

[Act 1996 No 102]



New South Wales

# Trans-Tasman Mutual Recognition (New South Wales) Bill 1996

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

### General

This Bill consists of a series of clauses together with a Schedule that contains a proposed Commonwealth Act.

The object of this Bill is to enable the enactment of legislation (in the form of the proposed Commonwealth Act) applying uniformly throughout Australia for the recognition of regulatory standards adopted in New Zealand regarding goods and occupations.

The Northern Territory and the Australian Capital Territory are treated as States for the purposes of this explanatory note, and accordingly references to a State extend to either Territory.

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## Overall legislative scheme

The Bill forms part of a larger legislative scheme that involves the enactment of Bills by the States, the Commonwealth and New Zealand. The larger legislative scheme has two components:

- an Australian component, and
- a New Zealand component.

This Bill is concerned with the Australian component of this larger legislative scheme. It provides or contributes to the legislative power for the enactment of the proposed Commonwealth Act.

The *Trans-Tasman Mutual Recognition Bill 1996* of New Zealand is concerned with the New Zealand Component of this total legislative scheme. That Bill was introduced into the Parliament of New Zealand on 18 July 1996.

## Background

The Trans-Tasman Mutual Recognition Arrangement was signed by the Commonwealth and the States on 14 June 1996 and by New Zealand on 9 July 1996.

The purpose of the Arrangement is to give effect to a scheme implementing mutual recognition principles between the parties relating to the sale of goods and the registration of occupations, consistent with the protection of public health and safety and the environment.

The objective of the Arrangement is to remove regulatory barriers to the movement of goods and service providers between Australia and New Zealand, and to thereby facilitate trade between the two countries.

The Arrangement recognises that it builds on, and is a natural extension of, the 1992 Mutual Recognition Agreement between the Commonwealth and the States. The Arrangement states that, as far as possible, the mutual recognition scheme contemplated by the 1996 Arrangement should be consistent with the scheme established by the 1992 Mutual Recognition Agreement.

The 1992 Mutual Recognition Agreement was the basis for a scheme for legislation applying uniformly throughout Australia for the mutual recognition by the States of each other's differing regulatory standards regarding goods and occupations. The *Mutual Recognition Act 1992* of the

Commonwealth was enacted as the result of State legislation. In the case of New South Wales, power was given for the enactment of the Act by the *Mutual Recognition (New South Wales) Act 1992*.

The scheme contemplated by the 1996 Arrangement is similar to the scheme under the 1992 Agreement in many respects. However, whereas the 1992 scheme principally affects the States, the 1996 scheme affects the Commonwealth and New Zealand as well as the States.

The terms of the proposed Commonwealth Act are based on and similar to the *Mutual Recognition Act 1992*.

### **Policy result to be achieved by the Commonwealth, State and New Zealand Bills (the overall legislative package)**

The Commonwealth, State and New Zealand Bills will implement the 1996 Trans-Tasman Mutual Recognition Arrangement. The Arrangement is based on two key principles in relation to goods and occupations:

- (a) if goods may be legally sold in New Zealand they may be sold in an Australian jurisdiction, and vice versa, and
- (b) if a person is registered to practise an occupation in New Zealand, he or she will be entitled to practise an equivalent occupation in an Australian jurisdiction, and vice versa.

### **The State Bill**

This Bill refers to the Parliament of the Commonwealth under paragraph (xxxvii) of section 51 of the Commonwealth Constitution the power to enact an Act in the terms, or substantially in the terms, set out in the Schedule to the Bill.

The proposed Schedule contains a Bill for a Commonwealth Act with the short title of the *Trans-Tasman Mutual Recognition Act 1996*. Amendment of the proposed Commonwealth Act is not referred to the Commonwealth. However, Schedules 1–4 to the proposed Commonwealth Act will be able to be amended by regulations in accordance with the proposed Commonwealth Act.

The referral of power to the Commonwealth may be terminated by the Governor by proclamation, but only after the period of 5 years after the commencement of the proposed Commonwealth Act.

The citation of the proposed Commonwealth Act will be able to be changed to include “1997” in the event that the Commonwealth Bill does not complete its parliamentary passage in 1996, as the Commonwealth Bill would still be “substantially in the terms” set out in the Schedule to the State Bill.

### **The Commonwealth Bill**

The Commonwealth Bill set out in the State Bill gives effect to the two key principles in relation to goods and occupations within Australia:

- (a) if goods may be legally sold in New Zealand they may be sold in an Australian jurisdiction, and
- (b) if a person is registered to practise an occupation in New Zealand, he or she will be entitled to practise an equivalent occupation in an Australian jurisdiction.

The Commonwealth Bill provides the mechanics for recognising these principles. The Schedules to the Commonwealth Bill detail exemptions and exclusions in relation to laws, goods and occupations and also provide for privacy of information collected under the proposed Commonwealth Act.

### **Legislative result to be achieved by the Commonwealth and State Bills**

The new national scheme for mutual recognition will involve at least one State enacting legislation referring or requesting the enactment of a Mutual Recognition Act to the Parliament of the Commonwealth. The Commonwealth Parliament will then enact the *Trans-Tasman Mutual Recognition Act 1996* in substantially the same terms as those set out in the proposed State Act.

The *Trans-Tasman Mutual Recognition Act 1996* of the Commonwealth will apply to those States that:

- refer power to enact the Commonwealth Act or request enactment of it, or
- adopt the Commonwealth Act afterwards (under paragraph (xxxvii) of section 51 of the Commonwealth Constitution).

The Commonwealth Act will provide a comprehensive scheme for mutual recognition in relation to New Zealand goods and occupations, which will operate independently of other State laws and therefore will not require

modification of those laws to enable its implementation. This is achieved through section 109 of the Commonwealth Constitution, which provides that a Commonwealth Act prevails over a State Act to the extent of any inconsistency.

## Outline of provisions

### State Bill

**Clause 1** sets out the name (also called the short title) of the proposed Act, as well as the purpose of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day to be appointed by proclamation of the Governor.

**Clause 3** defines *the Commonwealth Act* to mean the Act to be enacted by the Parliament of the Commonwealth as referred to in clause 4.

**Clause 4** refers power to enact the Bill set out in the Schedule to the State Bill. The clause does so by referring certain matters to the Parliament of the Commonwealth. The matters are those to which the Schedule relates, but only to the extent of the enactment of an Act in the terms, or substantially in the terms, set out in the Schedule to the State Bill. The referral of those matters has effect from the commencement of the State Act until a day (occurring at least 5 years after the commencement of the Commonwealth Act) fixed by the Governor by proclamation.

**Clause 5** enables the Governor to make regulations for the purposes of section 46 of the proposed Commonwealth Act (Temporary exemptions).

### Commonwealth Bill

#### Part 1—Preliminary

**Clause 1** provides for the proposed Act to be cited as the *Trans-Tasman Mutual Recognition Act 1996*.

**Clause 2** provides for Part 1 of the proposed Act to commence when the Act receives the Royal Assent. The remaining provisions of the Act are to commence on a day or days to be fixed by Proclamation of the Governor-General.

**Clause 3** sets out the principal purpose of the proposed Act, which is to enact legislation for the purpose of recognising within Australia regulatory standards adopted in New Zealand regarding goods and occupations.

**Clause 4** contains definitions of expressions used in the proposed Act. In particular:

- (a) **goods** means goods of any kind (including animals, plants, material of microbial origin, a package containing goods, and a label attached to goods), and
- (b) **local registration authority** of a participating jurisdiction for an occupation means the person or authority in the jurisdiction having the function conferred by legislation of registering persons in connection with their carrying on that occupation in the jurisdiction, and
- (c) **occupation** means an occupation, trade, profession or calling of any kind that may be carried on only by registered persons, where registration is wholly or partly dependent on the attainment or possession of some qualification (for example, training, education, examination, experience, character or being fit or proper), and includes a specialisation in any of the above in which registration may be granted, and
- (d) **participating jurisdiction** refers to clause 50, and covers New Zealand, the Commonwealth, or a State while the State has the appropriate legislation in force to give effect to the scheme.

This clause also states that a law specified in a Schedule to the proposed Act includes any regulations or other statutory instruments under the law and amendments to the law, unless the Schedule states otherwise.

**Clause 5** states that the proposed Act does not affect the operation of any other law of the Commonwealth, and generally does not affect the operation of the *Mutual Recognition Act 1992* of the Commonwealth.

**Clause 6** provides that the proposed Act applies to a State while it is a participating jurisdiction and does not affect the operation of a law of the State so far as it can operate concurrently with the proposed Act.

**Clause 7** states that the Governor-General may declare by Proclamation that the Act will cease to have effect on a specified day if New Zealand is or will become a non-participating jurisdiction.

**Clause 8** states that the proposed Act binds the Crown in right of the Commonwealth and of each of the States (while a participating jurisdiction).

## **Part 2—Goods**

**Clause 9** states that the mutual recognition principle in relation to goods is as set out in this Part. The Part deals with goods produced in or imported into New Zealand and their sale in Australia.

**Clause 10** provides that goods produced in or imported into New Zealand that may lawfully be sold in New Zealand may be sold in an Australian jurisdiction without the need to comply with the requirements set out in clause 11 (Requirements that do not need to be complied with).

**Clause 11** specifies the requirements relating to sale that are imposed by an Australian jurisdiction and that do not need to be complied with. Those requirements are as follows:

- (a) requirements relating to the goods themselves, for example, requirements relating to their production, composition, quality or performance,
- (b) requirements relating to the way the goods are presented, for example, requirements relating to their packaging, labelling, date stamping or age,
- (c) requirements that the goods be inspected, passed or similarly dealt with in or for the purposes of the Jurisdiction,
- (d) requirements that any step in the production of the goods not occur outside the jurisdiction,
- (e) any other requirements relating to sale that would prevent or restrict, or would have the effect of preventing or restricting, the sale of the goods in the jurisdiction.

**Clause 12** contains exceptions to the mutual recognition principle. The principle does not affect the operation of any laws of an Australian jurisdiction, so long as those laws apply equally to goods produced in or imported into the Australian jurisdiction and are laws which fall into one of the following three classes:

- (a) laws that regulate the manner of sale of goods or the manner in which sellers conduct their business in the jurisdiction (examples include laws relating to contractual aspects of the sale of goods, registration of sellers or other persons carrying on occupations, requirement for business franchise licences, the persons to whom, and the circumstances in which, goods may or may not be sold),
- (b) laws that relate to the transportation, storage or handling of goods and are directed at matters affecting the health and safety of persons within the jurisdiction or at environmental pollution matters,

- (c) laws that relate to the inspection of goods (other than laws providing that inspection is a prerequisite to the sale of the goods in the jurisdiction) and are directed at matters affecting the health and safety of persons within the jurisdiction or at environmental pollution matters.

**Clause 13** provides that it is a defence to a prosecution for an offence against sale of goods laws in an Australian jurisdiction if a person claims that the mutual recognition principle applies and establishes that the goods concerned were labelled at the point of sale with a statement that they were produced in or imported into New Zealand and also establishes that the person had no reasonable grounds for suspecting that the goods were not so produced or imported. The defence cannot be used if the prosecution proves that the mutual recognition principle did not apply in the particular case (because for example the laws did not comply with requirements imposed by the law of New Zealand).

**Clause 14** provides that nothing prevents goods from being sold in an Australian jurisdiction if they comply with the law of the jurisdiction in which they are sold.

## **Part 3—Occupations**

### **Division 1—Preliminary**

**Clause 15** states that the mutual recognition principle as applying to occupations is as set out in this Part. The Part deals with the ability of a person who is registered in connection with an occupation in New Zealand to carry on an equivalent occupation in Australia.

**Clause 16** provides that a person who is registered in New Zealand for an occupation is entitled to be registered for an equivalent occupation in an Australian jurisdiction after notifying the local registration authority in the Australian jurisdiction. Pending registration, the person may carry on the equivalent occupation in the Australian jurisdiction. The mutual recognition principle does not affect the operation of laws that affect the manner of carrying on an occupation in the Australian jurisdiction so long as those laws apply equally to all persons seeking to carry on the occupation or carrying it on and are not based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation.

**Clause 17** deals with aspects of how the Part applies. It applies to individuals and occupations carried on by them. It extends to each system of registration for an occupation in cases where more than one such system is involved (for example, admission as a legal practitioner by a court and issue of a practising certificate by another body).



## **Division 2—Entitlement to registration**

**Clause 18** enables a person who is registered in New Zealand for an occupation to lodge written notice with the local registration authority of an Australian jurisdiction seeking registration in an equivalent occupation. The clause specifies certain matters that must be contained in the notice and requires the notice to be accompanied by documentary evidence or information as to the person's existing registration.

**Clause 19** provides that once a person lodges a notice under clause 18 (Notification to local registration authority) in an Australian jurisdiction the person is entitled to be registered in the equivalent occupation and the entitlement continues (even if the registration in New Zealand ceases) so as to enable renewal of registration in the Australian jurisdiction. Continuance of registration is otherwise subject to the law of the Australian jurisdiction. The local registration authority of the Australian jurisdiction cannot impose conditions on registration that are more onerous than would be imposed in similar circumstances (having regard to qualifications and experience) unless they are conditions that apply to the person's registration in New Zealand or that are necessary to achieve equivalence of occupations. The clause states that it has effect subject to the Part (for example, clause 32—Disciplinary action).

**Clause 20** provides that registration must be granted within one month of lodging a notice under clause 18 and when granted takes effect from the date of lodgment of that notice. Within that month the local registration authority may postpone or refuse the grant of registration. If the registration authority does neither within that month, registration is automatic at the end of that month.

**Clause 21** specifies the circumstances in which the local registration authority of the Australian jurisdiction may postpone registration. The postponement may not extend beyond 6 months and if it does registration is automatic at the end of that 6-month period unless registration was refused at or before the end of that period. Earlier registration may be granted on a review by the Administrative Appeals Tribunal of the Commonwealth.

**Clause 22** specifies the grounds on which the local registration authority of the Australian jurisdiction may refuse registration. Those grounds are that a statement or information in the notice under clause 18, or documentary evidence or information provided as to existing registration, is materially false or misleading or that the registration sought is not for an equivalent occupation and equivalence cannot be achieved by imposing conditions. A

decision to refuse to grant registration on the ground that an occupation is not an equivalent occupation takes effect at the end of a specified period of not less than two weeks after the person concerned has been notified unless it has been previously revoked or an application for review made to the Administrative Appeals Tribunal. On such an application, the Tribunal may make whatever orders it considers appropriate.

**Clause 23** requires a local registration authority to give notice in writing of its decision as to registration.

### **Division 3—Interim arrangements**

**Clause 24** provides that pending determination of a notice under clause 18 the person lodging the notice has *deemed registration*. Deemed registration does not of itself provide a basis for registration in another Australian jurisdiction.

**Clause 25** deals with the duration of a person's deemed registration. It ceases when the person is registered by the local registration authority of an Australian jurisdiction, or if that authority refuses registration, or if substantive registration in every other participating jurisdiction ceases. It may be cancelled or suspended in accordance with this Part and is not affected by postponement of the grant of substantive registration.

**Clause 26** enables a person with deemed registration in an Australian jurisdiction to carry on the equivalent occupation in the jurisdiction but subject to certain limitations. Those limitations include the limits conferred by the person's substantive registration in New Zealand as well as by the person's deemed registration.

### **Division 4—Equivalent occupations**

**Clause 27** states that the equivalence of occupations carried on in different participating jurisdictions is to be determined in accordance with this Part.

**Clause 28** provides that occupations for which persons may be registered in New Zealand are to be taken as equivalent if the activities authorised under the registration for the occupation in an Australian jurisdiction are substantially the same. This equivalence may be achieved by the imposition of conditions.

**Clause 29** provides that this Part is to be given effect to in accordance with relevant declarations under this Division regarding equivalent occupations. If an inconsistency arises between a declaration of the Administrative Appeals

Tribunal (see clause 30) and a declaration of Ministers (see clause 31), the ministerial declaration prevails. A declaration does not affect the registration of a person already registered unless it is made by the Administrative Appeals Tribunal in relation to that person specifically.

**Clause 30** enables the Administrative Appeals Tribunal to make an order, on a review of a decision of a local registration authority under the proposed Act, that a person registered in an occupation in New Zealand is or is not entitled to registration in an Australian jurisdiction in a particular occupation. On such a review, the Administrative Appeals Tribunal may also specify conditions that will achieve equivalence and may make a declaration that occupations carried on in New Zealand and in an Australian jurisdiction are not equivalent if it is satisfied as to certain matters. Such declarations must be published and notified to appropriate authorities in other participating jurisdictions. The local registration authority must give effect to the decision on the review.

**Clause 31** enables a Minister from New Zealand and a Minister from one or more Australian jurisdictions to declare jointly that specified occupations are equivalent and to specify conditions that will achieve equivalence. Such a declaration has effect only in relation to the participating jurisdictions concerned and must be given effect to by the appropriate local registration authorities.

## **Division 5—General provisions**

**Clause 32** provides that if a person's registration in an occupation in New Zealand is cancelled or suspended, or subject to a condition, on disciplinary grounds or as a result of or in anticipation of criminal, civil or disciplinary proceedings, the person's registration in an equivalent occupation in an Australian jurisdiction is affected in the same way (whether or not the registration was effected under the proposed Act). The local registration authority of the Australian jurisdiction may in such cases reinstate the registration or waive conditions if it thinks it appropriate.

**Clause 33** allows a person to apply to the Administrative Appeals Tribunal for review of a decision of a local registration authority under the proposed Act.

**Clause 34** empowers the Administrative Appeals Tribunal to order a party in proceedings to pay costs if the party has acted unreasonably.

**Clause 35** provides for consistency of decisions made by the Administrative Appeals Tribunal and the Trans-Tasman Occupations Tribunal of New Zealand.

**Clause 36** states that residence or domicile is not to be a prerequisite or factor in a person's entitlement to registration under the proposed Act.

**Clause 37** requires a local registration authority of an Australian jurisdiction to promptly furnish information about a person registered in that jurisdiction reasonably required by a local registration authority of another participating jurisdiction. The request for information must be in connection with the seeking of registration by the person in the jurisdiction, the person's deemed registration, or actual or possible disciplinary action against the person. The information may be furnished despite any law relating to secrecy, confidentiality or privacy.

**Clause 38** provides that once information is received by a local registration authority under clause 37 the information is subject to any law relating to secrecy, confidentiality or privacy applicable to information provided under the law of the jurisdiction under which that authority is constituted or exercises its functions.

**Clause 39** sets out the general duties of local registration authorities under the proposed Act. They must facilitate the operation of this Part in relation to the relevant occupations and make use of the power to impose conditions in such a way as to promote the mutual recognition principle. They must prepare guidelines and information as to the operation of this Part. Such guidelines and information are to be available within six months of the commencement of the clause. The clause also requires local registration authorities to have regard to the privacy principles set out in Schedule 5. The principles do not create separately enforceable rights or duties.

**Clause 40** enables a local registration authority of an Australian jurisdiction to impose fees in connection with registration under the proposed Act but not fees greater than those imposed for registration apart from the proposed Act. The authority may impose a condition on substantive or deemed registration that a person may not carry out activities authorised by the registration until the fees have been paid.

**Clause 41** provides that registration or entitlement to registration under this Part does not require compliance with any requirements as to personal attendance in the relevant Australian jurisdiction.

**Clause 42** states that nothing prevents a person from seeking registration in an occupation apart from the Act.

## **Part 4—Exclusions and exemptions**

**Clause 43** is a definitional clause, and provides that for the purposes of this Part a jurisdiction endorses a regulation by publishing a notice in the Gazette of that jurisdiction. However, a recommendation by a Commonwealth Minister to the Governor-General for a regulation amounts to endorsement of it by the Commonwealth.

**Clause 44** provides for the exclusion from the proposed Act of laws of an Australian jurisdiction to the extent set out in Schedule 1 (Exclusions). The Governor-General may make regulations amending Schedule 1 but all participating jurisdictions must endorse the regulation, unless the regulation merely omits or reduces the effect of a law as set out in Schedule 1 or adds a consistent law of a State to the Schedule (in which case only the endorsement of the State is needed).

**Clause 45** provides for the permanent exemption from the proposed Act of laws of an Australian jurisdiction to the extent set out in Schedule 2 (Permanent exemptions). The Governor-General may make regulations amending Schedule 2. Any such regulation must be made with the endorsement of all participating jurisdictions. However, that requirement does not apply to a regulation that merely omits or reduces the extent of an exemption from the law of a State (in which case only the endorsement of the State is needed).

**Clause 46** provides for the temporary exemption from the proposed Act of the sale of particular goods in an Australian jurisdiction or of laws of Australian jurisdiction relating to particular goods. Such exemptions only have effect if they are substantially for the protection of the health and safety of persons within the jurisdiction or directed at environmental pollution matters. The exemption only has effect for 12 months (either continuously or as an aggregate).

**Clause 47** provides for a continuation of temporary exemptions referred to in clause 46. The purpose of the clause is to create a mechanism to provide an additional period not exceeding 12 months for legislative or other action to be taken to implement a ministerial agreement arising out of consideration (generally in the context of a ministerial council) of an exemption under clause 46. The Governor-General may make regulations for the purposes of this clause if they have the effect of continuing or reviving the effect of an exemption, with or without modification. However, endorsement of at least two-thirds of the participating jurisdictions is required before the regulation may be made. An exemption under this clause (together with the period of any previous exemption) can only operate for 12 months (either continuously or as an aggregate).

**Clause 48** provides for the special exemption from the proposed Act of laws of an Australian jurisdiction to the extent set out in Schedule 3 (Special exemptions). Such an exemption only operates for 12 months after the clause commences but this may be extended by regulations made by the Governor-General. Endorsement of all of the Participating jurisdictions is required before a regulation is made under this clause. However, that requirement does not apply to a regulation that relates solely to a law specified in Schedule 3 and will not take effect until after 5 years after the commencement of the clause (in which case only the endorsement of two-thirds of the participating jurisdictions is needed), or to a regulation that merely omits expired matter (in which case only Commonwealth endorsement is needed).

**Clause 49** provides for the exemption from the proposed Act of laws of an Australian jurisdiction to the extent set out in Schedule 4 (Exempt laws relating to occupations). The Governor-General may make regulations amending Schedule 4 and the endorsement of all participating jurisdictions is required, unless the regulation omits a law of a State (in which case only the endorsement of the State is needed).

## **Part 5—General**

**Clause 50** defines *participating jurisdiction* for the purposes of the proposed Act as being New Zealand (while there is an Act in force that corresponds to the proposed Commonwealth Act), the Commonwealth, or a State (while it has an Act sustaining or adopting the proposed Commonwealth Act).

**Clause 51** provides that the mutual recognition principle and the proposed Act may be taken into consideration in proceedings of any kind and for any purpose. The clause also ensures that a person may rely on the mutual recognition principle in relation to more than one Australian jurisdiction.

**Clause 52** enables conditions or undertakings imposed on the registration of a person in an occupation in New Zealand to be construed with necessary adaptations for the purposes of registration in the relevant Australian jurisdiction.

**Clause 53** provides a method for determining where goods are produced for the purposes of the proposed Act.

**Clause 54** empowers the Governor-General to make regulations for the purposes set out in clause 46.

### **Schedule 1 Exclusions**

The Schedule excludes specified laws relating to goods from the mutual recognition principle, as referred to in clause 44.

### **Schedule 2 Permanent exemptions**

The Schedule permanently exempts specified laws relating to goods from the mutual recognition principle, as referred to in clause 45.

### **Schedule 3 Special exemptions**

The Schedule provides limited exemptions for specified laws relating to goods from the mutual recognition principle, as referred to in clause 48.

### **Schedule 4 Exempt laws relating to occupations**

The Schedule exempts specified laws relating to occupations from the mutual recognition principle, as referred to in clause 49.

### **Schedule 5 Privacy of information collected under the Act**

The Schedule sets out requirements relating to privacy of information collected under the proposed Act to which local registration authorities are required to have regard, as referred to in clause 39.