



**SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT**

**REPORT OF THE**

**STANDING COMMITTEE ON UNIFORM  
LEGISLATION AND GENERAL PURPOSES**

**IN RELATION TO THE**

**TRANS-TASMAN MUTUAL RECOGNITION  
(WESTERN AUSTRALIA) BILL 2002**

Presented by Hon Adele Farina MLC (Chairman)

Report 4  
October 2002

## **STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES**

**Date first appointed:**

April 11 2002

**Terms of Reference:**

The following are extracts from Schedule 1 and Standing Order 230A of the Legislative Council Standing Orders:

**“7. Uniform Legislation and General Purposes Committee**

- 7.1 A Uniform Legislation and General Purposes Committee is established.
- 7.2 The Committee consists of 3 members with power in the Committee to coopt 2 additional members for a specific purpose or inquiry.
- 7.3 The functions of the Committee are –
- (a) to consider and report on bills referred under SO 230A;
  - (b) of its own motion or on a reference from a minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;
  - (c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;
  - (d) to consider and report on any matter referred by the House.
- 7.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting.”

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

Hon Adele Farina MLC (Chair)

Hon Paddy Embry MLC

Hon Simon O’Brien MLC

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**IN RELATION TO THE**

**TRANS-TASMAN MUTUAL RECOGNITION (WESTERN AUSTRALIA) BILL 2002**

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**1 REFERENCE OF THE BILL**

1.1 On August 13 2002 the Trans-Tasman Mutual Recognition (Western Australia) Bill 2002 (Bill) was referred to the Uniform Legislation and General Purposes Committee (Committee) pursuant to Standing Order 230A(3). Standing Order 230A(4) ordinarily requires that the Committee report to the Legislative Council (Council) within 30 days of the first reading of the Bill, being September 12 2002.

1.2 On August 21 2002 the Committee sought and was granted an extension of time to report the Bill to the Council under Standing Order 230A(4) to not later than October 17 2002.

1.3 Pursuant to Standing Order 230A(5) the policy of the Bill is not a matter for inquiry by the Committee.

**2 INQUIRY PROCEDURE**

2.1 Details of the inquiry were placed on the parliamentary website on the Internet. The Committee also wrote to the Minister for Agriculture and Parliamentary Counsel's Office seeking clarification about a number of aspects of the Bill. These issues are discussed in the report.

2.2 On September 25 2002 the Committee conducted a hearing with Mr Robert Delane, Executive Director, Plant Industries, Department of Agriculture. The Committee thanks Mr Delane for the information provided.

**3 OVERVIEW OF THE BILL**

3.1 The Committee notes that the Council referred a very similar Bill, the Trans-Tasman Mutual Recognition (Western Australia) Bill 1999 (1999 Bill) to the then Standing Committee on Constitutional Affairs (Constitutional Affairs Committee) during the Third Session of the Thirty-Fifth Parliament.

3.2 The Constitutional Affairs Committee considered the 1999 Bill and tabled its report in the Council on December 7 1999. The Constitutional Affairs Committee recommended that all clauses of the 1999 Bill be passed.

- 3.3 The adjournment and subsequent prorogation of Parliament on August 4 2000 resulted in the Bill lapsing from the Notice Paper of the Council.
- 3.4 The Committee has considered the Constitutional Affairs Committee report and refers members to that report for a discussion on the Trans-Tasman Mutual Recognition Arrangement (TTMRA) including:
- the Mutual Recognition Agreement;
  - principles of the TTMRA;
  - goods and the TTMRA;
  - laws affected by the TTMRA;
  - laws not affected by the TTMRA;
  - goods and laws exempt from the TTMRA; and
  - occupations and the TTMRA.
- 3.5 Australia and New Zealand are implementing the TTMRA through a legislative scheme that will include an Australian component and a New Zealand component. The Bill is ‘uniform legislation’ as the Australian component will require the Commonwealth, States and Territories to enact legislation.
- 3.6 The Committee notes that similar bills have been passed in Victoria, New South Wales, Queensland, South Australia and Tasmania.

### **Purpose of the Bill**

- 3.7 The purpose of the Bill is to implement the TTMRA in Western Australia.
- 3.8 The principal aim of the TTMRA is to remove impediments to trans-Tasman trade in goods and to the mobility of people in registered occupations created by regulatory differences among Australian jurisdictions and New Zealand. This aim is achieved by providing for mutual recognition of regulatory standards for goods and registered occupations adopted in Australia and New Zealand.

## **4 STRUCTURE OF THE REPORT**

- 4.1 The Bill contains seven clauses. The Committee has provided comment on clause 4 of the Bill and Item 1, Part 1 of Schedule 2 of the Commonwealth *Trans-Tasman Mutual Recognition Act 1997* (Commonwealth Act).

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- 4.2 The Committee has also provided comment on general quarantine issues raised by the Bill.

## 5 CLAUSE 4 - ADOPTION OF COMMONWEALTH ACT

- 5.1 The Committee was unclear about some constitutional issues in relation to this clause and in particular the effect of clause 4(3). The Committee's query was whether the effect of clause 4(3) as currently drafted would be that Western Australia would be automatically adopting the schedules to the Commonwealth Act including any amendments made to those schedules by the Commonwealth from time to time without the need for a further legislative act of adoption by the State.
- 5.2 To assist with its understanding of clause 4, the Committee wrote to the Parliamentary Counsel's Office seeking assistance.
- 5.3 Mr Greg Calcutt, Parliamentary Counsel, replied to the Committee by letter dated August 27 2002. He advised that in adopting the Commonwealth Act the Bill adopts a legislative scheme that includes an internal mechanism for the amendment of the Schedules to the Commonwealth Act by way of regulations. He noted that it is a necessary consequence of the adoption of the legislative scheme that amendments made by regulation in accordance with that mechanism will have effect in Western Australia without further legislative action on the part of the State.
- 5.4 Mr Calcutt expressed his view that the principle stated in clause 4(3) of the Bill would apply even if that clause were not included in the Bill. He noted that that is why it is expressed as an "avoidance of doubt" provision.<sup>1</sup>
- 5.5 The Committee was advised that if that principle is not acceptable, clause 4(3) would need to be deleted and replaced by a provision that expressly excluded future amendments by regulation to the Schedules of the Commonwealth Act from the scope of the adoption by Western Australia. However Mr Calcutt noted that Parliament has previously enacted a provision identical to clause 4(3) in section 4(3) of the *Mutual Recognition (Western Australia) Act 2001*.
- 5.6 In its letter to Parliamentary Counsel, the Committee noted that several states including Victoria, Queensland and Tasmania have a provision in their Trans-Tasman Mutual Recognition Acts whereby they purport to adopt the Commonwealth Act within the meaning of section 51(xxxvii) of the Commonwealth Constitution as originally enacted and amended from time to time by regulations made in accordance with the Commonwealth Act. The Committee queried why the Western Australian

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1 The Committee notes section 16(3) of the *Interpretation Act 1984* which provides that "A reference in a written law to an Imperial Act or a Commonwealth Act, or to a provision of an Imperial Act or a Commonwealth Act, shall be construed so as to include a reference to such Act or provisions as it may from time to time be amended."

provision has not been drafted in a similar way to expressly adopt the Commonwealth Act pursuant to the Commonwealth Constitution.

- 5.7 Mr Calcutt expressed his opinion that “as amended from time to time” means “as amended up to the time of adoption” and that future amendments by regulation would apply under the principle set out in paragraph 5.3 above.
- 5.8 The Committee accepts clause 4(3) as it is currently drafted.

**6 ITEM 1, PART 1 OF SCHEDULE 2 OF THE COMMONWEALTH *TRANS-TASMAN MUTUAL RECOGNITION ACT 1997***

- 6.1 Section 45 of the Commonwealth Act provides that the laws specified or described in Schedule 2 of the Commonwealth Act are exempt from the operation of the Commonwealth Act, to the extent that Schedule 2 indicates that they are exempt. If a law is exempt from the operation of the Commonwealth Act the TTMRA does not apply to that law.
- 6.2 The laws set out in Schedule 2 of the Commonwealth Act relate to general and specific goods. The Committee’s concern was in relation to the exemption of certain laws relating to quarantine set out in Item 1, Part 1 of Schedule 2.
- 6.3 The exemption of laws relating to quarantine are qualified in that they are exempt to the extent that:
- a) *the law is enacted or made substantially for the purpose of preventing the entry or spread of any pest, disease, organism, variety, genetic disorder or any other similar thing; and*
  - b) *the law authorises the application of quarantine measures that do not amount to an arbitrary or unjustifiable discrimination or to a disguised restriction on trade between Australia and New Zealand and are not inconsistent with the requirements of the Agreement establishing the World Trade Organisation.<sup>2</sup>*

**Agreement Establishing the World Trade Organization**

- 6.4 The Agreement Establishing the World Trade Organization (WTO Agreement) establishes the World Trade Organization (WTO). It was signed on April 15 1994 and provides that the WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexures to the WTO Agreement.
- 6.5 A number of the agreements and associated legal instruments included in the Annexures to the WTO Agreement are referred to as “Multilateral Trade Agreements”

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2 Item 1, Part 1 of Schedule 2 of the Commonwealth *Trans-Tasman Mutual Recognition Act 1997*.



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and are integral parts of the WTO Agreement, binding on all Members. The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) is one of the “Multilateral Trade Agreements”.

- 6.6 A smaller number of the agreements and associated legal instruments included in the Annexures to the WTO Agreement are referred to as “Plurilateral Trade Agreements” and are part of the WTO Agreement for those Members that have accepted them and are binding on those Members. However the Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.
- 6.7 The functions of the WTO are to, among other things, facilitate the implementation, administration and operation, and further the objectives, of the WTO Agreement and of the Multilateral Trade Agreements. It is also to provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.

### **Agreement on the Application of Sanitary and Phytosanitary Measures**

- 6.8 The SPS Agreement is an integral part of the WTO Agreement and applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. The SPS Agreement defines a sanitary or phytosanitary measure in Annexure A as any measure applied:
- a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
  - b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
  - c) to protect human or animal life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
  - d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.
- 6.9 Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, among other things, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

- 6.10 The SPS Agreement provides that Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of the SPS Agreement.
- 6.11 Members must ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence. However the SPS Agreement provides that in cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members.
- 6.12 Members must also ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

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

- 6.13 The Memorandum of Understanding on Animal and Plant Quarantine Measures (MOU) was entered into by the Commonwealth and the Australian States and Territories and signed on December 21 1995. It is deemed to have come into effect on January 1 1995, the date on which Australia assumed its obligations under the WTO Agreement.
- 6.14 The objective of the MOU is to enable compliance by Australia with relevant obligations under the SPS Agreement.
- 6.15 The MOU provides that, among other things, the States and Territories shall consult fully with the Commonwealth before implementing any relevant sanitary or phytosanitary measures which could inhibit trade into Australia and which may not conform with the provisions of the SPS Agreement. The MOU also provides that States and Territories shall not apply any relevant sanitary or phytosanitary measures within their jurisdiction which would not conform with the provisions of the SPS Agreement.

#### **Committee's concerns**

- 6.16 The Committee was concerned that the effect of the qualifications on the exemptions of certain laws relating to quarantine set out in Item 1, Part 1 of Schedule 2 of the Commonwealth Act may be to potentially place Western Australia at greater risk of exposure to dangerous pests and diseases than is currently the case.

- 6.17 In order to clarify this matter the Committee wrote to the Minister for Agriculture, Hon Kim Chance MLC, seeking comment as to whether those concerns had been addressed. The Committee also sought clarification as to the extent of the qualifications and comment on whether Western Australia would be placed at greater risk should the Bill be enacted than if it was not.
- 6.18 The Minister for Agriculture replied by letter, undated but received by Committee staff by courier on September 11 2002.
- 6.19 The Minister advised the Committee that its concern that Western Australia might potentially be placed at greater risk of exposure to dangerous pests and diseases than is currently the case had been addressed. The Minister advised that the Government's position is that the basis on which State quarantine restrictions are imposed do meet the requirements of the SPS Agreement.
- 6.20 The Minister advised the Committee that:

*These restrictions, being based on sound scientific principles, and meeting the requirements of that agreement (the SPS Agreement), will not amount to an arbitrary or unjustifiable discrimination or a disguised restriction on trade between Australia and New Zealand. Consequently, I am satisfied that the terms of this item (Item 1, Part 1 of Schedule 2 of the Commonwealth Act) do not pose a risk to Western Australia's ability to impose the quarantine requirements that are necessary to protect the State's biosecurity.*

## **7 GENERAL QUARANTINE ISSUES RAISED BY THE BILL**

- 7.1 At the hearing on September 25 2002 Mr Delane, Executive Director, Plant Industries, Department of Agriculture, provided information to the Committee about general quarantine issues raised by the Bill.
- 7.2 Mr Delane advised the Committee that, in practice, the qualifications in the Bill that relate to quarantine mimic the responsibilities Western Australia has in any case under the MOU which recognises the SPS Agreement under the WTO Agreement. Mr Delane submitted that the view of the Department of Agriculture was that the Bill does not change the State's freedom to operate or change any restrictions in relation to quarantine matters.
- 7.3 Mr Delane also submitted that in his view it would make no difference to the way in which quarantine matters are managed in Western Australia if the Bill was not passed. He advised the Committee that the Department of Agriculture administers quarantine consistent with the WTO Agreement regardless of whether or not the Bill is passed.

- 7.4 The Committee requested comment from Mr Delane in relation to a number of specific scenarios regarding quarantine issues. One such scenario concerned fire blight disease from New Zealand apples. The Committee queried whether, if Western Australia assessed that the New Zealand apples posed a higher risk of fire blight disease than the assessment made by the Commonwealth, selected a level of protection that was more stringent than the Commonwealth's chosen level of protection, and New Zealand challenged that decision, the Commonwealth could refuse to defend the Western Australian assessment. The Committee also queried what recourse was available to Western Australia if the Commonwealth refused to defend the State assessment.
- 7.5 Mr Delane accepted that although it was a possible scenario, "*...it would be obviated by the fact that in the case of apples, Western Australia is free from several other pests and diseases which means we have entirely justifiable reasons for not permitting New Zealand apples to enter into Western Australia. Assuming that we were not free from coddling moth, apple scab and the like, that scenario is possible.*"<sup>3</sup>
- 7.6 Mr Delane told the Committee that the Department of Agriculture has been very heavily engaged with the Commonwealth for several years to ensure that the risk assessment for fire blight for apples from New Zealand adequately addresses all risks, including regional risks and regional differences in pest status.
- 7.7 Mr Delane submitted that it was possible that the Commonwealth might not agree with the Western Australian risk assessment and would allow the entry of apples from New Zealand into the State. He advised that in that case it would be open to Western Australia to implement domestic quarantine measures that prohibited apples from entering Western Australia. If it chose to, New Zealand could take Australia to the international court rather than an Australian court.
- 7.8 Mr Delane submitted that in these circumstances, he would expect the Commonwealth to convince Western Australia to change its assessment. He expressed his belief that the Commonwealth would consider all constitutionally based powers available to it to try to override the Western Australian decision. However Mr Delane submitted that the Department of Agriculture considered this a low risk given the complex process that would have to be undertaken to arrive at that situation.
- 7.9 Mr Delane noted that the Commonwealth must manage the quarantine risk to ensure that diseases do not come into Australia. It was a balancing exercise between having measures that are too restrictive and having New Zealand appeal on that basis on the one hand, and having less restrictive measures that might be appealed by industry or one of the states on the other. Mr Delane submitted that the onus is on the Department

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3 Transcript of evidence taken at Perth, September 25 2002, p3.

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of Agriculture to ensure that the Commonwealth is well aware of the risks of Western Australia taking a different position when it releases a draft import risk assessment.

- 7.10 With respect to domestic quarantine measures, Mr Delane noted that Western Australia and Tasmania are the only two regions in Australia able to effectively implement such measures due to natural geographical barriers. He advised the Committee that Western Australia has “...*not iron-clad but comprehensive quarantine measures to reduce that risk. Produce can be imported into eastern Australia but not Western Australia...Table grapes are a case in point.*”<sup>4</sup>
- 7.11 The Committee notes that Western Australia’s right to a regional perspective in quarantine matters is not formally recognised in the MOU. However it also notes that there has been correspondence between the State and Commonwealth ministers with a view to a “partnership statement”<sup>5</sup> addressing regional freedoms and differences. To date no statement has been agreed to.<sup>6</sup>
- 7.12 Mr Delane submitted that the Government’s position, through the Minister for Agriculture, is that the MOU is not adequate for the Commonwealth to recognise the regional differences in pest status and risk. He submitted that the MOU was designed to reinforce to the States and Territories Australia’s obligations pursuant to the SPS Agreement, rather than to express any responsibility the Commonwealth may have to adequately protect all regions of Australia.
- 7.13 Mr Delane advised the Committee that this is a contentious area. He told the Committee that the Department of Agriculture has had a great deal of input to the import risk assessments conducted by the Commonwealth agency Biosecurity Australia, and that the Department often argues the case for the western region’s differences in pest status and risk.
- 7.14 The Committee notes Mr Delane’s letter of October 10 2002, in particular:
- “At the Primary Industry Standing Committee (PISC) meeting on 2 May 2002, it was agreed that the Commonwealth-States/Territories partnership approach to biosecurity would be affirmed through an exchange of letters.
  - The Commonwealth Minister for Agriculture, Fisheries and Forestry wrote to the WA Minister for Agriculture on 23 July 2002 proposing agreement on a statement.

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4 Transcript of evidence taken at Perth, September 25 2002, p4.

5 Letter from Mr Delane to the Committee dated October 10 2002.

6 Ibid.

- On 21 August 2002 Minister Chance responded to Minister Truss expressing concern that the proposed agreement did not include key wording from the PIMC resolutions – namely, that the Commonwealth was committed to addressing regional differences in pest status and risk and consequent SPS measures as part of import risk analysis.
- It is understood that at least one other State has requested significant changes to the partnership statement.
- WA has received no further response from the Commonwealth.
- On a number of occasions and at various levels, the Commonwealth has stated a commitment to addressing regional differences in pest status and risk and consequent SPS measures as part of import risk analysis. This commitment is also articulated in Commonwealth import risk assessment documents. It is the Department of Agriculture’s experience that these commitments are often not borne out by the facts for specific import risk analyses.”

7.15 The Committee notes Mr Delane’s advice that the question of finalisation of the partnership statement does not impact on the Bill and should be addressed independently of the Bill.

## 8 CONCLUSION

8.1 The Committee gave extensive consideration to the significant issues of biosecurity and the finalisation of the “partnership statement”. The “partnership statement” offers a mechanism through which Western Australia’s capacity to exercise effective quarantine safeguards can be protected. Therefore the Committee is of the view that the “partnership statement” should be finalised as a matter of priority. The Committee concurs with Mr Delane’s advice that the finalisation of the “partnership statement” need not impact on the passage of the Bill.

## 9 RECOMMENDATION

**Recommendation 1: The Committee recommends that the Trans-Tasman Mutual Recognition (Western Australia) Bill 2002 be passed without amendment.**



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Hon Adele Farina MLC  
Chairman

October 17 2002