



MUTUAL RECOGNITION (WESTERN AUSTRALIA) BILL 2020

EXPLANATORY MEMORANDUM

The purpose of this Bill is to continue Western Australia's participation in the national mutual recognition scheme by adopting the Commonwealth *Mutual Recognition Act 1992* (the Commonwealth Act) under section 51(xxxvii) of the Australian Constitution for another ten years.

The *Mutual Recognition (Western Australia) Act 2020* (the 2010 Act) adopts the Commonwealth Act until 28 February 2031, unless terminated earlier by the Governor, and is due to expire.

Western Australia has been participating in the national mutual recognition scheme since 1995, and the Trans-Tasman mutual recognition scheme since 2007.

The Scheme

In 1992, the Commonwealth, States and Territories entered into an agreement to establish a scheme to promote the goal of freedom of movement of goods and services providers in a national market. The resulting scheme is the Commonwealth Act, which applies across Australia through various legal mechanisms.

Subject to exceptions, the scheme is based on the following general principles:

- **Goods** – goods produced in or imported into one State or Territory which may be legally sold in that jurisdiction can be sold in another State or Territory, without meeting further regulatory requirements; and
- **Occupations** – a person registered to practise in an occupation in one State or Territory can practise an equivalent occupation in any other State or Territory.

With respect to goods, the mutual recognition legislation essentially overrides State laws that regulate the manufacture or the sale of goods (e.g. packaging and labelling requirements). However, the scheme does not affect the operation of any laws to the extent that they regulate the manner of sale of goods, transportation, storage or handling, or the inspection of goods.

For occupations, anyone working in a registered occupation is deemed to be registered in another jurisdiction following notification to the relevant registration authority within that jurisdiction. The key focus of the scheme is on equivalence, that is, whether the activities authorised to be carried out under each registration are substantially the same or equivalent.



A registration authority may impose conditions to achieve equivalence. Section 32 of the Commonwealth Act allows Ministers from two or more jurisdictions to declare the equivalence of activities covered by registration. A Council of the Australian Governments' initiative that commenced in 2006 has resulted in five ministerial declarations being made for priority trades.

Mutual recognition does not affect the operation of laws that regulate the manner of carrying on an occupation provided by the laws apply equally to all people carrying on the occupation and are not based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation.

Dispute resolution processes apply. For goods, a person prosecuted for an offence relating to the sale of a good, can use mutual recognition as a defence. For occupations, a person can appeal a decision made by a registration authority to the Administrative Appeals Tribunal.

The Commonwealth Act exempts certain goods and laws from the national scheme on a permanent or temporary basis. Laws that are permanently exempted from the scheme including those relating to: firearms and other offensive weapons; fireworks; the classification of publications, film and computer games; gaming machines; and pornographic material. A jurisdiction can unilaterally exempt a good or a class of goods on a temporary basis from the operation of the mutual recognition scheme for a period of up to 12 months, if it believes that the sale of the good could give rise to a threat to public health, safety or the environment.

The national and Trans-Tasman mutual recognition schemes were reviewed by the Productivity Commission in 2015, which concluded that the schemes are generally working well.

Legislation

The Commonwealth Act commenced in 1993 following a text-based referral of power by the New South Wales and Queensland Parliaments. Western Australia joined the scheme after the Western Australian Parliament passed the *Mutual Recognition (Western Australia) Act 1995*, which adopted the Commonwealth Act, and successive Acts have continued Western Australia's adoption.

The Bill seeks to continue Western Australia's participation in the national mutual recognition scheme for another 10 years by adopting the Commonwealth Act under section 51(xxxvii) of the Australian Constitution until 28 February 2031.

The Bill does not attach the Commonwealth Act as a note, which is consistent with the approach recommended by the Legislative Council Uniform Legislation and Statutes Review Committee for the *Trans-Tasman Mutual Recognition (Western Australia) Act 2007*.



Clause 1: Short title

This clause provides the short title of the Bill and its citation.

Clause 2: Commencement

This clause provides for the commence of the Bill. Clause 1 and 2 come into operation on the day on which the Bill receives Royal Assent. The rest of the Bill comes into effect on 1 March 2021.

Clause 3: Definitions

This clause provides definitions for the words “adopt” and “Commonwealth Act”. The definition “adopt” has the same meaning as in section 51(xxxvii) of the Australian Constitution.

Section 51(xxxvii) provides the Commonwealth Parliament with the power to make laws for the peace, order, and good government of the Commonwealth with respect to “*matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law*” [emphasis added].

Clause 4: Adoption of Commonwealth Act

Clause 4 sets out the terms on which Western Australia adopts the Commonwealth Act.

Clause 4(1): This clause provides that the State of Western Australia adopts the Commonwealth Act as originally enacted and any amendments made to it before the Bill receives Royal Assent. Since the Commonwealth Act was enacted, no amendments have been made to the principal Act. Schedule 2 of the Act has been amended twice by Commonwealth regulation.

Clause 4(2): This clause provides the adoption of the Commonwealth Act does not activate any provision of the Commonwealth Act before that provision commences as a law of the Commonwealth.

Clause 4(3): This clause expressly notes that it is State Parliament’s intention that a schedule to the Commonwealth Act may be amended from time to time by regulations made under the Commonwealth Act.



Under section 47 of the Commonwealth Act, the Governor General may make regulations amending the schedules. The schedules list the permanent exemptions to the schemes. Schedule 1 lists the goods that are permanently exempt from the scheme, and these are firearms and other prohibited or offensive weapons, fireworks, gaming machines and pornographic materials. Schedule 2 lists the laws relating to goods that are exempt, and includes a range of State laws.

Before the Governor General can make a regulation, the designated person for each of the participating jurisdictions in the scheme must have published a notice in the official gazette of the jurisdiction, setting out the terms of the proposed regulation and requested that it be made. The designated person in Western Australia is the Governor. The intergovernmental agreement that underpins the scheme also requires the unanimous consent of Heads of Government of the participating parties.

In practise, the process is as follows:

- the Prime Minister writes to Premiers and Chief Ministers proposing the addition of a permanent exemption (after a recommendation to this effect has been made by a Ministerial Council);
- Premiers and Chief Ministers advise the Prime Minister whether they agree to the proposal;
- the Commonwealth prepares draft regulations in consultation with the States and Territories;
- Premiers and Chief Ministers seek the approval of the designated person within their jurisdiction to request that the draft regulations are made; and
- a notice requesting the making of the proposed regulations, which attaches the proposed regulations, is signed by the Governor and published in the Government Gazette.

Clause 4(4): This clause requires the Minister responsible for administering the Acts to table any Commonwealth regulations in each House within 14 days after the registration of the regulations in the Federal Register of Legislative Instruments. A similar provision exists in the *Trans-Tasman Mutual Recognition (Western Australia) Act 2007*.

Clause 5: Regulations for temporary exemption of goods

This clause provides that the Governor may make regulations for the purposes mentioned in section 15 of the Commonwealth Act. This means that the Governor may make regulations to temporarily exempt a particular good or a law relating to a good from the national mutual recognition scheme substantially for the purpose of protecting the health and safety of persons in the State, or preventing or minimising or regulating environmental pollution (including air, water, noise or soil pollution) in the State. Under section 15(3) of the Commonwealth Act, a temporary exemption only operations for 12 months, or an aggregate period of 12 months.



The intergovernmental agreement relating to mutual recognition outlines a process once a jurisdiction has made a temporary exemption, and the Council of the Australian Governments has issued the *Temporary Exemptions: Guidelines*. The temporary exemption is referred to the Ministerial Council having responsibility for the particular good for determination as to whether mutual recognition should apply, regulatory requirements should be harmonised, or the good or law should be permanently exempted. Any determination is based on a vote of two thirds or more of the Ministerial Council.

Clause 6: Termination of adoption

Clause 6(1): This clause provides that the Bill expires on 28 February 2031 or on an earlier date fixed by the Governor.

Clause 6(2): This clause provides the process that the Governor may use to fix an earlier day to terminate the State's adoption of the Commonwealth Act, which is by proclamation.

Clause 6(3): This clause provides that the Bill expires when the adoption of the Commonwealth Act ends either on 28 February 2031, or on an earlier day fixed by the Governor.