



**THIRTY-SEVENTH PARLIAMENT**

**REPORT 8**

**STANDING COMMITTEE ON LEGISLATION**

**TRANS-TASMAN MUTUAL RECOGNITION  
(WESTERN AUSTRALIA) BILL 2005**

Presented by Hon Graham Giffard MLC (Chair)

June 2007

## STANDING COMMITTEE ON LEGISLATION

### **Date first appointed:**

17 August 2005

### **Terms of Reference:**

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

#### **“4. Legislation Committee**

- 4.1 *A Legislation Committee* is established.
- 4.2 The Committee consists of 5 members.
- 4.3 The functions of the Committee are to consider and report on any Bill referred by the House or under SO 125A.
- 4.4 Unless otherwise ordered any amendment recommended by the Committee must be consistent with the policy of a Bill.”

### **Members as at the time of this inquiry:**

Hon Graham Giffard MLC (Chair)	Hon Peter Collier MLC
Hon Giz Watson MLC (Deputy Chair)	Hon Sally Talbot MLC
Hon Ken Baston MLC	

### **Staff as at the time of this inquiry:**

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## **Government Response**

This Report is subject to Standing Order 337:

*After tabling, the Clerk shall send a copy of a report recommending action by, or seeking a response from, the Government to the responsible Minister. The Leader of the Government or the Minister (if a Member of the Council) shall report the Government's response within 4 months.*

The four-month period commences on the date of tabling.



## LIST OF ABBREVIATIONS AND DEFINED TERMS

1999 Bill	Trans-Tasman Mutual Recognition (Western Australia) Bill 1999
2002 Bill	Trans-Tasman Mutual Recognition (Western Australia) Bill 2002
AQIS	Australian Quarantine and Inspection Service
Bill	Trans-Tasman Mutual Recognition (Western Australia) Bill 2005
biosecurity	the prevention of the entry, establishment or spread of unwanted pests and infectious disease agents in people, animals, plants or the environment
Biosecurity Australia	an operating group in the Commonwealth Department of Agriculture, Fisheries and Forestry responsible for the development of Australia's biosecurity policy
CA Committee	Standing Committee on Constitutional Affairs (1989 to 2001)
Committee	Standing Committee on Legislation
Commonwealth Act	<i>Trans-Tasman Mutual Recognition Act 1997</i> (Cth)
IRA	import risk analysis
MOU	<i>Memorandum of Understanding on Animals and Plant Quarantine Measures</i> between the Commonwealth, the States and the Territories of Australia dated 21 December 1995
SPS Agreement	<i>World Trade Organisation Agreement on the Application of Sanitary and Phytosanitary Measures</i>
TTMRA	Trans-Tasman Mutual Recognition Arrangement
UG Committee	Standing Committee on Uniform Legislation and General Purposes (2002 to 2005)
WACOT	Western Australian College of Teaching
WAFGA	Western Australian Fruit Growers' Association Inc
WTO	World Trade Organisation



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**RECOMMENDATIONS FOR THE**  
**REPORT OF THE STANDING COMMITTEE ON LEGISLATION**  
**IN RELATION TO THE**  
**TRANS-TASMAN MUTUAL RECOGNITION (WESTERN AUSTRALIA) BILL 2005**

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**RECOMMENDATIONS**

- 1 Recommendations are grouped as they appear in the text at the page number indicated:

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**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.

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**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.

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

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**Recommendation 4:** 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.

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

## REPORT OF THE STANDING COMMITTEE ON LEGISLATION

### IN RELATION TO THE

#### TRANS-TASMAN MUTUAL RECOGNITION (WESTERN AUSTRALIA) BILL 2005

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#### 1 REFERRAL

- 1.1 On 3 May 2007, the Legislative Council referred the Trans-Tasman Mutual Recognition (Western Australia) Bill 2005 (**Bill**) to the Standing Committee on Legislation (**Committee**) for inquiry with a reporting deadline of 7 June 2007.<sup>1</sup> The debate on the motion to refer the Bill to the Committee revealed that the basis for the referral was the wish to clarify the Bill's effect on the State's biosecurity<sup>2</sup> or quarantine measures in relation to fruit imported from New Zealand.<sup>3</sup>
- 1.2 On 31 May 2007, the Committee sought and obtained an extension of its reporting deadline to 26 June 2007.<sup>4</sup>

#### 2 INQUIRY PROCEDURE

- 2.1 The Committee sought written submissions on the Bill by placing the details of the inquiry on the Parliament's website ([www.parliament.wa.gov.au](http://www.parliament.wa.gov.au)) and writing to the Western Australian Fruit Growers' Association Inc (**WAFGA**). Given the short inquiry timeframe and the specific nature of the referral, the Committee decided against advertising the inquiry in newspapers.
- 2.2 A written submission was received by the Committee from the WAFGA.
- 2.3 On 9 May 2007, a briefing on the Bill was held with the following Government representatives:
- Dr John Phillimore, Director, Intergovernmental Relations, Policy Division, Department of the Premier and Cabinet;

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<sup>1</sup> Parliament of Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 3 May 2007, pp1643 to 1644.

<sup>2</sup> Biosecurity is "*The prevention of the entry, establishment or spread of unwanted pests and infectious disease agents in people, animals, plants or the environment*": Biosecurity Australia, Department of Agriculture, Fisheries and Forestry, *Import Risk Analysis Handbook*, Australian Government, Canberra, 2003, p44.

<sup>3</sup> Refer to comments made by Hon Norman Moore MLC, Leader of the Opposition, and Hon Kim Chance MLC, Minister for Agriculture and Food, Parliament of Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 3 May 2007, p1643 and pp1643 to 1644, respectively.

<sup>4</sup> Parliament of Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 30 May 2007, p2571.

- Mr Alistair Jones, Principal Policy Officer, Intergovernmental Relations, Department of the Premier and Cabinet;
  - Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food; and
  - Ms Katy Ashforth, Manager, Legislation, Department of Agriculture and Food.
- 2.4 A public hearing was held on 23 May 2007 with Mr Alan Hill, Executive Manager, WAFGA and Ms Dianne Fry, President, WAFGA.
- 2.5 The Committee extends its appreciation to the individuals and organisations which provided evidence and information as part of the inquiry.

### 3 BACKGROUND TO THE BILL

- 3.1 The purpose of the Bill is to implement, in Western Australia, the Trans-Tasman Mutual Recognition Arrangement (**TTMRA**) which was signed by all Australian Heads of Government and the Prime Minister of New Zealand in 1996.<sup>5</sup> Western Australia is the last jurisdiction to give legislative effect to the TTMRA.
- 3.2 The Bill is 'uniform legislation' because, when passed, it will form a part of a national legislative scheme which will provide for Australia's recognition of the regulatory standards adopted in New Zealand regarding goods (including goods which are legally able to be imported into, and sold in, New Zealand)<sup>6</sup> 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* (Cth) (**Commonwealth Act**) in order to give legislative effect to the TTMRA. The Commonwealth Act is the 'template' legislation for the TTMRA. 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.<sup>7</sup>
- 3.3 A precursor to the Bill, the Trans-Tasman Mutual Recognition (Western Australia) Bill 1999 (**1999 Bill**), contained clauses which were very similar to those of the Bill. The 1999 Bill was referred to the Standing Committee on Constitutional Affairs (1989 to 2001) (**CA Committee**), which recommended in its 46<sup>th</sup> report that all clauses of

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<sup>5</sup> *Explanatory Memorandum* for the Trans-Tasman Mutual Recognition (Western Australia) Bill 2005.

<sup>6</sup> See Part 2 of the *Trans-Tasman Mutual Recognition Act 1997* (Cth).

<sup>7</sup> See section 51(xxxvii) of the *Commonwealth of Australia Constitution Act* and sections 6 and 50 of the *Trans-Tasman Mutual Recognition Act 1997* (Cth).

the 1999 Bill be passed.<sup>8</sup> The Committee refers that report by the CA Committee to the Legislative Council as it contains, among other things, a thorough discussion on the TTMRA and the Commonwealth Act.

3.4 The 1999 Bill lapsed from the Notice Paper when the Third Session of the 35<sup>th</sup> Parliament prorogued on 4 August 2000.

3.5 Another precursor to the Bill, the Trans-Tasman Mutual Recognition (Western Australia) Bill 2002 (**2002 Bill**), contained clauses which are identical to those of the Bill, and was referred to the Standing Committee on Uniform Legislation and General Purposes (2002 to 2005) (**UG Committee**). That committee recommended in its 4<sup>th</sup> report that the 2002 Bill be passed without amendment.<sup>9</sup> The Committee refers that report by the UG Committee to the Legislative Council as it contains, among other things:

- an informative technical analysis of clause 4 of the 2002 Bill (which is identical to clause 4 of the Bill);
- a thorough discussion of Schedule 2, Part 1, Item 1 of the Commonwealth Act, which is proposed to be adopted by the Bill. Schedule 2, Part 1, Item 1 of the Commonwealth Act has not changed since the UG Committee's report on the 2002 Bill was tabled on 17 October 2002; and
- a thorough discussion of general quarantine matters which are raised by the 2002 Bill. The Committee noted that it was Schedule 2, Part 1, Item 1 of the Commonwealth Act which gave rise to previous concerns about the 2002 Bill's effect on the State's quarantine measures (refer to heading 6 below).

3.6 The 2002 Bill lapsed from the Notice Paper when the Second Session of the 36<sup>th</sup> Parliament prorogued on 23 January 2005.

#### **4 SCOPE OF THIS REPORT**

4.1 This Report has been prepared as a continuation of the comments made by the UG Committee in its report on the 2002 Bill and should be read with that report.

#### **5 CLAUSE 4 - ADOPTION OF COMMONWEALTH ACT**

5.1 This clause proposes to adopt the Commonwealth Act, as a law which applies in Western Australia, as it was originally enacted, but also including any amendments

<sup>8</sup> Parliament of Western Australia, Legislative Council, Standing Committee on Constitutional Affairs, Report 46, *Trans-Tasman Mutual Recognition (Western Australia) Bill 1999*, November 1999.

<sup>9</sup> Parliament of Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 4, *Trans-Tasman Mutual Recognition (Western Australia) Bill 2002*, October 2002.

made to it before the Act proposed by the Bill receives the Royal Assent.<sup>10</sup> The text of the Commonwealth Act is displayed in a note at the end of the Bill.

### Committee Comment

- 5.2 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<sup>11</sup> the effect of section 16(3) of the *Interpretation Act 1984*, which provides that:

*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.*

- 5.3 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. This interpretation is supported by the *Explanatory Memorandum* for the Bill, which provides that:

*This clause [clause 4] adopts the Commonwealth Act as it stands at the time the Western Australian Act receives the Royal Assent.*

- 5.4 This would mean that any future amendments to the Schedules of the Commonwealth Act<sup>12</sup> 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.
- 5.5 As the UG Committee's interpretation of clause 4 was based on the advice of the Parliamentary Counsel, the Committee sought his view of its interpretation of the clause. The Parliamentary Counsel agreed with the Committee that clause 4(1) of the Bill overrides section 16(3) of the *Interpretation Act 1984* but did not agree with the remainder of the Committee's interpretation. However, he accepted that the

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<sup>10</sup> The *Trans-Tasman Mutual Recognition Act 1997* (Cth) will be adopted for an initial period of five years: clause 7 of the *Trans-Tasman Mutual Recognition (Western Australia) Bill 2005*.

<sup>11</sup> The possibility of this is contemplated in section 3(1)(a) of the *Interpretation Act 1984*, which provides that "*The provisions of this Act apply to every written law ... unless in relation to a particular written law — (a) express provision is made to the contrary;*".

<sup>12</sup> These Schedule amendments would be effected by Commonwealth regulations pursuant to sections 44, 45, 48 and 49 of the *Trans-Tasman Mutual Recognition Act 1997* (Cth).

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Committee's view is a tenable one, which is why clause 4(3) was included in the Bill.<sup>13</sup>

- 5.6 It was noted by the Committee that either interpretation would produce the same result: any amendments to the Commonwealth Act leading up to the point of adoption (Royal Assent) will be automatically adopted by this State, and after that point, only amendments to the Schedules to the Commonwealth Act which are effected by Commonwealth regulations will be automatically adopted.

**Point at which *Trans-Tasman Mutual Recognition Act 1997* (Cth) is Adopted**

- 5.7 Clause 4(1) of the Bill seeks to adopt the Commonwealth Act as it was originally enacted, but the adoption also includes any amendments that are made to the Commonwealth Act before the Act proposed by the Bill receives the Royal Assent. Theoretically, 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.
- 5.8 The other Australian jurisdictions which chose to implement the TTMRA by adopting the Commonwealth Act (Victoria, Queensland, South Australia and Tasmania) adopted the Commonwealth Act as it existed when it was originally enacted (including any amendments to the Schedules of the Commonwealth Act which are made by regulations from time to time).<sup>14</sup> The Northern Territory legislated to apply the Commonwealth Act "*as amended and in force from time to time*".<sup>15</sup>
- 5.9 It was noted by the Committee that section 4(1) of the *Mutual Recognition (Western Australia) Act 2001* (adoption of the *Mutual Recognition Act 1992* (Cth)) is effectively identical to clause 4(1) of the Bill.
- 5.10 As an alternative to adopting the Commonwealth Act as it exists immediately prior to the giving of the Royal Assent, the Committee considered 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.

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<sup>13</sup> Letter from Mr Greg Calcutt AM SC, Parliamentary Counsel, Parliamentary Counsel's Office, 11 June 2007.

<sup>14</sup> Section 4 of the *Trans-Tasman Mutual Recognition (Victoria) Act 1998* (Vic); section 5 of the *Trans-Tasman Mutual Recognition (Queensland) Act 2003* (Qld); section 4 of the *Trans-Tasman Mutual Recognition (South Australia) Act 1999* (SA); and section 4 of the *Trans-Tasman Mutual Recognition (Tasmania) Act 2003* (Tas).

<sup>15</sup> Section 5 of the *Trans-Tasman Mutual Recognition Act 1998* (NT).

- 5.11 In response to the Committee's request for an opinion on the Committee's proposal to fix a particular date of adoption in clause 4(1), the Parliamentary Counsel declined to express a view on the fixing of a date. However, he observed that the note to clause 4(1) would need to be consequentially adjusted by clerical action if clause 4(1) is amended substantially.<sup>16</sup> The Parliamentary Counsel also advised that it would be best if the interval between any fixed date of adoption and Royal Assent is as short as possible,<sup>17</sup> although he did not explain why this would be advantageous. The Committee reasoned that minimising the interval would also restrict the likelihood of amendments to the Commonwealth Act coming into effect during this period, being amendments which would not be adopted under the Bill unless they amended the Schedules to the Commonwealth Act and were effected by Commonwealth regulations. If, for example, another statute of the Commonwealth amends the Commonwealth Act during the interval between the date of adoption and the date of Royal Assent, and there is a pertinent reason to amend the Commonwealth Act as adopted in this State in a similar way, a Western Australian amending statute would be required to make that amendment. However, the Committee noted that this sort of legislative action would also be required for adopting any future amendments made to the Commonwealth Act via amending statutes.

*Committee Comment*

- 5.12 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.

**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.**

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<sup>16</sup> Letter from Mr Greg Calcutt AM SC, Parliamentary Counsel, Parliamentary Counsel's Office, 11 June 2007.

<sup>17</sup> *Ibid.*



## Henry VIII Clause

- 5.13 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)<sup>18</sup> 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.<sup>19</sup>
- 5.14 In all of the other Australian jurisdictions which chose to implement the TTMRA by adopting the Commonwealth Act (Victoria, Queensland, South Australia and Tasmania), and in the Northern Territory, which chose to apply the Commonwealth Act, any future amendments to the Schedules to the Commonwealth Act will also be automatically adopted or applied, respectively.<sup>20</sup>
- 5.15 It was noted by the Committee that generally, a Commonwealth regulation amending a Schedule can only be made with the unanimous endorsement of the regulation by the jurisdictions which are then participating in the TTMRA.<sup>21</sup> The general exceptions to that rule is that a Commonwealth regulation:
- amending a Schedule can be made with the unilateral endorsement of a participating State or Territory where the regulation merely relates to, or omits or reduces the extent of an exclusion or exemption of a law of, that State or Territory;<sup>22</sup> and
  - amending Schedule 3 can be made with the endorsement of at least two-thirds of the jurisdictions then participating in the TTMRA.<sup>23</sup>
- 5.16 The endorsements referred to above would be made by a ‘designated person’ from the Executive of each participating jurisdiction.<sup>24</sup> In the case of New Zealand or an

<sup>18</sup> See sections 44, 45, 48 and 49 of the *Trans-Tasman Mutual Recognition Act 1997* (Cth). These sections are Henry VIII clauses.

<sup>19</sup> A Henry VIII clause is a provision in an Act of Parliament which authorises the Act or other Acts to be amended by delegated legislation, which is made by the Executive.

<sup>20</sup> Section 4 of the *Trans-Tasman Mutual Recognition (Victoria) Act 1998* (Vic); section 5 of the *Trans-Tasman Mutual Recognition (Queensland) Act 2003* (Qld); section 4 of the *Trans-Tasman Mutual Recognition (South Australia) Act 1999* (SA); section 4 of the *Trans-Tasman Mutual Recognition (Tasmania) Act 2003* (Tas); and section 5 of the *Trans-Tasman Mutual Recognition Act 1998* (NT).

<sup>21</sup> Sections 44(3), 45(4) and 49(3) of the *Trans-Tasman Mutual Recognition Act 1997* (Cth).

<sup>22</sup> *Ibid*, sections 44(4), 45(5)(b) and 49(4).

<sup>23</sup> *Ibid*, section 48(5).

Australian State or Territory, the endorsement is made if the designated person for the jurisdiction publishes a notice in the official gazette of the jurisdiction setting out and endorsing the terms of the regulation before it is made.<sup>25</sup> In the case of the Commonwealth, the endorsement is constituted by the making of a recommendation by a Minister to the Governor-General for the making of the regulation.<sup>26</sup>

*Committee Comment*

- 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.
- 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.
- 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) Delegated legislation which is made and takes effect before the Parliament has considered it; for example, sections 41 and 42 of the *Interpretation Act 1984*. This method would provide the State Parliament with an opportunity to disallow amendments to the adopted Schedules in a way which is similar to the disallowance procedures usually associated with Western Australian regulations (or any other instruments of delegated legislation which are

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<sup>24</sup> This person is the Governor-General, the Governor, the Chief Minister, the Administrator or a Minister of the relevant jurisdiction: refer to the definition of ‘designated person’ in section 4 of the *Trans-Tasman Mutual Recognition Act 1997* (Cth).

<sup>25</sup> Section 43(1) of the *Trans-Tasman Mutual Recognition Act 1997* (Cth).

<sup>26</sup> *Ibid*, section 43(2).

subject to sections 41 and 42 of the *Interpretation Act 1984*); that is, any disallowance of the State instrument is likely to have effect only **after** it has come into force.

Of the three options examined by the Committee, this method would provide the lowest level of parliamentary scrutiny. It would involve publishing the equivalent (or adopting) State instrument in the *Western Australian Government Gazette*,<sup>27</sup> the instrument commencing operation in this State on the date of gazettal,<sup>28</sup> the tabling of the instrument in each House of the State Parliament within six sitting days after their gazettal,<sup>29</sup> and either House then having 14 sitting days in which to give notice of the motion for disallowance<sup>30</sup>. The amendment would cease to have effect on the day of the disallowance<sup>31</sup> (if any) but the disallowance would not affect the validity of anything done or the omission of anything in the meantime.<sup>32</sup> For example, an amending State instrument which has the effect of allowing New Zealand apples into Western Australia may lead to apples entering this State before the Western Australian instrument can be disallowed.

The Committee noted that a failure to table the State instrument within the required six sitting days after gazettal would result in its automatic disallowance.<sup>33</sup> It was also noted by the Committee that the Western Australian instrument would fall within the terms of reference of the Joint Standing Committee on Delegated Legislation, but that committee would not have the ability to recommend the disallowance of the instrument if the instrument is found to have been authorised or contemplated by the proposed Act.

- ii) Delegated legislation that does not come into effect until the period of possible disallowance by the Parliament has passed; for example, section 56 of the *Planning and Development Act 2005*. This method would provide an opportunity for the State Parliament to disallow amendments to the adopted Schedules **after** they are made but **before** they come into effect, in a way that is similar to the method for disallowing region planning schemes under the *Planning and Development Act 2005*.

<sup>27</sup> For example, refer to section 41(1)(a) of the *Interpretation Act 1984*.

<sup>28</sup> Or another later date as specified in the regulations: for example, refer to *ibid*, section 41(1)(b).

<sup>29</sup> For example, refer to *ibid*, section 42(1).

<sup>30</sup> For example, refer to *ibid*, section 42(2).

<sup>31</sup> In the Legislative Council, the motion for disallowance must be resolved within 11 sitting days after the motion for disallowance is moved: Legislative Council Standing Order 153(c).

<sup>32</sup> For example, refer to section 42(6) of the *Interpretation Act 1984*.

<sup>33</sup> For example, refer to *ibid*, section 41(6).

This method would involve the equivalent (or adopting) State instrument being published in the Western Australian *Government Gazette*,<sup>34</sup> tabling of the instrument within six sitting days after gazettal,<sup>35</sup> either House of Parliament then having 12 sitting days in which to give notice of the motion for disallowance,<sup>36</sup> and the instrument coming into effect once it is no longer subject to disallowance<sup>37</sup>.

The Committee noted that a failure to table the instrument, if it is referred to as a 'regulation', within the required six sitting days after gazettal would result in its automatic disallowance.<sup>38</sup> It was also noted by the Committee that the instrument would fall within the terms of reference of the Joint Standing Committee on Delegated Legislation, but that committee would not have the ability to recommend the disallowance of the instrument if the instrument is found to have been authorised or contemplated by the proposed Act.

- iii) Delegated legislation which can be made only after a draft is approved by both Houses of Parliament; for example, sections 5, 6 and 6B of the *Consumer Credit (Western Australia) Act 1996*. This method would provide the opportunity for the State Parliament to approve the amendments to the adopted Schedules **before** they are made and **before** they come into effect, in a way that is similar to the method for amending the *Consumer Credit (Western Australia) Code* and the *Consumer Credit (Western Australia) Code Regulations*.

Of the three options considered by the Committee, this method would provide the highest level of parliamentary scrutiny. It would involve the Minister giving a copy of the Commonwealth regulations to the Clerk of each House within seven days of these regulations being published in the Commonwealth *Government Gazette*,<sup>39</sup> the Clerk of each House giving a copy of the Commonwealth regulations to the parliamentary committee(s) whose terms of reference cover uniform legislation.<sup>40</sup> The Bill would authorise the Governor to amend the Commonwealth Act as adopted by Western Australia by a State instrument published in the Western Australian *Government Gazette*,<sup>41</sup> but

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<sup>34</sup> For example, refer to *ibid*, section 41(1)(a).

<sup>35</sup> For example, refer to *ibid*, section 42(1). As another example, also refer to section 56(1) of the *Planning and Development Act 2005*.

<sup>36</sup> For example, refer to section 56(2) of the *Planning and Development Act 2005*.

<sup>37</sup> For example, refer to *ibid*, section 56(3). In the Legislative Council, this is a period of 11 sitting days after the motion for disallowance is moved: Legislative Council Standing Order 153(c).

<sup>38</sup> For example, refer to section 41(6) of the *Interpretation Act 1984*.

<sup>39</sup> For example, refer to section 6B(1) of the *Consumer Credit (Western Australia) Act 1996*.

<sup>40</sup> For example, refer to *ibid*, section 6B(3).

<sup>41</sup> For example, refer to *ibid*, section 5(2).

that instrument could only be made if the draft of the instrument has first been approved by each House of the State Parliament.<sup>42</sup>

The Committee noted that this method would ensure that the amending Commonwealth regulation (and the equivalent or adopting draft Western Australian instrument) is examined by the Standing Committee on Uniform Legislation and Statutes Review, which is appropriate, given that the Bill will form a part of a uniform scheme of legislation. The instrument, if it is referred to as an 'order' would not be a disallowable instrument unless the Bill provided for this. An 'order' would come under the terms of reference of the Joint Standing Committee on Delegated Legislation; however, that committee has a standing resolution to consider only disallowable instruments.<sup>43</sup>

- 5.20 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: 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.**

#### **Updates to *Trans-Tasman Mutual Recognition Act 1997* (Cth)**

- 5.21 The Committee noted that the Commonwealth Act has been amended since the UG Committee's report on the 2002 Bill was tabled on 17 October 2002. These amendments appear to have been effected in order to update references to other

<sup>42</sup> For example, refer to *ibid*, section 5(3).

<sup>43</sup> Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 22, *Annual Report 2006*, March 2007, p1.

legislation. The following provisions of the Commonwealth Act were amended between 17 October 2002 and 21 June 2007:

- Sections 35(3) and (5) were amended on 16 May 2005. These amendments were consequential to various amendments which were made to the *Administrative Appeal Tribunal Act 1975* on 16 May 2005 and did not change the substance of sections 35(3) and (5).
- Schedule 1, Part 1, Item 1(1)(c) was amended on 14 September 2006. This amendment deleted the reference to ‘wholesale sales tax (Commonwealth) and’ from Schedule 1 of the Commonwealth Act, which deals with Australian laws which are excluded from the operation of Commonwealth Act, and therefore, the TTMRA.<sup>44</sup> Commonwealth sales tax laws became inoperative shortly after the introduction of the goods and services tax on 1 July 2000, as they generally ceased to apply to new transactions after that time.<sup>45</sup>
- Schedule 1, Part 2, Item 3 was amended on 15 March 2007. This amendment deleted the *Sydney 2000 Games (Indicia and Images) Protection Act 1996* (Cth) from Schedule 1 of the Commonwealth Act, which deals with Australian laws which are excluded from the operation of Commonwealth Act, and therefore, the TTMRA.<sup>46</sup> The *Sydney 2000 Games (Indicia and Images) Protection Act 1996* (Cth) was repealed on 31 December 2000.
- Schedule 1, Part 2, Item 5 was amended on 14 September 2006. This amendment deleted the reference to the *Sales Tax Assessment Act 1992* (Cth) and the *Sales Tax (Exemptions and Classification) Act 1992* (Cth) from Schedule 1 of the Commonwealth Act, which deals with Australian laws which are excluded from the operation of Commonwealth Act, and therefore, the TTMRA.<sup>47</sup> The deleted Acts were repealed on 14 September 2006.
- Schedule 2, Part 2, Item 3 was amended on 5 December 2003. Schedule 2 of the Commonwealth Act lists the Australian laws which are permanently exempt from the operation of the Commonwealth Act, and therefore, the TTMRA, to the extent that Schedule 2 indicates that they are exempt.<sup>48</sup> This amendment deleted the reference to the *Ozone Protection Act 1989* (Cth) and replaced it with “*Ozone Protection and Synthetic Greenhouse Gas Management Act 1989 (to the extent that it deals with ozone depleting*

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<sup>44</sup> Section 44(1) of the *Trans-Tasman Mutual Recognition Act 1997* (Cth).

<sup>45</sup> *Explanatory Memorandum for the Tax Laws Amendment (Repeal of Inoperative Provisions) Bill 2006*, p37.

<sup>46</sup> Section 44(1) of the *Trans-Tasman Mutual Recognition Act 1997* (Cth).

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid*, section 45(1).

*substances)*". This amendment was required in order to reflect the change of the short title of the *Ozone Protection Act 1989* (Cth) to *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*. The amendment also made sure that the application of the Commonwealth Act did not change due to the inclusion of synthetic greenhouse gases in the scope of the re-named *Ozone Protection Act 1989* (Cth): the exemption of the re-named *Ozone Protection Act 1989* (Cth) from the operation of the Commonwealth Act only applies to ozone-depleting substances.<sup>49</sup>

- Schedule 3, Item 2 was amended on 28 April 2003. Schedule 3 of the Commonwealth Act lists the Australian laws which are exempt from the operation of the Commonwealth Act, and therefore, the TTMRA, for a period of 12 months after 1 May 1998. The period of exemption may be extended by one or more further periods of up to 12 months.<sup>50</sup> This amendment deleted various trading laws (of the Commonwealth, New South Wales, Queensland, South Australia and Western Australia) which regulated sunglasses and fashion spectacles from Schedule 3. Commonwealth trading laws which regulated health warnings on tobacco products were also deleted.

5.22 At the 9 May 2007 briefing, the Committee was advised by Dr John Phillimore, Director, Intergovernmental Relations, Policy Division, Department of the Premier and Cabinet, that, as far as he was aware:

- the Commonwealth Act has not been amended in any substantial way since the UG Committee's report was tabled; and
- there are no plans to amend the Commonwealth Act.<sup>51</sup>

### Currency of Note at the end of the Bill

#### *Prior to Enactment of Act Proposed by the Bill*

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,<sup>52</sup> does not set out the most up-to-date version of the Commonwealth Act. For example, the text displayed in the note does not incorporate the amendments listed in the first four bullet points at paragraph 5.21 (that is,

<sup>49</sup> *Explanatory Memorandum* for the Ozone Protection and Synthetic Greenhouse Gas Legislation Amendment Bill 2003, p132: [http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/4FB4D5625C5C2746CA256F720030B7DA/\\$file/03082em.rtf](http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/4FB4D5625C5C2746CA256F720030B7DA/$file/03082em.rtf), (viewed on 7 June 2007).

<sup>50</sup> Sections 48(1) and (2) of the *Trans-Tasman Mutual Recognition Act 1997* (Cth).

<sup>51</sup> Dr John Phillimore, Director, Intergovernmental Relations, Policy Division, Department of the Premier and Cabinet, *Transcript of Evidence*, 9 May 2007, p4.

<sup>52</sup> Refer to clause 4(1) of the *Trans-Tasman Mutual Recognition (Western Australia) Bill 2005* and the note to that clause.

amendments to sections 35(3) and (5), Schedule 1, Part 1, Item 1(1)(c), Schedule 1, Part 2, Item 3, and Schedule 1, Part 2, Item 5). However, the Committee noted that the note at the end of the Bill was up-to-date when the Bill was introduced into the Legislative Council on 31 March 2005.

#### Committee Comment

- 5.24 The Committee acknowledged that the note at the end of the Bill would not form a part of the proposed Act.<sup>53</sup> 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.

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

- 5.25 The Committee observed that the Standing Orders of the Legislative Council provide for a certain procedure in Committee of the Whole and that notes are not normally considered. In order for effect to be given to its recommendation to delete the note at the end of the Bill (Recommendation 3), the Committee understands that an instruction to a Committee of the Whole will be required to enable the House to consider amendments that would otherwise fall outside the scope of Standing Order 381<sup>54</sup>. Accordingly, the Committee makes recommendation 4.

**Recommendation 4: 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.**

- 5.26 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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<sup>53</sup> See section 32(2) of the *Interpretation Act 1984*.

<sup>54</sup> Standing Order 381 provides that “*It is an instruction to all committees of the whole House to whom Bills may be committed that they have power to make such amendments therein as they shall think fit, provided they be relevant to the subject matter of the Bill, but if any such amendments shall not be within the title of the Bill they shall amend the title accordingly, and report the same specially to the House.*”



- 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.

5.27 A minority of the Committee (comprised of Hon Giz Watson MLC) considered that this direction to the Minister should have been the subject of a formal recommendation of the Committee. The remaining Members of the Committee (Hons Graham Giffard, Sally Talbot, Peter Collier and Ken Baston MLCs) disagreed.

*After Enactment of Act Proposed by the Bill*

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:

- (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.*

Committee Comment

5.29 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).

5.30 The Committee (by a majority comprised of Hons Giz Watson, Peter Collier and Ken Baston) endorsed the Queensland approach and recommends that, if Recommendation 3 is not agreed to, the Government give consideration to updating the note at the end of the proposed Act as required after the proposed Act receives the Royal Assent so that it always exhibits the most current version of the Commonwealth Act which is applicable to Western Australia.

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

- 5.31 A minority of the Committee (comprised of Hons Graham Giffard and Sally Talbot MLCs) considered that the Government already monitors the Statute Book as a matter of course and was satisfied that this existing process will ensure that the currency of the note at the end of the proposed Act, if it remains, is maintained.

*Wider Issue*

- 5.32 The Committee noted that these matters may be of wider application in relation to other State legislation which adopts the legislation of another jurisdiction. Without access to the adopted legislation, the State legislation itself would not be informative; that is, a person would not be able to understand the entire nature of the State legislation.
- 5.33 The State has no control over the currency or content of another jurisdiction's Statute Book. For example, if State legislation adopts an Act of another jurisdiction as at a particular date, then how might a member of the public access a version of the adopted legislation as at that particular date? Electronic versions of statutes may only provide access to legislation as it is amended from time to time.
- 5.34 This issue is outside the scope of the Committee's mandate; however, it is a matter that may benefit from further inquiry in the wider context of the form and content of the Statute Book. The Committee draws this matter to the attention of the House and will forward a copy of this Report to the Standing Committee on Uniform Legislation and Statutes Review.

**6 SCHEDULE 2, PART 1, ITEM 1 OF THE TRANS-TASMAN MUTUAL RECOGNITION ACT 1997 (CTH) - PERMANENT EXEMPTIONS**

- 6.1 The Committee refers to paragraphs 6.1 to 6.3 of the UG Committee's report on the 2002 Bill regarding the effect of Schedule 2, Part 1, Item 1 of the Commonwealth Act. The Committee reiterates that the effect of Schedule 2, Part 1, Item 1 of the Commonwealth Act for this State is that Western Australia's quarantine laws will be exempt from the operation of the Commonwealth Act and therefore, the TTMRA. In other words, Western Australia would continue to be entitled to make and enforce laws prohibiting or limiting the import into Western Australia of goods which can legally be sold in New Zealand as long as these laws meet the following two conditions:

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- (a) *the law is enacted or made substantially for the purpose of preventing the entry or spread of any pest, disease, organism, variety, genetic disorder or any other similar thing; and*
  - (b) *the law authorises the application of quarantine measures that do not amount to an arbitrary or unjustifiable discrimination or to a disguised restriction on trade between Australia and New Zealand and are not inconsistent with the requirements of the Agreement establishing the World Trade Organisation.*<sup>55</sup>

6.2 Schedule 2, Part 1, Item 1(b) of the Commonwealth Act incorporates the requirements of the World Trade Organisation (**WTO**) regarding quarantine measures, as embodied in the *Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)*, into Australian domestic law. The Committee refers to the discussion of the *Agreement Establishing the World Trade Organisation* and the SPS Agreement at paragraphs 6.4 to 6.12 of the UG Committee's report on the 2002 Bill.

**Effect of Incorporating the Requirements of the Agreement on the Application of Sanitary and Phytosanitary Measures into Australian Domestic Law**

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.*”<sup>56</sup>

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.*<sup>57</sup>

...

*[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*

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<sup>55</sup> Schedule 2, Part 1, Item 1 of the *Trans-Tasman Mutual Recognition Act 1997* (Cth).

<sup>56</sup> Parliament of Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 4, *Trans-Tasman Mutual Recognition (Western Australia) Bill 2002*, October 2002, p7.

<sup>57</sup> Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, *Transcript of Evidence*, 9 May 2007, p2.

*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.*<sup>58</sup>

...

*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 re-emphasise 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.*<sup>59</sup>

...

*failing to pass this legislation, provides no additional negotiation power with the Australian government [with respect to the recognition of Western Australia's unique biosecurity requirements]. It is no particular odds to the Australian government whether this legislation is passed. It affects people and economic activity in Western Australia and New Zealand. Whilst it is a frustration to the Australian government, if it does not pass, it provides no negotiation ability [to Western Australia]. If we need to progress vigorous arguments on biosecurity and quarantine, we need to do that with all the means available to us. This legislation does not impact on our ability to do that.*<sup>60</sup>

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<sup>58</sup> Ms Katy Ashforth, Manager, Legislation, Department of Agriculture and Food, *Transcript of Evidence*, 9 May 2007, p3.

<sup>59</sup> Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, *Transcript of Evidence*, 9 May 2007, pp3 to 4.

<sup>60</sup> *Ibid*, p6.

6.5 Mr Robert Delane, then Executive Director, Plant Industries, Department of Agriculture, also provided similar evidence to the UG Committee during its inquiry into the 2002 Bill.<sup>61</sup>

6.6 A legal opinion obtained by the then Member of the Legislative Council, Hon Christine Sharp, regarding the effect of the 1999 Bill concluded that, among other things:

- 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.<sup>62</sup> 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;<sup>63</sup>
- 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.*<sup>64</sup>

- if this State considered New Zealand apples to pose a higher risk of introducing a particular pest or disease than the import risk assessment<sup>65</sup> conducted by the Commonwealth and Western Australia chose a level of protection against New Zealand apples which is higher than that of the

<sup>61</sup> Parliament of Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 4, *Trans-Tasman Mutual Recognition (Western Australia) Bill 2002*, October 2002, p7.

<sup>62</sup> Letter from Ms Marie Wynter, Research School of Social Sciences, Australian National University, to the then Member of the Legislative Council, Hon Christine Sharp, 20 November 2000, p4.

<sup>63</sup> *Ibid*, pp4 to 5.

<sup>64</sup> *Ibid*, p6.

<sup>65</sup> Import risk assessments are discussed in this Report at paragraphs 6.13 to 6.15.

Commonwealth, New Zealand may be more likely to challenge the Western Australian measures at the WTO;<sup>66</sup> 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."*<sup>67</sup>

#### Committee 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.<sup>68</sup> 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.

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<sup>66</sup> Letter from Ms Marie Wynter, Research School of Social Sciences, Australian National University, to the then Member of the Legislative Council, Hon Christine Sharp, 20 November 2000, p7.

<sup>67</sup> *Ibid.*

<sup>68</sup> "Every treaty in force is binding upon the parties to it and must be adhered to or performed by those parties in good faith.": *Halsbury's Laws of Australia*, paragraph [215-785]; "There is a general duty to bring a nation State's municipal legal system into conformity with its obligations under international law.": *The Laws of Australia*, paragraph [1.7.4]; and refer to Article 27 of the *Vienna Convention on the Law of Treaties 1969* and Article 13 of the *World Trade Organisation Agreement on the Application of Sanitary and Phytosanitary Measures*.

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**Biosecurity Australia**

6.10 The SPS Agreement obliges member countries, when applying quarantine measures, to, among other things:

- ensure that quarantine measures are applied only to the extent necessary to protect human, animal or plant life or health;<sup>69</sup>
- base their quarantine measures on proper risk assessments (taking account of available scientific evidence and other factors)<sup>70</sup> or international standards, guidelines and recommendations<sup>71</sup>, and sufficient scientific evidence<sup>72</sup>;
- ensure that their quarantine measures are not more trade-restrictive than necessary to achieve the ‘appropriate level of protection’ (that is, the level of protection deemed appropriate by the member country to protect human, animal or plant life or health within its territory)<sup>73</sup>, taking into account technical and economic feasibility;<sup>74</sup> and
- avoid arbitrary or unjustifiable distinctions in the levels of protection it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.<sup>75</sup>

6.11 In Australia, an entity known as Biosecurity Australia is responsible for, among other things, developing and reviewing the measures for managing the biosecurity risks associated with importing goods. Biosecurity Australia was established in October 2000 and is a part of the Commonwealth Department of Agriculture, Fisheries and Forestry. It is a separate entity to the Australian Quarantine and Inspection Service (AQIS) and its responsibilities lie in biosecurity policy development and export technical market access negotiations.<sup>76</sup>

6.12 Biosecurity Australia may initiate the development of a new biosecurity policy or measure, or review an existing policy or measure in response to:

- a proposal to import a plant, an animal, a good derived from plants or animals, a micro-organism, or goods which present a biosecurity risk;

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<sup>69</sup> Article 2.2 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*.

<sup>70</sup> *Ibid*, Article 5.1.

<sup>71</sup> *Ibid*, Article 3.1.

<sup>72</sup> *Ibid*, Article 2.2.

<sup>73</sup> Definition of ‘appropriate level of sanitary or phytosanitary protection’: *ibid*, Annex A, Item 5.

<sup>74</sup> *Ibid*, Article 5.6.

<sup>75</sup> *Ibid*, Article 5.5.

- the identification of a changed biosecurity risk profile or the receipt of new information by Biosecurity Australia or AQIS; or
- an application to AQIS for an import permit.<sup>77</sup>

6.13 If:

- there is no relevant existing biosecurity policy or measure for the good and pest/disease combination; or
- it would be desirable to vary a relevant existing biosecurity policy or measure because the pest or disease, or the likelihood and/or consequences of entry, establishment or spread of the pest or disease could differ significantly from those previously assessed,

Biosecurity Australia may undertake an import risk analysis (**IRA**).<sup>78</sup> IRAs identify the pest(s) or disease(s) which is relevant to an existing or proposed import and assess the risks posed by them. If these risks are considered by Biosecurity Australia to be unacceptable, the IRA report will specify what measures should be taken to reduce those risks to ‘an appropriate level of protection’ as defined in the SPS Agreement<sup>79 80</sup>.

6.14 Biosecurity Australia conducts IRAs in accordance with the administrative processes outlined in its *Import Risk Analysis Handbook* and the technical methodologies contained in its *Guidelines for Import Risk Analysis*. Biosecurity Australia maintains that the processes and methodologies contained in those publications are consistent with Australian legislation and government policy, the requirements of the SPS Agreement, and the relevant international standards and guidelines on risk analysis and plant and animal health developed under the International Plant Protection Convention and by the Office of International des Epizooties (the World Organisation for Animal Health).<sup>81</sup> The current version of the *Import Risk Analysis Handbook* (2003) is also described as being “consonant” with Australia/New Zealand standards AS/NZS 3931:1998 (*Risk analysis of technological systems - application guide*) and AS/NZS 4360:1999 (*Risk management*).<sup>82</sup>

<sup>76</sup> Biosecurity Australia, Department of Agriculture, Fisheries and Forestry, *Import Risk Analysis Handbook*, Australian Government, Canberra, 2003, p6.

<sup>77</sup> *Ibid*, p8.

<sup>78</sup> *Ibid*, p8.

<sup>79</sup> “The level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory.”: Annex A, Item 5 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*.

<sup>80</sup> Biosecurity Australia, Department of Agriculture, Fisheries and Forestry, *Import Risk Analysis Handbook*, Australian Government, Canberra, 2003, p8.

<sup>81</sup> *Ibid*, pp7 and 9.

<sup>82</sup> *Ibid*, p7.



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6.15 IRAs for plants or plant goods involve three key stages:

- i) Pest categorisation - the identification of what pests might be associated with the good in question.
- ii) Risk assessment - the assessment of the likelihood that the identified pests would enter, establish and spread, as well as the types and likely magnitude of consequences that this would have.
- iii) Risk management - the assessment of what measures could be used to mitigate the assessed risks.<sup>83</sup>

### **Recognition of Differing Biosecurity Characteristics within Australia**

#### *Import of New Zealand Apples*

6.16 The WAFGA advised the Committee that, previously, fresh New Zealand apples were imported into Australia until 1921, when they were banned on the basis that the disease known as ‘fire blight’ had been introduced into, and established, in Auckland in 1919. In 1986 and 1989, New Zealand sought to regain access to Australian markets. Both applications were refused primarily because of unresolved issues of risk relating to ‘fire blight’.<sup>84</sup>

6.17 In late 1995, New Zealand again applied for access of their fresh apples into Australia on the basis that their fresh apples were not a vector of ‘fire blight’. That application was rejected:

*It is my determination that the importation of apple fruit (Malus pumila Miller var. domestica Schneider) from New Zealand will not be permitted under the conditions proposed by New Zealand which contend that mature apple fruit free of trash are not a vector of the bacterial disease Erwinia amylovora (fire blight). This determination is consistent with Australia’s appropriate level of protection for this disease and is in accord with Australia’s international rights and obligations under the Agreement on Application of Sanitary and Phytosanitary Measures.*<sup>85</sup>

6.18 Two draft IRA reports in relation to a January 1999 application from New Zealand for access of its apples into Australia were released on 11 October 2000 and on 19

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<sup>83</sup> Biosecurity Australia, Department of Agriculture, Fisheries and Forestry, *Final Import Risk Analysis Report for Apples from New Zealand: Part A*, Australian Government, Canberra, November 2006, p4.

<sup>84</sup> Submission from Western Australian Fruit Growers’ Association Inc, 18 May 2007, p5.

<sup>85</sup> Paul Hickey, Executive Director, Australian Quarantine and Inspection Service, *Final Import Risk Analysis of the New Zealand Request for the Access of Apples (Malus pumila Miller var. domestica Schneider) into Australia*, Australian Government, Canberra, December 1998, p4.

February 2004<sup>86</sup> as a revised draft. The 19 February 2004 revised draft IRA report resulted from an evaluation of the stakeholder comments received on the first draft report and the recommendations of the Senate Rural and Regional Affairs and Transport Legislation Committee in its inquiry into *The Proposed Importation of Fresh Apple Fruit from New Zealand*<sup>87 88</sup>.

- 6.19 On 3 June 2004 (that is, when the 2002 Bill was before the Legislative Council) the Legislative Council passed a motion moved by the then Member of the Legislative Council, Hon Christine Sharp:

*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.*<sup>89</sup>

- 6.20 It appears that the main basis for the motion was a concern that Biosecurity Australia was not adequately recognising differences in biosecurity characteristics between different regions within Australia when conducting IRAs. In particular, a revised draft IRA report on the import of New Zealand apples, which was released on 19 February 2004, was considered by the former Member to have given inadequate recognition of the fact that the Western Australian apple industry, unlike its eastern Australian counterparts:

- is the only commercial apple production in the world that is free of the disease known as ‘apple scab’, the most economically-destructive disease of apples worldwide; and
- is free of the pest known as ‘codling moth’.<sup>90</sup>

- 6.21 Similarly, the WAFGA was of the view that the IRAs conducted prior to 2005 “*drastically understated*” the “*economic and social impact consequences of an incursion of apple scab or codling moth*”.<sup>91</sup>

- 6.22 The revised draft IRA report released on 19 February 2004 recommended that the “*importation of fresh apples from New Zealand be permitted subject to certain*

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<sup>86</sup> Biosecurity Australia, Department of Agriculture, Fisheries and Forestry, *Importation of Apples from New Zealand: Revised Draft IRA Report Part A*, Australian Government, Canberra, February 2004, p1.

<sup>87</sup> Parliament of Australia, Senate, Rural and Regional Affairs and Transport Legislation Committee, *The Proposed Importation of Fresh Apple Fruit from New Zealand: Interim Report*, July 2001.

<sup>88</sup> Biosecurity Australia, Department of Agriculture, Fisheries and Forestry, *Importation of Apples from New Zealand: Revised Draft IRA Report Part A*, Australian Government, Canberra, February 2004, p1.

<sup>89</sup> Hon Christine Sharp MLC, Parliament of Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 3 June 2004, pp3442 to 3455.

<sup>90</sup> *Ibid*, p3443.

<sup>91</sup> Submission from Western Australian Fruit Growers’ Association Inc, 18 May 2007, p6.

conditions.”<sup>92</sup> However, the Committee noted that there were parts of this revised draft IRA report which indicated that Biosecurity Australia had recognised Western Australia’s unique biosecurity requirements in relation to apples while conducting the IRA. Examples of this are as follows:

- In addition to several pests and diseases which were assessed in detail for the whole of Australia, the biosecurity risks of seven pests and diseases, including ‘apple scab’ and ‘codling moth’, were considered for Western Australia **only**:

*Western Australia has a different pest status for apples compared with the rest of Australia, and for this State seven additional pests were considered, one fungus, five insects and one mite.*<sup>93</sup>

- Of those seven pests and diseases assessed in detail for Western Australia:

*one insect and one fungus required measures for importation into Western Australia because these pests, although present in the rest of Australia, are not present in Western Australia, where measures are in place to maintain area freedom.*<sup>94</sup>

- It was recognised that Western Australia is free of ‘apple scab’:

*Apple scab (referred to as black spot in New Zealand), caused by the fungus Venturia inaequalis is the most economically important disease of apple worldwide (CABI, 2003a). V. inaequalis occurs in Australia (APPD, 2003) except in Western Australia where it has been eradicated and is under official control (McKirdy et al., 2001).*<sup>95</sup>

- The IRA included, among other things, an analysis of the likelihood of ‘codling moth’ establishing in Western Australia and the likely financial cost of eradicating the pest from Western Australia once established:

*Several codling moth outbreaks have occurred in Western Australia and have been successfully eradicated. This is clear indication that the Western Australia environment is very suitable and establishment*

<sup>92</sup> One of those conditions represented an additional measure for New Zealand apples entering Western Australia: the New Zealand Minister of Agriculture and Forestry was to provide assurance that apples were sourced from areas free of disease (‘apple scab’) symptoms determined, for example, by surveillance: Biosecurity Australia, Department of Agriculture, Fisheries and Forestry, *Importation of Apples from New Zealand: Revised Draft IRA Report Part A*, Australian Government, Canberra, February 2004, p5.

<sup>93</sup> *Ibid*, p3.

<sup>94</sup> *Ibid*.

<sup>95</sup> *Ibid*, p290.

*would be virtually certain to occur if codling moth is introduced into Western Australia.*<sup>96</sup>

*If codling moth enters Western Australia again, the eradication program will be very expensive. It has already cost the WA Government and fruit growing industry several million dollars to eradicate three outbreaks since 1993, including a two-year eradication campaign to control an incursion at Dwellingup.*<sup>97</sup>

6.23 In December 2004, the Australian Government announced that Biosecurity Australia would review all IRAs in progress and reissue them as revised drafts for a further period of public comment. The IRA for apples from New Zealand was one of the IRAs affected by this announcement.<sup>98</sup> The second revised draft IRA report was released in December 2005.<sup>99</sup> Again, the Committee noted that there were parts of this revised draft IRA report which indicated that Biosecurity Australia had recognised Western Australia's unique biosecurity requirements in relation to apples while conducting the IRA. Examples of this are as follows:

- In addition to several pests and diseases which were assessed in detail for the whole of Australia, the biosecurity risks of six pests and diseases, including 'apple scab' and 'codling moth', were considered for Western Australia **only**.<sup>100</sup>
- It was recognised that Western Australia is considered to be free of 'apple scab',<sup>101</sup> although previous outbreaks of the disease indicated that there were environmental conditions in Western Australia which suited the development of the disease<sup>102</sup>.
- The IRA included, among other things, a consideration of the natural barriers enjoyed by Western Australia and how effective those barriers would be against exposure to 'apple scab'.<sup>103</sup>

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<sup>96</sup> *Ibid*, p336.

<sup>97</sup> *Ibid*, p341.

<sup>98</sup> Biosecurity Australia Policy Memorandum 2005/20 - *Revised Draft Import Risk Analysis Report for Apples from New Zealand*, 1 December 2005: [http://www.daffa.gov.au/\\_\\_data/assets/pdf\\_file/11525/2005-20.pdf](http://www.daffa.gov.au/__data/assets/pdf_file/11525/2005-20.pdf), (viewed on 21 May 2007).

<sup>99</sup> Biosecurity Australia, Department of Agriculture, Fisheries and Forestry, *Revised Draft Import Risk Analysis Report for Apples from New Zealand*, Australian Government, Canberra, December 2005.

<sup>100</sup> Biosecurity Australia, Department of Agriculture, Fisheries and Forestry, *Revised Draft Import Risk Analysis Report for Apples from New Zealand: Part B*, Australian Government, Canberra, December 2005, p44, Table 16.

<sup>101</sup> *Ibid*, p219.

<sup>102</sup> *Ibid*, pp234 to 235.

<sup>103</sup> *Ibid*, p236.

- The trade advantages enjoyed by Western Australia, both domestically and internationally, because of its ‘apple scab’-free status are recognised.<sup>104</sup>
- The IRA proposed that apples from New Zealand and the eastern Australian States be prohibited from entering into Western Australia until suitable risk management measures for ‘apple scab’ had been developed.<sup>105</sup>
- It recognised that Western Australia is free from ‘codling moth’.<sup>106</sup>

6.24 The final IRA report for New Zealand apples (November 2006) is discussed at paragraphs 6.39 to 6.40 of this Report.

*Agreement on the Application of Sanitary and Phytosanitary Measures*

6.25 The SPS Agreement requires member countries to recognise regional differences in biosecurity characteristics when assessing biosecurity risks or applying biosecurity or quarantine (known as sanitary or phytosanitary) measures.

6.26 For example, Article 5.2 provides as follows:

*In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; **existence of pest- or disease-free areas**; relevant ecological and environmental conditions; and quarantine or other treatment. (emphasis added)*

6.27 Article 6 of the SPS Agreement, titled ‘Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence’, obliges member countries to adapt their quarantine measures to the biosecurity characteristics of both the area from which the good originated and the area to which the good is destined, whether or not those areas amount to all or part of a country, or all or parts of several countries. Articles 6.1 and 6.2 are reproduced here for the information of the Legislative Council:

1. *Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area - whether all of a country, **part of a country**, or all or parts of several countries - from which the product originated and to which the product is destined. In assessing the sanitary or phytosanitary characteristics of a*

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<sup>104</sup> *Ibid*, p241.

<sup>105</sup> *Ibid*, p245.

<sup>106</sup> *Ibid*, p247.

*region, Members shall take into account, inter alia, the level of prevalence of specific diseases or pests, the existence of eradication or control programmes, and appropriate criteria or guidelines which may be developed by the relevant international organizations.*

2. *Members shall, in particular, recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Determination of such areas shall be based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls. (emphasis added)*

6.28 A ‘pest- or disease-free area’ (a term used in Articles 5.2 and 6.2) is defined as:

*An area, whether all of a country, **part of a country**, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease does not occur.<sup>107</sup> (emphasis added)*

6.29 An ‘area of low pest or disease prevalence’ (as term used in Article 6.2) is defined as:

*An area, whether all of a country, **part of a country**, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease occurs at low levels and which is subject to effective surveillance, control or eradication measures.<sup>108</sup> (emphasis added)*

#### *Memorandum of Understanding on Animals and Plant Quarantine Measures*

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.*”<sup>109</sup>

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

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<sup>107</sup> Annex A, Item 6 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*.

<sup>108</sup> *Ibid*, Annex A, Item 7.

<sup>109</sup> Parliament of Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 4, *Trans-Tasman Mutual Recognition (Western Australia) Bill 2002*, October 2002, p9.

advised by the Department of Agriculture and Food that the MOU has not been rewritten or re-signed.<sup>110</sup> The relevant Senate questions and answers are reproduced here for the information of the Legislative Council:

***Senator Siewert asked:***

*Is the principle of regional difference supported by Biosecurity?*

***Answer:***

*The principle of regional difference is strongly supported by the Australian Government.*

*The Memorandum of Understanding (MOU) between the Commonwealth and the States/Territories on Quarantine matters (1995, amended 2002) makes specific provision for the recognition of regional differences in pest status and risk.*

...

***Senator Siewert asked:***

*What administrative, or other guidelines, provide the requirement for quarantine procedures to recognise regional differences?*

***Answer:***

*The memorandum of understanding (MOU) on Quarantine, which is agreed between the Commonwealth and States specifies that the Commonwealth is committed to recognition of regional differences in pest status and risk.*

*Regional issues are regularly discussed in the Primary Industries Ministerial Council (PIMC) and the Primary Industries Standing Committee, (PISC) and associated bodies. Council meetings often include discussion of issues relating to pest and disease risks and all Governments are committed to Australia's present quarantine regime. This regime already allows for regional differences in the pest and disease status of States/Territories where such freedom can be scientifically demonstrated.*

*Moreover, the administrative arrangements include state/territory regulatory frameworks to define and maintain state and territory*

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<sup>110</sup> Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, *Transcript of Evidence*, 9 May 2007, p4.

*plant health status which is underpinned by animal and plant health legislation and quarantine/regulatory agencies, interstate quarantine protocols, surveillance/inspections, certification procedures, lists of gazetted pests (including weeds) which is nationally coordinated through the Domestic Quarantine and Market Access Working Group (PISC/Public Health Committee working group).*

*The import risk analysis process has consultation steps specifically for the States/Territories relevant to their roles in the Quarantine partnership, in addition to their normal rights as stakeholders.<sup>111</sup>*

6.32 However, since the UG Committee report, there appears to have been some developments in the bid to affirm the ‘partnership approach’ to addressing regional differences in biosecurity requirements. A letter from the then Commonwealth Minister for Agriculture, Fisheries and Forestry to the then Western Australian Minister for Agriculture, Forestry and Fisheries dated 24 October 2002 (a copy of this letter is attached as **Appendix 2** to this Report) advised that:

- the “Commonwealth is committed to addressing regional differences in pest status and risk and consequent SPS measures as part of import risk analysis”;
- the Commonwealth will consult fully with the States and Territories on the IRA work programme and on the arrangements for proposed IRAs;
- the Commonwealth will consult with the States and Territories at every stage of an IRA, including consultation on the outcomes of each IRA to address issues arising from regional differences in biosecurity risks;
- specifications relating to regional differences in pest status and risk would be enhanced in Biosecurity Australia’s *Draft Technical Guidelines for Import Risk Analysis*. (The Department of Agriculture and Food advised the Committee that the ‘partnership approach’ has been incorporated into a rewriting of the guidelines for the completion of IRAs)<sup>112</sup>; and
- two new ‘points’ at which States and Territories would be consulted by Biosecurity Australia during an IRA had been added to the IRA process. (These two ‘points’ are referred to as steps 4 and 18 in the IRA process at pages 12 and 17, respectively, of Biosecurity Australia’s latest *Import Risk Analysis Handbook* (2003). The flowchart which is attached to this Report as

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<sup>111</sup> Parliament of Australia, Senate Rural and Regional Affairs and Transport Legislation Committee, *Parliamentary Debates (Hansard)*, Answers to Questions on Notice, Budget Estimates (Agriculture, Fisheries and Forestry), May 2006, pp5 to 7.

<sup>112</sup> Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, *Transcript of Evidence*, 9 May 2007, p4.



**Appendix 3**<sup>113</sup> provides an illustration of how steps 4 and 18 fit into the IRA process).

- 6.33 There are other examples of the incorporation of the ‘partnership approach’ into government operations in addition to the above references. For example, in the *Import Risk Analysis Handbook*, it is stated that:

*As part of import risk analysis, Biosecurity Australia, works in partnership with the States and Territories to address regional differences in pest status and risk within Australia, and consequent sanitary and phytosanitary measures. This involves consultation with relevant State and Territory agencies throughout the course of an import risk analysis (IRA), with an emphasis on identifying and resolving issues relating to regional differences in pest status and risk early in the IRA process.*<sup>114</sup>

- 6.34 The Department for Agriculture and Food also advised the Committee that regional differences in biosecurity requirements are regularly considered at:

- meetings of the Primary Industry Standing Committee and a quarantine policy forum established by that committee;
- meetings of the Primary Industry Ministerial Council;
- meetings of primary industries and natural resource management committees and councils; and
- meetings of chief executive officers of agriculture, prior to meetings of the Primary Industry Standing Committee.<sup>115</sup>

- 6.35 To a limited extent, these issues are also discussed at a new Australian biosecurity system forum known as AusBIOSEC. The Department of Agriculture and Food expects that the extent of these discussions will increase in future.<sup>116</sup>

- 6.36 It was also noted by the Committee that clause 13 of the MOU already provides that the Commonwealth, the States and the Territories:

<sup>113</sup> Biosecurity Australia, Department of Agriculture, Fisheries and Forestry, *Import Risk Analysis Handbook*, Australian Government, Canberra, 2003, Annex 7, p30.

<sup>114</sup> *Ibid*, p6.

<sup>115</sup> Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, *Transcript of Evidence*, 9 May 2007, pp4 to 5.

<sup>116</sup> *Ibid*, p5.

*agree to make all relevant information freely available to the other parties to facilitate implementation of this Memorandum, and shall consult with the other parties as appropriate.*

- 6.37 In accordance with that agreed approach to consultation, the Department of Agriculture and Food acknowledged that it does have significant involvement in IRAs which are relevant to Western Australia:

*We have quite a lot of interaction with our interstate counterparts and with Biosecurity Australia to ensure that is the case. We also have substantial input to risk assessments completed by Biosecurity Australia, which we assess to have implications for Western Australia. We make comprehensive submissions where we believe Western Australia has freedom from pests and diseases that are relevant to that risk assessment and where we believe that Western Australia should be excluded from imports or where additional provisions should be put in place.*<sup>117</sup>

- 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.<sup>118</sup>

*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].*<sup>119</sup>

#### *Final Import Risk Analysis Report for New Zealand Apples*

- 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

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<sup>117</sup> *Ibid*, p4.

<sup>118</sup> *Ibid*, p6.

<sup>119</sup> *Ibid*, p5.

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’.<sup>120</sup> 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.*”<sup>121</sup>

6.40 The Committee noted that there were parts of this final IRA report which indicated that Biosecurity Australia had recognised Western Australia’s unique biosecurity requirements in relation to apples while conducting the IRA. Examples of this are as follows:

- There were general statements in recognition of Western Australia’s unique pest and disease status in relation to apples:

*Restrictions on fruit movement may be particularly relevant for Western Australia. Several pests of apples that are present in eastern Australia are absent in Western Australia. Western Australia already has controls on the importation of apples from eastern Australia, and these may be relevant to risk management for apples from New Zealand.*<sup>122</sup>

...

*Western Australia has a pest and disease status that, in some respects, is different from other areas of Australia. This regional freedom from pests or diseases that might already be present in other locations in Australia is recognised in the risk assessment.*<sup>123</sup>

- In addition to several pests and diseases which were assessed in detail for the whole of Australia, the biosecurity risks of six pests and diseases, including ‘apple scab’ and ‘codling moth’, were considered for Western Australia **only**.<sup>124</sup>

<sup>120</sup> Biosecurity Australia, Department of Agriculture, Fisheries and Forestry, *Final Import Risk Analysis Report for Apples from New Zealand: Part A*, Australian Government, Canberra, November 2006, p1.

<sup>121</sup> Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, *Transcript of Evidence*, 9 May 2007, p3.

<sup>122</sup> Biosecurity Australia, Department of Agriculture, Fisheries and Forestry, *Final Import Risk Analysis Report for Apples from New Zealand: Part A*, Australian Government, Canberra, November 2006, p9.

<sup>123</sup> *Ibid*, p14.

<sup>124</sup> Biosecurity Australia, Department of Agriculture, Fisheries and Forestry, *Final Import Risk Analysis Report for Apples from New Zealand: Part B*, Australian Government, Canberra, November 2006, p48, Table 16.

- It was recognised that Western Australia is considered to be free of ‘apple scab’:

*Apple scab (referred to as black spot in New Zealand), caused by the fungus Venturia inaequalis (Cooke) G. Winter (1875), is the most economically important disease of apples worldwide (CABI, 2005). V. inaequalis occurs in Australia (APPD, 2005) except in Western Australia, where it has been eradicated (McKirdy et al., 2001).*<sup>125</sup>

...

*A localised outbreak of apple scab was reported in Western Australia in late 2005. One stakeholder claims this outbreak combined with a number of previous outbreaks is evidence that apple scab is established in Western Australia but that symptoms only become visible when conditions are favourable for the disease. However, this view is not supported by the evidence. ... Considering the biology of Venturia inaequalis, conducive environmental conditions for apple scab in Western Australia and little or no scab management measures practiced by Western Australian growers, it is difficult to accept the claim that the disease was present but remained undetected for 40 years. ... On the basis of the evidence the IRA team has concluded that the current outbreak of apple scab disease in Western Australia is adequately contained and an eradication program is in place thus apple scab is under official control. The status of apple scab will be reviewed subject to the progress of the eradication program.*<sup>126</sup>

...

*Venturia inaequalis is a pest of concern only for Western Australia, as the disease is present throughout apple production areas of eastern Australia. The movement of mature apple fruit and apple nursery stock from eastern Australia into Western Australia is currently prohibited because of the lack of risk management measures that would maintain Australia’s ALOP [appropriate level of protection] for the disease based on regional freedom.*<sup>127</sup>

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<sup>125</sup> Ibid, p241.

<sup>126</sup> Ibid, p242.

<sup>127</sup> Ibid, p266.

- The IRA included, among other things, a consideration of the natural barriers enjoyed by Western Australia and how effective those barriers would be against exposure to ‘apple scab’:

*Western Australia is isolated from the closest apple growing area in South Australia by a dry land mass. It is unlikely that the pathogen would disseminate by rain or wind over such long distances.*

*Physical barriers may prevent long-range spread of the pathogen but, if scab were to be introduced to Western Australia, physical barriers are unlikely to be a limiting factor for the spread of scab. The disease has the potential to gradually spread by expanding its foci of infection to all apple production areas in Western Australia.<sup>128</sup>*

- It recognised that Western Australia is free from ‘codling moth’:

*This assessment relates to codling moth, Cydia pomonella (Linnaeus).*

*This species is not present in Western Australia and is a pest of regional quarantine concern for that state.<sup>129</sup>*

#### *Concerns of the Western Australian Fruit Growers’ Association Inc*

- 6.41 The WAFGA recommended to the Committee that the Bill not be passed until a “*clear consultative process with the industries likely to be affected by the ... [Bill] ... has occurred.*”<sup>130</sup> It appeared that the WAFGA’s main concern is ensuring that Western Australia’s regional biosecurity differences are recognised.<sup>131</sup> There appeared to be a perception in the WAFGA that the Bill will impact upon the State’s ability to assert biosecurity requirements which are different to other parts of Australia because quarantine issues relating to New Zealand goods will be resolved at an Australia-wide level:

*As a representative of a growers group it looks to me as though what is being said is, “We recognise that there are differences, but we would like to find a way to smooth those out from a federal level.” To me that spells concern because it is a failure to recognise a state concern, and our concern with the bill ... is anything that impacts*

<sup>128</sup> *Ibid*, p259.

<sup>129</sup> *Ibid*, p269.

<sup>130</sup> Submission from Western Australian Fruit Growers’ Association Inc, 18 May 2007, p3.

<sup>131</sup> For example, see Mr Alan Hill, Executive Manager, Western Australian Fruit Growers’ Association Inc, *Transcript of Evidence*, 23 May 2007, p1.

*upon our capacity to make an argument based on a state level would be a strong concern to the association.*<sup>132</sup>

6.42 In terms of the day-to-day operation of quarantine laws, which will not be altered by the Bill, the WAFGA considered that the MOU, as it currently exists, fails to display a “*real commitment to addressing regional differences in pest status and risk and consequent SPS measures as part of IRA*”.<sup>133</sup> The WAFGA was also not convinced that the ‘partnership approach’, as outlined in the letter from the then Commonwealth Minister for Agriculture, Fisheries and Forestry to the then Western Australian Minister for Agriculture, Forestry and Fisheries dated 24 October 2002, will be sufficient to ensure that Western Australia’s unique biosecurity requirements are supported through the IRA process.<sup>134</sup>

6.43 While the WAFGA acknowledged that the second revised draft IRA report released in December 2005 “*got it right*”<sup>135</sup> and the *Final Import Risk Analysis Report for Apples from New Zealand* recommended that New Zealand apples be prohibited from being imported into Western Australia,<sup>136</sup> it considered that the findings in those reports represented a “*drastic reversal of policy*” by Biosecurity Australia<sup>137</sup>. In the WAFGA’s view, Federal Government agencies have been slow to recognise Western Australia’s regional differences:

*WAFGA does not believe that the Federal Government’s approach to Western Australia’s position has been satisfactory, and it has been only through a lengthy and constant process has the fruit industry been able to win any recognition from AQIS and then BA [Biosecurity Australia] of the unique operating environment.*<sup>138</sup>

6.44 It cited the experiences of this State in relation to imported New Zealand stone fruit and apples in support of this view.<sup>139</sup>

6.45 The WAFGA also suggested that there should be a legally-binding cost-sharing agreement between the State Government and the Western Australian fruit industry for dealing with incursions of pests and diseases. The Committee was advised by the WAFGA that, in contrast to the Commonwealth situation, Western Australian fruit

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<sup>132</sup> *Ibid*, p3.

<sup>133</sup> Submission from Western Australian Fruit Growers’ Association Inc, 18 May 2007, p3.

<sup>134</sup> *Ibid*, p7.

<sup>135</sup> Mr Alan Hill, Executive Manager, Western Australian Fruit Growers’ Association Inc, *Transcript of Evidence*, 23 May 2007, p5.

<sup>136</sup> Submission from Western Australian Fruit Growers’ Association Inc, 18 May 2007, p5.

<sup>137</sup> *Ibid*, p6.

<sup>138</sup> *Ibid*, p7.

<sup>139</sup> *Ibid*, pp4 to 6.

growers were currently required to meet the full costs associated with the eradication of imported pests and diseases and surveillance programmes required to regain ‘area freedom’.<sup>140</sup>

6.46 The Committee sought advice from the Department of Agriculture and Food and the Department of the Premier and Cabinet on whether there would be any impediments to implementing the following suggestions:

- Creating a strict liability offence for Australian importers who import infected or infested goods into Western Australia which result in the outbreak of a pest or disease in Western Australia where the State was previously free of this pest or disease.
- As a penalty for the offence, impose on these importers the obligation to pay for the costs associated with eradicating (or where this is not possible, managing) the pest or disease.

6.47 The Committee also asked whether these suggestions would best be incorporated in the Bill or in other legislation.

6.48 The response from both departments was that it would be inappropriate to incorporate the suggestions into the Bill, given that quarantine or biosecurity laws are permanently excluded from the TTMRA. The Department of the Premier and Cabinet’s response was based on preliminary advice from the Parliamentary Counsel that, because quarantine matters have no relevance to the Bill, the incorporation of an offence relating to the import of infested or infected goods could offend Legislative Council Standing Order 222,<sup>141</sup> which provides that “*Such matters as have no proper relation to each other shall not be included in one and the same Bill.*” The Department of Agriculture and Food indicated that the Biosecurity and Agriculture Management Bill 2006, which will replace existing quarantine legislation, amongst other things, will:

*establish a robust and responsive regulatory scheme to control the entry, establishment and spread of harmful pests and diseases that may enter the State either directly, or as a result of the import of goods and agriculture products.*<sup>142</sup>

6.49 That Department maintained that this regulatory scheme and the penalties imposed under that scheme will be sufficient to deter the importation of goods into Western

<sup>140</sup> *Ibid*, p6; and Mr Alan Hill, Executive Manager, and Ms Dianne Fry, President, Western Australian Fruit Growers’ Association Inc, *Transcript of Evidence*, 23 May 2007, pp4 and 7, respectively.

<sup>141</sup> Letter from Mr Alistair Jones, Principal Policy Officer, Intergovernmental Relations Unit, Department of the Premier and Cabinet, undated, pp1 to 2.

<sup>142</sup> Letter from Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, 28 May 2007, p1.

Australia in contravention of the State's import conditions, and that the suggested offence and penalty provisions would be inconsistent with that scheme. The Department of Agriculture and Food also argued that it would be very difficult to successfully identify and prosecute the source of an incursion of a pest or disease.<sup>143</sup>

*Committee Comment*

- 6.50 The Committee acknowledged the concerns of the WAFGA. 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.
- 6.51 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.
- 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,<sup>144</sup> 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

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<sup>143</sup> *Ibid*, pp1 to 2.

<sup>144</sup> Refer to paragraph 6.6 in this Report.



MOU in this way,<sup>145</sup> 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.
- 6.55 With regard to the WAFGA's concerns about the costs associated with pest and disease incursions resulting from imported goods, the Committee identified the Declared Pest Account, which is proposed to be established under the Biosecurity and Agriculture Management Bill 2006, as a cost-sharing arrangement which could satisfy these concerns. The proposed Declared Pest Account would be the continuation (and possible extension) of the funding arrangements that already exist in pastoral regions of the State under the *Agriculture and Related Resources Protection Act 1976* for the control of declared pests in that region,<sup>146</sup> known as the Declared Plants and Animals Control Account. Under the Biosecurity and Agriculture Management Bill 2006, there would be a capacity to raise funds through the rating of land in prescribed<sup>147</sup> areas<sup>148</sup> for, among other things, the controlling<sup>149</sup> of 'declared pests' in those areas. As with the Declared Plants and Animals Control Account, the ratings which are payable in each financial year towards the Declared Pest Account would be 'matched' by the State Government.<sup>150</sup>

<sup>145</sup> Mr Robert Delane, Deputy Director General (Biosecurity and Research), Department of Agriculture and Food, *Transcript of Evidence*, 9 May 2007, p5.

<sup>146</sup> *Explanatory Memorandum* for the Biosecurity and Agriculture Management Bill 2006, p41.

<sup>147</sup> By regulations: definition of 'prescribed' in clause 5 of the Biosecurity and Agriculture Management Bill 2006.

<sup>148</sup> For example, only pastoral areas will initially be rated, but the south-west land division has been earmarked as a possible prescribed area: Hon Kim Chance MLC, Minister for Agriculture and Food, Parliament of Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 2 November 2006, p8143.

<sup>149</sup> This would include eradicating, destroying, preventing the presence or spread of, managing, examining or testing for, surveying for or monitoring the presence or spread of, and treating the 'declared pest': definition of 'control' in clause 5 of the Biosecurity and Agriculture Management Bill 2006.

<sup>150</sup> Refer to Part 6, Division 1 of the Biosecurity and Agriculture Management Bill 2006.

**7      IMPLICATIONS FOR WESTERN AUSTRALIA IF THE TRANS-TASMAN MUTUAL  
RECOGNITION (WESTERN AUSTRALIA) BILL 2005 IS NOT PASSED**

7.1      In October 2003, the Productivity Commission completed a review of the TTMRA and the 1992 Mutual Recognition Agreement between the Commonwealth, States and Territories of Australia.<sup>151</sup> The Productivity Commission concluded that overall, the two mutual recognition arrangements were contributing to the integration of the Australian and New Zealand economies and that they should continue.<sup>152</sup> The following findings were made on the impact of the two arrangements:

- Finding 4.1:

*Data inadequacies have meant that it has not been possible to identify reliably the impacts of the MRA and TTMRA on goods mobility. Overall, the perception of interested parties is that mutual recognition has increased goods mobility and trends in available data are consistent with this.*

- Finding 4.2:

*Both anecdotal information and such data as are available support the view that mutual recognition has contributed significantly to increased labour mobility across MRA and TTMRA jurisdictions.*

- Finding 4.3:

*There is evidence of increased activity to harmonise standards for a number of registered occupations and anecdotal evidence of decreased costs to industry from the operations of the MRA and the TTMRA.*

- Finding 4.4:

*The MRA and TTMRA appear to have had beneficial effects in relation to better standard making.*

7.2      The Productivity Commission also suggested ways in which the design of the arrangements could be improved in relation to their operation, scope and coverage.<sup>153</sup>

7.3      When the Committee queried what implications there would be for Western Australia if the Bill was not passed, the Department of the Premier and Cabinet advised that the

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<sup>151</sup>      Productivity Commission, *Evaluation of the Mutual Recognition Schemes*, Research Report, Canberra, 8 October 2003.

<sup>152</sup>      *Ibid.*, pXVII.

<sup>153</sup>      *Ibid.*, ppXVII to XXV.

State (and New Zealand) would not benefit from the mutual recognition of regulatory standards for goods and services adopted in each of the two jurisdictions:

*For example, New Zealand teachers who wish to be registered to teach in Western Australia at the moment have to go through extra hoops or are unable to register with the College of Teaching because this legislation has not passed. There will be other occupations along those lines. In addition, in the goods area, which we have not had as much to do with, there are issues with products from New Zealand that can come to Western Australia. ... What are we missing out on? Greater choice for consumers, increased opportunities for Western Australians working in New Zealand, and vice versa, lower cost to businesses, and increased competitiveness; all the sorts of things that go with mutual recognition more generally.*<sup>154</sup>

- 7.4 The Minister for Agriculture and Food endorsed this view “wholeheartedly”.<sup>155</sup> 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, an issue about which members of the community have approached him. The Minister was of the view that the passage of the Bill may ameliorate staff shortages in teaching and nursing in Western Australia and “will strengthen the economic and social fabric of Western Australia.”<sup>156</sup>
- 7.5 The Western Australian College of Teaching (**WACOT**) wrote to the Minister for Education and Training on 17 January 2007 seeking information on the progress of the Bill and emphasising that the Bill would facilitate the registration of New Zealand teachers in Western Australia. The WACOT advised the Minister that:

*Until such time as the Bill is passed, teachers from New Zealand cannot apply to the College for registration under mutual recognition provisions. Therefore, they must meet all registration requirements, including qualification requirements. With no access to the benefits of mutual recognition provisions, a small number of New Zealand teachers each year are not eligible for registration with the College.*<sup>157</sup>

<sup>154</sup> Dr John Phillimore, Director, Intergovernmental Relations, Policy Division, Department of the Premier and Cabinet, *Transcript of Evidence*, 9 May 2007, pp6 to 7.

<sup>155</sup> Letter from Hon Kim Chance MLC, Minister for Agriculture and Food, 29 May 2007.

<sup>156</sup> *Ibid.*

<sup>157</sup> Letter from the Western Australian College of Teaching to the Minister for Education and Training, 17 January 2007, p1.

7.6 In response to the Committee's request for more details of the difficulties faced by New Zealand teachers wishing to teach in Western Australia, the WACOT advised, among other things, that:

- a person must hold a three-year teaching qualification in order to be eligible for registration as a teacher in New Zealand, while the minimum qualification requirement to teach in Western Australia is four years of formal training (this requirement has been in place since 1999<sup>158</sup> but teacher registration was introduced only in 2004);<sup>159</sup>
- in 2007, it had so far received approximately 20 registration inquiries from New Zealand teachers with three-year teaching qualifications. The WACOT expressed the view that many New Zealand teachers are already informed of the higher qualification requirements in Western Australia and, therefore, do not make formal applications;<sup>160</sup>
- teachers from all other Australian States and Territories, except for New South Wales and the Australian Capital Territory, have three-year teaching qualification requirements. Any of these teachers who are registered in their respective States and Territories are eligible for registration in Western Australia under the *Mutual Recognition Act 1995*;<sup>161</sup>
- when teacher registration was introduced in Western Australian in 2004, Western Australian teachers who were already practising (including those with three-year teaching qualifications) were granted registration;<sup>162</sup>
- as at May 2007, approximately 7,000 out of an estimated 42,000 teachers registered in Western Australia have three-year teaching qualifications from various jurisdictions;<sup>163</sup> and
- all teachers wishing to become registered in Western Australia must also establish their 'fitness to teach' through criminal record screening, meet English language requirements and professional standard requirements.<sup>164</sup>

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<sup>158</sup> Telephone conversation between the Committee's Advisory Officer and the Department of Education and Training, 24 May 2007.

<sup>159</sup> Letter from Dr Suzanne Parry, Director, Western Australian College of Teaching, 30 May 2007, p1.

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*, p2.

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

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**Committee Comment**

- 7.7 The Committee acknowledged the favourable findings of the Productivity Commission in relation to the impact of the TTMRA and the Mutual Recognition Agreement.
- 7.8 The Committee noted that the passage of the Bill will provide New Zealand teachers with the ability to have their teaching qualifications recognised in Western Australia, despite the higher qualification requirements which currently exist in Western Australia. The Committee also noted that this result would effectively bring New Zealand teachers in line with teachers trained in other Australian States and Territories in relation to their eligibility for registration in this State. However, it was difficult for the Committee to reach a conclusion on how many New Zealand teachers would be affected by the passage of the Bill due to the fact that the Committee had only been supplied with anecdotal evidence of the extent of the registration problems faced by those teachers.

**8 CONCLUSION**

- 8.1 The Committee agreed with the Department of Agriculture and Food's advice 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.
- 8.2 The Committee could not reach consensus on a final recommendation on the passage of the Bill.
- 8.3 Hons Graham Giffard and Sally Talbot were of the view that Recommendations 1 to 4 should be agreed to as they improve the Bill. However, the passage of the Bill, which they support, should not be contingent on any or all of those recommendations being accepted.
- 8.4 Hons Peter Collier and Ken Baston were of the view that, subject to Recommendations 1 and 2, the Bill should be passed without amendment.
- 8.5 Hon Giz Watson was of the view that, subject to Recommendations 1, 2, 3 and 4 (or 5 in the alternative to Recommendations 3 and 4), the Bill should be passed without amendment.



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**Hon Graham Giffard MLC**  
**Chair**  
**26 June 2007**



**APPENDIX 1**  
**MEMORANDUM OF UNDERSTANDING**





# APPENDIX 1

## MEMORANDUM OF UNDERSTANDING

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ATTACHMENT

BETWEEN  
COMMONWEALTH OF AUSTRALIA  
AND  
STATE OF NEW SOUTH WALES  
AND  
STATE OF VICTORIA  
AND  
STATE OF QUEENSLAND  
AND  
STATE OF WESTERN AUSTRALIA  
AND  
STATE OF SOUTH AUSTRALIA  
AND  
STATE OF TASMANIA  
AND  
NORTHERN TERRITORY OF AUSTRALIA  
AND  
AUSTRALIAN CAPITAL TERRITORY

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MEMORANDUM OF UNDERSTANDING ON ANIMAL AND PLANT  
QUARANTINE MEASURES

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1

MEMORANDUM OF UNDERSTANDING made on the *twenty first* day of *December* 1995.

BETWEEN

COMMONWEALTH OF AUSTRALIA represented by the Minister for Primary Industries and Energy

AND

STATE OF NEW SOUTH WALES represented by the Minister for Agriculture

AND

STATE OF VICTORIA represented by the Minister for Agriculture

AND

STATE OF QUEENSLAND represented by the Minister for Primary Industries and Minister for Racing

AND

STATE OF WESTERN AUSTRALIA represented by the Minister for Primary Industry

AND

STATE OF SOUTH AUSTRALIA represented by the Minister for Primary Industries

AND

STATE OF TASMANIA represented by the Minister for Primary Industry and Fisheries

AND

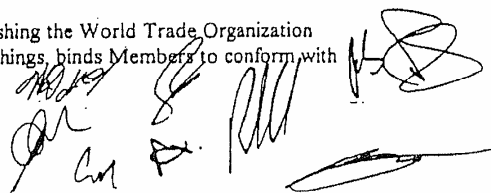
NORTHERN TERRITORY OF AUSTRALIA represented by the Minister for Primary Industry and Fisheries

AND

AUSTRALIAN CAPITAL TERRITORY represented by the Minister for the Environment, Land and Planning

WHEREAS:

- A. The Commonwealth of Australia is a signatory to the Final Act of the Uruguay Round of Multilateral Trade Negotiations.
- B. Australia is party to the Agreement Establishing the World Trade Organization ("WTO Agreement") which, among other things, binds Members to conform with



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the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement")

- C. Members of the World Trade Organization are obliged to formulate and implement positive measures and mechanisms in support of the observance of the provisions of the SPS Agreement by other than central government bodies. The provisions of the General Agreement on Tariffs and Trade 1994 relating to compensation or suspension of concessions or other obligations apply in cases where measures applied by regional or local governments or authorities do not conform with the provisions of the SPS Agreement.
- D. The dispute settlement procedures of the WTO Agreement may be invoked in respect of measures affecting the observance of Agreements under the WTO Agreement, including those taken by regional or local governments or authorities within the territory of a Member.
- E. The States and Territories have legal competence for establishing and maintaining quarantine measures to the extent that they are consistent with Commonwealth legislation.

NOW THIS MEMORANDUM WITNESSES AS FOLLOWS

#### DEFINITIONS

1. In this Memorandum of Understanding:

"ARMCANZ" means the Agriculture and Resource Management Council of Australia and New Zealand

"Memorandum" means this Memorandum of Understanding

"Parties" means the signatories to this Memorandum

"SCARM" means the Standing Committee on Agriculture and Resource Management

"SPS Agreement" means the Agreement on the Application of Sanitary and Phytosanitary Measures at Annex 1A of the WTO Agreement

"Relevant sanitary and [or] phytosanitary measures" means measures as defined in Annex A of the SPS Agreement which relate to the functions of State and Territory authorities responsible for primary industries

"States and Territories" means States and Territories party to this Memorandum; and

"WTO Agreement" means the Agreement Establishing the World Trade Organization done at Marrakesh on 15 April 1994.

#### APPLICATION

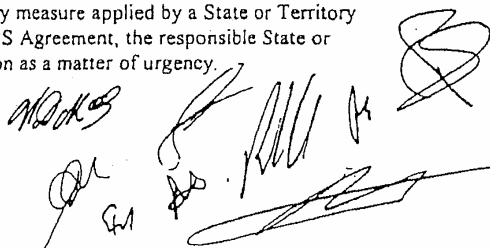
2. This Memorandum shall be known as the Memorandum of Understanding on Animal and Plant Quarantine Measures.
3. This Memorandum shall apply to all animal and plant quarantine measures which are relevant sanitary and phytosanitary measures and which may directly or indirectly affect trade into Australia.
4. This Memorandum shall be deemed to have come into effect on 1 January 1995, the date on which Australia assumed its obligations under the WTO Agreement.
5. This Memorandum may be varied by agreement in writing signed by the parties.
6. A party to this Memorandum may withdraw by giving two years' notice in writing of its intention to withdraw.
7. This Memorandum shall not create legal obligations binding on the parties.

#### OBJECTIVE

8. The objective of this Memorandum is to enable compliance by Australia with relevant obligations under the SPS Agreement.

#### ELEMENTS OF AGREEMENT

9. States and Territories shall ~~consult fully with the Commonwealth~~ before implementing any relevant sanitary or phytosanitary measures which could inhibit trade into Australia and which may not conform with the provisions of the SPS Agreement.
10. States and Territories, in consultation with the Commonwealth, shall:
  - (a) ~~review their existing relevant sanitary and phytosanitary measures with a view to identifying provisions which may be inconsistent with the provisions of this Memorandum; and~~
  - (b) ensure that their existing relevant sanitary and phytosanitary measures are in accordance with the provisions of this Memorandum by 1 October 1995.
11. States and Territories shall not apply any relevant sanitary or phytosanitary measures within their jurisdictions which would not conform with the provisions of the SPS Agreement.
12. If, in accordance with Article 11 of the SPS Agreement and the provisions of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, it is found that a relevant sanitary or phytosanitary measure applied by a State or Territory does not conform with the provisions of the SPS Agreement, the responsible State or Territory shall take appropriate corrective action as a matter of urgency.





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SIGNED for and on behalf of the  
STATE OF VICTORIA by the  
Honourable Bill McGrath MLA,  
Minister for Agriculture,  
in the presence of

*Bill McGrath*

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SIGNED for and on behalf of the  
STATE OF QUEENSLAND by the  
Honourable Robert Gibbs MLA,  
Minister for Primary Industries and Minister  
for Racing, in the presence of

*Robert Gibbs*

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SIGNED for and on behalf of the  
STATE OF WESTERN AUSTRALIA by the  
Honourable Montague Grant House MLA,  
Minister for Primary Industry,  
in the presence of

*Montague Grant House*

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SIGNED for and on behalf of the  
STATE OF SOUTH AUSTRALIA by the  
Honourable Dale S. Baker MP,  
Minister for Primary Industries,  
in the presence of

*Dale S. Baker*


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)

SIGNED for and on behalf of the  
STATE OF TASMANIA by the  
Honourable Robin Gray MHA,  
Minister for Primary Industry and Fisheries,  
in the presence of

*Robin Gray*

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SIGNED for and on behalf of the  
NORTHERN TERRITORY by the  
Honourable Mick Palmer M.L.A.,  
Minister for Primary Industry and Fisheries,  
in the presence of



SIGNED for and on behalf of the  
AUSTRALIAN CAPITAL TERRITORY by  
Gary Humphries MLA,  
Minister for the Environment, Land and  
Planning, in the presence of

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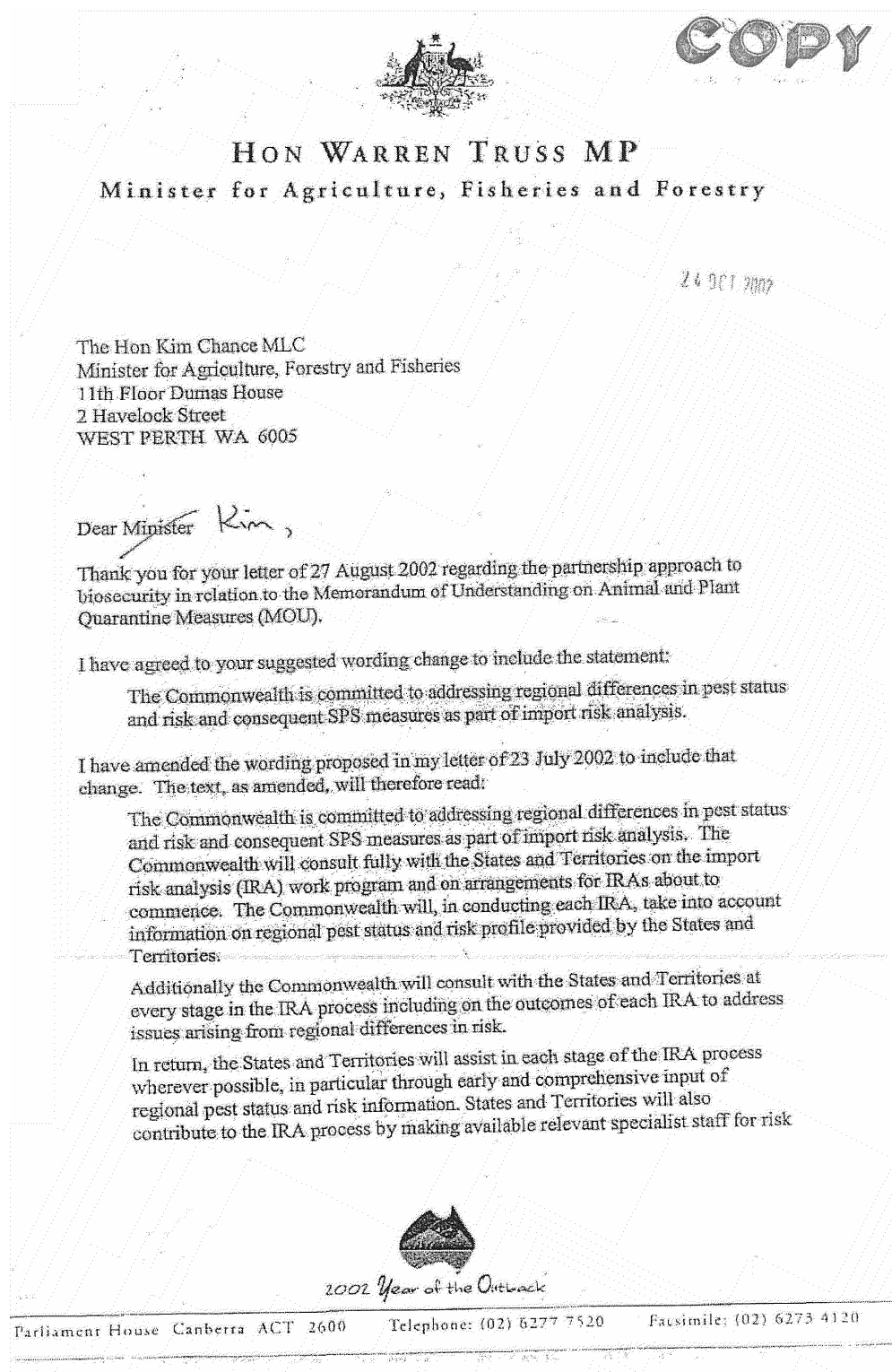


**APPENDIX 2**  
**LETTER FROM HON WARREN TRUSS MP**



## APPENDIX 2

### LETTER FROM HON WARREN TRUSS MP



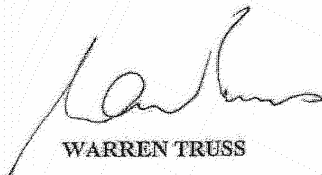
analysis panels and technical working groups. States and Territories will work with the Commonwealth in communicating the results of IRAs and other relevant matters to regional industries and communities.

Specifications relating to regional differences in pest status and risk will be enhanced in the *Draft Technical Guidelines for Import Risk Analysis*, taking into account PIMC decisions.

As for consultation with States and Territories during the IRA process, you would be aware that in the revised draft IRA Framework two new consultation points were specified for States and Territories, to consider issues crucial to the partnership and our joint responsibilities in the administration of quarantine. The States are, commonly, closely involved with the IRA process as providers of specialist advice and skills, and are also involved as stakeholders in the IRA process. Taken as a whole, I am convinced that this represents close and detailed involvement.

Discussions on this subject at the recent PIMC meeting were most valuable. I agree that the partnership between the Commonwealth and States and Territories is vital, and thank you for your comments.

Yours sincerely



WARREN TRUSS

**APPENDIX 3**  
**IMPORT RISK ANALYSIS FLOWCHART**



# APPENDIX 3

## IMPORT RISK ANALYSIS FLOWCHART

### Annex 7: Import Risk Analysis flowchart

