

TRANS-TASMAN MUTUAL RECOGNITION (WESTERN AUSTRALIA) AMENDMENT BILL 2012

EXPLANATORY MEMORANDUM

The purpose of this Bill is to amend the *Trans-Tasman Mutual Recognition (Western Australia) Act 2007* (the Act) to continue Western Australia's adoption of the Commonwealth *Trans-Tasman Mutual Recognition Act 1997* (the Commonwealth Act) under section 51(xxxvii) of the Australian Constitution.

The Act came into operation on 1 February 2008, and is due to expire on 31 January 2013. The Bill seeks to amend the termination day to continue Western Australia's participation for ten years until 31 January 2023, and make some other amendments to the Act.

Western Australia has been participating in the trans-Tasman mutual recognition scheme since 1 February 2008, and the national mutual recognition scheme since 1995.

The Scheme

In 1996, the Commonwealth, States and Territories entered into an intergovernmental agreement to establish a scheme to facilitate trade between Australia and New Zealand by removing regulatory barriers to the movement of goods and the mobility of persons in registered occupations.

Subject to exceptions, the trans-Tasman mutual recognition scheme is based on the following general principles:

- **Goods** – a good that may be legally sold in one State or Territory may be sold in New Zealand and a good that may legally be sold in New Zealand may be sold in the State or Territory; and
- **Occupations** - a person registered to practise in an occupation in a State or Territory is entitled to practise an equivalent occupation in New Zealand and a person registered to practise in New Zealand is entitled to practise an equivalent occupation in a State or Territory.

In general terms, the goods principle overrides State legislation with respect to regulatory requirements relating to the goods themselves and the requirements leading up to the point of sale. 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 (other than laws providing that inspection is a prerequisite to the sale of goods in the jurisdiction).

For occupations, the principle applies to registered occupations, and entitlement to recognition under the scheme only arises if the occupation in which the person is registered is equivalent to the occupation in which the person is seeking registration. The process for seeking registration involves the applicant lodging a notice with a local registration authority, and the applicant has deemed registration and can practise the occupation subject to limitations and other requirements. The local registration authority has one month to grant, postpone or refuse registration. A local registration authority may impose conditions to achieve equivalence.

Mutual recognition does not affect the operation of laws that regulate the manner of carrying on an occupation (for example, fidelity funds, insurance and trust accounts) provided 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 the trans-Tasman mutual recognition principle as a defence. For occupations, a person can appeal a decision made by a registration authority to the Administrative Appeals Tribunal.

There are certain Commonwealth and State laws that are excluded or exempted from the operation of the goods principle. Excluded laws are listed in Schedule 1 to the Commonwealth Act, and are laws that jurisdictions identified when the scheme was established as being unintentionally affected by the goods principle, and include customs controls and tariffs, intellectual property and taxation and business franchises.

Exempted laws are those potentially covered by the goods principle which jurisdictions have agreed mutual recognition should not apply. There are three categories of exemptions – temporary; permanent and special.

Temporary exemptions are laws covering a good or a class of goods that an individual jurisdiction has exempted on a temporary basis from the operation of the mutual recognition scheme for a period of up to 12 months (with the possibility of another 12 months) for the purpose of protecting the health and safety of persons, or preventing, minimising or regulating environmental pollution within the jurisdiction. Permanent exemptions are Commonwealth and State laws which are exempt from the operation of the scheme, and include laws relating to quarantine, firearms and other prohibited or offensive weapons, fireworks and indecent material. These laws are listed in Schedule 2 to the Commonwealth Act.

Special exemptions included categories of goods where Australian and New Zealand regulations differed significantly at the time the intergovernmental agreement was negotiated, but parties agreed to expedite the examination of differences with a view to either addressing them through mutual recognition, harmonisation or permanent exemptions. These included therapeutic goods, hazardous substances and road vehicles. Following regulatory action in 2010, all of the special exemptions, which were listed in Schedule 3 of the Commonwealth Act, were converted to permanent exemptions.

In accordance with section 6 of the Act, a review of the operation of and the effect on Western Australia of the Commonwealth Act has been conducted. *The “Review of the Trans-Tasman Mutual Recognition (Western Australia) Act 2007 (June 2012)”* has been tabled in Parliament.

Legislation

The Commonwealth Act commenced in 1997 following a text-based referral of power by the New South Wales Parliament. The New South Wales Parliament did not refer an amendment power to the Commonwealth. Western Australia joined the scheme after the

Western Australian Parliament passed the *Trans-Tasman Mutual Recognition (Western Australia) Act 2007* which adopted the Commonwealth Act for five years.

The Bill seeks to continue Western Australia's participation in the trans-Tasman recognition scheme for 10 years by amending the definition of "termination day" to extend Western Australia's participation until 31 January 2023.

The Bill also amends the adoption of the Commonwealth Act so that the Commonwealth Act is adopted as originally enacted and any amendments made to it before the amendment Bill receives Royal Assent, rather than at a specific date, and makes a related amendment to the long title. The Bill also removes the review clause.

Clause 1: Short title

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

Clause 2: Commencement

This clause provides for the commencement of the Bill. Clauses 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 the day after that day.

Clause 3: Act amended

This clause provides that the *Trans-Tasman Mutual Recognition (Western Australia) Act 2007* is being amended by this Bill.

Clause 4: Long title amended

This clause deletes the date "25 October 2007" in the long title, and replaces it with the day on which the Bill receives Royal Assent. The Act currently adopts the Commonwealth Act as originally enacted and any amendments made to it before 25 October 2007, and is being changed to adopt the Commonwealth Act as adopted as originally enacted and any amendments made to it before the day on which the Bill receives Royal Assent. This amendment would make the Act consistent with the *Mutual Recognition (Western Australia) Act 2010*. The date is in the long title and section 4 of the Act. Further explanation in relation to the amendment is provided in relation to clause 6 below.

Clause 5: Section 3 amended

Clause 5(1) amends the definition of "termination day" in section 3(1) of the Act by deleting paragraph (a), which defines the termination day to be "*the day 5 years after this Act comes into operation; or*". The Act came into operation on 1 February 2008. The effect of inserting the date 31 January 2023 is to extend Western Australia's participation in the trans-Tasman scheme for 10 years.

Under section 3(2) of the Act, the Governor may, by proclamation, fix an earlier day than the termination day to end Western Australia's participation in the scheme. Clause 5(2) of the Bill amends section 3(2) by deleting "*within 5 years after this Act comes into operation*" and inserting "*earlier than 31 January 2023*".

Section 3(3) of the Act provides that the Governor may make a proclamation to fix an earlier day whether or not a review under section 6 has been carried out. As this Bill is deleting the requirement to conduct the review (see clause 7 below), section 3(3) is no longer necessary.

Clause 6: Section 4 amended

Section 4(1) of the Act provides that the Western Australia adopts the Commonwealth Act as originally enacted including the amendments made to it before 25 October 2007. Clause 6 amends this section by removing the date of 25 October 2007 and inserting the day on which the Bill receives Royal Assent. The amendment would make the Act consistent with the *Mutual Recognition (Western Australia) Act 2010*.

The 25 October 2007 date was inserted following a recommendation of the Standing Committee on Legislation into the Trans-Tasman Mutual Recognition (Western Australia) Bill 2005 to fix a date which falls within the period that the Bill was before the Legislative Council. The Committee's concern was that any amendments made to the Commonwealth Act and which commenced operation in the period between the passing of the 2005 Bill and the date of Royal Assent would be adopted by the State without the ability of the WA Parliament to scrutinise the legislation.

Since 25 October 2007, the only amendments to the Commonwealth Act have been to schedules 2 and 3 of the Commonwealth Act. Commonwealth regulations can amend the schedules following a jurisdictional approval process, and the amendments form part of the Commonwealth Act as adopted by the Act. Section 4(3) of the Act notes the intention of the Western Australian Parliament that a schedule of the Commonwealth Act may be "*amended from time to time by regulations made under the Commonwealth Act*".

Section 4(5) of the Act requires the Commonwealth regulations to be tabled in the Western Australian Parliament within 14 sitting days after the registration of the regulations in the Federal Register of Legislative Instruments.

The Commonwealth regulations that have been made since 25 October 2007 are:

Commonwealth Regulations made since 25 October 2007	Publication date of Notice of Endorsement in WA Government Gazette	Date Regulations registered in the Federal Register of Legislative Instruments	Date Regulations Tabled in WA Parliament
Trans-Tasman Mutual Recognition Amendment Regulations 2008 (No. 1) ¹	Trans-Tasman Mutual Recognition (Western Australia) Endorsement of Regulations Notice 2008 published on 28 March 2008	14 April 2008	Legislative Assembly - 6 May 2008 (Tabled Paper No. 3821) Legislative Council - 6 May 2008 (Tabled Paper No. 3917)
Trans-Tasman Mutual Recognition Amendment Regulations 2009 (No. 1) ²	Trans-Tasman Mutual Recognition (Western Australia) Endorsement of Regulations Notice 2009 published on 27 March 2009	17 April 2009	Legislative Assembly - 5 May 2009 (Tabled Paper No. 861) Legislative Council – 5 May 2009 (Tabled Paper No. 695)
Trans-Tasman Mutual Recognition Act 1997 Amendment Regulations 2010 (No. 1) ³	Trans-Tasman Mutual Recognition (Western Australia) Endorsement of Regulations Notice 2010	15 March 2010	Legislative Assembly - 20 April 2010 (Tabled Paper No. 1978) Legislative Council – 30 March

¹ SLI 2008 No. 59

² SLI 2009 No. 65

³ SLI 2010 No. 42

Commonwealth Regulations made since 25 October 2007	Publication date of Notice of Endorsement in WA Government Gazette	Date Regulations registered in the Federal Register of Legislative Instruments	Date Regulations Tabled in WA Parliament
	published on 22 January 2010		2010 (Tabled Paper 1850)
Trans-Tasman Mutual Recognition (Modification of Act) Regulations 2010 (No. 1) ⁴	Trans-Tasman Mutual Recognition (Western Australia) Endorsement of Regulations Notice (No. 2) 2010 published on 26 February 2010	19 April 2010	Legislative Assembly - 4 May 2010 (Tabled Paper No. 2033) Legislative Council – 4 May 2010 (Tabled Paper No. 1965)

The 2008 and 2009 regulations extended the special exemptions in Schedule 3 of the Commonwealth Act for 12 months, and the 2009 regulations also partially converted the special exemption for gas appliances to a permanent exemption. The 2010(1) regulations created a permanent exemption for section 9 of the South Australian *Summary Offences Act 1953* which prohibits the sale of drug paraphernalia. The 2010(2) regulations converted the special exemptions in Schedule 3 to permanent exemptions.

The only amendment to the Commonwealth Act that may occur while the Bill is being considered by the Western Australian Parliament is an amendment to Schedule 2. At the request of Western Australia, and following approval of the Standing Council of Police and Emergency Management and in principle approval by jurisdictions, Commonwealth regulations have been drafted to permanently exempt the *Weapons Act 1999* (WA), *Weapons Regulations 1999* (WA) and *Firearms Regulations 1974* (WA). Subject to jurisdictional endorsement by the designated person in each jurisdiction (in Western Australia, this is the Governor), these regulations will be submitted to the Governor General for approval.

No amendments to the principal provisions of the Commonwealth Act have been proposed. If an amendment is proposed before this Bill receives Royal Assent, it would need to be considered first by the New South Wales Parliament and then by the Commonwealth Parliament as the New South Wales Parliament did not refer an amendment power to the Commonwealth.

Clause 7: Section 6 deleted

Section 6 of the Act provides for the review of mutual recognition arrangements, requiring the Minister to review the operation of and the effect of the Commonwealth Act on Western Australia and table the report in Parliament. The report is to contain a recommendation as to whether or not the adoption of the Commonwealth Act should continue, and is to be tabled in Parliament not later than 6 months before the day 5 years after the Act came into operation, that is, 31 July 2012. The section also provides a process to comply with the tabling requirement if Parliament is not sitting.

The review was completed and the review report was provided to the Clerk of each House on 11 July 2012 for tabling. The review report recommended that the legislation to continue Western Australia's participation in the trans-Tasman scheme not include a review provision as the Productivity Commission conducts a comprehensive review of the national and trans-

⁴ SLI 2010 No. 72

Tasman schemes every five years. The Productivity Commission completed a review in January 2009.

The requirement to review the trans-Tasman scheme every five years is provided in clause 12 of the Intergovernmental Arrangement relating to Trans-Tasman Mutual Recognition 1996.

The removal of the review clause will make the Act consistent with the *Mutual Recognition (Western Australia) Act 2010*.