THIRTY-NINTH PARLIAMENT

REPORT 89

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

GENE TECHNOLOGY (WESTERN AUSTRALIA) BILL 2014

Presented by Hon Kate Doust MLC (Chair)

March 2015

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 examine the provisions of any treaty that the Commonwealth has entered into or presented to the Commonwealth Parliament, and determine whether the treaty may impact upon the sovereignty and law-making powers of the Parliament of Western Australia;

(d) to review the form and content of the statute book; and

(e) 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."

Members as at the time of this inquiry:

Hon Kate Doust MLC (Chair)
Hon Brian Ellis MLC (Deputy Chair)
Hon Mark Lewis MLC
Hon Amber-Jade Sanderson MLC

Staff as at the time of this inquiry:

Alex Hickman (Advisory Officer (Legal))
Samantha Parsons (Committee Clerk)

Address:

Parliament House, Perth WA 6000, Telephone (08) 9222 7222
lcco@parliament.wa.gov.au
Website: http://www.parliament.wa.gov.au

ISBN 978-1-925149-12-8

CONTENTS

EXECUTIVE SUMMARY AND RECOMMENDATIONS I

EXECUTIVE SUMMARY I
RECOMMENDATIONS II

REPORT 1

1 REFERENCE 1
2 PROCEDURE 1
3 UNIFORM LEGISLATION 2
4 SUPPORTING DOCUMENTS 2
5 BACKGROUND TO THE BILL 3
Gene technology 3
The national scheme 3
The Gene Technology Act 2006 4
Generally 4
Review of the Act 6
The *Genetically Modified Crops Free Areas Act 2003* 7
6 THE INTERGOVERNMENTAL AGREEMENT 8
Sections of the IGA which may impact upon the sovereignty and law-making powers of the Parliament of Western Australia 8
Section 6(h) of the IGA 8
Section 9 of the IGA 9
Section 40 of the IGA 9
Section 44 of the IGA 10
Section 49 of the IGA 11
7 THE BILL 11
Clauses of the Bill which may impact upon the sovereignty and law-making powers of the Parliament of Western Australia 12
Clause 6 of the Bill 12
Applied laws versus mirror legislation approach to uniform legislation 13
Clause 7 of the Bill 16
Clauses 8, 12 and 15 of the Bill 18
Notification of disallowance of Commonwealth regulations 21
Fragmentation of oversight arrangements 22
Clause 21 of the Bill 23
8 THE COMMONWEALTH ACT 24
Sections of the Commonwealth Act which may impact upon the sovereignty and law making powers of the Parliament of Western Australia 24
Subsection 187(1) of the Commonwealth Act 24
9 REVIEW OF THE ACT 25
10 CONCLUSION 27

APPENDIX 1 STAKEHOLDERS INVITED TO PROVIDE A SUBMISSION, SUBMISSIONS RECEIVED AND HEARINGS 31

Stakeholders invited to provide a submission 31
Submissions received 31
Hearings 32

APPENDIX 2 OVERVIEW OF GENE TECHNOLOGY 35

EXECUTIVE SUMMARY AND RECOMMENDATIONS FOR THE

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO THE

GENE TECHNOLOGY (WESTERN AUSTRALIA) BILL 2014

EXECUTIVE SUMMARY

1 The Gene Technology (Western Australia) Bill 2014 (**Bill**) forms part of a national scheme for gene technology regulation. This scheme comprises a set of similar State, Territory and Commonwealth laws that provide for uniform control of dealings with genetically modified organisms throughout Australia.

2 The national scheme is underpinned by the Intergovernmental Agreement on Gene Technology, which sets out the understanding between Commonwealth, State and Territory governments regarding the establishment of a nationally consistent regulatory system for gene technology.

3 The Bill proposes replacing the *Gene Technology Act 2006* with an Act which applies Commonwealth gene technology laws, including the *Gene Technology Act 2000* (Cth) as laws of Western Australia. It is suggested that this scheme:

- removes inconsistencies between the *Gene Technology Act 2006* and the Commonwealth gene technology laws; and
- is to ensure ongoing uniformity without the need for specific amendments whenever the Commonwealth gene technology laws are amended.

4 The Committee has inquired into the Bill and identified a number of provisions and aspects it considers has an impact on parliamentary sovereignty and law-making powers, such as the application of Commonwealth interpretation and accountability legislation to the regulation of gene technology in Western Australia; a Henry VIII clause and the automatic application of amendments to the Commonwealth gene technology laws to Western Australia.

5 The Committee is of the view that the mirror, rather than the applied laws approach to uniform legislation, should have been adopted with respect to the regulation of gene technology in Western Australia.

6 The *Gene Technology Act 2006* should be amended to ensure its consistency with Commonwealth gene technology laws rather than the Bill introduced.

RECOMMENDATIONS

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

Page 11

Recommendation 1: The Committee recommends that the Minister for Agriculture and Food explain to the Legislative Council the process by which the Intergovernmental Agreement on Gene Technology will be reviewed and table any future review of the Intergovernmental Agreement on Gene Technology in the Legislative Council.

Page 11

Recommendation 2: The Committee recommends that the Minister for Agriculture and Food notify the Parliament of any withdrawal by Western Australia or any other party from the Intergovernmental Agreement on Gene Technology in the Legislative Council.

Page 16

Recommendation 3: The Committee recommends that the Minister for Agriculture and Food, during the Second Reading debate on the Gene Technology (Western Australia) Bill 2014, advise the Legislative Council why the mirror legislation approach cannot be adopted in the Bill as has been utilised in the *Gene Technology Act 2006*.

Page 21

Recommendation 4: The Committee recommends that, during the Second Reading debate, the Minister for Agriculture and Food inform the Legislative Council whether the Parliament of Western Australia will be notified, pursuant to clause 20(1)(c) of the Gene Technology (Western Australia) Bill 2014, whenever the regulations under the *Gene Technology Act 2000* (Cth) and the *Gene Technology (Licence Charges) Act 2000* (Cth) are disallowed by the Commonwealth Parliament.

Page 27

Recommendation 5: The Committee recommends that the Gene Technology (Western Australia) Bill 2014 be amended by providing for a review. This can be effected in the following manner:

Page 13, after line 8 – to insert –

Review of operation of Act

(1) The Minister must cause an independent review of the operation of this Act to be undertaken as soon as possible after the fourth anniversary of the commencement of this Act.

(2) A person who undertakes such a review must give the Minister a written report of the review.

(3) The Minister must cause a copy of the report of the review to be laid before each House of Parliament within 12 months after the fourth anniversary of the commencement of this Act.

(4) In this section —

***independent review* means a review undertaken by persons who —**

(a) in the opinion of the Minister possess appropriate qualifications to undertake the review; and

(b) include one or more persons who are not employed by the State of Western Australia, a State agency, the Commonwealth or a Commonwealth authority.

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO THE

GENE TECHNOLOGY (WESTERN AUSTRALIA) BILL 2014

---

1 REFERENCE

1.1 On 19 November 2014 the Gene Technology (Western Australia) Bill 2014 (**Bill**) was referred to the Standing Committee on Uniform Legislation and Statutes Review (**Committee**) for inquiry and report by 10 March 2015.

2 PROCEDURE

2.1 The Committee called for submissions by contacting 16 stakeholders directly and also by way of an advertisement in *The West Australian* on Saturday 29 November 2014.

2.2 Submissions closed on Friday 19 December 2014, with 12 submissions received. All submissions are available on the Committee's website.

2.3 The Committee held a hearing with the Department of Agriculture and Food (**Department**) on 1 December 2014. At this hearing Ms Katherine Smart and Ms Catharine Ashforth of the Department briefed the Committee on the Bill. A copy of the transcript of the hearing is available on the Committee's website.[1]

2.4 The Committee also posed a number of written questions to the Department on clauses in the Intergovernmental Agreement on Gene Technology (**IGA**),[2] the Bill and the Commonwealth gene technology laws applied by the Bill.[3] The Committee was concerned about their impact on the sovereignty and law-making powers of the Parliament of Western Australia.[4] The Department provided responses on 12 January 2015[5] and 12 February 2015.[6]

2.5 Details of stakeholders invited to make a submission, submissions received and the hearing of witnesses, are contained in **Appendix 1**.

---

1 http://www.parliament.wa.gov.au/uni.

2 http://www.health.gov.au/internet/main/publishing.nsf/Content/gene-tech-agreement.

3 See footnote 9.

4 Letter from Hon Kate Doust MLC to Mr Rob Delane, Director General, Department of Agriculture and Food, 17 December 2014; Letter from Hon Kate Doust MLC to Mr Rob Delane, Director General, Department of Agriculture and Food, 6 February 2015.

5 Letter from Mr Rob Delane, Director General, Department of Agriculture and Food, 12 January 2015.

6 Letter from, Mr Rob Delane, Director General, Department of Agriculture and Food, 12 February 2015.

2.6 The Committee wishes to thank all submitters and witnesses who made themselves available.

3 UNIFORM LEGISLATION

3.1 The Bill adopts *Structure 1 – Applied Law*. This is enacted in one jurisdiction and applied (as in force from time to time) by other participating jurisdictions as a law of those jurisdictions.[7] It can also be described as follows:

> *this type of legislation is enacted by one main jurisdiction and other jurisdictions then pass Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own. This is an elastic structure as variations can be made to accommodate requirements determined during the negotiation process.*
>
> *Each jurisdiction retains some flexibility in its consideration of proposed amendments. A high degree of consistency is emphasised in the original legislation.*[8]

3.2 The Bill applies the Commonwealth Gene Technology Laws[9] as laws of Western Australia under clause 6 of the Bill.

4 SUPPORTING DOCUMENTS

4.1 The Minister for Agriculture and Food, Hon Ken Baston MLC, provided the Committee with the following documentation and information pursuant to Ministerial Office Memorandum MM2007/01:[10]

- the IGA;
- the Second Reading Speech;

---

7 Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 64, *Information Report on Uniform Scheme Structures*, 31 August 2011, p17.

8 Id.

9 Defined in clause 4 of the Bill as follows:

> ***Commonwealth gene technology laws*** *means —*
>
> *(a) the Commonwealth Gene Technology Act; and*
>
> *(b) the Commonwealth Licence Charges Act; and*
>
> *(c) all regulations, guidelines, principles, standards and codes of practice in force under either of those Acts;*

10 A copy is available on the Committee's website.

- the Explanatory Memorandum;
- a statement as to any timetable for the implementation of the legislation;
- the Government's policy on the Bill;
- advantages and disadvantages to the State as a participant in the relevant scheme or agreement;
- relevant constitutional issues;
- an explanation as to whether and by what mechanism the State can opt out of the scheme; and
- the mechanisms by which the Bill, once enacted, can be amended.[11]

5 BACKGROUND TO THE BILL

Gene technology

5.1 An overview of gene technology and the history of its regulation in Australia prior to the setting up of the uniform national scheme is attached as **Appendix 2**.[12] This may assist the reader to obtain relevant background information.

The national scheme

5.2 In 1998, State, Territory and Commonwealth Governments embarked upon the development of a cooperative, consistent, risk-based approach to regulating the use of gene technology in Australia. These efforts resulted in what is now known as the national scheme for gene technology regulation.[13] The principal intention of the scheme is to protect the health and safety of Australians and the environment from threats posed by or resulting from dealings with Genetically Modified Organisms (**GMOs**).[14]

5.3 The scheme comprises a set of similar State, Territory and Commonwealth laws that provide for uniform regulation of GMOs throughout Australia.

5.4 The scheme does not operate in isolation but is part of a larger integrated legislative framework incorporating other specific aspects of GMOs and genetically modified (**GM**) product regulation.

---

11 Gene Technology (Western Australia) Bill 2014, *Supporting Information for the Uniform Legislation and Statutes Review Committee*.

12 Allen Consulting Group, *Review of the Gene Technology Act 2000*, Final Report, August 2011, pp3-5, http://www.acilallen.com.au/cms_files/acggenetechnology2011.pdf (viewed on 15 January 2015).

13 Consultation Paper, Statutory Review of Tasmania's Gene Technology Act 2001, p2, http://dpipwe.tas.gov.au/Documents/GeneTechConsultationPaper.pdf (viewed on 15 January 2015).

14 Id.

5.5 Other parts of the framework are focussed on GMOs and GM products in relation to food safety, health and medical research, therapeutic goods, agricultural and veterinary medicines, industrial chemicals and quarantine. Successful operation of the framework depends on consultation, communication and coordination between the various agencies that have responsibility for these matters.[15]

5.6 Under the *Commonwealth Constitution*, the Commonwealth does not have power over sole traders who do not trade interstate or State or Territory based organisations, hence the cooperative state and federal approach of the national scheme.

5.7 On 11 September 2001, the Commonwealth and the States and Territories signed the IGA, which sets out the understanding between the Commonwealth, State and Territory governments regarding the establishment of a nationally consistent regulatory system for gene technology and underpins the national scheme.

5.8 The *Gene Technology Act 2000* (Cth) (**Commonwealth Act**) covers most organisations conducting dealings with GMOs, such as those operating nationally and the interstate transactions of state-based organisations.

5.9 The Gene Technology Bill 2001, the purpose of which was to establish the Western Australian component of the national scheme, was introduced into the Legislative Assembly in 2001. It was the subject of an extensive inquiry by the Standing Committee on Environment and Public Affairs and lapsed in January 2005 on the prorogation of the 36th Parliament.

The Gene Technology Act 2006

Generally

5.10 Section 17 of the Commonwealth Act provides that a corresponding State law may confer powers, functions and duties on the Gene Technology Regulator (**Regulator**), thereby giving it authority over dealings with GMOs by constitutional corporations within the State.

5.11 The *Gene Technology Act 2006* (**State Act**) (together with the Gene Technology Regulations 2007) commenced operation on 28 July 2007.

5.12 The State Act applies to dealings with GMOs by individuals and organisations that are not constitutional corporations. However, as the State Act has not been declared corresponding to the Commonwealth Act, no functions or powers have yet been conferred on the Regulator with respect to gene technology in Western Australia. This

[15] Consultation Paper, Statutory Review of Tasmania's Gene Technology Act 2001, p2, http://dpipwe.tas.gov.au/Documents/GeneTechConsultationPaper.pdf (viewed on 15 January 2015).

has led some commentators to state that the State Act plays 'little effective part in the national legislative scheme on gene technology.'[16]

5.13 The following differences exist between the State Act and the Commonwealth Act (arising out of the amendments made to the Commonwealth Act in 2007 which have yet to apply in Western Australia).

- Emergency dealings: Part 5A of the Commonwealth Act provides a system whereby the Commonwealth Minister can make determinations relating to dealings with GMOs in emergencies.

- Inadvertent dealings: Section 40A of the Commonwealth Act allows the Regulator to treat a person as having made an 'inadvertent dealings application' if it is satisfied that person has come into possession of the GMO inadvertently.

- Limited and controlled release applications: Section 50A of the Commonwealth Act allows the Regulator to be satisfied that the purpose of an application for a licence to deal with a GMO is to conduct experiments and that satisfactory controls are in place that are appropriate for the Regulator not to seek advice on matters relevant to risk assessments.

- Confidentiality: Section 185(3B) of the Commonwealth Act allows commercial information to be treated as confidential until the Regulator makes a decision on an application for it to be treated as such.

5.14 Western Australia is the last jurisdiction to adopt the approach reflected in the national scheme. Some jurisdictions, such as New South Wales and Tasmania, have adopted the applied laws approach, where amendments to the Commonwealth gene technology laws are applied through an automatic procedure. Others, such as Queensland, Victoria, South Australia and the Australian Capital Territory, have adopted the mirror approach where an amendment Act is introduced for the Parliament to consider before amendments come into force.

5.15 There has been extensive commentary on the consequences of having inconsistent laws between the State and the Commonwealth, such as:

- The inconsistency acting as a disincentive for future investment in the field of gene technology;[17]

---

16 Western Australia, Gene Technology Act 2006, *Review of the Act under Section 194*, Report, June 2012, p15: http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3814984a0957e19ec8c5236648257a53002ac8b3/$file/4984.pdf (viewed on 15 January 2015).

- There is uncertainty about the regulatory coverage of certain dealings with GMOs in Western Australia where different sets of requirements apply to organisations. Those subject to the national scheme are covered by the scheme legislation and subject to a licence whereas others are not. This is especially acute in multi-user facilities where both types of organisations operate.[18]

Review of the Act

5.16 In the Review of the State Act, undertaken by Mr Greg Calcutt SC in 2012 (**State Act Review**), it was stated:

> *inconsistency between Commonwealth and State legislation leads to confusion within parts of the regulated community as to which legislation is applicable with resulting uncertainty and potential compliance issues.*[19]

5.17 The State Act Review recommended that 'the State government should take all necessary steps to secure the enactment of any State legislation needed to achieve consistency with the Commonwealth's GT laws'[20] and favoured the applied laws approach (or as referred to in the various documentation as the 'lock-step' approach) rather than the mirror legislation approach.

5.18 However, it was recognised in this review that Western Australia has largely favoured the mirror legislation approach. This is to enable it to decide whether to allow future amendments of national schemes to apply in Western Australia rather than them coming into effect automatically under the applied laws approach.

5.19 The review also noted Victoria, Queensland, South Australia and the Australian Capital Territory have been able to maintain consistent laws by amending their legislation when necessary.[21]

---

17 Bayer CropScience, *Submission to the Senate Department of Health and Aging on the 2011 Review of the Gene Technology Act 2000*, 16 June 2011. See also Agforce, *Submission from Agforce to the Statutory Review of the Gene Technology Act 2000*, which stated 'The inconsistencies in legislation across the grain growing states is extremely prohibitive in attracting funding for research and development into traits specific to Australia and each unique region', http://www.health.gov.au/internet/main/publishing.nsf/Content/genereview-submission25 (viewed on 23 January 2015).

18 Western Australia, *Gene Technology Act 2006, Review of the Act under Section 194*, Report, June 2012, p12-13, http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3814984a0957e19ec8c5236648257a53002ac8b3/$file/4984.pdf (viewed on 15 January 2015).

19 Ibid, p23.

20 Id.

21 Western Australia, *Gene Technology Act 2006, Review of the Act under Section 194*, Report, June 2012, p28.

The *Genetically Modified Crops Free Areas Act 2003*

5.20 In 2003 the Gene Technology Ministerial Council (now the Legislative and Governance Forum on Gene Technology) issued, pursuant to section 21 of the Commonwealth Act, the *Gene Technology (Recognition of Designated Areas) Principle 2003* (**2003 Policy Principle**). This took effect from 5 September 2003, 'for the purpose of recognising areas (if any) designated under a State law for the purpose of preserving the identity of GM crops, non-GM crops, or both GM and non-GM crops, for marketing purposes.'[22]

5.21 In July and December 2003, the Regulator issued two licences for the commercial release of GM canola lines in Australia. Subsequently, all States and Territories, except Queensland and the Northern Territory, enacted GM crop moratorium legislation, consistent with the 2003 Policy Principle. This was to delay the commercial production of approved GM canola until marketing and trade considerations had been addressed. These moratoria were not imposed on health and safety grounds.

5.22 The relevant legislation in Western Australia providing for such a moratorium is the *Genetically Modified Crops Free Areas Act 2003* (**GMCFA Act**).

5.23 The Explanatory Memorandum for the bill which became the GMCFA Act stated:

> *This Bill will allow the State Government to designate areas of the State, or the whole of the State, as areas where specified genetically modified (GM) food crops may not be grown. This will be done by Ministerial order.*
>
> *The intention is that an order will be made if this is believed to be necessary to protect the State's markets for non-GM crops and to protect the State's reputation as a clean, green source of agricultural products. The State's markets and its good reputation could be seriously damaged if the introduction of GM crops is allowed before adequate segregation and identity preservation systems are in place.*
>
> *The legislation will make it an offence to knowingly cultivate a GM food crop in an area designated as GM free for that crop, and allow substantial penalties to be imposed.*[23]

5.24 The then Minister for Agriculture designated the whole State by Order on 22 March 2004 as the designated area for the purposes of the GMCFA Act, prohibiting the cultivation of all commercial GM crops in the State.[24]

---

22 *Gene Technology (Recognition of Designated Areas) Principle 2003.*

23 Genetically Modified Crops Free Areas Bill 2003, *Explanatory Memorandum*, p1.

24 Genetically Modified Crops Free Areas Order 2004 (published in the *Government Gazette* on 22 March 2004).

5.25 Current Exemption Orders under section 4 of the GMCFA Act include those issued for small scale scientific research trials for cotton (mainly in the Ord River Irrigation Area) and canola as well as for permitting low levels of GM canola material in non-GM seed and grain for canola cultivated in 2007 and 2008.[25]

5.26 A review of the GMCFA Act was undertaken in 2009.[26]

6 THE INTERGOVERNMENTAL AGREEMENT

Sections of the IGA which may impact upon the sovereignty and law-making powers of the Parliament of Western Australia

6.1 The Committee notes the following provisions regarding the enactment and amendment of legislation by the States and Territories forming part of the national scheme and the review of the IGA. These provisions are relevant to parliamentary sovereignty and law making powers of the Parliament of Western Australia and the Committee draws them to the attention of the Legislative Council.

Section 6(h) of the IGA

6.2 This subsection provides:

> *Unless the Council otherwise determines in accordance with Part 5 of this Agreement, the Commonwealth will use its best endeavours to ensure that the Commonwealth Act, among other things, continues:*
>
> …
>
> *h) not to preclude any State or Territory law that is capable of operating concurrently with the Commonwealth Act from operating according to its terms (other than a law not forming part of the Scheme which regulates dealings with GMOs by reference to their character as such and which is prescribed under the Commonwealth Act)*

6.3 Accordingly, it has been left to the States and Territories to decide which type of uniform structure their legislation will take, as long as it operates concurrently with the Commonwealth Act.

---

25 Western Australia, Genetically Modified Crops Free Areas Act 2003, *Review of the Act under Section 19*, Report, November 2009, http://archive.agric.wa.gov.au/objtwr/imported_assets/content/fcp/gmcrops/gmactreviewbackground.pdf (viewed 23 January 2015).

26 Id. See also Katherine Smart, Policy and Legal Coordinator, Project Manager, GM Policy and Regulation, Department of Agriculture and Food, *Transcript of Evidence*, 1 December 2014, p3.

Section 9 of the IGA

6.4 This section provides:

> *Each State and Territory will submit to its Parliament as soon as possible a Bill or Bills to form part of the Scheme, for the purpose of ensuring that the Scheme applies consistently to all persons, things and activities within Australia. Each State and Territory will use its best endeavours to secure the passage of:*
>
> *(a) the Bill or Bills submitted to its Parliament to obtain consistency with the Gene Technology Act 2000 (Cth) and the Gene Technology Amendment Act 2000 (Cth), as introduced, and commencement of the associated Act(s) by 31 December 2001; and*
>
> *(b) any other State or Territory Bill that is subsequently required to ensure the Scheme remains nationally consistent. The State or Territory will use its best endeavours to ensure each such Bill is enacted in the form in which it was introduced.*

Section 40 of the IGA

6.5 This section provides:

> *Any Party that proposes to amend its legislation forming part of the Scheme will submit the proposed amendments to the Council for consideration before introduction of the amendments. The amendments will be submitted at least one month before introduction (unless a different minimum notice period is determined by the Council). Each Party agrees that it will not introduce such an amendment unless the Council has by special majority resolved to approve the proposed amendment. For the avoidance of doubt, this Clause does not apply to:*
>
> *a) the making, amending, suspending, revoking or extension of an emergency dealing determination;*
>
> *b) the making, amending or revoking of an emergency GMO regulation; or*
>
> *c) a regulation or determination made by a State or Territory to mirror an emergency dealing determination or emergency GMO regulation made under the Commonwealth Act.*[27]

[27] Section 5 of the IGA defines 'special majority' as at least two-thirds of the Parties.

6.6 Accordingly, it is possible that, should Western Australia wish to amend its legislation, it may not obtain the necessary approval in the Legislative and Governance Forum on Gene Technology. Also, any amendment proposed by another jurisdiction to its legislation and opposed by Western Australia which may impact on gene technology in the State may be approved. This has the potential to impact upon the sovereignty of the Parliament of Western Australia.

6.7 The Department informed the Committee that the Legislative and Governance Forum on Gene Technology had not given approval for the Bill as it repeals the State Act rather than amends it.[28] This appears to be a gap in the IGA as the repealing of legislation and replacing it with another Act can have the same effect as an amendment.

Section 44 of the IGA

6.8 This section provides:

> *The Parties will review this Agreement and the Scheme no later than four years after the commencement of this Agreement. Further reviews will be conducted at intervals of no more than five years.*

6.9 The Committee is unaware of the process by which this review will be undertaken.

6.10 The Committee asked the Department why there was no provision in the IGA for reviews of the IGA or the national scheme to be tabled in Parliament of Western Australia. The Department responded as follows:

> *Perhaps the parties to the IGA regarded it as up to the members of the Council to see that their respective Parliaments were kept informed of reviews of the IGA or the scheme, as seems reasonable. Any Minister is able to table any review and it is not possible to say whether any will do so in the future.*[29]

6.11 In the absence of such a requirement, the Parliaments of participating jurisdictions are denied an opportunity to scrutinise the review and determine whether it is in the best interests of that jurisdiction to continue to participate in the National Scheme.[30]

6.12 The Committee therefore makes the following recommendation.

---

28 Letter from Mr Rob Delane, Director General, Department of Agriculture and Food, 12 January 2015, List of Answers, p1 and Mr Rob Delane, Director General, Department of Agriculture and Food, 12 February 2015, List of Answers.

29 Letter from Mr Rob Delane, Director General, Department of Agriculture and Food, 12 January 2015, List of Answers, p1.

30 Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 52, *Health Practitioner Regulation National Law (WA) Bill 2010*, 22 June 2010, p62.

Recommendation 1: The Committee recommends that the Minister for Agriculture and Food explain to the Legislative Council the process by which the Intergovernmental Agreement on Gene Technology will be reviewed and table any future review of the Intergovernmental Agreement on Gene Technology in the Legislative Council.

Section 49 of the IGA

6.13 This section provides:

> *Any Party that intends to withdraw from this Agreement must give at least 12 months notice in writing to each of the other Parties. At the expiration of that period, the Party may withdraw from the Agreement by giving written notice to all other Parties stating the date that the withdrawal will be effective.*

6.14 While this provision in the IGA recognises state sovereignty to some extent, the Committee notes the requirement of 12 months notice is a significant lead time.

6.15 The Committee is also of the view that the Parliament of Western Australia should be notified of any withdrawal from the IGA by Western Australia or any party to the IGA and makes the following recommendation.

Recommendation 2: The Committee recommends that the Minister for Agriculture and Food notify the Parliament of any withdrawal by Western Australia or any other party from the Intergovernmental Agreement on Gene Technology in the Legislative Council.

7 THE BILL

7.1 The purpose of the Bill, which proposes to repeal and replace the State Act, is to ensure that Western Australia's gene technology legislation attains consistency with the national uniform scheme for the regulation of GMOs. According to the Explanatory Memorandum, it will do this by applying the Commonwealth gene technology laws as though they were laws of Western Australia. This will ensure ongoing uniformity without the need for specific amendments whenever the Commonwealth gene technology laws are amended.[31] The adoption of the applied law approach to uniform legislation in the Bill would appear to have been undertaken with this in mind.

7.2 Clause 20 of the Bill provides that the Minister must table in Parliament a copy of any amendment to the Commonwealth Act, the *Gene Technology* (*Licence Charges*) *Act 2000* (Cth) or regulations under either of these Acts within 10 sitting days after the amendment comes into operation.

---

31 Gene Technology (Western Australia) Bill 2014, *Explanatory Memorandum*, p1.

7.3 By applying the Commonwealth gene technology laws under clause 6 of the Bill as though they were laws of Western Australia, the Bill introduces the matters set out in paragraph 5.13 above into Western Australian law. This reflects amendments made to the Commonwealth Act since the passing of the State Act and implements the recommendations made by the reviews of the Commonwealth Act.

Clauses of the Bill which may impact upon the sovereignty and law-making powers of the Parliament of Western Australia

7.4 The Committee has identified the following clauses of the Bill as potentially impacting upon the sovereignty and law-making powers of the Parliament of Western Australia and draws these to the attention of the Legislative Council.

Clause 6 of the Bill

7.5 This clause provides:

> ***Application of Commonwealth gene technology laws to this State***
>
> *(1) The Commonwealth gene technology laws, as in force for the time being and as modified to give effect to regulations under section 7, apply as laws of the State and, as so applying —*
>
> *(a) in so far as they consist of the Commonwealth Gene Technology Act and the Commonwealth Licence Charges Act — apply as if they were a part of this Act; and*
>
> *(b) in so far as they consist of regulations and other instruments in force under either of those Commonwealth Acts — apply as if they were subsidiary legislation for the purposes of this Act.*
>
> *(2) Those Commonwealth gene technology laws so apply as if they extended to matters in relation to which the State may make laws —*
>
> *(a) whether or not the Commonwealth may make laws in relation to those matters; and*
>
> *(b) even though the Commonwealth gene technology laws provide that they apply only to specified matters with respect to which the Commonwealth may make laws.*

7.6 As stated above, clause 6 of the Bill proposes to apply the Commonwealth gene technology laws as laws of Western Australia. Accordingly, the Bill adopts the applied laws approach to uniform legislation, whereas the State Act adopted the mirror

approach. The Committee received evidence from a number of witnesses who expressed support for the applied laws approach.[32]

7.7 For example, in its submission to the Committee, the Office of the Gene Technology Regulator stated:

> *A 'lock-step' approach avoids any periods of inconsistency before amendments to the Commonwealth legislation are incorporated into State legislation. Inconsistency between Commonwealth and State/Territory legislation could mean that organisations doing similar work with GMOs within a given jurisdiction would be subject to different regulatory requirements depending on which legislation applied to them. Inconsistency could result in confusion and uncertainty for regulated organisations as to which provisions apply, create potential compliance issues for organisations and the Regulator, and potentially undermine risk management.*[33]

Applied laws versus mirror legislation approach to uniform legislation

7.8 The main difference between these two approaches is that when an amendment is sought to be made to mirror legislation, an amendment Bill will be introduced into Parliament. This would allow the Parliament to consider and debate any changes and decide whether they are in the best interests of Western Australia. Applied legislation automatically applies any such amendments without any requirement for an amendment Bill.

7.9 The tabling of amendments, pursuant to clause 20 of the Bill, will not automatically make them the subject of parliamentary debate, as would an amendment Bill. The Executive, and not the Parliament, would have to initiate any legislation to effect any amendment(s).

7.10 The Department, in its evidence, made the following points when discussing the applied laws approach:

> *The approach taken in the proposed new Act is clearly a much more effective means of achieving the purpose of nationally consistent laws. It has been suggested though, that this approach somehow represents an abrogation of the sovereignty of the State Parliament.*

---

32 See Submission No 1 from CropLife Australia, 12 December 2014; Submission No 3 from Western Australian Farmers Federation, 9 December 2014, p1; Submission No 4 from Mr Rob Delane, Director-General, Department of Agriculture and Food, 16 December 2014, p2; Submission No 6 from Bayer CropScience Pty Ltd, 18 December 2014, p1 and Submission No 7 from the Office of the Gene Technology Regulator, 19 December 2014, pp1-2.

33 Submission No 7 from the Office of the Gene Technology Regulator, 19 December 2014, pp1-2.

> *This concern is misconceived. In no sense does the Bill represent any limitation on the State Parliament's legislative powers. Rather, it represents the exercise of those powers to achieve the legislative purpose in the most effective and efficient way possible. It does not involve any restriction whatsoever on, or impediment to, the future exercise of those powers to repeal or amend the proposed Act in any way.*
>
> *Just as it does under the current approach, the State retains full power to allow its laws to diverge from the Commonwealth laws. The difference is, that under the proposed new Act the applicable laws will remain consistent unless and until any desired change is made to the State laws, whereas currently, with an amendment to the Commonwealth laws, the laws become inconsistent until the required amendment is made to the State laws. This is despite there being no Parliamentary intention that they should be so.*[34]

7.11 The Department also gave the following perspective on the applied versus the mirror legislation approach:

> *The only reason for continuing with the approach that has so far failed to ensure consistency is the misconceived notion that spending valuable Parliamentary and Executive time copying Commonwealth legislation somehow makes the Parliament more 'sovereign' than it is in adopting the far more rational approach. It is not expected that WA will be the last of the currently copying States to change to this approach.*[35]

7.12 The Committee is of the view that the concept of parliamentary sovereignty and law making powers encompasses a number of matters. For instance, Fundamental Legislative Principles 12 to 16 are directly relevant, which are as follows.

> *Does the Bill have sufficient regard to the institution of Parliament?*
>
> *12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?*
>
> *13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?*

---

34 Submission No 4 from Mr Rob Delane, Director-General, Department of Agriculture and Food, 16 December 2014, pp1-2.

35 Letter from Mr Rob Delane, Director General, Department of Agriculture and Food, 12 January 2015, List of Answers, p5.

14. Does the Bill allow or authorise the amendment of an Act only by another Act?

15. Does the Bill affect parliamentary privilege in any manner?

16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament.[36]

7.13 Further examples can be gleaned by consulting previous reports of the Committee, such as the application of laws to Western Australia which the Parliament does not have the power to amend.[37]

7.14 The Committee is also of the view that the mirror approach affords greater protection to the sovereignty of the Parliament of Western Australia and its law-making powers by giving the Parliament an opportunity to consider amendments before they come into effect rather than leaving this to the discretion of the Executive.

7.15 To regard the mirror approach to uniform legislation as no more than 'spending valuable Parliamentary and Executive time copying Commonwealth legislation' as stated in paragraph 7.11 above, displays a lack of understanding of the role Parliament plays in considering whether legislation developed and passed in another jurisdiction (in this case, by the Commonwealth Parliament) should apply in Western Australia and the nature of an effective democracy.

7.16 In light of:

- the importance now being placed on keeping the Commonwealth gene technology laws and State legislation consistent;
- the relatively few amendments that have been made to the Commonwealth gene technology laws since the coming into force of the Act; and
- the mirror approach affording greater protection to the sovereignty of the Parliament of Western Australia and its law-making powers,

---

36 Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 65, *Residential Tenancies Amendment Bill 2011*, 1 November 2011, p41.

37 See Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 71, *Education and Care Services National Law Bill 2011*, 3 May 2012, p9 and Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 59, *Personal Properties Securities (Commonwealth Laws) Bill 2007 and Personal Properties Securities (Consequential Repeals and Amendments) Bill 2007*, 22 March 2011 p5.

the Committee is of the view that, with the benefit of hindsight, the State Act should have been amended when amendments to the Commonwealth gene technology laws were made, which would have removed the need for the introduction of the Bill.

7.17 The Committee supports the application of the mirror approach adopted in Victoria, Queensland, South Australia and the Australian Capital Territory referred to in paragraphs 5.14 and 5.19 above. There is no reason why the Executive Government, having been given notice of amendments proposed to be introduced in the Commonwealth Parliament, could not prepare the necessary amendments to State legislation and introduce them in Parliament once they had been passed by the Commonwealth Parliament.

Recommendation 3: The Committee recommends that the Minister for Agriculture and Food, during the Second Reading debate on the Gene Technology (Western Australia) Bill 2014, advise the Legislative Council why the mirror legislation approach cannot be adopted in the Bill as has been utilised in the *Gene Technology Act 2006*.

Clause 7 of the Bill

7.18 This clause provides:

> ***Modification of Commonwealth gene technology laws***
>
> *The regulations may set out modifications for the purposes of section 6(1) but only to the extent to which they are necessary or convenient for the purpose of enabling the effective operation of the provisions of the Commonwealth gene technology laws as laws of the State.*

7.19 This is a Henry VIII clause as it enables the applied Commonwealth gene technology laws to be amended by regulation rather than an Act of Parliament.

7.20 The Committee's position on Henry VIII clauses is well documented in previous Committee reports.[38]

7.21 The Committee notes the following passage in the judgment of French CJ, Crennan, Kiefel and Keane JJ in the recent High Court case of *ADCO Constructions Pty Ltd v Goudappel* (emphasis in bold added):

[38] For example, see Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 59, *Personal Properties Securities (Commonwealth Laws) Bill 2007 and Personal Properties Securities (Consequential Repeals and Amendments) Bill 2007*, 22 March 2011, p6 and Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 55, *Trade Measurement Legislation (Amendment and Expiry Bill) 2010*, 11 November 2010, pp10-12. A detailed review of Henry VIII clauses is also contained in Western Australia, Legislative Council, Standing Committee on Legislation, Report 19 *Revenue Laws Amendment Bill 2012*, 12 September 2012.

> *The regulation-making power under the WCA, as expanded by cl 5(4) of Pt 19H, authorised regulations "whereby the provisions of the Workers Compensation Acts are deemed to be amended in the manner specified in the regulations." It was not disputed in this appeal that such powers,* ***although they have frequently been criticised for good reason****, lay within the legislative power of the Parliament of New South Wales.*[39]

7.22 Their Honours cite the following in footnote 38 of their judgment.

> *Criticisms of which there are many examples — the Donoughmore Committee, Report of the Committee on Ministers' Powers, (1932) Cmd 4060 at 65 recommended that such clauses "be abandoned in all but the most exceptional cases, and should not be permitted by Parliament except upon special grounds stated in the Ministerial Memorandum attached to the Bill"; see generally Morris, "Henry VIII Clauses: Their Birth, A Late 20th Century Renaissance and a Possible 21st Century Metamorphosis", The Loophole, March 2007 at 14.*[40]

7.23 The Committee makes the following observations.

- As a paper delivered to the 2011 Australia-New Zealand Scrutiny of Legislation Conference stated:

  > *Henry VIII powers provide the executive with a power to override primary legislation by way of delegated legislation. The practical significance of Henry VIII clauses lies in the loss of the public scrutiny and accountability for policy decisions that would usually occur when primary legislation is made by Parliament. In other words, matters of policy can be determined by the executive without the effective scrutiny of Parliament.*[41]

- Accountability of the Executive to the Parliament is an end in itself, not a factor which is routinely balanced against Executive flexibility and convenience.

- While the Joint Standing Committee on Delegated Legislation can recommend disallowance of regulations, the bases on which it can do so under its Terms of Reference are clearly defined and restricted. It is seldom, if ever, the case that a Henry VIII clause would be found to offend those Terms of Reference due to

---

39 [2014] HCA 18, at paragraph 31.

40 Ibid, at footnote 38.

41 Paper delivered by Tim Macindoe MP and the Hon Lianne Dalziel MP, entitled "*New Zealand's response to the Canterbury earthquakes*", p5, http://www.parliament.nz/resource/en-nz/49DBSCH_SCR5299_1/211f946d988923dcbaaeb3667c1b781721874c31 (viewed on 23 January 2015).

the very broad wording that is customarily used for such clauses. As stated by the former Standing Committee on Public Administration and Finance:

> *The Delegated Legislation Committee is relatively powerless in its opposition to the use of Henry VIII clauses because they appear in principal legislation, and only have effect via subordinate legislation. In scrutinising regulations made under Henry VIII powers the Committee is attempting to "shut the gate after the horse has bolted.*[42]

- There is no definition of 'for the purpose of enabling the effective operation of the provisions of the Commonwealth gene technology laws as laws of the State' in clause 7 of the Bill and therefore nothing in the Bill to confine the purpose. This leaves the interpretation of this phrase open to subjective judgment.

- The Explanatory Memorandum for the Bill did not identify clause 7 of the Bill as a Henry VIII clause. The Executive is accountable to the Parliament as the law-making body in the Westminster system of government. Essential to achieving this accountability is fulfilling its duty to Parliament of full, proactive disclosure on legislation, ensuring it is fully briefed. A quality explanatory memorandum, which should contain an explanation for any provision within a bill that appears to infringe the terms of reference of the relevant parliamentary committee scrutinising the proposed legislation, will assist the Executive in fulfilling this duty.

7.24 In its Report 55, the Committee made the following recommendation:

> *Recommendation 2: The Committee recommends that when introducing a bill to the Legislative Council that proposes a Henry VIII clause, the responsible Minister provide in the Explanatory Memorandum the rationale for that provision.*[43]

Clauses 8, 12 and 15 of the Bill

7.25 These clauses provide as follows:

> ***8. Interpretation of Commonwealth gene technology laws***
>
> *(1) The Acts Interpretation Act 1901 (Commonwealth) applies as a law of the State in relation to the interpretation of the applied provisions.*

---

42 Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report 1, *Planning Appeals Amendment Bill 2001*, 27 March 2002, p51.

43 Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 55, *Trade Measurement Legislation (Amendment and Expiry Bill) 2010*, 11 November 2010, p12.

(2) That Act so applies as if the applied provisions were a Commonwealth Act or were regulations or other instruments under a Commonwealth Act, as the case requires.

(3) The Interpretation Act 1984 (Western Australia) does not apply in relation to the applied provisions.

12. Application of Commonwealth criminal laws to offences against applied provisions

(1) The relevant Commonwealth laws apply as laws of the State in relation to an offence against the applied provisions as if those provisions were a law of the Commonwealth and not a law of the State.

(2) For the purposes of a law of the State, an offence against the applied provisions —

(a) is taken to be an offence against the laws of the Commonwealth in the same way as if those provisions were a law of the Commonwealth; and

(b) is taken not to be an offence against the laws of the State.

(3) Subsection (2) has effect for the purposes of a law of the State except as provided by regulations made under this Act.

15. Application of Commonwealth administrative laws to applied provisions

(1) The Commonwealth administrative laws apply as laws of the State to any matter arising in relation to the applied provisions as if those provisions were a law of the Commonwealth and not a law of the State.

(2) For the purposes of a law of the State, a matter arising in relation to the applied provisions —

(a) is taken to be a matter arising in relation to laws of the Commonwealth in the same way as if those provisions were a law of the Commonwealth; and

(b) is taken not to be a matter arising in relation to laws of the State.

> *(3) Subsection (2) has effect for the purposes of a law of the State except as provided by regulations made under this Act.*
>
> *(4) A provision of a Commonwealth administrative law applying because of this section that purports to confer jurisdiction on a federal court is taken not to have that effect.*
>
> *(5) For the purposes of this section, a reference in a provision of the Administrative Appeals Tribunal Act 1975 (Commonwealth) (as that provision applies as a law of the State) to the whole or any part of Part IVA of that Act is taken to be a reference to the whole or any part of that Part as it has effect as a law of the Commonwealth.*

7.26 Clause 4 of the Bill defines Commonwealth administrative laws as follows:

> ***Commonwealth administrative laws*** *means the following Acts and regulations of the Commonwealth —*
>
> *(a) the Administrative Appeals Tribunal Act 1975 (excluding Part IVA);*
>
> *(b) the Freedom of Information Act 1982;*
>
> *(c) the Ombudsman Act 1976;*
>
> *(d) the Privacy Act 1988;*
>
> *(e) the regulations in force under any of those Acts*

7.27 The Committee notes the inability of the Parliament of Western Australia to amend the Commonwealth legislation described above that will apply to the regulation of gene technology in Western Australia and, as a consequence, its impact upon the sovereignty and law-making powers of the Parliament.

7.28 The Minister for Agriculture and Food provided the Committee with a comparison between the Commonwealth legislation described above and their Western Australian equivalents. A copy is available on the Committee's website.

7.29 The Committee also notes clause 15 of the Bill excludes the Parliament and oversight bodies in Western Australia from any role in relation to gene technology in Western Australia.

7.30 The Explanatory Memorandum for the Bill did not contain any explanation for the application of these Commonwealth laws, merely paraphrasing the relevant clauses of the Bill. In this regard, the Committee repeats what it stated in the last bullet point under paragraph 7.23 above.

7.31 While the Committee acknowledges that one approach to achieving uniformity is to ensure the same laws apply across every Australian jurisdiction, its impact on parliamentary sovereignty remains. Applying the laws of another jurisdiction which the Parliament of Western Australia cannot amend or repeal and which may be inconsistent with the equivalent Western Australia legislation is inconsistent with state parliamentary sovereignty.

Notification of disallowance of Commonwealth regulations

7.32 The Committee asked the Department how the Parliament of Western Australia will be notified of any disallowance of the regulations forming part of the Commonwealth gene technology laws and what input, if any, will Western Australia have into the disallowance process. The Department responded as follows:

> *DAFWA presumes that in the event of disallowance of Commonwealth gene technology regulations the Commonwealth Department of Health would notify the States. This is also the understanding of the Office of the Gene Technology Regulator. That office has confirmed that it would be imperative to inform the States and Territories of any disallowance of Commonwealth regulations so that any resulting consistency issues could be addressed.*
>
> *Western Australian* [sic] *would not expect to have input into a disallowance motion in the Commonwealth Parliament.*[44]

7.33 The Committee questions how such a lack of certainty safeguards the sovereignty of Parliament.

7.34 The Committee requires clarification whether clause 20(1)(c) of the Bill, regarding the tabling of amendments to regulations made under the Commonwealth Act or the *Gene Technology* (*Licence Charges Act*) *2000* (Cth), applies to the disallowance of regulations forming part of the Commonwealth gene technology laws. The Committee makes the following recommendation.

Recommendation 4: The Committee recommends that, during the Second Reading debate, the Minister for Agriculture and Food inform the Legislative Council whether the Parliament of Western Australia will be notified, pursuant to clause 20(1)(c) of the Gene Technology (Western Australia) Bill 2014, whenever the regulations under the *Gene Technology Act 2000* (Cth) and the *Gene Technology (Licence Charges) Act 2000* (Cth) are disallowed by the Commonwealth Parliament.

7.35 In the event the answer to the question posed in Recommendation 4 is in the negative, the Committee is of the view that clause 20(1)(c) of the Bill should be amended to

[44] Letter from Mr Rob Delane, Director-General, Department of Agriculture and Food, 12 February 2015, List of Answers.

ensure that the Parliament of Western Australia is notified whenever regulations forming part of the Commonwealth gene technology laws are disallowed by the Commonwealth Parliament.

Fragmentation of oversight arrangements

7.36 In its Report 75, the Committee stated:

> *As has been noted in past reports, the Committee has previously received a letter from Mr Sven Bluemmel, Information Commissioner, enclosing an Issues Paper prepared by the Office of the Information Commissioner entitled "COAG Regulatory Reform Agenda: Potential Impact on State Oversight Laws and Mechanisms". The letter noted that between December 2010 and December 2011, an increasing number of proposed COAG reforms were being progressed, resulting in the Information Commissioner having serious concerns as to the efficacy of State oversight laws.*
>
> *In summary, the concerns raised by the Information Commissioner are:*
>
> > *"Recently introduced national schemes have not adopted a consistent approach to how oversight laws apply to the people and organisations which play a role under the national schemes. Instead, different oversight models have been developed for education and child care services, occupational licensing and health practitioner regulation. The use of different oversight models for different regulatory schemes will increase the complexity and fragmentation of oversight laws and will result in inefficiencies and unnecessary duplication of effort and expenditure.*
> >
> > *An increase in the number of oversight bodies is likely to create confusion for the public as well as increasing overall bureaucracy.*
> >
> > *The application of Commonwealth laws to state entities may raise complex jurisdictional issues and will increase the regulatory burden on State agencies, requiring affected officers to have an adequate understanding of both state and Commonwealth FOI Acts and to apply and comply with two different laws. While there are similarities between the WA FOI Act and the Commonwealth FOI Act, there are substantial differences.*
> >
> > *The application of the Commonwealth FOI Act under the national laws can generally be modified by regulations to be made by the relevant ministerial council. This approach could result in the*

> *potential dilution of the current provisions in the Commonwealth FOI Act and the fragmentation of oversight arrangements. It can also be argued that this allows regulations to make legislative determinations of a kind that should properly be the preserve of Parliaments."*[45]

7.37 In his submission to the Committee, the Information Commissioner stated:

> *For the purposes of these inquiries, the Committee may wish to consider the matters raised in my Issues Paper 'COAG Regulatory Reform Agenda: Potential Impact on State Oversight Laws and Mechanisms' provided to the Committee with my letter dated 14 December 2011. A further copy of the Issues Paper is enclosed for the Committee's reference.*
>
> *To the best of my understanding the matters identified in the Issues Paper have not been resolved.*[46]

7.38 The Committee is of the view that the Information Commissioner's concerns regarding the fragmentation of oversight arrangements outlined in his issues paper are applicable to the Bill. This is because the *Freedom of Information Act 1982* (Cth) will apply to the activities of the Regulator in Western Australia whereas the *Freedom of Information Act 1992* (WA) applies to other national regulatory schemes in operation in Western Australia. Again, this issue was not addressed in the Explanatory Memorandum for the Bill.

7.39 The Committee also questions whether the implications of this fragmentation in terms of cost, duplication, access and inefficiencies have been considered by the Executive Government via the Regulatory Gatekeeping Unit.

Clause 21 of the Bill

7.40 This clause provides:

> ***Regulations***
>
> *(1) The Governor may make regulations prescribing all matters that are required or permitted to be prescribed by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to this Act.*

---

45 Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 75, *National Health Funding Pool Bill 2012*, 16 October 2012, pp14-15.

46 Submission No 5 from Mr Sven Bluemmel, Western Australian Information Commissioner, 17 December 2014.

> *(2) The regulations may deal with all matters of a savings or transitional nature arising as a result of the enactment of this Act.*

7.41 The Committee sought clarification from the Department regarding the scope of the application of this clause. The Department confirmed that any regulations made under subclauses 7 and 12(3) would come within the scope of clause 21. Accordingly, they would, together with regulations made under clause 21, be subject to the *Interpretation Act 1984* and hence disallowable by the Parliament of Western Australia as they do not form part of the applied provisions referred to in subclause 8(3) of the Bill.

8 THE COMMONWEALTH ACT

8.1 As explained above, the Commonwealth Act, forming part of the Commonwealth gene technology laws, is sought to be applied as a law of Western Australia by clause 6 of the Bill.

Sections of the Commonwealth Act which may impact upon the sovereignty and law making powers of the Parliament of Western Australia

8.2 The Committee draws the following provision to the attention of the Legislative Council on the basis that it may impinge upon the sovereignty and law-making powers of the Parliament of Western Australia.

Subsection 187(1) of the Commonwealth Act

8.3 This subsection states:

> ***Confidential commercial information must not be disclosed***
>
> *(1) A person who —*
>
> *(a) has confidential commercial information;*
>
> *(b) has it only because of performing duties or functions under this Act or the regulations or under the Commonwealth Act or a corresponding State law within the meaning of the Commonwealth Act; and*
>
> *(c) knows that the information is confidential commercial information,*
>
> *must not disclose the information except —*
>
> *(d) to any of the following in the course of carrying out duties or functions under this Act or the regulations or under the*

Commonwealth Act or a corresponding State law within the meaning of the Commonwealth Act —

(i) a State agency;

(ii) the Commonwealth or a Commonwealth authority;

(iii) the Gene Technology Technical Advisory Committee;

(e) by order of a court; or

(f) with the consent of the person who applied to have the information treated as confidential commercial information.

Penalty: Imprisonment for 2 years or $13 200.

8.4 Subsection 187(2) is in similar terms and applies to those to whom the information referred to in subsection 187(1) has been disclosed.

8.5 The Committee notes subsection 187(1)(d) does not include the State or Commonwealth Parliament or its committees. Accordingly, this provision could be interpreted as a statutory secrecy provision and may adversely affect parliamentary privilege. This is because it may be interpreted as preventing the Parliament and its committees from performing their duties under their terms of reference should this require the receipt of the type of information referred to in subsection 187(1).

8.6 The Committee is of the view that this subclause does not disturb parliamentary privilege.

9 REVIEW OF THE ACT

9.1 The Committee notes there is no clause in the Bill providing for a review to be undertaken.

9.2 Section 194 of the State Act provides:

Review of operation of Act

(1) The Minister must cause an independent review of the operation of this Act to be undertaken as soon as possible after the fourth anniversary of the commencement of this Act.

(2) A person who undertakes such a review must give the Minister a written report of the review.

> *(3) The Minister must cause a copy of the report of the review to be laid before each House of Parliament within 12 months after the fourth anniversary of the commencement of this Act.*
>
> *(4) In this section —*
>
> ***independent review** means a review undertaken by persons who —*
>
> *(a) in the opinion of the Minister possess appropriate qualifications to undertake the review; and*
>
> *(b) include one or more persons who are not employed by the State of Western Australia, a State agency, the Commonwealth or a Commonwealth authority.*
>
> *Note: This section differs from section 194 of the Commonwealth Act.*

9.3 Section 194 of the Commonwealth Act is in very similar terms. While it applies as a law of the State by virtue of clause 6 of the Bill, the Committee notes reviews of the Commonwealth Act have already been undertaken and therefore does not consider it would operate to effect a review of the Bill.

9.4 Review clauses are a mechanism for parliamentary accountability and oversight of the operation of legislation.

9.5 The Committee is of the view that, given the impact of the Bill upon the sovereignty and law-making powers of the Parliament of Western Australia and the departure from the mirror approach as adopted by the State Act, the Bill should contain a clause in similar terms to section 194 of the State Act and Commonwealth Act. This will enable an assessment to be made of whether the Bill is serving the interests of gene technology in Western Australia.

9.6 The Committee therefore makes the following recommendation.

Recommendation 5: The Committee recommends that the Gene Technology (Western Australia) Bill 2014 be amended by providing for a review. This can be effected in the following manner:

Page 13, after line 8 – to insert –

Review of operation of Act

(1) The Minister must cause an independent review of the operation of this Act to be undertaken as soon as possible after the fourth anniversary of the commencement of this Act.

(2) A person who undertakes such a review must give the Minister a written report of the review.

(3) The Minister must cause a copy of the report of the review to be laid before each House of Parliament within 12 months after the fourth anniversary of the commencement of this Act.

(4) In this section —

***independent review* means a review undertaken by persons who —**

(c) in the opinion of the Minister possess appropriate qualifications to undertake the review; and

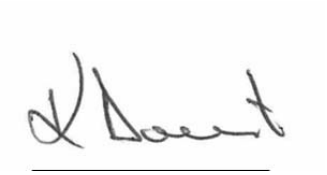
(d) include one or more persons who are not employed by the State of Western Australia, a State agency, the Commonwealth or a Commonwealth authority.

10 CONCLUSION

10.1 The Committee considers there are a number of aspects of the Bill which have a significant impact upon the sovereignty and law-making powers of the Parliament of Western Australia.

10.2 The Committee has sought to highlight some of the repercussions of the applied laws approach, as reflected in the Bill, as well as the application of various Commonwealth laws to gene technology in Western Australia, for the information of the Legislative Council.

10.3 In the Committee's view, the mirror legislation approach should have been adopted and the *Gene Technology Act 2006* amended to ensure its consistency with the Commonwealth gene technology laws.



Hon Kate Doust MLC
Chair

10 March 2015

APPENDIX 1

STAKEHOLDERS INVITED TO PROVIDE A SUBMISSION, SUBMISSIONS RECEIVED AND HEARINGS

APPENDIX 1

STAKEHOLDERS INVITED TO PROVIDE A SUBMISSION, SUBMISSIONS RECEIVED AND HEARINGS

Stakeholders invited to provide a submission

1. Department of Agriculture and Food
2. Institutional Biosafety Committee, University of Western Australia
3. Dr Joe Smith, Gene Technology Regulator
4. National Association for Sustainable Agriculture Australia
5. The Western Australian Farmers Federation
6. Pastoralists and Graziers Association of Western Australia
7. Agrifood Awareness Australia Ltd
8. Bayer CropScience Pty Ltd
9. AusBiotech Ltd
10. CropLife Australia Limited
11. Law Society of Western Australia
12. Institutional Biosafety Committee, Curtin University
13. Institutional Biosafety Committee Murdoch University
14. Mr Sven Bluemmel, Western Australian Information Commissioner
15. Mr Chris Field, Western Australian Ombudsman
16. Ms Cathrin Cassarchis, State Archivist and Executive Director, State Records Office of Western Australia

Submissions received

1. Mr Matthew Cossey, Chief Executive Officer, CropLife Australia

2. Dr Robyn Cleland, Acting Gene Technology Regulator, Office of the Gene Technology Regulator

3. Mr Rob Delane, Director General, Department of Agriculture and Food

4. Mr Sven Bluemmel, Western Australian Information Commissioner

5. Ms Julie Newman, National Spokesperson, Network of Concerned Farmers

6. Mr Darrell Boase, GM-Free Farmers

7. Mr Bob Phelps, Executive Director, gene ethics

8. Dr Bernadette Bradley, Biosafety Advisor, Office of Research and Development, Curtin University

9. Mr Noel Avery, Taipan Trading

10. Kim Simpson, Grains Council President, Western Australian Farmers Federation

11. Mr Rob Hall, General Manager – Seeds, Bayer CropScience Pty Ltd

12. Ms Shirley Collins, FOODwatch

Hearings

1. Department of Agriculture and Food, 1 December 2014.

APPENDIX 2

OVERVIEW OF GENE TECHNOLOGY

APPENDIX 2

OVERVIEW OF GENE TECHNOLOGY

- **Extract from the August 2011 review of the Gene Technology Act 2000 (Cth)**

Chapter 2

Gene technology and its applications

Gene technology refers to techniques to modify genes or other genetic material of organisms. This may involve modification of organisms by the direct incorporation, deletion or alteration of one or more genes or genetic sequences to introduce or alter a specific characteristic or characteristics.

Gene technology can be used to produce genetically modified organisms (GMOs), which are organisms modified by the said techniques to inherit particular traits. While organisms modified using gene technology are called GMOs, genetically modified (GM) products are derived or produced from GMOs. The Gene Technology Act defines a genetically modified organism (GMO) as:

> "(a) an organism that has been modified by gene technology; or
>
> (b) an organism that has inherited particular traits from an organism (the initial organism), being traits that occurred in the initial organism because of gene technology; or
>
> (c) anything declared by the regulations to be a genetically modified organism, or that belongs to a class of things declared by the regulations to be genetically modified organisms;
>
> but does not include:
>
> (d) a human being, if the human being is covered by paragraph (a) only because the human being has undergone somatic cell gene therapy; or
>
> (e) an organism declared by the regulations not to be a genetically modified organism, or that belongs to a class of organisms declared by the regulations not to be genetically modified organisms."
>
> *Gene Technology Act*, Section 10

A GM product is defined as:

> "a thing (other than a GMO) derived or produced from a GMO."
>
> *Gene Technology Act*, Section 10

Gene technology has applications in many areas. Key areas that use gene technology include medical research, industrial and agricultural chemicals, agriculture and pharmaceuticals. The following sections discuss the benefits and risks of gene technology on the key areas of human health, food and agriculture and the environment.

Health

In the area of health, gene technology has enabled:

- the development of more effective therapies for diseases such as cancer and diabetes;
- the production of vaccines for hepatitis B and insulin for diabetics;
- the study of genes that cause genetic diseases that make certain persons prone to heart disease, motor neurone disease and some cancers; and

- genetic testing to look for predisposition to disease or developing a particular condition such as some cancers.

While there are claims of potential health risks associated with the consumption of GMOs or GM products, gene technology and GM foods have not been shown to cause any adverse human health impacts. Examples of health concerns mentioned by some stakeholders include the potential to trigger allergic reactions and the possibility of adverse impacts on health resulting from gene transfer (from GM foods to cells of the body or to bacteria in the gastrointestinal tract). However the World Health Organisation has noted that:

> "no allergic effects have been found relative to GM foods currently on the market."
>
> World Health Organisation, 2011

In addition, Food Standards Australian and New Zealand has stated that:

> "to date gene technology has not been shown to introduce any new or altered hazards into the food supply..."
>
> FSANZ, 2011

Food and agriculture

Gene technology has helped to realise insect resistant and herbicide tolerant crops, as well as improve the efficiency of animal production in Australia. CSIRO (2010) has used gene technology to:

- produce cotton varieties that are resistant to certain insect pests;
- insert a particular gene from algae into crop plants so that they can produce DHA, a 'healthy oil' essential for health brain and eye development in infants; and
- investigate whether poultry immunity can be boosted to prevent avian influenza.

Gene technology is also used to improve the efficiency of animal production in Australia. For instance, Cooperative Research Centres, universities and CSIRO have used natural genetic variation in livestock to selectively breed animals that produce more meat, milk and fibre. The development of new vaccines and treatments for preventing and diagnosing livestock diseases are other examples of gene technology applications (CSIRO, 2010).

Potential risks associated with food safety and human consumption are under ongoing surveillance by FSANZ. Concerns expressed about food safety include whether the genetic material could cause adverse health impacts if transferred to human cells, cause allergies, or even be poisonous. Thus far, no adverse human health effects have resulted from of consumption of such foods in countries where they have been approved (World Health Organisation, 2011). However, the WHO also notes that the safety of GM foods should be assessed on a case-by-case basis, as different GM organisms introduce genes in different ways, and it is "not possible to make general statements on the safety of all GM foods."

Environment

By enabling the production of insect resistant and herbicide tolerant crops, the application of gene technology has resulted in reductions in insecticide application and enabled the use of more environmentally benign herbicides into the environment (Bureau of Rural Sciences 2008). This contributes to the sustainability of land management practices (CSIRO, 2010). Additionally, gene technology can enable the biological control of pests or harmful species. Examples are carp (a highly adaptable fish that competes with other native fish for food resources and contribute to the degradation of waterways) and cane toads (which contributes to a variety of adverse environmental impacts).

Scientists have used gene technology to try to block a specific gene in female carp so that only male fish are produced, in a bid to suppress carp numbers. Gene technology is also being used to find a way to prevent the tadpoles of cane toads from growing into adults. While these applications are still at the laboratory stage, they illustrate the potential for environmental benefits from gene technology that are relevant to Australia.

Although gene technology has the potential to be beneficial to the environment, it carries with it various risks. Potentially, some GMOs could reproduce, spread and multiply in the environment after they are released. In controlling biological pests, for instance, gene technology has to ensure that it involves manipulating only the genes of the specific species, in order to minimise risk to non-target species. Risks are assessed and managed before releasing any biological agents into the environment. Currently, the World Health Organisation is investigating potential adverse GMO impacts on beneficial insects, new plant pathogens, plant biodiversity, crop rotation, and movement of herbicide resistant genes to other plants.

- **Extract from the June 2012 review of the Gene Technology Act 2006**

Part 2 — Gene technology and its regulation

2.1 Gene technology

Biotechnology involves the use of living things to make or change products. Biotechnology has been used for centuries in activities ranging from plant and animal breeding through to brewing and baking.

As understanding of how living things function, grow and reproduce has developed, and particularly since the discovery of the structure of DNA in 1953, that area of biotechnology known as gene technology has become increasingly important.

In its wider sense gene technology is the term given to activities concerned with:

- understanding how genes function and interact, and
- learning how to take advantage of natural genetic variations, and
- manipulating and modifying genes and other genetic material.

It is the third set of activities that has been the focus of public attention and regulatory action. Gene technology in this sense involves the modification of organisms by the direct incorporation, deletion or alteration of one or more genes or genetic sequences to introduce or alter a specific characteristic or characteristics.

Genetically modified organisms produced using gene technology are known as GMOs. Other products can be derived or produced from GMOs. They are known as GM products.

Gene technology has already led to achievements in a wide range of areas particularly in human health and food production. For example gene technology has enabled:

- the development of therapies for diseases,
- the production of vaccines,
- the location and study of genes that cause diseases or increase susceptibility to them,
- the production of crop varieties with pest or virus resistance or herbicide or salt tolerance.

Both from a scientific point of view and as a matter of public perception, developments in gene technology, and the potential scope and implications

of future developments, give rise to an obvious need for ongoing monitoring and supervision.

2.2 Monitoring gene technology: from voluntary oversight to government involvement

Oversight of gene technology in Australia began on a voluntary basis in the 1970s. Committees of scientific experts were set up first by the Australian Academy of Sciences and then by the federal Department of Science. These committees effectively provided peer review assessments of proposals to conduct experiments with GMOs between 1975 and 1987.

The committees were superseded in 1987 by the Genetic Manipulation Advisory Committee (GMAC), a non-statutory body set up on the initiative of the federal Minister for Industry, Technology and Commerce. The GMAC's task was to assess risks to human health and the environment in connection with gene technology and provide advice to proponents on how risks associated with work with GMOs could be managed. Though it had no statutory powers, the GMAC's advice was sought and followed by researchers and compliance with its recommendations was a condition of research and development funding from the Commonwealth government.

Advances in gene technology led to an increase in commercial involvement, and an accompanying increase in community awareness and concerns about the application of gene technology generally and the release of GMOs in particular. Recognising this, in 1988 the Commonwealth and State governments initiated a cooperative process to develop a national approach to gene technology regulation.

The process was comprehensive and included issues papers, discussion papers, a draft Bill for public comment, public forums and the consideration of numerous written submissions. This extensive public input and participation proved to be well worthwhile as it led to general acceptance of a proposed regulatory system that sought to balance the potential public benefits of gene technology with community concerns about its development and deployment. The system is discussed in Part 3.