Government of **Western Australia**
Department of **Agriculture and Food**

16 December 2014

Hon Kate Doust MLC
Chair
Standing Committee on Uniform Legislation and Statutes Review
Legislative Council
Parliament House
PERTH WA 6000

Dear Ms Doust

INQUIRY INTO GENE TECHNOLOGY (WESTERN AUSTRALIA) BILL 2014 – SUBMISSION ON THE ISSUE OF PARLIAMENTARY SOVEREIGNTY

Thank you for your letter of 28 November 2014 inviting me to make a written submission on whether the clauses of the *Gene Technology (Western Australia) Bill 2014* "may impact upon the sovereignty and law making powers of the Parliament of Western Australia".

A reference to the Parliamentary sovereignty of the State is a reference to the principal that the State Parliament can make or repeal any law it chooses and that no authority has a right to set aside or overrule an Act of that Parliament.

The law-making power of the State Parliament is subject to the restraints imposed by section 73 of the *Constitution Act 1899* on the amendment of provisions of that Act and to section 109 of the Commonwealth Constitution[1]. Aside from these limitations, however, the State Parliament has overarching power to make laws on any subject matter "for the peace, order and good Government" of Western Australia[2]. This principal is affirmed in the *Australia Act 1986* (Commonwealth)[3]

The purpose of the *Gene Technology (Western Australia) Bill 2014* (the Bill) is to ensure a consistent national approach to the regulation of genetic modification (GM). It serves this purpose by applying the Commonwealth Gene Technology laws as laws of the State, "as if they were a part of this Act", and in so far as they consist of regulations and other instruments, "as if they were subsidiary legislation for the purposes of this Act".

The Bill will repeal the current *Gene Technology Act 2006* which sought to achieve a consistent national approach to the regulation of GM by the enactment of relevant provisions in precisely the same terms as the Commonwealth Act, but which has, by failing to keep up with amendments made to the Commonwealth laws, become, over time, inconsistent with them.

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[1] Section 109 provides that "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid".
[2] Constitution Act 1889 section 2(1).
[3] Section 2(2)

OFFICE OF THE DIRECTOR GENERAL
3 Baron Hay Court, South Perth, Western Australia 6151 (Locked Bag 4, Bentley Delivery Centre WA 6983)
Telephone: (08) 9368 3236 Facsimilie: (08) 9368 1205

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.

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.

The Department of Agriculture and Food consulted the drafter of the Bill on the issue of its impact on Parliamentary sovereignty and I attach the comments he provided.

Thank you again for the opportunity to address this issue.

Yours sincerely

Rob Delane
DIRECTOR GENERAL

Ms Katy Ashforth
Principal Legal Officer
Corporate Strategy and Operations
Department of Agriculture and Food

15 December 2014

Your ref
Our ref PCO 13/01569-02

***Gene Technology (Western Australia) Bill 2014* — Submission to Standing Committee on Uniform Legislation and Statutes Review**

I understand that your Director General has been invited to make a submission to the Committee on "whether the clauses of the Bill may impact upon the sovereignty and law making powers of the Parliament". I provide some comments to assist you in the preparation of that submission.

The primary restriction on the WA Parliament's legislative capacity

The first point to make is that the primary restriction on the WA Parliament's legislative capacity in relation to the regulation of dealings in GMOs is the fact that the Commonwealth has enacted the *Gene Technology Act 2000* (Cth) (the ***Commonwealth Act***).

The Commonwealth Act, relying on constitutional powers currently available to the Commonwealth, already regulates most dealings in GMOs in the State[1]. Only a small proportion of dealings in GMOs can be regulated by the State (see the Report of the Review of the Act, June 2012, Greg Calcutt AM SC).

Legal or constitutional restrictions

Enacting the Gene Technology (Western Australia) Act[2] (the ***WA Act***) does not, in a legal or constitutional sense, restrict the legislative capacity of the WA Parliament.

While section 6 of the WA Act will apply the Gene Technology Laws of the Commonwealth in a running form[3], there will be no legal or constitutional restriction on the WA Parliament's

[1] Under s. 109 of the *Constitution* (Cth), the Commonwealth Act prevails over any State law to the extent of any inconsistency. Section 16 of the Commonwealth Act provides that the operation of State laws is not excluded by the Commonwealth Act, to the extent to which the State laws can operate concurrently with the Commonwealth Act. The State's capacity to enact laws on this matter is limited to ones that can operate concurrently with the Commonwealth Act.
[2] I refer to Act rather than Bill since we are discussing the consequences of enacting the Bill.
[3] i.e. as in force from time to time.

capacity to make laws with respect to the regulation of dealings in GMOs arising from the enactment of the WA Act in that form.

The WA Parliament will retain its legal and constitutional autonomy through its capacity to:

- repeal the WA Act;
- modify the applied law resulting from the enactment of the WA Act or make other laws with respect to the regulation of dealings in GMOs, subject to the existing restrictions on the WA Parliament's capacity referred to above.

I note that other States have frequently applied laws, either of the Commonwealth or another State, in a running form, without apparent legal or constitutional impediment.

A policy or political issue

While enacting a law that applies the law of another jurisdiction in a running form does not, of itself, restrict the WA Parliament's capacity to make laws, doing so may impose practical or political limitations on the WA Parliament's capacity to repeal that law or enact other laws on the same matter.

The question becomes, I think, whether it is in WA's interests in a particular case to do so. I think that this is the real issue here, although it is often presented as a legal or constitutional issue.

The Report of the Review of the Act argues persuasively that in this case it is appropriate to do so.

Further, I cannot see that the practical or political limitations are any different to those arising from enacting an "ordinary" WA law on the matter.

Previous applications of laws in a running form

The WA Parliament has on previous occasions applied a law of another jurisdiction in a running form. For example:

- the *Agricultural and Veterinary Chemicals (Western Australia) Act 1995*, see s. 5 which applies the Agricultural and Veterinary Chemicals Code set out in the *Agricultural and Veterinary Chemicals Code Act 1994* (Cth);
- the *Associations Incorporation Act 1987*, see s. 30(4) which applies Parts 5.4 to 5.8 (on winding up) of the *Corporations Act 2001* (Cth);
- the *Competition Policy Reform (Western Australia) Act 1996*, see s. 4 which applies the Competition Code set out in Part 1 of the Schedule to the *Trade Practices Act 1974* (Cth)[4];
- the *New Tax System Price Exploitation Code (Western Australia) Act 1999*, see s. 4 which applies the New Tax System Price Exploitation Code set out in Part 2 of the Schedule to the *Trade Practices Act 1974* (Cth)[4];

[4] Now cited as the *Competition and Consumer Act 2010* (Cth).

- the *Co-operatives Act 2009* which, under many provisions, applies provisions of the *Corporations Act 2001* (Cth), e.g. s. 141, 213, 214, 250, 251, 254, 316, 323, 337, 344, 387.

This list is not exhaustive.

It is also quite common for Acts and regulations to apply WA legislation or other instruments in a running form. For example, it is quite common to regulate technical matters by reference to standards published by Standards Australia, and often enough, in a running form.

Pressure for a referral of power

In many instances the impetus for legislation that is uniform across the Australian jurisdictions comes from the regulated industry. In a number of cases, the enactment of mirror or stand-alone legislation by WA has not worked. The WA legislation has become out-of-date, causing real practical problems for regulators and the regulated industry. The approach in the Bill avoids these problems.

If uniform legislation cannot be made to work by the States involved then the pressure for a referral of legislative power by the States to the Commonwealth increases. The regulation of credit is a case in point[5].

From the point of view of the WA Parliament, an applied law approach is, I suggest, a better outcome than a referral of power to the Commonwealth. By that I mean, even though WA may apply the law of another jurisdiction, the WA Parliament will retain greater practical and legal capacity to repeal or modify the applied law because the applied law is WA State law.

Compare this to the result of a referral of State legislative power to the Commonwealth. The result of the Commonwealth's exercise of that power is Commonwealth legislation that applies in the State with the restrictions on WA legislative power that attend Commonwealth legislation. Further, while the State may retain the formal capacity to withdraw its referral, it seems to me that withdrawing a referral of power is even less likely that repealing a State Act that applies another jurisdiction's law.

Conclusion

I hope that these comments assist. If legal advice is required in relation to this matter, either concerning the constitutional restrictions on the WA Parliament's legislative capacity or on the best legal policy position for the State, then I suggest that you seek that advice from the Solicitor General.

Roger Jacobs

[5] See the *Credit (Commonwealth Powers) Act 2010.*

Assistant Parliamentary Counsel