

GOVERNMENT RESPONSE TO THE RECOMMENDATIONS OF THE LEGISLATIVE COUNCIL STANDING COMMITTEE ON LEGISLATION

Report No.8: Trans-Tasman Mutual Recognition (Western Australia) Bill 2005

The Government notes the report of the Legislative Council Standing Committee on Legislation into the Trans-Tasman Mutual Recognition (Western Australia) Bill 2005 tabled on 26 June 2007.

Before responding to the specific recommendations of the Committee the Government would like to make the following general observations about the report.

- (1) The Government recognises the Committee's agreement with advice provided by the Department of Agriculture and Food that the Bill will have no impact on Western Australia's capacity to exercise biosecurity or quarantine measures in relation to apples imported from New Zealand or anywhere else based on genuine biosecurity grounds.
- (2) The Government recognises that the passage of the Bill will provide New Zealand teachers with the ability to have their teaching qualifications recognised in Western Australia.
- (3) The Government also acknowledges the favourable findings of the Productivity Commission in relation to the impact of the Trans-Tasman Mutual Recognition Acts and the Mutual Recognition Agreement in other jurisdictions.
- (4) Western Australia is the only jurisdiction not to have given legislative effect to the Trans-Tasman Mutual Recognition Agreement, which was signed, by all Australian Heads of Government and the Prime Minister of New Zealand in 1996.

In its report the Committee made five recommendations, which will be dealt with separately in this response.

Recommendation 1: 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.

In paragraph 5.7 of its report the Committee argued that Clause 4(1) of the Bill in its current form would create a situation where:

... this would mean that any amendments which are made to the Commonwealth Act (and which commence operation) in the period between the Parliament passing the Bill and the giving of the Royal Assent would be adopted by this State without the Western Australian Parliament's knowledge and/or approval of those amendments.

As reported the Committee was concerned that any changes to the Commonwealth Act between the passing of the Bill and its Royal Assent could be effectively accepted by Western Australia without Parliament's knowledge. The Committee report referred to the advice provided by the Parliamentary Counsel that it would be preferable that difference between the date of adoption and Royal Assent is as short as possible.

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.

The Committee argues in paragraph 5.10 an alternative position to the current clause 4(1) which would see:

The adoption of the Commonwealth Act, as it exists at a date to be fixed by the Legislative Council; for example, being a date, which is earlier than, or which coincides with, the third reading of the Bill in the Legislative Council. This would ensure that the Bill is passed with the Parliament's knowledge and approval of the precise version of the Commonwealth Act which is being adopted.

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. Therefore:

<p>The Government <u>accepts</u> recommendation 1 of the Committee's report.</p>

Recommendation 2: 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:

- (a) are effected by Commonwealth regulations made under that Act; and***
- (b) relate to Commonwealth and/or Western Australian laws only,***

are only adopted by this State if Western Australian regulations which are equivalent to, or adopt, the Commonwealth regulations are made.

The Government sought legal advice from the State Solicitors Office on the draft amendment prepared by the Parliamentary Counsel for the Committee, an amendment designed to implement recommendation 2 of the report.

The legal advice prepared by the SSO for the Government recognises that the language of the current clause 4 of the Bill reflects that of the adopting legislation of other jurisdictions, and that of the Mutual Recognition (Western Australia) Act 2001 (WA).

The legal advice also recognises that the current clause 4 of the Bill would be effective to adopt the provisions of the purposes of s.51 (xxxvii) of the Constitution and that the Commonwealth Act would apply in Western Australia as a participating jurisdiction.

The amendment that the Committee has recommended would effectively require State Parliamentary scrutiny of amendments to the Schedules in the Commonwealth Act. The Government questions the validity of this approach as essentially this would modify the Commonwealth Act and then adopt it. This is not a purpose that can be validly achieved consistently with the provisions of s.51 (xxxvii) of the Commonwealth Constitution.

The Government also feels that the language of s.51 (xxxvii) 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.
- 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.
- The Committee’s proposed changes to cl. 4(3) of the Bill would be in conflict with those of the Commonwealth Act, which requires only the endorsement of the executive governments of participating jurisdictions for a regulation amending a schedule to be authorised. In cases of a conflict Section 109 of the Commonwealth Constitution would resolve that conflict in favour of the Commonwealth Act.

The Committee is essentially proposing that the West Australian Parliament would be scrutinising changes to a Commonwealth Act dealing with a referred power from New South Wales.

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 would be accepting the Commonwealth Act with only minor cosmetic amendments occurring without the scrutiny of the West Australian parliament.

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 also a 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.

The Government is convinced that the proposals contained in recommendation 2 of the Committee's report would result in a Bill that could not be validly enacted. On that basis:

The Government rejects recommendation 2 of the Committee's report.

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

The Government acknowledges that the note at the end of the Bill would not form part of the proposed Act and accepts the Committee's assertion that there is a potential risk of confusion in certain circumstances.

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.

On that basis:

The Government accepts recommendation 3 of the Committee's report.

Recommendation 4: In order for effect to be given to Recommendation 3, the whole 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

The Government agrees to the request of the Committee for the Minister to:

- *table a copy of the most current version of the Commonwealth Act when debate on the Bill resumes in the Legislative Council; and*
- *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.*

On the basis that the Government has accepted recommendation 3 of the Committee's report:

The Government accepts recommendation 4 of the Committee's report.

Recommendation 5: The Committee (by a majority comprised of Hons Giz Watson, Peter Collier and Ken Baston MLCs) recommend 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.

Whilst the Government has no problem with recommendation 5 proposed by the Committee this recommendation has lapsed due to the Government's acceptance of recommendation 3 of the report.

<p>Recommendation 5 of the Committee's report is not applicable as recommendation 3 has been accepted by the Government.</p>
