

**41ST PARLIAMENT**



## **Report 140**

# **STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW**

*Trans-Tasman Mutual Recognition (Western Australia)  
Amendment Bill 2022*

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Presented by  
Hon Donna Faragher MLC (Chair)  
November 2022

## **Standing Committee on Uniform Legislation and Statutes Review**

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## EXECUTIVE SUMMARY

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- 1 The Trans-Tasman Mutual Recognition (Western Australia) Amendment Bill 2022 (Bill) proposes to amend the *Trans-Tasman Mutual Recognition (Western Australia) Act 2007* to:
  - re-adopt the *Trans-Tasman Mutual Recognition Act 1997* (Commonwealth Act) under section 51(xxxvii) of the *Commonwealth Constitution*
  - require the Minister to table reports of reviews of the operation of the Trans-Tasman Mutual Recognition Arrangement (TTMRA) in both Houses of Parliament
  - replace the termination of adoption date of 31 January 2023 with a Governor's termination power by proclamation.
- 2 The TTMRA scheme facilitates trade between Australia and New Zealand by giving effect to the following mutual recognition principles:
  - Goods that are legally sold in Australia may be sold in New Zealand, and vice versa, regardless of regulatory differences.
  - A person registered to practice an occupation in Australia is entitled to practice an equivalent occupation in New Zealand, and vice versa, without undergoing further testing or examination.
- 3 The purpose of the re-adoption of the Commonwealth Act is to ensure Western Australia continues to benefit from participation in the TTMRA, allowing the free movement of goods and the mobility of persons in registered occupations between the State and New Zealand.
- 4 The Bill impacts upon the Parliamentary sovereignty and law-making powers of the Western Australian Parliament by proposing a clause with a Henry VIII effect, providing the Executive with the power to terminate the adoption of the Commonwealth Act.
- 5 The Committee has made a number of findings regarding this sovereignty issue and drawn this clause to the Legislative Council's attention for consideration during debate on the Bill.

## Findings

Findings are grouped as they appear in the text at the page number indicated:

### FINDING 1

Page 5

Clause 2 of the Trans-Tasman Mutual Recognition (Western Australia) Amendment Bill 2022 respects Parliamentary sovereignty by providing certainty of commencement.

### FINDING 2

Page 5

Clause 5, proposed section 4(1) of the Trans-Tasman Mutual Recognition (Western Australia) Amendment Bill 2022 is a Henry VIII clause and erodes the Western Australian Parliament's sovereignty and law-making powers.

**FINDING 3**

Page 6

Clause 5, proposed section 4(1) of the Trans-Tasman Mutual Recognition (Western Australia) Amendment Bill 2022 has the same effect as sections 4(1) and 4(3) of the *Trans-Tasman Mutual Recognition (Western Australia) Act 2007*.

**FINDING 4**

Page 7

Clause 6, proposed section 6 of the Trans-Tasman Mutual Recognition (Western Australia) Amendment Bill 2022 respects Parliamentary sovereignty by requiring the Minister to table reports of reviews of the operation of the Trans-Tasman Mutual Recognition Arrangement in each House of Parliament.

**FINDING 5**

Page 8

Clause 6, proposed sections 7 and 8 of the Trans-Tasman Mutual Recognition (Western Australia) Amendment Bill 2022 are Henry VIII clauses and erode the Western Australian Parliament's sovereignty and law-making powers.

**FINDING 6**

Page 9

Explanatory materials for a bill should identify and justify any Henry VIII clause in that bill.

**FINDING 7**

Page 10

Clause 6, proposed sections 7 and 8 of the Trans-Tasman Mutual Recognition (Western Australia) Amendment Bill 2022 erodes the Western Australian Parliament's sovereignty and law-making powers.

# 1 Introduction

- 1.1 On 25 October 2022 the Trans-Tasman Mutual Recognition (Western Australia) Amendment Bill 2022 (Bill) was introduced into the Legislative Council.
- 1.2 The Bill was referred to the Standing Committee on Uniform Legislation and Statutes Review (Committee) under Standing Order 126. The Committee is required to report by 14 February 2023, being the first Legislative Council sitting day following the expiry of the 45 day reporting period.
- 1.3 The purpose of the Bill is to amend the *Trans-Tasman Mutual Recognition (Western Australia) Act 2007* (Act) to ensure Western Australia's continued participation in the Trans-Tasman Mutual Recognition Arrangement (TTMRA). The Bill proposes re-adopting the *Trans-Tasman Mutual Recognition Act 1997* (Commonwealth Act) under section 51(xxxvii) of the *Commonwealth Constitution*.
- 1.4 The Committee resolved to table its report early, considering the following remarks in the second reading speech:

If the act is not amended prior to 31 January 2023, Western Australia would exit the Trans-Tasman Mutual Recognition arrangement, which may have consequences for the free movement of goods and services between Western Australia and New Zealand.

Western Australia benefits from being part of the Trans-Tasman Mutual Recognition Arrangement and should continue its participation.<sup>1</sup>

- 1.5 Given the severity of the consequences of Parliament not passing the Bill before 31 January 2023, the Committee hopes the early tabling of this report will assist in avoiding this outcome.

# 2 Inquiry procedure

- 2.1 The Committee posted the inquiry on its webpage.<sup>2</sup> The general public was notified of the referral via social media.<sup>3</sup>
- 2.2 Under its terms of reference, the Committee is confined to investigating whether a Bill may impact upon the sovereignty and law-making powers of the Parliament of Western Australia. The Committee is not able to consider any other matter, including the policy of the Bill.
- 2.3 Given the Committee's terms of reference, the Committee did not seek further submissions.

# 3 Supporting documents

- 3.1 The Committee received copies of the Bill, its second reading speech and Explanatory Memorandum (EM) when the Bill was introduced into the Legislative Council.
- 3.2 Standing Order 126(5) states:

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<sup>1</sup> [Tabled Paper 1771](#), Legislative Council, 26 October 2022, p 2.

<sup>2</sup> Legislative Council, [Standing Committee on Uniform Legislation and Statutes Review](#), Parliament of Western Australia, 2022, accessed 14 November 2022.

<sup>3</sup> Legislative Council (LC), 'The Trans-Tasman Mutual Recognition (Western Australia) Amendment Bill 2022' [Facebook post], LC, accessed 23 November 2022.



The Member in charge of a Bill referred to the Committee shall ensure that all documentation required by the Committee is provided to the Committee within 3 business days after referral...

- 3.3 The Committee thanks the Premier for providing the information required by Ministerial Office Memorandum 2022/01<sup>4</sup> within this timeframe.

## 4 Background

### Trans-Tasman Mutual Recognition Arrangement

- 4.1 Mutual recognition schemes facilitate business across borders by promoting the freedom of movement of goods and of registered occupations. They remove barriers to trade and labour mobility caused by regulatory differences across jurisdictions. This is achieved by providing for mutual recognition of regulatory standards for goods and registered occupations adopted in participating jurisdictions.
- 4.2 The TTMRA is such a scheme. It facilitates trade between Australia and New Zealand and is governed by an Intergovernmental Agreement entered into in 1996 between the governments of the Commonwealth, States and Territories and New Zealand. It builds upon a 1993 Mutual Recognition Agreement between all Australian jurisdictions.
- 4.3 The TTMRA gives effect to the following mutual recognition principles (Principles):
- Goods that are legally sold in Australia may be sold in New Zealand, and vice versa, regardless of regulatory differences.
  - A person registered to practice an occupation in Australia is entitled to practice an equivalent occupation in New Zealand, and vice versa, without undergoing further testing or examination.
- 4.4 Certain goods, such as firearms and hazardous substances, can be exempted if there are concerns about their effect on public safety and the environment. Also, conditions can be imposed on occupation registrations where required.

### Trans-Tasman Mutual Recognition Act 1997 (Commonwealth)

- 4.5 The Commonwealth Act gives legislative effect to the TTMRA. It was enacted following the New South Wales Parliament referring mutual recognition matters<sup>5</sup> under section 51(xxxvii) of the *Commonwealth Constitution*.<sup>6</sup> To participate in the scheme, States and Territories have enacted their own legislation to adopt the Commonwealth Act.
- 4.6 In addition to setting out the Principles, the Commonwealth Act provides for:
- exceptions to the Principles, such as laws regulating the manner of the sale of the goods or how sellers are required to conduct their business

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<sup>4</sup> M McGowan, *Ministerial Office Memorandum, Uniform Legislation and Statutes Review Committee*, Executive Government Services, accessed 9 November 2022.

<sup>5</sup> *Trans-Tasman Mutual Recognition (New South Wales) Act 1996*.

<sup>6</sup> Section 51(xxxvii) states:

The Parliament shall, subject to this Constitution, have 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.



- persons carrying on registered occupations in New Zealand notifying a local registration authority for the equivalent occupation
- registration for the equivalent occupation in an Australian jurisdiction after notification
- a local registration authority imposing conditions on, postponing or refusing registration on certain grounds
- the Administrative Appeals Tribunal reviewing decisions of local registration authorities
- the Administrative Appeals Tribunal declaring that a person carrying on a registered occupation in New Zealand is or is not entitled to registration in an Australian jurisdiction
- permanent or temporary exemptions of certain goods and laws from the TTMRA, listed in the Schedules to the Commonwealth Act which can be amended by regulations made by the Governor-General
- a jurisdiction temporarily exempting goods or laws from the Commonwealth Act.

## Western Australian legislative history and reviews

4.7 The *Trans-Tasman Mutual Recognition (Western Australia) Bill 2005* (2005 Bill), which became the Act, was preceded by the *Trans-Tasman Mutual Recognition (Western Australia) Bill 1999* (1999 Bill) and the *Trans-Tasman Mutual Recognition (Western Australia) Bill 2002* (2002 Bill).<sup>7</sup> These bills were scrutinised by various Legislative Council committees.

### Trans-Tasman Mutual Recognition (Western Australia) Bill 1999

- 4.8 The 1999 Bill was the State's first proposal to implement the TTMRA. In addition to adopting the Commonwealth Act, it provided for the Act to expire 5 years after it comes into operation.
- 4.9 The 1999 Bill was referred to one of the Committee's predecessors, the Standing Committee on Constitutional Affairs, which tabled its report on 7 December 1999.<sup>8</sup>
- 4.10 The 1999 Bill lapsed when the third session of the 35th Parliament was prorogued on 4 August 2000.

### Trans-Tasman Mutual Recognition (Western Australia) Bill 2002

- 4.11 The 2002 Bill was similar to the 1999 Bill. It was referred to another of the Committee's predecessors, the Standing Committee on Uniform Legislation and General Purposes. That committee tabled its report on 17 October 2002.<sup>9</sup>
- 4.12 The 2002 Bill lapsed when the 36th Parliament was prorogued on 23 January 2005.

### Trans-Tasman Mutual Recognition (Western Australia) Bill 2005

- 4.13 The 2005 Bill was referred to the Standing Committee on Legislation, which tabled its report on 26 June 2007.<sup>10</sup>

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<sup>7</sup> Both bills lapsed at the end of the parliamentary sessions in which they were introduced.

<sup>8</sup> Standing Committee on Constitutional Affairs, report 46, *Trans-Tasman Mutual Recognition (Western Australia) Bill 1999*, Western Australia, Legislative Council, 7 December 1999, accessed 14 November 2022.

<sup>9</sup> Standing Committee on Uniform Legislation and General Purposes, report 4, *Trans-Tasman Mutual Recognition (Western Australia) Bill 2002*, Western Australia, Legislative Council, 17 October 2002, accessed 14 November 2022.

<sup>10</sup> Standing Committee on Legislation, report 8, *Trans-Tasman Mutual Recognition (Western Australia) Bill 2005*, Western Australia, Legislative Council, 26 June 2007, accessed 14 November 2022.

- 4.14 Western Australia began participating in the scheme when the Act, which adopted the Commonwealth Act for an initial period of 5 years, commenced on 6 December 2007.<sup>11</sup>

### Review of the Act

- 4.15 On 14 August 2012 a statutory review into the operation and effect of the Commonwealth Act on Western Australia was tabled in the Legislative Council, as required by section 6 of the Act.<sup>12</sup> The review found there were no significant concerns with the operation of the scheme and recommended Western Australia continue adoption of the Commonwealth Act.

### Trans-Tasman Mutual Recognition (Western Australia) Amendment Bill 2012

- 4.16 The Trans-Tasman Mutual Recognition (Western Australia) Amendment Bill 2012 proposed extending Western Australia's participation in the scheme for a further 10 years until 31 January 2023. It was not referred to the Committee on the basis it was an extension of an existing uniform scheme.<sup>13</sup>

### Productivity Commission review

- 4.17 In 2015, the Productivity Commission (Commission) undertook a review of the TTMRA.<sup>14</sup> It concluded the scheme was generally working well. It also recommended the period between formal reviews of schemes be increased to 10 years.<sup>15</sup>

## 5 Committee scrutiny of the Bill

### Clause 2 – Commencement

- 5.1 Clause 2 states:

#### Commencement

This Act comes into operation as follows —

- (a) sections 1 and 2 — on the day on which this Act receives the Royal Assent;
- (b) the rest of the Act — on the day after that day.

- 5.2 The Committee has consistently raised concerns about how legislation coming into effect by proclamation erodes Parliamentary sovereignty because the Executive controls the commencement date, not Parliament.<sup>16</sup>

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<sup>11</sup> *Trans-Tasman Mutual Recognition (Western Australia) Act 2007* s 7.

<sup>12</sup> [Tabled Paper 4734](#), Legislative Council, 14 August 2012.

<sup>13</sup> Legislative Council, *Debates*, 17 October 2012, p 7044. The Trans-Tasman Mutual Recognition (Western Australia) Amendment Bill 2012 was passed on 28 November 2012 and the *Trans-Tasman Mutual Recognition (Western Australia) Amendment Act 2012* commenced on 6 December 2012.

<sup>14</sup> Australian Government, Productivity Commission, [Research report - Mutual Recognition Schemes - Productivity Commission \(pc.gov.au\)](#), 2015, accessed 27 October 2022.

<sup>15</sup> Productivity Commission, [Research report - Mutual Recognition Schemes - Productivity Commission \(pc.gov.au\)](#), p 2.

<sup>16</sup> Standing Committee on Uniform Legislation and Statutes Review, report 129, [Legal Profession Uniform Law Application Bill 2020 and Legal Profession Uniform Law Application \(Levy\) Bill 2020](#), Western Australia, Legislative Council, 15 September 2020, accessed 14 November 2022, p 12; Standing Committee on Uniform Legislation and Statutes Review, report 136, [Legal Profession Uniform Law Application Bill 2021 and Legal Profession Uniform Law Application \(Levy\) Bill 2021](#), Western Australia, Legislative Council, 12 October 2021, accessed 14 November 2022, p 6; Standing Committee on Uniform Legislation and Statutes Review, report 137, [Mutual Recognition \(Western Australia\) Amendment Bill 2021](#), Western Australia, Legislative Council, 15 February 2022, accessed 14 November 2022, p 4.

- 5.3 In this instance, the certainty of the Bill's commencement meets the Committee's expectation that Parliamentary sovereignty is respected.

#### **FINDING 1**

Clause 2 of the Trans-Tasman Mutual Recognition (Western Australia) Amendment Bill 2022 respects Parliamentary sovereignty by providing certainty of commencement.

#### **Clause 5 – proposed new section 4(1)**

- 5.4 Clause 5 proposes a new section 4(1). It states:

(1) The Commonwealth Act, as originally enacted and as amended from time to time by regulations made under the Commonwealth Act, is adopted.

- 5.5 This differs in wording from section 4(1) of the Act, which states:

(1) Subject to this section, the State of Western Australia adopts the Commonwealth Act as originally enacted including the amendments made to it before the day on which the *Trans-Tasman Mutual Recognition (Western Australia) Amendment Act 2012* receives the Royal Assent.

- 5.6 Like section 4(1), proposed new section 4(1) is a Henry VIII clause as it enables the amendment by regulations of the adopted legislation, thereby eroding the Western Australian Parliament's sovereignty and law-making powers. There is no reference to or justification for this clause in the EM. However, the rationale was previously debated when the Legislative Council considered the 2005 Bill.<sup>17</sup>

#### **FINDING 2**

Clause 5, proposed section 4(1) of the Trans-Tasman Mutual Recognition (Western Australia) Amendment Bill 2022 is a Henry VIII clause and erodes the Western Australian Parliament's sovereignty and law-making powers.

- 5.7 Clause 5 also deletes section 4(3), which states:

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

- 5.8 Section 4(3) recognises that the Commonwealth Act has an internal legislative mechanism for the amendment, by regulation, of schedules and that these amendments will be automatically adopted in Western Australia. This was discussed by the former Standing Committee on Uniform Legislation and General Purposes and the Standing Committee on Legislation.<sup>18</sup>

- 5.9 While proposed section 4(1), like section 4(3), enables the automatic adoption of amendments to the Commonwealth Act by regulations, its wording may suggest a broader scope. For instance, it does not, unlike section 4(3), restrict regulations to those amending the schedules but covers all regulations amending the Commonwealth Act. This may suggest it is intended to cover any regulation-making powers that may amend the Commonwealth Act.

<sup>17</sup> Legislative Council, *Debates*, 24 October 2007, pp 6661-6663; 6666 and 6676.

<sup>18</sup> Uniform Legislation and General Purposes Committee, *Trans-Tasman Mutual Recognition (Western Australia) Bill 2002*, pp 3-4; Legislation Committee, *Trans-Tasman Mutual Recognition (Western Australia) Bill 2005*, pp 4-5.

- 5.10 However, the Committee is of the view that proposed section 4(1) has the same effect as sections 4(1) and 4(3). This is because the reference of power from the New South Wales Parliament does not extend to any amendments other than to schedules to the Commonwealth Act. The EM explains:

Clause 5(1) proposes to delete section 4(1) and insert new wording for the adoption. The Commonwealth Act, as originally enacted and as amended from time to time by regulations made under the Commonwealth Act, is to be adopted. This wording is in line with the parameters of the referring legislative power provided to the Commonwealth by the *Trans-Tasman Mutual Recognition (NSW) Act 1996* and all other adopting States and Territories.

- 5.11 Section 4(5) of the *Trans-Tasman Mutual Recognition (NSW) Act 1996* states:

(5) The reference does not extend to amendments to the Commonwealth Act made after its original enactment, other than amendments to a Schedule to the Commonwealth Act made by regulations in accordance with the Commonwealth Act.

### FINDING 3

Clause 5, proposed section 4(1) of the *Trans-Tasman Mutual Recognition (Western Australia) Amendment Bill 2022* has the same effect as sections 4(1) and 4(3) of the *Trans-Tasman Mutual Recognition (Western Australia) Act 2007*.

## Clause 6 – proposed section 6

- 5.12 Clause 6 proposes to delete section 7 and insert a new section 6. It states:

### 6. Tabling documents relating to scheme reviews

(1) In this section —

**intergovernmental arrangement** means the Trans-Tasman Mutual Recognition Arrangement between the Commonwealth, New Zealand, the States, the Australian Capital Territory and the Northern Territory, as in force from time to time;

**scheme review** means a review of the operation of the intergovernmental arrangement and its related legislation carried out under paragraphs 12.1.1 to 12.1.3 of the intergovernmental arrangement.

(2) Subsection (3) applies if —

- (a) a scheme review is carried out; and
- (b) a report is prepared by the person carrying out the review; and
- (c) the Minister receives the report.

(3) The Minister must cause the report to be laid before each House of Parliament as soon as practicable after the Minister receives the report.

(4) If a report to which subsection (3) applies contains sensitive, confidential or personal information, the Minister may comply with subsection (3) by removing the sensitive, confidential or personal information from the report before causing the document to be laid before each House.

- 5.13 The TTMRA requires periodic reviews every 5 years of the effectiveness of the arrangements. Clauses 12.1.1 to 12.1.3 state:

### General review

12.1.1 The Parties will undertake a general review of the operation of the Arrangement and its related legislation in 2003 or in conjunction with the second review of the Australian Mutual Recognition Agreement, whichever comes first. This will align future reviews of both the TTMRA and the MRA which will thereafter take place at five yearly intervals.

12.1.2 The general review will assess the effectiveness of the arrangements in fostering and enhancing trade and workforce mobility between Australia and New Zealand and should consider whether any changes to the Arrangement or related legislation are required to improve the operation or coverage of the Arrangement.

12.1.3 The review should include an assessment of any amendments or additions to the laws in the Schedules to the Arrangement and comment on their consistency with the principles underpinning the Arrangement. It is the intention of the Parties to minimise, as far as possible, exemptions and exclusions from the Arrangement. The Participating Parties will also examine the scope for deletions from the schedules, consistent with the intention to minimise exemptions and exclusions from the Arrangement.

- 5.14 The Commission's 2015 review was undertaken pursuant to these clauses. As part of its review, it consulted with relevant stakeholders in all participating jurisdictions.
- 5.15 The Committee is pleased proposed section 6 mirrors a statutory form recommendation in the Committee's 137th report on the Mutual Recognition (Western Australia) Amendment Bill 2021.<sup>19</sup> In that report, the Committee stated:

The Committee notes the Premier's view that a separate review mechanism at State level would result in duplication but there should be some form of Parliamentary oversight given that the review required by the IGA is not required to be tabled in Parliament. Parliamentary sovereignty is impacted if there is no review mechanism.

In this instance, the Committee considers that Parliamentary sovereignty would be enhanced by the tabling of the review referred to in clause 12 of the IGA in both Houses of Parliament. This will avoid duplication but provide Parliament with the information from the review.

- 5.16 The Committee considers any further state based reviews would duplicate the review mechanism in the TTMRA and that proposed section 6 respects Parliamentary sovereignty in this regard.

### FINDING 4

Clause 6, proposed section 6 of the Trans-Tasman Mutual Recognition (Western Australia) Amendment Bill 2022 respects Parliamentary sovereignty by requiring the Minister to table reports of reviews of the operation of the Trans-Tasman Mutual Recognition Arrangement in each House of Parliament.

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<sup>19</sup> Uniform Legislation and Statutes Review Committee, *Mutual Recognition (Western Australia) Bill 2021*, pp 11-12.

## Clauses that may impact upon Parliamentary sovereignty and law-making powers

### Clause 6 – proposed sections 7 and 8

5.17 Clause 6 proposes new sections 7 and 8. They state:

#### 7. Termination of adoption

The Governor may by proclamation fix a day as the day on which the adoption under section 4(1) is to terminate.

#### 8. Revoking termination proclamations

- (1) The Governor may by proclamation (a **revoking proclamation**) revoke a proclamation made under section 7.
- (2) A revoking proclamation has effect only if published in the *Gazette* before the day fixed in the proclamation made under section 7.
- (3) If a revoking proclamation has effect, the revoked proclamation is taken never to have been made.
- (4) A revoking proclamation does not prevent the further making of a proclamation under section 7.

5.18 The Committee notes the Act already provides, in section 3(2), that the Governor may terminate the adoption. It states:

The Governor may, by proclamation, fix a day that is earlier than 31 January 2023 as the day on which the adoption of the Commonwealth Act under this Act ceases to have effect.

5.19 Proposed section 7 differs from section 3(2) in that the Governor's termination proclamation is not time bound by any fixed date.

5.20 Both provisions are Henry VIII clauses. They delegate power from the Parliament to the Governor (that is, the Executive) to terminate the adoption and reference by proclamation and revoke that proclamation.<sup>20</sup>

### FINDING 5

Clause 6, proposed sections 7 and 8 of the Trans-Tasman Mutual Recognition (Western Australia) Amendment Bill 2022 are Henry VIII clauses and erode the Western Australian Parliament's sovereignty and law-making powers.

5.21 There is no reference to or justification for these Henry VIII clauses in the EM or second reading speech. The Committee has previously stated that:

The purpose of a proposed Henry VIII clause should be clearly explained and justified in the Government's explanatory materials in support of its bill. This enables the Legislative Council to weigh the desirability of such a clause in the particular circumstances against its impact on the institution of Parliament.<sup>21</sup>

<sup>20</sup> Standing Committee on Uniform Legislation and Statutes Review, report 121, *Child Support (Commonwealth Powers) Bill 2019*, Western Australia, Legislative Council, 12 March 2019, accessed 14 November 2022, p 13.

<sup>21</sup> Uniform Legislation and Statutes Review Committee, *Mutual Recognition (Western Australia) Bill 2021*, p 6.

## FINDING 6

Explanatory materials for a bill should identify and justify any Henry VIII clause in that bill.

- 5.22 The Committee examined similar provisions in its 137th report relating to the Mutual Recognition (Western Australia) Amendment Bill 2021.<sup>22</sup> It recommended drafts of Governors' proclamations terminating the adoption and revoking proclamations be approved by both Houses of Parliament before they can be made.<sup>23</sup>
- 5.23 The Committee asked the Premier:
- What is the rationale for clause 6, proposed sections 7 and 8 of the Bill, rather than proposing a new fixed expiry date for the adoption of the *Trans-Tasman Mutual Recognition Act 1997* (Commonwealth)?
  - Has the Government considered that it is an erosion of Parliamentary sovereignty if Parliament loses the exclusive legislative power to terminate the adoption referred to in clause 6, proposed sections 7 and 8 of the Bill?
  - Why has the requirement for both Houses of Parliament to approve the draft proclamation and revoking proclamation not been included in clause 6, proposed sections 7 and 8 of the Bill?
- 5.24 The Premier's response is attached as Appendix 1.
- 5.25 The Committee notes some of the justifications the Premier has provided are the same for the similar provisions in the Mutual Recognition (Western Australia) Amendment Bill 2021.
- 5.26 Accordingly, the Committee repeats its commentary at paragraphs 5.25 to 5.28 of its 137th report, as follows:

Proposed section 8 is a Henry VIII clause. The Committee considers however, that Parliament's sovereignty would be preserved if there was a clause requiring both Houses of Parliament to review a draft proclamation to terminate the adoptions of Commonwealth legislation. Without this requirement, the legislative power to terminate the adoptions is placed solely in the hands of the Governor (and therefore the Executive).

The Committee acknowledges that other acts contain similar provisions permitting the Governor to terminate adoptions of Commonwealth legislation by way of proclamation. The Committee also notes the Premier's position that the State may need to terminate the adoptions quickly but the Committee considers a proclamation should not be made without Parliament's review. Parliament must exercise control over the return of legislative power.

It is the Committee's view that that any such proclamation must first be passed by both Houses. In forming this view, the Committee has noted the Solicitor-General's evidence at paragraph 6.20. This evidence, which was provided to the former committee in report 121, shows that it is appropriate for Parliament to exercise control over the return of legislative power.

Any termination of the adoptions of the Commonwealth Act and the Commonwealth Amendment Act under the WA Act should be by way of proclamation first approved by both Houses of Parliament.

<sup>22</sup> Uniform Legislation and Statutes Review Committee, *Mutual Recognition (Western Australia) Bill 2021*, pp 5-9.

<sup>23</sup> Uniform Legislation and Statutes Review Committee, *Mutual Recognition (Western Australia) Bill 2021*, p 9.



- 5.27 The Committee also agrees with evidence given by the Solicitor-General as part of its inquiry into the Child Support (Commonwealth Powers) Bill 2018 that:

if Parliament is referring it, it should be the body that takes it back because we are dealing here with legislative power and it is not appropriate for the executive to be making that decision.<sup>24</sup>

#### **FINDING 7**

Clause 6, proposed sections 7 and 8 of the Trans-Tasman Mutual Recognition (Western Australia) Amendment Bill 2022 erodes the Western Australian Parliament's sovereignty and law-making powers.

- 5.28 The Committee draws the lack of a requirement for both Houses of Parliament to approve a draft proclamation terminating the adoption of the Commonwealth Act and any revoking proclamation to the attention of the House for consideration during debate on the Bill.



Hon Donna Faragher MLC  
**Chair**

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<sup>24</sup> Uniform Legislation and Statutes Review Committee, *Child Support (Commonwealth Powers) Bill 2018*, p 14.

# APPENDIX 1

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## PREMIER'S RESPONSE TO COMMITTEE QUESTIONS ON THE BILL



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### Premier of Western Australia

Our Ref: 59-355979

Hon Donna Faragher MLC  
Chair, Standing Committee on Uniform Legislation and Statutes Review  
[unileg@parliament.wa.gov.au](mailto:unileg@parliament.wa.gov.au)

Dear Ms Faragher

#### **TRANS-TASMAN MUTUAL RECOGNITION (WESTERN AUSTRALIA) AMENDMENT BILL 2022**

Thank you for your correspondence dated 3 November 2022 seeking further advice on the Trans-Tasman Mutual Recognition (Western Australia) Amendment Bill 2022 (the Bill) that was referred to the Standing Committee on Uniform Legislation and Statutes Review (the Committee) on 25 October 2022.

Please find below responses to the Committee's questions.

#### **1.1 What is the rationale for clause 6, proposed sections 7 and 8 of the Bill, rather than proposing a new fixed expiry date for the adoption of the *Trans-Tasman Mutual Recognition Act 1997* (Commonwealth)?**

Western Australia has been party to the Intergovernmental Agreement on Trans-Tasman Mutual Recognition Arrangement (IGA) since 1996. Western Australia commenced participation in these arrangements when the *Trans-Tasman Mutual Recognition (Western Australia) Act 2007* commenced on 1 February 2008 for an initial period of five years. In 2012, the Western Australian Parliament agreed to extend the Act for a further 10 years until 31 January 2023.

Noting Western Australia has participated in the arrangement since 2008 and the Western Australian Parliament has extended the Act on two previous occasions, the fixed expiry date of 31 January 2023 has been removed and replaced with a termination by proclamation.

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Further rationale for these amendments include:

- Alignment with the recent amendments to the *Mutual Recognition (Western Australia) Act 2020* to replace the fixed expiry date with the ability to terminate by proclamation.
- Alignment with approaches by other participating States which do not include a fixed expiry date, including:
  - *Trans-Tasman Mutual Recognition (New South Wales) Act 1996*;
  - *Trans-Tasman Mutual Recognition (Victoria) Act 1998*;
  - *Trans-Tasman Mutual Recognition (Queensland) Act 2003*;
  - *Trans-Tasman Mutual Recognition (South Australia) Act 1999*;
  - *Trans-Tasman Mutual Recognition (Tasmania) Act 2003*.
- Alignment with other Western Australian legislation that refers power to the Commonwealth that do not include a fixed expiry date, including:
  - *National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Act 2018*; and
  - *Credit (Commonwealth Powers) Act 2010*.
- Reduces the risk of the Act expiring, particularly if Parliament was prorogued.

As noted by the Committee in *Report 137 on the Mutual Recognition (Western Australia) Amendment Bill 2021*, including a review clause provides Parliamentary oversight and enhances Parliamentary sovereignty when a fixed expiry date has been removed. The Bill includes a similar review clause to the *Mutual Recognition (Western Australia) Act 2020* which requires the Minister to table the review referred to in the IGA in both Houses of Parliament.

- 1.2 Has the Government considered that it is an erosion of Parliamentary sovereignty if Parliament loses the exclusive legislative power to terminate the adoption referred to in clause 6, proposed sections 7 and 8 of the Bill?**
- 1.3 Why has the requirement for both Houses of Parliament to approve the draft proclamation and revoking proclamation not been included in clause 6, proposed sections 7 and 8 of the Bill?**

The Bill has been drafted to align with the *Mutual Recognition (Western Australia) Act 2020* which allows for termination of the adoption by proclamation. Legislative power to terminate the adoption, including the requirement for both Houses of Parliament to approve the draft termination proclamation and revoking proclamation, has not been included in the event the State was required to act quickly in the interest of Western Australia.

The Bill has been drafted so that the State can act within a short time frame to terminate the adoption if there were negative consequences resulting from Western Australia's participation. If the Parliament was in recess or prorogued, it would not be practicable for the Western Australian Government to obtain Parliamentary approval for the proclamation.

All other States that have adopted the Commonwealth Act have a similar provision, including:

- *Trans-Tasman Mutual Recognition (Victoria) Act 1998*;
- *Trans-Tasman Mutual Recognition (Queensland) Act 2003*;
- *Trans-Tasman Mutual Recognition (South Australia) Act 1999*;
- *Trans-Tasman Mutual Recognition (Tasmania) Act 2003*.

Other Western Australia legislation that refers powers to the Commonwealth with a similar provision include:

- *National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Act 2018*;
- *Credit (Commonwealth Powers) Act 2010*.

As noted above, Clause 6, proposed section 6, inserts a review clause which provides Parliamentary oversight of the arrangement and enhances Parliamentary sovereignty.

I trust this advice will assist the Committee in its consideration of the Bill. If the Committee requires any further information, please contact Mrs Ashley Sakala, Principal Policy Officer, [Ashley.Sakala@dpc.wa.gov.au](mailto:Ashley.Sakala@dpc.wa.gov.au) or 08 6552 6226.

Yours sincerely



Mark McGowan MLA  
**PREMIER**

10 NOV 2022

## GLOSSARY

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Term	Definition
<b>1999 Bill</b>	Trans-Tasman Mutual Recognition (Western Australia) Bill 1999
<b>2002 Bill</b>	Trans-Tasman Mutual Recognition (Western Australia) Bill 2002
<b>2005 Bill</b>	Trans-Tasman Mutual Recognition (Western Australia) Bill 2005
<b>Act</b>	<i>Trans-Tasman Mutual Recognition (Western Australia) Act 2007</i>
<b>Bill</b>	Trans-Tasman Mutual Recognition (Western Australia) Amendment Bill 2022
<b>Commission</b>	Productivity Commission
<b>Committee</b>	Standing Committee on Uniform Legislation and Statutes Review
<b>Commonwealth Act</b>	<i>Trans-Tasman Mutual Recognition Act 1997</i>
<b>EM</b>	Explanatory Memorandum for the Trans-Tasman Mutual Recognition (Western Australia) Amendment Bill 2022
<b>Principles</b>	Mutual recognition principles contained in the TTMRA and the Commonwealth Act
<b>TTMRA</b>	Trans-Tasman Mutual Recognition Arrangement

## **Standing Committee on Uniform Legislation and Statutes Review**

### **Date first appointed:**

17 August 2005

### **Terms of Reference:**

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

#### **'6. Uniform Legislation and Statutes Review Committee**

- 6.1 *A Uniform Legislation and Statutes Review Committee is established.*
- 6.2 The Committee consists of 4 Members.
- 6.3 The functions of the Committee are –
  - (a) to consider and report on Bills referred under Standing Order 126;
  - (b) on reference from the Council, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to Standing Order 126;
  - (c) to review the form and content of the statute book; and
  - (d) to consider and report on any matter referred by the Council.
- 6.4 In relation to function 6.3(a) and (b), the Committee is to confine any inquiry and report to an investigation as to whether a Bill or proposal may impact upon the sovereignty and law-making powers of the Parliament of Western Australia.'



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