TRANS-TASMAN MUTUAL RECOGNITION (WESTERN AUSTRALIA) BILL 2005

Second Reading

Resumed from 23 October.

HON NORMAN MOORE (Mining and Pastoral - Leader of the Opposition) [5.52 pm]: When debate was adjourned last night, I indicated to the house that a number of my colleagues still had some reservations about the apple issue, if I can put it in those terms, and whether this bill will have an adverse effect on the apple industry in Western Australia. As I indicated to the house, the opposition has decided that in light of the three reports prepared by committees of this house and the assurances given by the government, perhaps the concerns of some members are not justified. However, it is for them to indicate what they might or might not want to do about that matter.

Before I move on to the next part of my comments, which is a consideration of the recommendations of the Standing Committee on Legislation, I apologise to the government for implying yesterday that it had not tabled a response to the eighth report of the Standing Committee on Legislation. It seems that the government's response was, indeed, tabled in the house and I was not aware of it. The Leader of the House kindly provided me with a copy last night and indicated that he had tabled the report some little while ago. I appreciate the fact that the report is now available, because it will make it a lot easier to determine where we go with this bill. The report reveals that the bill was sent to the legislation committee because of basic concerns relating to the apple industry; the committee seems to have sorted out that problem but, in the process of its deliberations, has identified a number of other significant problems with the bill. The committee's recommendations relate to the construction of the bill and also to the way in which the commonwealth act, which is a note to the bill, is constructed.

The committee has made five recommendations, of which some are dependent upon others. I will deal with them in turn. Recommendation 1 states -

> **The Committee recommends that clause 4(1) of the Trans-Tasman Mutual Recognition (Western Australia) Bill 2005 be amended so as to adopt the *Trans-Tasman Mutual Recognition Act 1997* (Cth) as it was in force on a date to be fixed by the Legislative Council, being a date which falls within the period that the bill is before the Legislative Council.**

That may sound like a bit of gobbledegook in some respects, but it is actually quite a significant issue. The bill is here for the reason that we are being asked to adopt, as part of state legislation, a commonwealth law. We need to understand, as I mentioned yesterday, that the commonwealth law can in fact change from time to time, depending on what the federal Parliament decides, so it is important that when we pass this legislation - assuming we do - we know exactly which commonwealth law is in fact being agreed to. The committee has considered the notion that between the time Parliament agrees to this legislation and the time at which it is proclaimed, there may well be an amendment to the federal legislation. That would then mean that the Parliament had agreed to a bill containing an act that had been amended between the time the house agreed to the Western Australian bill and the time at which it received royal assent. The committee has expressed some concerns about that, and I concur with those concerns.

On page 4 of the report, paragraph 5.2 states -

> The Committee refers to paragraphs 5.1 to 5.8 of the UG Committee's report on the 2002 Bill regarding the effect of the wording in clause 4, and in particular, clause 4(3). With respect, the Committee's interpretation of clause 4 differs from the interpretation that was accepted by the UG Committee. The Committee was of the view that the words "*adopts the Commonwealth Act as originally enacted including the amendments made to it before this Act receives the Royal Assent*" expressly override the effect of section 16(3) of the *Interpretation Act 1984*, which provides that:
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> > *A reference in a written law to an Imperial Act or a Commonwealth Act, or to a provision of an Imperial Act or a Commonwealth Act, shall be construed so as to include a reference to such Act or provision as it may from time to time be amended.*
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> Therefore, the Committee considered that the passage of the Bill would result in Western Australia adopting the Commonwealth Act as it will exist immediately before the Act proposed by the Bill is given the Royal Assent.

Paragraph 5.4 states -

> This would mean that any future amendments to the Schedules of the Commonwealth Act would not be automatically adopted by this State without further words to that effect. Clause 4(3) appears to provide

> words to that effect as it expressly states that, "*For the avoidance of doubt*," the adopted Schedules will be amended from time to time by regulations made under the Commonwealth Act.

The committee has made some comments on page 6 of the report about the issue of determining a point at which Parliament agrees to whatever is contained within the commonwealth act. Paragraph 5.12 states -

> The Committee was of the view that the method of adopting another jurisdiction's legislation without scrutiny as enshrined in clause 4(1) is not desirable and will continue poor legislative precedent. Therefore, the Committee recommends that the Commonwealth Act be adopted as it was in force on a date to be fixed by the Legislative Council, being a date which falls within the period that the Bill is before the Legislative Council. In making this recommendation, the Committee did consider the observations made by the Parliamentary Counsel, but it was of the view that Parliament's knowledge and awareness of the precise nature of the legislation it is making is a paramount concern.

The committee arrived at recommendation 1, which I read a moment ago. It states -

> **The Committee recommends that clause 4(1) of the Trans-Tasman Mutual Recognition (Western Australia) Bill 2005 be amended so as to adopt the *Trans-Tasman Mutual Recognition Act 1997* (Cth) as it was in force on a date to be fixed by the Legislative Council, being a date which falls within the period that the bill is before the Legislative Council.**

Sitting suspended from 6.00 to 7.30 pm

Hon NORMAN MOORE: Before the dinner break I was commenting on recommendation 1 of the committee's report, which basically seeks to resolve the difficulty that might arise between the passage of the Western Australian bill and royal assent being granted to the bill if the commonwealth act was amended during that period. That would, in a sense, preclude this Parliament from being able to be involved in any way with an amendment to the commonwealth act, which we are in fact adopting under this particular legislation. The committee has recommended that we set a date. I presume that the government will move an amendment to that effect, bearing in mind - I will come to it in a moment - that the government's response to this particular recommendation is that it will be supportive of the committee's view. One can expect in due course, when we get to the committee stage, that an amendment will be moved that will determine a date, and the commonwealth act that will relate to the Western Australia bill will be the act at that particular date, as determined by the Legislative Council. I do not know quite how long it will take to get from the passage of the legislation to the royal assent. It has been suggested by parliamentary counsel that it may take only a day or two, but I think it is important that we make it very clear that what the house is agreeing to is something that we are familiar with and we know, and that we are not prepared to take the risk of the commonwealth act being amended during the period between the passage of the bill through this house and it receiving royal assent. I guess that, at the moment, because a federal election is on, and if this bill is passed by this house and the other house in the next week or so, that there is no chance that there will be any amendments to the commonwealth act in that period. Let us make certain that we do not have any problems in this particular regard.

As I mentioned, the government in its response to recommendation 1 has indicated that it is supportive of the committee's position. The government's response states, in part -

> Parliamentary Counsel has advised the Government that theoretically the shortest possible timeframe for the Bill to get Royal Assent after its adoption would be two days. Taking this advice into account the Government feels that the risk of the Commonwealth Act changing in that sort of timeframe is slight.
>
> . . .
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> The Government notes that taking this approach will essentially not change the final outcome if the Bill is adopted and will actually provide the Parliament with clearer information about the Bill it is considering.

It therefore agrees with the committee's recommendation 1. We will watch with some interest the government's amendment to put into effect recommendation 1 of the committee.

The second area that was dealt with by the committee relates again to clause 4, which is the most significant clause of the bill. It relates to the Henry VIII clause. Henry VIII clauses are becoming a fairly common phenomenon in legislation in this Parliament. As I recall, we have just recently sent a bill back to the Assembly with the indication that we would not accept a Henry VIII clause in the form in which it was presented. That has been the case with a couple of bills in recent times. When I read the committee's report and the views of parliamentary counsel, I come to the conclusion that parliamentary counsel do not concern themselves with

Henry VIII causes. They seem to take the view, as I read it at least, that a clause can be put into a bill that states something to the effect that if something has been forgotten the government can, by regulation, amend the act. That is just simply not acceptable but, for some strange reason that is beyond me, parliamentary counsel seem to be of the view that that is the way to go. We have had a number of debates about that. The advice given to the committee in respect of this bill seems to suggest that parliamentary counsel regard Henry VIII clauses as something that we have just got to live with because they make life easier for the people who are administering legislation. Just to get some idea of how blatant the Henry VIII clauses are, I refer members to the bill. The state legislation - the Trans-Tasman Mutual Recognition (Western Australia) Bill 2005 - under clause 4(3) states -

> For the avoidance of doubt, it is the intention of the Parliament of the State that a Schedule to the Commonwealth Act as adopted under this Act may be amended from time to time by regulations made under the Commonwealth Act.

For the benefit of members who have not read this particular legislation, the bill contains as a note the commonwealth Trans-Tasman Mutual Recognition Act 1997. The state bill basically determines that the state of Western Australia will adopt this federal law fundamentally as part of our law. The bill we are discussing tonight includes in it the provision that we will accept that if the commonwealth act's schedule is amended by regulation, that is legitimate. In fact, it is provided for in the state bill. That is the state's Henry VIII clause. It is put in there, according to parliamentary counsel, because the commonwealth act of 1997 has a number of quite blatant Henry VIII clauses. I refer, for example, to section 44 of the commonwealth act, under "Exclusions". Section 44(2) states -

> The Governor-General may make regulations amending Schedule 1.

Section 45, "Permanent exemptions", states in part -

> (3) The Governor-General may make regulations amending Schedule 2.

Section 48, "Special exemptions", states in part -

> (4) The Governor-General may make regulations amending Schedule 3 for the purposes of subsection (2) or (6).

Section 49, "Exemptions relating to occupations", states in part -

> (2) The Governor-General may make regulations amending Schedule 4.

In addition, under section 54, "Commonwealth regulations for temporary exemptions", it states -

> Without limiting any other power under any other Act, the Governor-General may make regulations for the purposes mentioned in section 46.

Section 46 deals with temporary exemptions and relates to the schedules to the commonwealth act. As members know, the schedules to an act are part of the act. To allow for regulations to amend the schedule to an act is a Henry VIII clause, so the commonwealth act is riddled with Henry VIII clauses. I just wonder whether people have actually heard of them in the federal Parliament; and, if they have, whether they take any notice of them, because clearly this particular act of Parliament contains, as I have read out to the house, some quite blatant Henry VIII clauses.

We are told by parliamentary counsel that it is necessary for us to accept the federal act as it is provided to us, that we are unable to amend the federal act, for obvious reasons, and that either we accept the federal act as part of our own law or we do not. Therein lies the problem. The committee spent some time looking at this. I congratulate its members on the work they did on this particular matter, because they have drawn our attention to what is a potential, serious problem affecting these sorts of bills when we as a Parliament are being asked to agree to legislation which can then be amended by regulation of the commonwealth Parliament. In other words, state law can be amended by federal regulations. It is bad enough having the federal government telling us what to do all the time, but I have to draw the line at the federal Parliament enacting legislation on our behalf.

Let us look at what the committee has said on this matter. On page 7 of its report, under clause 5.13 it states -

> In effect, clause 4 will ensure the adoption of the most current version of the Commonwealth Act (including the Schedules to that Act) as at the time that the Act proposed by the Bill is enacted. Thereafter, under clause 4(3) of the Bill, only amendments to the Schedules of the Commonwealth Act (made by regulations made under the Commonwealth Act) will be automatically adopted by this State.

> That is, no further Western Australian legislative action would be required for this State to adopt any future amendments to the Schedules of the Commonwealth Act. Clause 4(3) of the Bill amounts to a Henry VIII clause.

Basically, the committee is saying that once we pass this bill, and the commonwealth act is as it is at the time that this bill is passed or at the date determined by the Legislative Council, that act remains as it is and cannot be changed within the state law by a change to the federal act. However, regulations made under that federal act, which amend the schedules to the federal act, will have an effect regardless of what the Parliament of Western Australia may think is appropriate. There are provisions in the federal act that relate to particular sorts of regulations. Basically, it says that in some circumstances where, say, for example, the regulations affect only one state, there is a need to consult with the state government in that particular state. If it affects all the states, I think they need a majority, two-thirds or something like that of the state jurisdictions to agree. However, it does not require the Parliaments of the states to be involved; it simply leaves it with the executive. That is exactly the same as having a Henry VIII clause within our own legislation, when the executive by virtue of executive power can create regulations which can amend an act and there is virtually nothing the Parliament can do about it other than perhaps seek to have the regulations disallowed.

Page 8 of the committee's report states -

> 5.17 The Committee considered that clause 4(3), if passed, will amount to a significant erosion of the legislative powers of the State Parliament. It was particularly concerned that any future amendments that would be made to the adopted Schedules, without further consideration by the State Parliament, would be made, not by the State Executive, but by the Commonwealth Executive, albeit in varying degrees of consultation with the Executive of the jurisdictions participating in the TTMRA.
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> 5.18 Accordingly, the Committee was of the view that clause 4 be amended so as to modify the automatic adoption of amendments (through Commonwealth regulations) to the Schedules to the Commonwealth Act: any amendments relating to Commonwealth or Western Australian laws should only apply in Western Australia if the State Parliament has been given an opportunity to consider those amendments; however, it would be appropriate for any amendments relating to the laws of all other jurisdictions to be adopted by this State automatically.
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> 5.19 In determining the appropriate level of parliamentary scrutiny that should apply to the adoption of the limited class of Schedule amendments, the Committee examined the application of three methods by which the State Parliament oversees Executive-made legislation. Each of the following three methods would involve the State Government making an 'instrument' of delegated legislation (for example, regulations, orders or another Executive-made instrument) which is equivalent to, or adopts, an amending Commonwealth regulation. The equivalent or adopting State delegated legislation will be referred to in this discussion as the 'State instrument', the 'Western Australian instrument', or the 'instrument':

I will not go into that in any detail, except to say that in basic, simple layman's language it is suggesting that if there is an amendment to the schedules of the commonwealth act made by regulation at the commonwealth level, the state Parliaments also have a similar regulation dealt with in the state Parliament. The committee goes through three different ways in which it considers that the state of Western Australia might contemplate this particular problem. I do not propose to waste the house's time by going through those three propositions, other than to say that it is worth members having a look if they are particularly interested in this problem. At paragraph 5.20 the committee states -

> After examining the above three methods of parliamentary scrutiny, the Committee was of the view that the first option would be the most appropriate mechanism for affording the State Parliament an opportunity to consider a Schedule amendment relating to Commonwealth or Western Australian laws. In making this recommendation, the Committee also recognised the potential need for Schedule amendments to be made as quickly and as flexibly as possible. It is submitted by the Committee that its recommended amendment to clause 4 would represent an appropriate balance between legislative flexibility and accountability.

Recommendation 2 states -

> **The Committee recommends that clause 4 of the Trans-Tasman Mutual Recognition (Western Australia) Bill 2005 be amended so that amendments to a Schedule to the *Trans-Tasman Mutual Recognition Act 1997* (Cth) which:**
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> **(a) are effected by Commonwealth regulations made under that Act; and**
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> **(b) relate to Commonwealth and/or Western Australian laws only,**
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> **are only adopted by this State if Western Australian regulations which are equivalent to, or adopt, the Commonwealth regulations are made.**

Having read through the three different potentialities identified by the committee, that seemed to be a reasonably sensible way to go about dealing with this matter. I was therefore interested to read the views of the government on recommendation 2. The government's report states, in part -

> The Government also feels that the language of s.51 (xxxvii) -

That is of the commonwealth Constitution -

> is inconsistent with a State modifying and adopting a Commonwealth law for the following reasons:

- The enactment of the Commonwealth Act, including provision for the amendment of the Schedules by regulation was authorised by s.51 (xxxvii) of the Constitution read with the referral contained in the original NSW Act. This is the law, which a State Parliament may "afterwards adopt". This language strongly suggests that if a State adopts a particular law it must do so in the form in which it is enacted.

I interpose to say: even if the law contains a Henry VIII clause, which it does quite clearly. The government's response continues -

- Section 52(xxxvii) provides that the condition for the application to a State of a Commonwealth law as Commonwealth law is that it has been adopted by a State Parliament. It is arguable that the State Parliament must take the Commonwealth law as it finds it.

What parliamentary counsel is telling the government - it is telling us in its report - is that we must accept the commonwealth legislation as it is because we are not in a position to carry out any action in the state Parliament that contradicts what the federal Parliament wants to do, albeit it is doing it through an executive action by way of regulations to amend the schedules of a commonwealth act. The government's response continues -

> The Committee is essentially proposing that the Western Australian Parliament would be scrutinising changes to a Commonwealth Act dealing with referred power from New South Wales.
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> It should be noted that any changes made under regulation in the current Commonwealth Act are purely cosmetic. Major changes to the Commonwealth Act would have to be sent back firstly to NSW for agreement as the referring jurisdiction and then accepted by two thirds of the "participating jurisdictions" including Western Australia. Therefore if Western Australia adopts the commonwealth law, it will be accepting the Commonwealth Act with only minor cosmetic amendments occurring without the scrutiny of the West Australian Parliament.

That is possibly a fair and reasonable interpretation of what we are talking about, except that what is cosmetic to one may be controversial or catastrophic to another. It seems to me that what parliamentary counsel is saying is that it is okay to have Henry VIII clauses and all that goes with them as long as they do not cause anybody too much trouble. That is not a good way to make law because, as I said a moment ago, trouble is in the eye of the beholder. The government's response continues -

> Based on its legal advice the Government's position is that an amendment to cl. 4(3) of the Bill as proposed by the Committee would render that clause invalid. There is a also strong argument that the whole of the Bill would be invalid as cl. 4(3) of the Bill would not be severable from the remainder of the Bill.
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> The Government is convinced that the proposals contained in recommendation 2 of the Committee's report would result in a Bill not validly enacted.

On that basis, the government rejected recommendation 2 of the committee's report. That puts me, and the opposition, in a difficult position, because I have a serious problem with the principles involved in this matter. I have a serious problem, first of all, with Henry VIII clauses and, beyond that, a simple problem with Henry VIII clauses when we are looking at a federal jurisdiction making laws for Western Australia by way of regulations. It might be cosmetic according to parliamentary counsel, but that does not matter; whether or not it is cosmetic

does not affect the principle of the issue. I will listen with great interest to the way in which the Leader of the House promotes the government's view, assuming, of course, that the recommendation from the government is the recommendation that it will bring before Parliament. I understand that the Greens (WA) also have considerable problems with this issue. It would be in the best interests of the house if the Leader of the House comes into this chamber with an argument that convinces me and a majority of members to the government's view if it wants this particular recommendation to be rejected. He must provide a good argument that reiterates the assertion of parliamentary counsel that if the recommendation is implemented, the bill will become invalid. I am not a lawyer - I wish I was on occasions - but I have serious concerns about this matter.

Recommendation 3 deals with what is termed on page 11 of the report as "Updates to Trans-Tasman Mutual Recognition Act 1997 (Cth)". In other words, what is the effect of amendments to the commonwealth act on Western Australian legislation? On page 13, under the heading "Currency of Note at the end of the Bill", the report reads -

> *Prior to Enactment of Act Proposed by the Bill*
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> 5.23 It was also observed by the Committee that the note at the end of the Bill, which purports to set out the text of the Commonwealth Act as at the time of the enactment of the Act proposed by the Bill, does not set out the most up-to-date version of the Commonwealth Act.

That is partly because the note on the 2005 bill relates to the commonwealth legislation at that time. It continues -

> 5.24 The Committee acknowledged that the note at the end of the Bill would not form a part of the proposed Act. However, the Committee was of the view that appending a copy of the Commonwealth Act to the Bill has the potential to cause confusion if the Commonwealth Act alters during the Bill's passage through the Western Australian Parliament or during the Royal Assent process. Accordingly, the Committee makes Recommendation 3.

Which reads as follows -

> **Recommendation 3: The Committee recommends that the note at the end of the Trans-Tasman Mutual Recognition (Western Australia) Bill 2005 be deleted.**

That is interesting when one considers what this bill does. I am not sure that I am totally enamoured of the proposition put by the committee, but I understand why it has put its position and I will not argue against it. Although the Trans-Tasman Mutual Recognition (Western Australia) Bill is a Western Australian bill, as stated in the long title of the bill, it is -

> **A Bill for**
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> **An Act to adopt the *Trans-Tasman Mutual Recognition Act 1997* of the Parliament of the Commonwealth (including the amendments made to it before the enactment of this Act) which provides for the recognition within each State and Territory of the Commonwealth of regulatory standards adopted in New Zealand regarding goods and Occupations, and for related purposes.**

The bill that we are dealing with adopts the commonwealth act as part of Western Australian law. It would seem to be a good idea to have attached to our law the law that we are adopting so that people who are interested in state law can have ready access to it, bearing in mind that it is attached as a note and not as part of our law. The committee is concerned that the commonwealth act may change from time to time and that whatever is attached to the state law may be out of date, therefore causing confusion for those who need to access the act. The government has considered this recommendation and it has stated in its report -

> Advice from the Parliamentary Counsel indicates that attaching this note is not vital and that it was a practice introduced by the previous Government and is not a long-standing parliamentary practice in Western Australia.

I do not know whether the previous government had a particular view about these things, but the indication seems to be that this is something that did not happen on a regular basis in the past and it presumes that anybody who wants to know what the federal act contains can obtain a copy of it without a great deal of difficulty. The government's response to the report is to accept recommendation 3 to delete the note. I presume the Leader of the House will move an amendment to that effect in due course. He has given notice of a motion today that will allow the Committee of the Whole to deal with that matter tomorrow. That brings me to recommendation 4 of the Standing Committee on Legislation's report -

> **In order for effect to be given to Recommendation 3, the Committee recommends that it be an instruction to the Committee of the Whole that it have power to consider any amendments to the notes to the Trans-Tasman Mutual Recognition (Western Australia) Bill 2005.**

That has been agreed to by the government and the Leader of the House has given notice of a motion for that to happen.

Paragraph 5.26, which is important, states -

> Irrespective of whether Recommendation 3 is agreed to, the Committee was also of the view that, in order to aid the debate of the Bill in the Legislative Council, the Minister should:
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> - table a copy of the most current version of the Commonwealth Act when debate on the Bill resumes in the Legislative Council;

I do not know whether that has happened, but the Leader of the House might give some thought to that -

> and
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> - continue to table copies of the most current versions of the Commonwealth Act if and when the Commonwealth Act is amended during the Legislative Council's debate on the Bill.

I do not know whether that has happened either. The report goes on to say later -

> *After Enactment of Act Proposed by the Bill*
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> 5.28 The Committee observed that Queensland's *Trans-Tasman Mutual Recognition (Queensland) Act 2003* also attaches a copy of the Commonwealth Act as adopted. Section 9 of that Act imposes an express requirement for the attachment to be continually revised:
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> > *(1) Attached to this Act is a copy of the Commonwealth Act as adopted.*
> >
> > *(2) The attachment is not part of this Act.*
> >
> > *(3) The attachment must be revised so that it is an accurate copy of the Commonwealth Act as amended from time to time and adopted under section 5(1).*
> >
> > *(4) The revision under subsection (3) must happen in the first reprint of this Act after an amendment of the Commonwealth Act*

The committee's comment on the Queensland legislation under paragraph 5.29 states -

> The Committee considered the Queensland approach to ensuring the currency of the attached Commonwealth Act after enactment in view of the possibility that the House may not agree to Recommendation 3 (deleting the note at the end of the Bill).

As members know, the government has agreed to committee recommendation 3. To complete the recommendations, recommendation 5 states -

> **The Committee (by a majority . . . recommends that, if Recommendation 3 is not agreed to, the Government give consideration to updating the note at the end of the Act proposed by the Trans-Tasman Mutual Recognition (Western Australia) Bill 2005 as required after the Act receives the Royal Assent.**

My view, for what it is worth, is that I would prefer recommendation 5 to recommendation 3, but that is after a reasonably cursory look at this legislation. Rather than dropping the note altogether, the suggestion contained in recommendation 5, which deals with the way it is handled in Queensland, seems to be a more useful way of dealing with this issue. The government has said that recommendation 5 is not applicable because recommendation 3 has been accepted by the government. I am comfortable to proceed along those lines in the committee stage.

Another matter I will refer to before I conclude is the issue of apples. If we did not talk about apples in the debate on this bill we would be doing ourselves a disservice. I mentioned yesterday, when I first spoke on this bill, that the committee seems to have resolved, certainly to my satisfaction, the issue of apples. The committee said in paragraph 6.50 on page 38 of its report, under "*Committee Comment*", that -

> The Committee acknowledged the concerns of the WAFGA.

That is, the Western Australian Fruit Growers Association -

> However, it appeared as though these concerns are derived from a scepticism about, and frustration with, the biosecurity policy and IRA processes which occur within Australia. The Committee noted that these considerations lie outside the scope of the Bill.

Paragraph 6.51 states -

> As stated in paragraphs 6.7 to 6.9 in this Report, the Committee was of the view that the Bill does not change Western Australia's existing obligation under the SPS Agreement to ensure that its quarantine measures are not more trade-restrictive than necessary to protect human, animal or plant life or health within its territory.

Paragraph 6.52 states in part -

> The Committee was of the view that it is imperative that Western Australia's unique biosecurity characteristics are recognised and protected in the formulation of Australian biosecurity policies. With this in mind, the Committee accepted that the SPS Agreement requires Australia to recognise regional differences (both within and outside of Australia) in biosecurity characteristics when assessing biosecurity risks or applying biosecurity or quarantine measures.

With this in mind, I am prepared to accept the government's view that these concerns are addressed in the legislation and that this bill, if passed, will not lead to fire blight, coddling moth and apple scab descending in great profusion on the apple crops of Western Australia. If it does, I will not say the Leader of the House should wear it, because the Parliament is making the decision, but those who advise him should wear it because they are telling us that there is nothing to worry about.

Hon Kim Chance: This legislation cannot make any difference.

Hon NORMAN MOORE: I do not disagree with what the Leader of the House is saying, but I know that a lot of people think it does and that is why it has been sitting here for eight years. The fruit growers of Western Australia will not necessarily believe what this committee is telling them. Whether it is because they are sceptical, I do not know. We will wait and see what will happen on that matter.

I have taken a fair bit of time of this house on a bill that I thought I would be able to deal with in about five minutes, because I was going to say "Ditto", to what I said three or four years ago. I found myself yesterday in a position where I could not do that, because of this excellent report by the Legislation Committee. I commend Hon Giz Watson and her committee members on the thoroughness of their consideration of this legislation and the excellence of their report. It has made it a lot easier for this house to deal with this bill than it would have been had we not had the benefit of this report. I think about how difficult it was reading the previous reports and advice provided and trying to work out who was having us on and who was not, what was right and what was wrong, and whose view we should accept over somebody else's. All those concerns were going through my mind and that is the reason I appreciated the fact that the house agreed to send this bill to the Standing Committee on Legislation and for us to have the benefit of the committee's report.

The opposition supports the legislation. That is not to say that some of my colleagues still do not have concerns about the apple issue, and I have yet to be persuaded to the view of the government's response to the report in respect of the Henry VIII clauses. I look forward to hearing the government's response to that matter and to making a decision during the committee stage.

HON GIZ WATSON (North Metropolitan) [8.09 pm]: This house is dealing with the Trans-Tasman Mutual Recognition (Western Australia) Bill 2005 and I need to take time to go through it, because it is a very complicated piece of legislation that has been coming back to this Parliament in various forms since 1999. I concur with the Leader of the Opposition's comments about the benefit of having referred this bill to the Standing Committee on Legislation. Having spent quite a long time in the committee considering the complexities, implications and interrelationships of the bill between the commonwealth laws and the state law, it still remains a very complicated piece of legislation with, I believe - on behalf of the Greens (WA) - some very significant implications.

The purpose of the bill is to implement in Western Australia the trans-Tasman mutual recognition arrangement, which was signed by all Australian heads of government and the Prime Minister of New Zealand in 1996. Western Australia, as we know, is the last jurisdiction to give legislative effect to this TTMRA. The bill is uniform legislation and when passed it will form part of a national legislative scheme that will provide for Australia's recognition of the regulatory standards adopted in New Zealand regarding goods, including goods that are legally able to be imported and sold into New Zealand, and occupations. Following a referral of these

mutual recognition matters from the New South Wales Parliament to the commonwealth Parliament under section 51(xxxvii) of the Commonwealth of Australia Constitution Act, the commonwealth Parliament enacted the Trans-Tasman Mutual Recognition Act 1997 - or the commonwealth act - in order to give legislative effect to the TTMRA. The commonwealth act is the template legislation for the TTMRA, and for the TTMRA to have effect in this state the Western Australian Parliament must either adopt the commonwealth act or refer the power to enact TTMRA legislation on its behalf to the commonwealth Parliament. A precursor to the bill, the Trans-Tasman Mutual Recognition (Western Australia) Bill 1999, contained clauses that are very similar to the clauses of this bill. As we know, that bill did not actually progress and we then dealt with another precursor bill in the shape of the Trans-Tasman Mutual Recognition (Western Australia) Bill 2002.

For the house to understand what this bill will enact, it is necessary to understand the trans-Tasman mutual recognition arrangement. An earlier report of the Standing Committee on Constitutional Affairs in relation to the 1999 bill gives a very good description of the trans-Tasman mutual recognition arrangement. I will refer to page 1 of that report, which says -

> 1.2 . . . (the TTMRA) is an arrangement between the Commonwealth, State and Territory Governments of Australia and the Government of New Zealand, the principle aim of which is to remove impediments to trans-Tasman trade in goods and to the mobility of people in registered occupations created by regulatory differences among Australian jurisdictions and New Zealand. The TTMRA was signed by Australian Heads of Government at the Council of Australian Governments on June 14 1996. The Prime Minister of New Zealand subsequently signed the TTMRA on July 9 1996.
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> 1.3 The aim of the TTMRA is achieved by providing for mutual recognition of regulatory standards for goods and registered occupations adopted in Australia and New Zealand.
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> 1.4 The purpose . . . is to give effect to two mutual recognition principles relating to the sale of goods and the registration of occupations. The two basic principles are:
>
> - a good that may legally be sold in Australia may be sold in New Zealand, and a good that may legally be sold in New Zealand may be sold in Australia, regardless of differences in standards or other sale-related regulatory requirements between Australia and New Zealand;

I will come back to this particular point a little later in what I have to say about this bill. The report continues -

> - a person registered to practise an occupation in Australia is entitled to practise an equivalent occupation in New Zealand, and a person registered to practise an occupation in New Zealand is entitled to practise an equivalent occupation in Australia, without the need to undergo further testing or examination.

The report goes on to say on page 3 -

> 4.3 In developing the TTMRA governments recognised that there are, in many areas, regulatory impediments to trade between New Zealand and Australia. These are often in the form of:
>
> - different standards for goods;
> - duplicative testing and certification requirements; and
> - different regulatory requirements for those wishing to practise in registered occupations.
>
> 4.4 The benefits of the TTMRA are particularly significant where regulatory differences mainly reflect national historical or institutional arrangements, rather than the objective assessment of risks to public health, safety and the environment.
>
> 4.5 The TTMRA commenced operation on May 1 1998 on the coming into force of legislation in both Australia, the *Trans-Tasman Mutual Recognition Act 1997* (the Commonwealth Act) and New Zealand. In the case of an Australian State or Territory, the scheme commences operation on the date of proclamation of the relevant State or Territory trans-Tasman mutual recognition legislation.
>
> . . .
>
> 4.6 The TTMRA builds on the Mutual Recognition Agreement (MRA) between the Commonwealth, States and Territories of Australia which commenced operation on March 1 1993. The MRA removed regulatory barriers to the movement of goods and service providers between Australian jurisdictions.

4.7 The MRA has recently been reviewed and it is generally considered that the practical benefits have included:

- greater choice for consumers;
- reduced compliance costs for manufacturers;
- economies of scale in production, leading to lower product costs;
- greater cooperation between regulatory authorities and the accelerated development of national standards where appropriate;
- greater discipline on individual jurisdictions contemplating the introduction of new standards and regulations;
- increased movement of service providers; and
- freedom for service providers to practise in jurisdictions in which they are not registered.

As regards the principles of the TTMRA, the report states -

4.8 The purpose of the TTMRA is to give effect to two mutual recognition principles relating to the sale of goods and the registration of occupations.

I have already touched on those principles. There are some exceptions and qualifications to those principles, and with regards to goods and the TTMRA these are discussed as follows -

4.10 The basic principle in respect of goods under the TTMRA is that goods that can be legally sold in a participating Australian jurisdiction can be sold in New Zealand and vice versa, as long as the goods meet the regulatory requirements for sale in the jurisdiction in which they were manufactured or first imported.

It is important to realise that if we accept this proposition not only will we be accepting goods that meet the standards of manufacturers in New Zealand, but also any goods that New Zealand imports under its standards will then of necessity be accepted in Western Australia. This is one of the critical points on which the Greens (WA) have a problem with this legislation because we will then lose control of those standards and we will then be intimately tied in with whatever standards New Zealand agrees to. That is not necessarily a bad thing, but it is an issue about relinquishing Western Australia's control over its own standards. One of the issues I am aware of is safety standards. The report continues -

This means that goods which can be sold lawfully in one jurisdiction may be sold freely in another, even though the goods may not comply with all the details of regulatory standards in the second jurisdiction.

4.11 Under the mutual recognition principle, producers in Australia will have to ensure that their products comply with the laws only in the place of production. If they do so, they will then be free to distribute and sell their products in New Zealand without being subjected to further testing or assessment of their product.

On the laws affecting the TTMR, the report states -

4.12 Legislation implementing the TTMRA overrides any laws (with certain exceptions) that regulate the manufacture or the sale of goods. Examples of laws overridden by the scheme include:

- requirements relating to product standards such as the production, composition, quality or performance of a good; -

Those laws will be overridden if this bill goes through -

- requirements relating to the way the goods are presented, such as packaging, labelling, date stamping and age;

That is a significant issue in, for example, differential requirements in labelling, and the example I am thinking of is in relation to any content of genetically modified material within a product. New Zealand and Australia have different approaches to those requirements. The report goes on -

- requirements that the goods be inspected, passed or similarly dealt with in or for the purposes of the jurisdiction;

- a requirement that any step in the production of the goods not occur outside the jurisdiction; and
- any other requirement that would prevent or restrict the sale of the good.

4.13 The mutual recognition principle applies to regulatory requirements relating to the good itself and requirements relating to and leading up to the point of sale. The scheme does not impact on post point of sale requirements, including those relating to the use of goods. For example, laws that regulate the manner in which goods are sold such as laws restricting the sale of certain goods to minors, or the manner in which sellers conduct their businesses, are explicitly exempted from the scheme.

However, Western Australia might contemplate a requirement for certain standards for solar hot water systems. If New Zealand has a lower standard and this bill is passed, there is nothing we can do to prevent the importation of New Zealand products. The products do not necessarily have to be from New Zealand; they can enter the New Zealand market, which might not meet the Western Australian standards, before they enter Western Australia. There are significant implications about how the bill can prevent Western Australia from imposing standards that we think are appropriate for Western Australia. The report of the Standing Committee on Constitutional Affairs refers to laws not affected by the TTMRA, and states -

4.14 The TTMRA does not affect the operation of any laws to the extent that they regulate:

> the manner of the sale of goods or the manner in which sellers conduct their business, so long as those laws apply equally to both locally produced and imported goods. Examples include laws relating to:
>
> > the contractual aspects of the sale of goods;
> >
> > the registration of sellers or other persons carrying on occupations (for example liquor licences);
> >
> > the requirement for business franchise licences (for example tobacco licences);
> >
> > the persons to whom the goods may or may not be sold (for example the sale of liquor to minors); and
> >
> > the circumstances in which goods may or may not be sold (for example health/hygiene requirements);
> >
> > the transportation, storage or handling of goods, so long as those laws apply equally to both locally produced and imported goods and the laws are directed at matters affecting public health or safety or at preventing, minimising or regulating environmental pollution; or
> >
> > the inspection of goods, so 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 protecting public health or safety or the environment.

4.15 The TTMRA does not affect the operation of any laws prohibiting or restricting the export of goods from a participating jurisdiction.

Goods and laws exempt from the TTMRA

4.16 The TTMRA contains various types of exemptions for goods and laws for which mutual recognition is not appropriate.

Exclusions

4.17 Some laws that may indirectly relate to the sale of goods are excluded from the TTMRA.

These laws include those relating to:

> customs controls and tariffs - but only to the extent that the laws provide for the imposition of tariffs and related measures (for example, anti-dumping and countervailing duties) and the prohibition or restriction of imports (for example, firearms);
>
> intellectual property - but only to the extent that the laws provide for the protection of intellectual property rights;

> taxation and business franchises - but only 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, wholesale sales tax (Commonwealth), and business franchise and stamp duties (States); and
>
> the implementation of international obligations - but only to the extent that the laws implementing those obligations deal with the requirements relating to the sale of goods.
>
> **Permanent exemptions**
>
> 4.19 Certain laws relating to the sale of goods are permanently exempt from the TTMRA . . .
>
> These. . . include laws relating to quarantine, endangered species, firearms, fireworks, indecent material, ozone protection, agriculture and veterinary chemicals and certain risk-categorised food, as well as a small number of State-specific laws, including a Western Australian law relating to gaming machines.

The permanent and special exemptions are listed in the schedules to the bill. The report continues -

> **Special Exemptions**
>
> 4.21 Special exemptions apply in a number of areas where further examination of each country's regulatory requirements was deemed desirable in order to determine the appropriateness or otherwise of allowing the mutual recognition principle to operate.

Examples of these are -

> therapeutic goods;
>
> hazardous substances, industrial chemicals and dangerous goods;
>
> electromagnetic compatibility and radiocommunications equipment;
>
> road vehicles; and
>
> gas appliances.

As I said, all these matters are in the schedule to this bill. The schedule also contains temporary exemptions that relate to certain goods or classes of goods that can be temporarily exempt from the operation of the TTMRA for periods of up to 12 months or an aggregated period of 12 months. The report continues -

> A participating jurisdiction may unilaterally invoke a temporary exemption if it considers that the standards of regulatory requirements applying to a good are such that the sale of the good could give rise to a threat to the health and safety of persons in the jurisdiction or the environment.

This is a complicated bill, and the schedules are even more complicated. The Greens (WA) have opposed the passage of this bill in its various forms since 1999. We are concerned on a number of levels. We are concerned with the quarantine matters and our concerns are shared by the apple and stone fruit growers in the south west of the state. An issue that arose from the committee inquiry was, to a large extent, the issue of quarantine. In my mind, that issue has been addressed, although I still have some lingering doubts in the same way as Hon Norman Moore does about the absence from our agricultural sector, and particularly the fruit-growing sector, of certain pests and diseases that are rampant in most places. That is a huge advantage that we should not jeopardise if we have any hesitation in our minds. Significantly, the Greens have a fundamental objection to the way that this legislation removes the sovereignty of the Western Australian Parliament to be in control of matters that affect Western Australians. I will talk about that a little more in a minute.

We have always argued that providing for Australia's recognition of the regulatory standards adopted by New Zealand is an abrogation of our control. Similarly, we have consistently raised our concerns about similar national schemes to which we are obliged under World Trade Organization agreements. Senator Dee Margetts, who was also a member in this place, gave a speech in the Senate on 27 September 1997 in the debate on the commonwealth Trans-Tasman Mutual Recognition Bill 1996. I will not quote her full speech, but a couple of paragraphs of it are equally relevant to this state legislation. She makes the point that the stated aim of the commonwealth bill, as it is in this uniform legislation with which we are dealing at the state level, is the harmonisation of differing standards. She says -

> The harmonisation of differing standards creates a lowest common denominator effect. This benefits, of course, corporate interests, not countries or people. Where Australia has higher standards, as with baby car seats or cigarette health warnings, our regulations will be undermined. Where New Zealand has higher requirements, as with the potential requirement for labelling of genetically modified food,

> these will be undermined. Even when regulations are currently in sync, this law will prevent any tightening from being effective unless it occurs in both countries.
>
> . . .
>
> Evidence from the World Trade Organisation experience around quarantine is that assurances of sovereignty and protection are meaningless. We currently have World Trade Organisation cases -

Those have since been played out. She continues -

> My views on inequalities in trade and the race to the bottom at the expense of nature, workers, industry and - as in this case and others - consumers are well known. This is not about New Zealand products. Product from anywhere in the world can enter Australia without complying with our laws as long as they comply with New Zealand's laws and have come through Auckland or some other New Zealand jurisdiction.

That has enormous implications. The only time this bill will be needed is when standards differ. It is not an argument to say that many standards are the same. Identical standards present no problem for importing. When standards differ, this bill says that the lowest ones apply. Any importer can import to either country through the other with the lower standard. This is the lowest common denominator principle or the race to the bottom. That remains the fundamental opposition the Greens (WA) have to this bill or any legislation that seeks to do the same thing. One of the questions I raised in the committee - I may talk about it a bit further - was: why is there a desperate need for this bill? The prime response put forward was that there was a problem getting New Zealand teachers into Western Australia. They have to undergo additional requirements to meet Western Australian standards and their qualifications are therefore not automatically recognised here. It is not that New Zealand teachers could not work here; it is just that it takes a little longer. My argument is that if they have to go through some extra processes to meet Western Australian standards, it is a good thing, not a bad thing. Surely the situation is the same for teachers coming to Western Australia from other countries with which we do not have mutual recognition arrangements, such as France, Germany or England. They too would have to go through some process of standards assessment and quite frankly, if that takes an extra month or two, I do not actually see it as a problem. It means that Western Australia is making appropriate assessments of people who are applying to teach here. Teaching is just one example; the same applies to any other trade or profession. I was not hugely convinced by the argument that there was much to be gained from the passage of this bill. I acknowledge that some advantages and changes have occurred as a result of the mutual recognition arrangements. The Productivity Commissioner has commented on the advantages to consumers of these arrangements with regard to cheaper products, more choice and other such outcomes. However, that has to be weighed up against the downside, which, as I say, is the application of the lowest common denominator to standards.

I turn to the question of quarantine. My former colleague Hon Chrissie Sharp was very much part of the debate in this place over concerns about the impact of these arrangements on apple growers in the south west. The committee took some time to examine this issue. On page 17 of report 8 of the Standing Committee on Legislation there are paragraphs under the heading "Effect of Incorporating the Requirements of the Agreement of Sanitary and Phytosanitary Measures into Australian Domestic Law". These concern the question of whether this bill will have any impact upon our capacity - in this case - to keep New Zealand apples out of Western Australia. The committee went into a lot of detail on this matter. I will not refer to all of the detail, because it might be a bit lengthy.

I will have to refer to the glossary; the report refers to the "UG Committee". I do not know what that is! The report states -

> 6.3 The UG Committee was advised by the Minister for Agriculture and Food (then Minister for Agriculture, Forestry and Fisheries) that Schedule 2, Part 1, Item 1 of the Commonwealth Act would not "*pose a risk to Western Australia's ability to impose the quarantine requirements that are necessary to protect the State's biosecurity*."
>
> 6.4 Similarly, the Department of Agriculture and Food advised the Committee of its view that:
>
> > *The passage of this legislation will have no impact on Western Australia's ability to exclude apples from New Zealand or anywhere else on biosecurity grounds.*
> >
> > …
> >
> > [Schedule 2, Part 1, Item 1 of the Commonwealth Act] *does not really do more than state the situation as it is. Biosecurity measures that are justified on biosecurity grounds and backed up by a robust risk assessment do not amount to an unjustifiable discrimination or an arbitrary trade restriction and are not in breach of the WTO*

> *agreements. If that provision was not there, the situation would be the same as it is with that provision there because WA, as part of Australia, is bound by the WTO agreements. If WA were introducing or acting upon laws that breached paragraph (b) - or even if it was not there - and they were introducing and implementing those kinds of laws, they would be in trouble both with the World Trade Organization and the commonwealth, who would, no doubt, try to use section 109 of the Constitution to give its quarantine laws the power over the WA laws. However, the thing is that that paragraph is there and it does not really add anything except clarity to the situation.*

That was a submission from the manager, legislation, Department of Agriculture and Food, to the committee inquiry. The submission continues -

> *Western Australia is obligated, as part of Australia under the SPS agreement, to not impose unjustifiable quarantine measures and to apply only the minimum measures necessary to reduce the risk to an appropriate level and to meet a range of other principles. To reemphasise that: if Western Australia was to be noncompliant with this clause, we would expect the New Zealand government to be threatening to take Australia to the WTO court for breach of the SPS agreement.*

That is very interesting. Just as an aside, when I was in New Zealand a few months ago at a committee conference, the main newspaper in Wellington was running advertisements criticising Australia for restricting the importation of New Zealand apples; so I thought, well, politically New Zealand is still very keen to continue to pressure Australia to get as much access to our markets as it can. I think that is where the concerns of the apple growers are partly justified. Nevertheless, the question that the committee was trying to establish is whether this bill will reduce our capacity to reject New Zealand apples.

The committee also looked at a legal opinion that was obtained by a then member of the Legislative Council, Hon Chrissie Sharp, regarding the effect of the 1999 bill, and concluded that, among other things -

6.6 . . .

- if the 1999 Bill was passed so that the Commonwealth Act was adopted but Schedule 2, Part 1, Item 1 of that Act was amended to exclude the reference to the *Agreement Establishing the World Trade Organisation*, Western Australia could then enact quarantine legislation which is inconsistent with that agreement (and the SPS Agreement) but which would be exempt from the operation of the Commonwealth Act and the TTMRA. However, Australia and Western Australia are bound, at international law, by the terms of the *Agreement Establishing the World Trade Organisation* (which includes the SPS Agreement) and any breach of that agreement would render Australia liable at international law;

- there is nothing in the SPS Agreement that would prevent Western Australia, rather than the Commonwealth, enacting measures to prohibit the import of, for example, apples infected with the disease known as 'fire blight' if those measures were consistent with the terms of the SPS Agreement:

  The SPS Agreement *recognises the concept of pest and disease free areas and areas of low pest and disease prevalence (Article 6), allowing Members to take a more conservative approach to risk in those areas. Therefore, if fireblight became established in the Eastern States and not in Western Australia, Western Australia could implement measures to retain its disease free status.*

- if this State considered New Zealand apples to pose a higher risk of introducing a particular pest or disease than the import risk assessment conducted by the Commonwealth and Western Australia chose a level of protection against New Zealand apples which is higher than that of the Commonwealth, New Zealand may be more likely to challenge the Western Australian measures at the WTO; and

- if Western Australia wishes to maintain areas which are free of any pests or diseases which pose a risk to agricultural crops or native flora and fauna within the State, that wish should be reflected in the Commonwealth import risk assessment and the Commonwealth's chosen level of protection (pursuant to the SPS Agreement). "*This point should be represented to the Commonwealth in the strongest possible terms.*"

The committee then went on to comment -

6.7 On this issue, the Committee accepted the advice of the then Minister for Agriculture, Forestry and Fisheries and the then Executive Director, Plant Industries, Department of Agriculture to the UG Committee, and the advice of the Department for Agriculture and Food in this inquiry. The Committee also noted the legal opinion obtained by the then Member of the Legislative Council, Hon Christine Sharp, regarding the effect of the 1999 Bill.

6.8 The Committee observed that Western Australia, as a part of Australia, is bound by the SPS Agreement regardless of the provisions in the Bill and the Commonwealth Act which is proposed to be adopted. That is, Western Australian quarantine laws, and their enforcement (referred to as 'sanitary or phytosanitary measures' in the SPS Agreement), must already be consistent with the SPS Agreement. By passing the Bill, and therefore, adopting Schedule 2, Part 1, Item 1 of the Commonwealth Act, the Western Australian Parliament would be confirming the application of the SPS Agreement to the quarantine laws in this State. For example, if a Western Australian quarantine law authorised quarantine measures which are unjustifiably trade restrictive, the law would be inconsistent with the SPS Agreement **and** the Commonwealth Act, and invalid pursuant to section 109 of the *Commonwealth of Australia Constitution Act* to the extent of the inconsistency.

6.9 If the Bill is passed and the Commonwealth Act is adopted, Schedule 2, Part 1, Item 1 of the Commonwealth Act would be an essential feature of the law because it would provide the permanent exemption of Western Australia's quarantine laws from the TTMRA.

I know that that is complicated, but we did revisit the issue of potential impact on the capacity to maintain our strict quarantine and biosecurity requirements for fire blight and other potential diseases that might come from New Zealand. One of the other issues we examined in relation to quarantine was the operation of the memorandum of understanding on plant and animal quarantine measures, which also has a bearing on this. Page 28 of the report reads -

6.30 The Committee refers to the discussion of the *Memorandum of Understanding on Animals and Plant Quarantine Measures* between the Commonwealth, the States and the Territories of Australia dated 21 December 1995 (**MOU**) (attached to this Report as **Appendix 1**) at paragraphs 6.13 to 6.15 and 7.11 to 7.15 of the UG Committee's report on the 2002 Bill. In particular, the Committee noted the then Department of Agriculture's advice that the "*Commonwealth-State/Territories partnership approach to biosecurity would be affirmed through an exchange of letters.*

6.31 Despite some answers which were provided to questions on notice in the Senate in 2006 which suggested that the MOU had been amended in 2002, the Committee was advised by the Department of Agriculture and Food that the MOU has not been rewritten or re-signed.

The report then makes reference to the actual questions that were asked in the Senate on this matter. On page 32, the reports states -

6.38 When the Committee queried whether it would be advantageous for Western Australia to amend the MOU to reflect the 'partnership approach' to addressing regional differences in biosecurity risks, the Department of Agriculture and Food indicated that the amendment would be useful but it would not be essential.

> *My understanding is that the original MOU was largely designed as a mechanism to educate the states about Australia's obligations, and therefore the obligations of the states, under the SPS agreement. The commonwealth officers, I assume in consultation with their minister, have taken the view that what is articulated in this letter* [the 'partnership approach'] *is better covered in the published IRA guidelines than in another MOU. My personal assessment is that a rewording and re-signing of the MOU would be instructive because it would bring to the attention of all ministers the importance of these issues, including a reminder to the states that we do need to comply* [with the SPS Agreement].

. . .

6.39 The *Final Import Risk Analysis Report for Apples from New Zealand* was released in November 2006 and recommended that the importation of apples from New Zealand into Australia be permitted, subject to seven risk management conditions. One of those conditions was that New Zealand apples not be permitted to be imported into Western Australia on the basis that no satisfactory risk management procedures could be identified for the disease

known as 'apple scab'. The Department for Agriculture and Food described the IRA as "an extensive analysis. It is the most comprehensive analysis of pests and diseases relating to apples that has possibly ever been completed anywhere in the world."

That might give some comfort. We heard from the WA Fruit Growers Association, and Hon Norman Moore touched on that briefly. I think it is fair to say that the fruit growers remain concerned, even after we met and heard their concerns and suggested that this bill might not have the consequences they were concerned about. However, I have some lingering concerns about the mechanisms and the documents that supposedly provide the assurance that this bill will not impact on our capacity to maintain the quarantine status. I am not 100 per cent reassured by that. On page 38 of its report in this whole area of biosecurity, the report states -

> 6.52 The Committee was of the view that it is imperative that Western Australia's unique biosecurity characteristics are recognised and protected in the formulation of Australian biosecurity policies. With this in mind, the Committee accepted that the SPS Agreement requires Australia to recognise regional differences (both within and outside of Australia) in biosecurity characteristics when assessing biosecurity risks or applying biosecurity or quarantine measures. In the Committee's view, this approach to biosecurity in Australia is evident in current government operations, including Biosecurity Australia's conduct of IRAs (this is despite the fact that the MOU has not been formally updated to reflect the 'partnership approach'). It is this requirement under the SPS Agreement and the 'partnership approach' which offers Western Australia the means of ensuring that its unique biosecurity characteristics are considered in the development or review of any Australian biosecurity policy. As was recognised in the legal opinion obtained by the then Member of the Legislative Council, Hon Christine Sharp, regarding the effect of the 1999 Bill, if, during an IRA, Western Australia wishes to assert differences in its biosecurity requirements in relation to the rest of Australia, it must ensure that this wish is represented to the Commonwealth in the strongest possible terms and with as much supporting scientific evidence as possible.
>
> 6.53 Given these findings, a majority of the Committee (comprised of Hons Graham Giffard, Sally Talbot, Ken Baston and Peter Collier) considered that it is not essential for the MOU to be amended to reflect the 'partnership approach'. Despite the Department of Agriculture and Food's advice that it would be instructive to amend the MOU in this way, these Members were of the view that the requirements of the SPS Agreement (which the Bill confirms) and the current approach to developing Australian biosecurity policy are sufficient to ensure that Western Australia's biosecurity requirements are recognised and protected. These Members thought that any formalisation of the 'partnership approach' need not impact upon the passage of the Bill.
>
> 6.54 While a minority of the Committee (comprised of Hon Giz Watson) also considered that it is not essential to amend the MOU to reflect the 'partnership approach', the Member was of the view that such an amendment would be highly desirable as it would remind the Commonwealth, the States and the Territories of their obligations under the SPS Agreement, including the need to recognise regional differences in biosecurity characteristics.

That was the issue of quarantine. I have touched on the implications of not passing this bill in terms of the arguments presented to the committee. I refer to page 41, which states -

> 7.4 The Minister for Agriculture and Food endorsed this view "*wholeheartedly*". He informed the Committee that, in addition to New Zealand teachers and nurses, mechanics, dentists and fitters and welders are also currently precluded from practising in Western Australia due to the lack of mutual recognition arrangements between the two jurisdictions,

I am not sure that that is entirely correct. I do not think it precludes them from practising. It simply means that they have to meet some assessment of their training and skills before they can practise in Western Australia. I think that is slightly different.

In the few minutes I have left, I want to emphasise that depending how this bill travels through the committee stage, that will determine whether the Greens ultimately support it. We certainly do not support it in its current form. Whilst we acknowledge that the government has responded positively to a number of the recommendations of the standing committee, the fact that the government has not been able to support recommendation 2, which deals with the Henry VIII aspect of this bill, is sufficient for us to not support the bill at this stage. If an amendment is forthcoming, we will re-visit our position. We would argue that at present the bill is inconsistent with the WA Parliament's constitutional responsibility to make laws, because it effectively gives the commonwealth a power to amend state law.

It is worth noting that a similar issue arose in 2003 with the Consumer Credit (Western Australia) Amendment Bill 2002. Under that bill, consumer credit laws approved by the ministerial council and passed in Queensland could automatically be adopted in Western Australia. The Greens and the opposition opposed the bill on the basis that this was an unacceptable way for legislation to be adopted. At least Hon Barry House was party to this debate in 2003. Facing defeat of the bill, the government moved an amendment to require parliamentary approval of the Queensland template laws before they could come into effect in Western Australia. An amendment of that kind does not appear to be available here on the basis of the government's legal advice. However, it is important to note that clause 7 of the bill provides a sunset clause of five years or less if the government brings it on sooner. This perhaps provides some comfort. Nevertheless, we would argue that clause 4(3) of the bill remains problematic. We will wait to see whether the government is prepared to either move or accept some amendment to this clause. At this stage we will be opposing the bill. Perhaps we will vote for the second reading and see how the bill comes out at the committee stage. We may ultimately delay our decision on the bill until the third reading.

HON MURRAY CRIDDLE (Agricultural) [8.53 pm]: I want to make a few brief remarks. We heard very detailed comments from the Leader of the Opposition and Hon Giz Watson. Obviously, I am one of the members who has had a concern with the Trans-Tasman Mutual Recognition (Western Australia) Bill 2005 from day one. As the introduction to the bill explains, the bill provides for the recognition by each state and territory of regulatory standards adopted in New Zealand regarding goods and occupations, and for related purposes.

One of the things we need to understand from the beginning is that Western Australia is in a very privileged position because it is a long way from anywhere else and it has the opportunity to maintain outstanding standards with the products that it has. That isolation gives us the opportunity to maintain those standards in the future. I listened very intently to Hon Giz Watson when she spoke about falling into line with New Zealand standards. That immediately led me to reflect on the dumbing down issue to do with teachers and so forth and the standards in education that I addressed recently. There is no way in the world that we need to reduce the standard of any of our products in Western Australia. It is interesting that the Minister for Agriculture and Food is currently maintaining a very strong hold on the genetically modified foods debate when we may well be losing a bit of ground on this issue. I would not like to think that we are compromised in any way at all. I understand that the minister is saying that the argument is about 50-50.

When I look at standards and the issue of diseases coming to Western Australia, I am reminded of equine influenza, which is a real issue now. I entirely understand the decision that the minister made about horses coming to Western Australia from environments that are currently disease free.

We do not want to make any mistakes. Of course, the fire blight issue has been raging in the fruit industry for quite some time as a result of the possible importation of apples from New Zealand. That has really been the basis of the argument in Western Australia. I have some concerns with the standards for the future. I emphasise the fact that Western Australia has a natural barrier that gives us the opportunity to maintain very high standards. In my view, it is the state's responsibility to maintain those standards. I understand that under the Plant Pests and Diseases (Eradication Funds) Act, there are regulations to provide for the maintenance of those standards, and that was reflected in the comments of the Leader of the House when I spoke to him recently. Perhaps the Leader of the House can develop that particular discussion when he replies to the second reading debate so that we all understand that there is a chance for the regulations to deal with some of these issues.

Those are my main concerns. I raised the issue of quarantine during debate on the Biosecurity and Agriculture Management Bill. I also raised it the other day during debate on the Fish Resources Management Amendment Bill with regard to people coming to Western Australia from Indonesia and places like that. I will continue to do that because we have a natural advantage and we need to maintain it. Coming from that angle, I will listen to the Leader of the House as he presents his second reading response, and I will see how we go from there.

HON BARRY HOUSE (South West) [8.56 pm]: The Trans-Tasman Mutual Recognition (Western Australia) Bill has been on the notice paper for three Parliaments and for three governments - the Court, Gallop and Carpenter governments. The issues have been expressed many times. We have heard that three committee reports on the bill have been tabled. I do not think anyone in this chamber has an issue with the reciprocal rights relating to teaching qualifications and other professional qualifications. However, there is a lingering doubt about whether we as a Parliament, if we pass this legislation, would open the door to the possibility of apples being imported into Australia, and Western Australia in particular, and some of the issues associated with it, particularly fire blight. I have read all the reports and all the literature. This is basically a biosecurity and quarantine issue; it is not necessarily a qualifications issue. However, I reiterate that there is a lingering doubt. There is certainly a lingering doubt in the minds of Donnybrook apple growers. Those people and their industry are very important to the members who represent the South West Region. We certainly want to do the right

thing by that industry, which is a vital part of the infrastructure of the south west. As a local member, I certainly do not want to have to confront the Donnybrook apple growers some years down the track and tell them that we passed this legislation and that it opened the door to fire blight in the Western Australian apple industry. I certainly do not relish that possibility, if that is a possibility, because some of those Donnybrook apple growers are pretty fearsome people. They are tough country people and they have very firm opinions on the way the world should be. They are good solid people who contribute an enormous amount to this state and this nation. I want to walk tall and look those people directly in the eye and do it with some assurance that we have passed this legislation in the firm knowledge that it will not jeopardise their industry; it will not in any way open the possibility of fire blight, coddling moth or apple scab being introduced into their industry, which might destroy their livelihoods. In that vein I will also be listening very intently to the minister's response to this legislation and I will seek from him an absolute assurance that those issues will not be put on the line. From an electorate point of view, it is very important to all of us who represent the South West Region. We are here to do the right thing by our communities. That is our job and we all take that seriously. We intend to remain committed to that.

As I said, I will be listening very intently to the Minister for Agriculture and Food's response to see how authoritative he is and how persuasive he is in the argument he puts to the house in the next few minutes.

HON NIGEL HALLETT (South West) [9.02 pm]: I endorse the comments of Hon Barry House on the Trans-Tasman Mutual Recognition (Western Australia) Bill 2005, which is before us tonight. The people of Donnybrook and Manjimup and fruit growing areas in general are all very hard-working people. They have committed their lives to providing the Western Australian and Australian public and overseas markets with a quality product.

The Western Australian Fruit Growers Association advised that the fresh New Zealand apples that were being imported into Australia until 1921 were banned in that year on the basis that a disease called fire blight had been introduced into that country in Auckland in 1919. Here we are in 2007, which is about 90 years later or thereabouts. In 1986 and 1989 New Zealand once again sought access to the Australian market but both applications were refused primarily because of the unresolved issue of the risk relating to fire blight.

In 1995 New Zealand again applied for access for its fresh apples to the Australian market. Once again, that application was rejected. History shows that we must go forward with a certain amount of hesitation about where the minister is going with this bill. I must acknowledge the work of a former member of the house, Hon Chrissy Sharp, when she moved the following motion on 3 June 2004 -

> That this House consider that the import risk analysis on the importation of apples from New Zealand will provide inadequate protection to the Western Australian apple and pear industry.

I do not think anything has changed to date. That is part of the equation we are looking at. We have looked at all the other issues talked about concerning employment and other industries. Trade is important to Western Australia. We have seen what has happened recently with the horse industry. We all know that once we start moving any commodity around the world, whether it is people in aircraft or whatever, diseases will come. It is our duty as members of this Council to ensure that this legislation is secured for the future of the fruit growers of Western Australia. I will certainly be looking at the response by the Leader of the House on the detail of the bill.

HON KIM CHANCE (Agricultural - Leader of the House) [9.05 pm]: I thank all members who have made a contribution to the debate, including Hon Giz Watson for reading back verbatim most of the committee report. It was in fact a very good report, but whether it needed to be read back again is another question.

There are two issues of substance. I do not intend to speak for very long, because I think we have all put both sides of the story from every possible angle, so my contribution is somewhat superfluous. The two issues of substance were both raised by the Leader of the Opposition. They are the Henry VIII clauses and the question of recommendation 2 of the committee report. I forget the exact paragraph of the committee's report that made this point, but the point is certainly made in the government's response to recommendation 2 that we do not have a lot of discretion in this; we either accept the uniform legislation or, if we do not like what we have, we reject the legislation. It is as simple as that. That is the nature of uniform legislation and the very reason that we have procedures in this Parliament, most particularly standing order 230A, to ensure that Parliament is prepared to accept or reject the adoption of uniform law. The Henry VIII clauses are not something we can do anything about, other than by taking the option of rejecting the legislation. We cannot amend commonwealth law. We cannot amend a statute of the state of New South Wales. There are processes, which are very clearly explained in the committee's report, which relate to the nature of the amendments that might be made and the way in which two-thirds of the signatory states have to be satisfied with those amendments. I do not intend to restate the case that is made in the government's response.

Another issue was raised on quarantine. I think that nobody outside this chamber, save some people who have been in this chamber, actually believe that this has anything to do with quarantine at all. The committee has been given very clear advice that it has nothing to do with quarantine. Let me state this quite clearly for the record: nothing in this legislation affects Western Australia's obligations as a sovereign state member of the Commonwealth of Australia in relation to our World Trade Organization obligations - nothing. It would not matter whether this bill even mentioned the World Trade Organization and phytosanitary agreement obligations or not, because our obligations exist regardless of this legislation. What this legislation does is simply note the fact that we are bound by our obligations under the World Trade Organization protocols. If it had not said that, probably nobody would have noticed, but the laws would have been binding anyway and the obligations would have been binding. I think the committee was satisfied in the end of that fact, but it just seems a shame that this issue has been one which has so delayed the legislation. I understand that fruit growers are sceptical and disillusioned about the import risk assessment process, which is a component of the sanitary and phytosanitary agreement. I agree with much of their scepticism. However, that has nothing to do with this legislation. Whether or not this legislation is passed is totally irrelevant to the question of IRAs and their quality. Five years ago I explained to apple growers at Pickering Brook that whatever decision was made about apples during negotiations with New Zealand, no New Zealand apples would ever come into Western Australia. I explained the reasons why and those reasons remain the same. The decision about the IRAs has already been made. We have been looking at this legislation for so long that the event that we all worried about has been and gone. Certainly, no New Zealand apples are coming into Sydney; however, one day they will and no doubt fire blight will come with them. That is one of the failings of the IRAs. Similarly, the decision about Canadian and Danish uncooked pig meat means that eventually we will import multisystemic wasting syndrome. There is a one in 10 000 chance that it will come in on that basis. For every 10 000 carcases that come in, we are certain to experience one case of multisystemic wasting syndrome. It is a crazy way of making decisions, but that is the IRA process.

Hon Murray Criddle interjected.

Hon KIM CHANCE: Certainly. The reason that New Zealand apples will never come into Western Australia at our current disease-free level is that Western Australia is the only jurisdiction in the world that has none of the big three apple diseases. Fire blight is the first. The honourable Leader of the Opposition mentioned the other two, which are apple scab and codling moth. Other Australian states already have apple scab and codling moth. The importation of apples from any other Australian state is therefore prevented by a Western Australian act; that is, the Plant Pests and Diseases (Eradication Funds) Act 1974. That is a different act from the commonwealth Quarantine Act, which regulates whether or not New Zealand apples come into any part of Australia - but that part cannot include Western Australia. The question was raised with me whether the provisions of the Quarantine Act might override the Plant Pests and Diseases (Eradication Funds) Act 1974 under the provisions of section 109 of the Constitution. They do not and they cannot. The reason that they cannot is that section 109 of the Constitution only makes that imperative on behalf of the commonwealth legislation to the extent of any conflict. There cannot be conflict between the commonwealth Quarantine Act and the Western Australian Plant Pests and Diseases (Eradication Funds) Act 1974.

Hon Murray Criddle: Is that the same reason you gave last time we had this debate?

Hon KIM CHANCE: Yes. There cannot be any conflict, because when one reads the two acts, they are meant to operate together. They recognise each other. It is impossible for one to operate in conflict with the other since both were designed to work side by side. There is the issue, as Hon Giz Watson raised, of the memorandum of understanding and the side letters to the MOU. That was our way of putting in place a formal recognition of the regional freedom status, with respect to the signatory states, between the state of Western Australia and the then federal Minister for Agriculture, Fisheries and Forestry, Warren Truss. That letter does exist. In fact, I think I tabled it in this Parliament. I may not have, but it does exist. In itself that was a belts and braces approach. The regional freedom guarantees, which recognise Western Australia and the other state signatories' capacity to have a different position from the rest of Australia, is guaranteed by the sanitary and phytosanitary agreement. The very instrument of World Trade Organisation operation is not our threat; it is our guarantee that we do not have to take that material if that material will adversely affect our industry. The debate is about what level of risk constitutes a due risk. That is a real debate and I recognise that.

Hon Murray Criddle: That is where the dumbing down part comes in.

Hon KIM CHANCE: Yes. However, that decision already has been resolved. It was resolved in exactly the way I told the Parliament and the apple industry it would be resolved. That is exactly what has happened. Yes, ultimately, I knew that we could not allow to continue the situation whereby New Zealand apples were kept out of Australia. I knew it was something that could be put off for a few years, but ultimately we would always lose

that as a WTO signatory. I always knew that it would never allow those apples to come into Western Australia. As I said, that decision has been made and that is exactly where we are.

Mutual recognition is not just about apples. Hon Murray Criddle was perhaps kind in not mentioning that since I have been the Minister for Agriculture and Food I have allowed New Zealand cherries and apricots to come into Western Australia, because, by any analysis under the import risk analysis, we could not continue to keep them out. While the cherries might be an arguable case, I believe that the importation of New Zealand apricots will be an advantage, rather than a disadvantage, to our apricot industry. We have such a short apricot season and members know that because as consumers the time we can get apricots is limited. The New Zealand apricots can come from only the South Island. They cannot come from the North Island because of other quarantine reasons. It means that our consumers will have access to apricots over a longer time, and that is a good thing for consumers. It is also a very good thing for our apricot producers, because their product achieves a much better recognition.

I will return briefly to those two issues of real substance raised by the Leader of the Opposition.

Hon Norman Moore: Before you do, would you refer to the matters raised by Hon Giz Watson about products coming into New Zealand from elsewhere and then being able to come into Australia?

Hon KIM CHANCE: Yes, I thank the Leader of the Opposition for reminding me of that. It is a requirement of the SPS agreement that the original country of origin has to have the same disease-free status as the country of origin if it is a second-hand importer. It is generally not something that New Zealand, in particular, is prepared to do because it is a very risky process. If New Zealand were fire blight free, New Zealand would not be able to, for example, import United States apples that have endemic fire blight and then export them into Australia because of the fire blight status. Of course, New Zealand would not accept them in the first place. Some plant pests and diseases that exist in other countries can, theoretically, be imported from New Zealand, but they have to meet the same standards, because of the SPS agreement, as they would if they were coming into Australia direct. There would be no commercial advantage to bringing them in through New Zealand. One example I could give of that, which is a realistic example, is the grape insect called something like the lacy-winged sharpshooter.

Hon Robyn McSweeney: Are you sure it's not a drink?

Hon KIM CHANCE: It does sound like one.

It is an insect of common infestation in the Californian table grape industry. We have had very strong representation from the United States to bring table grapes into Western Australia. Under the sanitary and phytosanitary agreement the Australian Quarantine and Inspection Service actually approved the importation of Canadian table grapes into Western Australia, and it was the very effective work of and representation by the Western Australian Department of Agriculture and Food to the Australian Quarantine and Inspection Service that prevented that from happening. New Zealand also does not have that particular insect. Any attempt to re-export Californian grapes from Australia to New Zealand, because the situation goes both ways, would be prevented under the terms of the SPS agreement. Although the execution of the SPS agreement contains some clear holes, the rules themselves are actually quite sound and provide a capacity for representation of individual regions, such as the state of Western Australia or any part, as we could be making separate representation for the Kimberley but not the south of Western Australia. Therefore, regional freedom is not confined only to state boundaries; the SPS rules allow regional freedom to be protected.

I will briefly refer again to the question of recommendation 2 of the report of the Standing Committee on Legislation. The honourable Leader of the Opposition went through quite a bit of the government's argument. However, it might not have been quite clearly understood that the legal advice prepared by the State Solicitor's Office for the government acknowledges that the language of clause 4 of the current bill reflects that of the adopting legislation of other jurisdictions and that of the Mutual Recognition (Western Australia) Act 2001. The legal advice also acknowledged that clause 4 of the current bill would be effective to adopt the provisions and purposes of section 51(xxxvii) of the Commonwealth of Australia Constitution Act and that the commonwealth act would apply to Western Australia as a participating jurisdiction. However, the amendment that the committee has recommended would effectively require state parliamentary scrutiny of amendments to the schedules in the commonwealth act, and the government very strongly questions the validity of that approach because essentially that would modify the commonwealth act prior to adoption. That is not a purpose that can be validly achieved consistent with the provisions of section 51(xxxvii) of the Constitution. That is the primary reason that we believe recommendation 2 cannot be adopted.

Having said that, the government is very grateful to the committee for raising the matters that it has raised. In particular we are keen to introduce at the committee stage - which will not be until tomorrow for a number of reasons - an amendment that can put in place the effect of recommendation 1 in particular, and we will be

supporting methodology to adopt recommendations 3 and 4 of the report. We are grateful for the committee's making those particular points. Again I thank the committee for its very good work, and indeed the committees that prepared the earlier reports. I can say to those members who are concerned about the issue of quarantine affecting fruit growers that I share their concerns, but nothing in this legislation makes any difference.

Question put and passed.

Bill read a second time.