministerial Councils have rarely been asked to review specific aspects of the schemes. This can make it challenging to strengthen the effectiveness of the schemes and possibly even to avoid actions that gradually reduce their value.

The issues that the Commission has confronted during the conduct of this study are indicative of limited oversight and coordination among the participating jurisdictions. This is evident in recurring examples of occupation-registration bodies not implementing mutual recognition as legislated; few individuals and firms exercising their right to



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challenge regulator decisions, with a resulting lack of case law to guide implementation and use of the schemes; the CJRF not meeting for almost four years from June 2010; and governments failing to coordinate timely updates of Ministerial Declarations of occupational equivalence in Australia.

However, there is no case to move to a centralised system for overseeing mutual recognition as in the European Union. That would be costly and the benefits would be relatively small, given that the Commission has found that the MRA and TTMRA are generally working well. Instead, there is scope to retain the advantages of the decentralised approach while also strengthening collective oversight of the schemes.

The components for robust governance arrangements are already there with, for example, tribunals and Ministerial Councils to formally review regulator decisions and standards, and the CJRF for governments to collectively oversee the schemes and coordinate their actions. A key element of the Commission's proposed reforms is to strengthen the CJRF by making the following changes.

- Revise the CJRF's terms of reference to give it more specific responsibilities, time frames and outputs. This would include requirements to develop an annual work program incorporating an annual progress report, and undertake yearly updates of Ministerial Declarations and the official users' guide for the schemes.
- Members of the COAG Senior Officials Meeting — comprising the Secretary of the Australian Department of Prime Minister and Cabinet, and corresponding departmental heads at an Australian state and territory level, as well as the equivalent NZ Government official — should formally accept responsibility for overseeing the CJRF's activities, and agree to its revised terms of reference.
- The chair of the CJRF should be rotated among participating jurisdictions, including the Australian and NZ Governments, according to an agreed schedule.
- The CJRF should have a standing secretariat jointly funded by all parties using an agreed funding model, for example based on the model used by the Australian Health Ministers' Advisory Council.

Individual jurisdictions should also improve oversight of how their regulators implement the mutual recognition schemes. In particular, where they do not already do so, governments should set clear expectations regarding how regulators implement mutual recognition. Further, all participating jurisdictions should, as a minimum, require regulators to report in their annual reports information on the number of licences granted under mutual recognition, and whether any decisions have been reviewed by a tribunal.

The Australian, State and Territory Governments should also amend their requirements for regulation impact analysis so that consideration must be given to how proposed new regulations affect the mutual recognition schemes where relevant. This would mirror requirements already adopted by the NZ Government.

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## **Simplifying the process for legislative reform**

A barrier to reforming the schemes in the past has been a reluctance among jurisdictions to make any legislative changes. This is partly due to a cumbersome amendment process within Australia. For the MRA, three states have reserved their amendment power and would need to pass any amendments through their parliaments. The remaining states and territories have referred the power to amend the legislation to the Commonwealth, subject to approving any changes. For the TTMRA, only the territories have referred the power to amend the legislation to the Commonwealth.

The process for amending the mutual recognition legislation within Australia could be simplified without weakening the influence of individual jurisdictions. Specifically, states that have not already referred their power to amend the mutual recognition legislation to the Commonwealth could do so, subject to a requirement that they have to approve any future changes.

## **Frequency of future reviews**

When first established in the 1990s, governments stipulated that the mutual recognition schemes be reviewed every five years. This reflected a concern at the time that the full impacts of the schemes were unknown because of their sweeping nature and the highly decentralised approach to implementation.

There is no longer a strong case for having full-scale reviews as regularly as every five years, given that the mutual recognition schemes are now well established after around 20 years of operation, and current and previous reviews have found that the schemes are generally working well. Strengthened oversight of the schemes should also reduce the need to comprehensively review the schemes as often as in the past.

The Commission therefore proposes that from now on the MRA and TTMRA be independently reviewed every ten years, rather than the current five years. An earlier review of the schemes should remain possible where the CJRF has established a strong case for one.

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# Draft findings and recommendations

## DRAFT FINDING 1.1

The Mutual Recognition Agreement and Trans-Tasman Mutual Recognition Arrangement are generally working well for goods and occupations covered by the schemes. However, the Commission is concerned that the value of the schemes risks slowly being eroded due to regulators not always implementing mutual recognition as required, weak oversight, and an increase in the number of goods and related laws permanently kept outside the scope of the schemes.

## Mutual recognition of goods

### DRAFT FINDING 4.1

There is not a case to remove, or narrow, existing permanent exemptions under the MRA and TTMRA, apart from those for road vehicles and hazardous substances, industrial chemicals and dangerous goods. The net benefit from removing the exemption for road vehicles would be larger if combined with wider reforms to abolish restrictions on the importation and registration of used vehicles, and parallel imports of new vehicles from countries other than New Zealand.

### DRAFT RECOMMENDATION 4.1

The Australian, State, Territory and NZ Governments should remove the TTMRA permanent exemption for road vehicles, and reconsider removing the exemption for hazardous substances, industrial chemicals and dangerous goods. The latter exemption should at least be narrowed in scope to exclude cosmetics and toiletries.

## Mutual recognition of occupational registration

### DRAFT RECOMMENDATION 5.1

Governments in Australia and New Zealand should make a joint statement that they view coregulated occupations as covered by mutual recognition, and they should ensure that this is reflected in the official users' guide for the schemes.

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**DRAFT FINDING 5.1**

Some occupational regulators are not implementing the mutual recognition schemes as intended and legislated, citing concerns about different standards in other jurisdictions leading to ‘shopping and hopping’. However, there is no clear-cut evidence that shopping and hopping has led to any harm.

**DRAFT FINDING 5.2**

The concerns of occupational regulators about harmful ‘shopping and hopping’ are concentrated in those occupations where vocational education and training is not being delivered to the standards expected by regulators, and are not symptomatic of deficiencies in the mutual recognition schemes.

**DRAFT RECOMMENDATION 5.2**

Where the Australian, State, Territory or NZ Governments have valid concerns about different occupational standards across jurisdictions leading to harmful ‘shopping and hopping’, they should first make use of the schemes’ existing remedies, including Ministerial Councils and imposing conditions on registration to achieve equivalence of occupations.

**DRAFT FINDING 5.3**

Ministerial Declarations that prescribe the equivalence of occupations across Australia assist regulators to make decisions on mutual recognition licence applications. However, the effectiveness of the declarations has been constrained by a failure to keep them up to date.

**DRAFT RECOMMENDATION 5.3**

The Australian, State and Territory Governments should — through their participation in the Cross-Jurisdictional Review Forum — update all out-of-date Ministerial Declarations as a priority. When this work is complete, governments in Australia and New Zealand should give consideration to extending the Ministerial Declarations to include New Zealand.

**DRAFT RECOMMENDATION 5.4**

Governments in Australia should jointly state that the intent of the mutual recognition legislation is to allow continuing professional development requirements to be applied equally to all persons when renewing their registration. This should be reflected in the official users' guide for the schemes.

**DRAFT RECOMMENDATION 5.5**

For occupations where background checks are necessary and are routinely required of local applicants, registration bodies should be able to continue to conduct their own checks on people seeking registration under mutual recognition. If this is successfully challenged in the relevant tribunals in the future, governments should amend the mutual recognition legislation.

## **Facilitating cross-border service provision**

**DRAFT FINDING 6.1**

Automatic mutual recognition (AMR) is a flexible, low cost way of facilitating service provision across borders. While there would be challenges in applying AMR beyond its current availability for electricians and veterinarians in selected Australian jurisdictions, the issues are not insurmountable.

**DRAFT RECOMMENDATION 6.1**

State and Territory Governments should, through the Council for the Australian Federation, give higher priority to their ongoing work to expand the use of automatic mutual recognition (AMR). This work should draw on the lessons from the recent introduction of AMR for electricians and veterinarians.

**DRAFT FINDING 6.2**

There is not a strong case for extending the scope of the mutual recognition schemes to cover laws on the manner of carrying on an occupation. There are more effective ways of dealing with the few cases where such laws restrict trade and labour mobility.

**DRAFT FINDING 6.3**

Following the introduction of national business registration in Australia in 2012, there is no longer a strong case to extend mutual recognition to general business registration requirements. However, sector-specific business licences required by the states and territories — such as for electrical contractors — continue to be a potential barrier to cross-border service provision.

**INFORMATION REQUEST 6.1**

*Which occupations would be best placed to gain from automatic mutual recognition (AMR) between Australia and New Zealand? How significant would the gains be? Would other measures be needed to ensure a trans-Tasman AMR arrangement works effectively?*

**INFORMATION REQUEST 6.2**

*To what extent is cross-border service provision hindered by unique state and territory requirements for business registration? Could this be addressed by mutually recognising state and territory business registration requirements? Are there alternative policy responses that are more efficient than mutual recognition?*

## Governance arrangements

**DRAFT FINDING 7.1**

Many of the issues identified by the Commission, which risk eroding the benefits of the MRA and TTMRA, are indicative of weak oversight and coordination among the participating jurisdictions.

**DRAFT RECOMMENDATION 7.1**

Governments should strengthen their collective oversight and coordination of the mutual recognition schemes. Specifically:

- The Cross-Jurisdictional Review Forum (CJRF) should update its terms of reference to include specific outputs (for example, updating Ministerial Declarations and the official users' guide), timeframes and reporting requirements.
- The COAG Senior Officials Meeting should formally accept responsibility for oversight of the CJRF and agree to its revised terms of reference.
- The chair of the CJRF should be rotated among participating jurisdictions, including the Australian and NZ Governments, according to an agreed schedule.
- The CJRF should have a jointly funded standing secretariat.

## DRAFT FINDING 7.2

The operation of the mutual recognition schemes is enhanced where governments ensure that the regulation imposed is the minimum necessary to achieve clearly defined outcomes. More broadly, benefits could be gained by jurisdictions adopting leading regulatory practices, for example by drawing from principles and practices outlined in:

- the Australian Government Regulator Performance Framework
- the New Zealand Best Practice Regulatory Model
- the Productivity Commission's benchmarking regulatory burdens studies, including: *Regulator Engagement with Small Business* (2013), *Regulatory Impact Analysis: Benchmarking* (2012) and *Identifying and Evaluating Regulation Reforms* (2011).

## DRAFT RECOMMENDATION 7.2

Governments should improve how their regulatory bodies implement the mutual recognition schemes. In particular:

- Where they do not do so already, parties to the mutual recognition schemes should set clear expectations regarding the implementation of mutual recognition by regulators, for example through Statements of Expectation, including how to balance risks.
- All participating jurisdictions should require regulators to report as a minimum in their annual reports information on the number of licences granted under mutual recognition for that year, and whether any decisions have been reviewed by the Administrative Appeals Tribunal or Trans-Tasman Occupations Tribunal under the mutual recognition legislation.

## DRAFT RECOMMENDATION 7.3

The Australian, State and Territory Governments should amend their requirements for regulation impact analysis so that consideration must be given to how proposed new regulations affect the mutual recognition schemes where relevant.

## DRAFT FINDING 7.3

The process for amending the mutual recognition legislation in Australia is overly complicated. It could be simplified without weakening the influence of individual jurisdictions if all states referred their power to amend the mutual recognition legislation to the Commonwealth, subject to a requirement that they have to approve any future changes.

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#### DRAFT RECOMMENDATION 7.4

The Australian, State, Territory and NZ Governments should in future commission an independent review of the MRA and TTMRA every ten years, rather than the current five. An earlier review of the schemes should remain possible where the reformed Cross-Jurisdictional Review Forum (outlined in Draft Recommendation 7.1) has established a strong case for one.

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#### INFORMATION REQUEST 7.1

*Are there impediments to mutual recognition applicants having the decisions of licensing authorities reviewed by the Administrative Appeals Tribunal or Trans-Tasman Occupations Tribunal?*

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# 1 About the review

## Key points

- This is the third review of the Mutual Recognition Agreement and Trans-Tasman Mutual Recognition Arrangement undertaken by the Productivity Commission.
- The overarching focus for the review is whether reforms to the mutual recognition schemes would achieve a net improvement in community wellbeing.
  - For the purpose of this review, the community is defined to comprise both the Australian and New Zealand populations. Differences in impacts on individual jurisdictions — including states and territories within Australia — are noted where they are significant.
- In undertaking this review, the Commission has taken account of a number of related policy developments and other reviews, including:
  - past reviews of the mutual recognition schemes
  - development work by the Council for the Australian Federation on automatic mutual recognition as a potentially lower-cost model of regulatory cooperation
  - lessons from the failed attempt to establish a National Occupational Licensing Scheme in Australia, and the successful adoption of a National Registration and Accreditation Scheme for Australian health professionals
  - initiatives to achieve greater trans-Tasman economic integration outside the framework of the mutual recognition schemes.
- This is a draft report. You are invited to provide feedback on its draft findings and recommendations, and information requests, through a written submission to the Commission. Details about how to make a submission are provided at the front of this report.

Australia's adoption of a mutual recognition scheme — and its later extension to New Zealand — had its origins in the late 1980s as one element of a broader microeconomic reform agenda aimed at improving efficiency and competitiveness by removing obstacles to trade and labour mobility within Australia and across the Tasman. In particular, separate and diverse state and territory practices regarding the sale of goods and the registration of occupations had 'balkanised' the Australian economy, impinging negatively on economic performance and community wellbeing.

To address this problem, the political leadership of the time identified a need for better cooperation between governments. This led, in the early 1990s, to governments in Australia and New Zealand agreeing that they would mutually recognise compliance with each other's laws for the *sale of goods* and the *registration of occupations*. This was formalised in the:

- Mutual Recognition Agreement (MRA) between the Commonwealth, State and Territory Governments within Australia (signed by Heads of Government in 1992)

- Trans-Tasman Mutual Recognition Arrangement (TTMRA) between the Australian signatories of the MRA and the Government of New Zealand (signed by Heads of Government in 1996).

It is now generally the case that goods which can be lawfully sold in one jurisdiction can also be sold in other jurisdictions without having to satisfy additional requirements. Similarly, people registered to practise an occupation in one jurisdiction are entitled to practise an equivalent occupation in other jurisdictions, after notifying the local occupation-registration body (box 1.1).

#### Box 1.1      **The MRA and TTMRA model of mutual recognition**

In broad terms, under the MRA:

- a good that may legally be sold in one Australian state or territory can also be sold in another, regardless of differences in standards or other sale-related regulatory requirements
- a person registered to practise an occupation in one Australian state or territory can practise an equivalent occupation in another, without the need to undergo further testing or examination.

Similarly, under the TTMRA it is generally the case that:

- a good that may legally be sold in Australia may be sold in New Zealand, and vice-versa, regardless of differences in standards or other sale-related regulatory requirements
- a person registered to practise an occupation in Australia is entitled to practise an equivalent occupation in New Zealand, and vice-versa, without the need to undergo further testing or examination.

However, the MRA and TTMRA only apply to occupations for which some form of legislation-based registration, certification, licensing, approval, admission or other form of authorisation is required. Also, some goods are exempt from the MRA and TTMRA (detailed in chapter 3).

The MRA and TTMRA do not apply to laws on how goods are used, the manner of sale, transport, storage, handling or inspection of goods. Laws governing the manner of carrying on an occupation and registration of sellers and business-franchise licences are also not covered.

Source: Australian Government (2014b).

## 1.1      **What the Commission has been asked to do**

The terms of reference for this review are provided at the beginning of this report. In summary, the Commission has been asked to:

- assess the coverage, efficiency and effectiveness of the MRA and TTMRA
- recommend ways to further improve interjurisdictional movement of goods and skilled workers, and reduce red tape, including examining the scope for establishing automatic mutual recognition for registered occupations

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- address matters identified by the Cross-Jurisdictional Review Forum (CJRF), including requirements for the use of goods and business registration (the CJRF is an interjurisdictional committee of officials that oversees the MRA and TTMRA)
  - consider how the Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement could facilitate trans-Tasman provision of services, based on a single occupational registration
  - examine the extent to which Commonwealth regulatory agencies are aware of their obligations under the TTMRA and have implemented mutual recognition processes.

The Commission was also asked to substantiate recommendations, wherever possible, with evidence relating to the scale of the problem and the estimated cost of both the problem and any solution proposed.

To carry out these tasks, the overarching concern for the review has been whether potential changes to the mutual recognition schemes would achieve a net improvement in the wellbeing of the community as a whole, rather than just the interests of a particular industry or group. The community was defined to comprise both the Australian and New Zealand populations. The Commission did not encounter any cases in this study where a potential reform was expected to involve a net cost for one country but generate a net benefit for both countries combined.

The final report for the review is to be presented to Australian Heads of Government and the New Zealand Prime Minister by September 2015. The jurisdictions will collectively prepare a response to the report through the CJRF, and this is to be provided to Australian Heads of Government and the New Zealand Prime Minister by December 2015.

## **1.2 Previous reviews of the MRA and TTMRA**

The sweeping nature of the MRA and TTMRA, and their highly decentralised approach to implementation, are unique design features found in no other approach to mutual recognition. Recognising the novel and path-breaking nature of the MRA signed in 1992, governments included a clause requiring a one-off review in its fifth year of operation, after which individual governments could choose to cease their participation. That review, released in 1998, found that the MRA was generally working well, and all governments accepted a recommendation that they continue their participation in the scheme indefinitely (COAG 1998).

The TTMRA, signed by governments in 1996, did not have a clause linking future participation to the results of a review. Instead, it committed the parties to joint reviews of the MRA and TTMRA every five years from 2003 onwards. Two such reviews — both undertaken by the Productivity Commission — have been published to date (PC 2003, 2009). This study is the third such review.

The Commission's 2003 review concluded that the schemes were effective in reducing regulatory barriers to trade between jurisdictions, but found that further improvements could be made. Among the recommended changes were initiatives to improve awareness of the schemes, to strengthen monitoring and enforcement, and to extend mutual recognition to goods classified as special exemptions.

The Commission's 2009 review reached a similar conclusion, finding that while the schemes were effective, there was scope for improvement. Specific recommendations were made regarding the coverage and operation of the schemes, reducing the number of exemptions, strengthening the oversight arrangements, and simplifying the process for making legislative amendments to the schemes (box 1.2).

### **Box 1.2      The 2009 review of the MRA and TTMRA**

The 2009 review concluded that the mutual recognition schemes were effective in increasing goods and labour mobility. However, the Commission found that the full potential of the schemes was not being realised. Recommendations were made on the coverage, operation and oversight of the schemes, as well as the processes for mutual recognition legislative amendment.

#### **Clarifying coverage and operation of the schemes**

The review identified ambiguity on various aspects of the schemes, such as:

- the treatment of goods-related issues, given an absence of case law
- the types of occupation registration covered
- how a tribunal can be requested to determine occupational equivalence between jurisdictions
- whether requirements for ongoing registration — such as continuing professional development — can be applied to people registered under mutual recognition.

Recommendations were made to clarify the coverage and operation of the schemes, including by legislative amendment. The review also recommended a mechanism for regulators and other interested parties to approach a tribunal for advice on the schemes.

The governments responded by stating that they would clarify matters by revising the users' guide for the schemes and explore the application of mutual recognition to occupations registered by professional associations. Recommendations to amend legislation and give tribunals an advisory role were rejected because it was considered that there was not a strong case for doing so, or the issue could be addressed by existing processes and a revised users' guide.

#### **Exemptions**

The review recommended narrowing the permanent exemption for risk-categorised foods, and removing the permanent exemption for ozone-protection legislation. The governments agreed to narrow the exemption for risk foods, but decided that mutual recognition could not be applied to ozone-protection legislation within Australia until after completion of phase-out plans for ozone-depleting substances.

(continued next page)

**Box 1.2** (continued)

It was recommended that special exemptions for therapeutic goods and hazardous substances, industrial chemicals and dangerous goods be converted to permanent exemptions, if mutual recognition or uniform regulation could not be achieved in the near future. In contrast, it was recommended that efforts to achieve mutual recognition for road vehicles and selected radiocommunications devices continue under a (simplified) special exemption process. The governments decided to convert all special exemptions to permanent exemptions on the grounds that regulatory harmonisation was not realistically achievable.

The review also recommended that mutual recognition be extended to laws governing how goods could be used, where these restricted the sale of goods. The governments decided that this would require further consideration in future reviews of the schemes.

**Strengthening oversight**

The review found that oversight of the schemes was ineffective, with regulators often failing to meet their mutual recognition obligations, and firms and individuals not making full use of the schemes. It was recommended that there be annual reporting by regulators and the COAG group of officials overseeing the schemes, as well as the establishment of specialist units to monitor and provide advice on the operation of the schemes within Australia.

The governments decided that specialist units were not warranted because the Australian Government Department of Industry was already responsible for the mutual recognition schemes within Australia. The recommendation on annual reporting by regulators and COAG was also rejected.

**Legislative barriers to reform**

The review recommended that the process for making legislative amendments to the schemes be streamlined so that changes could be made without having to be passed by the legislature of every participating jurisdiction within Australia. Specifically, a mechanism could be designed so that the Australian Government is able to amend the legislation on behalf of the states and territories, subject to their approval.

The governments decided to defer consideration of this issue. They supported the notion of increasing the flexibility of the legislative amendment process, but noted that consideration would have to be given to any possible issues that may arise with such a change and the role of each jurisdiction's legislature.

Sources: CJRF (2014b); PC (2009).

There have also been several other reviews of the schemes by government agencies.

- The Australian Government's Office of Regulation Review published a preliminary assessment of the MRA in 1997. It found that the scheme was working reasonably well and had achieved its goal of removing many regulatory barriers to the movement of goods and people in registered occupations (ORR 1997).
- The WA Government reviewed its involvement in the MRA in 1997, and the TTMRA in 2012 (Government of Western Australia 1997, 2012). This was required under WA legislation for the mutual recognition schemes. Both reviews recommended that Western Australia continue its participation in the schemes. The most recent review

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found no significant issues with the operation of the TTMRA, and recommended that legislation to continue WA participation in the scheme not include a requirement for further reviews.

In this review, the Commission has found that the mutual recognition schemes are generally working well. However, as detailed in later chapters, the Commission is concerned that the value of the schemes risks slowly being eroded due to regulators not always implementing mutual recognition as required, weak oversight, and an increase in the number of goods and related laws permanently kept outside the scope of the schemes.

#### DRAFT FINDING 1.1

The Mutual Recognition Agreement and Trans-Tasman Mutual Recognition Arrangement are generally working well for goods and occupations covered by the schemes. However, the Commission is concerned that the value of the schemes risks slowly being eroded due to regulators not always implementing mutual recognition as required, weak oversight, and an increase in the number of goods and related laws permanently kept outside the scope of the schemes.

### 1.3 Mutual recognition in the wider context

The terms of reference ask the Commission to take account of work by the Council for the Australian Federation (CAF) to reduce barriers to cross-border labour mobility in Australia. This work is exploring a deeper approach to mutual recognition which has been called automatic mutual recognition (AMR). In broad terms, AMR would make an occupational licence issued by one jurisdiction automatically valid in other jurisdictions. In effect, AMR would apply to registered occupations the same mutual recognition principle used for the sale of goods. Unlike the current arrangements, individuals who wish to practise outside their jurisdiction would not be required to register and pay a fee again in the destination jurisdiction.

The impetus for the CAF work on AMR came following the collapse of negotiations on a National Occupational Licensing Scheme (NOLS) in late 2013. NOLS failed for a variety of reasons, with a critical factor being that not all governments were convinced that national uniformity under NOLS would be cost effective (box 1.3). AMR is now being explored as a potentially more efficient form of mutual recognition for people providing services across multiple jurisdictions. Further discussion on how AMR could facilitate cross-border service provision is provided in chapter 6.

The efforts up until late 2013 to achieve national licensing had arguably caused governments in Australia to give low priority to managing the mutual recognition schemes, since it seemed likely that they would largely be replaced by NOLS and other national approaches. Since late 2013, governments have slowly shifted their attention back to the MRA and TTMRA. They have re-established the CJRF to oversee the schemes and



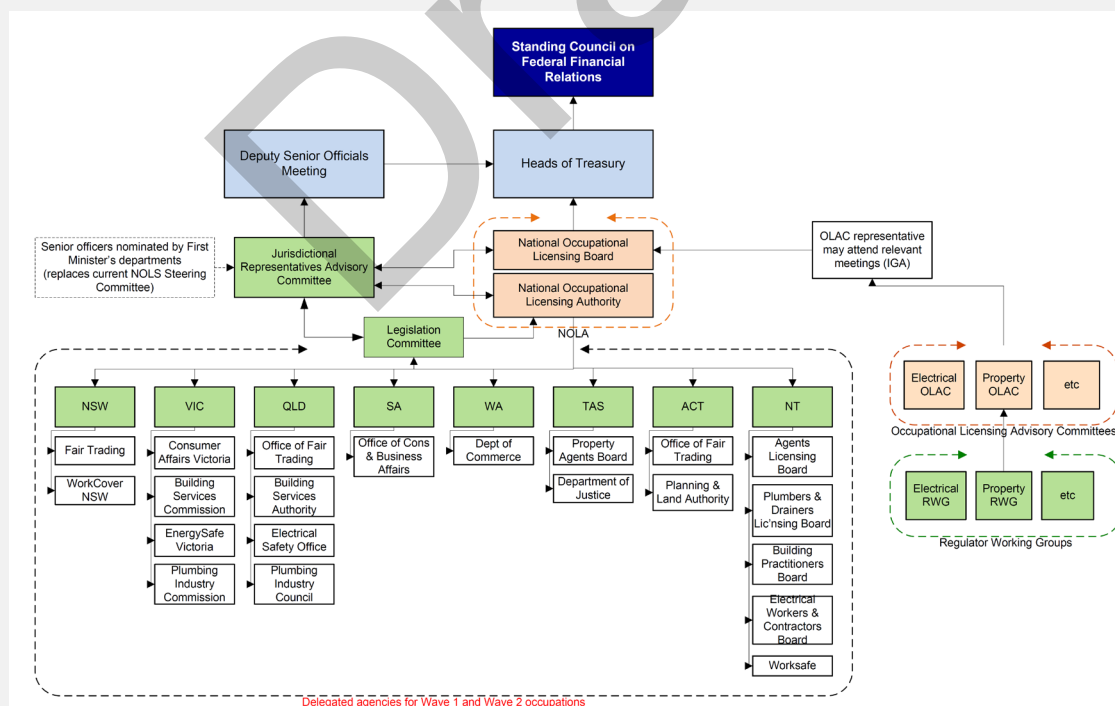
initiated work on updating statutory instruments — called Ministerial Declarations — which prescribe how regulators are to interpret occupational equivalence between jurisdictions.

### Box 1.3 Failure of the National Occupational Licensing Scheme

In 2009, the Australian, State and Territory Governments agreed to establish a National Occupational Licensing Scheme (NOLS) for air-conditioning and refrigeration mechanics, building-related occupations, electricians, drivers of passenger vehicles and dangerous goods vehicles, maritime occupations, plumbing and gasfitting roles, and property agents.

A national approach was expected to overcome several problems with the MRA and TTMRA, including the need to obtain multiple licences when working in more than one jurisdiction, difficulties in identifying licence equivalents across jurisdictions, the extensive use of conditions to achieve equivalence, duplicate testing of applicants, difficulties faced by regulators in accessing information on applicants, and a lack of understanding of mutual recognition requirements among regulators.

However, rather than adopt a simplified national system, the jurisdictions decided to keep their local regulators, record-keeping arrangements and unique registration fees. A complex system of national governance was to be grafted onto existing institutional arrangements (summarised in the figure below), which created considerable confusion about stakeholder consultation and the roles of different parties in making policy decisions. Moreover, it would have increased the cost of administering occupational registration. Another fundamental issue was that jurisdictions were unable to agree on nationally uniform registration requirements for each occupation.



After an extended period of development, a majority of states and territories decided in December 2013 not to proceed with NOLS. Instead, the states and territories agreed to work together via the Council for the Australian Federation to develop alternative options for minimising registration-related impediments to labour mobility.

Sources: COAG (2009a, 2013a); NOLA (2013, 2014).

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One area where national licensing has been introduced in Australia since the last review is for health professionals. The registration of medical practitioners and 13 other health professions is now regulated by nationally consistent legislation under the National Registration and Accreditation Scheme.<sup>1</sup> Once registered under the scheme, eligible health professionals are permitted to work anywhere within Australia. The Australian Health Practitioner Regulation Agency works with 14 National Health Practitioner Boards to implement the National Registration and Accreditation Scheme.

In producing this draft report, the Commission has been mindful of the implications for the mutual recognition schemes of recent and ongoing reform efforts designed to facilitate and ease the regulatory cost of doing business in Australia and across the Tasman. These include:

- a commitment by the Australian Government (2014a) to accept products complying with trusted international standards wherever possible. As part of this initiative, regulators are to assess whether unique Australian standards and risk assessment processes are needed. The Australian Government also requires new policy proposals to be supported by a regulation impact statement, which among other things has to identify when an applicable international standard is not being used and why this is the case (PM&C 2014b)
- a commitment by the Australian Government (2015) to reduce the burden of Commonwealth regulations, and work with the states and territories to reduce red tape across all levels of government
- work on various areas of business law by the Trans-Tasman Outcomes Implementation Group (TTOIG 2009).

The Commission has also taken account of other relevant inquiries and studies it has undertaken. In addition to the 2003 and 2009 reviews of the mutual recognition schemes, this includes analysis of regulations for specific goods and professions, and barriers to the set-up, transfer and closure of businesses (for example, PC 2000, 2003, 2008a, 2009, 2010, 2011c, 2013, 2014a, 2015a). Reform progress in these regulatory areas would on their own secure net benefits, but would also leverage the value from the mutual recognition schemes.

## 1.4 Conduct of the review

This review is being conducted independently of the Australian and New Zealand Governments, in accordance with the Australian *Productivity Commission Act 1998*

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<sup>1</sup> The following professions are nationally regulated by a corresponding national board: Aboriginal and Torres Strait Islander health practitioners, Chinese medicine practitioners, chiropractors, dental practitioners, medical practitioners, medical radiation practitioners, nurses and midwives, occupational therapists, optometrists, osteopaths, pharmacists, physiotherapists, podiatrists, and psychologists.



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(Cwlth). Also in keeping with its Act, the Commission has performed the review using open, transparent and public consultation processes.

On receipt of the terms of reference, the Commission informed interested parties and sought their input into the matters raised in the terms of reference. The review was also advertised in newspapers in both Australia and New Zealand. This was followed by the release of an issues paper in January 2015 inviting interested parties to make a written submission.

The Commission has met with a wide range of organisations in Australia and New Zealand, including individual businesses, industry organisations, professional groups, and officials from agencies within the Australian, State, Territory and New Zealand Governments.

A total of 55 submissions were received prior to this draft report. These came from a variety of groups, including industry organisations, professional associations and government agencies. The Commission supplemented the information it obtained through consultations and submissions by conducting a survey of occupation-registration authorities to gauge their practices regarding mutual recognition. The Commission thanks all of those who have contributed to this review to date.

This is a draft report. The Commission wants to get your feedback on the draft findings and recommendations, and information requests, in this document. It is seeking further submissions and also plans to hold roundtables with interested parties in Australia and New Zealand to discuss the content of this draft report. Details about how to make a submission are provided at the front of this report.

## 1.5 Structure of the report

The remainder of this report is structured as follows.

- The next chapter outlines the economic rationale for the mutual recognition schemes, where they sit in relation to other forms of cross-jurisdiction cooperation, and the analytical framework adopted by the Commission to assess the schemes. The Commission has also been guided by broadly accepted principles of good regulation.
- Chapter 3 provides an overview of the current design of the mutual recognition schemes.
- Chapters 4 and 5 provide, respectively, an analysis of the operation of mutual recognition for goods and occupations.
- Chapter 6 considers the model of automatic mutual recognition as a potentially more efficient form of mutual recognition for people providing services across multiple jurisdictions.

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- Chapter 7 examines the governance arrangements for the schemes and how they could be strengthened and improved.
  - Appendices support the analysis in the main body of the report. Appendix A lists the individuals and organisations that have participated in the review to date. Appendix B summarises relevant models of mutual recognition used outside of Australia and New Zealand. Appendix C provides further detail on the Commission's survey of occupation-registration authorities.

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## 2 Rationale for the schemes and approaches to their assessment

### Key points

- Regulatory cooperation between jurisdictions can reduce the barriers that different regulations pose to cross-border trade and labour mobility.
  - The benefits can include increased economic activity, the transmission of good regulatory practice across borders, and better management of public risks.
  - The precise magnitude of the benefits is difficult to quantify. It depends on many factors, including how well cooperation processes are applied and the size and incidence of other regulatory obstacles to cross-border trade and labour mobility.
- Australia and New Zealand currently use many forms of regulatory cooperation, including uniform laws, harmonised processes, mutual recognition, regional agreements, and memoranda of understanding.
- Mutual recognition is particularly suited to Australia and New Zealand.
  - Australian and NZ jurisdictions typically aim to achieve similar outcomes from regulation — reflecting their similar histories and culture — and so mutually recognising compliance with each other's laws raises few concerns.
  - The alternative of negotiating uniform regulations across Australian and NZ jurisdictions has often proved to be unachievable — as illustrated by failed efforts to implement national occupational licensing in Australia and a trans-Tasman regime for therapeutic goods — or, if achievable, prohibitively slow to negotiate.
- The Commission has assessed the coverage, efficiency and effectiveness of the Mutual Recognition Agreement and the Trans-Tasman Mutual Recognition Arrangement.
  - Coverage refers to the goods, occupations and related laws subject to the schemes.
  - Effectiveness measures how well the schemes achieve their stated objectives.
  - Efficiency refers to how well the schemes improve community wellbeing.
- The Commission has used a range of quantitative and qualitative evidence to illustrate the scale of particular problems with the schemes, and the benefits and costs of proposed solutions.

## 2.1 Regulatory cooperation as a tool to promote economic integration

A range of barriers can impede economic integration — the freedom of exchange of goods, services, capital, technology, knowledge and people. These barriers can be measured by the transaction costs incurred in trade and the movement of resources across borders. Transaction costs range from communication and transport to information-gathering and regulatory compliance. These costs can be classified according to their causes — for example, policy-related or structural — and whether the cost is incurred between, at or behind border (table 2.1).

**Table 2.1 Barriers to trade and mobility across jurisdictions**

Type of exchange	Point at which impediment occurs		
	Between borders	At the border	Behind the border <sup>a</sup>
Goods	Transport costs	Tariffs and non-tariff barriers	Bias in government procurement, consumer law, <u>testing and certification standards</u> , <u>labelling requirements</u>
Services	Communication and transport costs	Migration and foreign investment laws	Bias in government procurement, ownership requirements, eligibility for government programs, impediments to establishment & operations, <u>occupational licensing</u>
Capital	..	Screening of foreign investment	Ownership requirements, prudential regulation
Labour	Transport costs	Migration laws	Eligibility for government programs, <u>occupational licensing</u>

<sup>a</sup> Underlined barriers are those most likely to be addressed by mutual recognition. .. Not applicable.

Source: Adapted from PC and NZ PC (2012).

Reducing barriers to economic integration can have wide-ranging economic benefits resulting from the increased exchange of goods, services, capital and labour across borders (box 2.1). There are commercial incentives in markets for the private sector to reduce these barriers, for example by innovation in communications, transport and logistics. There is also a role for government to provide the institutional and legal platforms required for well-functioning markets (these platforms can extend across national borders) and to address policy-related transaction costs where this unambiguously increases efficiency and community wellbeing (PC and NZ PC 2012). Barriers created as a result of policy-related transaction costs can be intended (for example, tariffs and migration laws) or unintended (for example, compliance costs caused by differences in regulation).

This study focused on a particular type of barrier to economic integration — regulatory differences, specifically those relating to occupational licensing and the sale of goods. Regulatory differences can act as a barrier to the movement of goods and labour between jurisdictions by burdening firms and individuals with regulatory duplication and inconsistency. The potential impacts of regulatory differences include reduced competition

in goods and labour markets, higher prices for consumers, larger compliance costs for firms operating across jurisdictions, and greater difficulty in attracting workers to locations where their services would generate the greatest net benefit.

### **Box 2.1      Economic benefits from reducing barriers to economic integration**

Reducing barriers to economic integration can increase the exchange of goods, services, capital and labour across borders and lead to an array of benefits.

- Increased trade enables access to a wider range of goods and services, which in turn can help diffuse innovations and production technologies.
- Increased exports can help producers achieve economies of scale and reduce their production costs.
- Stronger competition from imports can promote more efficient production by local firms.
- Higher mobility of people between jurisdictions allows labour to be allocated to its most productive use and to acquire new skills (PC and NZ PC 2012).

The OECD (2013b) reported the results from several studies that attempted to quantify the economic benefits of reducing barriers to economic integration. For example:

- regulatory cooperation that decreases the domestic regulatory burden in Canada or the United States could increase their exports by 2.5 per cent
- eliminating half of the non-tariff barriers to trade caused by regulatory divergences could increase EU GDP by 0.7 per cent in 2018
- harmonisation of data through the use of global trade item numbers could reduce the volume of toy products subject to consumer safety examination and lead to savings of US\$16.8 million for toy importers and US\$775 000 for the US regulator.

However, these estimates have limitations. In particular, they cannot be used to gauge which measures would be most beneficial and to differentiate between regulatory burdens at different levels of government (OECD 2013b).

## **Mechanisms of regulatory cooperation**

Regulatory cooperation can help minimise unnecessary differences in regulation across jurisdictions and reduce some of the barriers to economic integration. The potential gains from regulatory cooperation are wide ranging. For example, it can help:

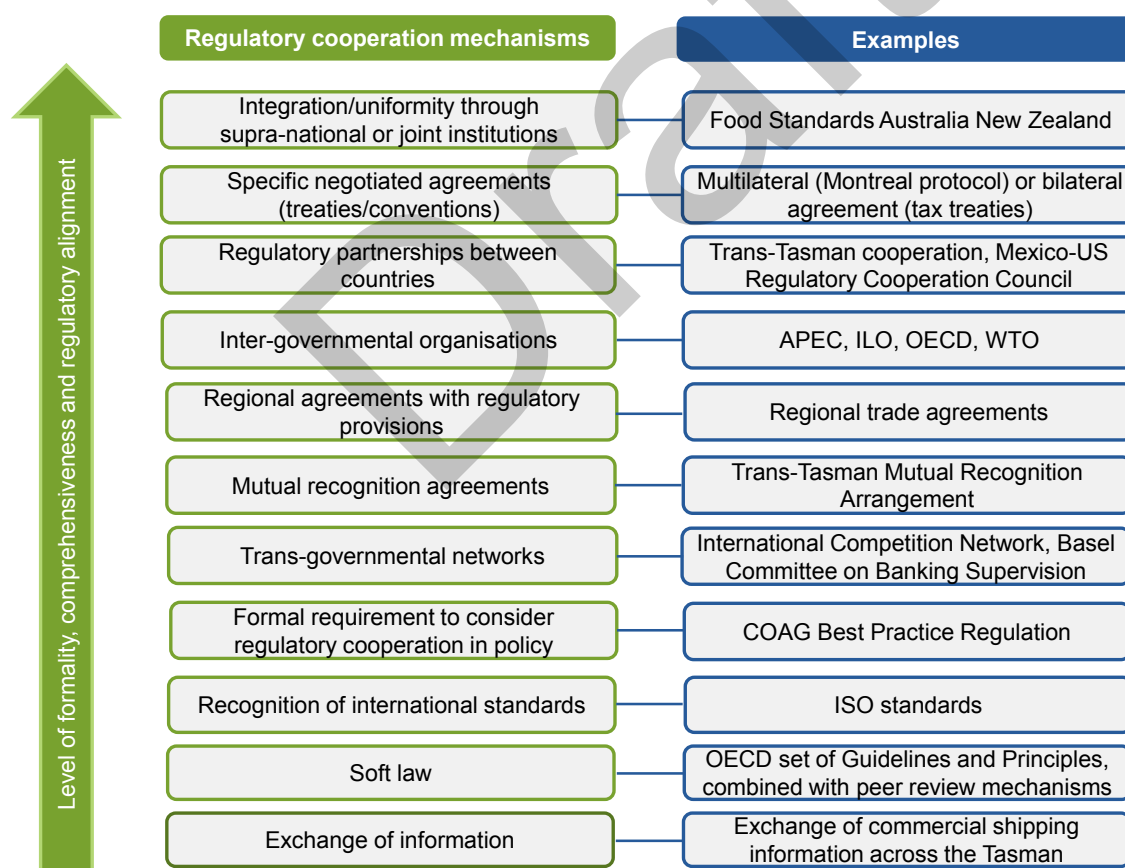
- increase economic activity by reducing the transaction costs involved in the movement of goods, labour, services and capital across borders (box 2.1)
- transfer good regulatory practices across borders
- generate economies of scale in government activities that reduce the cost of the services they deliver
- better manage global public goods and risks (OECD 2013a).

Governments use a range of mechanisms to foster regulatory cooperation across jurisdictions. These mechanisms have diverse characteristics; some can be formal and legally binding while others can be informal. The OECD (2013b, p. 16) reported that:

... Countries are embedded in webs of regulatory co-operation that go beyond the traditional treaty-based model of international relations, to encompass trans-governmental networks involving multiple actors with sometimes limited oversight or monitoring by the centre of government.

The OECD (2013b) classified commonly used mechanisms for regulatory cooperation into 11 categories (figure 2.1). These mechanisms differ in terms of their formality, comprehensiveness, and cost to negotiate, establish and maintain. While the OECD described them as ‘international regulatory cooperation mechanisms’, partly reflecting the fact that most cooperation happens at the intercountry level, they are also relevant for cooperation among Australian states and territories.

Figure 2.1 **Regulatory cooperation mechanisms**



Source: Adapted from OECD (2013b).

These mechanisms of regulatory cooperation are not mutually exclusive. In most cases, particular mechanisms are used in conjunction with others to achieve regulatory or policy

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objectives. For example, regulatory cooperation between Australia and New Zealand involves the use of mutual recognition, harmonised standards, information sharing and memoranda of understanding (section 2.2).

Further, regulatory cooperation mechanisms that sit below mutual recognition in terms of formality, comprehensiveness and regulatory alignment can support the functioning of mutual recognition schemes. Broadly speaking, these mechanisms can improve the comparability and acceptance of processes and regulations across jurisdictions, thereby facilitating the implementation or operation of mutual recognition schemes.

- The informal exchange of information is a low-cost method that can help parties understand interjurisdictional differences in regulations and gauge the potential benefits of mutual recognition. Sharing information may also help jurisdictions gain confidence in each other's systems, and develop policies and regulations that are relatively aligned.
- The recognition of international standards can contribute to making goods and occupations more similar across jurisdictions (for example, by adopting the same technical specifications for a particular product), consequently improving the likelihood of a mutual recognition scheme working well.
- A memorandum of understanding can foster regulator confidence in the systems used by a counterpart regulator in another jurisdiction.

Each form of regulatory cooperation has benefits and drawbacks. For example, informal cooperation can provide a high level of flexibility in designing regulatory settings and foster trust and confidence between jurisdictions. However, it is not as durable as formal arrangements and relies a lot on the goodwill of jurisdictions. More formal types of cooperation, such as harmonisation, can create a high level of certainty for firms and workers. However, harmonisation can be costly to negotiate and can reduce the scope for policy innovation. It may also favour the largest participating jurisdiction or align standards with the highest common denominator, leading to unnecessary regulation (NZ Government, sub. 47).

In contrast, mutual recognition tends to be at the lower end of the spectrum in terms of its cost to negotiate, establish and maintain. This is because jurisdictions do not need to negotiate changes to their own regulations or standards. Rather, they can simply agree to mutually recognise compliance with each other's laws. For such an approach to be successful, each jurisdiction must have a high degree of confidence in the outcomes achieved under the laws of other jurisdictions.

## Mutual recognition in a global context

Mutual recognition schemes are becoming increasingly common around the world and have evolved significantly since the late 1990s. The European Union, APEC countries, Scandinavia, United States and Canada all operate mutual recognition schemes

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(appendix B discusses some of these schemes). The schemes currently in operation can be categorised into:

- broad schemes concerning the mutual recognition of rules with equivalent objectives, regulatory requirements, standards and conformity assessment procedures
- narrow schemes concerning only the recognition of conformity assessments undertaken in another jurisdiction.

Narrow versions of mutual recognition schemes are the most common. Examples include the Mutual Recognition Agreement on Conformity Assessment between:

- Australia and Singapore covering the electrical, electronic and telecommunications equipment sectors
- Australia and Canada covering the manufacturing, inspection and certification of medicines (Australian Government and Government of Canada 2014; DIS 2015a).

The only international examples of broad mutual recognition schemes are the EU internal market and the Trans-Tasman Mutual Recognition Arrangement (TTMRA). Broad schemes can also operate within countries. The Mutual Recognition Agreement (MRA) between Australian states and territories is one example. Another example is the Canadian Agreement on Internal Trade (discussed in appendix B).

## **2.2 Rationale for mutual recognition in Australia and New Zealand**

The MRA and TTMRA coexist with many other forms of regulatory cooperation between Australian jurisdictions, and between Australia and New Zealand (box 2.2).<sup>2</sup>

While regulations in Australian jurisdictions and New Zealand are similar in many respects, they do have differences. Regulatory differences among Australian jurisdictions exist for historical reasons and because individual states and territories have the power under the Australian constitution to regulate many policy areas independently.

Uniform regulation across jurisdictions would address these differences. However, Australia's experience is that national uniformity is often unachievable or, if achievable, prohibitively slow to negotiate.

Historically, government, business and industry thought that uniform national regulation was the answer to ameliorating the barriers to free trade which were a product of the existence of multiple regulatory environments across the [Australian] States and Territories. However, the Australian experience of uniform national regulation is that the process is either not achievable

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<sup>2</sup> In this study, the term 'jurisdiction' generally includes Australian states and territories as well as New Zealand unless otherwise specified.



in the context of the existence of the independent sovereign States of Australia, or if achievable, prohibitively slow. (COAG 2008)

### Box 2.2 **Regulatory cooperation between Australia and New Zealand**

There is extensive regulatory cooperation between Australia and New Zealand reflecting the deep cultural, economic, historical and political ties between the two countries. Trans-Tasman examples of regulatory cooperation include the:

- Australia-New Zealand Closer Economic Relations Trade Agreement
- Trans-Tasman Mutual Recognition Arrangement
- joint Food Standards Code developed by Food Standards Australia New Zealand
- the Agreement on Trans-Tasman Regulatory Enforcement and Court Proceedings
- initiatives stemming from the Single Economic Market agenda.

Regulatory cooperation between Australia and New Zealand extends to all levels of government and can be broadly categorised as unilateral cooperation, bilateral cooperation that is not legally binding, and legally binding cooperation.

#### **Mechanisms for trans-Tasman regulatory cooperation**

The mechanisms for regulatory cooperation between Australia and New Zealand are varied and differ in their comprehensiveness, costs and formality. Examples are:

- regular Ministerial meetings — Closer Economic Relations senior official meetings and Australian Treasury/New Zealand Treasury Meetings
- secondments between government departments/agencies — Australian and New Zealand Treasuries and Foreign Affairs Departments
- information sharing — Australia and New Zealand customs
- memoranda of understanding and other arrangements — Australia and New Zealand Government Procurement Agreement, Memorandum of Understanding on Business Law Coordination, Memorandum of Understanding between Standards Australia and Standards New Zealand, and Trans-Tasman Travel Arrangement
- joint institutions — Food Standards Australia New Zealand.

*Sources:* ANZSOG (nd); NZ MED and DFAT (2011); OECD (2013b); Standards Australia (sub. 13).

One example of this was the failure of negotiations to establish a National Occupational Licensing Scheme in Australia (chapter 1).

Similarly, efforts to achieve a uniform approach between Australia and New Zealand have sometimes encountered significant difficulties. A recent example was negotiations for a joint therapeutic products regulator (chapter 4). The proposal for an Australia New Zealand Therapeutic Products Agency was abandoned in November 2014, following negotiations lasting more than a decade (Dutton and Coleman 2014).

Nevertheless, Australia and New Zealand have concluded that uniformity is workable in some areas and have been able to negotiate an outcome, including for the regulation of:

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- 14 health professions within Australia (overseen by the Australian Health Practitioner Regulation Agency)
  - food standards across Australia and New Zealand (administered by Food Standards Australia New Zealand).

Where uniformity is not a suitable option, Australia and New Zealand have sometimes been able to harmonise standards or regulations so that they are sufficiently consistent or compatible to not be a significant barrier to trade.<sup>3</sup> Examples of this approach include work on harmonising financial reporting standards between Australia and New Zealand (Chartered Accountants Australia and New Zealand 2011).

However, for the majority of cases it was more straightforward to adopt mutual recognition. This was a feasible option for Australian jurisdictions and New Zealand because of their similar history, culture and objectives. As a result, regulations meeting community expectations in one jurisdiction tended to be acceptable to the other jurisdictions. It also meant that regulatory differences were more likely to reflect historical or institutional arrangements, rather than significantly different assessments of risks to public health, safety and the environment. Accord Australasia (sub. 32) noted that, where the impact of regulatory differences is relatively small due to a low number of firms operating across borders, it may be simpler to mutually recognise regulations rather than take the time consuming and potentially resource intensive path of harmonisation.

The architects of the MRA and TTMRA considered the model of mutual recognition adopted by the European Union (summarised in appendix B) and concluded that a 'lighter-handed' approach was more appropriate for Australia and New Zealand. In particular, they did not see a strong case for jurisdictions to make significant changes to their standards or establish a centralised bureaucracy for administration and enforcement.

... [We] were familiar with the application of the [mutual recognition] concept in the ... European Union ... that ... involved an extensive bureaucratic administration and its effectiveness was dependent on the issuing of directives to ensure that minimum essential standards would apply. Those directives were subject to a variety of interpretations and required close monitoring and enforcement. We wanted a more straightforward, low maintenance approach in Australia, given the relative homogeneity of our states and territories. (Wilkins 1995, pp. 3–4).

Thus, the model adopted by Australia and New Zealand is at the lower end of the cost spectrum even when compared to other mutual recognition schemes. It is particularly light handed for goods, largely relying on case law for enforcement.

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

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## 2.3 Anticipated benefits and costs of the schemes

Those who proposed the MRA and TTMRA claimed the mutual recognition schemes would deliver many benefits (for example, COAG and NZ Government 1995; CRR 1991). The reasoning behind these claims was based on how the schemes change the incentives faced by firms and workers. By reducing regulatory duplication and inconsistency affecting cross-border trade and movements of labour, the MRA and TTMRA tend to decrease the costs incurred by:

- firms when selling a product or service into another jurisdiction
- workers in order to work in another jurisdiction.

This view was supported by study participants. For example, the Business Council of Australia (sub. 45, p. 2) submitted that:

A well functioning mutual recognition system helps businesses find the right people for the right jobs, and increases competition and choice among goods for consumers while ensuring the public interest and safety is protected.

The Department of Foreign Affairs and Trade (sub. 48, p. 1) observed that:

Through the mutual recognition and harmonisation of product and occupation standards the TTMRA reduces regulatory impediments to the movement of goods and people in registered occupations across the Tasman, delivering greater choice for consumers, enhancing the international competitiveness of Australian and New Zealand enterprises and lowering compliance costs for exporters in both countries.

The initial benefits will come from a reduction in firms' compliance costs and workers' accreditation expenses, and the greater consumption, output and employment this stimulates (table 2.2) This was, for example, noted by the Australian Health Practitioner Regulation Agency (sub. 50) and is illustrated in box 2.3 using a simplified model for goods.

**Table 2.2 Potential benefits from mutual recognition**

<i>Firms</i>	<i>Workers</i>	<i>Consumers</i>	<i>Governments</i>
Increased profits due to retaining some of the reduction in compliance costs	Increased savings from their lower accreditation costs	Lower prices as firms and workers share part of the decline in their compliance/accreditation costs with consumers	Lower costs on economic activity and higher trade and investment flows
Increased sales where some of the fall in compliance costs is passed on to consumers as lower prices	Increased employment as firms increase their sales volumes	Increased consumption (including deferred consumption in the form of savings) in response to lower prices and greater earnings from employment and the ownership of firms	Better management of risks and externalities across borders
Reduced costs where workers share with employers part of the fall in their cross-border accreditation costs	Higher wages as employers share part of their reduction in compliance costs with workers		Higher confidence in other jurisdictions' regulatory decisions
			Improved administrative efficiency through greater transparency and sharing of information between governments

Sources: OECD (2013b); PC (2009).

**Box 2.3 Initial impacts of mutual recognition in goods markets**

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

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

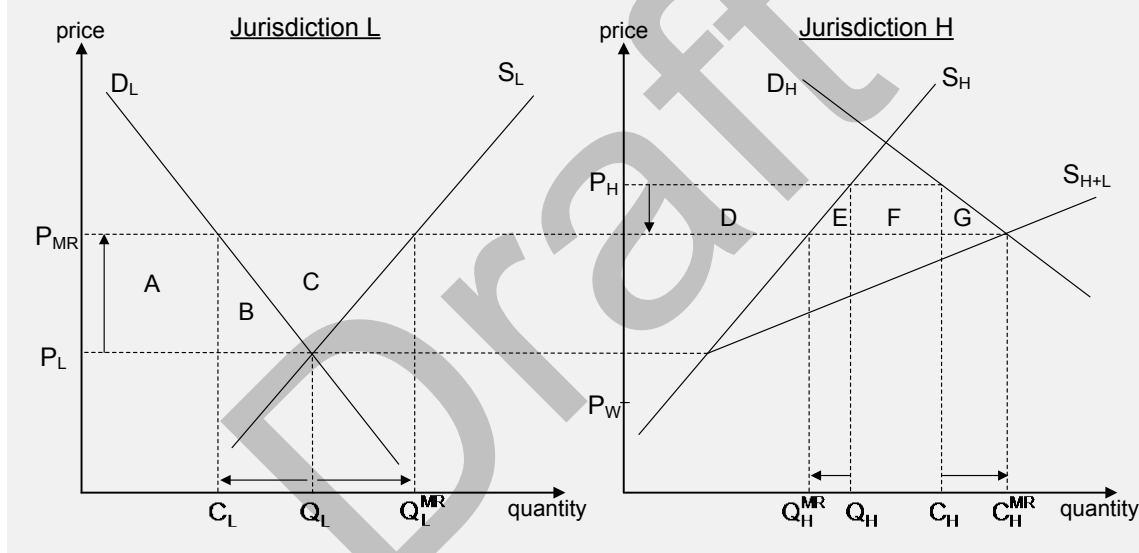
Suppose jurisdictions L and H mutually recognised each other's goods standards, so that there was no longer an additional cost in exporting to each other's markets. Jurisdiction L would then be able to export to H for a lower price than the rest of the world. This would change the supply curve in jurisdiction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

(continued next page)

**Box 2.3** (continued)

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

Adopting a global standard could lead to larger benefits. Assuming the relevant good in the rest of the world satisfied a global standard with a corresponding price of  $P_W$ , jurisdictions L and H would both import the relevant good (because of the lower price) and the welfare gains would be larger than those under mutual recognition. Mutual recognition can therefore create trade between countries H and L but possibly at the risk of diverting trade from the rest of the world.



While the initial impacts will likely make each jurisdiction's community better off as a whole, not everyone will necessarily gain. Based on evidence available shortly after the MRA was established, Sturgess (1994) observed that the main beneficiaries, at least in the early stages, were expected to be small firms because they are most impacted by cross-border differences in regulations. On the other hand, less-efficient firms may experience falling sales and prices in the face of increased competition from other jurisdictions. This does not necessarily provide a case against mutual recognition, since the community as a whole would gain.

In time, a range of other benefits is also likely to emerge (box 2.4). These can involve ongoing structural reform and so might deliver more significant benefits in the longer term than do the initial impacts (CRR 1991).

### Box 2.4 Longer-term benefits from mutual recognition

In addition to the first-round impacts of mutual recognition, other beneficial changes are likely to materialise over time. These include:

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

Mutual recognition can also increase regulatory competition between governments by giving firms and workers greater discretion over which jurisdiction's regulatory regime they comply with. Over time, this can deliver benefits to the community by creating:

- increased pressure on governments to find ways to reduce the costs of regulation
- greater discipline on jurisdictions contemplating new regulations
- improved cooperation and dialogue between regulators across jurisdictions.

*Sources:* Australian Government (2014b); Carroll (2006); COAG and New Zealand Government (1995); CRR (1991); Sturgess (1993, 1994).

Most notably, mutual recognition is likely to encourage greater regulatory competition between jurisdictions. This occurs because mutual recognition gives firms the opportunity to supply goods to multiple jurisdictions while only complying with the standards of the jurisdiction with the lowest compliance costs. Individuals may also stimulate regulatory competition for occupational licensing because mutual recognition makes it easier for them to become licensed in the jurisdiction with the lowest accreditation costs.

One of the anticipated benefits of enhanced regulatory competition as a result of mutual recognition is that it can create greater impetus to harmonise regulations where there are genuine concerns about mutually recognising different jurisdictions' standards. However, harmonisation may not always lead to a net benefit for the community. Consequently, there is likely an intrinsic benefit in maintaining mutual recognition over the longer term, rather than regarding it as an interim step on the path to uniform regulations across all jurisdictions.

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

- jurisdictions will have less scope to tailor regulations to reflect local conditions and preferences
- joint decision-making procedures associated with the mutual recognition schemes can make it more difficult to implement regulatory reforms within a given jurisdiction
- firms and workers may have an incentive to engage in jurisdiction ‘shopping and hopping’ — the practice of using the jurisdiction with the easiest or cheapest standards to enter markets in other jurisdictions — that reduces the quality and/or safety of goods and services supplied. To some extent, this risk was addressed in the design of the mutual recognition schemes<sup>4</sup>
- to benefit from mutual recognition, firms and workers will have to incur the cost of becoming informed about the relevant procedures, and complying with them
- governments will incur additional administration costs, such as to fund coordinating bodies, and to implement and oversee mutual recognition procedures
- regulators may not implement mutual recognition arrangements appropriately.

An assessment of mutual recognition, therefore, needs to weigh up not only the benefits, but also the associated costs. This is discussed further below in the context of assessing efficiency.

## 2.4 The Commission’s framework for assessing the schemes

In responding to its terms of reference, the Commission has been guided by the requirements of its legislation — *Productivity Commission Act 1998* (Cwlth) — and has adopted a whole-of-community perspective when assessing the mutual recognition schemes. As noted in chapter 1, the community was defined to comprise both the Australian and New Zealand populations. Changes to the schemes were only recommended where they were expected to generate a joint net benefit. In this study, the Commission did not encounter any cases where a potential reform was expected to involve a net cost for one country but generate a net benefit for both countries combined.

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<sup>4</sup> When designing the MRA, governments sought to prevent a ‘race to the bottom’ in goods standards by allowing individual jurisdictions to temporarily exempt products from mutual recognition for up to 12 months, and gave Ministerial Councils the authority to declare such exemptions permanent by a two-thirds majority vote (Australian Government 2014b; Sturgess 1993, 1994). Similarly, one jurisdiction can refer concerns about occupational standards in another to a Ministerial Council for a determination based on a two-thirds majority vote (Australian Government 2014b).



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The aim of this review is not to assess the need for the mutual recognition schemes. Rather, the Commission has been requested to assess the coverage, efficiency and effectiveness of the schemes, recommend ways to further improve the schemes and address any identified problems (chapter 1). That said, mutual recognition is only one of a suite of measures to facilitate cooperation within Australia, and between Australia and New Zealand. Where particular problems were identified, the Commission has considered whether these are best addressed within the mutual recognition schemes, through alternative forms of regulatory cooperation, or whether other policy instruments may be more appropriate.

In applying its framework, the Commission referred to, where relevant, the broad body of work — from Australia, New Zealand and internationally — on good practice principles for regulation design and implementation. It has also grounded its analysis in relevant Australian and NZ government policy guidance such as that associated with the Australian Government's commitment to cut regulatory burdens across all levels of government (chapter 1).

The Commission's framework applied the three assessment criteria (coverage, efficiency and effectiveness) identified in the terms of reference and broadly involved:

- identifying problem areas with the mutual recognition schemes
- assessing the case for government intervention to address these problems
- identifying options to address the problems
- evaluating options to determine whether they are likely to deliver benefits that exceed their costs.

In assessing the coverage, efficiency and effectiveness of the schemes, the Commission has adopted a broadly similar interpretation and application of these criteria to the 2009 review (PC 2009).

## Coverage

The word 'coverage' is interpreted as referring to the:

- goods and occupations that are subject to mutual recognition
- scope of the two schemes — the range of laws, regulations and activities that are covered by mutual recognition.

The mutual recognition schemes cover most occupations for which some form of legislation-based registration is required and a wide range of goods (chapter 3). However, there are particular exemptions that can be used to keep specific goods or occupations outside the scope of the MRA and TTMRA. Further, the categories of exceptions and exclusions ensure that certain laws are not subject to mutual recognition.



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In examining the issue of coverage, this study considers whether potential changes to coverage would improve the effectiveness and efficiency of the schemes, including in areas already subject to mutual recognition.

## Effectiveness

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

A key basis for judging effectiveness is, therefore, the extent to which goods, services and workers cross borders without being burdened with regulatory duplication and inconsistency. In some cases, this is relatively straightforward to observe directly. For example, the records of occupation-registration bodies could be used to measure the share of workers from other jurisdictions who register under mutual recognition, and so reduce regulatory duplication and inconsistency. However, such detailed records do not exist for traded goods.

Various indirect indicators are used in this study because it is difficult to directly observe the extent to which regulatory burdens impede trade and labour mobility (and consequently, the extent to which the schemes reduce these burdens). In this regard, the mutual recognition schemes are judged to be more effective, the greater the extent to which:

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

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

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

In some cases, these indicators are easily quantified. In other cases, the Commission has applied principle-based reasoning and qualitative analysis in order to make a judgment about the effectiveness of the schemes (the types of evidence used is discussed in section 2.5).

## Efficiency

Efficiency, in its broadest sense, refers to how well resources are used to benefit the wellbeing of the community as a whole. This broad interpretation is known as ‘economic efficiency’ and has three components — the degree to which outputs are produced at least possible cost, resources are allocated to uses that generate the greatest community wellbeing at a given point in time, and over time (box 2.5).

### Box 2.5 Components of economic efficiency

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

- **Productive efficiency** is achieved when goods and services are produced at the lowest possible cost. This occurs where no more output can be produced given the resources available.
- **Allocative efficiency** is about ensuring that the community gets the greatest return (very broadly defined) from its scarce resources. A nation’s resources can be used in many different ways. The best or ‘most efficient’ allocation of resources is the one that contributes most to community wellbeing.
- **Dynamic efficiency** refers to the allocation of resources over time, including allocations designed to improve economic efficiency and to generate more resources. This can mean finding better products and innovative ways of producing goods and services, which may involve investment in education, research and development. Dynamic efficiency can also refer to the ability to adapt efficiently to changed economic conditions — a capacity for optimally modifying output and productivity performance in the face of economic shocks.

Source: PC (2009).

Since the need for the mutual recognition schemes was not examined, the Commission did not assess the overall costs and benefits of the schemes. Rather, an economic efficiency criterion was used to review the appropriate coverage of the schemes, the extent of any problems identified (for example, to what extent are they impeding the efficient operation of the schemes) and the policy reforms proposed (whether these reforms will improve economic efficiency).

## 2.5 Evidence used to support recommendations

The terms of reference ask the Commission to substantiate recommendations, wherever possible, with evidence relating to the scale of the problems and the estimated cost of both the problems and any solutions proposed. Ideally, this would be based on a comprehensive quantitative analysis.

In practice, quantitative analysis is constrained by a lack of data and problems in disentangling the impact of mutual recognition from other factors. Further, some of the benefits from mutual recognition cannot be readily quantified. Quantification is particularly difficult for goods, because mutual recognition operates in a more decentralised way than it does for occupations. These issues were evident in the Commission's previous two reviews of the mutual recognition schemes (PC 2003, 2009). While the OECD has also noted such issues, its Environment, Health and Safety Program is one of the few examples where some of the costs and benefits of initiatives akin to mutual recognition have been quantified (box 2.6).

### Box 2.6 Quantifying the costs and benefits of the OECD Environment, Health and Safety Program

The OECD Environment, Health and Safety Program includes a range of initiatives to reduce the costs involved in interjurisdictional testing and evaluation of industrial chemicals, pesticide, and biotechnology and nanotechnology products. For example, a safety test performed in one 'approved' country can be accepted by other countries if it is carried out in accordance with the OECD Test Guidelines and Principles of Good Laboratory Practice.

The OECD quantified some of the program's costs and benefits and estimated the net savings at around €153 million annually. Two categories of costs were quantified.

- Secretariat costs — such as salaries, travel expenses, costs of consultants and overheads.
- Country costs — costs to governments, industry and non-government organisations participating in the program.

The benefits that were quantified included reduced repeat testing for new substances, harmonising review reports, and sharing the responsibility for chemicals testing. Other benefits were only described qualitatively because of the difficulties in assigning a monetary value to them, such as the improvement of risk-management methods.

*Source:* OECD (2010).

For this review, the Commission has used the limited quantitative evidence at its disposal relevant to the Australian and trans-Tasman schemes, including from a survey of occupation-registration authorities. This is supported by qualitative evidence from study participants and other research, and lessons from international experience.

In considering the extent to which an issue warrants examination, the Commission has taken note of factors such as the magnitude of potential costs and benefits (using the filtering criteria in box 2.7), number of viable policy options, and availability of existing

evidence. A similar approach was used by the Commission in its examination of integration opportunities between Australia and New Zealand (PC and NZ PC 2012).

### **Box 2.7 Filtering criteria used in quantitative analysis**

The Commission used a range of filtering criteria to inform its analysis of the costs and benefits of reforming particular components of the mutual recognition schemes. These include:

- width of reach (the number of entities and/or value of activity affected)
- depth of reach (the extent to which entities are affected)
- information that the issue is important to stakeholders (for example, from submissions and previous reviews)
- impediments that do not impose large costs in isolation, but ‘add up’ or cause unnecessary frictions and prevent a ‘domestic-like’ experience in the other country
- any other information suggesting that reform would generate large gains.

*Source:* Adapted from PC and NZ PC (2012).

## **Quantitative evidence**

The Commission used a range of quantitative evidence to inform its assessment of the mutual recognition schemes and the impacts of mutual recognition.

### **Goods and services trade**

The possible effects of mutual recognition on national and trans-Tasman goods and services markets include increased goods and services trade. However, it is difficult to isolate the effects of mutual recognition from other factors influencing trade. Trends in interstate and trans-Tasman trade provide useful contextual information, but these are only circumstantial since trade flows are influenced by many economic factors. Data on trade flows are presented in chapter 4.

### **Labour mobility**

By reducing some costs associated with relocation, mutual recognition may increase labour mobility, as registered workers are effectively freed up to seek employment opportunities in other jurisdictions without further training or accreditation requirements. However, it was not possible in this study to isolate the impact of mutual recognition because of the many other factors that can affect labour mobility. These other factors include:

- expected wages and the probability of finding employment in the new location
- the relative costs of living, in particular housing costs
- regional differences that affect quality of life (PC 2014b).

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## Evidence from a survey of occupation-registration bodies

While registered occupations account for between 15 and 20 per cent of employment in most jurisdictions in Australia and New Zealand (chapter 5), data on the actual use of mutual recognition as a means of obtaining registration are limited. To address this deficiency, the Commission conducted a survey of occupation-registration authorities across Australia and New Zealand so as to:

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

Responses to the survey helped uncover some of the costs and benefits of mutual recognition when it comes to occupational registration, as well as some of the problems with the schemes. However, the survey only provided a partial picture of how the mutual recognition schemes are working in relation to occupational licensing. In particular, the Commission did not survey businesses and licence holders. Qualitative evidence was used to gain an understanding of the perspectives of these stakeholders. An analysis of the survey results is presented in appendix C.

## Qualitative evidence

Qualitative evidence played an important role in this study, since many of the benefits and costs of mutual recognition cannot be quantified. For example, it is difficult to put a financial value on the loss of regulatory autonomy associated with mutual recognition. Therefore, the quantitative analysis in this study was supported by a qualitative assessment of some aspects of the schemes. For example, there has been long-standing community and political support in Australia and New Zealand for initiatives that integrate their economies, even in cases where this has involved some loss of autonomy.

Qualitative evidence included the experience of participants in the mutual recognition schemes, details of how changes to the mutual recognition schemes have been implemented, and comments from study participants about areas of concern — for example, professional associations commenting that it has become easier for licence holders to obtain registration in other jurisdictions, or occupation-registration bodies commenting that it is easier to communicate with their counterparts in other jurisdictions.

Qualitative evidence was obtained from a range of sources, including submissions, case studies, meetings with stakeholders, the survey of occupation-registration bodies and desktop research.

DRAFT REPORT

This draft report is no longer open for consultation. For final outcomes of this project refer to the research report.

Draft

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## 3 Overview of the mutual recognition schemes

### Key points<sup>5</sup>

- The mutual recognition schemes in Australia and New Zealand oblige governments to recognise compliance with each other's laws for the sale of goods and the registration of occupations.
- While mutual recognition is a widely used form of regulator cooperation in other countries, the Australian and NZ models are unique in their breadth and scope.
- The mutual recognition schemes are premised on two fundamental principles.
  - Goods that can be lawfully sold in one jurisdiction can be sold in other jurisdictions without having to meet additional requirements.
  - People registered to practise an occupation in one jurisdiction are entitled to practise an equivalent occupation in other jurisdictions, after notifying the local occupation-registration body.
- The schemes aim to reduce regulatory red tape and barriers to cross-border movements of goods and labour, lifting economic activity and the wellbeing of citizens.
- There are various provisions that limit the scope of the schemes.
  - Permanent, temporary and special exemptions keep particular goods and occupations out of scope.
  - Exceptions include laws which relate to how goods are sold and the manner of carrying on an occupation.
  - Exclusions are provided for laws which are related to the sovereign rights of nations, such as customs controls and taxation.
- The schemes provide for the review of standards and occupation-registration decisions.
  - Standards for a particular good or occupation can be referred to a COAG Ministerial Council for review.
  - Decisions made by occupational regulators can be reviewed by the Administrative Appeals Tribunal in Australia and the Trans-Tasman Occupations Tribunal in New Zealand.
- The schemes are inherently decentralised, with implementation, monitoring and compliance systems largely delegated to individual regulators and jurisdictions.

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<sup>5</sup> This chapter has drawn extensively on the 2009 review of the mutual recognition schemes (PC 2009).

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### 3.1 Origins of the mutual recognition schemes

The origins of the Mutual Recognition Agreement (MRA) and Trans-Tasman Mutual Recognition Arrangement (TTMRA) can be traced back to the 1980s, as part of a broader microeconomic reform agenda aimed at improving efficiency and competitiveness by removing obstacles to trade and labour mobility within Australia and across the Tasman. In particular, separate and diverse state and territory practices regarding the sale of goods and the registration of occupations had ‘balkanised’ the Australian economy, impacting negatively on economic performance and community wellbeing.

In a speech to the National Press Club in July 1990, Prime Minister Hawke (1990, p. 2) drew attention to the ‘burden of different rules and regulations and requirements’ between Australian states and territories. Prime Minister Hawke also commented that there would be fewer barriers to trade between members of the European Union than between Australian states. Contrary to the intention of the Australian Constitution to create a single national economy through the removal of barriers to trade between states, barriers in the form of regulatory variation had given rise to eight distinct markets.

Among examples of impediments to the mobility of goods and services were requirements for manufacturers to use different packaging for goods sold in different states, and the need for professionals and tradespeople to obtain a licence if they sought to work outside their home state.

To address this problem, the Prime Minister emphasised the need for better cooperation between Australian governments on the regulation of occupations and the sale of goods.<sup>6</sup> This perspective led the Australian, State and Territory Governments to sign the Intergovernmental Agreement on Mutual Recognition in May 1992, which committed the parties to:

... establish a scheme for implementation of mutual recognition principles for goods and occupations for the purpose of promoting the goal of freedom of movement of goods and service providers in a national market in Australia. (COAG 1992, p. 1)

The MRA also committed the parties to consider a similar scheme with New Zealand. Australia and New Zealand have a long history of working together to reduce barriers to trade. There have been preferential trade agreements between the two countries since 1922, with the most recent being the Australia–New Zealand Closer Economic Relations Trade Agreement, which took effect in 1983. In the mid-1990s, a mutual recognition scheme was seen as a way to further reduce barriers by helping to overcome the remaining ‘significant regulatory impediments, usually in the form of product standards, conformance assessment requirements for mandatory standards or occupational registration’ (COAG and NZ Government 1995, p. 17).

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<sup>6</sup> Wilkins (1995, p. 4) noted that trade in services was excluded from the schemes on the grounds that ‘a large number of [services] were already regulated at Commonwealth level or under uniformity agreements. Examples [included] corporations law, banking and finance, non-bank financial institutions, insurance, securities, telecommunications and transport’.



The Intergovernmental Arrangement Relating to Trans-Tasman Mutual Recognition was signed by leaders of the participating jurisdictions in mid-1996 and came into force in May 1998. The TTMRA is closely modelled on the MRA.

The governments decided to adopt mutual recognition as a general principle because it was seen to address concerns about regulatory differences across a far wider range of goods and occupations, and much more promptly, than could ever realistically be expected under the alternatives of regulatory harmonisation or uniform laws. Harmonisation would have required multiple governments to align standards so that they were sufficiently consistent or compatible to not be a barrier to trade (COAG and NZ Government 1995). This did not necessarily require uniform laws across jurisdictions, but it would still have been a formidable task to achieve across many goods and occupations. In the case of uniformity, governments were mindful that the Australian experience had been that it was either unachievable or, if achievable, prohibitively slow to negotiate (COAG 1998). In contrast, it was recognised that mutual recognition could reduce the adverse impacts of regulatory differences without requiring those differences to be removed (CRR 1991).

While it was path breaking in the mid-1990s to adopt mutual recognition as a general principle, the concept was not unprecedented for all occupations. Most notably, mutual recognition had applied to the surveying profession since the late 19th century (box 3.1).

### Box 3.1 **Mutual recognition of surveyors in Australia and New Zealand**

In October 1892, representatives from the colonies of New South Wales, Victoria, Queensland, South Australia, Western Australia and New Zealand held the inaugural meeting of the Council of Reciprocating Surveyors Boards of Australia and New Zealand (CRSBANZ). At that meeting, it was unanimously agreed that:

- each colony would reciprocally recognise certificates of competency issued by the other colonies for surveyors
- the Board of Examiners of each colony would be empowered to issue licences to those holding certificates of competency issued by the Board of Examiners of any other colony.

The profession's commitment to mutual recognition was subsequently reflected in the legislation which regulated surveyors in each jurisdiction.

Today, CRSBANZ is made up of the relevant surveyors boards of all the Australian states and territories, and the Cadastral Surveyors Licensing Board of New Zealand. CRSBANZ submitted to this review that it had demonstrated over 100 years of successful mutual recognition between jurisdictions to ensure surveyors are able to operate across borders.

*Sources:* Council of Reciprocating Surveyors Boards of Australia and New Zealand (sub. 52); Land Surveyors Licensing Board of Western Australia (sub. 28); Roberts (1983).

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## 3.2 Legislative underpinnings

Within Australia, the mutual recognition schemes are based on a form of legislative coordination in which the states and territories have either referred their power to the Commonwealth Government to enact mutual recognition legislation, or adopted Commonwealth legislation (COAG 1998). The relevant Commonwealth legislation for the MRA is the *Mutual Recognition Act 1992* (Cwlth).

Legislative amendments to the MRA require the agreement of all jurisdictions participating in the scheme. However, the amendment process differs between jurisdictions. New South Wales, Queensland, Tasmania, the ACT and the Northern Territory have referred their power to amend the legislation to the Commonwealth, as long as they approve the changes.<sup>7</sup> The other three states — Victoria, South Australia and Western Australia — would need to pass any amendments through their own Parliaments.

Legislation to give effect to the TTMRA was passed by the Australian and NZ Parliaments in 1997 in the form of the *Trans-Tasman Mutual Recognition Act 1997* (Cwlth) and the *Trans-Tasman Mutual Recognition Act 1997* (NZ). The Australian states and territories subsequently passed legislation adopting the Commonwealth Act or referred their powers to enact legislation in this area to the Commonwealth.<sup>8</sup> Western Australia was the last state to pass its legislation in 2007.<sup>9</sup> Only the Australian territories have referred their power to amend the TTMRA legislation to the Commonwealth. All the Australian states require amendments to be passed through their Parliaments.

The TTMRA legislation generally takes precedence over other legislation in Australia or New Zealand. The legislation also provides that any Commonwealth law made after the commencement of the mutual recognition laws is to be construed as having effect subject to the mutual recognition legislation, except where that law expressly overrides it. These provisions were included to ensure that the obligations of the mutual recognition schemes are not accidentally or deliberately circumvented by individual jurisdictions' legislative actions.

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<sup>7</sup> For the states, the Governor approves amendments of the Commonwealth Act by proclamation. For the Northern Territory, the Administrator approves amendments by notice in the *Gazette*. For the ACT, the Chief Minister approves amendments in writing. This approval is a notifiable instrument and must be registered on the ACT Legislation Register.

<sup>8</sup> New South Wales referred its power to the Commonwealth to enact the trans-Tasman mutual recognition legislation. The remaining states passed legislation adopting the Commonwealth Act. The territories, given their different status under the Constitution, requested the Commonwealth Parliament to enact the trans-Tasman mutual recognition legislation.

<sup>9</sup> The Trans-Tasman Mutual Recognition (Western Australia) Bill 2005 received Royal Assent on 6 December 2007. There had been two previous attempts by Western Australia to pass such a bill — the Trans-Tasman Mutual Recognition (Western Australia) Bill 1999 and the Trans-Tasman Mutual Recognition (Western Australia) Bill 2002. Both bills were considered by Standing Committees, which recommended that they be passed, but they lapsed from the Notice Paper when the respective Parliaments were prorogued (Government of Western Australia 2012).

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Local governments are also subject to the obligations set out in the mutual recognition legislation. However, the practical effect of this provision may be minimal, as most local governments do not regulate the ‘sale’ or ‘occupational registration’ activities that are covered by the mutual recognition schemes.

### 3.3 Mutual recognition principles and processes

The architects of the mutual recognition schemes opted for an ambitious approach, unique in its breadth and scope, and innovative administrative mechanisms which aimed to limit bureaucratic oversight and require infrequent amendments. These characteristics were achieved through two models — one for goods and one for occupations.

#### Mutual recognition of goods

The fundamental principle of mutual recognition for goods is that a good which may lawfully be sold in one jurisdiction may also lawfully be sold in another jurisdiction, without needing to comply with additional requirements of the other jurisdiction relating to:

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

The application of this principle removes the need for any authorisation process to sell goods in any other jurisdiction. The principle was intended to operate as a defence for a person who is prosecuted for selling goods if they were produced in, or imported into, another state or territory and met the legal requirements for sale in that state or territory (Wilkins 1995).

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

A few classes of goods and laws are exempt from mutual recognition. These are described in section 3.4 below.

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## Mutual recognition of occupations

Initially, the architects of the mutual recognition schemes intended that the mutual recognition principle for the sale of goods would also apply to occupations (Wilkins 1995). In other words, anyone registered in an occupation in one jurisdiction would be permitted to carry out that occupation in another jurisdiction.

Two factors led governments to adopt a different principle.

- For some registered occupations, there were differences between jurisdictions in the scope of activities that can be undertaken. For example, in Queensland, a single licence is issued for both pest control and fumigation activities (Queensland Government 2012) whereas in New South Wales separate certificates of competency are issued for pest management technicians and fumigators (WorkCover NSW 2015).
- Governments considered that regulators needed to know who is practising in their jurisdiction in order to monitor compliance with codes of conduct and to have the capacity to effectively respond to breaches.

In the end, the mutual recognition principle adopted for occupations was that *registration* in an occupation in one jurisdiction is sufficient grounds for registration in the *equivalent* occupation in another jurisdiction. Anyone in a registered occupation wishing to work in a different jurisdiction needs to notify the relevant registration authority in that jurisdiction (with the exception of occupations for which registration is nationally recognised, such as veterinarians) and is *deemed* to be registered.

### Registration

The *Mutual Recognition Act 1992* (Cwlth) and the *Trans-Tasman Mutual Recognition Act 1997* (Cwlth) define occupational registration to include:

... the licensing, approval, admission, certification (including by way of practising certificates), or any other form of authorisation, of a person required by or under legislation for carrying on an occupation.

A similar definition is used in the *Trans-Tasman Mutual Recognition Act 1997* (NZ).

While the MRA covers occupations registered in Australian jurisdictions, it only has practical effect where individuals must register in each jurisdiction in which they work. It does not apply to occupations which are licensed nationally, such as the health professions in Australia. Nor does it apply to occupations where licences granted by an Australian state or territory are recognised nationally, such as veterinarians (chapter 6).

### Equivalence

The mutual recognition legislation states that occupations are equivalent if the activities authorised to be carried out under each registration are substantially the same. Local

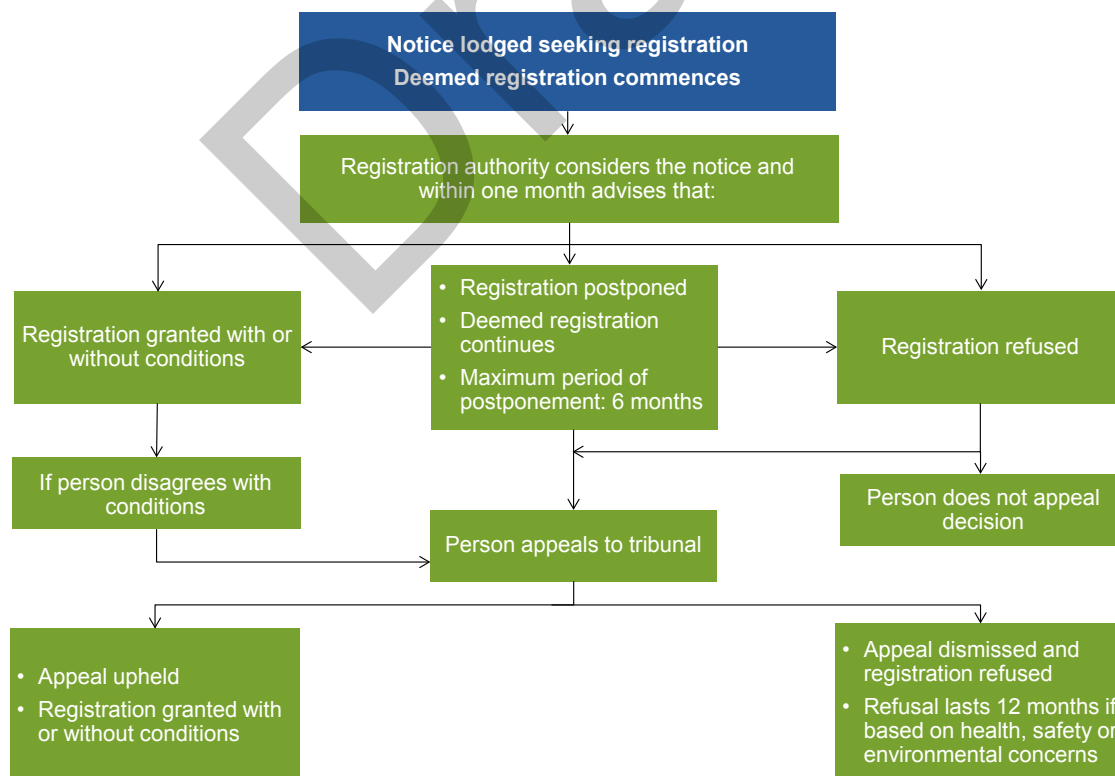
authorities may impose conditions on registration in order to achieve equivalence. Equivalence and the issues associated with its implementation are discussed in chapter 5.

### Deemed registration

When a registered person applies to the relevant authority in another jurisdiction for registration under mutual recognition, the authority must grant them deemed registration (figure 3.1). They can then carry on their occupation in the second jurisdiction, pending the granting or refusal of their application. The registration authority has one month to grant, postpone or refuse registration. If the authority does not respond within a month, the applicant is entitled to substantive registration.

Deemed registration ceases if the person's application is granted or refused. The authority may postpone granting registration for up to six months if the information provided in support of the application is incomplete or inaccurate, the circumstances of the applicant change materially or the occupation for which registration is sought is not equivalent to the occupation carried out in the home jurisdiction. A number of study participants raised issues with the application of deemed registration. These are discussed in chapter 5.

Figure 3.1 **Occupation-registration process under the MRA and TTMRA**



Source: Australian Government (2014b).

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## 3.4 Scope and coverage of the schemes

As noted above, the MRA and TTMRA generally allow goods lawfully sold in one jurisdiction to be sold in others without having to satisfy additional requirements. However, a number of goods-related laws are explicitly kept outside the scope of the schemes. Similarly, there are measures which limit the coverage of occupations and related laws.

### Measures that limit goods coverage

There are three types of exemptions that can be used to keep specific goods outside the scope of the MRA and TTMRA (figures 3.2 and 3.3).

- Permanent exemptions — these ‘exist to deal with jurisdictional regulatory differences or situations where all parties [to the schemes] agree that mutual recognition could jeopardise public health or safety’ (CJRF 2004, p. 30). They include general laws relating to quarantine and weapons, and specific laws covering goods such as road vehicles, fireworks and therapeutic goods.
- Temporary exemptions — these provide a means for jurisdictions to unilaterally ban goods for up to 12 months on health, safety or environmental grounds while the relevant COAG Ministerial Council considers whether mutual recognition, harmonisation or a permanent exemption is appropriate. No goods are currently subject to a temporary exemption under the MRA or TTMRA.
- Special exemptions (TTMRA only) — these are for cases where jurisdictions anticipate that greater integration can be achieved, but recognise further work is required. Special exemptions have to be renewed at least every 12 months until the outstanding issues are resolved by harmonisation, mutual recognition or a permanent exemption. There are currently no goods subject to a special exemption.

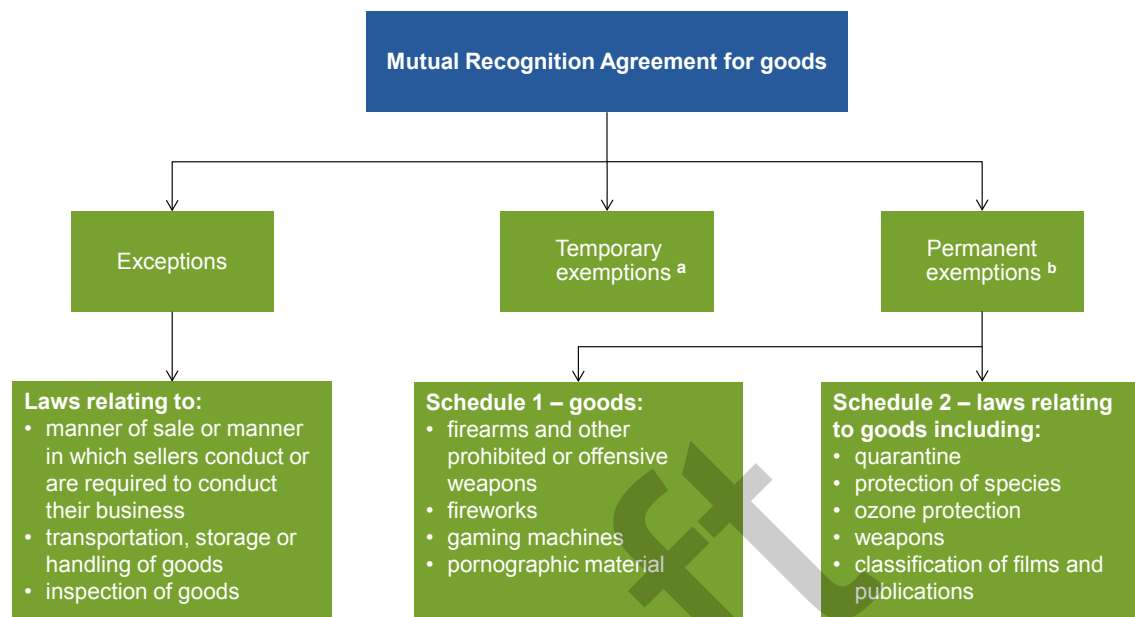
There are also two measures to quarantine goods-related laws from the MRA and TTMRA.

- Exceptions — these are laws the jurisdictions consider to be outside the intended scope of the MRA and TTMRA, including laws relating to how goods are sold, the inspection of goods, and the transportation, storage or handling of goods.
- Exclusions (TTMRA only) — these are used to exclude laws relating to the sale of goods that essentially relate to the sovereign rights of nation states, such as customs controls, intellectual property and taxation.<sup>10</sup>

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<sup>10</sup> For example, the Customs (Prohibited Imports) Regulations 1956 (Cwlth) are an exclusion under the *Trans-Tasman Mutual Recognition Act 1997* (Cwlth). These control the importation of drugs, firearms and objectionable goods, among other things.

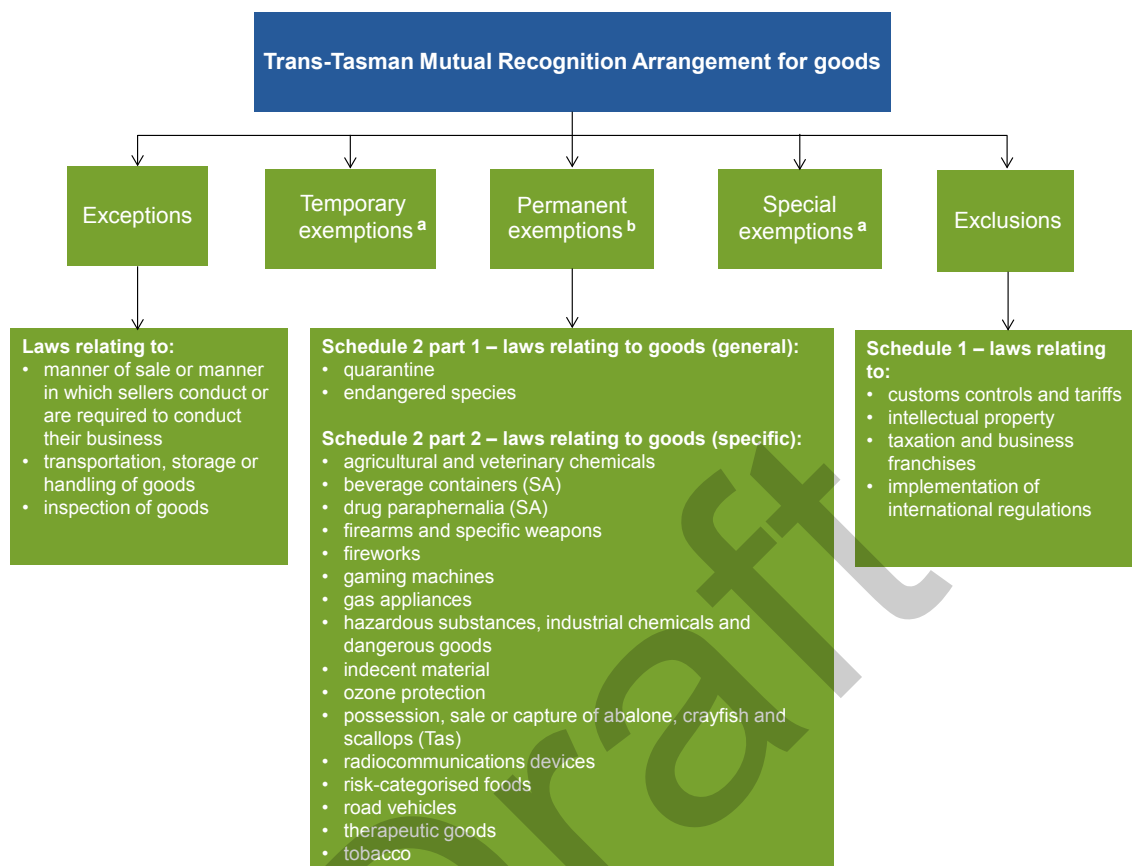
Figure 3.2 Coverage of goods under the MRA



<sup>a</sup> There are currently no temporary exemptions. <sup>b</sup> Full list is in the *Mutual Recognition Act 1992* (Cwlth).  
 Source: *Mutual Recognition Act 1992* (Cwlth).



Figure 3.3 Coverage of goods under the TTMRA



<sup>a</sup> There are currently no special or temporary exemptions. <sup>b</sup> Schedule 2 parts 1 and 2 relate to the *Trans-Tasman Mutual Recognition Act 1997* (Cwlth). Most listed items are also permanent exemptions under Schedule 2 of the *Trans-Tasman Mutual Recognition Act 1997* (NZ). For example, laws relating to gas appliances, hazardous substances and radiocommunications equipment. Laws relating to NZ protected objects (such as cultural artefacts) are also permanent exemptions under the NZ legislation. Laws relating to ozone protection and risk-categorised foods fall under exclusions rather than permanent exemptions in the NZ legislation.

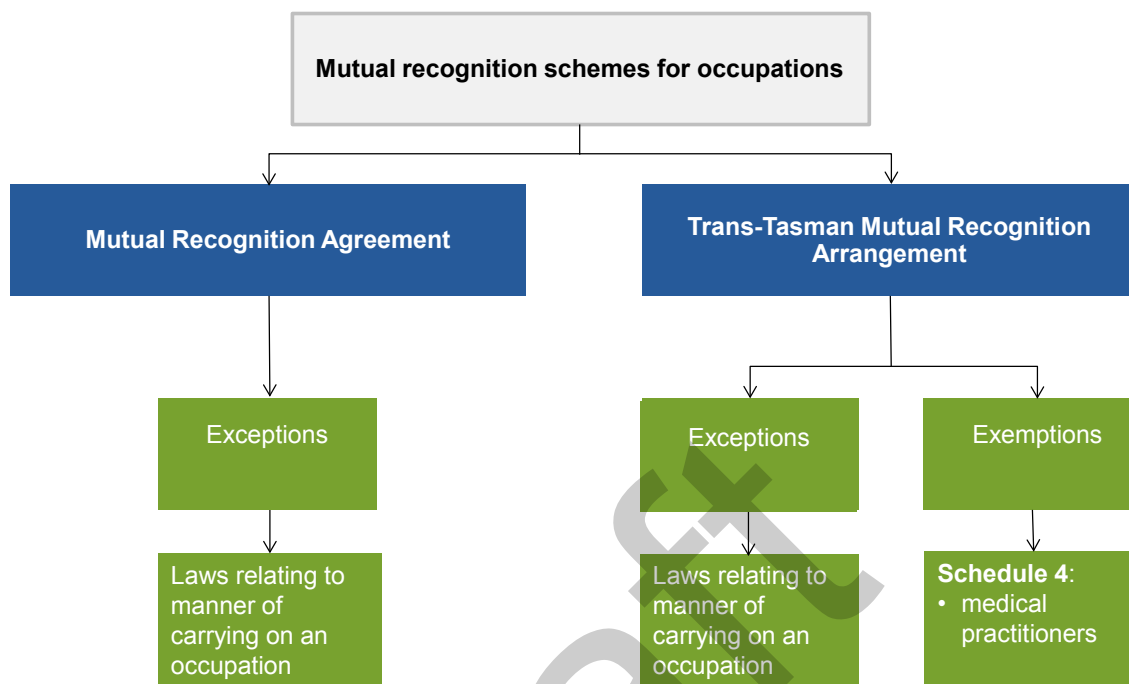
Sources: *Trans-Tasman Mutual Recognition Act 1997* (Cwlth); *Trans-Tasman Mutual Recognition Act 1997* (NZ).

## Measures that limit coverage of occupations and related laws

There are also two measures which explicitly limit the application of mutual recognition to occupations (figure 3.4).

- Exemptions — used to rule out coverage of specific occupations. There is currently one exemption — registration of medical practitioners under the TTMRA.
- Exceptions — laws relating to the manner of carrying on an occupation where they apply equally to all people carrying on, or seeking to carry on, the occupation, and are not based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation.



Figure 3.4 Coverage of occupations under the MRA and TTMRA<sup>a</sup>

<sup>a</sup> These only cover occupations where some form of legislation-based registration, certification, licensing, approval, admission or other form of authorisation is required in order to legally practise the occupation.

Sources: *Mutual Recognition Act 1992* (Cwlth); *Trans-Tasman Mutual Recognition Act 1997* (Cwlth); *Trans-Tasman Mutual Recognition Act 1997* (NZ).

The TTMRA exemption for medical practitioners only affects doctors trained outside Australia or New Zealand. Doctors with primary medical qualifications obtained in New Zealand are automatically granted general registration in Australia and vice versa under other arrangements (DIS 2015c).

The exception for laws regulating the manner of carrying on an occupation means that applicants under mutual recognition must meet local requirements for ongoing activities of persons registered to practice an occupation. For example, individuals may be required to establish a principal office, set up a trust fund for monies received and develop a complaints process in each jurisdiction in which they operate. These laws can thus impede service provision across jurisdictions, potentially limiting the benefits of mutual recognition. This issue is considered in chapter 6.

A further design feature of the MRA and TTMRA is that they cover occupations only where some form of legislation-based registration, certification, licensing, approval, admission or other form of authorisation is required in order to legally practise the occupation. If registration is not required in an applicant's home jurisdiction for all practitioners, then they cannot apply under mutual recognition for registration in another jurisdiction.

There is some ambiguity about whether the mutual recognition schemes apply to cases of occupational regulation where individuals are not registered by a statutory authority. Three such approaches — coregulation, de facto and negative licensing — could potentially be covered by the schemes (box 3.2). This issue is discussed further in chapter 5.

### Box 3.2 Coregulation, de facto and negative occupational licensing

**Coregulation** involves government endorsement, usually by legislation, of a licensing scheme administered by a private-sector professional body. For instance, several professional bodies are involved in the regulation of the accountancy profession.

**De facto registration** arises when legislation authorises people who meet certain requirements (such as training requirements) to practise an occupation, without further reference to a registration body. For example, land valuers in Tasmania are not required to be formally registered, but must have satisfactorily completed an accredited course of study and completed practical experience as determined by the Australian Property Institute or any other organisation representing the interests of land valuers in Tasmania.

**Negative occupational licensing** is ‘a statutory scheme that allows a person or business to practise an occupation unless they breach statutory-based requirements’ (COAG 2009b, p. 3). For instance, in Victoria, debt collectors do not need a licence unless they are a prohibited person (because, for instance, they have been found guilty of certain crimes) or a prohibited corporation (such as a corporation managed by a prohibited person).

## 3.5 Review mechanisms

The mutual recognition schemes include processes to review the standards for particular goods and registered occupations, and individual decisions by occupation-registration authorities. There is also a mechanism to clarify which occupations are equivalent across jurisdictions.

### Referral of standards to Ministerial Councils

The MRA and the TTMRA outline a referral process to determine the standards applicable to both goods and occupations. Any jurisdiction can refer a question about the standards applying to a good or the practice of an occupation in another jurisdiction to the Ministerial Council responsible for that good or occupation.

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

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

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## Review of individual occupation-registration decisions

Any person whose interests are affected by a decision made by an occupation-registration authority under the MRA or TTMRA can seek a review of that decision by the Administrative Appeals Tribunal in Australia, or the Trans-Tasman Occupations Tribunal in New Zealand. The Tribunals can make an order that a person registered in an occupation in one jurisdiction is, or is not, entitled to registration in that occupation in another jurisdiction.

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

## Declarations of the equivalence or non-equivalence of occupations

### Declarations by tribunals

After reviewing a decision made by an occupation-registration authority, the Administrative Appeals Tribunal or the Trans-Tasman Occupations Tribunal can make a declaration that occupations in two jurisdictions are not equivalent. In making such a declaration, a tribunal has to be satisfied that either:

- the activities covered by registration in the two jurisdictions are not substantially the same (even with the imposition of conditions)
- irrespective of whether or not the activities are substantially the same, the standards required for registration in the first jurisdiction would expose people in the second jurisdiction to a real threat to their health or safety.

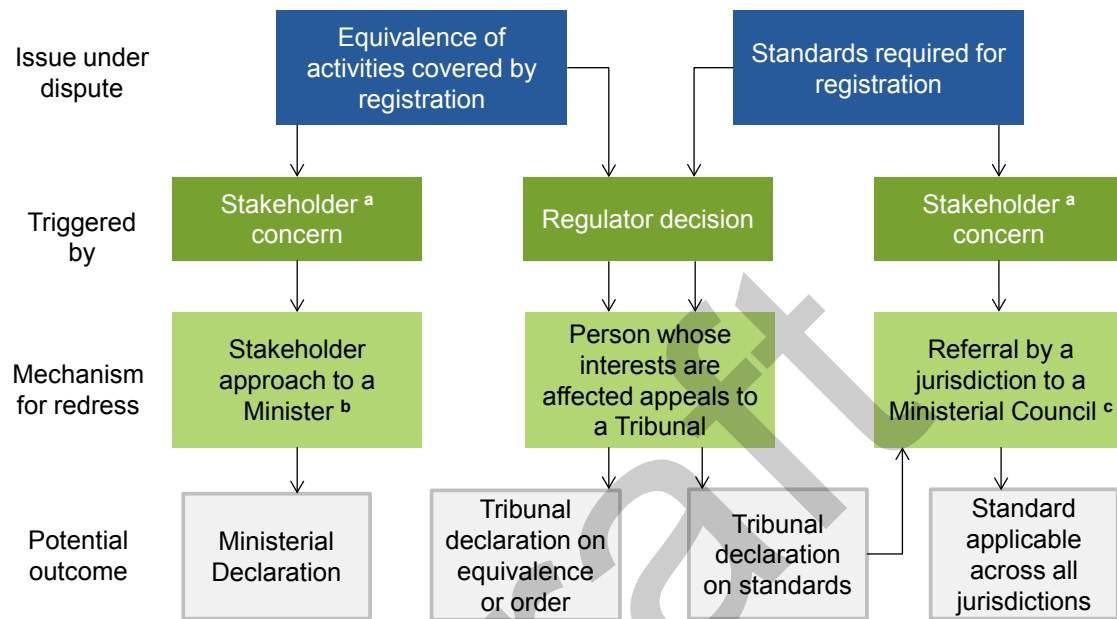
A declaration by the Administrative Appeals Tribunal or the Trans-Tasman Occupations Tribunal that occupations in two jurisdictions are not equivalent must be referred to a Ministerial Council by the jurisdiction in which the declaration applies.

### Ministerial Declarations

Ministers from two or more jurisdictions can declare that specified occupations are equivalent, and may also specify or describe the conditions required to achieve equivalence. In Australia, Ministerial Declarations of equivalence must be published on the Federal Register of Legislative Instruments. This option has been used to prescribe occupational equivalence for many registered trades across the Australian states and territories (chapter 5).

A summary of the review mechanisms to address issues linked to differences in the activities covered by, or standards required for, occupational registration is presented in figure 3.5.

Figure 3.5 **Summary of review mechanisms for registered occupations**



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

### 3.6 Governance arrangements

The MRA and TTMRA have a system of governance arrangements involving many parties (box 3.3). The system is inherently decentralised, with administration and monitoring and compliance systems largely delegated to regulators in each jurisdiction. This reflects the intention of the architects of the schemes to have a ‘low maintenance’ system which does not establish a new bureaucracy or require repeated updating (Sturges 1993, 1994).

Responsibility for oversight of the mutual recognition schemes ultimately rests with Heads of Government, coordinated through the Council of Australian Governments (COAG), including New Zealand for TTMRA matters. To carry out this function, the Heads of Government are supported by Ministerial Councils and government departments.

### Box 3.3 Governance arrangements for the MRA and the TTMRA

**Heads of Government** are ultimately responsible for oversight of the MRA and TTMRA. This is coordinated through the Council of Australian Governments (COAG), including New Zealand for TTMRA matters.

The **Cross-Jurisdictional Review Forum (CJRF)** — a committee of officials from central agencies in each jurisdiction — is responsible for monitoring and promoting effective operation of the MRA and TTMRA, responding to five-yearly reviews of the schemes, and recommending improvements to governments. The Australian Government provides a secretariat for the CJRF.

The CJRF reports to the **COAG Senior Officials Meeting**, which is chaired by the Secretary of the Australian Department of Prime Minister and Cabinet, with other members being corresponding departmental heads at a state and territory level within Australia.

A **central agency** in each jurisdiction — typically the treasury or head of government's department — is responsible for overall oversight of the schemes and providing a point of contact for mutual recognition matters in their jurisdiction. These central agencies also typically represent their jurisdiction in the CJRF.

**Government departments and regulators** in each jurisdiction are responsible for administering and enforcing particular aspects of the schemes, such as registering a specific occupation under mutual recognition.

**Tribunals** can review decisions made by occupation-registration authorities under the MRA and TTMRA. This function is carried out by the Administrative Appeals Tribunal in Australia and the Trans-Tasman Occupations Tribunal in New Zealand.

**COAG Ministerial Councils** can be called upon to make decisions on how a specific good or occupation is to be treated under the MRA and TTMRA. When a TTMRA issue arises, New Zealand has full membership and voting rights on the relevant Ministerial Council.

*Sources:* Australian Government (2014b); Mutual Recognition Agreement; Trans-Tasman Mutual Recognition Arrangement.

However, in practice COAG has had limited involvement in the schemes; oversight of the schemes has been largely through the Cross-Jurisdictional Review Forum. Each jurisdiction is represented on the Cross-Jurisdictional Review Forum by a central agency — typically the treasury or head of government's department — which serves as a point of contact for mutual recognition matters in their jurisdiction.

As discussed in section 3.5, the Administrative Appeals Tribunal and the Trans-Tasman Occupations Tribunal have the power to review decisions made by occupation-registration authorities under the MRA and TTMRA. Ministerial Councils can also be called upon to make decisions on how a specific good or occupation is to be treated under the MRA and TTMRA.

Chapter 7 considers the effectiveness of these governance arrangements for the mutual recognition schemes.

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There are a number of institutional and other arrangements that, while not part of the mutual recognition schemes, are considered in this report since they impinge on the potential coverage, efficiency and effectiveness of the MRA and TTMRA. They include:

- development work by the Council for the Australian Federation on an alternative form of mutual recognition — termed automatic mutual recognition — and how implementation of this on a trans-Tasman basis may be facilitated by the Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement. These developments are reviewed in chapter 6
- the use of regulation impact statements to ensure that policy makers consider the impact of new regulations on the operation of the mutual recognition schemes. This is explored in chapter 7.

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## 4 Mutual recognition of goods

### Key points

- The mutual recognition of goods covered by the schemes is generally working well. While some study participants had concerns regarding specific goods or regulations, they were few in number and do not represent systemic problems with the operation of the mutual recognition schemes.
- However, there are grounds to be concerned that the value from the schemes is slowly being eroded due to an increase in the number of goods and related laws explicitly kept outside the scope of the schemes.
- While most of the permanent exemptions to the schemes should remain, there is some potential to remove or narrow the scope of the exemptions.
  - The permanent exemption from the Trans-Tasman Mutual Recognition Agreement for road vehicles should be removed. However, the Commission notes the net benefit from removing the exemption would be larger if combined with wider reforms to abolish restrictions on the importation and registration of used vehicles, and parallel imports of new vehicles from countries other than New Zealand.
  - The exemption for all hazardous substances, industrial chemicals and dangerous goods should be narrowed to exclude cosmetics and toiletries.
- The conversion of special to permanent exemptions under the Trans-Tasman Mutual Recognition Agreement has not resulted in a reduction in efforts to remove trans-Tasman barriers to trade. There is not a strong case for legislating a formal mechanism to reclassify permanently exempted goods as special exemptions.
- The temporary exemption mechanism has been used several times since the last review, but no concerns have been raised regarding the use of this mechanism or the process. Likewise, few concerns have been raised regarding the exceptions and exclusions to the schemes.
- There is insufficient evidence to indicate that ‘use-of-goods’ provisions are posing a problem to the operation of the mutual recognition schemes. The Commission does not recommend any changes to the schemes to address use-of-goods regulations. However, governments should be mindful of the potential for use-of-goods requirements to undermine the mutual recognition schemes.

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## 4.1 Operation of mutual recognition

### Impacts on goods markets

The effects of mutual recognition on national and trans-Tasman goods markets include lower costs to business, improved goods mobility through trade, greater choice and increased competitiveness (chapter 2). It is difficult to isolate and attribute a value to each of these benefits from mutual recognition as a myriad of other factors influence competitiveness and trade. However, indicators on trends in interstate and trans-Tasman trade and its composition provide contextual information.

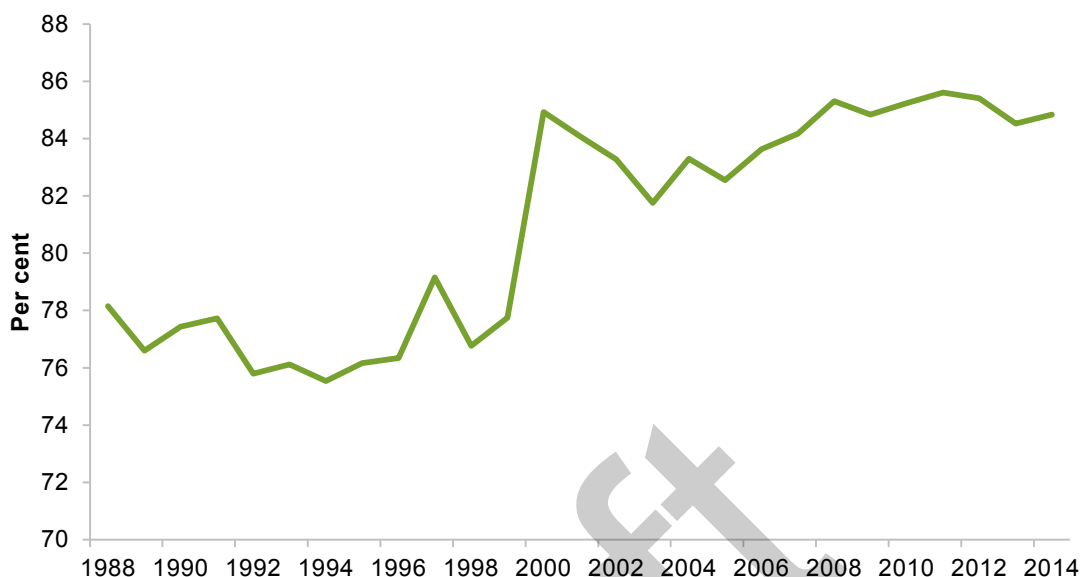
For instance:

- interstate trade in each Australian jurisdiction accounts for at least 20 per cent of gross state product. In the smaller jurisdictions, the share is considerably higher, as you would expect given the smaller size of the state market
- the value of trans-Tasman trade in goods since the adoption of the Australia-New Zealand Closer Economic Relations Trade Agreement in 1983, of which the Trans-Tasman Mutual Recognition Agreement (TTMRA) is a supporting component, has grown on average by 8 per cent each year
- in 2014, trans-Tasman trade represented 3 per cent of Australia's merchandise exports and 17 per cent of New Zealand's. On a value added basis, the relative importance of trans-Tasman trade is slightly lower, reflecting the size of trade in intermediate goods between the two countries
- trade in goods not subject to permanent or special exemptions from the TTMRA as a share of total trade has increased since the introduction of mutual recognition in the mid-1990s and currently cover over four-fifths of the total value of trans-Tasman trade (figure 4.1)
- the diversity of goods traded across the Tasman offers consumers a wide choice of items available for sale (figure 4.2). The Australian Food and Grocery Council (sub. 29) submitted that mutual recognition opened the market to new products, including vitamin waters and energy drinks.

### Views of study participants

The views of most study participants suggest that the Mutual Recognition Agreement (MRA) and the TTMRA have delivered benefits and are generally working well for goods covered by the schemes. For example, the Department of Industry and Science (sub. 46, p. 1) stated that 'the mutual recognition system as it relates to goods is well established, and the Department ... has not been made aware of significant issues'.



Figure 4.1 Trans-Tasman trade in goods not subject to exemption<sup>a</sup>

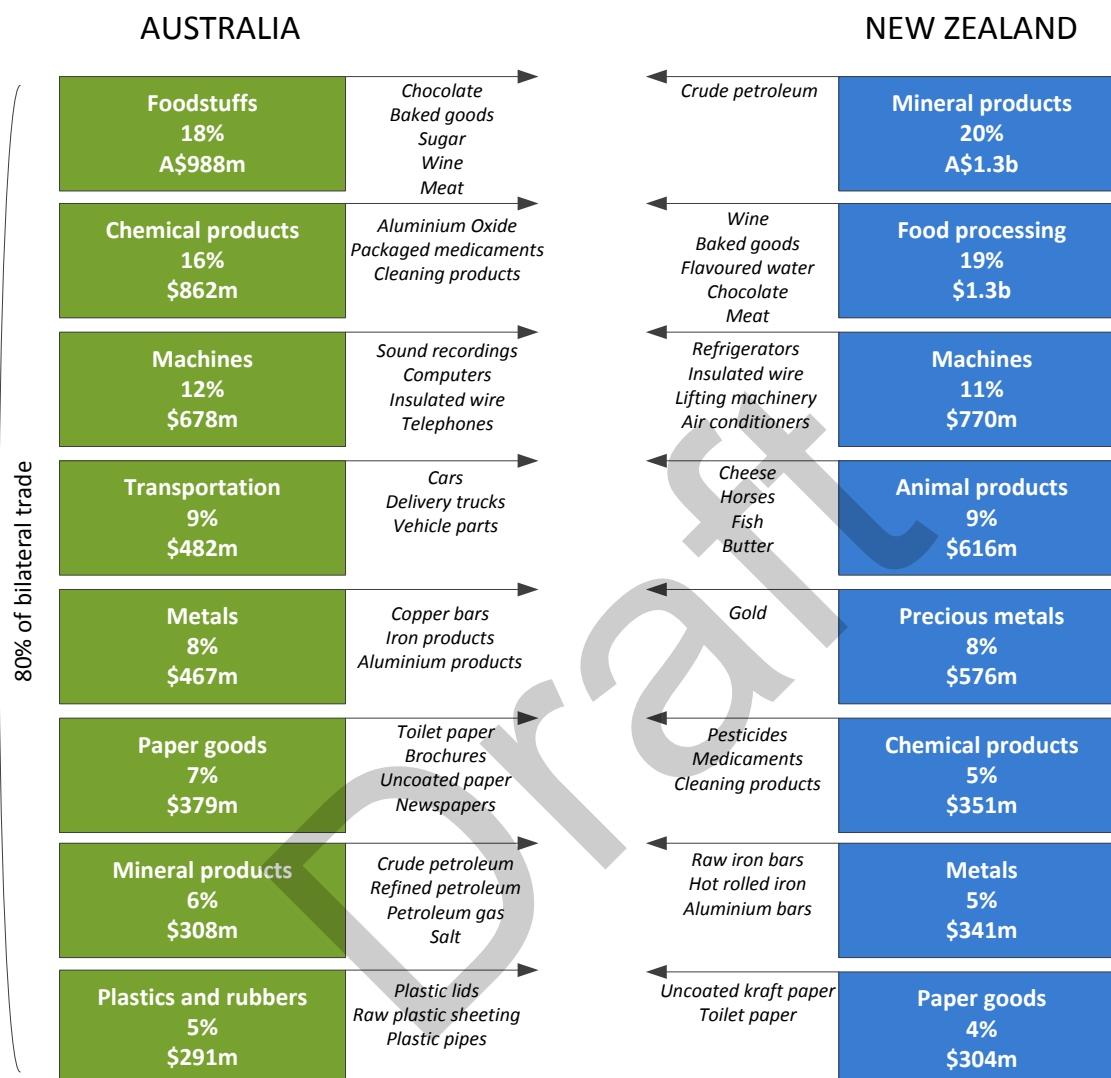
<sup>a</sup> This figure represents the value share of total trans-Tasman trade (exports and imports from Australia to New Zealand) in commodity groups not subject to exemption from the TTMRA. Trade in the following exemption categories is excluded: chemicals; gas appliances; risk-categorised food (the exemption for which was narrowed in 2011); firearms and explosives; radiocommunications devices; therapeutic goods (including pharmaceuticals, medicaments and therapeutic devices); and specific consumer goods which were subject to an exemption until 1999.

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

Similar feedback was received from other jurisdictions. For instance, the NSW Department of Premier and Cabinet (sub. 51, p. 1) submitted that both the MRA and TTMRA are operating effectively and ‘extend economic and social opportunities for businesses and individuals in NSW and other jurisdictions by broadening access to goods and services and reducing associated regulatory costs’.

Business groups were also broadly supportive of how the schemes were operating in goods markets. The Business Council of Australia (sub. 45, p. 3) noted the importance of the mutual recognition schemes to the economy and stated that ‘the experience of some Business Council members is that mutual recognition works well, especially in sectors that have relatively uniform standards already, or efficient regulators’. Similarly, the Australian Food and Grocery Council (sub. 29, p. 2) strongly supported both schemes ‘as the principal mechanism to promote economic integration through the removal of jurisdictional barriers, and further as drivers of regulatory reform’.

**Figure 4.2 Bilateral trade between Australia and New Zealand, 2012<sup>a</sup>**  
Per cent of total bilateral trade, and value of trade (in AUD) by product type<sup>b</sup>



<sup>a</sup> Based on Harmonised System (HS) four digit codes. <sup>b</sup> Source data in US dollars, currency conversion based on average exchange rate for year ended 30 June 2012 (ATO 2012).

Data source: Observatory of Economic Complexity, using data from BACI International Trade Database.

However, a small number of study participants raised concerns about specific goods or related laws.

- The NSW Department of Premier and Cabinet observed that other Australian jurisdictions have introduced requirements for suppliers of electrical articles to be registered. It considered that this removes the utility of mutual recognition and places an additional requirement on suppliers (sub. 51). Energy Safe Victoria (sub. 26) noted that this requirement is part of the Electrical Equipment Safety Scheme being developed by the Electrical Regulatory Authorities Council. The scheme is mandatory

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in some states and is slowly being implemented nationally in Australia. Energy Safe Victoria recommended that all states adopt the Electrical Equipment Safety Scheme.

- Mondelez (sub. 2) commented that there are different requirements for product weight declarations in Australia and New Zealand. In Australia, manufacturers may choose to measure the weight of their product using either the ‘average quantity system’, which was adopted in Australia in 2010, or the previous ‘minimum contents’ regulations. Australian manufacturers must identify if they have chosen the average quantity system by including an ‘e’ mark adjacent to the weight declaration. Products from New Zealand all comply with the average quantity system, but do not include an ‘e’ mark.
- Mondelez (sub. 2) was also concerned that dietary supplements can be manufactured in, or transhipped through, New Zealand and exported to Australia, when these products cannot be manufactured and sold in Australia. Mondelez proposed either abolishing the NZ Dietary Supplements Regulations or permitting the manufacture of dietary supplement products in Australia.
- Graham Mackney (sub. 30) was concerned about New South Wales and Queensland licensing for the harvesting and distribution of kangaroo meat. These only allow harvested kangaroos to be sold to a registered site in the state in which they are harvested. As a result, harvesters in a border area cannot consolidate their processing operations in a single state and export across the border.

These kinds of specific issues are to be expected from time to time. The Department of Industry and Science — which is responsible for administering goods-related aspects of the schemes at an Australian Government level — observed that ‘issues with mutual recognition are raised on a case-by-case basis and are generally to do with specific products, in specific States and/or Territories and not with the system itself’ (sub. 46, p. 2).

The small number of concerns raised with the Commission in this review are not indicative of systemic problems with the operation of the mutual recognition schemes and do not constitute a case for changes in the way that mutual recognition for goods operates. This does not mean that these issues are irrelevant. Rather, if warranted, they can typically be dealt with through mechanisms within the schemes, such as by referring a goods standard to a Ministerial Council to make a determination (chapter 7). In other cases, alternative forms of regulatory cooperation may be a more efficient device for handling irritants in the day-to-day operation of mutual recognition.

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## Interaction with other forms of regulatory cooperation

Mutual recognition is often an impetus for closer cooperation between regulatory bodies. Feedback from study participants indicates that this has been the case under the MRA and TTMRA, and is a factor supporting the smooth operation of the schemes. For example, the NZ Government (sub. 47, p. 3) commented that the TTMRA is a powerful driver of regulatory cooperation because:

Jurisdictions are effectively compelled to consider the regulatory regimes of other participating jurisdictions, due to the regulatory competition effects created by the TTMRA.

Similarly, the Australian Department of Foreign Affairs and Trade (sub. 48, p. 1) noted that:

The TTMRA has driven deeper levels of regulatory policy coordination and integration between Australia and New Zealand. In this way it has been a central instrument for both governments to advance the long-standing shared aim of a seamless regulatory environment and a Single Economic Market for business, consumers and investors on both sides of the Tasman.

There has also been a high degree of coordination and cooperation between Australia and New Zealand in developing joint standards. Standards include technical standards (product related) and those relating to conformance assessment procedures (testing and other methods). The NZ Government (sub. 47) noted that there is a high level of consistency between the two countries, with joint trans-Tasman standards comprising 82 per cent of the New Zealand standards catalogue. Standards Australia (sub. 13, p. 1) observed that:

... the TTMRA is an effective mechanism to drive regulatory cooperation and the SEM [Single Economic Market] Agenda. Joint standards development supports the range of regulatory measures used to enhance trade across the Tasman and promotes harmonisation.

Other examples of regulatory cooperation supporting the operation of the schemes for covered goods include:

- Australia and New Zealand sharing a joint system of food standards, which is served by Food Standards Australia New Zealand, a bi-national agency for the development of food standards
- Australian and NZ energy efficiency regulators working together under the Equipment Energy Efficiency (E3) Programme. The E3 Programme aims to align product energy efficiency measures across Australia and New Zealand.

In summary, the Commission has reached the conclusion that mutual recognition in the goods markets operates well for those goods covered by the schemes. As to be expected, some irritants in the schemes orderly functioning were identified, but these are not indicative of systemic problems and, where appropriate, are capable of being handled through existing mutual recognition procedures or through other forms of regulatory cooperation.

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However, there are grounds to be concerned that the value from the schemes is slowly being eroded due to some regulators not implementing mutual recognition as required (chapter 5), weak oversight (chapter 7) and an increase in the number of goods and related laws explicitly kept outside the scope of the schemes through permanent exemptions. Whether and how to expand the scope of goods covered by mutual recognition is discussed in the following section.

## 4.2 Scope of mutual recognition for goods

### Permanent exemptions

As detailed in chapter 3, a range of goods and related laws have a permanent exemption from the mutual recognition schemes. A number of exemptions apply under both the MRA and TTMRA, including exemptions for firearms and dangerous weapons, fireworks, gaming machines, pornographic material and laws relating to ozone protection and quarantine and endangered species. However, there are more exemptions under the TTMRA than the MRA. In some cases, these are specific to one jurisdiction, for example, South Australia's beverage container deposit scheme and Tasmanian laws relating to abalone, crayfish and scallops.

The Commission's previous review concluded that these exemptions should be retained on environmental protection and public safety grounds (PC 2009). Likewise, no participants in this review advocated for changes to these exemptions, and the Commission has not been provided with evidence indicating that these exemptions are no longer appropriate. Accordingly, the Commission does not propose any changes to the scope and coverage of the schemes by removing or narrowing these permanent exemptions.

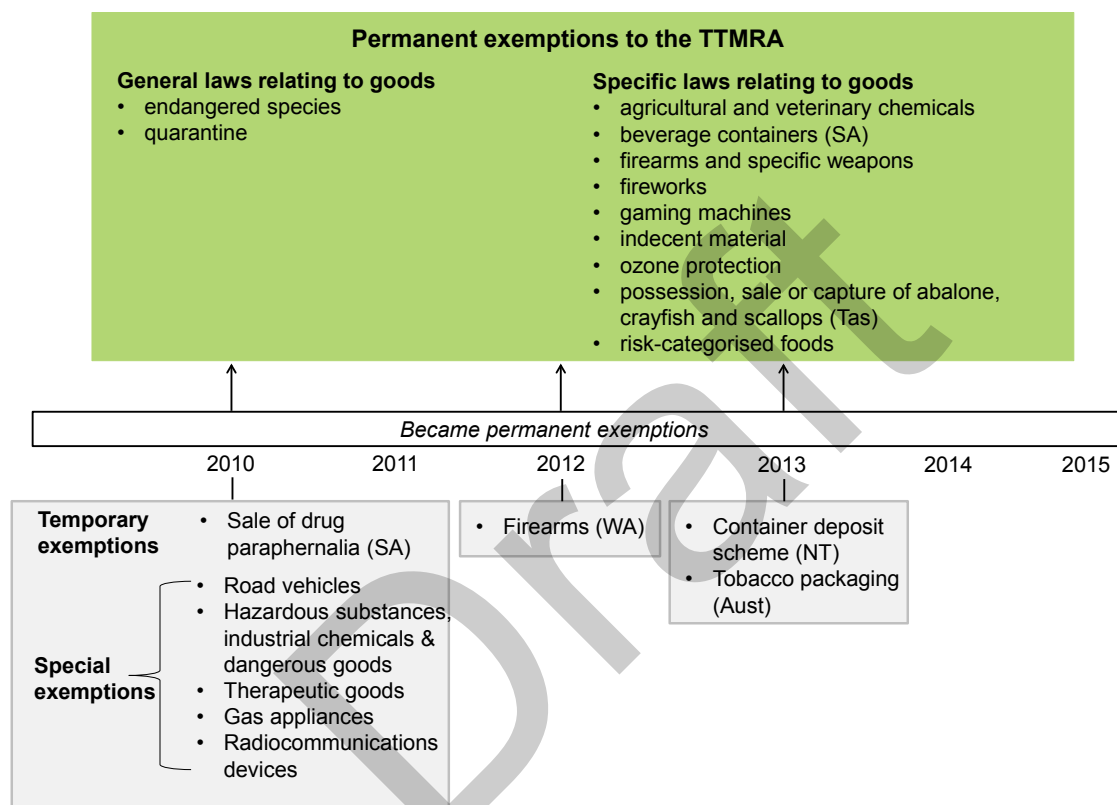
However, the number of goods subject to a permanent exemption has grown since the last review. Most notably, in 2010 governments added five categories of goods to the list of permanent exemptions under the TTMRA, covering:

- road vehicles
- hazardous substances, industrial chemicals and dangerous goods
- therapeutic goods
- gas appliances
- radiocommunications devices.

Prior to 2010, these goods had been classified as special exemptions, which had to be renewed every 12 months, because there was an expectation that efforts to achieve mutual recognition would ultimately be successful. Over the past five years, a number of permanent exemptions have been added to the TTMRA, such as South Australia's legislation prohibiting the sale of drug paraphernalia and the Northern Territory container deposit scheme (figure 4.3).

This section provides a brief discussion on the permanent exemptions for risk categorised foods and ozone protection. The section then focuses on the permanent exemptions for goods that have been added since the Commission's 2009 review — all TTMRA exemptions — and considers whether these could potentially be narrowed or removed.

**Figure 4.3 Existing and new permanent exemptions to the TTMRA, over the period 2010-2015**



## Risk-categorised foods

Risk-categorised foods are items assessed by each country as posing a high or medium risk to public safety, and are therefore subject to additional control measures (such as testing). They are exempted from the TTMRA.

In its previous review, the Commission recommended narrowing the permanent exemption for risk foods to only those items where harmonisation of risk-food lists and equivalence of import-control measures was not achievable in the long term.

The governments accepted this recommendation and worked together to reduce the number of foods on the risk-food list. Australia now has five categories of risk-categorised foods which are permanently exempted from the TTMRA. These are beef and beef products (for bovine spongiform encephalopathy (BSE) risk), cassava chips, cooked pig meat, raw milk

cheese and brown seaweed. New Zealand has two categories — beef and beef products (for BSE risk), and bivalve molluscan shellfish (NZ Government, sub. 47).

The governments have collectively stated that the remaining exemptions are for goods where harmonisation of risk-food lists, and equivalence of import-control measures, are not likely to be achievable in the long term (CJRF 2014b). In light of this, the NZ Government (sub. 47) expressed the view that it would be more productive for Australia and New Zealand to focus future efforts on harmonising risk assessments for products subject to quarantine and biosecurity regulations. This constitutes a much wider category of products, and for products on the risk-food list — such as pig meat — it is Australia's quarantine requirements which are of greatest concern to New Zealand.

Despite sharing some similarities, Australia and New Zealand have different environments and biosecurity risks. These differences limit the scope for mutual recognition and rule out options such as adopting the same quarantine standards for imports from third countries and removing quarantine restrictions on a trans-Tasman basis (PC and NZ PC 2012).

The Australian and NZ Productivity Commissions have previously recommended that, where cost effective, quarantine and biosecurity agencies in Australia and New Zealand should continue to develop common systems and processes, and enhance their joint approach to risk analysis (PC and NZ PC 2012).

The governments supported this recommendation and highlighted the well-established process for trans-Tasman cooperation on biosecurity matters that takes place through the Consultative Group on Biosecurity Cooperation (box 4.1). They noted that Australia and New Zealand have agreed, where possible, to recognise each other's systems to manage risk, remove unnecessary trans-Tasman biosecurity controls, and implement a consistent approach to assessing biosecurity risks and managing imports from third countries (Australian and NZ Governments 2014).

#### **Box 4.1 Consultative Group on Biosecurity Cooperation**

The Consultative Group of Biosecurity Cooperation (CGBC) was established in 1999. It is co-chaired by a senior official from each country and reports to the relevant Ministers in Australia and New Zealand. The CGBC usually meets annually and focuses on identifying differences between Australian and NZ approaches which may impede trade, and how to harmonise approaches where possible to facilitate trade. Examples of regulatory cooperation by the CGBC include:

- the harmonisation of regulatory controls and the sharing of risk assessments for the import of pet cats and dogs from third countries
- for horses and equine influenza, Australia and New Zealand allow shared transportation for the imports of horses to both countries to manage third country biosecurity risks
- the sharing of research findings on heat inactivation of biosecurity pathogens to support common requirements for imports from third countries (for example, infectious bursal disease in poultry meat).

*Source:* NZ Government (sub. 47).



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Given that there are few remaining products on the risk foods list, some of which are unable to be exported because of biosecurity restrictions, it is unlikely that work to further narrow the list of permanently exempted risk foods would result in a significant benefit. The Commission supports continued efforts by governments to facilitate trade by removing unnecessary trans-Tasman biosecurity controls.

## Ozone-protection legislation

Ozone-protection legislation is exempt from both the MRA and the TTMRA. In 2009, the Commission recommended that the permanent exemption for ozone-protection legislation be removed from the MRA. It also recommended that governments consider removing the ozone-protection exemption from the TTMRA, subject to both countries aligning their respective regulatory systems while ensuring consistency with international obligations.

In response, governments supported removing this exemption from the MRA, following completion of the phase-out plans for ozone-depleting substances within Australia. However, removal of the TTMRA exemption was not supported because of different phase-out schedules for ozone-depleting substances (CJRF 2014b, p. 19).

Both the Australian and NZ Governments have reiterated that the permanent exemption is warranted because of the differing phase-out schedules for the two countries (Australian Department of the Environment, sub. 10; NZ Government, sub. 47). Moreover, Australia has in recent years implemented emission control measures in addition to its Montreal Protocol obligations, and these differ from those adopted in New Zealand (Department of the Environment, sub. 10).

However, the Australian Department of the Environment said that it would be willing to investigate removing the TTMRA exemption if a forthcoming review of the relevant Australian legislation leads to changes in the management of synthetic greenhouse gases which brings it more in line with New Zealand.

The NZ Government said that it was open to reviewing the permanent exemption once the phase-out programs of the two countries are completed. But, while the penultimate step in Australia and New Zealand's phase-out schedules will occur in 2016 and 2015 respectively, the Montreal Protocol does not require countries to complete their phasing out of hydro chlorofluorocarbons until 2030.

The Australian Department of the Environment was doubtful that there would be a net benefit from accelerating the phase-out programs of both countries so that the TTMRA exemption could be removed more promptly.

To change the approach to the phase out in Australia and New Zealand would require significant redesign and would affect major gas and equipment importers in both countries. Changes to align the systems are unlikely to produce significant benefits as both countries will have phased out 99.5% of HCFCs [hydro chlorofluorocarbons] by 2016, whereas the cost of making changes at this late stage would be significant. (sub. 10, p. 1)



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The Commission supports removing the TTMRA exemption when the Australian and NZ phase-out programs are completed, and encourages governments to consider narrowing the exemption before then if regulatory changes make this a possibility. However, due to the substantial phase out of hydro chlorofluorocarbons in both countries already in prospect by 2016, it is unlikely that the potential benefits from applying mutual recognition would outweigh the costs involved in bringing forward mutual recognition before the phase-out programs are completed in 2030.

## Road vehicles

As noted above, a TTMRA special exemption applied to road vehicles up until 2010. In its previous review, the Commission recommended that governments reinvigorate their efforts to bring road vehicles within the scope of the TTMRA, as well as to act on opportunities to harmonise vehicle standards and associated procedures at a global level. Governments rejected this recommendation because of the barriers to standard harmonisation, and instead shifted road vehicles to a permanent exemption in 2010.

There are two key differences between Australian and NZ vehicle regulations which have been a barrier to removing the permanent exemption.

- New Zealand accepts vehicles complying with other countries' domestic standards, such as US and EU standards. In contrast, Australia requires certification to Australian Design Rules (box 4.2).
- New Zealand allows the importation of second-hand vehicles, whereas Australia has a number of regulations in place to significantly restrict such imports.

The Australian Department of Infrastructure and Regional Development (DIRD, sub. 54) argued that the TTMRA permanent exemption should be retained. It was concerned about New Zealand's acceptance of the domestic standards of other countries.

The NZ Government (sub. 47) also supported the retention of the permanent exemption due to Australia's different regulatory approach, but indicated that it was open to working with Australia to reduce the scope of the permanent exemption. It noted that there are also differences in frontal impact and emission standards between the two countries.

In essence, the permanent exemption for road vehicles exists because Australia has been unwilling to accept vehicle standards set by other countries and at an international level. (New Zealand has unilaterally recognised Australian vehicle standards as meeting its requirements).

#### Box 4.2 Australia's motor vehicle standards

Under the *Motor Vehicle Standards Act 1989* (Cwlth) and the Motor Vehicle Standards Regulations 1989, Australia requires road vehicles to meet national design and performance standards — Australian Design Rules (ADRs) — before they can be supplied to the Australian market. The ADRs set requirements for vehicle safety, environmental performance and anti-theft protection in line with community expectations and international standards.

Since the mid-1980s, the ADRs have been progressively harmonised with international standards which are developed by the United Nations World Forum for Harmonisation of Vehicle Regulations. This is the key body through which international harmonisation of vehicle standards occurs. Both Australia and New Zealand are parties to the UN's 1958 and 1998 agreements on standards development and mutual recognition of approvals.

In 2010, Australia formally 'applied' 29 UN regulations. Application of a UN regulation under the 1958 Agreement means that a contracting party must maintain alignment of its domestic standard with the regulation. As a minimum, the UN regulation needs to be an allowable alternative to any domestic requirements. To meet this obligation, the ADRs allow for automatic acceptance of the latest versions of the UN regulations should an applied UN regulation be updated. This means that Australia can immediately accept products built to the latest international standards.

The Australian Government recently accelerated Australia's harmonisation process by applying two UN regulations in 2014 (for front fog lights and rear-vision mirrors), as part of a medium-term program to apply a further 17 UN regulations. The Government has also embarked on a program to remove Australian-specific requirements from the ADRs, where they are no longer relevant and cannot be justified.

Australia is also taking an active role in the development of International Whole Vehicle Type Approval, which will lead to greater harmonisation and more vehicles being approved for entry into Australia based on requirements at a whole-of-vehicle level, rather than at a component level. International Whole Vehicle Type Approval is expected to begin in 2016.

Source: DIRD (sub. 54).

Considerable progress, however, has been made in overcoming these barriers in recent years. The Department of Infrastructure and Regional Development (sub. 54, p. 4) noted that Australia has focused on harmonising with international standards because this is seen to be less costly than the NZ approach of also recognising the standards of other countries.

... [It] avoids any further administrative burden being placed on governments and manufacturers alike, in having to maintain expertise and processes for a number of parallel approval options. More fundamentally, such options would require Australia to accept local standards over which it has no influence (unlike UN regulations) under a take-it-or-leave it arrangement. This may prevent Australia from mandating internationally agreed UN vehicle regulations, which may in many cases result in significant opportunity cost in terms of net benefits forgone in Australia.

Further, in September 2014, the Australian Government released a discussion paper on options to reform the *Motor Vehicle Standards Act 1989* (Cwlth). This included potential ways of further harmonising Australian vehicle requirements with international standards, and reducing barriers to the importation of second-hand vehicles (DIRD 2014).

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More generally, individual country vehicle standards are converging on international norms. For example, APEC countries agreed in 2005 to move towards harmonisation with UN regulations. Major vehicle producing nations such as Japan and the United States are formally part of this program (DIRD, sub. 54). However, progress to date has been slow and, without renewed vigour, country-specific standards are likely to remain for the foreseeable future.

The Commission considers that further efforts to harmonise road vehicle regulation with international standards would be worthwhile in their own right, and ultimately would allow the inclusion of road vehicles within the scope of the TTMRA. However, without wider action, removing the TTMRA exemption on road vehicles may encourage imported cars from places such as Japan to be routed through New Zealand in order to bypass Australia's more restrictive standards.

Clearly, this would not be the most efficient means of increasing competition and choice in the Australian market. Nor is it an argument to maintain the permanent exemption. Rather, the incentive to 'shop-ship-and-hop' is indicative of the much larger gains that Australia could reap from further opening its market to new and used vehicles from countries other than New Zealand.

The Commission's 2014 automotive industry inquiry recommended that the Australian Government progressively relax the restrictions on the importation of second-hand vehicles and remove a \$12 000 duty on second-hand vehicles from the Customs Tariff (PC 2014a). A similar recommendation was made in the recent Competition Policy Review (Harper et al. 2015). The experience of New Zealand indicates that the importation of second-hand cars has put downward pressure on used vehicle prices and increased consumer choice, while not compromising safety (box 4.3).

In response, the Australian Government stated that the Commission's recommendation would be considered in a review of the Motor Vehicle Standards Act. The Government is yet to announce details of how it intends to reform this legislation, but it has recently stated that it favours relaxing restrictions on the parallel importation of new vehicles (Briggs 2015). In relation to second-hand vehicle imports, the government's response noted that it does not support removing the \$12 000 duty.

The Commission supports the removal of Australia's restrictions on the importation of used vehicles and parallel imports of new vehicles from any country, subject to requiring such vehicles to meet trusted international standards and have an accurately documented history. This would place downward pressure on vehicle prices in Australia and lead to greater consumer choice (PC 2014a).

### Box 4.3      **Second-hand vehicle imports in New Zealand**

New Zealand reduced its vehicle import tariffs from the mid-1980s and removed all tariffs on passenger and light commercial vehicles (excluding motor homes and ambulances) in 1998.

Vehicle imports grew strongly, particularly imports of second-hand vehicles. By 2002, used imports represented about 68 per cent of all vehicle registrations, compared with less than 10 per cent before 1986. Most of the used imports were from Japan.

Pawson (2012, p. 2) reported that the entry of Japanese used vehicles 'gave New Zealanders access to well-priced late model cars, further increasing the country's high level of car ownership'. A survey of prices for second-hand Toyota Corollas found that vehicles of similar mileage were on average almost 20 per cent cheaper in New Zealand than in Australia, although the survey had a limited sample size and data were from online car advertisements, and so would have differed from actual sale prices.

#### **Vehicle entry requirements**

Before they can be registered for road use, second-hand vehicles entering New Zealand for the first time must pass:

- border inspection (checks for vehicle and importer identity, odometer reading, and any significant observable structural damage)
- biosecurity and customs clearance (vehicles are barred from entry by customs only if they are found to have missing or fraudulent odometers)
- entry certification (to demonstrate compliance with applicable NZ vehicle standards).

The entry certification process includes a physical inspection as well as the sighting of documentary evidence provided by the importer, showing compliance with NZ legal requirements. A warrant of fitness (light vehicles) or certificate of fitness (passenger service, rental and heavy vehicles) is issued to indicate that the vehicle meets required safety standards and must be maintained via annual or six-monthly inspections (depending on vehicle age).

#### **Safety performance**

In 2005, the Monash University Accident Research Centre investigated the relative safety of imported used vehicles and vehicles sold new in New Zealand. It found that used imports were as safe as those sold new when compared on a year-of-manufacture basis, and that the difference in crashworthiness performance between an average used imported vehicle and an average new vehicle was due to the date of manufacture of the used vehicle rather than its previous use in its country of origin.

More recent (2013) research from the same centre found that improvements in crashworthiness have slowed since 2008, suggesting that the gap in crashworthiness performance between new vehicles and used imported vehicles may be narrowing.

(continued next page)

**Box 4.3** (continued)**Consumer protection and information standards**

Tampering with odometer readings of imported used vehicles was a noted problem in New Zealand following removal of second-hand vehicle import barriers from the mid-1980s. The NZ House of Representatives Commerce Committee reported that there was 'little doubt that substantial proportions of used Japanese imported vehicles have their odometer tampered with' (2002, p. 3). Estimates by industry and consumer groups of the extent of such tampering mostly ranged from 10 to 30 per cent of all imported used vehicles, but were as high as 60 to 70 per cent. The NZ Government subsequently passed the *Motor Vehicle Sales Amendment Act 2010* (NZ) to increase consumer protection and information in relation to motor vehicle sales.

All used vehicles for sale in New Zealand must now display a Consumer Information Notice to assist buyers to make an informed purchasing decision. Imported used vehicles face an additional requirement to display the year of first registration overseas, country of last registration before import, and whether the vehicle was recorded 'damaged' at the time of import.

Source: PC (2014a).

**Hazardous substances, industrial chemicals and dangerous goods**

Hazardous substances, industrial chemicals and dangerous goods<sup>11</sup> was a TTMRA special exemption which was converted to a permanent exemption in 2010. The 2009 review noted that the key regulatory differences underpinning the special exemption for these goods related to requirements for:

- notification and assessment of industrial chemicals
- industrial chemical classification, labelling, packaging and safety data sheets.

In relation to regulation for notification and assessment of industrial chemicals, the Australian Department of Health and Ageing argued that there were a number of barriers to mutual recognition between Australia and New Zealand. These included that New Zealand takes a risk-based approach to chemical assessment and has a self-reporting regime, whereas Australia assesses all new chemicals and priority existing chemicals, both hazardous and nonhazardous (Department of Health and Ageing 2008). In addition, the Australian National Industrial Chemicals Notification and Assessment Scheme (NICNAS) is a chemical-entity based scheme (that is, it assesses the individual ingredients found within products, rather than the end-use product) whereas New Zealand assesses products as well as chemical entities.

<sup>11</sup> Collectively termed 'industrial chemicals' in this chapter, these products include: dyes; solvents; adhesives; laboratory chemicals; chemicals used in mineral and petroleum processing, refrigeration, printing and photocopying; paints and coatings, as well as chemicals used in the home, such as weed killers, cleaning products, cosmetics and toiletries.

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Another key difference was that New Zealand had commenced implementation of the Globally Harmonised System of Classification and Labelling of Chemicals (GHS). In 2006, the Australian Safety and Compensation Council had proposed that the GHS be adopted, but progress finalising this proposal had been slow (PC 2009).

Given these circumstances, the Commission recommended in its 2009 review that governments undertake a cost–benefit analysis before converting these products to a permanent exemption. It suggested that this analysis could compare a permanent exemption with a continuation of the special exemption, and possibly combine these options with the application of mutual recognition to selected products, such as cosmetics.

In the 2009 review, cosmetics and toiletries was identified as a potential area that may be suitable to mutual recognition due to strong support from industry, however such an approach was strongly rejected by the Department of Health and Ageing (PC 2009). Accord Australasia — the industry association for the cosmetics industry — claimed that there would be significant benefits from applying mutual recognition for cosmetics and that this would be feasible because the regulations were closely harmonised between Australia and New Zealand (Accord Australasia 2008). The Commission is not aware of a cost–benefit analysis being carried out and so it is unclear why governments decided not to consider mutual recognition for cosmetics.

#### *Developments since the previous review*

There have been a number of recent policy developments in both Australia and New Zealand that are likely to reduce the differences in regulatory approaches taken by the two countries for industrial chemicals.

Notably, Australia has now adopted the GHS, with all workplace chemicals to be covered by this system from late 2016. In addition, the NZ Government is reviewing its workplace health and safety regime and hazardous substances regulations. The NZ Government (sub. 47, p. 7) noted that:

The Health and Safety Reform Bill is before Parliament and draws extensively on the model Australian law. Once the reforms are bedded in in New Zealand and in the various Australian states, it should be possible to look at removing or reducing the scope of the permanent exemption. However, it would make sense for the ... regulations to be examined prior to final enactment or promulgation to ensure that there are no unnecessary impediments to the movement of hazardous substances between Australia and New Zealand.

In Australia, NICNAS has also recently been reviewed (box 4.4). As a result, the *Industrial Chemicals (Notification and Assessment) Act 1989* (Cwlth) will be amended to move to a more proportionate risk-based framework to assess industrial chemicals, and to develop streamlined assessment processes for new and existing chemicals, including using existing international approvals where appropriate (Nash 2015). These reforms will aim to reduce the regulatory burden of the industrial chemicals regulatory framework and remove unnecessary barriers to the entry to market of lower-risk chemicals (NICNAS 2015).



The Government is also proposing that the Australian Competition and Consumer Authority take responsibility for administration of the Cosmetic Standard 2007. Under this arrangement NICNAS would continue to regulate the introduction of industrial chemicals for use in cosmetics, but would not regulate the end-use cosmetic product (Australian Government 2014e). Moreover, the proposed reforms to NICNAS will significantly streamline regulatory processes associated with the introduction of chemicals used in cosmetics. Under the preferred option (box 4.4), the number of cosmetics chemicals likely to be assessed pre-market by NICNAS is expected to be reduced to around 0.1 per cent of total cosmetic introductions, with the majority of these chemicals being introduced through the industry self-assessment and notification channel (Australian Government 2014e).

#### **Box 4.4      Review of the National Industrial Chemicals Notification and Assessment Scheme (NICNAS)**

Commencing in 2011, the Australian Government Department of Health and Ageing and the Department of Finance and Deregulation undertook a review of NICNAS to investigate 'how the regulatory settings could be improved to enhance both the competitiveness of the Australian chemical industry, and public health and environmental outcomes' (Australian Government 2014e, p. 11).

Three main problems were identified with the existing regulatory framework for the notification and assessment of industrial chemicals:

- the assessment framework is rule-based and does not sufficiently align assessment effort with risk probability
- the legislative requirements create inefficient regulatory processes which cause unnecessary burdens on industry for no improvement in outcome, and
- there are inconsistencies and uncertainties in regulatory coverage which cause misunderstandings. (Australian Government 2014e, p. 30)

A regulation impact statement has been prepared outlining options to reform NICNAS based on the review's findings. The preferred option:

- introduces a three-tiered classification system for industrial chemicals, according to risk (based on hazard and exposure thresholds)
- focuses pre-market assessment on new chemicals with an anticipated higher risk and allows immediate introduction of new chemicals that pose a low risk following self-assessment and notification
- streamlines pre-market risk assessment of higher-risk chemicals by utilising international hazard or exposure assessments
- NICNAS would continue to be able to make recommendations to risk management agencies, and/or impose post-market regulatory controls for both new and existing chemicals.

Source: Australian Government (2014e).

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Given the above developments, Accord Australasia (sub. 32) questioned why industrial chemicals, and in particular cosmetics products, should continue to be exempted from the TTMRA. Similarly, the NZ Government (sub. 47, p. 7) stated that:

... there would be benefit in New Zealand and Australia formally examining harmonisation of hazardous substances regulation in the immediate future so as to facilitate removal of the current permanent exemption leading to mutual recognition.

While Australia has now adopted the GHS, the Australian Department of Health previously indicated that this would not necessarily mean the exemption for hazardous substances, industrial chemicals and dangerous goods could be removed. In the 2009 review, it stated:

While the GHS will help to bring about international harmonisation in regard to chemicals classification and some elements of labelling, it is not an objective of the GHS to bring about harmonisation in the overall approach to chemical regulation. The GHS is specifically not intended to harmonise risk assessment procedures or risk management decisions and therefore regulatory approaches between countries, given the varying national priorities and chemical use situations that may exist, will continue to differ. (Department of Health and Ageing 2008, p. 2)

In converting the special exemption for hazardous substances, industrial chemicals and dangerous goods to a permanent exemption in 2010, participating parties agreed that regulatory cooperation would continue (Australian Government 2010b). The NZ Government noted that the intention was to review the special exemption once chemicals regulation in Australia was harmonised with the GHS (sub. 47). However, despite adoption of the GHS in Australia, no work program has been set up to facilitate mutual recognition of chemicals and hazardous substances. NICNAS indicated in its 2011-12 annual report that regulatory cooperation with New Zealand relating to mutual recognition of industrial chemicals classification, chemicals regulation and the regulation of cosmetics products had been assigned a 'low priority' and not progressed (NICNAS 2012). The NZ Government stated that regulatory cooperation in this area has 'slipped off the radar' (sub. 47).

Given recent regulatory changes, including Australia's move to a more risk-based approach to assessing chemicals, there is a sound case to reactivate cooperative efforts and consider removing the permanent exemption for hazardous substances, industrial chemicals and dangerous goods. In addition, there is a case to immediately narrow the scope of the permanent exemption to exclude cosmetics and toiletries.

## Therapeutic goods

In the 2009 review, the Commission recommended that therapeutic goods be converted from a special exemption to a permanent exemption if it was not possible to achieve a proposed trans-Tasman regulatory regime within 12 months. This turned out to be the case and therapeutic products were made a permanent exemption in 2010.



While negotiations for a joint therapeutic products regime continued until 2014, the Australian and NZ Governments ultimately abandoned the proposal in 2014 (box 4.5). In announcing their decision, the two governments sought to highlight work on less ambitious forms of cooperation, including a new information sharing agreement between their regulators and the mutual recognition of manufacturers' audits (Dutton and Coleman 2014).

#### **Box 4.5      Efforts to establish a Trans-Tasman regulatory regime for therapeutic products**

Australia and New Zealand signed a treaty to establish a joint regulatory scheme for therapeutic products and a joint therapeutics agency to oversee the scheme in 2003. Progress came to a halt in 2007, however, when the NZ Government announced that it would not be proceeding with the legislation required to implement the scheme. This was a result of public opposition in New Zealand to the more stringent controls that the scheme would have applied to complementary medicines (natural health products) in order to align with Australia's stricter approach to regulating such products (PC 2009).

Efforts to establish the scheme were revived in 2011, with the signing of a Statement of Intent by the Australian and NZ Prime Ministers. This reaffirmed the two countries' commitment to establishing the joint agency within five years (ANZTPA 2012). It also acknowledged that New Zealand would introduce a separate scheme to regulate certain natural health products, essentially carving out these products from the joint scheme.

A Ministerial Council was established to oversee implementation and some harmonisation activities were completed. However, in 2014 Australian and NZ health ministers announced that, 'following a comprehensive review of progress and assessment of the costs and benefits to each country of proceeding' (Dutton and Coleman 2014, p. 1), they would cease efforts to establish the joint regulator.

Given these past difficulties in reconciling differences between the regulatory approaches adopted by Australia and New Zealand, the Commission considers that the permanent exemption should remain for therapeutic products. The Commission supports other forms of cooperation (such as those identified by health ministers) to align approaches and lower barriers to trade where possible.

### **Gas appliances**

Gas appliances were converted from a special exemption to a permanent exemption from the TTMRA in 2010. The main reason for this was that differences in liquefied petroleum gas (LPG) composition between the two countries led to safety concerns about mutual recognition of some LPG appliances. Australia uses LPG that is predominantly propane, while New Zealand uses LPG that is a mixture of propane and butane. Some LPG appliances built to burn propane-based LPG become hazardous when used with propane-butane LPG, and vice versa.

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Participants in this review supported maintaining the permanent exemption (Energy Safe Victoria, sub. 26; Master Plumbers Association of Queensland, sub. 31; Master Plumbers and Mechanical Services Association of Australia, sub. 33). Energy Safe Victoria (sub. 26, p. 1) reiterated the difference between Australia and New Zealand gas and said that ‘the permanent exemption of gas appliances should remain in place as a result of the differences’.

Given the fundamental differences between LPG supply in Australia and New Zealand and the safety risks posed by mutual recognition for these products, the Commission considers that the permanent exemption for gas appliances should continue to apply.

## Radiocommunications devices

Radiocommunications devices operate via radio waves within the radiofrequency spectrum. They include wireless computer networks, mobile and cordless phones, radios, electronic paging devices and some therapeutic devices.

Regulation of the use of the radio spectrum is necessary to ensure that different sections of the spectrum are allocated for specific purposes, and that signals from different devices do not interfere with one another. Interference between radiocommunications devices can reduce the performance of these devices, but also has the potential for severe consequences, particularly when the health and safety of people are dependent on the functioning of these devices.

Because of the different historical paths of Australian and NZ spectrum allocation and use, the Commission previously recommended that a permanent exemption should be considered for short-range and spread-spectrum devices, once opportunities for harmonisation of standards were exhausted. It also recommended that a special exemption remain where there was a possibility of harmonisation of spectrum allocation (including for the high frequency citizen band, in-shore boating devices and digital electrical cordless telephones) and for devices likely to become obsolete in the near future (PC 2009).

The governments, however, applied a permanent exemption to all radiocommunications devices on the grounds that ‘there are adequate alternative mechanisms in place to facilitate further efforts to align regulatory approaches in the field of radiocommunications’ (CJRF 2014b, p. 18). Against that background, the Australian Communications and Media Authority (ACMA, sub. 41) noted that a significant degree of harmonisation has been achieved in this area. The product categories not currently harmonised are:

- Personal Handyphone Services
- certain short-range devices
- digital modulation transmitters (spread-spectrum devices)
- high frequency citizen band

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- in-shore boating radio services
  - cordless telephones using the medium and high frequency bands.

The ACMA (sub. 41) also stated that harmonisation for these remaining categories is unlikely either because the products are expected to become obsolete in the near term (Personal Handyphone Services and cordless phones), there are differences in spectrum allocation (high frequency citizen band, short range and spread-spectrum devices) or there are differences in licensing arrangements (in-shore boating radio services). It concluded that:

... continuation of the current permanent exemption for radiocommunications devices is warranted due to the substantive historical differences between Australian and New Zealand spectrum allocations that underpin the current non-harmonised standards, and the negligible economic and trading benefits that would be achieved by further harmonisation (where practicably feasible). (ACMA, sub. 41, p. 3)

Similarly, the NZ Government (sub. 47, p. 8) argued that removal of the TTMRA permanent exemption for radio transmitting products is not feasible in the short to medium term.

... [D]ifferences, which are embedded in communications infrastructures, would require massive expenditure on technology change and major legislative adjustment to eliminate, even between countries as closely aligned as Australia and New Zealand.

In light of the above, the Commission accepts the case put by the Australian and New Zealand regulators for retaining the permanent exemption for radiocommunications devices. Given the likely significant costs associated with further harmonisation for the few remaining areas that are not harmonised, the Commission does not consider that removal of the permanent exemption would result in a net benefit.

### Other permanent exemptions

Four additional permanent exemptions have been introduced since the last review of the TTMRA. Few concerns were raised with the Commission regarding these exemptions. For example, in the cases of South Australia's sale of drug paraphernalia regulations and Western Australia's firearms regulation, no comments were received from study participants. These regulations were made permanent exemptions from the TTMRA following a temporary exemption period of one year. In both cases, a Ministerial Council negotiated unanimous agreement by all participating parties to the permanent exemption (Australian Government 2010a, 2012).

### Tobacco

In 2013, tobacco was added to the list of permanent exemptions under the TTMRA. This was a result of the introduction in Australia of the *Tobacco Plain Packaging Act 2011* (Cwlth), the Tobacco Plain Packaging Regulations 2011 and the Competition and

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Consumer (Tobacco) Information Standard 2011. Together, these measures prescribe the requirements for health warnings and the plain packaging of tobacco products. They aim to reduce the attractiveness and appeal of tobacco products and increase the noticeability and effectiveness of health warnings. The permanent exemption to the TTMRA was necessary to ensure that branded tobacco products from New Zealand could not be sold legally in Australia (Australian Government 2013).

The NZ Government has also agreed to introduce plain packaging requirements in line with Australia (Turia 2013). A bill to implement these requirements is before the NZ Parliament (the Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill), but has not yet been passed. Once the NZ legislation is in force, it may be possible to remove the permanent exemption from the TTMRA. This will be dependent on how closely the final version of the NZ legislation matches the requirements applying in Australia.

#### *Northern Territory container deposit scheme*

In 2013, the Northern Territory obtained a permanent exemption from the MRA for its container deposit scheme. This is similar to South Australia's container deposit scheme which is also exempt from the mutual recognition schemes. The Australian Food and Grocery Council (sub. 29, p. 6) suggested that the exemptions for these schemes are an example of 'exemption creep'.

In its previous reviews, the Commission found that it was unlikely that South Australia's permanent exemption could be removed because of the strong support for the scheme from the SA government and community (PC 2009). Similar factors are likely to apply in the Northern Territory.

#### DRAFT FINDING 4.1

There is not a case to remove, or narrow, existing permanent exemptions under the MRA and TTMRA, apart from those for road vehicles and hazardous substances, industrial chemicals and dangerous goods. The net benefit from removing the exemption for road vehicles would be larger if combined with wider reforms to abolish restrictions on the importation and registration of used vehicles, and parallel imports of new vehicles from countries other than New Zealand.

#### DRAFT RECOMMENDATION 4.1

The Australian, State, Territory and NZ Governments should remove the TTMRA permanent exemption for road vehicles, and reconsider removing the exemption for hazardous substances, industrial chemicals and dangerous goods. The latter exemption should at least be narrowed in scope to exclude cosmetics and toiletries.

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## 4.3 Converting from special to permanent exemptions

In 2010, all special exemptions under the TTMRA were reclassified as permanent exemptions. As a result, regulators in Australia and New Zealand were no longer required to maintain joint work programs that sought to achieve harmonisation or mutual recognition for the relevant goods. This raises the question of whether the shift to permanent exemptions has caused a deterioration in regulator cooperation between the two countries.

Some evidence indicates that regulators have continued to work on narrowing differences in regulations and regulatory processes that also serve to lower barriers to trade. For example, in the case of radiocommunications devices, cooperation has occurred despite the end of a formal work program. The ACMA (sub. 41, p. 3) noted that it:

... has continued to work with MBIE [the NZ Ministry of Business, Innovation and Employment] to develop harmonised approaches to spectrum allocation and usage. This has been undertaken both bilaterally and multilaterally, as part of regional preparations and the trans-region Spectrum Regulators' Forum. The ACMA also notes that Australia and New Zealand both align with ITU [International Telecommunication Union] requirements in developing national spectrum plans. This will promote harmonisation of standards that apply to future product categories and trans-Tasman trade in those products.

For gas appliances, Australian and NZ regulators continue to cooperate through the Gas Technical Regulators Committee. This Committee is a forum in which regulators aim to share ideas and work together to improve gas safety, measurement and quality. There is also a joint Australian–New Zealand standards committee for gas appliance safety. This committee is currently developing a suite of joint standards for gas appliances that will eventually replace current Australian standards (Worksafe NZ, pers. comm., 15 April 2015).

The Commission has also received evidence of ongoing regulatory cooperation in areas covered by permanent exemptions where mutual recognition is not considered feasible, such as biosecurity (box 4.1) and agricultural chemicals and veterinary medicines (box 4.6). Further, as noted above, while the proposal for a joint therapeutics regulator has been abandoned, it is expected that the Australian and NZ regulators will pursue less ambitious forms of cooperation, including a new information sharing agreement and the mutual recognition of manufacturers' audits.

Nonetheless, the removal of a requirement for formal work programs may have lessened the impetus to move towards mutual recognition or harmonisation in other areas. The NZ Government (sub. 47, p. 7) noted a lack of cooperation for hazardous substances.

Although the exemption was made permanent in 2010, the intention was that it would be reviewed once the chemicals regulation in the various states was harmonised with the GHS. However, no work programme has been set up to facilitate or oversee this and harmonisation or mutual recognition of chemicals and hazardous substances has 'slipped off the radar'.

#### Box 4.6 **Agricultural chemicals and veterinary medicines**

Although Australian and NZ governments do not consider that mutual recognition for agricultural chemicals and veterinary medicines is appropriate, they have identified that there are opportunities to reduce barriers to trade in this area through regulatory cooperation.

Australian and NZ regulators have signed a Memorandum of Understanding and developed a five-year work plan. The aim is to remove barriers by recognising systems (including registration) and sharing information. Regulators are currently working on updating the Memorandum of Understanding.

The NZ Government (sub. 47, pp. 6–7) considers that this approach results in ‘significant efficiency gains with relatively simple arrangements’. For example, New Zealand unilaterally recognises Australia’s risk assessment system for certain product type registrations as equivalent to its own requirements. It stated that ‘this simplifies the process for registration of these products in New Zealand and reduces the time and cost for industry, thereby enhancing the availability of products for the sector’ (NZ Government, sub. 47, p. 7).

Source: NZ Government (sub. 47).

Likewise, there appears to be little bilateral cooperation to reduce trade barriers for road vehicles. However, as noted above, both Australia and New Zealand are members of the international forum for harmonising vehicle standards.

A second issue is whether there needs to be a formal process to allow permanently exempted goods to be re-categorised as special exemptions if changed circumstances raise the prospect of achieving mutual recognition or harmonisation. In the previous review, the Commission supported having such a mechanism (PC 2009). In response, the governments considered this unnecessary because any issues that may arise can be dealt with via the temporary exemption process, or through regulator cooperation outside of the mutual recognition schemes, such as that described above (CJRF 2014b).

Overall, while evidence on the impact of abandoning the special exemption process is mixed, it does not appear to have led to a reduction in efforts to remove trans-Tasman barriers to trade. Further in light of the continued cooperation in many areas now permanently exempted from the schemes, and the high administrative costs associated with the special exemption process, the Commission considers that there is not a strong case for legislating a formal mechanism to reclassify a specific good from a permanent to a special exemption.

## 4.4 **Other limits on the coverage of mutual recognition**

### **Temporary exemptions**

Any jurisdiction can temporarily exempt a good from the MRA and/or TTMRA, provided it is on health, safety or environmental grounds. In such cases, the relevant COAG



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Ministerial Council must, within 12 months, make a decision on whether the temporary exemption will be resolved by harmonising standards, creating a permanent exemption, or reverting to mutual recognition (Australian Government 2014b). If no action is taken, the temporary exemption lapses after 12 months and mutual recognition resumes by default. Under the TTMRA a temporary exemption can be extended for an additional 12 months.

At the time of this draft report, there were no temporary exemptions. However, since the 2009 review, temporary exemptions have been invoked on six occasions. Three of these temporary exemptions led to permanent exemptions.

- Western Australia's weapons and firearms legislation (*Weapons Act 1999*, Weapons Regulations 1999, Firearms Regulations 1974) in 2011 (TTMRA only). They became permanent exemptions in 2012.
- Northern Territory's Container Deposit Scheme, from 2012 to 2013 (MRA only). It became a permanent exemption in 2013.
- Australia's *Tobacco Plain Packaging Act 2011* (Cwlth) and the Competition and Consumer (Tobacco) Information Standard 2011 from 2012 to 2013 (TTMRA only). They became permanent exemptions in 2013.
- Western Australia's *Misuse of Drugs Amendment Act 2011* for drug paraphernalia, from 2013 to 2014 (TTMRA and MRA).
- Queensland's ban on the sale of inefficient air-conditioners, from 2009 till 2010 (TTMRA and MRA).
- Queensland's *Tobacco and Other Smoking Products Act 1998* for drug paraphernalia, from 2011 till 2012 (TTMRA and MRA).

No specific concerns regarding the temporary exemption process have been raised with the Commission.

The 2009 review raised concerns about Australian jurisdictions introducing product bans without invoking a temporary exemption under the mutual recognition schemes. Since then the development of a national approach to consumer policy in Australia has likely addressed this concern. Australia's processes for temporarily exempting goods from the MRA are now integrated in its national consumer product safety regime under the *Australian Competition and Consumer Act 2010* (Cwlth) (CJRF 2014b).

## Exceptions

Exceptions are used for laws outside the intended focus of the MRA and TTMRA relating to whether a good can lawfully be sold. There are a wide range of laws listed as exceptions (box 4.7).

#### Box 4.7 Exceptions from the MRA and TTMRA

Exceptions from the MRA and TTMRA are listed in s. 11 of the *Mutual Recognition Act 1992* (Cwlth), s. 12 of the *Trans-Tasman Mutual Recognition Act 1997* (Cwlth) and s. 11 of the *Trans-Tasman Mutual Recognition Act 1997* (NZ). They include the following.

- Areas of regulation relating to the manner of sale of goods (covering all manner of sale laws where they apply equally to goods produced in, or imported into, a jurisdiction), such as:
  - the contractual aspects of the sale of goods (for example, contractual arrangements between the seller and purchaser of a good)
  - the registration of sellers or other persons carrying on occupations (for example, liquor licences)
  - requirements for business franchise licences (for example, tobacco licences)
  - the persons to whom goods may or may not be sold (for example, the sale of liquor to minors)
  - the circumstances in which goods may or may not be sold (for example, health and hygiene requirements).
- Laws relating to the transport, storage or handling of goods, as long as they apply equally to both locally produced or imported goods, and are directed at matters affecting health and safety, or protecting the environment.
- The inspection of goods, as long as inspection is not a prerequisite to the sale of the goods; the laws apply equally to both locally produced and imported goods; and the laws are directed at matters affecting health and safety, or protecting the environment.

Source: Australian Government (2014b).

The Commission sought participants' views on whether the current exceptions are still justified. Only one participant — Accord Australasia (sub. 32) — questioned why an exception is needed for laws relating to the transport, storage or handling of goods. They noted that the Australian Dangerous Goods Code (Edition 7.3), which applies in all Australian jurisdictions, provides for consistent technical requirements for the land transport of dangerous goods. Moreover, the Code follows the structure, format, definitions and concepts of the UN Recommendations on the Transport of Dangerous Goods Model Regulations, which New Zealand has also adopted.

While the UN model encourages the international harmonisation of transport of dangerous goods regulation, there are a number of key differences between arrangements in Australia and New Zealand. One of these is the treatment of transport of 'limited quantities' of dangerous goods by road and rail. Unlike New Zealand, Australia has not adopted the less stringent arrangements in the UN model on limited quantities, while New Zealand has (DIRD, pers. comm., 21 April 2015).

Australia's National Transport Commission — a joint Australian, state and territory government statutory authority which has responsibility for developing and coordinating national policy on the transport of dangerous goods by road and rail — is currently reviewing Australia's limited quantities arrangements. This will include the development



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of a regulatory impact statement exploring the costs and benefits of various policy options, including adopting the UN model (DIRD, pers. comm., 21 April 2015).

The Commission recognises that inconsistencies in the regulation governing the transport, storage and handling of goods can contribute to unnecessary compliance burdens for businesses. These concerns need to be balanced with the risks associated with extending the scope of mutual recognition to cover these regulatory requirements. In particular, mutual recognition could create confusion, as well as problems with having requirements that are not compatible with local circumstances. Given the rationale for transport, storage and handling regulations is often concerned with materials such as explosives and hazardous substances, regulation that is not fit for purpose could pose serious risks to people and the environment.

On balance, the Commission considers that governments should continue ongoing efforts to reduce inconsistencies in the areas of regulation that are exceptions in the mutual recognition schemes. This requires greater coordination between jurisdictions in regulatory design and implementation, and further harmonisation with international standards.

## Exclusions

Schedule 1 of the TTMRA specifies laws that are excluded from mutual recognition. These laws closely relate to the sovereign rights of nation states and include:

- customs controls and tariffs — to the extent that the laws provide for the imposition of tariffs and related measures (for example, antidumping and countervailing duties) and the prohibition or restriction of import
- intellectual property (IP) — to the extent that the laws provide for the protection of intellectual rights
- taxation and business franchises — to the extent that the laws provide for the imposition of taxes on the sale of locally produced and imported goods in a non-discriminatory way (for example, business franchise and stamp duties)
- specified international obligations — to the extent that the laws implementing those obligations deal with the requirements relating to the sale of goods.

The Commission has not received any evidence of concerns with these exclusions. In the case of IP, there was strong support from participants to retain the exclusion (IP Australia, sub. 38; NZ Government, sub. 47; NZ Institute of Patent Attorneys, sub. 12; NZ Law Society, sub. 23). Participants commented that the nature and scope of IP rights make this area unsuitable for mutual recognition. IP Australia (sub. 38, p. 4) stated:

... mutual recognition is aimed at removing unnecessary regulatory impediments to the trade in goods. IP Australia considers that the protection of IPRs [intellectual property rights] is not an unnecessary regulatory impediment, but is instead a necessary measure to encourage technological innovation (patents) and to prevent confusion in the marketplace about the origin of goods and services (registered trade marks).

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The NZ Government (sub. 47, p. 9) observed that:

The territorial scope of IP rights and the ‘first in time, first in right’ principle do not lend themselves to mutual recognition. Different businesses can and do own IP rights in Australia compared to New Zealand, and vice versa. It is possible for different businesses to operate in Australia and New Zealand and own the same IP rights, without any conflicts arising over the ownership and the use of the IP rights in question.

Participants stated that mutual recognition of IP rights could therefore put Australian and NZ businesses unnecessarily into conflict with each other and would restrict other businesses’ freedom to operate in the country where the owner of the IP rights would otherwise not seek IP protection.

Participants also said that under mutual recognition, each country would lose the flexibility to optimise its IP systems so as to encourage creativity and innovation.

The objective of IP systems is to encourage investment in innovation by rewarding innovators with time-limited monopolies over the sale of their innovations. Optimal levels of protection will differ between countries for a variety of reasons, including different market sizes, business and industry profiles, economic, social and cultural policy settings. (IP Australia, sub. 38, p. 3)

Material differences between Australian and NZ patent and trade mark laws also make mutual recognition of IP laws difficult to implement. These differences include differing tenure terms for patent protection and inconsistent exclusions from patentability in each country. For example, Australia allows for the patenting of methods of medical treatment, whereas New Zealand does not (IP Australia, sub. 38; NZ government, sub. 47; NZ Institute of Patent Attorneys, sub. 12; NZ Law Society, sub. 23).

Finally, participants pointed to other initiatives outside of the TTMRA where Australia and New Zealand work together to reduce the compliance costs associated with IP rights. These efforts focus on alignment of registration procedures and examination practices rather than of IP laws themselves. For example, changes to Australian and NZ trade mark legislation have resulted in registration procedures becoming substantially aligned. Work is also being done to allow a single application and examination process for persons seeking patent protection in both jurisdictions (IP Australia, sub. 38).

In light of the above, the Commission has concluded that current exclusions from the TTMRA should be retained. In the case of IP, applying mutual recognition is unlikely to result in a net benefit. Continued efforts to align registration procedures and examination practices are a better use of resources.

## 4.5 Use-of-goods requirements

The terms of reference ask the Commission to consider cases where goods can be exported to another jurisdiction and sold under mutual recognition but cannot be legally used. This possibility arises because jurisdictions often have different requirements on how goods are

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used, and such use-of-goods requirements are not explicitly included in the MRA and TTMRA.

Use-of-goods regulations dictate specific conditions under which a good may or may not be used, including bans on uses of particular goods in particular circumstances. They can cover a wide range of requirements, including the:

- purpose of the particular use (for example, a particular chemical may only be used for cleaning)
- context of the use (say, in an industrial setting as opposed to a household)
- environmental or geographic setting of the use (for example, certain locations may ban the use of wood heaters)
- identity of the user (for example, the licensing of persons for the use of radioactive substances)
- time of use (either a particular time of day or on particular dates)
- use in connection with other goods or activities (for example, combinations of chemicals)
- extent of the use (say, maximum or minimum quantities)
- method of the use (for example, aerial spraying as opposed to handheld spraying of a chemical) (PC 2003, 2009).

These regulations are generally put in place to protect public health and safety or the environment. However, if they are more restrictive than necessary to achieve their objective, or in practice these provisions discriminate between goods from different jurisdictions, they can undermine the benefits of mutual recognition and unnecessarily impede interjurisdictional trade.

The Commission has considered this issue in both its previous reports on mutual recognition. In 2009, the Commission recommended that requirements relating to the use of goods, to the extent that they prevent or restrict the sale of goods, should be explicitly brought into the scope of the mutual recognition schemes. The Commission recommended that an exception be made where mutual recognition of use-of-goods provisions could expose persons in another jurisdiction to a real threat to health or safety or cause significant harm to the environment (PC 2009). In response, the governments stated that this was an area that required further consideration, including an investigation of the implications, feasibility and possible scope of extending mutual recognition to the use of goods (CJRF 2014b).

Submissions to the 2009 review mentioned a small number of examples of use-of-goods requirements affecting the operation of the mutual recognition schemes. These included buses exported from New South Wales, which could be sold in Western Australia but not registered for use without modification to meet different seat belt requirements. Another example was dishwashers exported from New Zealand, which could be sold in Australia

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but not used because they did not have the plumbing certification required by local water authorities.

Similarly, few examples have been mentioned by participants in the current review.

- Energy Safe Victoria (sub. 26) mentioned certified gas appliances from Queensland which are legal to sell under mutual recognition but not legal to install in Victoria, as only appliances that have been certified by a certifier accepted by Victoria can be installed. The NSW Department of Premier and Cabinet (sub. 51) also raised gas appliances as an area of concern.
- The Australian Radiation Protection and Nuclear Safety Agency (sub. 42, p. 1) noted that many jurisdictions require radiation apparatus or radioactive substances to be approved or registered before they can be used and that ‘this requirement acts, in some cases, as a barrier to mutual recognition of the registration of a radiation apparatus or radioactive substance’.

While use-of-goods requirements do have the potential to unnecessarily impede the movement of goods across borders, the small number of examples provided to the Commission does not indicate that this is occurring often in practice. Given the limited evidence of a problem, it is not apparent that use-of-goods requirements are systematically undermining the value of the mutual recognition schemes and consequently do not warrant amending the mutual recognition legislation.

Furthermore, the Commission is not convinced that the application of the mutual recognition schemes to use-of-goods requirements would be the most appropriate way to address problems when they do arise. It is more likely that when an issue does arise that it can be dealt with more effectively with less formal options, such as through dialogue and cooperation between regulators.

It is important, however, for governments to be mindful of the potential for use-of-goods requirements to undermine the mutual recognition schemes when developing regulations in the future. Policy makers need to ensure that they are taking account of the likely effects on mutual recognition when developing regulations, including use-of-goods requirements. This issue is discussed more fully in chapter 7.

## 5 Mutual recognition of occupational registration

### Key points

- Mutual recognition is working well for most registered occupations, particularly where jurisdictions have similar standards and approaches.
- Where standards differ, the potential benefits from mutual recognition are not always being fully realised.
  - Some occupation registration bodies do not implement mutual recognition as envisaged and legislated because of a fear that it would create opportunities for ‘shopping and hopping’ — the practice of registering in a jurisdiction with less stringent requirements in order to obtain registration in a more stringent jurisdiction.
  - But the Commission found no clear-cut evidence of harm caused by individuals registered under mutual recognition. If such a case, or the risk of, were to arise, the mutual recognition schemes have mechanisms to address it.
  - Concerns about shopping and hopping are more common in occupations requiring qualifications from the vocational education and training sector, and are particularly prevalent in the security industry. These concerns largely reflect problems with training delivery rather than mutual recognition.
- For occupations where background checks are necessary and are routinely required of local applicants, registration bodies should be able to continue to conduct their own checks on people seeking registration under mutual recognition. If this approach is successfully challenged in the relevant tribunals in the future, governments should amend the mutual recognition legislation.
- Governments should jointly state that the mutual recognition legislation is intended to allow continuing professional development (CPD) requirements to be applied equally to all persons when renewing their registration.
  - This would address ambiguity in the Australian legislation which has led some to argue that people originally registered under mutual recognition are exempt from any future CPD requirements when renewing their registration.
- Ministerial Declarations — which prescribe the equivalence of many occupations between Australian jurisdictions — should be updated as a matter of priority to ensure that mutual recognition is as effective as possible. Once this has been completed, the benefits of extending the Ministerial Declarations to include New Zealand should be examined.
- More broadly, it is important that all occupational registration schemes are rigorously assessed and evaluated, given the potential for such schemes to impose unnecessary costs, restrict competition and increase prices.

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## 5.1 Rationale for occupational registration

Governments have established registration regimes in many occupations, including those that require extensive formal education (such as medicine, teaching and veterinary science) and those that require less, or no, formal education (such as the security and taxi industries). The Commission found that there are currently over 180 occupational regulators in Australia and New Zealand.

While there is great variety in the nature and scope of registered occupations, two reasons are commonly put forward for establishing occupational registration regimes. They are to:

- protect the safety of consumers and/or the public
- ensure a sufficient and reliable level of service quality.

For instance, the Nursing Council of New Zealand (sub. 22, p. 1) said:

The Nursing Council ... has a primary function to protect the health and safety of members of the public by ensuring that nurses are competent and fit to practise.

The Australian Institute of Architects (sub. 43, p. 2) considered that:

... the principal purpose of accreditation is to enable consumers to know that an individual (or practice) is assessed as reaching a standard they are entitled to rely on.

The NZ Ministry of Economic Development (2011) stated that:

... the aim of regulating occupations is broadly to protect the public from the risks of an occupation being carried out incompetently or recklessly.

For some occupations and jurisdictions, occupational health and safety may also be an objective of registration regimes (COAG 2009b).

The desire to provide certain levels of safety or quality does not necessarily imply that regulatory intervention is required. There must also be a clear rationale for government intervention. For occupational licensing schemes, the rationales are generally to address information failures and to account for spillover effects or externalities (box 5.1).

Using licensing to address information failures and spillovers has both advantages and disadvantages. Licensing can be a relatively simple and efficient method of reducing risks to health and safety, and of providing consumer protection in some cases. For instance, licensing can signal to consumers that a person has satisfied certain minimum standards of knowledge, competence, probity or some other desirable attribute.

Disadvantages of licensing include potential restrictions on competition by limiting entry into an industry or occupation. As the recent review of competition policy in Australia pointed out:

Licensing that restricts who can provide services in the marketplace can prevent new and innovative businesses from entering the market. It can also limit the scope of existing

businesses to evolve and innovate. As a result, service providers can become less responsive to consumer demand. This imposes a cost on consumers without necessarily improving consumer protection. (Harper et al. 2015, p. 140)

### Box 5.1 Economic rationales for occupational licensing

#### Information failures

For many occupations, an individual professional or tradesperson has specialised knowledge not available to the average consumer, including information about the nature of the service and about their own quality and ability. For consumers, information is either costly to obtain (perhaps requiring significant search efforts), or cannot be obtained (given that consumers cannot measure the attributes of certain services before using them).

Consumer uncertainty about quality of services may result in a reduction in both the quality and quantity of services consumed. This is commonly termed the 'lemons' problem, based on Akerlof's (1970) example of the market for used cars. Because buyers cannot tell which cars are high quality and which are low quality ('lemons'), they are willing to pay less than they would pay if they could be certain of purchasing a high quality car. The low price offered for all used cars in turn discourages sellers of high quality cars, and sales that could have benefited both the buyer and seller do not occur.

For services provided by professionals and tradespeople, additional complications may arise.

Consumers may not be able to readily judge the quality of the service even after the purchase. Problems can only become apparent over time and be difficult to attribute to the original work. For instance, a poor quality plumbing job might not be noticeable for several years, and there might then be doubt as to whether the plumbing problems were caused by the plumber, by misuse, or by wear and tear.

The provider of the service may also be the provider of information about the consumer's needs. These characteristics of information asymmetry are referred to as 'credence attributes'. For services with credence attributes, consumers rely on professionals to:

- identify the precise nature of a problem (diagnosis)
- determine the best way to address the problem
- provide the services needed to solve the problem.

This degree of reliance creates opportunities for unethical behaviour. The provider may have an incentive to recommend unnecessary services, or to provide a lower standard of service than is optimal (and agreed), particularly where the consequences of poor service may not become apparent for some time.

#### Externalities

Externalities or 'spillovers' arise when one person's actions result in uncompensated benefits or costs to others. Externalities may be positive or negative. An example of a positive externality is a doctor correctly diagnosing an individual as having a contagious disease, thereby limiting the risk of an epidemic. A negative externality would arise where a poorly designed or constructed building creates risks for users of the building who were not involved in the original dealings with the architect, engineer or builder.



In addition, the administrative and compliance costs associated with occupational licensing impose burdens on licensees, who may in turn pass them on to consumers through higher prices. Indeed, the Commission (2008b, p. 10) has previously identified occupational licensing as an area where there is ‘considerable scope to reduce burdensome regulation’.

Because of the potential for licensing to restrict competition, limit choice and increase prices, it is important that all licensing schemes are rigorously assessed to determine that they are the most efficient method of addressing identified problems. The NSW Independent Pricing and Regulatory Tribunal, and Pricewaterhouse Coopers, have suggested a framework for assessing licensing schemes (box 5.2), as have others (for instance, Allen Consulting Group (2007), NZ DPMC (1999)). The governance arrangements for such assessments — particularly the independence of the review body — is critical to their effectiveness (PC 2011c). Hence, it can be undesirable for a regulator to review the case for regulation which it administers.

In addition to occupational licensing, businesses in many sectors are required to obtain some form of registration (for example, a licence, permit, or approval) before they can commence operations. Business registration requirements differ across sectors and jurisdictions, which can increase costs and reduce competition by providers from other jurisdictions. The case for extending mutual recognition to business registration requirements is considered in chapter 6.

#### **Box 5.2      A framework for assessing licensing schemes**

The NSW Independent Pricing and Regulatory Tribunal (IPART), together with Pricewaterhouse Coopers (PwC), recommended that all existing and proposed licensing structures should be assessed in a four stage process. The hurdles and requirements of each stage must be fully met before proceeding to the next stage.

Stage 1 considers whether licensing is appropriate, by asking if:

- there is a clear need for government action. This includes considering whether:
  - (a) there is a rationale for government intervention (such as an information failure or externality)
  - (b) the risk of detriment is high (in terms of likelihood and/or consequence)
  - (c) the ability to remedy the detriment after the event is poor
  - (d) the market is unlikely to provide an adequate response.

There is only a need for government action if there is an affirmative answer to all of points (a)–(d)

- there is a need for new action, because generic laws have proven to be inadequate
- regulation is the most appropriate form of new action
- the policy objective is best addressed through licensing.

(continued next page)



**Box 5.2** (continued)

If a licensing proposal fails the Stage 1 assessment, then a clear rationale for a licence has not been established. If a licensing proposal passes the Stage 1 assessment, it is an appropriate option and the assessment can then proceed to Stage 2.

Stage 2 tests whether the design of the licensing scheme matches its objectives, whether licensing fees and charges are appropriate, and that the scheme imposes only the minimum necessary requirements on licence holders.

Stage 3 examines whether licence administration is efficient and effective. The application process, information provided to and by licence holders, responses to complaints and queries, and enforcement practices should be timely, accurate, reliable and designed to minimise burdens on business and the community.

Stage 4 involves confirming that licensing is the best possible response, when compared with other regulatory and non-regulatory options. It requires examination of the costs and benefits of the final licensing scheme (including its design and administration) to confirm that it is, or remains, the best option.

Sources: IPART (2013); PwC (2012).

Under Australia's National Competition Policy Legislative Review Program, a range of occupational licensing schemes were reformed or abolished over the period 1996–2000, including arrangements in some jurisdictions for hairdressers, employment agents, podiatrists, real estate agents, dentists, veterinarians, and conveyancing services (PC 2008). More recently, IPART has recommended reviews or the abolition of licences in New South Wales (IPART 2013).

When it comes to signalling that a person has satisfied certain minimum standards of knowledge, competence or probity, a range of other mechanisms may provide efficient alternatives to occupational licensing (box 5.3).

As the Business Council of Australia (sub. 45) noted, occupational licensing functions as a type of pre-approval of practitioners, as do some of the non-regulatory approaches outlined in box 5.3. Only those who are approved by the licensing body may offer particular services. Similarly, only those who have been certified by an independent certification agency may claim that agency's endorsement.

A possible alternative pre-approval mechanism is to rely on generic consumer protection laws. These laws cover a wide range of situations including services provided by professionals and tradespeople. For example, under the Australian Consumer Law, a supplier must meet the consumer guarantees of providing services with due care and skill, which are fit for purpose, and within a reasonable time. This means that suppliers must:

- use an acceptable level of skill or technical knowledge when providing the services, and take all necessary care to avoid loss or damage when providing the services
- supply the services within a reasonable time. What is 'reasonable' depends on the nature of the services

- guarantee that services will be reasonably fit for any purpose specified by the consumer and any product resulting from the services are also fit for that purpose (Commonwealth of Australia 2010).<sup>12</sup>

Similarly, in New Zealand, services to consumers must be carried out with reasonable care and skill, and be fit for any particular purpose that the consumer has told the service provider about. If the price and timeframe for the provision of the service were not agreed prior to completion of the work, it must be carried out within a reasonable time and charged for at a reasonable price (NZ MBIE 2014).

### Box 5.3 Alternatives to occupational licensing

In the absence of occupational licensing, service providers have an incentive to maintain or create a market for their service. There are numerous ways in which they can signal their quality to consumers and promote consumer confidence. They include the following.

- **Consumer search.** Although the qualities of service providers may not be immediately evident to consumers, they may be able to obtain that information, either through searching (including searching on the internet and in online community forums) or through experience (where there is the potential for repeat purchases). For example, consumers seeking plumbing services may search to find a plumber with a reputation for reliability and quality workmanship. Those using the services of an accountant on a quarterly or yearly basis are likely to gain information about the quality of services in the process.
- **Warranties or guarantees** can be offered by sellers to signal the quality of their services, as one way of overcoming information asymmetries. For example, some plumbers guarantee sewer clearances for six months and other services for various periods of time.
- **Independent certification agencies.** Reputable external bodies can endorse service providers, signalling that the provider meets certain standards of quality and/or behaviour. For instance, car insurance providers maintain lists of 'approved car repairers', which can guide consumer choice.
- A **reputation** for good (or bad) service provision can develop either through the direct experience of consumers (through repeated purchases) or through word of mouth (recommendations from family, friends, colleagues and associates, including on social media). In addition, large firms and brand names can act as signals of reliability, by indicating the seller's ability to enforce quality standards and to maintain long-term customer relationships.
- Through **membership of a professional association** with a code of conduct or ethics, a service provider can signal to a consumer that his or her services meet certain standards of quality, reliability or ethics. Adherence to the code may provide consumers with assurance that the professional will hold their interests above opportunities to obtain unscrupulous financial gain and that the professional will be competent and diligent in providing the service.

Source: PC and ANU (2000).

<sup>12</sup> This guarantee applies very broadly but excludes services provided by architects or engineers.

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Relying on consumer protection legislation can have considerable advantages, including that it is less likely to be subject to capture by a profession and tends to be less prescriptive than occupation specific legislation. Consumer protection legislation also avoids many of the potential downsides of occupational licensing, including the risk of restricting competition, limiting choice and increasing prices.

To sum up, it is important that all licensing schemes are rigorously assessed to determine that they are the most efficient method of addressing identified problems. Licensing should not be taken for granted as the preferred option, and the advantages of relying on consumer protection legislation should be given due consideration in any decision about the creation or continuation of occupational licensing schemes.

## **5.2 Forms of occupational registration covered by the schemes**

As noted in chapter 3, the Mutual Recognition Agreement (MRA) and Trans-Tasman Mutual Recognition Arrangement (TTMRA) cover occupations for which some form of legislation based registration, certification, licensing, approval, admission or other form of authorisation is required in order to legally practise the occupation.

The mutual recognition schemes are designed to accommodate a diverse range of approaches to authorising the practise of an occupation because many different models are used in Australia and New Zealand. This is evident not only between different occupations, but sometimes also for the same occupation between jurisdictions.

These different approaches to regulation largely arose because of historical and state specific influences. As the Housing Industry Association (sub. 37, p. 8) explained in relation to the construction industry:

There are many reasons for legislative divergence in licensing arrangements among jurisdictions. The very causes for the current differences between state regulations is not however a result of inherently different risks in construction from state to state — since 1997 there has been one national building code, the National Construction Code (NCC), governing the technical provisions for the design and construction of buildings. Rather the regional differences flow for a variety of reasons, reflecting the outcomes of state/territory coronial inquiries, parliamentary committees (and government responses to), court decisions, election commitments, budget constraint, regulatory culture, and the like.

### **Overview of different registration models**

For ease of exposition, this report generally uses the term ‘registration’ to refer to all of the different models that can be used to authorise the practise of an occupation. Terms such as registration, certification and licensing are often used interchangeably to denote occupational regulation.

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Notification is the least restrictive form of regulation.<sup>13</sup> Generally, a notification system requires those performing prescribed services to inform the relevant authorities and to be recorded as such, but without having to meet significant pre-registration requirements or standards.

Under a certification model, a certified practitioner is recognised as meeting prescribed standards of competence and conduct, but meeting those standards is not a requirement to legally practise. That is, uncertified people can practise the occupation provided they do not represent themselves as being certified. Certification allows for a range of quality in the services provided to consumers. These schemes have relatively low barriers to entry, thus promoting competition. Consumers may then exercise choice in the quality of services they desire and are willing to pay for. Certification is most appropriate where consumers purchase services frequently, can easily assess the quality of service they are receiving, and can easily switch between service providers.

Licensing generally refers to a legal requirement for a practitioner to be approved as meeting prescribed standards of competence and conduct to practise in defined areas of work (NZPC 2014a). By imposing a minimum competency requirement, licensing regimes aim to put a floor under the level of quality provided to consumers. While licensing restricts competition, it may be justified where there would be an unacceptable risk to consumers in the absence of licensing, or where it is difficult for consumers to assess the quality of the service they are receiving.

Regulatory models called ‘registration’ are sometimes in fact licensing schemes. For example, the Australian Health Practitioner Regulation Agency (AHPRA) registers health practitioners in Australia (box 5.4). However this form of regulation is what would typically be called ‘licensing’, since health practitioners are not legally allowed to practise without being registered. When governments are considering making a choice between various models of registration, certification and licensing, it is important that that choice is made after full consideration of the factors considered in box 5.2 and of potential alternatives to occupation specific regulation.

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<sup>13</sup> In contrast to the terminology used in this report, the term ‘registration’ is commonly used in the literature to refer to notification systems.

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## **Box 5.4      The National Registration and Accreditation Scheme for health practitioners in Australia**

### **Institutional structure**

A number of bodies play a role in the National Registration and Accreditation Scheme (NRAS) for health professionals. The Australian Health Workforce Ministerial Council provides policy and procedural directions, and approves recommendations by National Boards about registration standards and other matters.

The Australian Health Practitioner Regulation Agency (AHPRA) establishes procedures for National Boards to follow concerning matters such as the development of accreditation and registration standards. AHPRA also provides administrative support to National Boards to maintain national registers of health practitioners, students and lists of approved courses. Through its state and territory offices, AHPRA manages local enquiries about registration, processes registration applications and complaints against registered practitioners, monitors registration conditions and provides administrative support to local committees set up by National Boards.

Each of the fourteen professions covered by the NRAS has its own National Board and accreditation authority. The responsibilities of National Boards include:

- deciding requirements for registration, developing registration standards, registering qualified applicants, imposing conditions on registration if necessary, and receiving and investigating notifications of misconduct (and other matters)
- approving accreditation standards developed by its associated accreditation authority and approving accredited programs of study.

Where necessary, National Boards can establish committees to carry out functions on their behalf (such as dealing with disciplinary matters), and establish state and territory boards to provide a timely local response to health practitioners and others.

### **Registration and endorsement**

In the context of the NRAS, registration refers to the process of legally recognising the qualifications, experience and 'suitability' of a health practitioner. A key requirement of registration is completion of an accredited course of study (or equivalent). Courses of study are accredited to ensure they meet appropriate standards so that students are provided with the knowledge, skills and professional attributes necessary to practise as health professionals.

The most common types of registration are general registration, student registration (for people undertaking an approved course of study) and specialist registration (for practitioners who wish to operate in a recognised speciality field). To be eligible for general registration a person must be appropriately qualified; must have completed a period of supervised practice, examination or other assessment as required by a registration standard; and must be a 'suitable' person (with sufficient English language competency and without a criminal history, for example).

A registered health practitioner may also apply for an 'endorsement' by a National Board. Similar to specialist registration, an endorsement allows a registered practitioner to practise in an area that requires advanced qualifications and experience, and to use certain protected titles (for example, only a health practitioner with general registration through the Pharmacy Board of Australia can use the title 'pharmacist'). All endorsements and registrations need to be renewed annually.

## Registration models covered by the MRA and TTMRA

A wide range of occupational registration systems are covered by the mutual recognition schemes. These include occupations in the health, building, real estate, public health and safety, transport and legal sectors (table 5.1).

**Table 5.1 Selected occupations covered by the MRA and the TTMRA**

<i><b>Health occupations<sup>a</sup></b></i>	<i><b>Building and construction occupations</b></i>	<i><b>Real estate occupations</b></i>
Aboriginal and Torres Strait Islander health practitioner	Architect	Auctioneer
Chinese medicine practitioner	Electrician	Conveyancer
Chiropractor	Gasfitter	Property manager
Dental practitioner	Plumber	Real estate agent
Medical radiation practitioner	Surveyor	Valuer
Nurse/Midwife	<i><b>Public health and safety occupations</b></i>	<i><b>Animal-related occupations</b></i>
Occupational therapist	Meat inspector	Jockey
Optometrist	Pest management technician	Veterinarian
Osteopath	Security guard	Greyhound trainer
Pharmacist	<i><b>Transport occupations</b></i>	<i><b>Legal occupations</b></i>
Physiotherapist	Driving instructor	Barrister
Podiatrist	Pilot vehicle driver	Patent attorney
Psychologist	Taxi driver	Solicitor

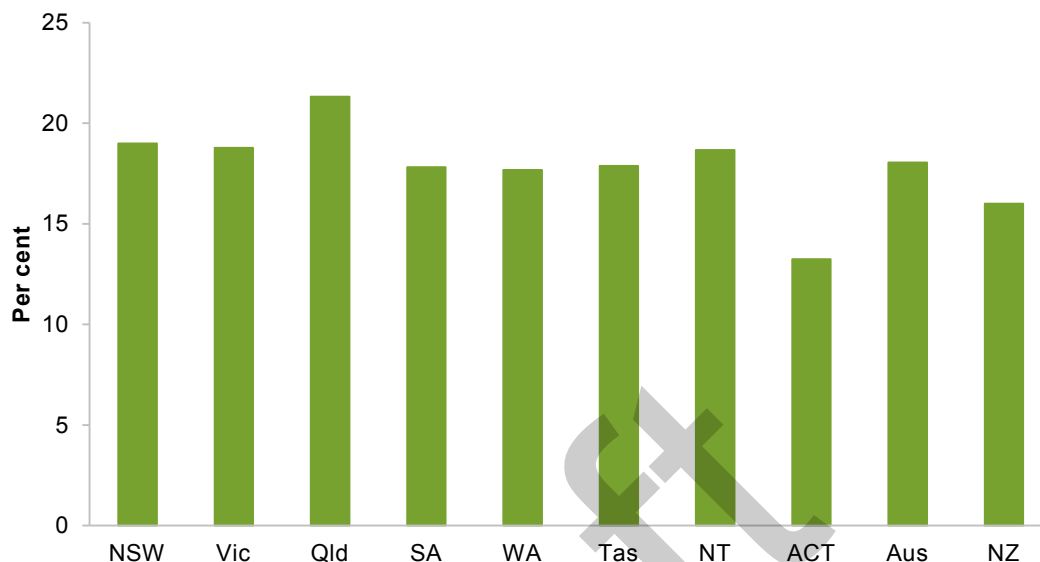
<sup>a</sup> TTMRA only.

An indicator of the potential role of mutual recognition in facilitating trade in services is the proportion of people employed in registered occupations. In 2011, around 18 per cent of employed people in Australia worked in an occupation that was subject to registration requirements. This proportion varied from a low of 13 per cent in the ACT to a high of 21 per cent in Queensland (figure 5.1). In New Zealand, the percentage of employed people covered by the TTMRA is slightly less than Australia at 16 per cent.

The above estimates will tend to overstate the coverage of the MRA because some registered occupations — such as health practitioners — are subject to a national system of regulation in Australia (and so do not rely on the MRA when they move between jurisdictions) (box 5.4). Similarly, the TTMRA will not apply to patent attorneys after a foreshadowed single trans-Tasman regulatory framework is in place (TTOIG 2014b).

Where registration is not required in order to legally practice an occupation, the MRA and TTMRA do not apply. However, alternatives to the MRA and TTMRA could be negotiated to enable mutual recognition to occur. For example, the Dietitians Association of Australia (sub. 35) noted that the dietetic profession is self-regulated (and thus falls outside of the scope of the MRA and TTMRA), but the industry has developed mutual recognition arrangements with counterparts in New Zealand and Canada.

Figure 5.1 **Employment in registered occupations as a share of total employment, 2011<sup>a</sup>**



<sup>a</sup> NZ data are for 2013.

*Data source:* Productivity Commission estimates based on data from the ABS Census of Population and Housing and the NZ Census.

In several other occupations that fall outside the scope of the TTMRA, participants' willingness to embrace the TTMRA is nonetheless evident.

For the allied health professional workforce that is not a registered profession, the professional associations have a recognition policy for membership into the relevant Australian associations. Unregistered allied health professionals are required to be members of their professional association or 'eligible' for membership to enable employment within NSW Health. This means that their qualifications must be recognised by the TTMRA. (NSW Department of Premier and Cabinet, sub. 51, p. 4)

Similarly, IPENZ (sub. 49) said despite the voluntary nature of engineering registration in New Zealand, it recognises Registered Professional Engineer of Queensland registrants under the TTMRA.

These cases point to ways in which the TTMRA has inspired professional associations to work together, even where the TTMRA itself could not technically be applied (such as in the absence of a legislation based compulsory registration system). Other study participants pointed out that they have mutual recognition arrangements that predate the MRA and the TTMRA. For example, the Council of Reciprocating Surveyors Board of Australia and New Zealand (sub. 52, p. 2) noted that it has had 'successful reciprocal arrangements in operation since 1892' (chapter 3).



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Even where the registration model for a given occupation covered by the MRA and/or the TTMRA is the same or very similar between jurisdictions, there can be key differences in its implementation. In particular, there may be differences in the qualifications required to achieve registration, or in the way in which occupational regulators oversee those qualifications (discussed below).

## **Registration models not covered by the MRA and TTMRA**

As noted above, mutual recognition schemes only apply where all people practising a given occupation must be registered. This is not currently the case for certain real estate occupations (Real Estate Institute of Australia, sub. 40) or for teachers in New South Wales. People in these occupations or jurisdictions are therefore not eligible to register under mutual recognition elsewhere in Australia or New Zealand.

... the success of [the mutual recognition] scheme does require all states and territories to register teachers, and currently New South Wales does not register all of the teachers in schools. This has weakened the national approach to mutual recognition. (Victorian Institute of Teaching, sub. 5, p. 1)

However, foreshadowed changes to NSW teacher registration will mean that all teachers will be covered by the mutual recognition schemes by 2018.

By 1 January 2018, all NSW teachers must be accredited and the requirement for comprehensive coverage under the MRA Act will be met. (Australasian Teacher Regulatory Authorities, sub. 36, p. 2)

Some differences in teacher registration will remain, particularly in relation to registration requirements for early childhood and kindergarten teachers. But the Victorian Institute of Teaching (sub. 5) suggested that these are not a significant issue for the mutual recognition schemes.

## **Models where coverage is uncertain**

While mutual recognition clearly applies to occupations that are covered by legislative registration schemes in all their many varieties (and does not apply to occupations that are not so covered), there is ambiguity about whether or not this includes forms of occupational regulation with no statutory registration authority, such as coregulatory, de facto and negative occupational licensing arrangements. There are three such types of occupational licensing:

- Coregulatory arrangements involve government endorsement, usually by legislation, of professional associations which are responsible for regulating the conduct and standards of their members. For instance, several professional bodies are involved in the regulation of the accountancy profession.



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- De facto registration arises when legislation authorises people who meet certain requirements to practise an occupation, without formally requiring them to register. This model applies to land valuers in Tasmania, for example.
  - Negative occupational licensing is ‘a statutory scheme that allows a person or business to practise an occupation unless they breach statutory-based requirements’ (COAG 2009b, p. 3). For instance, in Victoria, debt collectors do not need a licence unless they are a prohibited person (because, for instance, they have been found guilty of certain crimes) or a prohibited corporation (such as a corporation managed by a prohibited person). There is also negative licensing for certain categories of real estate licences in some jurisdictions (Real Estate Institute of Australia, sub. 40).

In its 2009 review, the Commission found that coregulatory arrangements were likely to be covered, but that negative and de facto forms of licensing were not. It therefore proposed that governments amend the mutual recognition legislation to clarify whether or not the mutual recognition schemes applied to these forms of occupational licensing.

In response to this recommendation, the Cross-Jurisdictional Review Forum (CJRF) (2014b, p. 8) proposed to ‘explore issues relating to the application of mutual recognition to coregulatory licensing arrangements and to investigate what action is necessary to clarify that de facto and negative licensing are not covered by the schemes’. It also proposed to include more information about coregulatory, de facto and negative occupational licensing in the official mutual recognition users’ guide.

While exploration of alternative options and the provision of information would be useful, they would provide less certainty than would legislative amendment. However, legislative amendment may pose difficulties of its own, as highlighted by the Department of Education and Training (sub. 9, p. 2):

For occupations, mutual recognition could be ‘extended’ to include co-regulated occupations (legally, the MRA may already include this form of regulation, but jurisdictions do not currently recognise co-regulation for mutual recognition purposes). However, while some regulators still fail fully to understand the operation of mutual recognition for licensed occupations, such an extension is more likely to complicate that understanding. Formalising the recognition of co-regulated occupations would require agreement on which occupations would be considered as co-regulated, what evidence was acceptable for a recognition claim and how breaches of the recognition obligation were to be addressed.

In addition to these concerns, the reluctance of the CJRF to proceed with legislative amendment is likely to reflect the difficulty of doing so (chapter 7). Moreover, if the schemes were extended to coregulated occupations, agreement would be needed on which occupations are considered to be coregulated, what evidence was acceptable for a recognition claim, and how breaches of the recognition obligation are to be addressed. In addition, the amended legislation would itself be subject to interpretation, which could create — rather than resolve — uncertainty. There is also the risk that governments could use the opportunity for legislative change to include amendments that dilute the application of mutual recognition principles.

In light of these concerns, legislative change may not be warranted unless there are occupational registration systems with broad coverage that are adversely affected by the current situation. There is little evidence that this is the case. Notably, no stakeholders from one of the largest occupations covered by a coregulatory regime — accountancy — have expressed concern about current arrangements. The net benefit of making legislative change to resolve ambiguity about the coverage of coregulated occupations is therefore likely to be small and possibly negative.

To a large extent, ambiguity about coregulatory, de facto and negative occupational licensing could be resolved through better information provision about the mutual recognition schemes, combined with better access to advice about the schemes. In particular, if all jurisdictions agree to update the official user's guide (chapter 7) and provide more information about the coverage of the schemes, any ambiguity about coverage will be minimised. In the Commission's view, this would be the most appropriate way to address this issue.

#### DRAFT RECOMMENDATION 5.1

Governments in Australia and New Zealand should make a joint statement that they view coregulated occupations as covered by mutual recognition, and they should ensure that this is reflected in the official users' guide for the schemes.

## 5.3 Use of mutual recognition

### How mutual recognition is used

Publicly available data on the use of mutual recognition as a means of obtaining occupational registration are limited. The Commission therefore decided to conduct a survey of occupation-registration authorities across Australia and New Zealand, with the aim of:

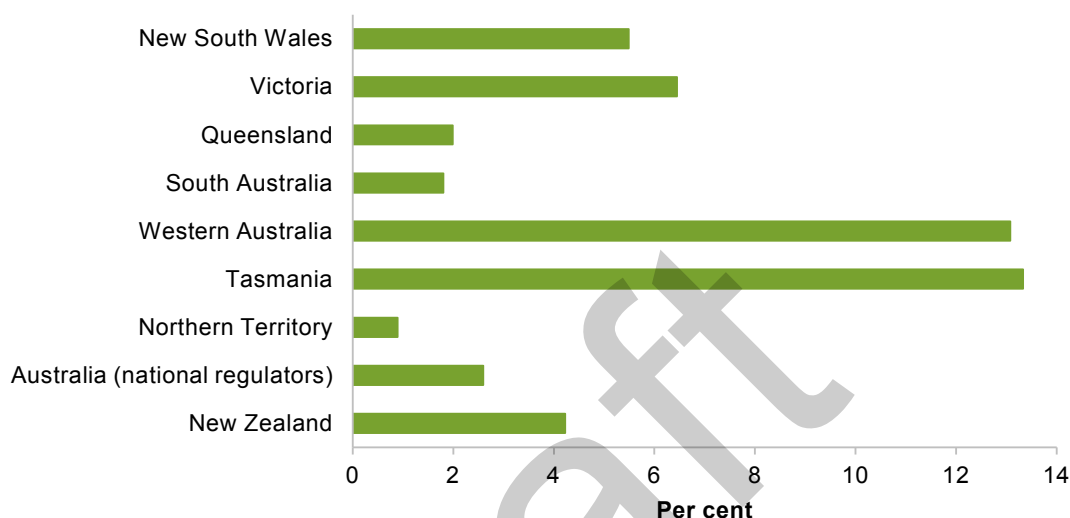
- quantifying the use of mutual recognition
- obtaining regulators' views about the importance and effectiveness of mutual recognition.

Occupation-registration authorities reported over 10 000 uses of mutual recognition as a means of registration in the 2014 calendar year. This compares to nearly 400 000 new registrations in 2014. More detail about the survey and its results is in appendix C.

Figure 5.2 shows that usage of mutual recognition varied between jurisdictions. The higher proportion of mutual recognition registration in Tasmania may reflect that that state does not have the training facilities required for specific occupations and relies on trained

practitioners from other states to fill vacancies. The low rate in the Northern Territory and could be an artefact of the survey response rate from that jurisdiction.

**Figure 5.2 Mutual recognition registrations in 2014 as a percentage of new registrations, by responding jurisdiction<sup>a</sup>**



<sup>a</sup> No data were provided by occupation-registration bodies in the ACT.

*Data source:* Productivity Commission survey of occupation-registration bodies.

## Mutual recognition for occupations generally works well

Previous reviews of the mutual recognition schemes concluded that they were working reasonably well for registered occupations (PC 2003, 2009). There is evidence to suggest that this continues to be the case, with many participants expressing support for mutual recognition (box 5.5).

Among occupational regulators that responded to the Commission's survey, around 60 per cent considered the mutual recognition schemes to be effective. A further 27 per cent considered the schemes to be somewhat effective.

As would be expected, mutual recognition works more easily where jurisdictions share similar standards and approaches. For example, the Master Plumbers' Association of Queensland (sub. 31) and Master Plumbers and Mechanical Services Association of Australia (sub. 33) considered that mutual recognition is enhanced where there is greater consistency between the types of work carried out in different jurisdictions.

### Box 5.5      **Participants were generally supportive of mutual recognition for occupational registration**

[The] TTMRA has positively enhanced the ability of practitioners to transfer between jurisdictions, at little cost and with comparative ease. (Dental Council of New Zealand, sub. 21, p. 2)

In general the mutual recognition scheme between Australia and New Zealand works well. This has been achieved by ensuring that [the Australian Health Practitioner Regulation Agency] and New Zealand have similar standards for education of nurses and for assessing overseas applicants for registration. (Nursing Council of New Zealand, sub. 22, p. 1)

... mutual recognition appears to work quite well for occupations in most instances ... Without mutual recognition ... the regulatory barriers to the movement of skilled people would then increase, as would their associated costs. (Department of Education and Training, sub. 9, p. 2)

The TTMRA ... has helped the workforce move freely between New Zealand and Australia and has removed many of the costs involved. (Real Estate Institute of New Zealand, sub. 7, p. 2)

[Australasian Teacher Regulatory Authorities'] members believe, on the whole, the current mutual recognition processes work well enabling teachers to move easily between states and territories. (sub. 36, p. 2)

[The] right to registration 'across the ditch' is useful, in that as a result clients in Australia and New Zealand have more choice and Australian and New Zealand architects have additional opportunities. (New Zealand Registered Architects Board, sub. 4, p. 2)

The TTMRA and MRA effectively allows for the respective jurisdictions to recognise comparability of competency to facilitate recognition of registration. This is of benefit to the individual in terms of time and costs to become [registered] in Australia or New Zealand and to the economies and the community. (Architects Accreditation Council of Australia, sub. 20, pp. 6–7)

The enactment of both the MRA and TTMRA is viewed as a constructive development for both individuals wishing to relocate, either for professional opportunities or personal reasons, and commercial enterprises seeking increased flexibility in their workforce. (Air Conditioning and Mechanical Contractors' Association, sub. 15, p. 2)

Mutual recognition reduces costs by: requiring a person or good to only be certified once, with the certification recognised by other jurisdictions; and by increasing competition. The experience of some Business Council members is that mutual recognition works well, especially in sectors that have relatively uniform standards already, or efficient regulators. (BCA, sub. 45, p. 3)

The Dental Council of New Zealand (sub. 21, p. 2) said that mutual recognition had facilitated greater alignment of occupational requirements:

Cooperation between the regulatory authorities in each of the jurisdictions has resulted in closely aligned standards, processes and prerequisites for registration, enabling [the] TTMRA to work simply, quickly and efficiently.

This also highlights the important point that in order for mutual recognition to operate effectively, there must be a culture of cooperation — occupational regulators must have trust and confidence in, and respect for, their counterparts in other jurisdictions.

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In such cases, mutual recognition can work well even where there are differences in the scope of occupations and the way in which they are registered. For instance, the New Zealand Council of Legal Education (sub. 17, p. 2) said:

There are differences between some Australian States and New Zealand in terms of admission to the Bar. Jurisdictions such as Western Australia and New Zealand have a fused system in which legal practitioners can be admitted as both barristers and solicitors, while jurisdictions such as Queensland recognise these as separate professions.

The Council does not consider that these differences create difficulties in practice. While New Zealand lawyers are admitted as barristers and solicitors, they can be issued practising certificates as barristers and solicitor or as barristers sole. This enables effective recognition of different legal occupations.

Similarly, the Nursing Council of New Zealand (sub. 22) reported that it overcomes differences in the scope of practice between Australian and New Zealand nurse practitioners by applying conditions to the licences of those registered under mutual recognition.

### **Some regulators misunderstand the purpose of mutual recognition**

The fundamental principle of mutual recognition of occupations is that registration in one jurisdiction is sufficient grounds for registration in an equivalent occupation in another jurisdiction. Differences in the occupational standards — such as qualifications, skills and experience — required to obtain (and retain) registration are not grounds to reject an application. In other words, the jurisdictions that participate in the mutual recognition schemes have agreed to accept each others' standards, even when those standards are different.

Some participants noted that they would prefer that differences between jurisdictions' occupational registration systems be eliminated. For example, the Australian Security Industry Association Limited (ASIAL) (sub. 11, p. 1) said:

Since 1996, [ASIAL] has advocated for the introduction of a uniform national system of regulatory control for the security industry, one which satisfies the requirements of harmonisation ... Whilst there has been some progress, a national licensing system for the security industry appears to be no closer to realisation.

Similarly, the Australian Institute of Architects (sub. 43) and the Real Estate Institute of Australia (sub. 40) suggested that a national registration scheme would be preferable to mutual recognition.

Other participants were under the misapprehension that harmonised occupational standards were a prerequisite for mutual recognition. For example, one respondent to the Commission's survey said that 'if mutual recognition was to happen, it would require a national agreement on a set of minimum standards for the different occupations'.

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Some participants also appeared to misunderstand the purpose of mutual recognition. For example, the Australian Dental Association (sub. 6) expressed concern about the movement of dental practitioners between Australia and New Zealand exposing Australian dental practitioners to increased competition. Such misunderstandings point to the need for better governance and oversight arrangements, and for improvements to the mutual recognition users' guide (chapter 7).

## 5.4 Concerns about shopping and hopping

Differences in occupational standards across jurisdictions can create the potential for 'shopping and hopping' — the practice of registering in the jurisdiction with the least stringent requirements and then using the MRA or TTMRA to move to a preferred jurisdiction, either within Australia or between Australia and New Zealand. Shopping and hopping was a key concern for several study participants and industries, notably the security industry.

### Shopping and hopping in the security industry

In contrast to the confusion in some industries, there are legitimate concerns about shopping and hopping in the security industry. For example, ASIAL (sub. 11, p. 2) said:

Some individuals have sought to abuse or manipulate the mutual recognition process. They have done so by obtaining a security licence in a jurisdiction that they do not reside [in], where the licensing process is viewed as less rigorous. Once they obtain their licence they then seek mutual recognition in the jurisdiction in which they usually reside, where the licensing process is regarded as more rigorous. They have no intention of working in the state in which they obtained the licence.

The NSW Department of Premier and Cabinet (sub. 51, p. 5) observed that 'prospective security licence applicants, who are incapable of meeting NSW competency standards, are taking advantage of weaknesses in other jurisdictions' regulation of security training'. The Australian Government Department of Education and Training (sub. 9, p. 11) said:

There has been long-standing concern in relation to perceived low standards required for licensed security occupations in at least one jurisdiction. Other jurisdictions have indicated that applicants seek to obtain a licence in this jurisdiction, because the requirements are substantially lower than required elsewhere in Australia. They then apply for licence recognition in the other jurisdictions and regulators are obliged to recognise these licences ... There have been concerns that a small number of licensed security staff may have links to organised crime, therefore there may be risks associated with poor standards in particular jurisdictions.

Concerns about shopping and hopping in the security industry are more pronounced in certain jurisdictions. In particular, there is concern about the flow of security personnel registered in Queensland to New South Wales and Victoria. NSW Police told the



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Commission that around 50 per cent of all security guard licences in New South Wales are issued under mutual recognition to people who were originally licensed in Queensland, and a significant proportion of people who initially register in Queensland are residents of south western Sydney. There was a tenfold increase in applicants with Queensland security licences seeking registration under mutual recognition in New South Wales between 2008 and 2012 (NSW Police, pers. comm., 9 June 2015).

The emergence of such widespread shopping and hopping stems from differences between occupational regulators in their approach to training qualifications and standards.

- Some regulators accept the qualifications issued by any registered training organisation (RTO) without further questioning. In the security industry, the Queensland Office of Fair trading adopts this approach.
- Other regulators have added an additional layer of oversight to the training system. For example in New South Wales, training organisations are required to adhere to 32 standards set by the NSW Police in order to be approved to deliver security licence courses (NSW Police Force 2014).

Regulators' perceived need to have closer oversight of training providers reflects broader systemic concerns about the quality of training delivery in the vocational education and training (VET) sector. These concerns are currently being considered by the Australian Skills Quality Authority, which is conducting a 'strategic review' of security training (ASQA 2014).

## Shopping and hopping in other industries

The risk of, rather than the potential benefit from, shopping and hopping dominated submissions and information provided by study participants from other industries. Around 35 per cent of the occupation-registration authorities that responded to the Commission's survey were concerned about shopping and hopping. Among this group, the concerns were concentrated in occupations where registration bodies did not consider the prerequisite training requirements to be comparable across jurisdictions (figure 5.3).

Study participants highlighted occupations where they considered there was a risk of poor outcomes due to shopping and hopping, warning of the potential risks to property, health and safety from lower standards. For example, the Valuers Registration Board of Queensland (sub. 14, p. 6) said:

Jurisdiction hopping is occurring, particularly between NSW and Queensland ... The Board perceives this as the race to the bottom.

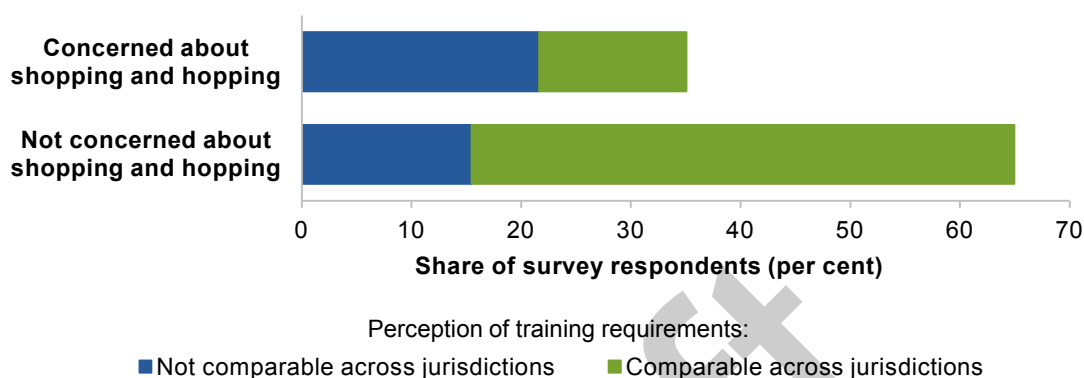
The Real Estate Institute of Australia (sub. 40, p. 4) said:

... [mutual recognition] applications are in most instances the result of jurisdictional 'shopping and hopping' where agents choose to obtain a licence in a jurisdiction with lesser education and



experience requirements most often as a ‘quickie’ course and then apply for mutual recognition of the licence in their home jurisdiction.

**Figure 5.3 Shopping and hopping concerns and training comparability**



*Data source:* Productivity Commission survey of occupation-registration bodies.

The NSW Department of Premier and Cabinet (sub. 51, p. 5) observed that an:

... example of ‘jurisdiction shopping and hopping’ relates to the field of contaminated land site auditors in NSW ... other jurisdictions have established systems for approving contaminated land auditors with significantly lower standards of entry. NSW is aware of a number of individuals indicating that they are planning to become accredited auditors in other jurisdictions so they can become accredited in NSW under the MRA. This has the potential to undermine the integrity of the NSW site auditor scheme.

Master Electricians Australia (sub. 34, p. 2) warned that:

... electrical contractor licensing standards in NSW ... are lower than most states and territories.

The New Zealand Psychologists Board (sub. 18) suggested that 38 New Zealanders and 23 psychologists of other nationalities applied to Australia with qualifications that would not have met the New Zealand requirements, and then came to New Zealand under TTMRA.

Shopping and hopping is also reportedly occurring in the dental profession (Dental Council of New Zealand, sub. 21) and gasfitting (Master Plumbers, Gasfitters and Drainlayers, sub. 44).

Health Regulatory Authorities of New Zealand (sub. 16, p. 3) said that while shopping and hopping ‘is more of an administrative inconvenience than a risk to the public’ in most

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occupations, some overseas trained osteopathy registrants use the TTMRA to avoid the preceptorship condition that would otherwise be applied to their practice.<sup>14</sup>

Where Ministerial Declarations on occupational equivalence apply (the declarations apply between Australian jurisdictions, but not between Australia and New Zealand), it is important that they are kept up to date. Failure to maintain the declarations can place regulators in the difficult position of being unable to comply with all applicable laws, creating apprehension about, and potentially undermining trust in, mutual recognition (discussed below).

Despite the concerns raised in some occupations, shopping and hopping was not considered to be an issue of concern for study participants in many other occupations. They included:

- teaching (Australasian Teacher Regulatory Authorities, sub. 36; Queensland College of Teachers, sub. 8; Victorian Institute of Teaching, sub. 5)
- nursing (Nursing Council of New Zealand, sub. 22)
- architecture (New Zealand Registered Architects Board, sub. 4)
- the legal professions (New Zealand Council of Legal Education, sub. 17; New Zealand Law Society, sub. 19).

These occupations tend to be those whose requirements for initial and ongoing registration are largely consistent between jurisdictions. In many cases, these are occupations for which initial training takes place at university, rather than in the VET sector. This in turn is likely to reflect systemic differences in allowed assessment methods within and between the VET and higher education sectors (discussed below).

## Concerns partly reflect problems with the VET sector in Australia

While differences in occupational standards are the primary source of concerns about shopping and hopping, such concerns also reflect disparities in the curriculum and assessment methods used in training provided by the VET sector within and across jurisdictions in Australia. These concerns have previously been expressed in range of forums, including past Commission studies and inquiries (PC 2011a, 2011b, 2012a).

In this study, several respondents to the Commission's survey of occupational regulators considered the behaviour of registered training organisations (RTOs) to be problematic. For example, one respondent expressed concern about RTOs' inconsistent interpretation of national standards:

The training standard is set within the national competencies from which regulators are selecting the appropriate modules for licensing. It is the interpretation of the delivery and

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<sup>14</sup> A preceptorship is a period of supervised practice. For osteopaths in New Zealand, the preceptorship period is 12 months.

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assessment components by RTOs that seems to be creating substantial differences in training outcomes. (SA Health, survey response)

Survey responses echoed sentiments that have also been expressed in the current Senate inquiry into the operation, regulation and funding of private VET providers in Australia (Senate Education and Employment References Committee 2015). For instance, in its submission to the Senate inquiry, the Australian Skills Quality Authority (ASQA) expressed concern about ‘the risk that an individual is certified by a RTO as possessing competencies that do not accurately reflect his/her true ability to apply the associated skills and knowledge’ (ASQA 2015, p. 4).

In addition, as discussed above, some regulators in the security industry were sufficiently concerned about the competence of VET graduates that they have added an additional layer of security-specific oversight to the training system.

In contrast, no concerns about student outcomes were expressed in relation to the higher education sector. The main factors contributing to relatively higher risks in the VET sector compared to the higher education sector are:

- the number of providers: around 5000 in VET and 170 in higher education
- the scale of operations: median provider size — by equivalent full time student load — in the publicly funded VET system is about 30, compared with around 500 in higher education, while the average (mean) size is around 360 and 5000, respectively
- the prevalence of relatively short duration courses in VET compared with higher education
- barriers to entry/exit: these are much lower in VET than higher education (and, thus, the scope for ‘dodgy operators’ to move in and out is commensurately greater) (PC 2015b, p. 109).

Legislative changes have recently been made in an attempt to address concerns about VET quality. The *National Vocational Education and Training Regulator Amendment Act 2015* (Cwlth) introduces VET ‘Quality Standards’ to enhance:

... the ability of the VET sector to respond to emerging issues promptly and effectively ... Quality Standards will address the quality of training by establishing a new standard to address emerging issues which impact on the quality and integrity of training for individuals and students. The Quality Standards will provide a method by which unanticipated changes in the VET sector may be quickly addressed ... A Quality Standard would be instituted where current standards are not sufficient for a particular issue that affects the quality of outcomes for students. (Birmingham 2015, pp. 8–9)

The introduction of VET Quality Standards should, over time, help to address occupational regulators’ concerns. If the concerns persist the mutual recognition schemes contain mechanisms that ultimately give regulators the tools to limit the risk of regulatory failure (discussed below).

## Approaches available to constrain shopping and hopping

There are three potential avenues of action that can legally be taken if an occupation registration body is concerned about another jurisdiction's occupational standards.

- Regulators or jurisdictions concerned about lower occupational standards could engage in dialogue with their counterparts in other jurisdictions, with the aim of finding common ground, thereby allowing mutual recognition to occur to both regulators' satisfaction.
- Local authorities may impose conditions on registration in order to achieve equivalence of occupations. For example, when a licenced pest control operator moves from Victoria to Queensland, they would have a condition placed on the Queensland licence to exclude them from treating timber pests (such as termites), because Victorian pest control operators do not treat timber pests. Issues related to determining occupational equivalence are discussed below.
- A more formal channel involves referring issues about disparities in occupational standards to Ministerial Councils for resolution. A Ministerial Council 'shall endeavour to determine, within 12 months ... whether or not agreed standards ... should be set with respect to the carrying on of the occupation' (MRA, para. 4.8.1). Determination of a standard requires a vote in favour by two thirds of jurisdictions participating in the relevant mutual recognition scheme. A recommendation on standards is then made to Heads of Government. Unless at least one third of the Heads of Government reject the recommendation within three months, participating jurisdictions are deemed to have agreed to implement any recommended standard as soon as practicable.

However, the first two of these options appear to be rarely used and the third has never been used (reasons for this are discussed in chapter 7) to address concerns about shopping and hopping. Instead, as noted by the Australian Department of Education and Training (sub. 9, p. 2), some occupation-registration bodies have decided not to implement mutual recognition in accordance with the legislation.

... a small number of regulators exhibit a marked reluctance to comply with all aspects of their obligations, particularly those who seek to impose additional tests on applicants or who continue to take into account the pathway by which the applicant obtained the licence. In a very few cases, a regulator has made it clear that they do not believe they need to abide by the Act, even if they have been advised of a breach, and, in one instance, their action has been attributed, correctly or incorrectly, to direction from quite a senior official in their jurisdiction.

In certain cases, this includes refusing to register applicants from other jurisdictions. For example, ASIAL (sub. 11, p. 2) claimed that concerns about the quality of applicants from other jurisdictions for security guard licences had caused the regulator in Victoria to 'delay or decline [mutual recognition] applicants without further investigation or assessment'.

The Land Surveyors Licensing Board of Western Australia (sub. 28) reported that it places conditions on surveyors registered under mutual recognition until they pass the Board's Application of Survey Law exam.

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Energy Safe Victoria (ESV) (sub. 6, p. 2) said that when an electrician applies under mutual recognition for a Victorian licence, it:

... requires the person to submit evidence of how their interstate licence was obtained. If ESV is not satisfied that they have met similar requirements to Victorian applicants including a [Licensed Electrician's Assessment] equivalent, Certificate III and four year contract of training; a supervised worker's licence is issued, requiring them to be supervised when carrying out electrical installation work. This may be seen as contrary to the requirements of the MRA, but ensures the same level of competence as those that train and qualify in Victoria.

Responses to the Commission's survey of occupational regulators suggested that the use of conditions was not widespread. In 2014, around 10 per cent of mutual recognition registrations reported to the Commission had conditions attached to them. The use of conditions was concentrated in building occupations (around 70 per cent). Thirteen regulators applied conditions to all licenses issued under mutual recognition, while the majority did not issue any licences with conditions.

Other regulators are reportedly requiring mutual recognition applicants to sit a test or to undertake further training before being granted registration. For example, Western Australia requires mutual recognition applicants for an electrical contractors licence to complete training modules delivered by one of three approved providers (Department of Commerce (WA) 2014). Completing these modules takes a minimum of five days face to face training and costs at least \$880.

The Commission found other examples of breaches of the mutual recognition legislation by occupational regulators in a range of occupations, including for driving instructors and pest controllers.

## **New measures proposed by study participants**

The New Zealand Psychologists Board (sub. 18) suggested that shopping and hopping could be prevented through the introduction of a residency requirement. The Real Estate Institute of Australia (sub. 40) mistakenly considered that a residency requirement was already in place. However, the mutual recognition legislation states that 'residence or domicile' in a particular jurisdiction 'is not to be a prerequisite for or a factor in entitlement to the grant, renewal or continuation of registration'.

If these legislative provisions were repealed in order to introduce a residency requirement, such a requirement could, for example, take the form of requiring new registrants to remain within the registering jurisdiction for 12 months before seeking registration in another jurisdiction under mutual recognition. Such a requirement would preserve the original intent of mutual recognition, while preventing the low standards in one jurisdiction from undermining the higher standards in other jurisdictions, through widespread remote training and licencing.

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Alternatively, a residency requirement could involve refusing to recognise the qualifications of an individual who undertakes training in one jurisdiction, registers in another jurisdiction and then seeks to have their registration recognised in the jurisdiction where they trained. This would be similar to the exclusion that applies under the EU's Professional Qualifications Directive, under which countries can refuse to recognise the qualifications of an individual who seeks to use mutual recognition to bypass registration requirements in the jurisdiction where they trained (appendix B).

However, residency or work experience requirements are likely to be heavy handed and difficult to administer, relative to the potential benefits. Occupational regulators would incur additional costs in checking an applicant's residency status, although the fact that a person lived in a jurisdiction for a particular period of time does little — if anything — to guarantee their occupational competency. Similarly, regulators would incur additional costs in verifying work experience. These costs could be particularly high where former employers are hard to trace or no longer exist.

Even a more light handed system, such as requiring applicants to complete statutory declarations about their residency or work experience, would increase the costs borne by applicants for registration under mutual recognition. Residency requirements would also preclude applicants from seeking registration and employment in a jurisdiction in advance of relocating, thereby making it more difficult for them to benefit from mutual recognition. A residency requirement would also work against the mobility of people seeking to provide services in more than one jurisdiction on a short term or temporary basis (chapter 6).

Another way of countering concerns about shopping and hopping would be to abolish licensing requirements for a particular occupation. For instance, concerns about valuers obtaining registration in New South Wales and then 'hopping' to Queensland would cease if New South Wales abolished its property valuer licensing regime, as recommended by the NSW Independent Pricing and Regulatory Tribunal (IPART 2013).

## **The Commission's assessment of shopping and hopping**

In many ways, shopping and hopping is a desired outcome of mutual recognition of occupations. It promotes regulatory competition between jurisdictions and provides benefits to workers, who can gain registration more cheaply and easily.

The potential drawback of shopping and hopping is that outcomes under the least stringent jurisdiction's requirements do not meet community expectations. However, the Commission was presented with no compelling evidence of standards being set at a level low enough to cause harm, nor any evidence to suggest that differences in standards have led to unacceptable risks. This suggests that shopping and hopping is leading to economic gains in practice.



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Concerns about shopping and hopping have tended to occur where regulators consider that the operation of mutual recognition is dependent on there being a great degree of similarity between their requirements and those of other jurisdictions. This focus on inputs is at odds with the focus taken by the architects of the mutual recognition schemes, who took a broader view, based on the principle that the outcomes of different occupational registration systems generally meet community expectations in each jurisdiction, and that there is little difference in such expectations between jurisdictions. With such close alignment of community expectations, mutual recognition can operate smoothly and delivers similar outcomes despite variations in processes. The ability of mutual recognition to deliver outcomes that meet community expectations has been demonstrated through more than 20 years of operation of mutual recognition.

The number of people engaging in shopping and hopping in most occupations is relatively small compared to the total number of registered practitioners, and there is an absence of evidence to suggest that the ‘easier’ registration pathways (or pathways that are perceived to be ‘easier’) have led to inferior outcomes in practice, at least outside the security industry.

In relation to the specific concerns of the security industry, ASQA is currently conducting a strategic review of security training. As ASQA (2014) noted, the review was necessary ‘in response to persistent concerns raised by stakeholders, the general community and Coroners’ reports ... about the quality of training provided for workers in the security industry’. The draft report of the review is expected to be published in mid-2015. To the extent that changes proposed by ASQA lead to improvements in the standard of security training delivery and of security personnel competency, they are likely to alleviate many concerns about mutual recognition in that industry.

#### DRAFT FINDING 5.1

Some occupational regulators are not implementing the mutual recognition schemes as intended and legislated, citing concerns about different standards in other jurisdictions leading to ‘shopping and hopping’. However, there is no clear-cut evidence that shopping and hopping has led to any harm.

#### DRAFT FINDING 5.2

The concerns of occupational regulators about harmful ‘shopping and hopping’ are concentrated in those occupations where vocational education and training is not being delivered to the standards expected by regulators, and are not symptomatic of deficiencies in the mutual recognition schemes.



**DRAFT RECOMMENDATION 5.2**

Where the Australian, State, Territory or NZ Governments have valid concerns about different occupational standards across jurisdictions leading to harmful ‘shopping and hopping’, they should first make use of the schemes’ existing remedies, including Ministerial Councils and imposing conditions on registration to achieve equivalence of occupations.

## 5.5 Improving the operation of mutual recognition

In addition to concerns about differences in standards and subsequent shopping and hopping, there are a range of other issues affecting the way in which regulators implement the mutual recognition of occupations. They relate to:

- determining occupational equivalence
- continuing professional development (CPD)
- background checks
- the mutual recognition application process
- disciplinary procedures
- the TTMRA exemption for medical practitioners.

This section addresses each of these issues in turn.

### Determining occupational equivalence

Determining what is an ‘equivalent’ occupation across jurisdictions — and therefore who is entitled to register under mutual recognition and under what conditions — is a recurring issue for registration authorities. This was evident in responses to the Commission’s survey of occupational regulators, which indicated that they require more guidance in determining occupational equivalence.

Since 2006, Australian jurisdictions have developed detailed statutory instruments — termed Ministerial Declarations — which prescribe the equivalence of (mainly trade related) occupations across Australia (chapter 3). (Some Ministerial Declarations made prior to 2006 prescribe occupational equivalence between two states.)

Mutual recognition is greatly streamlined where a ministerial declaration of licence equivalency has been agreed for an occupation, which reduces the need for a regulator to make a case-by-case assessment of a licence. (Department of Education and Training, sub. 9, p. 3)

Data from the Commission's survey of occupational regulators suggest that, among occupations regulated by the respondents, around one quarter are covered by Ministerial Declarations. However, the declarations focus on registered occupations in which many people work, and so the proportion of workers covered by declarations is likely to be substantially larger. The criteria used to determine which occupations should be covered by Ministerial Declarations:

... included the numbers of regulated persons within the occupation, the likely frequency of mobility for that occupation and the economic 'risk' if labour mobility was impeded. Occupations which, after investigation, did not meet these criteria, were not the subject of ministerial declarations ... These included ... private investigators, jockeys, drillers, fishing hands, greyhound trainers [and] insurance agents. (Department of Education and Training, sub. 9, p. 9)

The declarations are published on a licence recognition website to provide information to licence holders seeking to provide their services in another jurisdiction (box 5.6). Processes for ensuring that the licence recognition website is efficiently updated are discussed in chapter 7.

#### **Box 5.6      The licence recognition website**

The licence recognition website ([www.licencerecognition.gov.au](http://www.licencerecognition.gov.au)) provides information on the mutual recognition of licensed occupations in Australia. In particular, it allows workers who hold licences in trade and other vocationally trained occupations to search for equivalent licences in other Australian jurisdictions, where equivalence is defined by a Ministerial Declaration.

To search for an equivalent licence in another jurisdiction, licence holders are guided through a four step process, requiring them to select:

- the jurisdiction in which their licence was issued
- their occupation
- their licence
- the state or territory in which they would like to find an equivalent licence.

Search results show the equivalent licence and the relevant regulator in the second jurisdiction.

The website also contains information about Ministerial Declarations, the Federal Register of Legislative Instruments (on which Ministerial Declarations must be registered), the ability to appeal regulator decisions to the Administrative Appeals Tribunal or Trans-Tasman Occupational Tribunal, and the governance arrangements of the mutual recognition schemes. The website provides links to relevant mutual recognition resources, including the users' guide, and to occupational regulators' websites.

*Source:* Department of Industry (2015b).

There is some evidence that the declarations have assisted regulators in making decisions on licence applications under mutual recognition, and that regulators had granted more licences with conditions as a result (ACG 2008). The Real Estate Institute of New Zealand (sub. 7, p. 4) considered the license recognition website (and the underpinning

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declarations) to be a useful tool, and suggested that ‘this tool be extended to include New Zealand ... once national licensing is accomplished in Australia’.

However, the declarations have become outdated due to a lack of regular updating as jurisdictions change their registration regimes, or due to changes in others regulations that are referenced in the declarations. For example, many builders’ licences refer to classes of building that are defined in the Building Code of Australia. The building code is updated yearly (ABCB 2014), and those updates can have consequential effects on builders’ licences. The declarations may also be missing key information in some cases, such as complete codes of scope of work that can be performed by certain occupations (Air Conditioning and Mechanical Contractors’ Association, sub. 15).

This can pose considerable difficulties for regulators, who are legally required to implement the declarations, even when they are out of date. It becomes particularly problematic when it is impossible for regulators to adhere to the declaration, such as when licence classes no longer exist. For example, the Building Practitioners Board (Victoria) (sub. 39, p. 2) said:

A particular difficulty arises for the Board where the Ministerial Declaration of equivalency for a particular registration relates to the construction of classes of buildings where the content of those classes may have changed in the years since the Declaration was made.

The Air Conditioning and Mechanical Contractors’ Association (sub. 15, p. 2) raised concerns about the currency of the Ministerial Declaration for plumbing occupations and air conditioning and refrigeration mechanics. It noted that ‘the Ministerial Declarations have not been updated since [they were developed], while state-based licensing legislation has been amended’.

Energy Safe Victoria (sub. 26, p. 2) stated that there is a need to ‘revise the Ministerial declarations to clearly indicate the type of conditions that can and will be applied to achieve equivalence’.

As noted above, responses to the Commission’s survey of occupational regulators indicated that around 70 per cent of licences granted with conditions were for building occupations — that is, occupations in which many of the Ministerial Declarations are out of date.

The CJRF began work to update the Ministerial Declarations in March 2014, for the first time since 2009. However, progress has been slow. At the time of writing this report, updated declarations were expected to be completed by mid-2015 for property, gaming, shotfiring and pyrotechnics, pest and weed control, and land transport occupations. Updated declarations for various construction occupations, as well as for mine managers, were also being prepared.

Given the number of out-of-date declarations and the volume of work required, this is a time consuming and difficult task. The Department of Education and Training (sub. 9) noted that intensive work is required to maintain the declarations, and that the work needs

to be properly resourced. The governance and resourcing arrangements for ensuring that Ministerial Declarations remain up to date are discussed in chapter 7.

Once the Ministerial Declarations have been updated and appropriate governance arrangements have been established, governments in Australia and New Zealand should consider extending the Ministerial Declarations to include New Zealand.

#### DRAFT FINDING 5.3

Ministerial Declarations that prescribe the equivalence of occupations across Australia assist regulators to make decisions on mutual recognition licence applications. However, the effectiveness of the declarations has been constrained by a failure to keep them up to date.

#### DRAFT RECOMMENDATION 5.3

The Australian, State and Territory Governments should — through their participation in the Cross-Jurisdictional Review Forum — update all out-of-date Ministerial Declarations as a priority. When this work is complete, governments in Australia and New Zealand should give consideration to extending the Ministerial Declarations to include New Zealand.

## Continuing professional development

Many occupational regulators in Australia and New Zealand require registered members of the occupation to participate in continuing professional development (CPD). Typically, CPD is seen as:

... the means by which members of the professions maintain, improve and broaden their knowledge, expertise and competence, and develop the personal and professional qualities required throughout their professional lives. (Nursing and Midwifery Board of Australia 2015, p. 1)

The mutual recognition legislation is clear that CPD requirements cannot be imposed when a person first registers under mutual recognition. In Australia, the situation is less clear when such a person later renews their registration. In its 2009 review of the mutual recognition schemes, the Commission obtained legal advice on this issue. It found that, for individuals who originally registered in an Australian jurisdiction under mutual recognition, ‘ongoing conditions, including those relating to further study and upgrading of professional skills are probably not permitted, although the [relevant pieces of legislation] are ambiguous’ (PC 2009, p. 101).

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The view that CPD requirements cannot be imposed on individuals who originally registered under mutual recognition was supported by the Department of Education and Training (sub. 9, p. 11), which noted that:

... requirements for compulsory professional development, if they apply, may not be imposed at any time [in Australia], not just at the time of licence application and grant. Some regulator responses to specific issues appear to suggest that a small number of regulators may disregard this provision but it is difficult to gain evidence of this.

In contrast, the NZ mutual recognition legislation is clear that ongoing CPD requirements can be imposed on the renewal of a registration (but not as a requirement to gain initial NZ registration under mutual recognition).

Most participants were strongly of the view that those registered under mutual recognition should be subject to the same ongoing requirements as other registrants, particularly in relation to CPD (box 5.7). This view was reflected in responses to the Commission's survey of occupational regulators which showed that, among the respondents who imposed CPD requirements on local registrants, 84 per cent imposed the same requirements on those registered under mutual recognition.

Indeed, a number of Australian regulators said that they require people registered under mutual recognition to fulfil CPD requirements in order to renew their registration. For example, the Australian Institute of Architects (sub. 43, p. 1) said that mutual recognition:

... does not currently exempt an architect from ... having to comply with the continuing professional development and other additional requirements required which are in some instances over and above those required by their home jurisdiction.

The Queensland College of Teachers (sub. 8, p. 4) said that it:

... believes that it is essential for reasons of quality teaching and protection of children that ongoing requirements for registration including matters such as continuing professional development ... are applied equally to all registered teachers in Queensland.

The Council of Reciprocating Surveyors Board of Australia and New Zealand (sub. 52, p. 3) said:

Surveyors need to comply with ongoing requirements of further training and continuing professional development in the jurisdiction they practise in. This provides equity and ensures surveyors are kept up to date with local issues and are competent to practise in that jurisdiction.

AHPRA (sub. 50, p. 8) considered that:

Parliament could not have intended for the pathway in obtaining registration to have any relevance to ongoing compliance with Australian requirements, namely that people initially registered under the TTMR [Act] would be immune from ongoing requirements for registration for the rest of their careers in Australia.

The Commission is sympathetic to these views and considers that there is not a good argument for exempting people who gain registration under mutual recognition from

ongoing requirements for CPD, provided regulators apply those requirements equally to all registration holders.

#### **Box 5.7 Participants' support for ongoing requirements**

... individuals registered under mutual recognition should be subject to the same ongoing requirements as other licence holders in a jurisdiction. (Air Conditioning and Mechanical Contractors' Association, sub. 15, p. 3)

The Council strongly supports the idea that all people registered under mutual recognition should be subject to the same ongoing requirements as other licence holders as that is the whole basis of the [Health Practitioners Competence Assurance] Act and one of the reasons for its introduction in its current form which has a very strong emphasis on maintaining competence. (Nursing Council of New Zealand, sub. 22, p. 4)

The authorities would vehemently oppose any provision for TTMRA registrants to be exempted from ongoing requirements for registration. Entitlement to registration is just that; it allows a person entry to the Register. Once there, all registrants — whether TTMR, overseas trained, or qualified in the home jurisdiction — must meet all statutory requirements set by their regulator, including those required for renewal of authority to practise each year. The annual renewal requirement is a key opportunity for the regulator to satisfy itself that the registrant is maintaining competence and fitness to practise, which is an essential aspect of public protection. (Health Regulatory Authorities of New Zealand, sub. 16, p. 4)

Subjecting those registered under mutual recognition to the same ongoing requirements as others in the jurisdiction is equitable, as these requirements relate to the conduct of the licensee, not to the obtaining of a licence ... Ongoing requirements such as continuing professional development are an important means of providing orientation to a new working environment, progressively upgrading skills and reducing risk to the public. The pathway by which registration/licensing was granted should not exempt practitioners from full participation in their chosen profession, but the requirement should not be imposed at the time the licence is granted, and should not be more onerous than is imposed on other regulated persons for the same licence type. (Department of Education and Training, sub. 9, pp. 10–11)

Ongoing registration requirements should apply to all practitioners equally, whether they have registered pursuant to TTMRA or otherwise. There is currently no justification for treating TTMRA registrants and other registrants differently. (Dental Council of New Zealand, sub. 21, p. 2)

Australian applicants who become licensees in New Zealand under the TTMRA are also required to complete the continuing education requirements in New Zealand under the Real Estate Agents Act (Continuing Education) Practice Rules 2011 which came into force on 1 January 2012. (Real Estate Institute of New Zealand, sub. 7, p. 3)

However, where requirements such as CPD are imposed, it is important that their benefits outweigh their costs. This may not always be the case, for several reasons:

- When CPD is compulsory, it is generally delivered in a standardised fashion. This can result in an emphasis being placed on course attendance rather than on responding to individuals' development needs.



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- Attendance at a CPD session neither guarantees that learning takes place, nor that any learning will be translated into changes that improve practice.

Indeed, some CPD programs that are currently in place are of doubtful quality. In New South Wales, for example, IPART (2013) reported that CPD for the home building licence offers limited value. There is also little evidence to suggest that participation in CPD has a bearing on professional competence or performance in a range of other professions, including teaching, dentistry, and physiotherapy (for example, Cole 2004; Eaton et al. 2011; French and Dowds 2008). Even in professions with a long tradition of CPD, such as medicine, reliable data on the cost effectiveness of CPD are largely absent (Merkur et al. 2008).

The Housing Industry Association (sub. 37, p. 10) expressed these concerns by saying ‘CPD is an unnecessary piece of red tape that adds costs to an already significantly regulated industry’.

However, concerns about the quality and cost effectiveness of CPD need to be separated from the in-principle question of whether people who gain registration under mutual recognition should be forever exempted from requirements that apply to people who register through other pathways.

In its 2009 report, the Commission recommended that the mutual recognition legislation be amended to make it clear that CPD requirements apply equally to all registered persons within an occupation, including those registered under mutual recognition. The CJRF (2014b, p. 13) supported the ‘principle that licence holders should be subject to the same ongoing requirements in a jurisdiction, irrespective of whether a licence was acquired under mutual recognition’. However, it cautioned that ‘careful consideration will need to be given to the implications for occupational practitioners who maintain a licence in more than one jurisdiction, for example where this would result in duplicate training requirements for persons concurrently registered in more than one jurisdiction’.

The Department of Education and Training (sub. 9, p. 11) also sounded a note of caution, warning that:

A legislative amendment could address this [CPD] issue, but there is a risk that re-opening too much of the policy underpinning mutual recognition would result in regulators seeking to impose more state-specific restrictions, undermining the original policy rationale for the schemes.

In light of these risks, together with the demonstrated reluctance among jurisdictions to make any legislative changes and the cumbersome process for amending the mutual recognition legislation in Australia (chapter 7), the Commission therefore prefers an approach where the governments jointly state the intention of the legislation is to allow CPD requirements to be applied equally to all persons when renewing their registration, and publicise this in the official users’ guide for the schemes. This would effectively be an instruction to regulators. In time, the Commission would expect case law to further develop and, if uncertainty regarding a regulator’s right to treat workers equally when



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renewing their registration persists, then the option of changing the legislation would need to be considered.

#### DRAFT RECOMMENDATION 5.4

Governments in Australia should jointly state that the intent of the mutual recognition legislation is to allow continuing professional development requirements to be applied equally to all persons when renewing their registration. This should be reflected in the official users' guide for the schemes.

### Mutual recognition of CPD

As noted above, if CPD requirements are applied equally to all persons when renewing their registration, there is the potential for this to lead to duplication in training requirements for those registered in multiple jurisdictions.

This is of particular concern for occupations in which the registration renewal period — and thus the period over which CPD requirements must be met — differs between jurisdictions. For instance, Queensland College of Teachers requires teachers with full registration to complete at least 20 hours of CPD on an annual basis (QCT 2015), whereas the Teachers Registration Board of South Australia requires teachers to have completed 60 hours of 'professional learning' over a three-year period, as well as attending a mandatory notification training session (TRBSA 2015).<sup>15</sup>

When maintaining registrations in multiple jurisdictions leads to a person being required to undertake additional CPD or to change its timing, this adds to the regulatory burden and limits the size of the gains from mutual recognition. It also indicates the potential for enhanced cooperation between regulators. The Governments have noted that there may be scope for 'encouraging regulators to recognise ongoing requirements [such as CPD] conducted in other jurisdictions' (CJRF 2014b, p. 13). The Commission agrees.

Some occupational regulators have already established mechanisms for the recognition of CPD activities undertaken in another jurisdiction for the purposes of local CPD requirements. For example, the lawyers registered in New Zealand 'may count CPD activities required by ... other professional bodies or regulated bodies both in New Zealand and overseas towards ... CPD requirements provided they comply with the definition of activities in the [CPD] Rules' (NZLS 2014, p. 3). Similar arrangements could be pursued in other occupations.

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<sup>15</sup> Mandatory notification training is designed to train 'staff working in schools and children's services about the role they play in preventing and responding to child abuse and neglect' (DECD 2015).

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## Background checks

Background checks — including police checks, criminal-history checks and working-with-children checks — are a particularly sensitive issue for many regulators because they cannot legally be required for registrants under mutual recognition. Nonetheless, occupational regulators often require applicants to undertake a background check as a condition of registration under mutual recognition. In essence, those regulators who routinely undertake background checks of local applicants do not have sufficient confidence in the background checks that may have been done by other jurisdictions to mutually recognise them.

The Department of Education and Training (sub. 9, p. 15) observed:

... some agencies seem to persist in imposing testing of mutual recognition applicants. This may be a particular problem for fit and proper checks where there is sometimes regulator anxiety that offenders of a particular type may not have been adequately screened in the originating jurisdiction. It is difficult to estimate the extent of this problem ...

For teachers, the Queensland College of Teachers (QCT) (sub. 8, p. 2) said that:

... one significant aspect of teacher registration is the requirement and need for a criminal record and character check of all applicants for registration as a teacher. The view of the QCT is that this check should continue to be required by each jurisdiction ... The QCT believes that the additional level of security provided by undertaking its own criminal record and character checks is necessary to enable it to fulfil this requirement regarding the protection of children ... in practice these required and necessary checks are conducted.

The Victorian Institute of Teaching (sub. 5) supported this view.

Australasian Teacher Regulatory Authorities (sub. 36, p. 2) attributed the perceived need for each jurisdiction to conduct its own checks to differences among jurisdictions in the legislative provisions applying to criminal history checks:

... character checks (including a criminal record check) should continue to be required by each jurisdiction because there are differences among jurisdictions in the legislative provisions applying to criminal history checks. Registration authorities in some jurisdictions are able to obtain more information than others through police checks. For example, provisions differ regarding the type of offences and whether and to what extent 'spent' convictions are revealed. In addition, authorities have different legislative provisions in relation to the frequency of criminal record checks, for example, on renewal of registration which could range from 3-5 years. Any offences occurring from the date of the criminal record check, which may have been undertaken over four years ago, would not have been taken into consideration by the originating jurisdiction.

The Nursing Council of New Zealand (sub. 22, p. 5) said that it 'needs to ensure that it has carried out all the appropriate criminal checks to ensure that a practitioner is fit for registration and to continue practising'. Similarly, AHPRA (2015) said that it 'must check an applicant's criminal history during the registration process to ensure only those practitioners who are suitable and safe to practise are granted registration in Australia'.

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This includes requiring all applicants who have resided outside of Australia for more than six months — including Australians, New Zealanders and citizens of other countries — to undergo an international criminal history check.

The Building Practitioners Board (Victoria) (sub. 39, p. 3) said that it ‘regards it as a consumer protection issue that all practitioners and applicants for registration are subject to the same level of probity review’. The Board conducts police checks on applicants for registration (including mutual recognition applicants).

In its 2009 review of the mutual recognition schemes, the Commission (2009) considered that the frequency of regulator refusal to mutually recognise criminal record checks suggested a need to change the status of these checks within the mutual recognition schemes. It therefore recommended that the mutual recognition legislation be amended to allow criminal record checks if they are required for local applicants.

The CJRF (2014b, p. 11) responded by agreeing to ‘consider whether legislative amendments or an alternative feasible option could allow for criminal record checks of applicants in appropriate circumstances’. Alternative feasible options, at least for some occupations, include the creation of a nationally harmonised system for working-with-children checks or increasing the consistency between jurisdictions in their approaches to working-with-children checks. In 2009, COAG (2009c, p. 14) adopted the latter approach, by agreeing to develop a ‘nationally consistent approach’ to working-with-children checks and child-safe organisations. A Working with Children Checks Working Group was formed to inform the national alignment. However, the most recent report on the issue stated that:

Harmonisation of state and territory legislation would require substantial investment of resources to bring the data and related information management mechanisms into line. Current fiscal constraints make additional financial commitments untenable as part of an agile response. There is insufficient evidence to inform a best practice screening model. Attempting to develop a best practice model in an emerging area of research and practice risks being influenced by high profile cases and worst case scenarios. (FaHCSIA 2011, p. 3)

Given the absence of evidence on best practice screening models, it is unsurprising that regulators in the same occupation in different jurisdictions are permitted and/or required to ask very different questions about the background of applicants for registration (New Zealand Law Society, sub. 19) and that they have different levels of access to information on spent convictions. The Queensland College of Teachers (sub. 8, p. 2) said:

Because of the differences among jurisdictions in the legislative provisions applying to criminal history checks, registration authorities in some jurisdictions are able to obtain more information than others through police checks ... For example, the QCT and some (but not all) interstate teacher registration authorities are parties to the inter-jurisdictional exchange of ‘expanded’ criminal history information for people working with children. That ‘expanded’ information includes details of interstate pardoned and spent convictions and is information used in determining an applicant’s suitability to work in a child-related field.

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This points to the complexity that would be involved in harmonisation in the area of criminal history, and the need for careful cost–benefit analysis before undertaking such a project. It would also appear unwise to harmonise police checks, criminal history checks and working with children checks solely to facilitate mutual recognition.

Against this background, and a community expectation that local authorities are responsible for protecting vulnerable groups, there is not a strong case for requiring the mutual recognition of background checks. Rather, for occupations where background checks are necessary and are routinely required of local applicants, registration bodies should be able to continue to conduct their own checks on people seeking registration under mutual recognition. If this approach is successfully challenged in the relevant tribunals in the future, governments should amend the mutual recognition legislation.

DRAFT RECOMMENDATION 5.5

For occupations where background checks are necessary and are routinely required of local applicants, registration bodies should be able to continue to conduct their own checks on people seeking registration under mutual recognition. If this is successfully challenged in the relevant tribunals in the future, governments should amend the mutual recognition legislation.

A related issue is the status of mutual recognition applicants while background checks are conducted. While many providers of background checks can deliver their findings in minutes or hours, in some cases it can take weeks to obtain the results. Several participants reported that, contrary to the requirements of the mutual recognition legislation (chapter 3), mutual recognition applicants are not always being granted deemed registration while such checks are undertaken.

The QCT believes that in relation to the registration of teachers, some jurisdictions are not implementing ‘deemed registration’ (as defined at section 25 of the *Mutual Recognition Act*) because of their concerns about potential implications for child safety. (Queensland College of Teachers, sub. 8, p. 3)

The New Zealand Registered Architects Board (sub. 4, p. 2) does not provide a deemed registration period, as TTMRA registration is completed ‘within a few days’.

The reasons for regulators’ failure to provide deemed registration to mutual recognition applicants are unclear. It is clear, however, that ensuring regulators are aware of the requirement for them to grant deemed registration is a necessary first precursor to consistent deemed registration practices. Awareness and oversight of mutual recognition requirements are discussed further in chapter 7.

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## The mutual recognition application process

The Commission received relatively few comments on the mutual recognition application process. Those comments contained diverging views, possibly reflecting the different ways in which mutual recognition has been applied in different sectors. Some were largely positive.

TTMRA applications are able to be completed quickly and easily by applicants and processed by [the Dental] Council with minimal resort to [the Dental Board of Australia] beyond verifying Australian registration, candidate good standing and any conditions or restrictions on registration. (Dental Council, sub. 21, p. 5)

Other participants expressed concern about the time and cost involved in the mutual recognition application process in some cases.

The MRA process in each jurisdiction varies with evidence suggesting demands upon applicants at times are not only impractical but costly. Interstate travel and the associated costs incurred in meeting jurisdictional processing requirements are not consistent with the underpinning intent and convenience suggested by the [mutual recognition] legislation. (ASIAL, sub. 11, p. 2)

However, one study participant expressed concern that the deeming period is too short.

... the one month period within which ... registration must be granted (unless postponed or refused) by the local registration authority is too short to allow adequate criminal and character checks to be undertaken in all cases. For example, more time is needed to allow the registration authority to confirm that the criminal history provided by the police service is in fact that of the applicant, and to allow natural justice considerations to be effected (e.g. adequate time for an applicant to make submissions in response to any criminal history or other relevant material). (Queensland College of Teachers, sub. 8, p. 3)

In the Commission's view, one month has proven to be adequate time in which to process mutual recognition applications since the schemes were established. There is little evidence and no tangible examples to suggest that the one month period is too short. Moreover, in the event of such an example, there is already provision in the mutual recognition legislation to allow the deeming period to be extended in certain circumstances (including where there has been a material change in circumstances or misleading information has been provided). Any move to extend this period is likely to result in a general increase in the time taken to process mutual recognition applications, with limited corresponding benefit.

## Disciplinary and related procedures

Section 19 of the *Mutual Recognition Act 1992* (Cwlth), section 19 of the *Trans-Tasman Mutual Recognition Act 1997* (NZ) and section 18 of the *Trans-Tasman Mutual Recognition Act 1997* (Cwlth) require applicants under mutual recognition to state that they are not the subject of disciplinary proceedings or investigations. Those who are currently

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subject to investigations or disciplinary proceedings are excluded from the mutual recognition schemes.

Some study participants considered that these provisions should be broadened to require disclosure of past disciplinary procedures.

An applicant is not required to disclose in the notice whether they have been the subject of any disciplinary proceedings irrespective of the outcome of those proceedings. At least one jurisdiction has encountered this issue. Amendment of section 19 to require the notice to include details of any finalised proceedings or investigations irrespective of outcome would address this issue. (Australasian Teacher Regulatory Authorities, sub. 36, pp. 2–3)

While applicants are not required to disclose past disciplinary proceedings, there is a mechanism for such disclosure to occur — regulators are entitled to make inquiries about an applicant from their counterparts in other jurisdictions. Any matters relevant to an applicant's registration can be disclosed in response to such inquiries. This mechanism — based as it is on information exchange between regulators rather than on paperwork submitted by applicants — again highlights that a key feature of mutual recognition is the need for cooperation and trust between regulators. Moreover, data exchange between regulators should be the preferred approach, as it is the best way to ensure that registration decisions are based on the most reliable information.

A separate but related concern centred on New Zealand's distinction between competence and discipline processes for health professionals. New Zealand has a:

... unique statutory competence regime for managing [health] practitioner competence concerns. It is non adversarial; is designed to be remedial and educative; and to assist the practitioner to regain full competence. It has none of the characteristics of a disciplinary process. No charges are laid, and accordingly the practitioner has no ability to refute an allegation or a finding that his or her competence may be deficient. The process relies on an assessment of the practitioner's competence by a committee of two of his or her peers and a lay person, which provides a written report ... (Dental Council of New Zealand, sub. 21, p. 5)

The Dental Council of New Zealand (sub. 21) and the Nursing Council of New Zealand (sub. 22) expressed concern about the difficulty in sharing concerns arising from this competence regime with their Australian counterparts, given that the TTMRA only makes provision for sharing information about discipline processes (and not competence processes). The Nursing Council of New Zealand (sub. 22, p. 2) said:

Issues arise for the Council when a nurse is already registered in Australia but subsequently has conditions included or is suspended for non-discipline related issues in New Zealand. [The TTMR Act] does not require the release of information relating to a nurse's health or competence. This cannot be said to come within the scope of disciplinary action under ... the TTMR Act and such a release could be contrary to the Privacy Act (for competence) and the Health Information Privacy Code (for health).



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However, there is already provision in the TTMR Act to allow the exchange of relevant information between regulators:

Fortunately there is a catch all provision in section 19(2)(i) [of the TTMR Act (NZ)] that requires the applicant to give consent to the making of inquiries of, and the exchange of information with, the authorities of any participating jurisdiction regarding the applicant's activities in the relevant occupation. (Nursing Council of New Zealand, sub. 22, p. 2)

To the extent that concerns about sharing information about practitioner competence persist, there would likely be scope for New Zealand health regulators to adopt a similar approach to that of the Nursing Council of New Zealand, thereby sharing relevant information with other regulators.

### **TTMRA exemption for medical practitioners**

Only one occupation has a permanent exemption from the mutual recognition schemes — medical practitioners — and this is only the case for the TTMRA. However, arrangements outside of the mutual recognition schemes mean that this has no practical effect on practitioners trained in Australia or New Zealand. These arrangements include that registration boards on both sides of the Tasman apply the same requirements to graduates of Australian and New Zealand medical schools, so that:

- graduates of medical schools in New Zealand who have completed the required period of intern training are eligible for general registration in Australia
- graduates of medical schools in New Zealand who have not completed intern training are eligible for provisional registration in Australia (AHPRA, sub. 50).

Registration processes for medical practitioners trained in countries other than Australia and New Zealand are more demanding, and can involve examinations, workplace-based assessment and supervision. These more demanding processes also apply to practitioners who are registered in Australia or New Zealand but who trained in other countries. A doctor who originally trained in South Africa expressed it thus:

... my NZ registration as a doctor and work [in New Zealand] has no bearing on the Australian decision to register me. (Richard Lunz, sub. 1, p. 1)

Mr Lunz considered that exclusion of medical practitioners who trained in countries other than Australia and New Zealand was inappropriate. Few other participants in this review expressed views on the exemption of medical practitioners. The New Zealand Government (sub. 47, p. 12) was of the view that 'it would be timely to revisit the reasons for the exemption to ensure they remain valid'.

AHPRA (sub. 50) considered that current arrangements are working effectively — both for medical practitioners trained in Australia and New Zealand and for those trained in third countries — and supported maintaining medical practitioners' exemption from the TTMRA.



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In its 2009 review, the Commission saw no reason why mutual recognition should not apply to doctors who obtain all of their medical qualifications in Australia or New Zealand. At that time, the Commission recommended that the permanent exemption for registered medical practitioners should become a special exemption, and be limited to third country trained medical practitioners (that is, practitioners with primary and/or postgraduate qualifications obtained outside Australia or New Zealand). The CJRF did not agree with this recommendation and did not give a reason for its response.

In the Commission's view, the principle that mutual recognition should apply to all occupations remains a valid and important one. Any exemptions should be avoided, or at least minimised, such as through the use of special exemptions that require regular review.

Not only do exemptions mean that the benefits of mutual recognition are forgone, they also tend to lead to requests for further exemptions. This was demonstrated by the Australian Dental Association (sub. 6), which cited the exemption of medical practitioners in its request for restrictions on the application of mutual recognition to dentists.

However, the exemption of medical practitioners from the TTMRA has little effect in practice. Its removal would, at least on paper, reduce the number of exemptions to the scheme, but would have few to her benefits. In light of the Australian and New Zealand governments' alternative practices for recognising the qualification of Australian and New Zealand trained medical practitioners, the small number of overseas trained doctors affected by the exemption and their decreasing share in the medical workforce (HWA 2012), the Commission considers that converting the permanent exemption of medical practitioners into a special exemption would be a second order priority.

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## 6 Facilitating cross-border service provision

### Key points

- Automatic mutual recognition (AMR) allows individuals to provide services beyond their home jurisdiction without having to register again. It is a more cost effective regulatory model for individuals who provide services across borders on a temporary or occasional basis than the current mutual recognition schemes. Where people are moving permanently to a new jurisdiction, however, it is reasonable to expect people to transfer their registration to their new place of residence.
- To date, AMR arrangements are in place for veterinarians in five states, and for electricians working in the eastern states of mainland Australia. These arrangements are working well.
- AMR reduces the time and cost associated with providing services in multiple jurisdictions, increases competition among providers, and increases the quantity, quality and diversity of services available to consumers. Benefits are likely to be concentrated in areas close to jurisdictional borders and to grow as innovations further enable remote service delivery.
- The Commission supports the model of AMR, but recognises that there are challenges in its implementation. Participants raised concerns about monitoring and compliance, risks of regulatory failure and potential loss of regulator revenue. These challenges are not insurmountable. AMR is likely to be most easily implemented for occupations with limited dispersion in standards across jurisdictions in terms of the services provided, types of licences, necessary qualifications and regulatory arrangements.
- The Council for the Australian Federation is, on behalf of the states and territories, exploring the extension of AMR to other professions, including plumbers and gasfitters. This work should be accelerated and given high priority.
- The feasibility of AMR between Australia and New Zealand is likely to have increased recently following the adoption of a new legal framework for trans-Tasman civil disputes.
- A staged implementation of AMR is preferred. It should start with those professions already identified as most amenable (such as plumbers), drawing on the lessons learned along the way. For professions where health and safety considerations are significant and the standards for gaining qualifications vary significantly between jurisdictions, additional safeguards and more time to achieve acceptance may be necessary.
- The timeframes and challenges associated with implementing AMR imply that the Mutual Recognition Agreement and Trans-Tasman Mutual Recognition Arrangement will continue to be important tools for facilitating cross-border trade for the foreseeable future.
- There is not a strong case for extending the scope of the mutual recognition schemes to cover laws on the manner of carrying on an occupation. There are more effective ways of dealing with the few cases where these laws restrict trade and labour mobility.

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The terms of reference for this study ask the Commission to consider a model of occupational registration which would allow individuals to provide services beyond their home jurisdiction without having to register again under the Mutual Recognition Agreement (MRA) or Trans-Tasman Mutual Recognition Arrangement (TTMRA).

Such a model would, in effect, apply the mutual recognition principle for the sale of goods to occupations, as the architects of the schemes originally intended (chapter 3). This single-registration model — broadly known as automatic mutual recognition (AMR) — is sometimes described as being analogous to the approach used for drivers' licences whereby a person licensed to drive in their home jurisdiction can lawfully drive in another jurisdiction in Australia or New Zealand without having to obtain and pay for an additional licence.

## 6.1 The case for automatic mutual recognition

AMR could facilitate two forms of cross-border service provision.

- Individuals — such as electricians or veterinarians — who physically cross a border to work in another jurisdiction.
- Remote provision of services via the internet or in other ways without leaving the home jurisdiction. For example, an architect could provide a building design to be used in another jurisdiction.

Under current mutual recognition arrangements, service providers are required to register, and pay a separate registration fee, in each jurisdiction in which they operate. While a distinct improvement on pre-mutual recognition arrangements, this can still hinder the provision of services across borders, and possibly present major problems following an emergency in a particular jurisdiction.

AMR allows an occupational licence issued by one jurisdiction to be recognised automatically by another. In its simplest form, licence holders can operate across borders without informing regulators outside their home jurisdiction. Another form of AMR could require licence holders operating outside their home jurisdiction to notify the relevant local regulator, or to automatically obtain a licence upon application based on their interstate qualification. These contrast with the current MRA and TTMRA arrangements where licence holders in one jurisdiction must formally apply for licences in all jurisdictions in which they wish to provide services (chapters 3 and 5).

AMR would allow for more seamless provision of services across borders by reducing the time and cost associated with operating in multiple jurisdictions, in particular by eliminating the need for multiple licences (the potential cost savings are discussed below). This could in turn increase competition among service providers, and raise the quantity, quality and diversity of services available to consumers.

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The Department of Education and Training (sub. 9, pp. 12–13) noted the benefits that AMR could potentially deliver.

AMR would provide an excellent solution to reduce or remove existing barriers to the mobility of skilled labour, from the perspective of the licensee. Effectively, there would be no borders affecting their operation and the licensed person would be able to capitalise on opportunities for employment wherever they arose, at the current market rates. Licensees would not need to notify their presence or pay any additional fee. They would simply need to familiarise themselves with the conduct requirements of the jurisdiction in which they chose to work.

The NSW Department of Premier and Cabinet (sub. 51, p. 6) was also supportive of the concept.

By allowing recognised licence holders to work across State/Territory borders without needing to hold licences in each jurisdiction [AMR] can improve labour mobility and cut red tape, particularly in cross border areas. It is a simpler, decentralised alternative to the now defunct National Occupational Licensing System.

AMR arrangements are in place for electricians in the eastern states of mainland Australia (detailed below). Australian jurisdictions also allow a temporary form of AMR for a wider range of occupations in the aftermath of emergency situations, such as bushfires or cyclones, when the number of local professionals is insufficient to promptly provide emergency response (for example, reconnecting power to homes) and reconnect services. However, this relies on jurisdictions invoking a special permission or exemption. For example, under the Queensland *Disaster Management Act 2003*, visiting electricians may be able to undertake repair work following the declaration of a disaster situation (WorkCover Queensland 2014a).

AMR arrangements also exist for veterinarians in all Australian states except Western Australia. Under the National Recognition of Veterinarians scheme, a veterinarian registered in one of the participating states — New South Wales, Victoria, Queensland, South Australia or Tasmania — is able to temporarily practise in another participating state without having to register again. The other Australian jurisdictions — Western Australia, the ACT and Northern Territory — have also committed to adopting this approach.

The Housing Industry Association (HIA) (sub. 37, p. 4) noted that an ongoing form of AMR would be more effective in emergencies.

More effective automatic mutual recognition ... would also help overcome some of the barriers state based licensing systems provide when interstate trades attempt to temporarily work in regions affected by natural disasters, such as the bushfires in Victoria in 2009 and floods in Queensland in 2011. At the moment, the only way such occupations can lawfully work in such situations is through special permissions and exemptions.

The fact that AMR can be made to work during emergencies is *prima facie* an argument supporting its adoption on an ongoing basis.

## Potential cost savings for licensees

The cost savings from AMR could be material for individual licensees, with savings varying with the length of licences and the size of the associated fees. Data submitted by Master Electricians Australia showed significant disparities in fees across jurisdictions for electricians and electrical contractors (table 6.1). The lowest application fee for electrical workers is \$50 for a 5-year licence in the Northern Territory, while a 3-year licence in the ACT costs \$722. For electricians operating around the New South Wales–ACT border, AMR could provide significant savings.

**Table 6.1 Application fees and licence lengths for electrical worker licences<sup>a</sup>**

<i>State/Territory</i>	<i>Licence length (years)</i>	<i>Application fee (\$)</i>
New South Wales	3	137.00
Victoria	5	368.00
Queensland	5	70.70
South Australia	3	235.00
Western Australia	5	365.00 <sup>b</sup>
Tasmania	3	310.80
Northern Territory	5	50.00
ACT	3	722.00 <sup>c</sup>

<sup>a</sup> Data as at March 2015. <sup>b</sup> Includes registration fees. <sup>c</sup> Includes licence term fees.

Source: Master Electricians Australia (sub. 34).

In addition to an electrical worker licence, an electrical contractor licence is generally required to provide electrical work for others when trading as a sole trader, partnership or corporation. For electrical contractors, the lowest application fee is \$184 for a one-year licence in South Australia, while an application for a three-year licence for a company in New South Wales is \$961 (table 6.2). While mutual recognition arrangements apply generally to individuals, there are strong arguments for extending AMR arrangements to contractors' licences for companies. These will be discussed later in the chapter.

In the absence of AMR, these fees represent a disincentive for electricians or electrical contractors to undertake cross-border work. Notably, electricians operating in local markets near jurisdictional boundaries, such as Albury–Wodonga, Queanbeyan–Canberra and Gold Coast–Tweed Valley face additional costs supplying their services.

How significant these additional costs are in aggregate is difficult to quantify, as there are limited data on the number of practitioners who have registered in multiple jurisdictions. There would also be an additional group of workers who have been discouraged from working outside their home jurisdiction because of the cost and effort of registering more

than once. That said, the Commission understands that regulators sometimes exempt workers in border regions from local registration requirements if they are registered in the adjacent jurisdiction. There may also be cases where such workers practise across a nearby border without authorisation from the local regulator.

**Table 6.2 Application fees and licence lengths for electrical contractor licences<sup>a</sup>**

<i>State/Territory</i>	<i>Licence length (years)</i>	<i>Application fee (\$)</i>
New South Wales		
<i>Sole Trader</i>	3	566.00
<i>Company</i>	3	961.00
Victoria	5	573.00
Queensland	1	337.40
South Australia	1	184.00
Western Australia	5	531.00 <sup>b</sup>
Tasmania	1	488.40
Northern Territory	3	215.00
ACT	3	722.00 <sup>c</sup>

<sup>a</sup> Data as at March 2015. <sup>b</sup> Includes registration fees. <sup>c</sup> Includes licence term fees.

Source: Master Electricians Australia (sub. 34).

Estimates prepared for COAG in 2013 suggest that around 5 per cent of electrical, plumbing and property professionals residing in Australia's eastern mainland states had a licence in multiple jurisdictions (table 6.3). The proportion tended to be higher in smaller jurisdictions. Based on these estimates, the aggregate annual cost of holding multiple licences was calculated to be about \$2.7 million for electrical occupations, \$1.4 million for plumbing and gasfitting occupations, and \$2.3 million for property occupations (NOLA 2014).

In its review of the proposed national licensing scheme, the Queensland Competition Authority (QCA) (2013, pp. 6–7) reached similar conclusions based on feedback from Queensland regulators.

The number of licensees that operate in multiple jurisdictions is ... quite small. According to Queensland regulators across [property; electrical work; plumbing and gasfitting; and refrigerating and air conditioning], the number of licensees who have either obtained their licence via mutual recognition, or reside interstate is no more than 5% of total licensees. Licensing data also suggests that those workers that reside in border areas such as the Gold Coast/Tweed area are most likely to hold multiple licences and operate in multiple jurisdictions.



**Table 6.3 Share of licence holders who also held a licence outside their home jurisdiction, 2013**

	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>NT</i>	<i>ACT</i>
	%	%	%	%	%	%	%	%
Electrical	4	6	7	6	23	12	10	33
Plumbing and gas fitting	4	2	4	6	12	12	10	33
Property	4	4	4	6	1	12	10	33

Sources: COAG (2013b, 2013c, 2013d).

This evidence suggests that the potential cost savings for licensees will be palpable but not large. However, the Commission considers they are likely to represent a lower bound estimate of benefits to licensees given AMR would likely encourage more people to undertake work in other jurisdictions. The introduction of AMR would also be likely to put downward pressure on licence fees in jurisdictions where fees were relatively high.

Another indicator is the reduction in the number of licences held by health professionals following the introduction of national licensing for health practitioners in Australia. The body overseeing national licensing — the Australian Health Practitioner Regulation Agency — suggested that around 15 per cent of health professionals held licences in multiple jurisdictions prior to the national scheme (sub. 50, p. 4):

Before 2010, there were more than 637,000 active health profession registrations in Australia. With the inception of the National Scheme, this reduced to around 536,000 ... This suggests that just under 15% of practitioners nationally had previously paid more than one registration fee.

In addition to the financial cost of obtaining a licence in more than one jurisdiction, there are additional costs — such as the time taken to obtain, complete and lodge multiple application forms — which may further deter cross-border service provision. Nevertheless, the evidence suggests that, at an aggregate level, AMR would benefit a small minority of service providers. However, the cost savings could be relatively significant for the individuals concerned and in border areas such as Albury–Wodonga. Moreover, as the following section outlines, there is likely to be growing demand for AMR in the future.

## Potential benefits are likely to increase over time

The mutual recognition schemes were designed in an era when service provision typically required a physical presence in the location where the service was delivered. Today, there is a wide range of occupations capable of remote service provision to other jurisdictions through technology. They include accounting, legal advice, valuation, architecture and

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engineering services. The NZ Government noted (sub. 47, p. 13) this changing landscape and argued that the model of requiring registration in each jurisdiction where an occupation is practised may no longer be appropriate.

The occupations principle in the TTMRA works well for the traditional situation where a person moves permanently to work in a new (single) jurisdiction. However, it may be imposing unnecessary additional costs or acting as a barrier to people wanting to work in multiple jurisdictions, moving back and forth between jurisdictions as required. With the advent of the internet and services like Skype, some occupations may no longer require a physical presence in the jurisdiction in which services are to be provided. In that case, a person may wish to base themselves primarily in one jurisdiction but undertake work in multiple jurisdictions.

The Harper Review of Competition Policy (Harper et al. 2015, p. 22) highlighted the way technology was changing service provision.

Technological innovation is lowering barriers to entry across a range of markets. ... Innovative, competitive new entrants in a market can lower prices to consumers and widen their choice of providers. However, they can also raise concerns about consumer safety. The community will expect new entrants to challenge existing providers by offering new and better products, while still adhering to expected safeguards against doubtful or dangerous market practices.

For services where a physical presence is still essential, increasing potential benefits from AMR are likely to arise because of growing populations in border areas such as the Gold Coast–Tweed Valley. The benefits of AMR are likely to be most evident in border areas where service providers commonly operate across jurisdiction boundaries and have previously required multiple licences to do this. The improvement in availability of services will therefore be most pronounced in these areas. In particular, the areas of Albury–Wodonga (population around 129 000) and the Gold Coast–Tweed Valley (population around 650 000, with 91 000 of these people in New South Wales) are likely to be beneficiaries (ABS nd).

Nevertheless, many of the beneficiaries of AMR might not be people living in more populated border areas, but rather those in relatively remote or isolated areas who might have very few service options to choose from, and be reliant on service provision from interstate (including via technology). AMR would potentially benefit such people significantly, particularly in emergencies.

There may also be costs involved with AMR. These are discussed in section 6.3.

## **6.2 Automatic mutual recognition in Australia**

As noted above, AMR arrangements are currently in place for electricians in the eastern states of mainland Australia, and for veterinarians in all Australian states except Western Australia. This section provides further information on those arrangements, and summarises efforts by the states and territories to extend AMR to other occupations.

## Electricians

Table 6.4 summarises the current AMR arrangements for electricians. These were largely driven by concerns about unnecessary regulatory duplication in border areas such as Albury–Wodonga and Gold Coast–Tweed Valley. They were also influenced by recovery efforts following major disasters (such as the Black Saturday bushfires in Victoria), where tradespeople from other jurisdictions have been critically important.

**Table 6.4 Automatic mutual recognition for electricians**

<i>Jurisdiction</i>	<i>Approach to AMR for electricians</i>
NSW	A person with a recognised licence from another jurisdiction is deemed to hold the local equivalent licence where that person's principal place of residence is in that other jurisdiction.
Victoria	A person holding an interstate licence which is the equivalent of a Victorian electrician's licence is to be treated as licensed under Victorian regulations, provided that the person notifies Energy Safe Victoria.
Queensland	A person holding a licence from another jurisdiction that is considered equivalent to the Queensland work licence can work within the scope of that licence without having to apply for a separate Queensland licence.

New South Wales passed laws in 2014 establishing AMR for certain electrical licences from Victoria, Queensland and the ACT, enabling licence holders from those jurisdictions to work temporarily in New South Wales without requiring separate NSW licences. The NSW Department of Premier and Cabinet (sub. 51, p. 6) indicated that it is looking at extending AMR to 'other categories of occupational licences, such as plumbers, drainers and gas-fitters'.

The National Electrical and Communications Association (2014, p. 3) has expressed support for the move towards AMR for electricians in New South Wales.

NECA supports [NSW] legislation ... that allows for the automatic mutual recognition of licences from the state in which the principle business is domiciled. This legislation would lower the cost of labour mobility and make it easier to do business in the state of New South Wales.

Since 2010, Victorian electricity regulations have enabled interstate electricians residing out of the State to do electrical work in Victoria after notifying the State's electricity regulator (although the Commission understands the regulations have not been used by visiting electricians). As described by Energy Safe Victoria (sub. 26, p. 2):

The Victorian Electricity Safety (Registration and Licensing) Regulations 2010, under Regulation 30 allows a person ... residing [outside] ... Victoria with a current ... electrical licence [issued in their home jurisdiction] to carry out the work of an electrician (A Grade) in Victoria after notifying ESV. While working in Victoria, the person is required to comply with the Victorian Electricity Safety Act and regulations, including certification of work and issuing of Certificates of Electrical Safety (COES). The person is also subject to the Victorian

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compliance and enforcement regime. A person moving to live in Victoria must apply for a Victorian licence under Mutual Recognition.

Queensland has had a system of external equivalence for electricians for many years (included previously in the Electrical Safety Regulation 2002, and more recently the Electrical Safety Regulation 2013). An electrician holding a licence from another state or territory that is considered equivalent to a Queensland licence is able to work within the scope of their licence in Queensland without having to apply for a Queensland electrical work licence. However, these arrangements do not extend to contractors' licences, which are required in order to provide electrical work for others as a sole trader, partnership or corporation (WorkCover Queensland 2014b).

The approaches of these three states are broadly similar, but also have key differences.

- New South Wales restricts AMR to electricians from Victoria, Queensland and the ACT. On the other hand, it is the only jurisdiction that automatically recognises contractor licences as well as worker licences.
- Victoria recognises electrical worker licences from all Australian states and territories. Unlike New South Wales and Queensland, it requires interstate workers to notify the local regulator — Energy Safe Victoria — before undertaking work in Victoria.
- Queensland recognises electrical worker licences from all Australian states and territories, and New Zealand.

A 'gold standard' AMR system for electricians would feature elements of the approaches used by all three jurisdictions — automatic recognition of both worker and contractor licences from all Australian jurisdictions and New Zealand. A notification requirement would be desirable where there is particular concern about the ability of regulatory agencies to regulate visiting service providers in the absence of such a requirement. (Monitoring and compliance issues are discussed later in the chapter.)

Such a system could be extended to all Australian jurisdictions and New Zealand. (The feasibility of extending AMR to New Zealand, and how this would best be done, is discussed later in the chapter.)

## Veterinarians

The National Recognition of Veterinarians scheme was endorsed by the COAG Primary Industries Ministerial Council in 2006 (PIMC 2006) and applies to both veterinary surgeons and veterinary specialists. Veterinarians practising under AMR arrangements are subject to the insurance requirements in the host jurisdiction. In addition to the financial benefits to veterinarians from only needing to have one licence, it was envisaged that the scheme would be beneficial because of the:

- relatively high mobility of veterinarians, especially early in their careers
- shortages of veterinarians in the smaller jurisdictions

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- need to respond promptly to natural disasters, and livestock emergencies such as avian flu or the Hendra virus
  - requirement for many veterinarians, such as feed lot, racetrack or Australian Government employees to operate in multiple jurisdictions (PISC 2006).

Implementation and development of the National Recognition Scheme for Veterinarians has been assisted by the recognition of such benefits by the veterinary profession which, through the Australian Veterinary Association, was also involved in the development of the scheme from the beginning.

As noted above, the scheme is currently operating in all Australian states except Western Australia. South Australia was the most recent participant to join, commencing on 1 January 2015 (VSBSA 2015). The remaining Australian jurisdictions — Western Australia, the Northern Territory and the ACT — have committed to adopting the scheme. The Commission understands that Western Australia and the Northern Territory intend to legislate in the near future. Implementation in Western Australia has been slowed by the inclusion of the reforms in a broader update of the state's veterinary legislation.

The Commission has spoken to a range of stakeholders regarding the National Recognition of Veterinarians scheme, with the general consensus being that the scheme has worked well. There is widespread support for extending it to those jurisdictions where it is yet to be legislated.

### **Options being developed by the Council for the Australian Federation**

As noted in chapter 1, the Australian states and territories began exploring greater use of AMR after the proposed National Occupational Licensing Scheme (NOLS) was abandoned in late 2013. In essence, it was hoped that AMR would provide a less costly and more practical means of reducing barriers to cross-border provision of services within Australia. This work is being undertaken by the Council for the Australian Federation (CAF).

Many study participants see AMR as a substitute for national licensing, at least temporarily. For example, the Australian Security Industry Association Limited (sub. 11, p. 2) said it:

... would welcome the introduction of a more efficient mechanism to enable easier movement between jurisdictions of security personnel. If a national security licence proves too problematic, an automatic mutual recognition process (with the appropriate checks and balances) could offer a practical and workable alternative.

Some view AMR as being a superior long-term alternative to national licensing. For example, the Master Plumbers' Association of Queensland (2013, p. 2) has said:

[AMR] does not require the costly development of an entirely new licensing structure with its additional bureaucracy. It means less change to existing legislation and regulations and will not compromise the stringency and coverage of current licensing arrangements. It will deliver the

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benefits of national licensing in a much cheaper and simpler manner than other options proposed. This is an important consideration because it is estimated that less than 2% of plumbing practitioners will benefit from the increased labour mobility provided under National Licensing.

Initial work by CAF has focused on broadening the adoption of AMR for electricians and introducing it for plumbers and gasfitters (CAF 2014).

Master Electricians Australia (sub. 34, p. 3) noted the AMR system in Queensland and supported wider application of AMR for electricians across Australia.

MEA would ... be supportive of the introduction of external equivalence arrangements, a form of automatic mutual recognition, for electrical worker occupations. This arrangement is in place in Queensland ... In order to realise the full benefits of such an arrangement it is proposed external equivalence would need to be adopted by all states and territories throughout Australia, with the range of occupations currently covered to be gradually expanded.

Similarly, the HIA (sub. 37, p. 11) supported wider use of AMR, noting the arrangements introduced by New South Wales.

Since December 2014, New South Wales, Queensland and Victorian electricians have been able to work across state borders using the licence issued by their home state without having to apply for the issue of a New South Wales licence under mutual recognition. This removes the need for two licences to perform the same work in a bordering region, saving time and fees. HIA commends the efforts of the New South Wales Government and supports an extension of automatic mutual recognition to other trades, particularly those that have occupational based licensing.

The Commission understands that the work done by CAF has been of an incremental, gradual nature, with decisions on whether to adopt proposed reforms resting with individual state and territory governments. Jurisdictions have the option of implementing proposed reforms on a unilateral, bilateral, multilateral or national basis, with the opportunity to opt-in to reforms at any time.

The Business Council of Australia (sub. 45, p. 6) expressed disappointment at what it saw as a slow rate of progress.

CAF was tasked by COAG with developing options to minimise impediments specifically for occupational licensing. Since then, there has been no substantive progress reports made publicly available on the status of discussions or details on how mutual recognition of occupational licensing could be progressed. CAF should reinvigorate this work as a priority.

Given the challenges associated with implementing AMR (discussed in the next section), the gradual, incremental approach being taken by CAF is understandable. Such an approach avoids the hurdles evident in the failed attempt to implement NOLS across multiple occupations and jurisdictions simultaneously. It also provides greater scope for lessons to be learned before wider scale implementation of AMR. However, it is important that the approach does not become excessively cautious. The experience thus far with AMR arrangements for electricians in Queensland leads the Commission to conclude that



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the work being undertaken by CAF to extend AMR to other occupations such as plumbing could safely be expanded and accorded a higher priority.

### **6.3 Challenges to expanding automatic mutual recognition**

Many study participants have raised doubts about the widespread applicability of AMR given the lack of harmonisation of authorised services, types of licences, necessary qualifications and regulatory arrangements. Others have raised doubts about the feasibility of monitoring and compliance in an environment where regulators would not always be aware of the presence of service providers within their jurisdiction, and where visiting service providers are registered only in another jurisdiction. Participants argued that these concerns could lead to regulatory failures which could compromise public health and safety. Another concern was a potential revenue loss for regulators. This section reviews each of these issues.

#### **Is a high degree of harmonisation a prerequisite for AMR?**

A number of participants suggested a high degree of harmonisation is essential for AMR to work. In the areas where AMR has been introduced, for electrical workers and veterinarians, there is a broad consensus that the work done across jurisdictions is similar and that qualifications are also highly comparable. Participants expressing scepticism about AMR have questioned its applicability in areas of more diverse activity.

Without closer harmonisation of standards, there is concern that visiting service providers will be unsure of the scope of their licence or, in some cases, be unfamiliar with local conditions or practices. There is also concern about disparity in standards and qualifications across jurisdictions, leading to an increased possibility of accidents in the jurisdiction being visited from ‘underqualified’ providers. Moreover, some jurisdictions might have different risk appetites or variations in how they balance trade-offs between initial qualifications and subsequent supervision and the degree of regulatory oversight.

#### **Participants’ views**

Various participants questioned whether AMR has broad applicability, and therefore whether it is likely to provide significant benefits. For example, the QCA (2013, p. 33) has questioned the labour mobility benefits of AMR in the absence of broader reform.

While AMR may result in lower implementation costs to both government and industry, as no national licensing body or register needs to be developed, it is unlikely to provide any significant labour mobility benefit. Further it is unlikely to provide any benefit to stakeholders until there is further harmonisation of legislation and conduct requirements between jurisdictions.



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In its submission to the Commission's Geographic Labour Mobility study, the (now abolished) National Occupational Licensing Authority (2014, p. 12) saw harmonised AMR as preferable to non-harmonised AMR, and highlighted difficulties in achieving convergence between jurisdictions.

Significant progress was made under the national licensing project in relation to a range of licensing issues and this could be used as the foundation for commencing work on a harmonised model. However, based on the national licensing experience [it] is anticipated there would be resistance by regulators to attempts to change the status quo and few opportunities to streamline and rationalise licensing frameworks. Some advocates for harmonised licences have suggested that only those licences with clear equivalence could be harmonised, with others left non-harmonised.

Other participants were opposed to AMR. For example, the Real Estate Institute of Australia said (sub. 40, pp. 5–6):

REIA believes that improvements need to be made to current arrangements and as such Automatic Mutual Recognition would at this stage be very much considered a sub optimal solution. At least with Mutual Recognition (as currently practised) the normative practice established by the law of requiring a person to register in the 'foreign' jurisdiction means the applicant is provided with the opportunity to become aware of the scope of practice and conduct requirements of that jurisdiction. REIA recommends that Automatic Mutual Recognition not be proceeded with at this stage.

The Dietitians Association of Australia stated (sub. 35, p. 4):

DAA has been the assessing authority for the Australian Government for dietitians trained overseas for a number of years. This has provided insight into various levels of practice due to various standards of academic preparation and professional experience in other countries. This has implications for public safety and [therefore] DAA is not supportive of automatic mutual recognition.

Participants who were more supportive of AMR typically questioned whether existing disparities across jurisdictions were large enough to warrant concern, and, where they were, whether an AMR regime could be readily quarantined to areas of similarity within occupations through conditions (akin to a different class of drivers' licence). Other participants saw no major impediments to its introduction for occupational licensing. For example, the HIA stated (sub. 37, p. 7):

For occupational licensing (as opposed to business to consumer licensing) there appears to be little reason why more effective automatic licensing arrangements are not already in place.

The Business Council of Australia (sub. 45, p. 5) suggested jurisdictions proactively review the feasibility of introducing AMR.

Jurisdictions should individually review and report on what would be required to transition to automatic mutual recognition. A transition period would likely be required to plan implementation and identify any goods or occupations for which automatic mutual recognition is not appropriate.

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## The Commission's view

The Commission recognises that the risk of undesirable outcomes from visiting service providers means a reasonable degree of harmonisation is important to successfully implement AMR. Based on this criterion, different professions which require registration are at various stages of readiness. It is likely that any shift in favour of AMR would be gradual, starting with those professions already identified as feasible (such as electricians or plumbers). The lessons learned along the way could be used to successfully extend AMR to other professions. Ministerial Declarations, defining equivalence of occupations across jurisdictions (chapter 5), could help guide the process.

For some professions, the degree of harmonisation required might be too great for AMR to be embraced. For others, the complications might be 'at the margin', relating to a small proportion of work undertaken, or to particular workers (for example, those with partial licences). In these cases, AMR could be quarantined to those workers whose skills and qualifications were suited to working across jurisdictions, and conditions could be placed on the types of services that visiting service providers were able to offer to provide further assurance to the community.

If AMR were to be implemented, it would be important to first consult with and secure the support of the relevant professional bodies. This would help in the design and to resolve implementation issues with AMR, and also raise awareness of its anticipated benefits. Many of the benefits of AMR would flow to participants in those professions where it is established, as they would be able to expand the services they offer across jurisdictions without incurring an additional regulatory compliance burden. This process was successfully deployed by the COAG Primary Industries Ministerial Council in cooperation with the Australian Veterinary Association.

## Monitoring and compliance

As discussed in chapter 5, the rationales for occupational licensing generally relate to information asymmetries or externalities. Occupational licensing seeks to protect consumers and the broader community from harm, and ensure services provided are of acceptable quality. For licensing regimes to operate effectively, monitoring and enforcing compliance is necessary to ensure the integrity of the regimes.

## Participants' views

Many participants who were opposed to AMR raised enforcement concerns as a reason for their opposition. Some questioned the prospect of adequate enforcement where only home registration is required, meaning regulators in the jurisdiction where a service was being provided would not always be aware of the presence of visiting service providers.

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For example, the Health Regulatory Authorities of New Zealand stated (sub. 16, p. 3):

If a home registration process is implemented, the bypassed authority is unlikely to even be aware of the presence of the practitioner in its territory, thus removing the opportunity for it to communicate with the transferring professional on their responsibilities; this exposes the professional to risk of falling foul of local laws, and the public to the risks associated with that departure from requirements.

The New Zealand Registered Architects Board (sub. 4, p. 3) also saw potential enforcement problems stemming from AMR.

If an architect behaves unethically or incompetently in either Australia or New Zealand it should be the registration authority in the country where the alleged failing occurred that investigates and, if need be, disciplines the architect ... The NZRAB, based in Wellington, would struggle to investigate allegations of incompetence in relation to a project in Darwin. Likewise accountability for the registration entity could not work in that circumstance. Expecting the state government of Western Australia to hold to account the Architects Board of Western Australia for failing to protect people in New Zealand who are the clients of a Western Australian Registered Architect working in New Zealand would be unrealistic.

The Victorian Institute of Teaching stated (sub. 5, p. 1):

The Institute would not support a model based on [single registration]. It would create a significant administrative and compliance burden on regulators. There are several reasons for this. Monitoring for unregistered teaching would become very difficult in a profession of this size and which is practiced in a variety of settings within the country. In addition all states and territories have different legislative requirements that teachers are respondent to, such as mandatory reporting, renewal of registration, and it would be impossible to ensure that teachers practice within the requirements of each jurisdiction without registration in that jurisdiction.

The Real Estate Institute of New Zealand (sub. 7, p. 6) expressed a similar view.

REINZ submits against adopting the approach ... where the applicant is only required to be registered in their home jurisdiction. Adoption of such an approach is likely to distort the licensing data in the host jurisdiction, making it difficult to monitor those who were granted the license under the TTMRA. REINZ submits instead that people licensed or registered under the TTMRA should be subject to the same on-going requirements as other license holders in that jurisdiction to ensure that consistent standard applies to all licensees practising in the host jurisdiction. In the view of REINZ, this is particularly important in respect of the current obligation on New Zealand licensees to hold monies in trust accounts that are regularly audited, and the obligation to comply with the new continuing education requirements.

Other compliance-related issues were also raised. For example, New Zealand's Dental Council (sub. 21, p. 4) saw a perception of public 'ownership' of regulatory processes to be a precondition for their acceptance.

Whilst the harmonisation of legislation may be feasible along the lines of the EU model, it is fundamental to the success of publically focused regulation to ensure ongoing public confidence and engagement. It is submitted that this is only practically possible where the public perceive 'ownership' of the regulatory processes. If a practitioner registered only in Australia, was entitled as of right to practice in New Zealand, how would the confidence of the

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New Zealand public be maintained when practitioner disciplinary or competence issues arising in New Zealand, were dealt with by the Australian regulatory authority?

The Air Conditioning and Mechanical Contractors Association (sub. 15, p. 3) noted AMR could create legal problems for employers if workers exceeded their scope of work.

A concern of the AMCA is that automatic mutual recognition will increase the risk of employers that take on inter-jurisdictional workers in the event that they exceed their scope of work. While the 'external license' model applied to electrical workers in Queensland makes it clear that workers must not exceed their original licence scope of work, it is unclear to what extent an employer will be at risk should they do so.

### The Commission's view

The Commission acknowledges that AMR has the potential to create complexities for regulatory monitoring and enforcement. However, the AMR arrangements currently in place for electricians and veterinarians in Australia show that this is not an insurmountable issue. Victoria resolves the issue of regulators being otherwise unaware of the presence of visiting service providers by requiring them to notify Energy Safe Victoria before they undertake work, which could potentially be done through a simple online process. The European Union also provides an example of how similar monitoring and enforcement issues have been handled (box 6.1).

#### Box 6.1 Monitoring and compliance in the European Union

EU member states in which services are provided are responsible for the supervision of providers within their territory. The EU Services Directive provides regulatory mechanisms that seek to ensure the quality of services supplied by service providers from another member state. Specifically, member states:

- are to supply information to one another, upon request, confirming that providers are established within their jurisdiction and are not known to be exercising their activities in an unlawful manner
- in which providers are based are to undertake checks, inspections and investigations where requested by other member states, and are to inform the other states on the results of these investigations and the actions taken in response
- are not to refrain from taking action on the grounds that damage has been caused in another state
- are to carry out checks, inspections and investigations on behalf of the establishment state.

The Services Directive also contains an 'alert mechanism'. Upon gaining knowledge of specific acts or circumstances relating to a service activity which could cause serious damage to the health or safety of people or to the environment, member states are to inform all other affected member states and the European Commission as soon as possible (EC 2006).

The EU arrangements are described in more depth in appendix B.

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A requirement for visiting service providers to provide notice to regulators that they are operating within their jurisdiction would deal with the problem of regulators being unaware of their presence without delaying the recognition of licences or imposing significant costs on visiting service providers. While such a requirement makes the operation of AMR less ‘seamless’, the associated burden for visiting providers and regulators is low and, for professions where health and safety considerations are significant, this approach is likely to provide net benefits. Such arrangements could easily be replicated for other occupations.

For those professions where there are specific sensitivities relating to jurisdictional differences (such as teaching where child safety is a paramount consideration and there are jurisdictional differences in what might disqualify a person from teaching) it might be necessary to explicitly factor these considerations into regulatory arrangements (such as by implementing requirements to notify regulatory authorities, or briefly delaying ‘automatic’ recognition to enable more detailed security checks).

While AMR would alter the way in which jurisdictions monitor and enforce health and safety regulations, they would not weaken regulatory standards. For instance, under the current AMR arrangements for electricians, regardless of where they are registered, visiting service providers are subject to all local regulations and face potential sanctions. Actions available to regulators for sanctioning visiting service providers typically include monetary penalties or suspension of the recognition of a licence in the jurisdiction being visited.

However, since licences are typically only able to be suspended or rescinded by the jurisdiction that issued them, (where not already the case) arrangements would need to be put in place to ensure regulatory breaches were treated similarly regardless of the jurisdiction in which they occurred. This could operate like current arrangements in Australia for a driver’s licence, where there is a national system of demerit points which can ultimately lead to suspension of the licence regardless of where in Australia the points are accumulated (NSW Roads and Maritime Services 2015). Cooperation between regulators would be important to ensure issuing regulators were aware of actions taken in another jurisdiction.

## **Loss of revenue for regulators**

A major advantage of AMR is that service providers operating across jurisdictions would no longer need to pay multiple licence fees. However, occupational regulators stressed that they are typically reliant on licence fee revenue for their funding, and that they would struggle to adequately perform their regulatory functions in the absence of such revenue.

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## Participants' views

Some study participants were concerned that AMR could result in locally-registered practitioners bearing the cost of regulatory oversight for individuals from other jurisdictions.

There is a cost to each regulatory authority in ensuring that registrants are entitled to hold a practising certificate by maintaining competence and fitness to practise, and disciplinary costs. These costs are paid by the practising certificate fee and are borne by the profession. If registrants are able to practise in one jurisdiction while holding a practising certificate in another then the cost of carrying out disciplinary functions (funded by a disciplinary levy in New Zealand) or reviews of fitness to practise will not be appropriately funded. (Nursing Council of New Zealand, sub. 22, p. 6)

Costs associated with taking competence or disciplinary action against a practitioner registered in one jurisdiction but practising in the other would be borne by the profession based in the home jurisdiction, despite the issue having no impact on the members of the public the home jurisdiction is charged with — and funded for — protecting. ... Introduction of a home registration provision would essentially mean that New Zealand authorities would take on a higher cost for regulation with no increased protection for members of the New Zealand public. That is untenable; it will not be acceptable to the profession which pays for its own regulation, or to (for example) the parliamentary regulator of fee-setting practices by statutory authorities in New Zealand, to whom any fee increases need to be justified. (Health Regulatory Authorities of New Zealand, sub. 16, p. 3)

However, Energy Safe Victoria (sub. 26, p. 3) estimated that its revenue would fall by no more than 6 per cent under the AMR arrangements for electricians.

If all electricians holding a Victorian licence but residing in NSW, South Australia or Queensland choose not to renew their licences this would remove 2,670 licences and reduce revenue to ESV by approximately \$490,000 or approximately six per cent over the next five years. There is a prestige attached to holding multiple licences and it avoids the need to explain the AMR process to customers for electricians. ESV estimates that 50 per cent of electricians will not renew their Victorian licences.

The National Occupational Licensing Authority, an organisation formed specifically to promote national licensing, considered that difficulties dealing with service providers domiciled in other jurisdictions meant AMR was likely to create an increased compliance burden for regulators (NOLA 2014, p. 16).

Automatic mutual recognition would seem to impose an increased compliance workload, however, reduced licence fees will mean reduced revenue for compliance work.

Any increased compliance burden under AMR, or increased costs from harmonisation processes that might be associated with AMR, would compound losses of revenue from licence fees, although it is uncertain how significant any increased burden would be, particularly if regulators worked together more closely than presently. There would also be a reduction in workloads for regulatory agencies from no longer needing to provide



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licences to visiting service providers. However, concern about revenue and an increased compliance burden has the potential to encourage regulator resistance towards AMR.

### The Commission's view

The Commission recognises the relevance of monitoring and compliance to achieve satisfactory regulatory outcomes, and it is important that regulators are adequately resourced to perform these roles. However, the Commission considers that the concerns associated with the potential revenue losses to regulators from AMR could be handled, where significant, through changes to a regulator's funding model and are unlikely to outweigh the wider benefits.

The take up of AMR is likely to remain relatively small because it is intended to only apply to the temporary or occasional provision of services across borders. Moreover, as noted above by Energy Safe Victoria, some service providers might see commercial benefits from having a licence from the host jurisdiction even if it is not required. This may be because host jurisdiction customers are familiar with the local licence and are more likely to employ someone holding one.

Even if a regulator did face a genuine prospect of losing significant revenue from registration fees, it does not necessarily follow that AMR should be avoided. Instead, there could be a case on efficiency grounds for a greater share of the regulator's resources to come from taxes raised by its parent government.

The Commission has previously outlined principles for efficient cost recovery by government agencies (PC 2001). One of these was that, in principle, the price of regulated products should incorporate all of the costs of bringing them to market, including the administrative costs associated with regulation. This is seen as efficient on the basis that it is appropriate for those benefiting from the provision of a service to pay for it. Therefore, for example, those using electrical services should pay for the cost of licensing and regulating electricians (PC 2001).

In response to a possible loss of revenue under AMR, regulatory agencies could increase their licence fees for domestic service providers, potentially placing domestic providers at a competitive disadvantage relative to visiting providers. Local service providers might therefore be unable to pass on regulatory costs. An alternative funding model, such as funding regulators through budgetary allocations might therefore warrant consideration.

Taxation is not the only alternative to licence fees for funding regulators. There might be other services provided by regulators such as inspections or certificates of compliance where work is audited. However, it is important for economic efficiency that charges relating to these activities are truly reflective of the costs incurred by regulators. Increasing charges for these activities to fund the broader activities of regulators would be inefficient and undesirable. To the extent regulators had discretion over the number of audits or



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inspections undertaken it would also be important to ensure regulators did not undertake an unnecessarily high number in order to boost funding under a user pays model.

## Summing up on automatic mutual recognition

Participants have expressed mixed views on the desirability and practicality of implementing AMR for workers offering their services in another jurisdiction on a temporary and occasional basis. Views vary by occupation, largely based on differing perceptions of similarities of qualifications and the scope of work across jurisdictions.

The Commission supports the model of AMR as a flexible, low cost way of facilitating labour mobility while minimising the regulatory burden. The benefits are likely to be concentrated in border areas and are expected to expand over time due to innovations in technology that enable the remote service delivery and population growth in border areas. The Commission is, however, mindful of the practical challenges associated with the implementation of AMR.

The extent to which AMR could be introduced to various regulated professions, and over what timeline, is likely to vary significantly. A staged implementation is therefore preferred by the Commission. For those professions where the degree of harmonisation in standards is high across jurisdictions, such as electricians and plumbers, the prospect of introducing AMR nationwide in the short to medium term is high. For other professions, the introduction of AMR is likely to meet more resistance, and might require a more lengthy process to reduce disparities in standards, making it more of a medium- to long-term proposition.

For some professions, particularly where health and safety considerations are significant and qualifications vary significantly between jurisdictions, barriers to acceptance of AMR by regulators and the broader community are likely to be high and there might be requirements for additional safeguards to achieve acceptance. In some cases where the scope of work varies widely across jurisdictions, the benefits of AMR might never be likely to exceed the costs and it would not be appropriate to implement.

The Commission supports the ongoing work of CAF to expand the use of AMR. However progress to date by CAF has been slow and it is important that a staged approach does not become excessively cautious. State and Territory Governments should accelerate this work and afford it a higher priority. The AMR arrangements for electricians and veterinarians in Australia — and any further extensions to these schemes — will help inform CAF and other policy makers about the practical implications of introducing AMR more widely. Drawing out and responding to the lessons learned from these early adopters of AMR would also help boost public and regulator confidence that the integrity of the regulatory framework would continue to be upheld under AMR and at lower overall cost to the community.

The arrangements for veterinarians appear to be working well and have broad acceptance and support within the industry. The Commission considers that the benefits of the national recognition scheme for veterinarians would be maximised were the scheme operating on a national basis, which requires the Governments of Western Australia, the Northern Territory and the ACT to legislate for national recognition of veterinarians in their jurisdictions.

Importantly, the timeframes associated with implementing AMR, and the difficulties associated with implementing it at all for some professions, mean that the MRA and TTMRA will continue to be important tools for facilitating service provision across jurisdictions for the foreseeable future.

#### DRAFT FINDING 6.1

Automatic mutual recognition (AMR) is a flexible, low cost way of facilitating service provision across borders. While there would be challenges in applying AMR beyond its current availability for electricians and veterinarians in selected Australian jurisdictions, the issues are not insurmountable.

#### DRAFT RECOMMENDATION 6.1

State and Territory Governments should, through the Council for the Australian Federation, give higher priority to their ongoing work to expand the use of automatic mutual recognition (AMR). This work should draw on the lessons from the recent introduction of AMR for electricians and veterinarians.

## 6.4 Manner-of-carrying-on requirements

The model of AMR described above is based on the principle that individuals comply with the requirements for carrying on an occupation in the jurisdiction where they are working, irrespective of where they gained occupational registration. This is also the case under the MRA and TTMRA. As noted in chapter 3, laws regulating the manner of carrying on an occupation are exceptions from the mutual recognition schemes.

Manner-of-carrying-on requirements for occupations can impede cross-border service provision. For example, an individual seeking to provide services in a second jurisdiction might first be required to establish a principal office, set up a new trust fund for monies received, and develop a complaints process in the second jurisdiction. More generally, individuals have to familiarise themselves with different rules for practising their occupation.

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## Scale of issue

The Commission has received mixed evidence from participants on the significance of manner-of-carrying-on requirements. Some stated that regulatory inconsistencies did not present major problems for their industries. For example, the Air Conditioning and Mechanical Contractors Association (sub. 15, p. 2) saw regulatory inconsistencies as inevitable and not a major impediment to labour mobility:

Inter-jurisdictional differences in laws and regulations have the potential to impede labour mobility in some cases ... Such disincentives can result in businesses and individuals being unable to respond to market opportunities and skills shortages, acting as an artificial barrier to competition. Notwithstanding the above, the AMCA acknowledges the importance of ensuring that building and plumbing practitioners have a thorough understanding of the risks and conditions specific to certain jurisdictions. Although the performance requirements of the National Construction Code and related standards vary across jurisdictions, the national framework means that this is not likely to act as an impediment to labour mobility. Additionally, efforts towards the harmonisation of [health and safety and dangerous goods laws] are also likely to have reduced barriers to labour mobility.

The Architects Accreditation Council of Australia (sub. 20, p. 7) expressed a similar view for architects.

In the architectural context there is no evidence that the inter-jurisdictional differences in laws hinders labour mobility. There are different obligations placed upon architects in relation to insurance, continuing professional development and differences in the manner in which disciplinary matters are managed. Architects comply with the requirements in each jurisdiction where they hold registration. There is no evidence that these differences in obligations on architects across state and territory borders has impeded architects applying for registration under the MRA.

The Department of Education and Training (sub. 9, pp. 5–6) also stated that such inconsistencies might have a relatively limited impact on mobility.

Only once they have a recognised licence ... [licensees] engage with the requirements of the second jurisdiction for carrying on the occupation. They may be aware ... that there are specific aspects of carrying on the occupation in a specific jurisdiction which differ from their own, and these may be a disincentive to moving there, but it must be assumed that the decision to move will have already been made before most licensees seek to find out the conduct rules in the second jurisdiction ... Addressing some ... differences in conduct would undoubtedly remove some of the complexity for licensees, reducing costs however it is not the case that licensees are likely to ‘vote with their feet’, as indicated in the previous review, as they are less likely to seek to understand the regulatory model until they have already committed to move.

However, the HIA (sub. 37, p. 6) raised a number of inconsistencies across jurisdictions relating to business conduct:

In addition to different licensing requirements, states and territories currently have unique legislation regulating the minimum conduct requirements required of licensees. ... These ‘conduct’ requirements include the way licensees perform the work, consumer protection and contract requirements, statutory warranties, warranty insurance and financial controls. ...

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Whilst there are common themes imposed under each jurisdictions' legislation, many of the specific requirements are inconsistent.

The QCA suggested (2013, p. 7) that manner-of-carrying-on requirements were likely to be a bigger impediment to labour mobility than issues related to occupational licensing.

While the licensing environment may impose administrative and financial burden to those workers and businesses wishing to operate in multiple jurisdictions, it is considered unlikely that these represent significant barriers to labour mobility. Barriers to labour mobility are instead likely to continue to arise from varying legislative requirements between jurisdictions ... and the extent that localised knowledge and experience improves competitiveness.

Issues relating to 'carrying on' of a business are particularly important in border areas. Participants have raised examples of the need for staff in border areas to do separate Responsible Service of Alcohol or Responsible Conduct of Gambling courses in both New South Wales and Victoria (Office of the NSW Small Business Commissioner, sub. 25), and of real estate agents operating in Albury and Wodonga being required to have separate trust funds in New South Wales and Victoria.

### **Are different requirements across jurisdictions warranted?**

Given community standards and expectations, while similar, are not identical across jurisdictions, it is to be expected that there will be at least some differences in the training regimes for employees. Factors such as climate are also a factor (for example, the relative lack of reliance on gas heating in Queensland when compared to southern jurisdictions influences the training of plumbers).

The Department of Education and Training (sub. 9, p. 6) noted there were legitimate reasons for jurisdictional differences.

Significantly different risks and community expectations in different jurisdictions are valid concerns and so the ability to address such issues locally should be available. The means of ensuring that individual practitioners have appropriate local knowledge should not be more burdensome than necessary.

Jurisdictional differences may be inevitable, but are probably not a significant obstacle to labour mobility. Such differences are generally 'at the margin' and mutual recognition arrangements could generally be applied to the bulk of skills licensees possess. As noted above by the Air Conditioning and Mechanical Contractors Association, the development of the National Construction Code and the harmonisation of occupational health and safety laws have reduced the potential for such divergences.

Nonetheless, if the full benefits from the mutual recognition schemes are to be obtained, it is important that regulatory inconsistencies are minimised to enable service providers to operate seamlessly across jurisdictions. In the Commission's view a number of the examples raised of jurisdictional differences seem unnecessary. For example, the Commission has previously highlighted the potential for gains from reducing the

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remaining jurisdictional variations in the National Construction Code (PC 2012b). The Commission also questions the need for hospitality staff in border areas to do separate Responsible Service of Alcohol or Responsible Conduct of Gambling courses in New South Wales and Victoria.

Moreover, legal advice provided to the Commission's 2009 study suggested that licences such as Responsible Service of Alcohol certificates probably fell within the existing mutual recognition system. As such, it can be argued that jurisdictions should recognise these interstate certificates without the imposition of additional requirements or conditions (PC 2009).

More broadly, manner-of-carrying-on requirements would be less likely to pose a barrier to cross-border service provision if governments followed the principles of good regulatory practice which have been enunciated in various reports (for example, Regulation Taskforce (2006), COAG (2007), IPART (2013), ANAO (2014), DPMC (2014b)). Such principles include ensuring that all options are considered before regulating, that regulatory options taken are those with the greatest net benefit, that regulations are reviewed over time, and that government actions are proportionate to the problem they seek to address. There is further discussion of the importance of good regulatory practice in chapter 7.

## **The consequences of removing the exception**

Removing the manner-of-carrying-on exception under the mutual recognition schemes would potentially create anomalies and inappropriate regulatory arrangements in some circumstances. It raises the possibility of individuals practising the same occupation in a given jurisdiction under different regulations. It could also see regulations suitable for one jurisdiction being implemented in another jurisdiction where they were inapt (although, as noted above, recent initiatives have reduced the potential for such divergences).

Another potential consequence of removing the manner-of-carrying-on exception would be the subsequent loss of complementarities between manner-of-carrying-on arrangements and licences within jurisdictions. Some jurisdictions will license relatively inexperienced workers because of strict monitoring and audit requirements, or requirements for indemnity insurance. Such workers might be less suited to working in an environment where there was a limited monitoring regime and less onerous insurance requirements.

The Department of Education and Training (sub. 9, p. 13) highlighted this issue:

Different licensing approaches tend to work as a complete model, including the requirement for obtaining the licence plus the obligations under which the licence is held. ... An example might be where the regulators of the home jurisdiction would require a lesser degree of training in order to obtain a licence but would actively monitor all work in a given range but the destination jurisdiction might have higher up-front standards and/or continuing professional development and would therefore monitor only 10% of the same work.

Moreover, jurisdictions have already addressed some of the concerns about manner-of-carrying-on requirements without altering the mutual recognition schemes. For example, the NSW and Victorian regulators have agreed that a real estate agent can have their principal office in the other jurisdiction and they are currently working together to figure out how the requirement for a local trust account can be resolved.

This approach of regulators working together to resolve the few specific examples of where laws on the manner-of-carrying-on an occupation are restricting trade and labour mobility represents a low cost solution. The Commission does not consider that there has been enough evidence provided to make a sufficient case for the removal of the manner-of-carrying-on exception.

#### DRAFT FINDING 6.2

There is not a strong case for extending the scope of the mutual recognition schemes to cover laws on the manner of carrying on an occupation. There are more effective ways of dealing with the few cases where such laws restrict trade and labour mobility.

## 6.5 Extending automatic mutual recognition to trans-Tasman service provision

The Commission has been asked to consider the extent to which the Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement (TTCPRE) could facilitate trans-Tasman service provision by individuals who are allowed to practise with a single occupational registration under AMR.

The TTCPRE created a new legal framework for trans-Tasman civil disputes which makes hearing cases more like those between parties in the same country (box 6.2). It has also made it more straightforward to enforce disciplinary sanctions across the Tasman. This is expected to lead to cheaper and more effective resolution of disputes (McClelland 2009).

The TTCPRE is relevant to trans-Tasman service provision under AMR because it gives consumers greater confidence that accessible remedies are available if an individual from across the Tasman provides a substandard service. For example, under the TTCPRE an aggrieved consumer could more easily:

- take legal action against a provider from across the Tasman
- seek interim relief locally in support of proceedings in the other country
- provide evidence in a court or tribunal case held across the Tasman
- have a witness subpoenaed to provide evidence in a court or tribunal case taking place across the Tasman



- seek to have an Australian or NZ court judgment enforced by the courts of the other country.

### Box 6.2      **Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement**

The Agreement Between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement was signed in 2008. Legislation to implement the Agreement commenced in October 2013.

It puts in place a framework for the resolution of trans-Tasman civil disputes, with the aim of making a trans-Tasman court or tribunal case more like a case between parties in the same country. This includes making it easier to:

- start Australian court proceedings against a person located in New Zealand
- ask for cases that were started in New Zealand to be heard before Australian courts in certain circumstances
- have a person located in New Zealand give evidence in certain Australian proceedings
- appear by audio or video link in New Zealand court proceedings
- have a broader range of Australian court judgments recognised and enforced in New Zealand.

A major factor behind adoption of the Agreement was a realisation that the expanding trans-Tasman flows of people, assets and services — including the remote or digital delivery of services between Australia and New Zealand — was increasing the need for a more effective regime to deal with legal disputes across the Tasman.

*Sources:* Australian and NZ Governments (nd); McClelland (2009).

Prior to the TTCPRE, the capacity to take trans-Tasman actions was much more limited as plaintiffs often had to seek leave to serve initiating documents originating from the other country, or to prove a particular connection between the proceedings and the other country.

The NZ Government (sub. 47, p. 4) highlighted the potential for the TTCPRE to better facilitate a trans-Tasman system of AMR.

The recently implemented Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement would, in our view, make the option of relying on a single registration more feasible in a trans-Tasman context. The Agreement makes civil litigation much easier between trans-Tasman parties and would also allow regulatory sanctions imposed in one country to be enforced in the other.

The Department of Education and Training (sub. 9, p. 14) expressed a similar view:

The Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement would help underpin the operation of AMR, as disciplinary outcomes could be enforced across borders.

The Commission shares the view that the TTCPRE would facilitate trans-Tasman service provision under AMR. The enhanced capacity to take legal action against trans-Tasman



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service providers in the event of substandard service provision means consumers would be less wary of, and have more confidence in, considering a trans-Tasman provider.

All Australian and NZ courts are subject to the TTCPRE. It also applies to tribunals in Australia and New Zealand that are prescribed by regulation. The judgments of a particular tribunal can be prescribed if the tribunal has an adjudicative function (that is, decision-making capacity) and its decisions can be enforced without a court order. A tribunal can be prescribed as able to issue subpoenas or take evidence from across the Tasman if it is authorised by law to take evidence on oath or affirmation.

Australia's Administrative Appeals Tribunal — which has jurisdiction for reviewing occupation-registration decisions under mutual recognition — is prescribed as a tribunal for the purposes of allowing it to issue subpoenas to be served in New Zealand, give individuals leave to appear remotely from New Zealand, and give assistance to NZ courts and tribunals for remote appearances from Australia. While not directly affecting the feasibility of AMR, prescribing the Administrative Appeals Tribunal for these purposes should simplify the review of occupation-registration decisions under the TTMRA.

## Implementation of trans-Tasman AMR

A trans-Tasman form of AMR could be built on the previously mentioned work by Australian states and territories on their AMR regimes. There are unlikely to be major practical problems associated with including New Zealand in any AMR arrangement adopted in Australia, particularly now that the TTCPRE has been implemented. The extension of AMR to New Zealand would be feasible for a number of professions, particularly where there are existing strong links between qualifications and professional bodies.

The inclusion of NZ electricians in Queensland's external equivalence regime highlights how New Zealanders could participate in an AMR scheme in a relatively straightforward manner. The mechanism employed is the inclusion of the *Electricity Act 1992* (NZ) in Schedule 1 of the Queensland Electrical Safety Regulation 2013, which contains the list of external licences recognised as equivalent under Queensland regulations. The Commission understands that these arrangements have worked well since they were implemented over a decade ago.

While this highlights the ease of incorporating NZ electricians from a legal perspective, behind this was a thorough process of regulators and professional bodies working together to determine the equivalence of licences throughout Australia and New Zealand. Such a process is an essential element in designing an effective mutual recognition regime.

As part of due diligence, it is important for policy makers to be cognisant of differences between Australia and New Zealand in the scope of work for occupations, and to ensure the day-to-day functioning of any AMR scheme reflects these differences. The NZ Society of Master Plumbers, Gasfitters and Drainlayers (sub. 44) highlighted differences in the

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work undertaken by gasfitters in the two countries. This would need to be considered, similarly to within Australia where the scope of work for gasfitters also varies across jurisdictions.

In many cases, there are already strong links between professional bodies and regulators in Australia and New Zealand and this would assist in implementing AMR. Where these relationships are not close, it would be important to develop them (particularly between regulators).

The European Union has demonstrated that it is possible to establish measures for governments and regulators to cooperate and share information so that service provision can occur across national boundaries without the need to register in more than one country (appendix B). The Commission considers that these arrangements provide lessons on mechanisms for information sharing that would facilitate AMR between Australia and New Zealand.

## **Evidence of demand for trans-Tasman AMR**

The Commission has been asked to identify and document evidence of any occupations where there is sufficient demand for, and barriers to, cross-border service provision to merit inclusion in a trans-Tasman system of AMR.

Little specific information has been found on this issue so far, including from study participants during consultations and in their submissions. However, the available evidence suggests that the gains from a trans-Tasman system of AMR would be relatively small, although significant and growing, particularly if the introduction of AMR led to increased trade in services.

- Trade statistics between Australia and New Zealand suggest that the main beneficiaries would include consumers and providers of legal, accounting and architecture services. Exports of these services from Australia to New Zealand are collectively valued at between \$150–200 million each year, with exports from New Zealand to Australia being of a similar magnitude (Statistics New Zealand 2015).
- Evidence from the Australian Health Practitioner Regulation Agency (sub. 50) could indicate the potential for labour to move between Australia and New Zealand when there is a relatively seamless process for providing services across the two countries.<sup>16</sup> There were 2293 mutual recognition applications in Australia from health practitioners under the TTMRA between July 2010 and February 2015, with 1842 for nurses. (Medical practitioners have a permanent exemption under the TTMRA and use other pathways to transfer between Australia and New Zealand.) Data from the

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<sup>16</sup> The introduction of the National Registration and Accreditation Scheme in Australia in July 2010 is likely to have increased the attractiveness of registering in Australia for NZ health practitioners, by ensuring they could practise anywhere in Australia based on a single registration.

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Commission's survey of occupational regulators suggests more than half of TTMRA applications relate to health professions (appendix C).

- The trend discussed earlier in the chapter towards remote service delivery via electronic means will be relevant for some occupations. In particular, where a physical presence is not essential to provide a service — such as supplying architectural drawings or computer code — there may be increasing gains from making AMR available on a trans-Tasman basis for the occupation. This is particularly likely where difficulties associated with obtaining registration in the other country dissuade service providers from trans-Tasman operations.

The Commission seeks further information on which occupations would be most likely to benefit from a trans-Tasman system of AMR. The Commission also seeks feedback on the potential benefits and what arrangements are necessary for a trans-Tasman AMR scheme to function effectively.

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*INFORMATION REQUEST 6.1*

*Which occupations would be best placed to gain from automatic mutual recognition (AMR) between Australia and New Zealand? How significant would the gains be? Would other measures be needed to ensure a trans-Tasman AMR arrangement works effectively?*

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## **6.6 Mutual recognition and business registration**

In the same way as individuals must be registered to carry out some occupations, businesses can be required to obtain some form of authorisation (for example, a licence, permit, or approval) before they commence operating. Many of these authorisations are granted by state or territory agencies.

Where registration is based only on the characteristics of an individual, whether they are an employee or sole trader, this is classified as occupational registration and therefore captured within mutual recognition arrangements. Schemes that impose requirements relating to both an individual and his or her associated business lead to uncertainty about whether the registration is a form of occupational registration subject to mutual recognition (PC 2009). For example, a NSW business licence for property agents requires applicants to have an 'appropriate' qualification and be a 'fit and proper' person (NSW Fair Trading 2015).

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In its 2009 review of the mutual recognition schemes, the Commission concluded that business licences held by sole traders, if they include at least one requirement relating to an individual's 'fitness' to hold a licence, are likely to fall within the coverage of the mutual recognition schemes. This was based on advice from the Australian Government Solicitor (PC 2009, pp. 216–217):

Where licences to perform work may be granted to individuals according to conditions at least one of which relates to the 'attainment or possession of some qualification' then that work, providing it amounts to an 'occupation, trade, profession or calling', would constitute an occupation for the purposes of the mutual recognition regime, even where the other licence conditions do not relate to the 'attainment or possession of some qualification'.

However, registration of business entities that are not individuals is outside the scope of the mutual recognition schemes.

The need for businesses providing services in multiple jurisdictions to register in each Australian jurisdiction in which they intended to do business was raised by a number of participants in the 2009 study as unnecessarily increasing the costs associated with providing services in multiple jurisdictions. Since then, however, the introduction of national business registration in Australia in May 2012 is likely to have eliminated many of the unnecessary costs previously incurred.

In view of this change, the Department of Education and Training (sub. 9, p. 7) doubted whether there are remaining benefits to be reaped from including business registration in the mutual recognition schemes.

It is unclear whether there are aspects of business registration that would provide a benefit if they were included in the mutual recognition arrangements, given the introduction of the national business registration. Individual businesses, such as sole traders, are already covered by the arrangements.

In addition to national registration within Australia, further reform has been proposed for companies wishing to operate in both Australia and New Zealand. A single entry point for business registration is being considered by the Australian Securities and Investment Commission and New Zealand Companies Office (TTOIG 2014a). Under this proposal, businesses applying for incorporation in their home country would be able to simultaneously elect to be registered as a foreign company in the other country (with the provision of any additional information and payments required in that country), eliminating the need for separate registrations.

Australian and NZ officials have also discussed opportunities for mutual recognition of the Australian Business Number (ABN), Australian Companies Number (ACN) and New Zealand Business Number (NZBN) (TTOIG 2014b).

While national business registration is likely to have solved many of the problems identified in 2009, some study participants identified issues relating to additional licences required in each jurisdiction. One example, discussed earlier, is the requirement for

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electrical contractor licences. The Australian Security Industry Association Limited (sub. 11, p. 3) also highlighted issues relating to security licences:

... security providers are still required to obtain ... security business licences in each jurisdiction they wish to operate. This places significant imposts on organisations ... the cost of obtaining security business licences in each jurisdiction is expensive and time consuming. It also results in the inefficient duplication of the application process across multiple jurisdictions ... for many small business enterprises the impost makes it prohibitive to seek work interstate. ASIAL is supportive of consideration being given to extending coverage of the MRA to business registration.

The HIA (sub. 37, pp. 5–6) raised consistency issues regarding building licences, noting that mutual recognition did not apply to building licences issued to companies.

There is a marked disparity in the extent of business and occupational licensing amongst jurisdictions, with licensing of all builders and trade contractors mandatory in Queensland and South Australia whilst in some other jurisdiction, such as the Australian Capital Territory only residential builders are required to be licensed. ... Notably MRA does not yet enable mutual recognition of a company's building licence.

The Australian Institute of Architects (sub. 43, pp. 2–3) raised issues relating to architecture businesses:

The establishment of a national business name register does not address the issue for licensing/accreditation/registration where, like architecture, there is specific occupation-based legislation requiring registration in addition to overarching state and territory business names legislation. ... The Institute believes that an architectural business should only need to register itself once, in its home jurisdiction, or, if not provided for by local architect legislation, another jurisdiction which does provide for it. Once registered, the business should attain licensing/accreditation/registration on the national register which enables it to practice in any mutual recognition scheme jurisdiction without further registration fees.

There would appear to be considerable merit in extending mutual recognition to electrical contracting, security, building and architecture business licences, given that this would reduce costs in these industries and promote greater competition stemming from lower barriers to entry by interstate providers. However, the Commission has, for this draft report, been unable to ascertain the extent of the problem caused by differing business registration requirements, and whether this can be addressed by mutual recognition. The Commission is seeking further information on the extent of the problem and the possible remedies.

Another issue that would need to be resolved for AMR to function seamlessly for some professions would be the significant variations in requirements for liability insurance across jurisdictions. Master Electricians Australia (sub. 34, p. 5) suggested possible ways forward for electrical contractor licences:

Regarding insurance requirements, there is the option of requiring interstate licensees to simply provide a Certificate of Currency or a statutory declaration. Another alternative may be the introduction of a conduct rule for business licensees from states that do not require insurance.

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**DRAFT FINDING 6.3**

Following the introduction of national business registration in Australia in 2012, there is no longer a strong case to extend mutual recognition to general business registration requirements. However, sector-specific business licences required by the states and territories — such as for electrical contractors — continue to be a potential barrier to cross-border service provision.

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**INFORMATION REQUEST 6.2**

*To what extent is cross-border service provision hindered by unique state and territory requirements for business registration? Could this be addressed by mutually recognising state and territory business registration requirements? Are there alternative policy responses that are more efficient than mutual recognition?*

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More broadly, and as recommended in past regulatory reviews, there is scope to streamline the information required from businesses to obtain licences, potential to reduce the renewal frequency for some licences, and opportunities to combine licences that groups of businesses frequently need. The Commission notes that progress on these fronts would, on their own, secure net benefits, and would also leverage the value from the mutual recognition schemes.

## 7 Governance arrangements

### Key points

- The governance arrangements for the mutual recognition schemes are highly decentralised, with administration and compliance largely delegated to existing regulators, and only a limited form of collective oversight and coordination by the ten participating governments.
- This makes the schemes straightforward and inexpensive to implement and maintain, but has also made it challenging to arrest signs of a slow erosion in their benefits.
  - In the absence of effective oversight, there continue to be examples of occupational regulators not implementing mutual recognition as legislated. Parallel regulation — such as business registration — can also reduce benefits from the schemes.
  - Individuals and firms are not always aware of their rights under mutual recognition, partly due to limited government information on the schemes. Further, there is a lack of case law to guide use and implementation of the schemes.
- There is scope to retain the advantages of the current decentralised approach while also strengthening oversight of the schemes and increasing the accountability of all parties.
  - The components for robust governance arrangements already exist, including tribunals and Ministerial Councils to formally review regulator decisions and standards, and a body for governments to coordinate their actions.
- A key element of the Commission's proposed reforms is to strengthen the interjurisdictional group of officials which oversees the schemes — a task currently assigned to the Cross-Jurisdictional Review Forum (CJRF) — by making the following changes.
  - Revise the terms of reference for the CJRF to give it more specific responsibilities, time frames and outputs.
  - Rotate the chair of the CJRF among participating jurisdictions, supported by a jointly-funded standing secretariat.
  - Members of the COAG Senior Officials Meeting — comprising the Secretary of the Australian Department of Prime Minister and Cabinet and corresponding departmental heads at an Australian state and territory level as well as the equivalent NZ Government official — should formally accept responsibility for overseeing the CJRF's activities.
- Improvements in broader regulatory practices are also recommended.
  - Regulation impact analyses should consider the implications of proposed regulations on the mutual recognition schemes. Jurisdictions should also coordinate and collaborate when developing regulations that have cross-border impacts.
  - Regulator accountability should be improved by setting clear expectations regarding the application of mutual recognition, providing better targeted guidance on the schemes, and requiring regulators to report data on mutual recognition in their annual reports.
- The period between formal reviews of the schemes should be increased to ten years, given the recommended improvements to ongoing oversight of the schemes, and the findings of successive reviews that the schemes are generally working well.



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This chapter assesses the governance arrangements for the Mutual Recognition Agreement (MRA) and Trans-Tasman Mutual Recognition Arrangement (TTMRA). The term ‘governance arrangements’ is used here to refer to how the responsibilities of, and relationships between, different bodies and jurisdictions are organised to form the system of mutual recognition across Australia and New Zealand.

As detailed in chapter 3, the mutual recognition schemes involve many different parties and are inherently decentralised, with administration and compliance largely delegated to individual regulators in each jurisdiction. This reflects the intention of the architects of the schemes to have a system that is relatively straightforward and inexpensive to implement and maintain. The broad and decentralised nature of mutual recognition schemes are a key strength (NZ Government, sub. 47). However, it also makes it challenging to ensure that there is effective oversight.

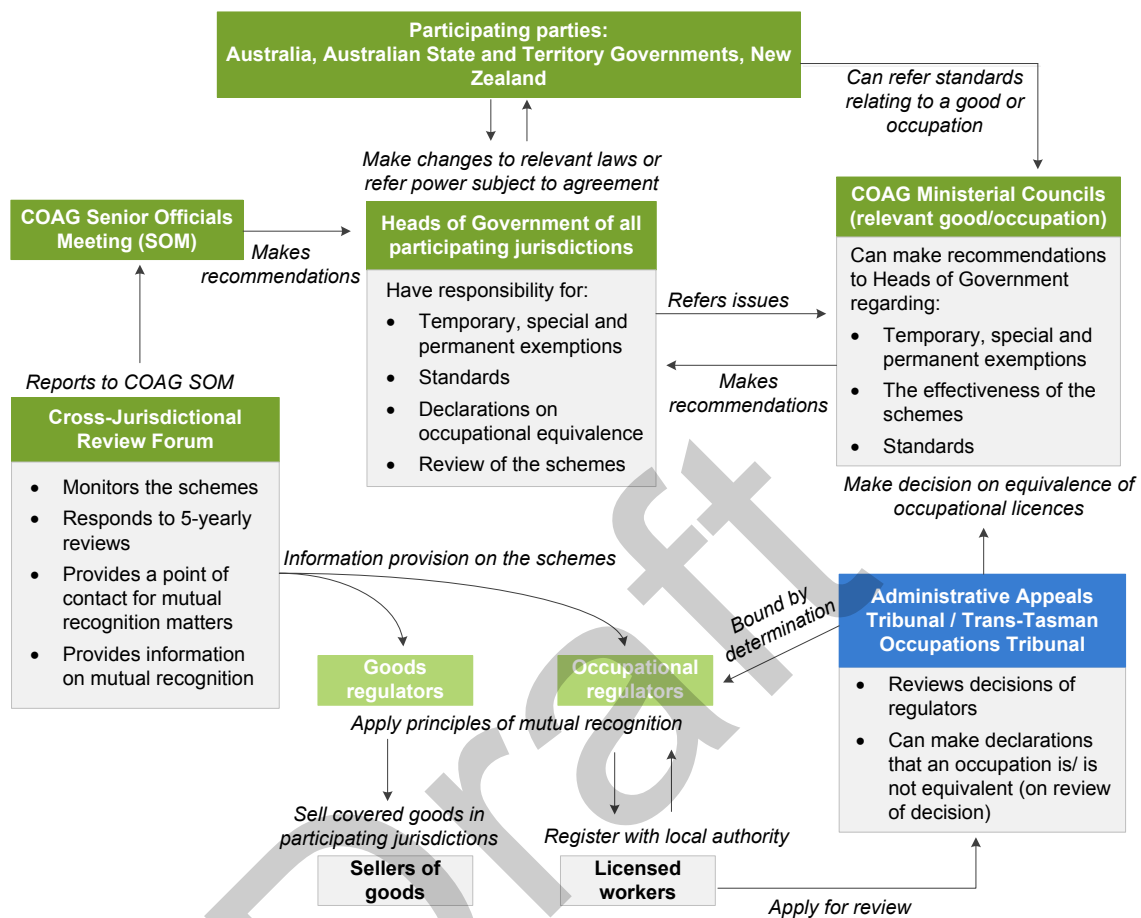
The schemes’ architects gave a number of central bodies — including the Administrative Appeals Tribunal (AAT), Trans-Tasman Occupations Tribunal (TTOT) and COAG Ministerial Councils — important oversight and coordination roles (chapter 3 and figure 7.1). After the 2003 review of the schemes, a forum of representatives from central government departments in each jurisdiction was also formed — the Cross-Jurisdictional Review Forum (CJRF). These roles are critical to maintaining ongoing benefits from the schemes.

The Commission has concluded that the roles envisaged for central bodies have not been as effective as anticipated, and that this is leading to a slow erosion of benefits from the schemes. Several reforms are recommended to address this issue, while maintaining the advantages of the decentralised approach of the MRA and TTMRA.

## 7.1 Evidence of limited oversight and coordination

While a number of central bodies are assigned an oversight and/or coordination role for the mutual recognition schemes, they have either taken a very ‘hands-off’ approach or, in the case of tribunals and Ministerial Councils, rarely been asked to review specific aspects of the schemes. This situation is compounded by a lack of high-level oversight by Heads of Government. The absence of appropriate oversight raises concerns that the mutual recognition arrangements are being applied in a fragmented and ad hoc manner. Similar concerns were raised in the *Strengthening Trans-Tasman Economic Relations* study. In particular, a risk of lapses in continuity and direction of the Closer Economic Relations policy agenda were identified (PC and NZ PC 2012).

Figure 7.1 Governance arrangements for the MRA and TTMRA



## Lack of oversight and coordination by governments

The agreements contain a high level commitment by Heads of Government to monitor the schemes. In practice, this responsibility has been delegated to the CJRF, comprised of representatives from a central agency in each jurisdiction — typically the treasury or head of government's department. However, designated representatives often have limited expertise on the operational details of the schemes, and the relevant state and territory agencies typically allocate few resources to the task.

The CJRF is intended to provide a vehicle for governments to collectively oversee the schemes and coordinate their actions (box 7.1). In practice, the CJRF has rarely met and has few resources. No CJRF meetings were held for almost four years — from June 2010 to March 2014 — after the NSW Government relinquished its role in providing a secretariat. Since March 2014, the CJRF has only met twice.

### Box 7.1 The Cross-Jurisdictional Review Forum

In 2004, COAG and the NZ Government established the Cross-Jurisdictional Review Forum (CJRF) — an interjurisdictional committee of officials — to undertake further consultations and develop final recommendations following the Productivity Commission's 2003 review of the mutual recognition schemes. The CJRF subsequently recommended that it be given an ongoing role to monitor the operation of the schemes, respond to five-yearly reviews, and provide recommendations for improvements. This was accepted by participating parties.

The CJRF currently comprises officials from central agencies in each jurisdiction. Forum members act as the point of contact for mutual recognition matters within their jurisdiction and have a responsibility to promote the operation of mutual recognition principles.

The CJRF's current terms of reference specify that its role includes:

- providing a clear point of contact for mutual recognition matters in each participating jurisdiction, to assist with interjurisdictional collaboration and intra-jurisdictional coordination
- overseeing mutual recognition arrangements for registered occupations, specifically the Ministerial Declarations of occupational equivalence, and managing any proposed variations to these arrangements, including any implications for the TTMRA
- receiving, sharing, recording details, and promoting broader policy discussion by relevant agencies within each jurisdiction, of the issues in respect of any areas of economic activity that are not covered by existing mutual recognition arrangements
- receiving and sharing information on any non-compliance with existing mutual recognition arrangements with a view to better targeting any necessary information campaigns.

The NSW Government provided a secretariat and chaired the CJRF until late 2010, after which the forum ceased to function until March 2014, when the Australian Government took on the role. The CJRF has met twice since reforming in 2014.

*Sources:* CJRF (2014a); Department of Education and Training (sub. 9).

The CJRF is meant to report to the COAG Senior Officials Meeting (SOM), which is chaired by the Secretary of the Department of the Prime Minister and Cabinet, with other members being corresponding departmental heads at a state and territory level<sup>17</sup>. But such reporting has not occurred in practice.

In its 2009 review of the schemes, the Commission recommended that the CJRF report to the SOM on an annual basis. At that time, the CJRF effectively had no formal reporting requirement (the body it nominally reported to had ceased to exist). In its response to the Commission's 2009 report, the CJRF (2014b, p. 31) partly accepted this recommendation, stating it would report to the SOM on an 'as-needs basis' because 'the five-yearly [review] process already provides appropriate means for reporting to COAG on progress with mutual recognition matters'.

<sup>17</sup> Under the TTMRA, New Zealand has full membership and voting rights on Ministerial Councils where councils are making decisions on matters pursuant to the TTMRA. Under COAG provisions more generally, representatives from New Zealand can be included as members on COAG bodies that consider matters impacting New Zealand.

The Department of Education and Training (sub. 9, p. 14) noted that the SOM had not held the CJRF to account over its lack of activity from late 2010.

The oversight mechanisms for mutual recognition are not always optimal. Currently, the CJRF reports to COAG SOM which does not appear to have remarked on the lack of operation of the CJRF between late 2010 and late 2013.

The history of the CJRF illustrates how there is a risk that a decentralised approach to governance arrangements can lead to lapses in oversight. More specifically, the Commission has not seen evidence that work was undertaken on the occupational aspects of the MRA and TTMRA — particularly updating the Ministerial Declarations of occupational equivalence — during the CJRF's hiatus of almost four years.

The CJRF was assigned responsibility for managing annual updates to the Ministerial Declarations of occupational equivalence in 2009 (Department of Education and Training, sub. 9). A process for updating the Ministerial Declarations, along with associated guidance materials, was formulated by the COAG Skills Recognition Taskforce, which had originally developed the declarations (box 7.2). However, it is unclear whether this documentation was formally agreed by COAG.

#### **Box 7.2      Development of Ministerial Declarations on occupational equivalence**

Over the period 2006 to 2009, COAG worked to achieve full mutual recognition of selected vocationally trained occupations through Ministerial Declarations signed by all Australian premiers and chief ministers. This work was coordinated by the COAG Skills Recognition Steering Committee (which comprised senior officials from first minister's departments of the Australian and all state and territory governments). The Declarations are underpinned by schedules that describe the conditions under which occupations are equivalent across jurisdictions.

Regulator working groups by occupation were set up to establish licensing requirements in each jurisdiction and to work through the detail of the equivalence tables. Occupational Action Groups were also formed with representation from state and territory governments, registration authorities, employer and employee bodies and training authorities.

For each occupation there were around 8 to 12 meetings before an agreement on the equivalence tables was reached. These more formal meetings were supplemented by teleconferences and working groups on specific issues.

This work culminated in nine Ministerial Declarations covering 26 occupations. Occupational equivalence is detailed in over 50 schedules (matrices) that show licensing requirements in each jurisdiction and the extent to which they are equivalent.

*Sources:* Australian Government (2007); Australian Department of Education and Training (pers. comm., 2 April 2015).

The lack of updating of Ministerial Declarations has meant that occupation-registration bodies, who are legally required to implement Ministerial Declarations even where they

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are out of date, may not be able to adhere to the mutual recognition legislation even when they mutually recognise a current system of licences in another jurisdiction (chapter 5).

The failure to update the Ministerial Declarations appears linked to an expectation that national licensing would replace mutual recognition for occupations within Australia (chapter 1). However, a lack of commitment and appropriate resourcing by jurisdictions to undertake the ongoing work of the CJRF must have also contributed.

The way in which governments responded to the Commission's 2009 review of the mutual recognition schemes also raises concerns about government oversight and coordination. The CJRF prepared a response to the review on behalf of all governments, and it was approved by Australian Heads of Government and the NZ Prime Minister in 2010. However, it was not made public, and some of the proposed responses were not acted on. The CJRF only published an updated version of the response in July 2014, after being urged to do so in a separate report on trans-Tasman cooperation by the Australian and NZ Productivity Commissions (CJRF 2014b; PC and NZ PC 2012).

The CJRF was revived in 2014, with the current secretariat jointly provided by the Australian Government Department of Education and Training (for matters relating to occupations) and the Department of Industry and Science (for matters relating to goods) (box 7.3). However, no resources were provided to undertake this role and the costs of running the secretariat are being absorbed by these departments. The Department of Education and Training (sub. 9) stated that expenditure on the CJRF secretariat for occupations has been relatively modest, amounting to around \$250 000 in the past year (equivalent to around 1.6 mid-level public servants).<sup>18</sup> The Department also noted that the lack of resources limits the level of support that can be provided by the secretariat.

There was general support by study participants for an interjurisdictional body to oversee the mutual recognition schemes. The NZ Government (sub. 47, p. 16) welcomed the revival of the CJRF and voiced support for it to 'act both formally and informally as a contact point for queries as well as the development of policy responses and addressing more substantive issues'. The Department of Education and Training (sub. 9) also voiced support for the activities of the CJRF and stated that resources for the coordination and update process of Ministerial Declarations, and for the provision of information and training to regulators, would greatly assist in improving their understanding of mutual recognition.

The NSW Government (sub. 51, p. 7) supported maintaining a cross-jurisdiction body like the CJRF but considered that it needed to be more 'client-focused' than currently. However, the main tasks it identified for the CJRF — 'to ensure that consumers, businesses and governments understand mutual recognition schemes, that mutual

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<sup>18</sup> Staffing equivalent estimated by the Productivity Commission, based on average remuneration across all Australian Public Service agencies for an Executive Level 1 employee (Australian Public Service Commission 2014).

recognition schemes are properly implemented and emerging issues are identified and addressed’ — are already covered in the CJRF’s current terms of reference.

### Box 7.3 The CJRF secretariat

The Australian Government provides the secretariat for the CJRF. The Department of Education and Training (sub. 9, pp. 1–2) stated that the responsibilities of the secretariat include:

- convening meetings, preparing agenda papers
- maintenance of supporting documents and manual, coordination of updates to ministerial declarations, including liaising with CJRF members and regulators, procurement of legal advice as required and preparation of documents for the Federal Register of Legislative Instruments [FRLI] and gazette (the most recent update took 8 months)
- liaison with Department of Industry and Science in relation to the operation of goods recognition
- initiation of five-yearly reviews of mutual recognition schemes, briefing ministers, coordinating formal CJRF response to reviews, publication of response
- Maintaining the currency of the website [www.licencerecognition.gov.au](http://www.licencerecognition.gov.au) (provides advice on mutual recognition including a search function for licences declared equivalent in Ministerial Declarations).

In addition, for the forthcoming year, the Secretariat has offered to provide information sessions to regulators to support the ministerial update process.

The Department of Education and Training (sub. 9) also noted that the overall cost of running the secretariat for occupations was difficult to quantify. However, it estimated this to have been as follows over the past year:

- staff costs — just under \$200 000
- meeting costs — around \$5000
- related staff costs (legal and website) — \$45 000.

The Australian Government Department of Industry and Science is responsible for secretariat work relating to the goods component of the schemes and would incur additional costs, although these are likely to be lower because there have been fewer issues in this area. Other jurisdictions would incur costs for coordination of Ministerial Declaration updates, education and processing.

## Few regulator decisions have been reviewed by courts or tribunals

As noted in chapter 3, a tribunal can be asked to review a decision made by an occupation-registration authority under the MRA and TTMRA. This function — assigned to the AAT in Australia and the TTOT in New Zealand — is intended to ensure that registration bodies are implementing mutual recognition as legislated.

The mutual recognition legislation requires an occupation-registration authority to advise applicants that they can request a review of that authority’s decision. The NZ legislation also requires an authority to include a statement of the reasons for their decision. Applicants in all jurisdictions have a right to request a written statement outlining an authority’s findings.



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However, the tribunals have been asked to review very few decisions on occupation registration (box 7.4). Moreover, the majority of applications for a review have been withdrawn prior to hearing. It is difficult to determine why this has been the case. The approach of the AAT is to only resort to a hearing if the matter cannot be resolved by agreement between the parties. The AAT facilitates conferences with the parties to discuss the matter and, where appropriate, the application may be referred to another form of dispute resolution such as conciliation or mediation. This could be a desirable outcome because disputes are resolved prior to a more costly recourse. However, it means that a strong body of case law is not being developed to support the schemes.

Previous reviews have suggested that the small number of cases lodged with the tribunals could relate to a lack of awareness of the right to have a decision reviewed by a tribunal, or a hesitancy to utilise these mechanisms due to their cost. The Commission has not received any evidence during the current review to suggest that regulators do not advise affected parties of their right to a review. Nor have study participants indicated that the fees of the tribunals are prohibitive. However, applicants could be deterred by the upfront fee to lodge a case — \$861 for the AAT and NZ\$600 for the TTOT — and the time involved. That said, the AAT does have hardship provisions so that fees can be reduced in particular circumstances.

While the tribunals do not have jurisdiction to hear disputes relating to mutual recognition of goods, regulator decisions could potentially be reviewed by the courts. The Commission has not received any evidence of problems with this mechanism. Similarly, the Department of Industry and Science (sub. 46, p. 2) — which is responsible for administering goods-related aspects of the schemes for the Australian Government — noted that it ‘has not been made aware of any problems with the current enforcement mechanisms available under Australia’s legal system’.

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#### INFORMATION REQUEST 7.1

*Are there impediments to mutual recognition applicants having the decisions of licensing authorities reviewed by the Administrative Appeals Tribunal or Trans-Tasman Occupations Tribunal?*

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## Box 7.4 Mutual recognition decisions reviewed by the AAT and the TTOT

### Administrative Appeals Tribunal (AAT)

The AAT provides independent merits reviews of a wide range of administrative decisions made by Australian government ministers, departments, agencies and some other tribunals. In some limited circumstances, such as under the MRA and TTMRA, the tribunal can review administrative decisions made by state government and non-government bodies.

The application fee to have a decision reviewed by the AAT is \$861 (where there is financial hardship it can be reduced to \$100). If the matter is decided in the applicant's favour they receive \$761 back.

Since 2009-10, there have been 52 cases lodged with the AAT under the MRA and 1 case under the TTMRA. Of these, only 15 went to hearing and a final decision was made. Among the remaining cases, 27 were withdrawn by the applicant and 10 were not considered by the AAT because it had no jurisdiction or the applicant did not pay the lodgement fee. Almost half of the 52 cases lodged were in 2010-11 and related to licensing of security officers in New South Wales (21 cases lodged, with a large number of these withdrawn or not heard for other reasons).

The AAT decision will either affirm, vary or set aside the decision of the authority/department that is under review. If a party considers the AAT has made a mistake in law in making the decision, it can appeal to a court.

### Trans-Tasman Occupations Tribunal (TTOT)

The TTOT was established under the *Trans-Tasman Mutual Recognition Act 1997* (NZ). It only hears matters relating to decisions made by NZ occupational registration authorities under the TTMRA. The TTOT comprises a chairperson, who is appointed by the Governor-General on the recommendation of the Minister of Justice, and two other individuals appointed by the Chairperson for the purposes of each review. The Chairperson must be a barrister or solicitor of the High Court of not less than seven years' practice or a District Court Judge.

The application fee to have a decision reviewed by the TTOT is NZ\$600.

Only five cases were lodged with the TTOT between 2002 and 2009. All of these were withdrawn before reaching the hearing stage. There have been no further cases lodged since 2009. Moreover, the Commission understands that the TTOT secretariat has received very few inquiries about the TTMRA (Ministry of Justice, Wellington, pers. comm., 28 April 2015).

If it were to make a decision, the TTOT would provide its reasoning in writing after a hearing. A party to a case could then appeal to the NZ High Court if they believed the TTOT had made a legal error. An appeal must be filed within 20 working days after a decision by the TTOT.

*Sources:* AAT (2015a, 2015b); Department of Employment and Training (sub. 9); NZ Ministry of Justice (2015).

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## Limited use of Ministerial Councils

The mutual recognition schemes state that a jurisdiction can, for the purpose of protecting health and safety or preventing, minimising or regulating environmental pollution, refer questions to a COAG Ministerial Council regarding:

- the appropriate competency standards required to entitle a person to carry on an occupation or a particular activity as part of the practice of an occupation
- the standard applicable to any goods under the jurisdiction of another participating party.

Referrals relating to a standard applicable to goods set in train Ministerial Council processes similar to those under the temporary exemption mechanism (chapter 4). However, the good is not exempted from the scheme during the period in which a Ministerial Council determination is developed (Australian Government 2014b).

A further provision in the MRA and TTMRA requires that where, on review of a decision by an occupation-registration body, a tribunal finds that the occupational licences of two jurisdictions are not equivalent (and that equivalence cannot be achieved through imposing conditions) this can provide a trigger for the relevant jurisdiction to take the matter to a Ministerial Council. For this to occur, the tribunal must be satisfied that registration of the person could result in a real threat to public health and safety or could threaten significant environmental pollution.

Where questions are referred to Ministerial Councils, the relevant Council must endeavour to make a determination within 12 months of receiving the referral and determine whether a standard should be set with respect to the good or occupation, and if so, what the standard should be (chapter 3).

In the past five years, governments have not referred a matter relating to mutual recognition to a Ministerial Council. Previous reviews also found that these mechanisms are rarely used.

It is unclear why mutual recognition issues have rarely been referred to a Ministerial Council. However, evidence presented in chapter 5 indicates that, where individual regulators are concerned about the consequences of mutually recognising occupational licences, they have sometimes decided not to implement the schemes as legislated. Given the limited oversight of regulators noted above, this behaviour has often gone unchecked and so may be perceived by regulators as a quicker and easier means of dealing with any concerns they have.

Other potential explanations for the limited use of Ministerial Councils could include:

- uncertainty about which Ministerial Council was responsible for mutual recognition following streamlining of the council system in 2013 (box 7.5)

- in relation to goods, the shift of all outstanding special exemptions to permanent exemptions, possibly removing most outstanding issues (chapter 4)
- in relation to occupations, Australian jurisdictions' attention and efforts were largely focused on negotiations around national occupational licensing and subsequently automatic mutual recognition by the Council for the Australian Federation (chapter 1).

### Box 7.5 COAG Ministerial Councils

In late 2013, COAG agreed to streamline the COAG Council system and refocus COAG's priorities. Under the new system, there is no longer any distinction between Standing and Select Councils and all councils are time limited.

There are currently eight COAG Councils:

- Federal Financial Relations Council
- Disability Reform Council
- Transport and Infrastructure Council
- Energy Council
- Industry and Skills Council
- Law, Crime and Community Safety Council
- Education Council
- Health Council.

The Council system is to be reviewed annually by COAG in order to ensure the terms of reference of the councils remain consistent with COAG's priorities, to review progress and to determine whether there is a continuing need for each Council.

Under the new Council system, it is intended that Councils will be responsible for their own management, with minimal involvement from COAG. In the interests of reducing the reporting burden, Councils do not need to provide a formal report to COAG, but are required to raise issues with COAG which they consider genuinely require First Ministers' attention.

#### Industry and Skills Council

Given its remit and membership, the Ministerial Council for Industry and Skills is the most relevant Ministerial Council under this reformed structure to consider issues relating to mutual recognition of both occupations and goods (although there are provisions in the MRA and TTMRA for multiple Ministerial Councils to be involved where there are overlapping responsibilities for a matter). This Ministerial Council replaces the former Standing Council for Tertiary Education, Skills and Employment. Its secretariat and administrative functions are shared between the Department of Industry and Science and the Department of Education and Training due to a recent administrative arrangements order which has split responsibility for occupations and goods across the two portfolios. The Government of New Zealand is also a member of this council.

*Sources:* Australian Government (2014c); Department of the Prime Minister and Cabinet (2014a).

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## 7.2 Resulting erosion of benefits from the schemes

The Commission has concluded that the abovementioned deficiencies in oversight and coordination are facilitating a slow erosion of the benefits from the mutual recognition schemes.

- In the absence of effective oversight, there continue to be examples of occupation-registration bodies not implementing mutual recognition as legislated. Parallel regulation — such as business registration — can also reduce benefits from the schemes.
- In the absence of concerted government coordination to publicise the schemes, individuals and firms are not always aware of their rights under mutual recognition. This may in turn explain why little case law has developed to guide implementation and use of mutual recognition, which can itself erode the benefits from the schemes.

Much of the evidence of these problems was presented in earlier chapters and so is only briefly reiterated in this section.

### Regulators are not implementing mutual recognition as legislated

As detailed in chapter 5, there is evidence that occupation-registration bodies are not always implementing mutual recognition in accordance with the legislation. This includes refusing to register people from jurisdictions with different registration requirements, imposing continuing professional development requirements, and requiring additional training prior to registration under mutual recognition. As noted above, this behaviour has often gone unchecked because of the limited oversight of regulators. There is also a lack of case law to support the schemes (discussed previously).

Occupation-registration authorities have responsibilities in addition to applying mutual recognition and need to balance a range of objectives. These can include managing risks to public safety, maintaining a revenue base and fostering good relationships with industry. These objectives may not always be consistent with the objectives of mutual recognition.

Yet, to a large extent, individual registration bodies are unilaterally deciding that mutual recognition is inappropriate because other jurisdictions use a different approach. This is contrary to the spirit of the mutual recognition schemes that, while Australian and NZ jurisdictions may use different regulatory approaches, they all achieve outcomes that meet community expectations. As noted by the Business Council of Australia (sub. 45, p. 7), ‘regulators can undo the benefits of mutual recognition if they take an unduly narrow and restrictive approach that is not in line with the principle of efficient regulation that underpins mutual recognition’.

A further issue is that the decentralised nature of the schemes can make it difficult for regulators, particularly smaller regulators, to maintain the expertise needed to meet their obligations under the schemes.

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Currently, regulators have access to information about the schemes through a general users' guide, website for occupations subject to a Ministerial Declaration in Australia, or by contacting their CJRF representative. The CJRF also provides guidance to regulators around the process for updating Ministerial Declarations through a procedure guide (Australian Government Department of Education and Training, pers. comm. 2 April 2015). Regulators can also seek independent legal advice regarding their specific responsibilities under the schemes.

Some regulators posited that the current guidance provided on the schemes is insufficient. In particular, the Queensland College of Teachers (sub. 8, p. 5) noted that it lacked guidance on practical matters, for example 'whether the grounds for postponement and refusal are limited to the legislatively prescribed matters' and 'whether refusal of registration is available where a material change of circumstances has occurred in the postponement period'. It called for a central agency to advise licensing authorities on interpreting and applying mutual recognition legislation. It argued that such an agency could improve the consistency of implementation of the schemes by regulators, as different practices are being adopted by regulators due to differing legal interpretations of obligations under the schemes.

While greater information and guidance about the schemes would assist to minimise cases where regulators implement mutual recognition inconsistently, it will not address those instances where regulators are unilaterally deciding not to implement mutual recognition as legislated.

### **Individuals and firms have limited awareness of their rights**

Mutual recognition is unlikely to interest most firms or individuals unless they are about to sell goods or provide services across a border. As a result, it is not necessary for there to be widespread public awareness of the schemes. However, it is important that information is accessible to those members of the public who need it, and that the bodies they would consult — such as industry associations, trade unions, and government agencies — act as conduits for accurate information.

It is difficult to gauge the extent of public awareness of the schemes. As noted by the Department of Education and Training (sub. 9), those unaware of their rights are unlikely to raise this issue with a government. This is particularly the case for the sale of goods, where mutual recognition tends to operate silently in the background because there is no registration requirement similar to occupations.

A number of study participants claimed there was a lack of awareness of the schemes among the public and businesses. The Department of Employment and Training (sub. 9, p. 16) noted that individuals who contact the CJRF through the licence recognition website 'often have little understanding of the mutual recognition processes and what they are entitled to expect'. The NZ Council of Legal Education (sub. 17) indicated that there is a need for awareness initiatives targeting particular groups, such as graduates and trainees.

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In contrast, occupation-registration authorities appear to be of the view that individuals are usually well aware of the mutual recognition schemes. Among the authorities that responded to the Commission's survey of occupation-registration bodies, only 12 per cent considered that applicants were unaware of mutual recognition or their rights under the schemes (appendix C). Two-thirds of the responding authorities considered that individuals were 'somewhat aware' of the schemes.

Some occupational bodies noted that they provide their members with information about mutual recognition (NZ Council of Legal Education, sub. 17; NZ Law Society, sub. 19). The Victorian Institute of Teaching (sub. 5, p. 3) submitted that 'teachers are aware of the mutual recognition schemes and our staff at the Institute provide information to potential applicants in relation to the schemes if they are applicable to their situation'.

There is a shared responsibility for information provision regarding the schemes. Under its terms of reference, the CJRF has a responsibility to promote awareness of the mutual recognition arrangements to industry and regulators. The mutual recognition legislation contains general responsibilities for information provision to the public by occupational registration authorities, including a requirement for authorities to provide guidelines and information about the operation of the schemes in relation to the occupations for which they are responsible.

To date, public awareness raising has involved an official users' guide, the provision of information on government websites, and a central point of contact in each jurisdiction.

The users' guide to the MRA and TTMRA schemes is maintained by the CJRF and aims to 'ensure that the benefits of the mutual recognition arrangements are fully realised and to give users a greater understanding of the practical aspects of the MRA and the TTMRA' (Australian Government 2014b, p. 5). The guide's intended audience includes businesses, people in registered occupations, Ministers and policy makers across Australia and New Zealand. This makes it challenging to tailor advice to meet the needs of a diverse audience. It is arguably too detailed for the broader public, and not detailed or specific enough for technical specialists in regulatory agencies and government departments.

Among occupation-registration bodies that responded to the Commission's survey, just over half were aware of the users' guide. The majority of this group rated the guide as being in the middle to upper segment of a range between ineffective and very effective (although less than 2 per cent of respondents rated the guide as 'very effective'). In addition, there were mixed views provided by regulators regarding the effectiveness of the users' guide (box 7.6).

A key source of online information on mutual recognition for occupations is the Australian licence recognition website. This site primarily provides information about mutual recognition for trades occupations covered by Ministerial Declarations (chapter 5). It also provides information about the schemes more broadly, and links to further information, including a downloadable copy of the users' guide and details of Australian licensing authorities.



### Box 7.6      **Licensing agencies' views on the effectiveness of the mutual recognition users' guide**

#### **Some licensing agencies found the users' guide very useful**

'It explains the mutual recognition process well'.

'Excellent users guide including appeals processes'.

'The guide is helpful in explaining the mutual recognition scheme and providing examples and criteria for its application for both registrants and the registration authorities. It could be enhanced by the inclusion of more examples or case studies'.

#### **Others found the guide less useful**

'Not a particularly user friendly document'.

'The users' guide is only effective as a general introductory guide as it can be confusing and misleading (e.g. some sections do not provide comprehensive guidance or interpretation on ambiguous sections of the legislation). Also of concern for safety regulators is the inadequate coverage in the guide about how safety and health issues may be taken into account'.

'It doesn't deal with any of the difficult issues we have administering the TTMRA such as how you deal with someone who has a complaint pending'.

*Source:* Productivity Commission survey of occupation-registration authorities.

The AMCA (sub. 15) observed that the licence recognition website has been a positive development, but it needs to be kept up-to-date and it does not cover all the issues that may arise.

In its 2009 report, the Commission found a notable lack of information on regulators' websites about mutual recognition. Comments by the Department of Education and Training (sub. 9, p. 15) suggest that there continue to be problems.

Information on the operation of mutual recognition differs substantially between jurisdictions and between different agencies in the same jurisdiction in terms of access and level of information ... Website information is often difficult to find, even for those who understand the mutual recognition acts. Most sites do not reference the appeals processes and only a few seem to link to the licence recognition website. It may be useful for jurisdictions to examine, revise, and streamline, the information provided on the various websites they have available.

For this review, the Commission again examined a selected number of regulator websites across Australia and New Zealand. This revealed that the level of available information is not uniform (likely reflecting regulator capacity more generally) but in almost all cases some reference to mutual recognition was given alongside general licensing information. In a few cases, guidance on the schemes was available, although very few regulators provided a link to the Australian licence recognition website or other sources of information.



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**DRAFT FINDING 7.1**

Many of the issues identified by the Commission, which risk eroding the benefits of the MRA and TTMRA, are indicative of weak oversight and coordination among the participating jurisdictions.

### **7.3 Strengthening collective oversight and coordination by governments**

While there are deficiencies in current governance arrangements for the MRA and TTMRA, there is not a compelling case for moving to a much more centralised approach like that used for mutual recognition in the European Union (the EU's approach is summarised in appendix B). That would be costly, and the findings in earlier chapters that the schemes are generally working well suggest that the benefits would be relatively small. The Commission has therefore focused on how to improve governance arrangements for the schemes while maintaining the advantages of the current decentralised approach.

A key element of the Commission's proposed reforms is to strengthen the interjurisdictional group of officials through which governments collectively oversee the schemes and coordinate their actions (the CJRF). As noted above, the CJRF was recently reinstituted. However, the Commission is not convinced that this has involved any changes that substantially address the weaknesses evident in the CJRF's previous incarnation.

#### **Functions of the CJRF**

While a new terms of reference was developed for the CJRF when it was recently revived (summarised in box 7.1), it does not differ significantly from the previous version. The current terms of reference lists a number of broad functions — including providing points of contact, sharing information and promoting awareness — but few specific outputs are mentioned. For example, there is no mention of the users' guide which the CJRF coordinates. Moreover, there is no formal requirement for the CJRF to report to anyone on its activities, or indeed any mention of who it is accountable to.

The Commission considers that there is a pressing need to revise the CJRF's terms of reference to include specific requirements and time limits to achieve key activities and identify who the CJRF reports to and when. Key activities that should be specified in the terms of reference include updating the Ministerial Declarations and the users' guide (both should occur annually).

In addition, the CJRF should document the specific ways in which it intends to satisfy its broad terms of reference, the timing of particular tasks, and link reporting requirements to the achievement of particular outcomes. This could be achieved by the CJRF agreeing on,

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and releasing, an annual work program (which would be made publicly available on COAG's website and provided to the SOM). This work program could also include a brief performance report on the previous year's activities.

In order to establish an agreed approach for updating the Ministerial Declarations, the process developed by the Skills Recognition Taskforce should be reviewed and updated to incorporate any lessons learned from the update process currently underway. All CJRF representatives should agree to this revised process. Specific timing and reporting requirements for updating Ministerial Declarations should be incorporated in the CJRF's work plan to ensure that updates occur as scheduled and do not lapse. Mechanisms so that new Ministerial Declarations can be negotiated for other occupations should also be incorporated.

The task of updating the Declarations involves considerable technical input, as was evidenced by the work involved to negotiate agreement for the Declarations in the first instance (box 7.2). While there is a role for the CJRF to oversee this work, active cross-jurisdictional coordination at the regulator level is also necessary. Ideally, an annual update process would build expertise and understanding of occupational equivalence and mutual recognition issues over time and also foster collaboration between jurisdictions.

As the majority of the occupational equivalence tables have not been updated since they were first formulated, the current update process is likely to be more time consuming and resource intensive than what would be required as part of more regular updates (chapter 5). Any requirements for regular updates should be phased in once the current update process is completed.

Another avenue to give greater specificity to the CJRF's role is its awareness raising activities, including providing a central point of contact for the public on mutual recognition matters and the ongoing maintenance of the users' guide (discussed in section 7.4). The NZ Government (sub. 47) stated that it is currently leading the development of a new interactive web-based users' guide for the TTMRA. This is intended to enable different audiences to more efficiently access information relevant to them. Once all jurisdictions have agreed on the new TTMRA guide, a revised MRA guide will be developed.

The NZ Government (sub. 47) suggested that the CJRF also should have a leadership role in monitoring whether permanent exemptions can be removed or reduced. However, the Commission does not consider that the CJRF has the expertise to undertake detailed reviews of permanent exemptions. But it could keep abreast of changes in regulatory arrangements that point to a potential for broadening the coverage of the MRA and TTMRA and initiate reviews where appropriate.

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More broadly, stronger oversight by the CJRF and the provision of information regarding the schemes could reinforce the scheme's accountability mechanisms. For example:

- clarification of when and how to refer issues to Ministerial Councils could be beneficial. This could be achieved at low cost by the CJRF providing further guidance in the updated users' guide. Additionally, given the recent restructure of Ministerial Councils, confirmation of its role under the MRA and TTMRA by the Industry and Skills Council may also assist. This could be done through an explicit statement in the Council's terms of reference
- greater oversight by the CJRF of regulators who are not implementing mutual recognition consistently may compel jurisdictions to address concerns about standards directly, rather than through imposing conditions on mutual recognition applicants.

## **The CJRF's reporting obligations**

It is appropriate for the CJRF to report to the SOM, given that it comprises the Heads of Prime Ministers', Premiers' and Chief Ministers' Departments, and CJRF representatives are typically officials from these agencies. However, to date this arrangement has not worked well. As noted above, the CJRF ceased to undertake its functions for an extended period from June 2010 and was not held to account by the SOM during that time.

The Commission considered a range of alternative bodies that could adopt the responsibility of overseeing the CJRF's activities. In particular, it considered whether a less senior body could undertake this role. While there is little evidence as to why the current reporting arrangements have not worked well, it seems partly due to the fact that the day-to-day work of the CJRF is simply too detailed for a high-level body like the SOM. The Department of Education and Training (sub. 9, p. 14) noted that:

It is likely that SOM officials would need significant briefing on the operation of the acts if matters were brought to their attention. There is considerable detail to be understood in the arrangements affecting particular issues for both goods and occupations across jurisdictions.

Yet high-level agreement and involvement is required for the ongoing functioning of the schemes, for example changes to permanent exemptions and updates to the Ministerial Declarations of occupational equivalence all require agreement by Heads of Government.

The Commission has concluded that the SOM's supervisory role should be maintained and that specific reporting requirements be incorporated in the CJRF's terms of reference. For example, the CJRF should provide the SOM with an annual work program that includes a brief report of outcomes from the previous year, and escalate particular issues where appropriate.

Both the CJRF and the SOM need to formally accept responsibility for their respective roles in order for this arrangement to work effectively. The Commission considers that in order to fulfil its role, the SOM would not need to get involved in the detail of the CJRF's

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work. However, some high-level oversight of the CJRF's activities is required in order to fulfil the Heads of Governments' overall responsibility to monitor the schemes.

## **The CJRF's chair, secretariat and resourcing**

The mutual recognition schemes require an ongoing active commitment to the schemes by the ten participating jurisdictions. This can be difficult to maintain, as the NSW Government (sub. 51, p. 7) noted:

... mutual recognition is in many respects a “victim of its own success” — because mutual recognition schemes are perceived to be largely effective ... there is a risk that governments lose focus on mutual recognition and assume there is no more to be done.

This is also evident in the fact that the problems with oversight and coordination were identified in previous reviews of the schemes (PC 2003, 2009). The fact that they persist suggests that a much stronger commitment from all participating governments to improve the governance and oversight of the schemes is required.

The Commission proposes that a greater commitment from governments be facilitated by making changes to the arrangements for the chairing, secretariat and resourcing of the CJRF.

Currently, the Australian Government has responsibility for the role of chair and is also providing secretariat support. The Commission proposes that the role of chair be rotated among participating jurisdictions according to an agreed schedule, such as annually. The first task of an incoming chair would be to develop and secure agreement for the CJRF's annual work program. This approach would be similar to the model used by the Council for the Australian Federation. A rotating chair would promote greater engagement by participating parties, as all signatories have to take their turn and fulfil their responsibilities as chair. This arrangement should include both the Australian and New Zealand governments. However, given that New Zealand is not a signatory to the MRA, the Australian and New Zealand governments could co-chair the CJRF when it is their turn.

The proposal for a rotating chair is intended to guard against lapses in oversight by the CJRF, as jurisdictions may be reticent to ‘let the ball drop’ on their watch. On the other hand, it does risk fluctuations in the leadership of the CJRF, where some jurisdictions may be more engaged chairs than others. To address this, it is also proposed that there be a standing secretariat to ensure continuity of support to the CJRF chair and members to oversee the schemes.

The standing secretariat should be jointly funded through agreed contributions from all jurisdictions. A joint funding model would ensure that the secretariat has ongoing and adequate resources to support the functions of the CJRF and that all parties have an interest in the effective functioning of the secretariat and the CJRF more broadly. A fully funded standing secretariat for the mutual recognition schemes may also guard against mutual recognition work being absorbed by more pressing activities in the government agencies

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providing secretariat support. In addition, expertise and capacity around the schemes can be built and maintained over time. More generally, a standing secretariat with ongoing funding would be a further buttress against lapses in the CJRF's activities.

A strong case was made by the Department of Education and Training (sub. 9) for ongoing funding for the work of the secretariat, particularly in order to update the Ministerial Declarations. While based on simple principles, the mutual recognition schemes can involve very complex detail, particularly when determining the equivalence of licensed occupations. For example, the Ministerial Declaration relating to restricted electrical licences has a 36 page (73 rows by 9 columns) matrix to depict the differing licencing requirements in each jurisdiction and the extent to which they are equivalent (Mutual Recognition Act 1992 – Section 32 – Ministerial Declaration 9/02/2007). The Department of Education and Training (sub. 9, p. 8) stated that:

The process could be made more efficient if adequately resourced so that, firstly, regulators could be better informed of the mutual recognition and declaration process and, secondly, regulators were provided with the ability to spend dedicated time on the process.

The Commission considers that the funding requirements of the secretariat, while likely to be greater than those currently provided, would not be significantly higher (the Commission notes that current secretariat costs are being incurred by the Australian Government and are not transparent). A simple joint funding model could be worked out similar to that adopted for the Australian Health Ministers' Advisory Council (AHMAC). The AHMAC cost-sharing formula has been utilised in a range of cross-jurisdictional contexts and involves the Australian Government contributing 50 per cent of the budget, while the states and territories each contribute according to their population (Department of Health 2010).

The funding arrangements for AHMAC include a fixed amount from the NZ Government, which offsets the administrative and secretariat costs associated with its involvement. The Commission notes that there is precedent for other cross-jurisdictional bodies to utilise the AHMAC model while providing for greater contributions by New Zealand depending on the nature of its involvement. For example, the funding arrangements for the Implementation Subcommittee for Food Regulation — a forum for food regulation authorities in Australia and New Zealand — require New Zealand to contribute an agreed ratio for project work and an 'amount that is appropriate using the AHMAC formula' for the project pool fund (Implementation Subcommittee for Food Regulation 2014). The agreed funding model should incorporate provisions for New Zealand to contribute an amount that reflects its involvement in the TTMRA.

## **Agencies which represent their jurisdiction at the CJRF**

As noted above, the CJRF currently comprises officials from central agencies in each jurisdiction. In its submission, the NSW Government (sub. 51, p. 7) suggested that the CJRF comprise 'frontline agencies'. While the NSW Government did not provide specific

examples, it noted that these agencies would have a better understanding of community and business needs.

While the Commission agrees that the work of the CJRF is often applied and technical, a strong case has not been made that this necessitates a change in the current membership of the forum. Under the MRA and TTMRA, Heads of Government agreed to assume oversight of the schemes, and it is appropriate that representatives from their central agencies undertake the more ‘hands-on’ and routine monitoring and oversight required. Further, central agencies provide a broader policy and community-wide perspective to mutual recognition issues and have overall responsibility for the regulators that implement mutual recognition in each jurisdiction. It would not be appropriate to allocate a monitoring and oversight role to those with responsibility for implementing the schemes.

Questions were also raised regarding the appropriate level of seniority and experience of representatives in the CJRF. The Department of Education and Training (sub. 9, p. 15) stated:

Not all CJRF members have an equally strong background in mutual recognition policy and operation; this can cause a difficulty where strong jurisdictional agency views are represented to them and they may not always be confident of the legal position or the technical operation of particular licences. Responsibility for mutual recognition is only a small part of members’ overall responsibilities, so it is difficult for the work to gain the attention it needs, on occasion the day to day work may be delegated, which may dilute historical knowledge.

It is the responsibility of each jurisdiction to ensure that its representatives are appropriately experienced in order to discharge their duties. Where the CJRF’s functions are formalised and performed with more regularity, it is likely this will help build capacity and understanding of mutual recognition issues among officials. Further, more active oversight of the CJRF by the SOM would also strengthen incentives for jurisdictions to ensure that their delegates have the appropriate capacity to fulfil the CJRF’s role, and in doing so represent their jurisdiction’s interests.

#### DRAFT RECOMMENDATION 7.1

Governments should strengthen their collective oversight and coordination of the mutual recognition schemes. Specifically:

- The Cross-Jurisdictional Review Forum (CJRF) should update its terms of reference to include specific outputs (for example, updating Ministerial Declarations and the official users’ guide), timeframes and reporting requirements.
- The COAG Senior Officials Meeting should formally accept responsibility for oversight of the CJRF and agree to its revised terms of reference.
- The chair of the CJRF should be rotated among participating jurisdictions, including the Australian and NZ Governments, according to an agreed schedule.
- The CJRF should have a jointly funded standing secretariat.



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## 7.4 Improving oversight by individual jurisdictions

While the Commission's recommended reforms to the CJRF will improve collective oversight and coordination of the mutual recognition schemes, it is also important that individual jurisdictions have effective measures to facilitate good regulatory practice.

A key determinant of regulatory outcomes includes not only how a regulation is specified, but also how it is interpreted and enforced by regulators. The Commission has previously found that regulator behaviour can have as large an effect on compliance costs as the regulations themselves (PC 2014c).

Principles and policy to improve regulatory outcomes and regulator performance are broad issues that are relevant to all areas of regulation, not just mutual recognition. There have been a range of reviews that have examined this issue (box 7.7). This body of work has informed policy development and processes in both Australia and New Zealand, including the Australian Government's current regulatory reform agenda (PM&C 2014b).

The Commission has noted in the past that monitoring, evaluation and review is typically a significant weakness for regulators and regulatory systems in Australia (PC 2011c, 2013). It has made a number of recommendations, for example in the *Performance Benchmarking of Australian and New Zealand Business Regulation* studies, that aim to strengthen the performance of regulators and enhance accountability systems (box 7.7).

There is a trade-off to consider in increasing the accountability of regulators. While increased accountability can have benefits, it can also involve costs. For example, increased reporting and internal review requirements can be resource intensive and external review can undermine the expertise and independence of regulators (Australian National Audit Office 2014). It is important that any mechanisms that increase the accountability of regulators lead to improved outcomes for the community as a whole.

While the Commission has heard of a range of examples where regulators have either deliberately or unknowingly worked in opposition to the mutual recognition schemes, the evidence received to date does not indicate a widespread problem, and primarily relates to occupational regulators (chapter 5). Further, there are already a range of processes ongoing across jurisdictions, albeit at different paces, that aim to improve regulator performance and accountability more broadly (for example, the recently introduced Australian Government Regulator Performance Framework, box 7.7).



## Box 7.7 Principles and frameworks to strengthen the accountability of regulators

### Australia and New Zealand

*The Review of the Corporate Governance of Statutory Authorities and Office Holders* (The Uhrig Report, 2002) developed good governance principles and arrangements for public sector bodies. In particular, it recommended that the government should clarify expectations of statutory authorities by Ministers issuing 'Statements of Expectations' to statutory authorities and by statutory authorities responding with Statements of Intent for approval by Ministers.

*The Taskforce on Reducing Regulatory Burdens on Business* (The Banks Review, 2006) identified three broad areas where action was needed: clarifying policy intent, strengthening the accountability framework (through expanded reporting requirements and strengthened appeal and review mechanisms) and improved communication and interaction with business.

As part of COAG's *Performance Benchmarking of Australian and New Zealand Business Regulation* projects the Productivity Commission conducted a number of studies to benchmark regulatory burdens over the period 2007 to 2013.

*The Australian Government Regulator Performance Framework* ([cuttingredtape.gov.au](http://cuttingredtape.gov.au)) recognises that poorly administered regulation can impose costs and reduce productivity. It identifies six key performance indicators that Australian Government bodies that administer, monitor or enforce regulation must report against. All Commonwealth regulators will be required to implement this framework from 1 July 2015, with the first assessment period in the 2015-16 financial year.

*The NZ Best Practice Regulatory Model: Principles and Assessments* distils international and New Zealand experience to assess regulatory regimes in New Zealand. The most recent assessment against the principles was undertaken in early 2015 (NZ Treasury 2015).

### Other arrangements

The OECD's *The Governance of Regulators* report (2014) develops seven principles for the governance of regulators covering role clarity, accountability and transparency, engagement and performance evaluation.

## Clarifying policy intent

Clarity in governments' regulatory objectives and their expectations of regulators is a key driver of better regulator performance (PC 2013). Research indicates that regulatory regimes with clear objectives are more likely to enjoy high levels of compliance and credibility, and regulators with clear and well-understood roles can more easily be held to account (NZPC 2014b; OECD 2014b).

A Minister's letter or Statement of Expectations provided to a regulator can be a useful vehicle for clarifying regulatory outcomes and administrative priorities. Regulators can then respond through a written Statement of Intent which outlines how the authority will meet the government's expectations. Such an approach was first recommended in the Uhrig Report (box 7.7) and has subsequently been adopted by the Australian and Victorian

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Governments. In accordance with New Zealand's public sector performance and financial management system, departments and Crown entities are required to produce Statements of Intent which set out an entity's strategic objectives and approach to performance assessment (NZ Treasury 2014).

The Australian National Audit Office (2014, pp. 13–14) noted that, in relation to Australian Government requirements:

The Minister's letter or statement should outline the Government's broader policy framework within which a regulator must operate, the objectives [of] the regulatory regime, the role of the regulator, how it is envisaged that the regulator will conduct its operations, and performance expectations. A regulator may find it useful to outline in its corporate plan how it proposes to meet the objectives of the regulatory regime, the Government's expectations and the way in which its performance will be evaluated and reported. Such processes aid transparency and accountability by informing stakeholders about the role of the regulator, what it is expected to achieve and how its performance will be assessed.

There was support from study participants for governments to set clear expectations for their regulators to make greater use of mutual recognition under the MRA and TTMRA (Business Council of Australia, sub. 45). A Statement of Expectations is one avenue through which this could be achieved, by including the need to have regard to, and apply where appropriate, principles of mutual recognition under the MRA and TTMRA. Such an approach could include guidance regarding the balancing of risk and appropriate trade-offs.

However, Statements of Expectations also have limitations. For example, the NZ Productivity Commission (2014b) noted that ministerial directions may not be appropriate for regulatory regimes where a high degree of regulator independence is important. There has also been some criticism of the effectiveness of these tools to date. For example, the Financial System Inquiry (Australian Government 2014d, pp. 241–242) found that Statements of Expectations issued in Australia have not provided 'guidance from Government on its tolerance for risk, or how it expects regulators to balance the different components of their mandates, especially where there may be a trade-off between objectives'.

## Supporting regulator expertise

There is a need for regulators to be able to access a central source of technical information on the mutual recognition schemes. The Commission does not consider that this information should take the place of legal advice, although this information may result in regulators needing to seek legal advice less frequently due to an improved understanding of the schemes.

There are current mechanisms in place provided by the CJRF, such as the users' guide and the email contact points provided by the Australian and NZ governments, that could address this need. However, these mechanisms need to be strengthened, better targeted and

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appropriately resourced (discussed earlier). There is also a role for engagement and communication between regulators which could also be facilitated through the CJRF.

Following the 2003 study into the mutual recognition schemes, governments conducted workshops and seminars to improve understanding of the schemes by regulators and policy makers. With stable resourcing, the CJRF could also provide these sorts of awareness-raising initiatives for a range of stakeholders on an as-needs basis.

The current efforts of the NZ Government to update the TTMRA users' guide so that it is better tailored to its audience is a step in the right direction. However, this process needs greater impetus in order to ensure a timely update of guidance for both the TTMRA and the MRA. Further, this process should incorporate engagement with intended users of the guide in order to better target this resource to meet stakeholder needs.

Once available online and in its new format, the users' guide should be reviewed and updated regularly. The CJRF should continuously monitor questions and comments provided through the Australian and New Zealand governments' contact emails, by regulators through the Ministerial Declaration update process and its other awareness-raising initiatives, in order to inform areas where further clarification or information may be required in the guide.

## **Improved reporting and communication**

Institutional arrangements that set up formal obligations for regulators to account for, and publicly report on, their performance strengthen the incentives for good regulatory practice more generally (PC 2014c). Under the mutual recognition legislation, occupation-registration authorities have a responsibility to provide information to the public regarding the operation of the schemes in relation to the occupations they license and their decisions under schemes. However, there are no other formal reporting requirements for regulators under the mutual recognition schemes.

The Commission has found in the past that there are significant deficiencies in the record keeping of occupation-registration authorities that make it difficult to assess the effectiveness of the schemes (PC 2009). While study participants did not raise concerns that regulators were not providing sufficient information to the public regarding the schemes, there was a general message that public awareness could be improved (AMCA, sub. 15; Department of Education and Training, sub. 9; NZ Council of Legal Education, sub. 17). In addition, there was broad support from study participants for regulators to share and publish data about the number of occupational licence holders who make use of mutual recognition arrangements (Department of Education and Training, sub. 9; NSW Government, sub. 51).

Alongside broader efforts to raise awareness of mutual recognition led by the CJRF, regulators could include links on their website to the updated users' guide and the licence recognition website. There could also be benefits from CJRF representatives working with

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regulators in their own jurisdictions to improve information provision to the public on mutual recognition.

In its 2009 review, the Commission recommended that occupational regulators provide the CJRF with yearly reports on the number of people registered under mutual recognition and information about complaints and appeals. The CJRF (2014b, p. 30) did not agree with this recommendation and stated that ‘while the CJR Forum agrees that this recommendation would provide improved agency focus and awareness on mutual recognition, its implementation would entail additional costs for regulators. The CJR Forum proposes that jurisdictions request that their respective regulators collect data on mutual recognition on an annual basis and that provision for the collection of such data be a priority in the introduction of any new regulator recordkeeping systems’.

The Commission agrees that a dedicated report to the CJRF would entail additional costs for regulators. However, it is reasonable to expect that regulators should collect some data relating to mutual recognition in order to monitor their own operations. This information could be made publicly available as part of existing reporting requirements at relatively low cost.

One existing avenue for providing this information is through regulators’ annual reports. Regulators are generally required to publish an annual report which can provide information on the number of licences granted in that year, total number of licences held, number and nature of complaints received, and any civil litigation that the authority was involved in. For example, NSW Fair Trading’s 2013-14 Annual Report includes information about the number of new licences issued in the year and the total number of registrations for the occupations it licenses (NSW Fair Trading 2014). It also notes whether any decisions by the Office were reviewed by the AAT under the mutual recognition schemes.

#### DRAFT FINDING 7.2

The operation of the mutual recognition schemes is enhanced where governments ensure that the regulation imposed is the minimum necessary to achieve clearly defined outcomes. More broadly, benefits could be gained by jurisdictions adopting leading regulatory practices, for example by drawing from principles and practices outlined in:

- the Australian Government Regulator Performance Framework
- the New Zealand Best Practice Regulatory Model
- the Productivity Commission’s benchmarking regulatory burdens studies, including: *Regulator Engagement with Small Business* (2013), *Regulatory Impact Analysis: Benchmarking* (2012) and *Identifying and Evaluating Regulation Reforms* (2011).

## DRAFT RECOMMENDATION 7.2

Governments should improve how their regulatory bodies implement the mutual recognition schemes. In particular:

- Where they do not do so already, parties to the mutual recognition schemes should set clear expectations regarding the implementation of mutual recognition by regulators, for example through Statements of Expectation, including how to balance risks.
- All participating jurisdictions should require regulators to report as a minimum in their annual reports information on the number of licences granted under mutual recognition for that year, and whether any decisions have been reviewed by the Administrative Appeals Tribunal or Trans-Tasman Occupations Tribunal under the mutual recognition legislation.

## 7.5 Mutual recognition in new policy proposals

When designing new regulations, good-practice principles highlight the need to first understand the policy problem, the risks involved, and the need for government intervention. Once a decision to regulate is taken, robust regulatory impact analysis should be undertaken to assess the appropriateness and cost effectiveness of regulatory options (COAG Business Advisory Forum Taskforce 2013; PC 2011c; Regulation Taskforce 2006).

Adherence to good regulatory process is essential for the full benefits of the mutual recognition schemes to be achieved. For example, it is important for there to be a clear rationale for governments to impose regulation or standards — that are consequently mutually recognised — and that these are the most efficient method of addressing identified problems (chapter 5). Further, parallel instruments and regulation — such as business registration — can reduce, or in extreme cases nullify, the benefits of the schemes by creating barriers to cross-border movements (chapter 6).

Regulatory impact analysis processes are well established in each jurisdiction and are required for all significant new regulations and modifications of existing ones (PC and NZ PC 2012; PC 2012). In order to embed consideration of mutual recognition within good regulatory process, the Commission recommended in its 2009 review that the implications for mutual recognition should feature as one of the factors to be taken into account in jurisdictions' respective regulatory guidelines (PC 2009).

The NZ Government (sub. 47) submitted that consideration of the implications for the TTMRA from major policy projects is explicitly embedded into New Zealand's regulatory impact analysis process. The guidance provided by the Australian Government is less clear in this regard, however the *COAG Guide to Best Practice Regulation* (2007) does state that TTMRA principles should be considered in cost-benefit analyses of proposed regulatory

actions. In addition, a protocol exists between the Australian Government's Office of Best Practice Regulation and its NZ counterpart that requires consultation with New Zealand on regulatory impact statements for proposals that may have trans-Tasman implications (Australian Government 2014b).

A similar issue was also identified in the Australian and NZ Productivity Commissions' study into *Strengthening Trans-Tasman Economic Relations*, which found that there could be gains from a more collaborative approach to developing regulation across the Tasman (PC and NZ PC 2012). It recommended that government agencies consider, as part of regulatory impact analysis, whether trans-Tasman collaboration, or alignment more broadly, would deliver tangible gains. The Australian and NZ Governments have both subsequently amended their regulatory guidance to incorporate statements in line with this recommendation (NZ Government 2013; PM&C 2014b).

A new initiative introduced in New Zealand, provides for preliminary impact and risk assessment (box 7.8). According to the NZ Government, this can assist the identification of the implications and opportunities for the TTMRA from new regulation and address them early on in the policy process (NZ Government, sub. 47).

#### **Box 7.8 New Zealand's Preliminary Impact and Risk Assessment**

Preliminary impact and risk assessments are required where a NZ agency is commencing policy work that has potential regulatory implications that will lead to the submission of a cabinet paper. These assessments are the first step in the regulatory impact analysis process and are intended to:

- help agencies determine whether Cabinet's regulatory impact analysis requirements apply to a policy initiative
- help agencies identify the potential range of impacts and risks that might be presented by the policy options, in order that these can be appropriately addressed in the regulatory impact analysis undertaken
- provide an initial plan for regulatory impact analysis processes and identify milestones, timeframes, and who to consult
- help Treasury policy teams determine the level and sort of policy engagement they wish to have with the lead agency on this policy initiative.

Source: NZ Government (2013).

While the frameworks in Australia and New Zealand for regulatory impact analysis are well developed, there is still room for improvement. For example, an independent review of the quality of regulatory impact statements in New Zealand found that only one-third of regulation impact statements assessed by external reviewers fully met quality criteria — predominantly due to analytical shortcomings (for example, cost-benefit analyses that lacked rigour) or a lack of consultation with affected parties (NZIER 2011).



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The Commission has identified similar issues in Australia. In its *Regulatory Impact Analysis: Benchmarking* report it identified a considerable gap between agreed regulatory impact analysis principles and what happens in practice (PC 2012c). Consequently, a continued focus on promoting and strengthening robust regulatory impact analysis is needed.

DRAFT RECOMMENDATION 7.3

The Australian, State and Territory Governments should amend their requirements for regulation impact analysis so that consideration must be given to how proposed new regulations affect the mutual recognition schemes where relevant.

## 7.6 The role of individual jurisdictions in legislating reforms

A barrier to reforming the schemes in the past has been a reluctance among jurisdictions to make any legislative changes. For example, governments chose not to implement any of the recommendations in the 2009 review that required the mutual recognition legislation to be amended (CJRF 2014b). Some changes have been made to the schemes since 2009 — such as converting remaining special exemptions to permanent exemptions — but these did not require parliaments to pass legislative amendments (chapter 4).

The reluctance to make legislative changes reflects the difficult process this would involve within Australia. For the MRA, three states have reserved their amendment power and would need to pass any amendments through their Parliaments. The remaining states and territories have referred the power to amend the legislation to the Commonwealth, subject to approving any changes. For the TTMRA, only the territories have referred the power to amend the legislation to the Commonwealth. All of the states require amendments to be passed through their Parliaments.

In its 2009 review, the Commission recommended that state and territory jurisdictions consider ways to make amending the mutual recognition legislation more flexible (PC 2009). In its response to the Commission's recommendations, the CJRF (2014b, p. 6) proposed to defer consideration of this issue and noted that 'any reduction in the role of state and territory legislatures in approving changes to the mutual recognition Acts would be a significant change requiring careful consideration'.

In March 2014, the CJRF members agreed to consider alternative approaches to reducing the complexity of the legislative amendment process. However no concrete proposals have emerged. The Department of Education and Training (sub. 9, p. 18) noted that 'the complexity of the amendment process is a particular issue for the secretariat which is not resourced, as it would need to procure, and pay for, legal assistance or have the states and territories take on, and resource, the preparation of legislative amendments to the Acts'.



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The Commission's view remains unchanged from the position it put forward in 2009. The right of every jurisdiction to agree to any change to the mutual recognition legislation can be retained where states refer their powers to amend the legislation to the Commonwealth. Such an approach would not require state parliaments to pass legislation and would mean that changes to the schemes could be achieved more cost effectively and with less administration.

DRAFT FINDING 7.3

The process for amending the mutual recognition legislation in Australia is overly complicated. It could be simplified without weakening the influence of individual jurisdictions if all states referred their power to amend the mutual recognition legislation to the Commonwealth, subject to a requirement that they have to approve any future changes.

## 7.7 The frequency of independent reviews

As noted in chapter 1, the novel and path-breaking nature of the MRA when adopted in 1992 caused participating governments to include a requirement for a one-off review in its fifth year of operation. The TTMRA, signed by governments in 1996, did not have a clause linking future participation to the results of a review. Instead, it committed the parties to joint reviews of the MRA and TTMRA every five years from 2003 onwards.

Systematic and periodic reviews of regulation are important to achieve good regulatory outcomes (OECD 2005). The Regulation Taskforce (box 7.7) considered it essential for regulations to be revisited over time to assess their effectiveness and identify opportunities for improving them. In its report, it noted that 'reviews are not costless, especially if they are done well. Their timing and scope should accordingly be proportionate to the potential gains' (Regulation Taskforce 2006, p. 173).

The mutual recognition schemes have now been in place for over 20 years and there is considerably less uncertainty about the impacts of mutual recognition relative to when the schemes first commenced. Indeed, successive reviews, including the current one, have found that the schemes are generally working well. Moreover, the strengthening of the oversight arrangements, as recommended in this chapter, should mean that independent reviews are not as critical.

The Commission therefore considers that the frequency of regular independent reviews of the schemes could be reduced to every ten years. The schemes already contain mechanisms for Heads of Government to request a review of the schemes at any point. A review could be undertaken within a ten-year period in the event of any unanticipated issues and where the CJRF has established a strong case for a review.

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#### DRAFT RECOMMENDATION 7.4

The Australian, State, Territory and NZ Governments should in future commission an independent review of the MRA and TTMRA every ten years, rather than the current five. An earlier review of the schemes should remain possible where the reformed Cross-Jurisdictional Review Forum (outlined in Draft Recommendation 7.1) has established a strong case for one.

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## A Public consultation

In keeping with its standard practice, the Commission has actively encouraged public participation in this study.

- Following receipt of the terms of reference on 11 December 2014, an advertisement was placed in newspapers in Australia and New Zealand and a circular was sent to identified interested parties.
- An issues paper was released on 15 January 2015 to assist those wishing to make a written submission. A total of 55 submissions were subsequently received (table A.1). These submissions are available online at [www.pc.gov.au/inquiries/current/mutual-recognition-schemes/submissions](http://www.pc.gov.au/inquiries/current/mutual-recognition-schemes/submissions).
- As detailed in tables A.2 and A.3, consultations were held with a wide range of stakeholders in Australia and New Zealand.
- A survey of occupation-registration authorities in Australia and New Zealand was also conducted. A total of 100 authorities responded to the survey (table A.4).

The Commission thanks all parties who have contributed to this study and now seeks additional input towards its final report. The Commission welcomes further submissions to discuss the substance of the draft report, including responses to the information requests, draft recommendations and findings.

**Table A.1 Submissions**

<i>Participant</i>	<i>Submission number</i>
Accord Australasia	32
Air Conditioning and Mechanical Contractors' Association (AMCA)	15
Architects Accreditation Council of Australia (AACA)	20
Australian Communications and Media Authority (ACMA)	41
Australian Dental Association	6
Australian Drilling Industry Training Committee (ADITC)	3
Australian Food and Grocery Council	29
Australian Health Practitioner Regulation Agency (AHPRA)	50
Australian Institute of Architects	43
Australian Radiation Protection and Nuclear Safety Agency (ARPANSA)	42
Australian Security Industry Association Limited (ASIAL)	11
Australasian Teacher Regulatory Authorities (ATRA)	36
Australasian and New Zealand Association of Oral and Maxillofacial Surgeons Inc. (ANZAOMS)	53
Business Council of Australia (BCA)	45
Building Practitioners Board	39
Council of Reciprocating Surveyors Boards of Australia and New Zealand (CRSBANZ)	52
Department of Education and Training (Australian Government)	9
Department of the Environment (Australian Government)	10
Dental Council of New Zealand	21
Department of Industry and Science (Australian Government)	46
Department of Infrastructure and Regional Development (Australian Government)	54
Department of Foreign Affairs and Trade (Australian Government) (DFAT)	48
Dietitians Association of Australia	35
Energy Safe Victoria	26
Housing Industry Association (HIA)	37
Health Regulatory Authorities of New Zealand (HRANZ)	16
Health Workforce Principal Committee (confidential)	55
IP Australia	38
Land Surveyors Licensing Board of Western Australia	28
Lunz, Richard	1
Mackney, Graham	30
Master Electricians Australia	34
Master Plumbers Association of New South Wales	24
Master Plumbers Association of Queensland	31
Master Plumbers and Mechanical Services Association of Australia	33
Mondelez Australia	2
NZ Council of Legal Education	17
NZ Government	47
NZ Institute of Patent Attorneys	12
NZ Law Society	19, 23
NZ Psychologists Board	18

(continued next page)

Table A.1 (continued)

<i>Participant</i>	<i>Submission number</i>
NZ Society of Master Plumbers, Gasfitters and Drainlayers	44
NSW Department of Premier and Cabinet	51
Nursing Council of New Zealand	22
Office of the NSW Small Business Commissioner	25
Osteopathy Australia	27
Queensland College of Teachers	8
Real Estate Institute of Australia (REIA)	40
Real Estate Institute of New Zealand (REINZ)	7
Registered Architects Board	4
Regulation Authority for Chartered Professional Engineers	49
Standards Australia	13
Valuers Registration Board of Queensland	14
Victorian Institute of Teaching	5

Table A.2 Visits

*Participant***Brisbane**

Australian Skills Quality Authority  
 Board of Professional Engineers of Queensland  
 Master Electricians Australia  
 Queensland Building and Construction Commission  
 Queensland College of Teachers  
 Queensland Electrical Safety Office  
 Queensland Office of Fair Trading  
 Queensland Treasury  
 Valuers Registration Board of Queensland

**Canberra**

Attorney-General's Department (Australian Government)  
 Cross-Jurisdictional Review Forum  
 Department of Education and Training (Australian Government)  
 Department of Foreign Affairs and Trade (Australian Government)  
 Department of Industry and Science (Australian Government)  
 Department of Prime Minister and Cabinet and COAG Secretariat (Australian Government)  
 Housing Industry Association  
 The Treasury (Australian Government)

**Melbourne**

Administrative Appeals Tribunal  
 Australian Health Practitioner Regulation Agency  
 Energy Safe Victoria  
 Master Plumbers Association  
 Plumbing Industry Climate Action Centre  
 Victoria Police  
 Victorian Building Authority  
 Victorian Department of Treasury and Finance

**Sydney**

Master Plumbers New South Wales  
 NSW Department of Premier and Cabinet (including Council for the Australian Federation Secretariat)  
 NSW Fair Trading  
 NSW Police

**Wellington**

Australian High Commission  
 Electrical Contractors Association of New Zealand  
 Health Workforce New Zealand  
 Institution of Professional Engineers New Zealand

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**Table A.2** (continued)*Participant*

Master Plumbers, Gasfitters and Drainlayers  
 Medical Council of New Zealand  
 Ministry of Business, Innovation and Employment (NZ Government)  
 Ministry of Foreign Affairs and Trade (NZ Government)  
 Ministry of Health (NZ Government)  
 Ministry of Justice (NZ Government)  
 Ministry for Primary Industries (NZ Government)  
 NZ Productivity Commission  
 NZ Registered Architects Board  
 NZ Law Society  
 Plumbers, Gasfitters and Drainlayers Board

**Table A.3 Teleconferences***Participant*

Department of Industry (Australian Government)  
 Department of Prime Minister and Cabinet (Australian Government)  
 NSW Cross-Border Commissioner  
 Organisation for Economic Cooperation and Development

**Table A.4 Survey respondents<sup>a</sup>***Participant***Australia (national regulators)**

Australian Health Practitioner Regulation Agency  
 National Measurement Institute  
 Office of the Migration Agents Registration Authority  
 Professional Standards Board for Patent and Trade Marks Attorneys

**New South Wales**

Board of Surveying and Spatial Information  
 Law Society of New South Wales  
 NSW Architects Registration Board  
 NSW Bar Association  
 NSW Department of Primary Industries  
 NSW Department of Primary Industries — Office of Water  
 NSW Environment Protection Authority  
 NSW Environment Protection Authority — Site Auditor  
 NSW Fair Trading  
 NSW Office of Liquor, Gaming & Racing  
 NSW Police Force — Security Licensing & Enforcement Directorate  
 NSW Trade & Investment — Division of Resources & Energy  
 Veterinary Practitioners Board of New South Wales  
 WorkCover NSW

**Victoria**

Architects Registration Board of Victoria  
 Automotive Alternative Fuels Registration Board  
 Energy Safe Victoria  
 PrimeSafe  
 Racing Victoria Limited  
 Surveyors Registration Board of Victoria  
 Taxi Services Commission  
 Transport Safety Victoria  
 Veterinary Practitioners Registration Board of Victoria  
 Victoria Police  
 Victorian Commission for Gambling and Liquor Regulation  
 WorkSafe Victoria

**Queensland**

Bar Association of Queensland  
 Queensland Building and Construction Commission  
 Queensland Department of Environment and Heritage Protection  
 Queensland Department of Justice and Attorney General — Workplace Health and Safety Queensland  
 Queensland Department of Natural Resources and Mines — Land Valuations

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**Table A.4** (continued)*Participant*

Queensland Department of Natural Resources and Mines — Mine Health and Safety  
 Queensland Health  
 Queensland Office of Fair Trading  
 Veterinary Surgeons Board of Queensland

**South Australia**

Architectural Practice Board of South Australia  
 Dairy Authority of South Australia  
 Environment Protection Authority South Australia  
 Greyhound Racing South Australia  
 Institution of Surveyors, South Australia Division  
 Law Society of South Australia  
 SA Department of Planning, Transport and Infrastructure — Private Certifiers  
 SA Department of Planning, Transport and Infrastructure — Standards and Training  
 SA Health  
 SafeWork SA  
 Teachers Registration Board of South Australia  
 Veterinary Surgeons Board of South Australia

**Western Australia**

Architects Board of Western Australia  
 Land Surveyors Licensing Board of Western Australia  
 Legal Practice Board of Western Australia  
 Teacher Registration Board of Western Australia  
 Veterinary Surgeons' Board of Western Australia  
 WA Department of Commerce — Building Commission  
 WA Department of Commerce — Office of Energy Safety  
 WA Department of Health  
 WA Department of Mines and Petroleum  
 WA Department of Racing, Gaming and Liquor  
 WA Department of Transport

**Tasmania**

Board of Architects of Tasmania  
 Tasmanian Department of Health and Human Services — Public Health Services  
 Tasmanian Department of Justice — Building Standards and Occupational Licensing  
 Tasmanian Department of Primary Industries, Parks, Water and Environment — Biosecurity  
 Tasmanian Department of Primary Industries, Parks, Water and Environment — Office of the Surveyor General  
 Tasmanian Department of Treasury and Finance — Liquor and Gaming Branch  
 Property Agents Board of Tasmania  
 Racing Services Tasmania

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**Table A.4** (continued)*Participant*

Teachers Registration Board of Tasmania  
 Veterinary Board of Tasmania

**Australian Capital Territory**

ACT Gambling and Racing Commission  
 ACT Supreme Court  
 ACT Veterinary Surgeons Board

**Northern Territory**

NT WorkSafe  
 NT Plumbers & Drainers Licensing Board  
 Veterinary Board of the Northern Territory

**New Zealand**

Cadastral Surveyors Licensing Board of New Zealand  
 Civil Aviation Authority of New Zealand  
 Dietitians Board of New Zealand  
 Immigration Advisers Authority of New Zealand  
 Intellectual Property Office of New Zealand  
 Medical Council of New Zealand  
 Midwifery Council of New Zealand  
 New Zealand Psychologists Board  
 New Zealand Teachers Council  
 Nursing Council of New Zealand  
 NZ Ministry of Business, Innovation and Employment — Electrical Workers Registration Board and Building Practitioners  
 NZ Ministry of Business, Innovation and Employment — Trading standards  
 NZ Ministry of Justice  
 Occupational Therapy Board of New Zealand  
 Optometrists and Dispensing Opticians Board of New Zealand  
 Osteopathic Council of New Zealand  
 Pharmacy Council of New Zealand  
 Plumbers, Gasfitters and Drainlayers Board of New Zealand  
 Podiatrists Board of New Zealand  
 Real Estate Agents Authority of New Zealand  
 Veterinary Council of New Zealand

<sup>a</sup> One survey respondent did not wish to be listed.

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## B Overseas models of mutual recognition

This appendix describes mutual recognition arrangements elsewhere in the world and draws out practices which might also be applicable for the Mutual Recognition Agreement (MRA) and Trans-Tasman Mutual Recognition Arrangement (TTMRA). The comprehensive nature of the MRA and TTMRA limits the number of other agreements that they can be meaningfully compared against. For this reason, this appendix concentrates on the European Union and Canada.<sup>19</sup>

### B.1 European Union

Goods traded within the European Union fall into either the ‘harmonised’ or ‘non-harmonised’ sectors. Harmonised goods are defined as those for which harmonised standards or product requirements apply across the European Union. Non-harmonised goods are not subject to common rules but to national rules, subject to a notification procedure designed to prevent undue barriers to trade.

#### Non-harmonised goods and the principle of mutual recognition

The principle of mutual recognition seeks to guarantee that any product lawfully sold in one EU country can be sold in another, even if the product does not fully comply with the technical rules of the other country. This principle was established under the European Community Treaty and has developed through case law following the 1979 *Cassis de Dijon* decision of the European Court of Justice.

Articles 28–30 of the European Community Treaty (or Articles 34–36 of the Treaty on the Functioning of the European Union) prohibited the imposition of trade barriers within the European Union except in particular circumstances. These articles sought to ensure the free movement of goods within the European Union. Specifically:

- Articles 28 and 29 prohibited quantitative restrictions on imports and exports between member states, as well as any measures having equivalent effect to quantitative restrictions.

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<sup>19</sup> The OECD has taken stock of the operational modalities, institutional setting, strengths and weaknesses of the (several hundred) mutual recognition schemes that exist and reported case studies on their use. However, the vast majority of these mutual recognition schemes relate to conformity assessment in accordance with the importing country regulations. Publication of this study by the OECD is forthcoming.

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- Article 30 made an exception for measures designed to protect public health and safety or the environment, where such measures do not represent arbitrary discrimination or a disguised restriction on trade.

In the *Cassis de Dijon* case, the European Court of Justice ruled that a product recognised and approved for sale in one member state should be allowed to be sold in any other member state, without the need for additional testing or approval. Refusal of a product on the grounds of health and safety, the environment or consumer interests is legitimate as long as the refusal is proportionate to the risk posed by the product and is applied in a non-discriminatory way (PC 2009).

Since the *Cassis de Dijon* case, case law has developed such that:

- products lawfully manufactured or marketed in one member state should in principle move freely throughout the European Union where such products meet equivalent levels of protection to those imposed by the member state of destination
- in the absence of harmonisation legislation, member states are free to legislate on their territory subject to the Treaty rules on the free movement of goods
- barriers to free movement which result from differences in national legislation may only be accepted if national measures:
  - are necessary to satisfy mandatory requirements (such as health, safety, consumer protection and environmental protection)
  - serve a legitimate purpose which justifies overriding the principle of free movement of goods
  - can be justified with regard to the legitimate purpose and are proportionate with the objectives (EC 2014f).

## Harmonised goods

EU legislation relating to goods harmonisation has progressed through four main phases, namely:

- the ‘Old Approach’ involving detailed texts containing all the necessary technical and administrative requirements
- the ‘New Approach’ developed in 1985, which restricted the content of legislation to ‘essential requirements’, leaving the technical details to European harmonised standards. This in turn led to the development of European standardisation policy to support this legislation
- the development of the conformity assessment instruments made necessary by the implementation of the various EU harmonisation acts
- the ‘New Legislative Framework’ adopted in July 2008, which built on the New Approach and completed the overall legislative framework with all the necessary

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elements for effective conformity assessment, accreditation and market surveillance including the control of products from outside the Union (EC 2014f).

The Old Approach reflected the traditional manner in which national authorities drew up highly prescriptive legislation, but the need for unanimity using this approach made the adoption of such legislation unwieldy. The Old Approach is still used in many sectors and is often justified for reasons of public policy, or by international traditions and/or agreements which cannot be changed unilaterally.

The New Approach was approved in 1985 following the *Cassis de Dijon* case. The guiding principles behind the approach are:

- legislative harmonisation should be limited to the essential requirements (preferably performance or functional requirements) for the free movement of goods within the European Union
- the technical specifications for products meeting the essential requirements set out in legislation should be laid down in harmonised standards to be applied in conjunction with the legislation
- products manufactured in compliance with harmonised standards benefit from a presumption of conformity with the corresponding essential requirements of the applicable legislation and, in some cases, the manufacturer may benefit from a simplified conformity assessment procedure (in many instances the manufacturer's Declaration of Conformity)
- the application of harmonised or other standards remains voluntary, and the manufacturer can always apply other technical specifications to meet the requirements (but will carry the burden of demonstrating that these meet the essential requirements, more often than not, through a third party conformity assessment process).

The principle of reliance on standards in technical regulations has also been adopted by the World Trade Organisation in its Agreement on Technical Barriers to Trade.

In 1989 and 1990, the European Council adopted a Resolution laying down the general guidelines and detailed procedures for conformity assessment, subsequently updated in 2008 by a decision on a common framework for the marketing of products (EC 2014f).

## Monitoring and enforcement

The European Commission monitors restrictions to the free movement of goods and seeks to eliminate barriers that are inconsistent with Treaty provisions. Monitoring and enforcement of the EU mutual recognition and harmonisation arrangements are carried out by surveillance bodies, national courts and administrative bodies and, in some cases, by the EU authorities themselves. Member states are responsible for the implementation and enforcement of EU legislation under national law, and national courts and administrative bodies have primary responsibility for ensuring national authorities comply with EU law



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(PC 2009). The European Commission is responsible for facilitating the exchange of information between national authorities to ensure that market surveillance is effectively EU-wide (EC 2014f).

Market surveillance aims at ensuring that products provide a high level of protection of public interests such as health and safety, protection of consumers, protection of the environment and security, while also ensuring that the free movement of products is not restricted to any extent greater than that which is allowed under EU rules. Market surveillance bodies monitor products on the market, to ensure compliance with the relevant directives (EC 2014f). National courts have the power to issue orders to administrative bodies and annul a national decision, as well as to order a member state to compensate an individual for losses sustained as a result of infringement of EU law (PC 2009).

Individuals and businesses with a complaint about infringements of EU law can seek redress at a national level, with public authorities and courts in each member state predominantly responsible for upholding EU law, or they can lodge a complaint with the European Commission against a member state for any regulation or measure considered to be in breach of EU legislation. The European Commission can only take up complaints where they relate to breaches of EU law by authorities in an EU member state (EC 2014a).

An alternative to legal proceedings is a non-judicial dispute resolution mechanism known as SOLVIT. To use the service, an individual or business registers a complaint with the local SOLVIT centre, which then works with the SOLVIT centre in the jurisdiction where the problem has occurred to address the issue. Where a problem remains unresolved, or the proposed solution is unacceptable to the complainant, they can still pursue legal action through a national court or lodge a formal complaint with the European Commission (EC 2014a, 2014b).

A 2011 evaluation of SOLVIT found it is generally used effectively and is well integrated into current practices, although awareness of it could be improved. The benefits of SOLVIT were seen as significantly outweighing the associated costs (CSES 2011).

## Occupations

The European Union has two main mechanisms designed to facilitate the recognition of occupational qualifications and the cross-border provision of services. These are:

- Directive 2005/36/EC on the recognition of professional qualifications (the Professional Qualifications Directive)
- Directive 2006/123/EC on services in the internal market (the Services Directive) (EC 2005, 2006).

The two directives are complementary instruments, dealing with different matters. As their names suggest, the Professional Qualifications Directive pertains to qualifications, while

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other matters (such as professional liability insurance and codes of conduct) are covered by the Services Directive (EC 2010a).

## Recognition of professional qualifications

The Professional Qualifications Directive requires member states to permit a qualified professional from another member state to practice that profession under the same conditions that apply to its nationals. All people wishing to practise a regulated profession in an EU member state other than the one in which they obtained their professional qualifications may seek recognition under one of the following three systems:

- automatic recognition for seven specified sectoral professions
- automatic recognition based on professional experience for certain industrial, commercial and craft activities
- a general system for other regulated occupations.

The procedure for seeking recognition is broadly the same in each of the three systems (box B.1). These arrangements apply to EU citizens who obtained their qualifications within the European Union, and who wish to become established in another member state. There are different rules for those wishing to provide services in another member state on a temporary or occasional basis, and these are discussed later in this appendix.

Different rules also apply to qualifications obtained outside the European Union and to non-EU citizens. Broadly, foreign nationals are excluded from the recognition of qualifications arrangements unless they have family members who are EU citizens.

### Automatic system for sectoral professions

Under the first system, there is ‘automatic’ recognition of professional qualifications for seven professions (known as sectoral professions) for which the minimum training conditions have been harmonised. The seven professions in this system are doctors, nurses (excluding specialist nurses), midwives, dentists, pharmacists, veterinary surgeons and architects.

Although called ‘automatic mutual recognition’, this system differs from that described in chapter 6 in that it operates on the basis of requests for recognition. In this context, automatic means that the host state is only permitted to check whether or not an applicant’s qualifications are in line with what is required under the Professional Qualifications Directive — that is, whether the qualifications are on a list of qualifications that have been agreed to be equivalent.

### Box B.1 Procedure for the mutual recognition of professional qualifications in the European Union

A person who wishes to have their professional qualifications recognised in another EU member state must submit an application to the competent authority in the host member state, accompanied by certain documents (such as proof of nationality and diplomas from any training undertaken).

The competent authority should seek to make a decision as soon as possible, and has:

- one month to acknowledge receipt of an application and to draw attention to any missing documents
- three months to make a decision for applications for automatic recognition of sectoral professions, and four months for applications made under other systems.

Once a person has made an application for recognition of their qualifications, they can generally start work immediately. However, if the profession involves public health or safety concerns, the competent authority in the host state may seek to verify the qualification before the applicant is permitted to work.

The competent authority in the host member state must give reasons for any rejection. A rejection or a failure to take a decision by the deadline can be contested in national courts.

Member states may require applicants to have language knowledge sufficient for practising the profession, but must not systematically impose language tests before a professional activity can be practised.

Member states may also require applicants to prove that they are of good character and repute and have not been declared bankrupt, as long as nationals of the host member state are required to do likewise. If proof is required that the applicant has not committed a crime or engaged in professional misconduct, the competent authorities in the home member state must provide the required documents within two months.

Sources: EC (2010a, 2010b).

## Automatic recognition based on professional experience

The second system of recognition on the basis of professional experience applies to professions involved in industrial, commercial and craft activities.

The factors taken into account for the recognition of professional experience are its duration and form (that is, whether the applicant worked in a management, self-employed or employed capacity), as well as previous training (which may reduce the amount of professional experience required). Different requirements apply to those working in sectors on three different lists.

- For workers in the textiles, chemical, oil, printing, manufacturing and construction sectors (list I), six consecutive years of experience on a self-employed basis or as a manager of an undertaking (or training and management experience totalling six years) are required.

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- For workers in the transport, postal services and telecommunications sectors (list II), five years of experience and/or training are required.
  - For workers in the restaurant, hotel, personal care, recreation and community services sectors (list III), three years of experience and/or training are required.

Again, although this system is called ‘automatic mutual recognition’, it differs from the regime described in chapter 6, and operates on the basis of requests for recognition. If the authorities of the host country find significant differences between the training acquired in the country of origin (including professional experience) and the training required for the same work in the host country, they may ask the applicant to complete a traineeship or aptitude test (EC 2014e).

## The general system

The third system for the recognition of professional qualifications in the European Union is known as the ‘general system’. It applies where the individual does not meet the conditions set out in other systems, and to professions not covered by the other systems. In all, it involves around 4700 professions that are regulated by EU member states (grouped into 800 categories) (EC 2011b).

As with the other systems, individuals seeking recognition under the general system must submit an application for recognition, which is then considered by the competent authority in the host member state (box B.1).

Under the general system, there are considered to be five levels of professional qualifications. Broadly, the five levels are:

- general knowledge corresponding to primary or secondary education, or informal training, or three years’ professional experience
- completion of technical secondary school, supplemented by a professional course
- diploma attained after one year of post-secondary study
- diploma attained after three years of university study
- diploma attained after four or more years of university study.

When a profession is regulated in the host member state, and an applicant holds a training qualification that is at least equivalent to the level immediately below that required in the host member state, the relevant authority in the host state is required to allow access to the profession under the same conditions as for its nationals.

However, the host member state can require the applicant to complete a ‘compensation measure’ (such as an aptitude test or adaptation period of up to three years) if the:

- applicant’s training covered substantially different matters from those covered by the formal training required in the host state

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- applicant's training was at least one year shorter than that required by the host state
  - profession in the host state does not correspond to the profession in the applicant's home state and requires specific training that covers substantially different matters from those covered by the applicant's training.

When a profession is not regulated in the applicant's home state, access to that profession in a host member state where it is regulated requires, in addition to the relevant qualification, proof of two years' full-time experience in the profession over the preceding ten years.

The general system specifically excludes people who undertake training in one state, register in another state and then seek to have their registration recognised in the first state without any additional education or work experience acquired in the second state (EC 2010a). This behaviour (commonly known in Australia as shopping and hopping) is generally known as 'zig zag' in the European Union.

## Temporary provision of services

Under the Professional Qualifications Directive, the rules that apply to practising a profession in another member state on a temporary basis are more flexible than those applying to permanent establishment. Any EU national who is legally established in a professional capacity in one member state may provide services on a temporary and occasional basis in another member state under their original professional title. In most cases, they can do this straight away without having to apply for recognition of their qualifications.

However, the host member state may require the service provider to:

- make a declaration prior to providing any services on its territory, including details of insurance cover or other documents such as proof of nationality, legal establishment and professional qualifications
- renew the declaration annually
- register for tax purposes (such as obtaining a national tax number)
- apply for recognition of professional qualifications in professions having health or safety implications (other than in sectoral professions covered by automatic recognition).

In addition, if the profession in question is not regulated in the home state, the service provider must provide evidence of two years' professional experience.

The rules on the temporary provision of services apply when a person is physically present in the host member state. Services that are provided without leaving the country of origin are covered separately by the Directive on Electronic Commerce (Directive 2000/31/EC) (box B.2).

## Box B.2 Directive on Electronic Commerce

The objective of the Directive on Electronic Commerce (Directive 2000/31/EC) is to create a legal framework to cover certain aspects of electronic commerce in the EU's internal market. It applies to 'information society services', which are defined as any service normally provided:

- for remuneration
- at a distance
- by electronic means
- at the individual request of a recipient of services.

The Directive on Electronic Commerce therefore covers many professional services provided at a distance. The Directive provides that information services are, in principle, subject to the law of the member state in which the service provider is established. (This is the 'country of origin principle', though the term 'country of origin' is not used in the Directive.) In turn, the member state in which the information service is received cannot restrict incoming services. There are, however, exceptions for measures necessary for public policy, public security, public health or environmental protection, provided those measures are proportional to their objectives.

Source: EC (2000).

## Other features of EU recognition of professional qualifications arrangements

### Other directives

In addition to the automatic and general systems outlined above, there are many other sector-specific recognition arrangements in the European Union. For instance, there are directives providing specific recognition arrangements for:

- lawyers
- seafarers
- air traffic controllers
- statutory auditors
- insurance intermediaries
- renewable energy equipment installers (EC 2014d; Garcia Bermudez 2014).

### Qualifications database

There is a database of regulated professions to assist those seeking recognition of their qualifications by providing information on which professions are regulated in which countries. For instance, the database highlights that qualifications to be a baker are required in France but not in Poland or Italy. The database also provides links to the relevant authority.

## Effectiveness of the Professional Qualifications Directive

### Uptake of the recognition of professional qualifications arrangements

The number of people using the EU recognition of professional qualifications arrangements, measured in terms of the number of decisions taken on applications for recognition of professional qualifications for the purpose of permanent establishment, is relatively small. For instance, in 2013:

- 8111 decisions were made in response to applications from nurses
- 577 decisions were made in response to applications from primary school teachers
- 148 decisions were made in response to applications from plumbers
- 19 decisions were made in response to applications from chiropractors (EC 2015).

### Evaluation of the Professional Qualifications Directive

The Professional Qualifications Directive was evaluated in 2011. The evaluation found that the three systems of recognition were effective and supported by stakeholders. However, it also concluded that there was room for improvement.

The general system ... proved to be a pragmatic and effective solution, though the case-by-case assessment of each request for recognition is a burdensome exercise both for competent authorities and professionals ...

[The automatic] system [for sectoral professionals] is appreciated by competent authorities and professionals because it allows for efficient treatment of requests for recognition. The efficiency of the system is, however, undermined by a complex procedure for the notification of new diplomas (in particular for architects), which is an essential process for keeping automatic recognition up to date ...

Professions in the areas of craft, trade and industry also benefit from automatic recognition, on the basis of periods of professional experience. This system works smoothly but the classification of economic activities in Annex IV of the Directive, which was established many decades ago, makes the identification of the professions benefiting from this system quite difficult. (EC 2011a, p. 6)

The evaluation also found that the use of the 'lighter regime for professionals interested in providing services on a temporary and occasional basis ... is rather limited compared to cases of establishment' (EC 2011a, p. 7).

### Recent developments regarding the Professional Qualifications Directive

The Professional Qualifications Directive was updated by Directive 2013/55/EU, which entered into force on 18 January 2014 (EC 2013). Member states have until January 2016 to transpose the Directive into their national laws. Changes that will be introduced include:



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- the requirement for member states to consider providing partial access to a profession on a case-by-case basis. For example, the profession of snowboard instructor exists as a separate profession in some states but not in others, where snowboarding is taught by ski instructors. If partial access was provided, a snowboard instructor could become qualified in the host state as a ski instructor who teaches only snowboarding
  - a European Professional Card — seven professions expressed interest in using the card, and consultation is currently underway with nurses, doctors, pharmacists, physiotherapists, engineers, mountain guides and real estate agents to determine how the card might work in practice to provide streamlined recognition of qualifications (EC 2013).

## The EU Services Directive

In conjunction with the arrangements covering the mutual recognition of professional qualifications, the European Union also has a form of mutual recognition for services. The Services Directive (Directive 2006/123/EC) establishes the legal framework for service provision across the European Union.

### Freedom to provide services

The Services Directive applies during both:

- the permanent establishment of businesses, when an entrepreneur or business wishes to set up a permanent establishment (a company or branch) in its own country or in another EU country
- cross-border service provision, specifically when an undertaking already established in an EU country wishes to provide services in another EU country, without creating a permanent establishment, or when a consumer resident in an EU country wishes to be provided with a service from a supplier in another EU country.

The Services Directive provides that member states should, in principle, not impose their national requirements on incoming service providers. However, states may continue to impose local regulations on service providers from other jurisdictions in certain limited circumstances. Any such regulations must be non-discriminatory; justified for reasons of public policy, public security, public health or environmental protection; and proportional to their objectives (EC 2006). Matters covered by the Professional Qualifications Directive or the Posting of Workers Directive (box B.3) are excluded from the coverage of the Services Directive.

As a basic rule, the Services Directive applies to all services which are not explicitly excluded. It therefore applies to wide range of industries including construction, retail trade, most regulated professions (for example, lawyers, architects, engineers and accountants) and real estate.

Services excluded from the scope of the Services Directive include financial services, telecommunications networks, transport, healthcare services, gambling activities and private security services.

### Box B.3      **Posting of Workers Directive**

In EU terminology, 'posted workers' are workers who are employed in one member state but sent by their employer on a temporary basis to carry out work in another member state. Workers are only 'posted' if the employment relationship between the employer and the posted worker is maintained during the period of posting. As such, migrant workers who go to another member state to seek work and are employed there are not considered posted workers.

The Posting of Workers Directive provides a core of mandatory rules to be applied to posted workers in all industries (except seagoing personnel working for merchant navy companies) (EC 1996). The idea underlying the Directive is that where a member state has certain minimum terms and conditions of employment, those minimum terms and conditions must also apply to workers posted to that state. To facilitate this, the Directive defines a core set of employment conditions including minimum rates of pay, holidays, maximum working hours, minimum rest periods, and occupational health and safety requirements.

This facilitates the cross-border provision of services considerably as the service provider does not have to know and apply the entire body of employment rules of the host country. At the same time, the Directive provides for a significant level of protection of posted workers and avoids that working conditions in the host country are undermined as an effect of competition. (EC 2012a, p. 2)

Although the Directive lays down minimum standards, there is nothing to stop the employer applying working conditions which are more favourable to workers (such as those of the member state where the employee usually works).

Workers can be posted for a maximum of two years, and continue to make contributions to their home country social security systems during that time. They are considered to be temporary workers for the purposes of the recognition of their professional qualifications.

While posted workers comprise a relatively small proportion of the workforce, their prevalence varies by industry.

Each year, around one million workers are posted by their employers across EU borders to provide services (0.4% of the EU workforce). The biggest 'sending' countries are [Poland, Germany, France, Luxembourg, Belgium and Portugal]. These workers play an important role in filling labour and skill shortages in various sectors and regions like construction, agriculture and transport. Posting also plays an important role in providing specialised, high-skilled services, such as information technology. (EC 2012b, p. 2)

There have been concerns that core employment conditions were not always applied correctly or enforced in the host member state. In particular, there have been concerns in the construction and road haulage industries that so-called 'letter box' companies (without any real economic activity in their home country) have been using false posting to circumvent national rules on social security and labour conditions.

In 2014, a new Posting of Workers Enforcement Directive was adopted (EC 2014c). It is designed to combat letter box companies, improve cooperation between national authorities and make a range of other administrative changes to ensure the 1996 Posting of Workers Directive is applied effectively on the ground (EC 2012b).

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## Administrative simplification

Member states may continue to impose their own legal and administrative requirements on incoming service providers in these industries. However, the Services Directive obliges member states to simplify procedures and formalities by:

- operating ‘points of single contact’ — one-stop shops through which service providers can obtain all relevant information and complete all procedures relating to their activities
- enabling all procedures and formalities to be completed at a distance and by electronic means
- issuing authorisations that are, in principle, granted for an indefinite period and valid throughout the national territory
- removing legal and administrative barriers to the development of service activities, including by:
  - evaluating the compatibility of authorisation schemes with the principles of non-discrimination and proportionality
  - repealing any legal requirements that are no longer justifiable, such as requirements on nationality.

## Effectiveness of the EU arrangements

The creation of the EU Single Market is widely viewed as having successfully promoted the free movement of goods, services, capital and people within Europe, but there is still room for improvement. The European Commission (2011c, p. 3) stated in 2011:

We must give the single market the opportunity to develop its full potential. To this end, a proactive and cross-cutting strategy should be developed. This means putting an end to market fragmentation and eliminating barriers and obstacles to the movement of services, innovation and creativity. It means strengthening citizens’ confidence in their internal market and ensuring that its benefits are passed on to consumers. A better integrated market which fully plays its role as a platform on which to build European competitiveness for its peoples, businesses and regions, including the remotest and least developed. There is an urgent need to act.

Areas seen as priorities for reform included:

- better recognition of professional qualifications across EU member states
- better intellectual property arrangements
- easier out-of-court dispute settlement procedures
- more effective standardisation procedures for goods
- better reinforcement of the Posting of Workers Directive
- easier financial reporting requirements across EU member states

- better enforcement of product safety and market surveillance rules (EC 2011c, 2012c).

The OECD's 2014 Economic Survey of the European Union also found scope for improvement.

The EU Single Market remains fragmented by complex and heterogeneous rules at the EU and national levels affecting trade, capital, including foreign direct investment, and labour mobility. Further development of the Single Market and removing barriers to external trade would bring substantial growth and employment gains by enhancing resource allocation in Europe. (OECD 2014a, p. 51)

The OECD (2014a) concluded that the Services Directive had done little to reduce barriers to trade in services, with many such barriers changing little between 2008 and 2013. In several EU countries, the barriers appeared to have increased. The OECD saw the best solution to this problem as being a revised directive with more systematic prohibitions on unjustified and disproportionate barriers. However, action by EU member states was seen as necessary within shorter timeframes than such a directive could achieve.

A report produced by staff of the International Monetary Fund (Fernández Corugedo and Pérez Ruiz 2014, p. 3) stated the implementation of the Services Directive:

... has so far proved challenging and half-hearted: challenging because the Directive's scope is broad, covering as much as 65 per cent of service activities (or 45 per cent of EU GDP); and half-hearted because the Directive per se does not require countries to abolish restrictions to competition. Rather, it gives governments [considerable] leeway to maintain pre-existing restrictions if judged necessary to protect the public interest.

## B.2 Canada

### Agreement on Internal Trade

The Canadian Agreement on Internal Trade (AIT) has been in force since 1995. All Canadian first ministers are signatories to the AIT, the aim of which is to:

... reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market. (AIT, Article 100)

The AIT includes six general rules — set out in Articles 400–407 — prohibiting governments from imposing measures that restrict trade, except in special circumstances. Articles 401 and 402 provide for equal treatment and free movement of all Canadian persons, goods, services and investments. Article 403 requires that government laws and regulations do not create an obstacle to trade. Article 404 provides an exception for measures considered to have a legitimate objective (such as protecting public health and safety or the environment), where these measures are not unnecessarily trade restrictive. The six general rules apply to ten sectors of the Canadian economy, and further rules

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governing each of these sectors are set out in the sector-specific chapters of the AIT (PC 2009).

The agreement has been cited as an example of case-by-case liberalisation, rather than the sweeping approach of the MRA and TTMRA, where all goods are covered unless otherwise specified. However, the scope of the AIT is broader than the MRA and TTMRA in the sense that it also covers regulations concerning the use of goods and manner of sale. However, like the EU model, the AIT enables jurisdictions to impose their own regulations where these are directed at legitimate objectives. In contrast, the MRA and TTMRA apply mutual recognition to all products except those subject to exemptions.

Chapter 7 of the AIT states that any worker qualified for an occupation in one Canadian jurisdiction should have access to employment opportunities in that occupation in any other Canadian jurisdiction (Article 701).

Approximately 15 per cent of Canadian workers work in regulated occupations or trades (Becklumb and Elgersman 2008). The AIT does not provide for automatic or universal mutual recognition of occupational registration or licences. Instead, under Article 708, participating jurisdictions are required to:

- mutually recognise the qualifications of workers from other jurisdictions
- reconcile differences in occupational standards in specific regulated occupations where possible.

To meet this latter requirement, governments must assess the occupational standards in their jurisdiction to determine where there is commonality with other jurisdictions, and then take steps to reconcile or accommodate differences in standards.

The Red Seal Program sets common standards to assess the skills of tradespeople across Canada. The program is administered in each province and territory under the guidance of the Canadian Council of Directors of Apprenticeship — a voluntary partnership between Canada's national, provincial and territorial governments — currently covering 57 regulated trades (ESDC 2015). Interprovincial multiple choice examinations for each trade are developed using National Occupational Analyses, which are created by industry representatives and identify the key tasks performed by workers in that trade. The feasibility of introducing new forms of assessment is currently being explored (ESDC 2014).

## Recent developments

In 2009, Canada's national, provincial and territory governments agreed to amend two chapters of the AIT to enhance labour mobility. This involved recognising across all jurisdictions any worker certified for an occupation by a regulatory authority of one province or territory, and to establish a clear and effective dispute resolution mechanism (Harper 2009).

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The Canadian Government plans to reform the AIT in the lead up to Canada's 150th anniversary in 2017. The responsible government department — Industry Canada — recently outlined the case for such reform.

Since coming into force, the AIT has achieved limited success. Outcomes include:

- labour mobility for regulated occupations
- increased transparency and openness in government procurement
- dispute resolution that has been strengthened by introducing monetary penalties.

However, after 20 years, the very architecture of the agreement is out of date, resulting in a patchwork that does not cover all economic activity or even embody a presumption of open trade. ... Progress has been slow in tackling areas such as aligning regulations and standards across the country, or making the dispute resolution provisions more accessible, transparent and binding on governments. Unnecessary differences in standards and regulations can have major cost implications for doing business and may impede investment. (Industry Canada 2015, pp. 1–2)

Particular concerns with the AIT include difficulties workers have moving around Canada to pursue work opportunities and upgrade skills due to internal barriers, limitations placed on businesses seeking to operate across provinces and whether the AIT facilitates globally competitive supply chains. The Canadian Government has presented two options for future reform — either focus on areas seen as a reform priority, or completely redesign Canada's internal trade framework (Industry Canada 2015).

## **The New West Partnership Trade Agreement**

A major recent development in Canada is the New West Partnership Trade Agreement. Fully implemented in 2013, it seeks to create a single economic region encompassing British Columbia, Alberta and Saskatchewan, building on an earlier agreement signed between Alberta and British Columbia in April 2006. The agreement incorporates labour mobility provisions allowing certified workers to practise their occupation in the three provinces without being subject to additional exams or training requirements, and businesses registered in one province are now able to seamlessly register in the other provinces at the same time as their original incorporation, with all residency requirements removed (NWPTA 2010).

The New West Partnership Trade Agreement is widely seen by those seeking reform of the AIT as strengthening mutual recognition arrangements in the provinces that are signatories. Industry Canada (2015, p. 4) has heralded the agreement.

There is growing support from federal, provincial and territorial governments for modernisation of Canada's internal market. For example, the New West Partnership Trade Agreement among British Columbia, Alberta and Saskatchewan, and labour mobility resolutions among Atlantic provinces demonstrate the opportunities we have to grow and succeed together.

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While the Agreement is seen as representing a significant positive development, it is too early in its life to draw meaningful conclusions about its effectiveness. One concern raised by some, including supporters of the Agreement, is whether professional licensing organisations will give the Agreement their full support (Macmillan and Grady 2007).

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DRAFT REPORT

This draft report is no longer open for consultation. For final outcomes of this project refer to the research report.

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# C Survey of occupation-registration authorities

## C.1 Introduction

To support its assessment of mutual recognition for occupations, the Commission conducted a survey of occupation-registration authorities in Australia and New Zealand. The Commission conducted a similar survey of Australian authorities for the 2009 review of the mutual recognition schemes (PC 2009).

The most recent survey collected quantitative and qualitative information on aspects of the Mutual Recognition Agreement (MRA) and the Trans-Tasman Mutual Recognition Arrangement (TTMRA), including the:

- number of people using mutual recognition to obtain registration in a different jurisdiction
- extent to which conditions are imposed on those registering via mutual recognition
- awareness of various aspects of the schemes among registration authorities and licence holders
- comments from registration authorities on the functioning of the schemes and how they can be improved.

For the purpose of the survey, registration included legislation-based registration, certification (including practising certificates), licensing, approval, admission or any other form of authorisation required to legally practise an occupation or use a title.

### Target population and survey method

The survey targeted all authorities in Australia — primarily at the state and territory level — and in New Zealand that have a regulatory role in the registration of occupations. The list of these authorities was put together by the Commission, with assistance from each jurisdiction's representatives in the Cross-Jurisdictional Review Forum.

Approximately 180 authorities were contacted by email inviting them to participate in the survey. They could do this by downloading a copy of the survey from the Commission's website. (The survey is also provided at the end of this appendix.) Participants were initially given approximately three weeks to complete the survey and those who had not responded to the survey by the due date were sent a reminder email. Throughout the

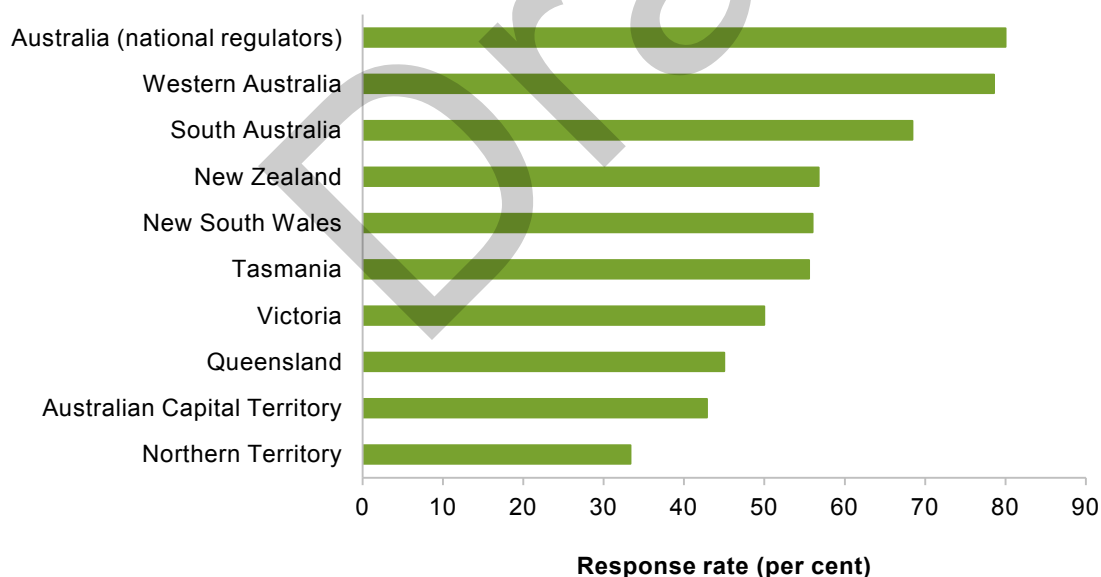
following two months, respondents completed the survey form electronically and submitted their responses to the Commission via email.

## C.2 Survey responses

A total of 100 responses were received, providing registration and mutual recognition data for a wide range of occupations and licence classes. This was equivalent to a survey response rate of over 55 per cent, which was broadly similar to the response rate for the survey conducted for the Commission's 2009 review.

Response rates to the survey varied across jurisdictions (figure C.1). National regulators in Australia and registration bodies in Western Australia recorded the highest rates. In contrast, under 50 per cent of surveys were returned by authorities in Queensland, the ACT, and the Northern Territory. It is important to note that response rates do not take into account the quality of responses or the number of occupations licensed by each responding authority.

Figure C.1 **Response rates by jurisdiction**



*Data source:* Productivity Commission survey of occupation-registration authorities.

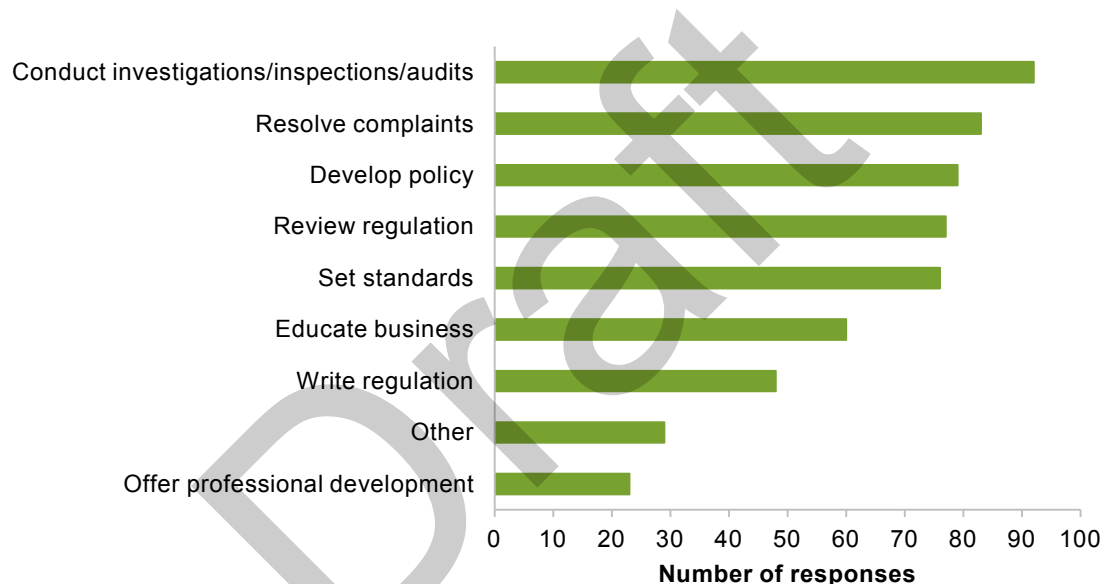
## Respondents

The classification of authorities that responded to the survey and their reporting and administrative arrangements varied. Around 60 per cent of occupation-registration authorities were statutory bodies and nearly 35 per cent were part of a larger government

department or agency. In terms of agency oversight, most authorities stated that they reported to a Minister and/or board or other governing body. Moreover, one-fifth of them reported that a Ministerial Declaration applied to at least one of the occupations they registered (chapter 5).

Most authorities reported performing additional functions beyond the registration of occupations. The most common additional functions were conducting investigations, inspections and audits and resolving complaints (figure C.2). Accreditation was mentioned several times in the ‘other’ category.

**Figure C.2 Additional functions performed by occupation-registration authorities<sup>a</sup>**



<sup>a</sup> Additional functions beyond the registration of occupations. Survey respondents were able to choose more than one function.

*Data source:* Productivity Commission survey of occupation-registration authorities.

Over 95 per cent of participants reported cooperating with regulators in other jurisdictions. Forms of cooperation included:

- addressing interjurisdictional queries related to mutual recognition applications and disciplinary actions
- sharing of information via, for example, forums and regular meetings
- discussions about areas of mutual interest, training and professional standards, and policy issues
- memoranda of understanding or work plans to achieve more aligned standards (and in some cases harmonisation).

## Surveyed occupations

Survey responses covered an array of licensed occupations across different sectors. To facilitate the analysis of these responses, the reported occupations were grouped into eight broad occupational categories.

- Trades occupations — such as drainlayers, electricians, plumbers and gasfitters.
- Other building occupations — such as building practitioners, and asbestos removalists.<sup>20</sup>
- Design, legal and real estate occupations — such as property agents, architects, surveyors, conveyancers, barristers and migration agents.
- Gambling, gaming and racing occupations — such as casino employees, bookmakers, jockeys, and greyhound trainers.
- Health occupations — such as dietitians, psychologists, nurses and veterinarians.
- High-risk occupations — such as dangerous goods drivers, high-risk work assessors and handlers of explosives.<sup>21</sup>
- Transport occupations — such as driving instructors and mechanics.
- Other — such as dairy farmers, mining engineers, security officers and teachers.

Total registrations (as at 31 December 2014) reported by survey participants were 3 million and varied significantly by occupation group (figure C.3). Registrations were highest in health and high-risk occupations, and lowest in other building occupations.

## Registration fees and renewal periods

Almost all occupation-registration authorities reported charging a fee for the initial registration of an applicant and for renewing their registration. These fees and renewal periods varied by occupation group (table C.1). The numbers presented here are average fees derived from survey responses, and so may not be representative of the entire population of occupations.

The survey results suggested that, on average, initial and renewal registration fees were highest in the other building occupations and lowest in transport occupations.<sup>22</sup> Licence renewal periods ranged from one year to lifetime licences. The most common renewal period was within three years.

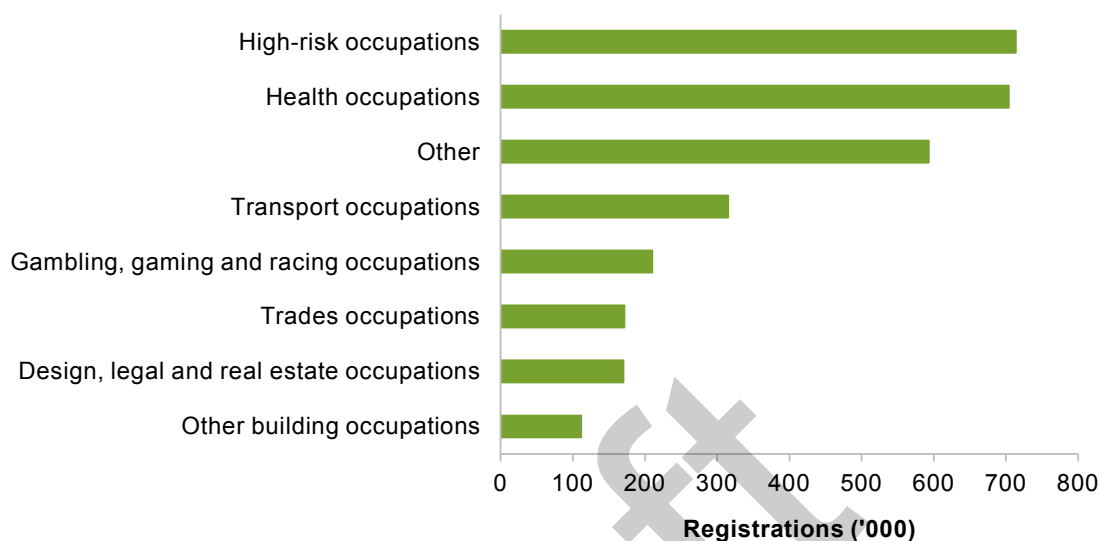
<sup>20</sup> An occupation-registration body in New South Wales provided data on other building licences in aggregate form. Some trades occupations were included in these data.

<sup>21</sup> Several occupation-registration authorities responsible for administering high-risk licences only provided aggregated data for 'high-risk' work rather than registrations by licence class.

<sup>22</sup> The average fees presented here are not annualised — they do not capture the fact that higher registration and renewal fees are sometimes associated with longer renewal periods.

**Figure C.3 Total registrations reported by survey respondents<sup>a</sup>**

By occupation group, as at 31 December 2014



<sup>a</sup> Excludes NSW licence for the sale, supply, service of liquor or provision of security services or responsible service of alcohol services in licensed premises. This licence had a total of over 390 000 registrations and zero mutual recognition registrations. It can be considered an outlier and has therefore been excluded.

Data source: Productivity Commission survey of occupation-registration authorities.

**Table C.1 Registration fees and renewal periods**

Occupation group	Average initial registration fee	Average renewal registration fee	Average period of renewal
	\$	\$	Years
Other building occupations <sup>a</sup>	886	826	4
Design, legal and real estate occupations	488	395	1
Gambling, gaming and racing occupations	224	193	3
Health occupations	414	336	1
High-risk occupations	542	531	5
Trades occupations	249	217	3
Transport occupations	209	182	2
Other	341	337	2

<sup>a</sup> The average fees for other building occupations exclude the \$22 140 initial and renewal registration fees for an Asbestos Removalist Licence Class A in South Australia. These are outliers that skew the average fees significantly.

Source: Productivity Commission survey of occupation-registration authorities.

The level of fees and length of renewal periods can help determine the potential savings to licence holders if automatic mutual recognition arrangements were introduced. Under

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automatic mutual recognition, licence holders would not have to pay a separate registration fee in each jurisdiction in which they operate. The cost savings would vary across occupations and would depend on the cost and length of licences. Examples of such savings for different occupations are presented in chapter 6.

## Limitations of survey data

Before analysing the data collected from the survey, it is important to note some of the limitations that can bear on the interpretation of the results. In particular:

- some occupations were over-represented in the results because many agencies regulating these occupations responded to the survey. Consequently, the sample of respondents may not be representative of the population of occupation-registration authorities
- a small number of authorities provided data separately to the survey form, and in a few cases the Commission has decided to exclude the data because they were outside of the scope of the survey
- authorities sometimes reported that they did not collect data on particular aspects of mutual recognition queried in the survey
- a number of authorities provided registration data for the 2013-14 financial year rather than the 2014 calendar year. These data have been treated as a proxy for the calendar year data and were therefore included in the analysis
- certain questions may have been misinterpreted by survey respondents (for example, a question seeking information about automatic mutual recognition)
- registration data were sometimes only provided for two or more occupations combined.

## C.3 Survey results

### Registrations in 2014

The surveyed occupation-registration authorities reported a total of approximately 315 000 new registrations in the 2014 calendar year. Out of this total, 15 050 were registrations made under mutual recognition. The largest number of new registrations in 2014 were recorded in high-risk occupations, followed by gambling, gaming and racing occupations, and other occupations (table C.2).

According to survey responses, around 40 per cent of mutual recognition registrations in 2014 were recorded in New South Wales, followed by 20 per cent in Western Australia (table C.3). In contrast, the ACT and the Northern Territory recorded the lowest shares of mutual recognition registrations in 2014. This can potentially be explained by the low number of responses from these jurisdictions and their small size. Finally, approximately



5 per cent of reported mutual recognition applicants were Australian licence holders applying in New Zealand, with nursing recording the highest number of applicants. However, data quality is likely an issue here since several survey respondents reported not collecting data on trans-Tasman registrations.

**Table C.2 New registrations reported by survey respondents<sup>a</sup>**  
By occupation group, 2014

<i>Occupation group</i>	<i>Mutual recognition registrations</i>	<i>Total registrations</i>	<i>Mutual recognition share of total registrations</i>	<i>Mutual recognition registrations from New Zealand</i>
			%	
Other building occupations	1 753	17 786	10	5
Design, legal and real estate occupations	1 180	25 302	5	112
Gambling, gaming and racing occupations	197	52 026	<1	20
Health occupations	1 332	35 190	4	621
High-risk occupations <sup>b</sup>	3 386	112 563	3	14
Trades occupations	2 461	19 270	13	73
Transport occupations	12	11 050	<1	6
Other	4 729	42 195	11	278
<b>Total</b>	<b>15 050</b>	<b>315 382</b>	<b>5</b>	<b>1 129</b>

<sup>a</sup> Excludes NSW licence for the sale, supply, service of liquor or provision of security services or responsible service of alcohol services in licensed premises. This licence class recorded over 125 000 new registrations in 2014 but no mutual recognition registrations. It can be considered an outlier and has therefore been excluded. <sup>b</sup> One authority provided data on the number of high-risk licences rather than the number of licence holders — an individual may hold numerous classes.

Source: Productivity Commission survey of occupation-registration authorities.

The relative importance of mutual recognition registrations within each jurisdiction also varied. In most jurisdictions, the share of mutual recognition registrations out of total registrations was around 5 per cent. However, in Tasmania and Western Australia, over 10 per cent of total registrations were under mutual recognition. These results were driven by a high number of mutual recognition registrations in a few occupations — electricians in Western Australia; and architects, real estate agents and teachers in Tasmania.

The relative importance of mutual recognition registrations was greatest in trades occupations (nearly 15 per cent of total registrations), followed by other building and other occupations (around 10 per cent each).

In the Commission's 2009 review, most mutual recognition registrations were observed in health occupations. The establishment of the National Registration and Accreditation Scheme in 2010 made mutual recognition redundant within Australia for 14 health professions. However, health professionals from New Zealand still need to apply for mutual recognition through the TTMRA to practise in Australia. Survey responses

indicated that over 60 per cent of New Zealanders registering in Australia under the TTMRA were in health occupations.

**Table C.3 New registrations by jurisdiction, 2014<sup>a</sup>**

<i>Jurisdiction</i>	<i>Mutual recognition registrations</i>	<i>Total registrations</i>	<i>Mutual recognition share of total registrations</i>
			%
NSW	6 119	111 515	5
Vic	2 374	36 816	6
Qld	1 372	68 912	2
SA	388	21 522	2
WA	3 030	23 170	13
Tas	269	2 018	13
ACT	0	34	0
NT	74	8 283	1
Australia (national regulators)	633	24 390	3
New Zealand	791	18 722	4
<b>Total</b>	<b>15 050</b>	<b>315 382</b>	<b>5</b>

<sup>a</sup> Excludes NSW licence for the sale, supply, service of liquor or provision of security services or responsible service of alcohol services in licensed premises. This licence class recorded over 125 000 new registrations in 2014 but no mutual recognition registrations. It can be considered an outlier and has therefore been excluded.

Source: Productivity Commission survey of occupation-registration authorities.

Limited data were reported on the number of registrants who were from another jurisdiction but did not register under mutual recognition. This was mainly because most authorities do not collect such data.

## Conditions

Overall, occupation-registration authorities reported treating those registered under mutual recognition in a similar way to new registrants when deciding whether to impose conditions. In addition, the use of conditions on mutual recognition registrations to achieve equivalence with the original licence was not widespread — under 10 per cent of mutual recognition registrations in 2014 had conditions attached. The use of conditions was concentrated in the other building occupations (around 60 per cent).

While the types of conditions were wide ranging, the most common ones related to:

- the need for further training and ongoing professional development
- restricted scope of work for a period of time
- carrying over conditions from the original jurisdiction.

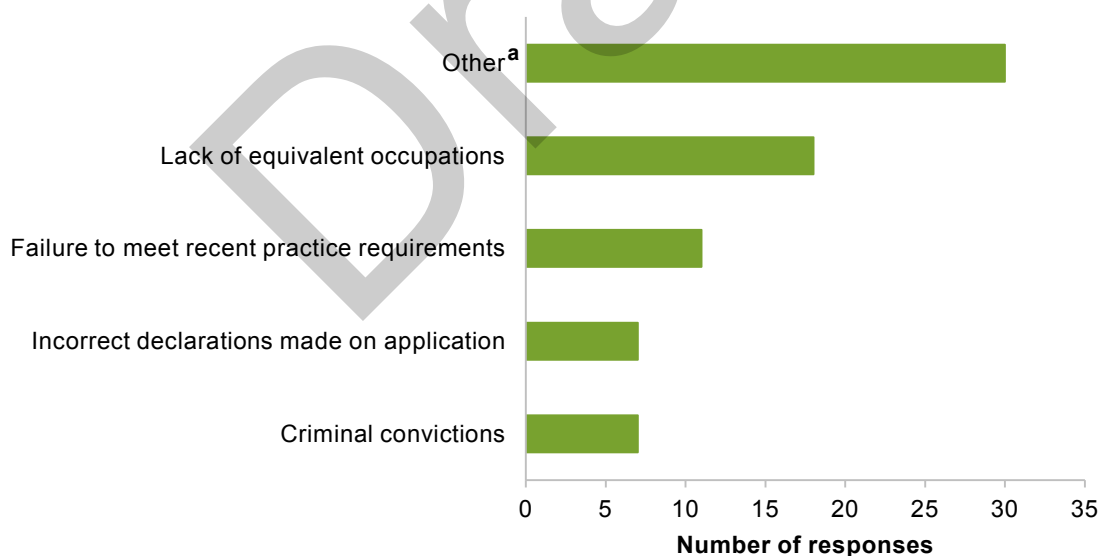
## Rejected applications

The rejection of new applications for registration was not a widespread phenomenon. Survey respondents reported that around 3300 applications were rejected in 2014, representing 1 per cent of new registrations in the same period. Nearly half of these rejections were in the other building occupations.

Similarly, rejection of applications made under mutual recognition was rare and concentrated in a few occupations. In 2014, rejected mutual recognition applications accounted for only 1 per cent of mutual recognition registrations. Half of these rejections were in other occupations, with this result driven by a large number of rejected mutual recognition applications for security guard licences (chapter 5). A number of respondents commented that they had no recollection of a mutual recognition application ever being rejected.

The reported reasons for rejecting mutual recognition applications varied, with commonly cited ones being the lack of an equivalent occupation or failure to meet recent practice requirements (figure C.4).

Figure C.4 **Reasons for rejecting mutual recognition applications**



<sup>a</sup> The 'other' reasons for rejecting mutual recognition applications included non-comparability of licences across jurisdictions and non-satisfaction of a particular pre-requisite.

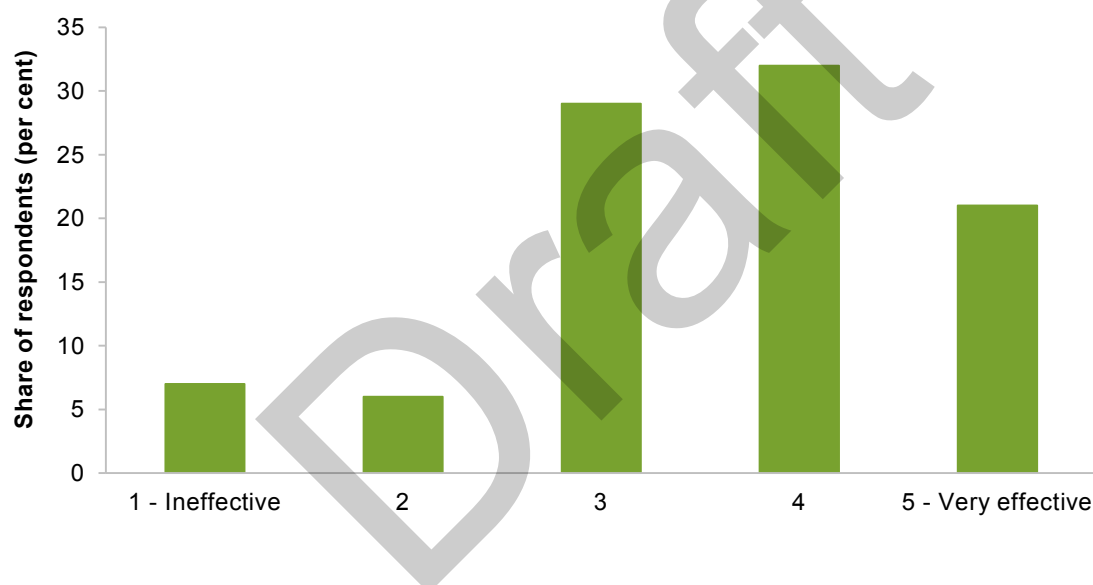
*Data source:* Productivity Commission survey of occupation-registration authorities.

## Operation of the mutual recognition schemes

Occupation-registration authorities were also canvassed about other aspects of the mutual recognition schemes, such as awareness and effectiveness of the schemes and associated users' guide, use of automatic mutual recognition, practice of shopping and hopping, comparability of training standards, and imposition of requirements for continued registration. These are discussed below.

Authorities reported that the mutual recognition schemes are generally working well — 82 per cent rated the schemes as being somewhat effective to very effective (figure C.5). In contrast, only 7 per cent of respondents rated the schemes as ineffective.

Figure C.5 Perceived effectiveness of the mutual recognition schemes



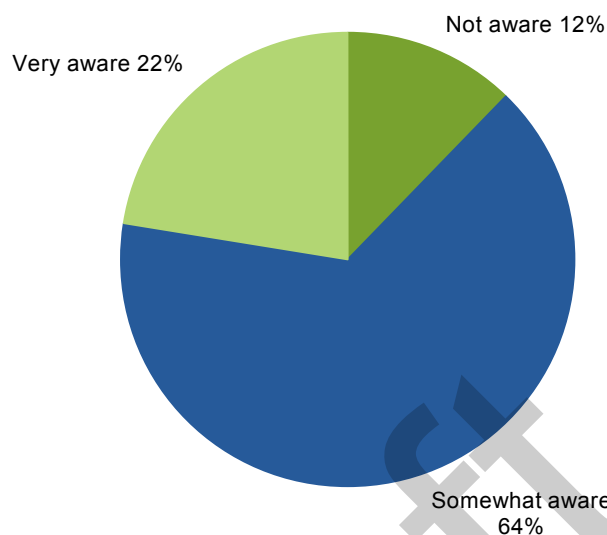
*Data source:* Productivity Commission survey of occupation-registration authorities.

Survey respondents suggested various actions to improve the operation of the mutual recognition schemes. These included setting minimum standards and accreditation processes that are nationally recognised; clarifying some aspects of the mutual recognition schemes; implementing automatic mutual recognition in selected occupations; sharing information; and increasing awareness of the schemes.

## Awareness of mutual recognition schemes

According to responding occupation-registration authorities, interjurisdictional applicants are generally aware of mutual recognition and their rights under the schemes. For example, 22 per cent reported that applicants are very aware of the schemes (figure C.6). However, the level of awareness varied by occupation (chapter 7).

Figure C.6 **Applicants' awareness of mutual recognition schemes**



*Data source:* Productivity Commission survey of occupation-registration authorities.

### Automatic mutual recognition

Survey responses suggested that occupation-registration authorities may not have a clear understanding of how automatic mutual recognition works. A number of authorities reported that automatic mutual recognition applied to the occupations they registered when, in fact, they were only referring to 'normal' mutual recognition. Some authorities even thought of automatic mutual recognition and harmonisation as being the same.

Comments on the scope for implementing automatic mutual recognition were limited. Some authorities reported that automatic mutual recognition is not feasible for the occupation(s) that they regulate because of safety and security issues; lack of an overarching legislative framework; and occupational and compliance requirements that are too different.

### Training standards

Over 60 per cent of responding occupation-registration authorities reported that training standards to achieve registration are comparable across jurisdictions. Those who considered the training standards to be different typically reported that these differences were not a basis for rejecting mutual recognition applications, as per the regulations set out in the MRA and TTMRA.

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## Shopping and hopping

Differences in occupational standards across jurisdictions can create the potential for ‘shopping and hopping’ — the practice of registering in the jurisdiction with the least stringent requirements and then using the MRA or TTMRA to move to a preferred jurisdiction, either within Australia or between Australia and New Zealand.

Responses to the survey indicated that shopping and hopping is not a widespread concern among occupation-registration bodies. Over 60 per cent of authorities reported that shopping and hopping is not a problem for the occupation(s) that they register. For those who responded otherwise, differences in standards and training were reported as the main reason for their concerns (chapter 5).

## Requirements for continued registration

Many occupation-registration authorities in Australia and New Zealand require registrants to have undertaken continuing professional development (chapter 5). Approximately 85 per cent of survey respondents reported imposing such requirements for continued registration of licensed individuals operating in their jurisdiction. In most cases, the same requirements are applied to those who registered under mutual recognition.

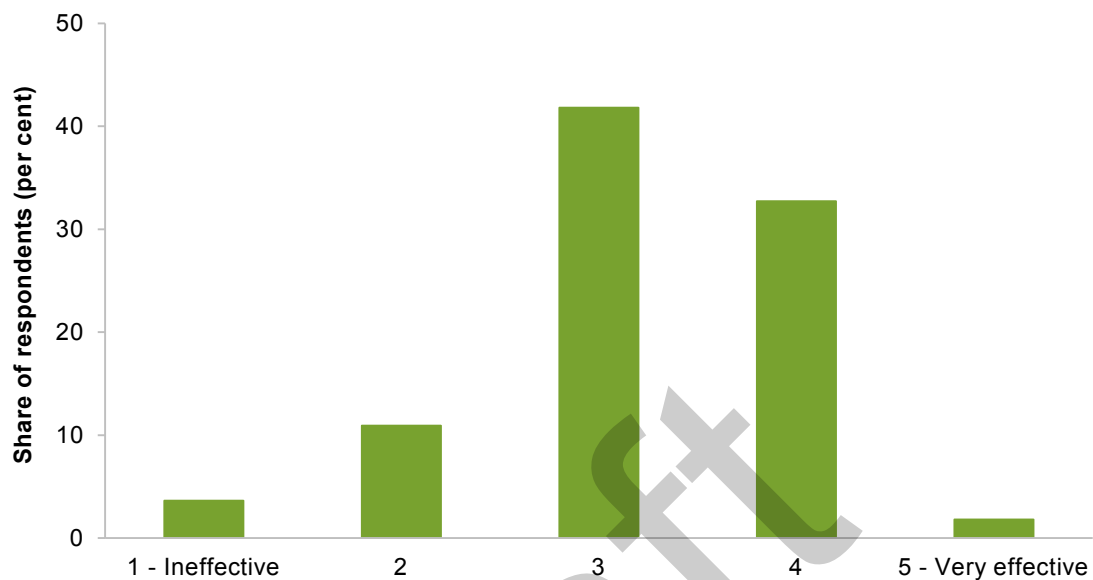
## Users’ guide for the mutual recognition schemes

Around 40 per cent of survey respondents reported that they were unaware of the users’ guide for the mutual recognition schemes. Authorities that were aware of the users’ guide had mixed views about its effectiveness (figure C.7). Under 5 per cent of respondents found it very effective, with most of them rating it as only somewhat effective (rating 3).

Some survey participants argued that, while the guide is useful, it:

- does not address the relatively complex issues associated with managing the mutual recognition schemes
- is not user friendly.

Figure C.7 **Perceived effectiveness of the users' guide for the mutual recognition schemes**



Data source: Productivity Commission survey of occupation-registration authorities.





Australian Government  
Productivity Commission

## Survey of occupation registration under the MRA and TTMRA

Please return the survey form by Monday 13 April 2015

### About the survey

This is a survey of occupation registration authorities' experience with the mutual recognition of occupations under the MRA (Mutual Recognition Agreement) and TTMRA (Trans-Tasman Mutual Recognition Arrangement).

The survey is being undertaken as part of a Productivity Commission review of the MRA and TTMRA for the Prime Ministers of Australia and New Zealand, and Premiers and Chief Ministers of the Australian States and Territories. The review's terms of reference can be viewed at <http://www.pc.gov.au/inquiries/current/mutual-recognition-schemes>.

### What is a registered occupation?

For the purpose of the survey, registration includes legislation-based registration, certification (including practising certificates), licensing, approval, admission or any other form of authorisation required to legally practise an occupation or use a title.

### Confidentiality of responses

Survey responses will not be reported in a way that enables the identification of individual authorities without their consent. Contact details are only collected in case survey responses need to be clarified.

### Completing and submitting the survey

Please return the survey by **13 April 2015**. To submit the form, press the 'Save & Submit' button at the end of the survey.

If you want to save your responses prior to submitting, select 'File => Save As' at the top of the screen.

Where an answer is zero, please mark the cell as '0'.

If you require assistance with the survey, please contact **Cordelia Foo** on **+61-3-9653-2198** or at [mr\\_survey@pc.gov.au](mailto:mr_survey@pc.gov.au).

### About the Productivity Commission

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

## Section 1: About your agency

### Q1.

Agency name		Contact position	
Jurisdiction		Phone number	
Contact name		Email address	

### Q2.

(a) Your agency is a:

☐ Statutory authority ☐ Unit within a department/agency ☐ Industry body ☐ Other

(b) The head of your agency reports to:

☐ Board or other governing body ☐ Statutory office holder ☐ Minister ☐ Parliament ☐ Other

### Q3.

In addition to registering occupations, which of the following functions does your agency perform?

- ☐ Develop policy
 ☐ Write regulation
 ☐ Review regulation
 ☐ Set standards  
☐ Resolve complaints
 ☐ Educate businesses
 ☐ Conduct investigations/inspections/audits  
☐ Offer professional development
 ☐ Other, please specify:

Q4.

In performing your functions, do you cooperate with regulators in other jurisdictions? ☐ Yes ☐ No

Please comment on the nature of this cooperation.

Q5.

How many occupations (or licence classes, where relevant) is your agency responsible for registering? 

For each of the occupations, please provide the following details.

	Occupation	Initial registration fee	Renewal registration fee	Period after which registration must be renewed
1	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/> (Years)
2	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/> (Years)

## Section 2: New registrations in the 2014 calendar year

Q6.

Please report the total number of **new** registrants in the 2014 calendar year (that is, those not registered in your jurisdiction in preceding years).

How many of them:

- (a) registered under mutual recognition?  
 (b) were from another jurisdiction but did not register under mutual recognition?

For those registered under mutual recognition, how many were:

- (a) granted registration with conditions attached to achieve equivalence with the licence held in their original jurisdiction?  
 (b) from New Zealand?

Occupation	New registrants in 2014	Registered under mutual recognition	Were from another jurisdiction but did not register under mutual recognition	Were granted registration with conditions	Were from NZ
<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>

Q7.

What were the most common types of conditions imposed on registration?

Q8.

Are any of the occupations you register subject to a Ministerial Declaration? ☐ Yes ☐ No

Q9.

In your experience, how aware are inter-jurisdictional applicants of mutual recognition and their rights under the schemes?

☐ Not aware    ☐ Somewhat aware    ☐ Very aware

### Section 3: Applications rejected in the 2014 calendar year

Q10.

Please report the total number of applications rejected for registration in the 2014 calendar year.

How many of these were:

(a) applications made under mutual recognition?

(b) applications made under mutual recognition of a licence granted in New Zealand?

Occupation	Total number of rejected applications in 2014	Applied under mutual recognition	Applied under mutual recognition of a licence granted in New Zealand

Q11.

What were the most common reasons for rejecting applications under mutual recognition?

- ☐ Criminal convictions  
☐ Failure to meet recent practice requirements  
☐ Incorrect declarations made on the application form  
☐ Lack of an equivalent occupation  
☐ Other, please specify:

### Section 4: Total number of people registered

Q12.

Please report the total number of people registered as at 31 December 2014.

How many of them were originally:

(a) registered under mutual recognition?

(b) from another jurisdiction but did not register under mutual recognition?

For those originally registered under mutual recognition, how many:

(a) were subject to conditions to achieve equivalence with the licence held in their original jurisdiction?

(b) involved the mutual recognition of a licence granted in New Zealand?

Please report the total number of people registered under mutual recognition, including from New Zealand, in the past five years (2010 -2014).

Occupation	Number of registrations as at 31 Dec 2014	Registered under mutual recognition	Were from another jurisdiction but did not register under mutual recognition	Were granted registration with conditions	Were from NZ	Total MR registrations in the past 5 years

## Section 5: The mutual recognition schemes

Q14.

Does **automatic mutual recognition** apply to any of the occupations you register?\*

☐ Yes ☐ No

What model(s) of automatic mutual recognition do you use?

Does automatic mutual recognition work well? ☐ Yes ☐ No

Please comment on the scope for its implementation.

*\*In broad terms, automatic mutual recognition refers to a system where an occupational licence issued by one jurisdiction would automatically be valid in other jurisdictions with no requirements for re-registration. This is akin to having an Australian drivers licence that is valid in all jurisdictions.*

Q16.

Are **training standards** to achieve registration for your occupation(s) comparable across jurisdictions? ☐ Yes ☐ No

How do differences in training standards impact on your assessment of mutual recognition applications?



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