

CHEMISTRY CENTRE (WA) BILL 2006

Committee

Resumed from an earlier stage of the sitting. The Deputy Chairman of Committees (Hon Graham Giffard) in the chair; Hon Kim Chance (Leader of the House) in charge of the bill.

Progress was reported after clause 12 had been agreed to.

Clauses 13 to 19 put and passed.

Clause 20: Strategic development plan and statement of corporate intent -

Hon MURRAY CRIDDLE: I was interested to read in part 5 of the bill that the board will be required to prepare a statement of corporate intent and a strategic development plan. That is similar, if my memory serves me rightly, to what is provided in the ports legislation. I understand that. Part 5 goes on to say that the minister may give written directions to the Chemistry Centre with respect to the performance of its functions generally. It says also that the minister is entitled to have access to information in the possession of the Chemistry Centre, unless that information is client related. How much influence will the minister have? Will the minister be required to table any request that is made for information to be provided?

Hon KIM CHANCE: The direct answer, as I understand it, is that the minister will be required to table a direction, but not a request, for information. That is certainly my understanding from the arrangements that are outlined in the legislation that covers my portfolios. The broader question that was asked by Hon Murray Criddle is very interesting. I could spend a couple of days on that question, but I know the member would not want me to do that, so I will not. The issue of statutory authorities that have governance provided by a board, and the degree to which a statutory authority is separate from the minister, is fascinating. To look at the government structure where such arrangements exist, and whether they have senior executive service application to a statutory agency, is also fascinating. I have my own view on this matter, because I am engaged in that question at this very moment. In order to get some guidance, I have looked at the structure of agencies within the Western Australian government system. There really is a rainbow of differences between the set of conditions that applies in one agency and the set that applies in another. It is quite an interesting study.

Hon Barry House: That is what the thirty-sixth report set out.

Hon KIM CHANCE: The thirty-sixth report of course anticipated all this. Those few of us who remain conversant with the thirty-sixth report will have some interest in that. I will sum it up quickly. The structure that is proposed in this clause, whereby corporate governance is established by a board within a statutory authority, but that board is subject to direction by the minister, is probably where all these bodies will end up. However, that raises certain issues, because if the minister has the power to direct, what is the function of the board? Is it a board of management, or is it an advisory board? Boards will always need to be comfortable with that particular situation. It is not the easiest thing in the world to explain or even to resolve in one's mind. However, I would always support a structure of this nature, because I believe the minister should always be given the power to direct. It is irrelevant to me whether the minister ever uses that power. The reason I take that view is that no minister should devolve to another person the authority for his public functions, even if the act allows that to be done. In my view, it is bad governance for a minister to devolve his authority to a management board that has decision making power, but that has no power to direct the chief executive officer of that board. Obviously, the minister will always have the power to direct the board itself. That means that the minister can never be in control of the things that this house will always hold the minister accountable for. That is an uncomfortable position for a minister to be in. A minister must fulfil his legal obligation to the people represented by this place, or the Legislative Assembly if the minister is an Assembly minister. In my view, a minister cannot do that if the minister does not have the power to direct. The concept that we could have a devolved system of management through a board appointed through the act is a practical nonsense as far as I am concerned.

Hon MURRAY CRIDDLE: I understand completely what the minister is saying. That is particularly relevant at this time in light of the situation in Esperance. I am pleased to hear the minister's explanation, because I have been in that situation myself, as the minister would probably understand. What is the time frame for the preparation of the strategic plans and so forth, and when will they be assessed?

Hon KIM CHANCE: The statement of corporate intent is prepared annually, in the budget cycle. The strategic plan is a five-yearly document.

Hon MURRAY CRIDDLE: The minister said that it is part of the budget cycle. Does that mean there is close communication with the board in setting the parameters? We currently have a situation in Geraldton where the port authority could have added berth 5 a bit earlier, but government budget constraints and the capacity to repay came into play. Therefore, it is still subject to the capacity of the state to fund the situation.

Hon Murray Criddle; Hon Kim Chance; Deputy Chairman; Hon Barry House; Hon Bruce Donaldson; Chairman

Hon KIM CHANCE: Yes, that is true and that is the way it must be for the state's Treasurer and for the government to have control of their debt to revenue ratios, which are the key indicators for the Standard and Poor's ratings. Notwithstanding the source of the debt or the relative equity in an agency, the Treasurer is accountable for the bottom line figure, even though a particular investment involving debt by an agency is otherwise separate from the government process, such as in a port authority -

Hon Murray Criddle: I'm only using them as an example.

Hon KIM CHANCE: Yes, but it is a good example. It is still an issue for government and it has to take that into account because the ratings agencies take it into account in the calculation of the debt to revenue ratio. There are certainly some interesting arguments about whether that is a sensible arrangement but, sadly, that is the way the world is.

Hon Murray Criddle: Bearing in mind if they borrow and pay back.

Hon KIM CHANCE: Yes, without any burden on the state. It gets even sillier in my view when we start talking about the way public-private partnerships are taken into account by the ratings agencies.

Hon Murray Criddle: It could be relevant in this.

Hon KIM CHANCE: It may well be but, fortunately, its debt is never likely to be high enough to be a bother.

Clause put and passed.

Clause 21 put and passed.

Clause 22: Minister may give directions -

Hon KIM CHANCE: I move -

Page 17, lines 7 and 8 - To delete "*Financial Administration and Audit Act 1985* section 66"
and insert instead -

Financial Management Act 2006 Part 5

This is an identical amendment to the amendment I moved to clause 12 and it is moved for the same reason. I thank Hon Barry House for indicating his prospective support for similar motions.

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 23 to 26 put and passed.

Clause 27: Chemistry Centre (WA) Account -

Hon KIM CHANCE: I move -

Page 19, line 10 - To insert after "Account" -

, which is to be established

Page 19, lines 11 to 13 - To delete the lines and insert instead -

(a) as an agency special purpose account under the *Financial Management Act 2006*
section 16; or

Page 19, lines 15 and 16 - To delete "the *Financial Administration and Audit Act 1985* section 3(1)"
and insert instead -

section 3 of that Act

The first amendment adds words to line 10, whilst the second and third amendments delete and substitute similar words to those that we dealt with in the amendments to clauses 12 and 22. I think they all relate to each other.

Amendments put and passed.

Clause, as amended, put and passed.

Clause 28 put and passed.

Clause 29: Guarantees -

Hon KIM CHANCE: I move -

Page 20, line 15 - To delete "Fund" and insert instead -

Account

Page 20, line 20 - To delete "Fund" and insert instead -

Account

These amendments refer to the amendment that has just been moved and has the effect of deleting the word “Fund” in the middle line of clause 29(3) and substituting “Account”.

Amendments put and passed.

Clause, as amended, put and passed.

Clause 30: Charges for guarantee -

Hon KIM CHANCE: I move -

Page 20, line 24 - To delete “Fund” and insert instead -

Account

Again, this is an identical substitution, so the words “Consolidated Fund” will read “Consolidated Account”.

Amendment put and passed.

Clause, as amended, put and passed.

Division 3: *Financial Administration and Audit Act 1985* -

Hon KIM CHANCE: I move -

Page 21, line 1 -To delete “*Financial Administration and Audit Act 1985*” and insert instead -

Financial Management Act 2006 and Auditor General Act 2006

Amendment put and passed.

Clause 31: Application of the *Financial Administration and Audit Act 1985* -

Hon KIM CHANCE: I move -

Page 21, lines 3 and 4 - To delete “*Financial Administration and Audit Act 1985*” and insert instead -

Financial Management Act 2006 and the Auditor General Act 2006.

As with the title, where previously we have been simply referring to the Financial Management Act, with the adoption of the new title in clause 31 and, I think, thereafter, both those relevant acts come into play. We are now referring to the two acts - the Financial Management Act 2006 and the Auditor General Act 2006 - which replace the repealed Financial Administration and Audit Act.

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 32 and 33 put and passed.

Clause 34: Confidentiality - reports and other documents -

The DEPUTY CHAIRMAN (Hon Graham Giffard): Would the Leader of the House like to move all the amendments on the supplementary notice paper for this clause together?

Hon KIM CHANCE: Thank you, Mr Chairman, I had not thought of that. I move -

Page 24, lines 2 and 3 - To delete “*Financial Administration and Audit Act 1985*” and insert instead -

Financial Management Act 2006 Part 5.

Page 24, lines 11 and 12 - To delete “*Financial Administration and Audit Act 1985*” and insert instead -

Financial Management Act 2006 Part 5.

Page 24, lines 19 and 20 - To delete “*Financial Administration and Audit Act 1985* section 69” and insert instead -

Financial Management Act 2006 section 64.

Amendments put and passed.

Clause, as amended, put and passed.

Clauses 35 to 42 put and passed.

New clause 31 -

Hon KIM CHANCE: I move -

Page 20, after line 28 -To insert the following new clause -

31. Liability for duties, taxes and other statutory imposts

- (1) Despite any other written law but except as stated in subsection (2) -
 - (a) the Chemistry Centre; and
 - (b) deeds or other instruments to which it is a party,are liable to and chargeable with duties, taxes or other imposts under any written law.
- (2) Despite subsection (1) but subject to subsection (3), the Chemistry Centre is not liable to pay any local government rate or charge.
- (3) Subsection (2) does not apply to the liability to pay any rate or charge in respect of land held under a lease or tenancy agreement from the Chemistry Centre.
- (4) The Chemistry Centre is to pay to the Treasurer in respect of each financial year an amount equivalent to the sum of all local government rates and charges that, but for subsection (2) and the *Local Government Act 1995* section 6.26(2)(a)(i), the Chemistry Centre would have been liable to pay in respect of that financial year.
- (5) Subsection (4) does not apply in relation to rates and charges in respect of land referred to in subsection (3).
- (6) An amount payable under subsection (4) -
 - (a) is to be determined in accordance with such principles as the Treasurer may direct; and
 - (b) is to be paid at such time or times as the Treasurer may direct.
- (7) The first payment under subsection (4) is to be in respect of the next full financial year after the commencement of this Act.

The DEPUTY CHAIRMAN: Order! I have read proposed new clause 31 and formed the view that provisions of subclauses (4) and (6) may amount to a tax. Section 46(7) of the Constitution Acts Amendment Act 1899 reads as follows -

- (7) Bills imposing taxation shall deal only with the imposition of taxation.

The word “taxation” usually covers “every conceivable exaction which it is possible for a government to make, whether under the name of a tax or under such names as rates, assessments, duties, imposts, excise, licences, fees, tolls etc” - see Quick and Garran on the Constitution, p.550; Wynes, p.165. Prima facie, therefore, the Legislative Council may interpret the expression bills imposing “taxation” in section 46(7) as including bills imposing rates.

What is regarded as the classic definition of a tax was given in *Matthews v Chicory Marketing Board* (1938) 60 CLR 263 at 270 per Latham CJ -

... a tax. It is a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered ...

A bill may “impose taxation” notwithstanding that the bill merely authorises the taxation and does not itself define the tax payable and the persons liable - see *Stephens v Abrahams* (No.2) (1903-4) 29 VLR 229 at p.253; *Federal Commissioner of Taxation v Munro* (1925) 38 CLR 153 at ps. 188-190.

In the *Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 208, it was held by the High Court that to levy a municipal rate upon commonwealth property is to “impose a tax” within the meaning of section 114 of the commonwealth Constitution.

It is stated in *Halsbury’s Laws of England*, 2nd Ed. at p.188 that “the word ‘tax’ in its widest sense includes all money raised by taxation and it may, therefore, include parliamentary taxes; that is, taxes levied directly by Parliament usually for the benefit of the whole community and also rates and other charges levied by local authorities under statutory powers; but, as a rule, it denotes parliamentary taxes, and an agreement by the tenant to pay taxes will bind him to pay the landlord’s proportion of the land tax and also other parliamentary taxes which are payable by the landlord in the absence of agreement to the contrary”.

I am unable to establish whether the payment in subclause (7) is for any service so as to constitute a charge. If the amendment is a tax, it would violate section 46(7). The bill, as amended, by imposing taxation would deal with matters other than taxation and any provisions dealing with other matters would “be of no effect”.

Hon Murray Criddle; Hon Kim Chance; Deputy Chairman; Hon Barry House; Hon Bruce Donaldson; Chairman

However, before I rule whether the amendment is out of order I invite the minister to provide advice on this matter.

Hon KIM CHANCE: To say that this is a surprise would be the understatement of the year. I really do not understand how we can get to the point of this stage in the committee without the government having had any warning whatsoever that this matter would be raised, particularly since we already have parliamentary precedence. Precedence has already been established for precisely this wording. This wording is drawn straight from an act of Parliament which was passed by this place and for which this matter was never raised. I urge the Deputy Chairman to reconsider.

The DEPUTY CHAIRMAN: I need to clarify this. Therefore, I will leave the chair until the ringing of the bells.

Sitting suspended from 8.11 to 8.35 pm

Hon KIM CHANCE: Mr Deputy Chairman, you have invited me to provide the committee with advice on the matters that you have raised. I will be able to provide some of that advice. However, at this stage my view is that when I have given a brief explanation, I will move to postpone consideration of this new clause, proceed with the rest of the bill and come back tomorrow to debate the new clause after we have had more time to consider it.

By way of explanation, the reason that new clause 31 exists at all goes back to clause 5 on page 5 of the bill. Clause 5 provides that the Chemistry Centre (WA) is an agent of the Crown and enjoys the status, immunities and privileges of the Crown; that is, notwithstanding it is moved from an agency of the state to a statutory authority, it still maintains the status, immunities and privileges of the Crown, which includes its tax-free status.

An opposition member interjected.

Hon KIM CHANCE: Yes, the status, immunities and privileges of the Crown. That includes its tax-free status. The principle of competitive neutrality, however, would prevent a statutory authority operating in that way in competition with private sector providers of similar services. That is the reason for new clause 31. New clause 31 is, in effect, a competitive neutrality clause. It makes separate provision for the taxation status of the new agency. Whether this is a taxing provision is a matter that I cannot advise members on. I suggest it is something that we need to sleep on, consider in more depth, and come back tomorrow and decide because we need to take further advice. My concern is that my advice is that new clause 31 is taken from existing legislation. If this is invalid for the reasons outlined by Mr Deputy Chairman (Hon Graham Giffard), there is a risk that legislation that was passed by this place last year is invalid. The legislation I refer to specifically is the Land Information Authority Act 2006. That is something we will have to consider.

As a result of the invitation by Mr Deputy Chairman, I submit that this is not a tax; it is not a taxing provision but rather a definition of a formula for payments made by one government agency to another. As a result of that, it is not a tax. That is my contention and I assert that it is worthy of consideration as an argument rather than as a legal fact. Therefore, I move -

That consideration of new clause 31 be postponed until after consideration of the long title.

Hon BARRY HOUSE: The opposition supports the minister's motion to defer consideration of the clause to another day because it seems that some advice needs to be obtained and a resolution achieved. When the minister comes back to the house with some advice, I am sure he will tell us where this occurs in other legislation and whether it has been inserted in legislation in this house previously. The peculiar aspect of the clause is that it is a rates equivalent regime that takes an equivalent from a local government rate but it does not return it to local government; it puts it into consolidated revenue. That is a little odd. Perhaps a provision can be made to return it to a local authority, whichever local authority that may be. Perhaps when the minister provides an explanation, he can cover that aspect also.

Hon BRUCE DONALDSON: Will the Deputy Chairman (Hon Graham Giffard) give a ruling on this matter now that the new clause will be deferred?

The DEPUTY CHAIRMAN: The explanation I gave earlier was not a ruling; it was an invitation for the minister to explain certain questions about the new clause. The minister has said that he will provide a further explanation tomorrow, and we will await that explanation from the minister to determine where we go from there, without pre-empting what the minister might say.

Question put and passed; further consideration of the new clause thus postponed.

Schedule 1 put and passed.

Schedule 2: Transitional provisions -

Hon KIM CHANCE: I move -

Page 37, line 7 - To delete “*Financial Administration and Audit Act 1985*” and insert instead -
Financial Management Act 2006

This amendment simply refers to the new act; that is, the Financial Management Act, which replaces the existing bill’s reference to the Financial Administration and Audit Act.

Amendment put and passed.

Hon KIM CHANCE: I move -

Page 39, line 31 to page 40, line 1 - To delete “*Financial Administration and Audit Act 1985* section 66” and insert instead -

Financial Management Act 2006 Part 5

Hon MURRAY CRIDDLE: I want the minister to tell us just exactly what that means. Does section 66 relate to part 5 of the other act?

Hon KIM CHANCE: We have dealt with these in the past and it has no more significance than that it is referencing the name of the new act in its appropriate clause. That is the reference to section 66, rather than the old act.

Hon Murray Criddle: What has part 5 got to do with it?

Hon KIM CHANCE: I do not know. I do not have a clue!

Hon Murray Criddle: I haven’t got a clue either; that’s why I want to know.

Hon KIM CHANCE: In the past with these like amendments we have replaced reference to the whole act in its original form, which is the name of the act now being repealed, with the act which replaced it, or in some cases the two acts because sometimes we referred to the Auditor General’s act. In this case we are referring to only one particular part. While that part may be of enormous interest, the answer is I do not know.

Amendment put and passed.

Hon BARRY HOUSE: Clause 6 is headed “Exemption from State taxes”. It appears to me that that is a straight-out exemption from any state taxes for the Chemistry Centre. I pose the question: why is there a difference between the way state taxes seem to be treated there and the proposed new clause that has been postponed, where a tax equivalence regime is introduced in relation to local government rates, levies and duties? Perhaps the minister can explain this now or postpone the bill and answer the whole gamut tomorrow when state government taxes, rates and charges may be considered. There appears to be a difference in the way the bill treats rates and taxes.

Hon KIM CHANCE: I believe I can answer that question. If Hon Barry House believes my answer is inadequate, we can defer the clause. I would rather not because I do not believe it is overly complex. Schedule 2 relates to the transitional provisions. In the simplest terms, it relates to the transfer of the physical assets from the former state agency to the new statutory corporation. Physical assets are devolved in that process. In the normal course of events, stamp duty would be payable on that devolution, because assets are being transitioned from one owner to another, even though the owner is the same; just the owner’s name is being changed. Whenever that happens in state agency transfers, we never charge stamp duty. In the simplest terms possible, that is the reason for the wording. The effect of this amendment is constrained to the meaning in the second schedule and the schedule relates only to transitional provisions. It does not have effect on the operation, for example, of the Chemistry Centre or any other component of the transaction.

Hon BARRY HOUSE: I accept that but I still pose a question, which may go across boundaries a little: where in the bill are the tax equivalent provisions in terms of state taxes? I can see quite clearly where they are being inserted in terms of local authority rates and charges, but I cannot see where in the bill the same provision applies to state taxes.

Hon KIM CHANCE: Good question!

Hon Barry House: Clearly payroll tax would come into it.

Hon KIM CHANCE: Yes, and it is payroll tax that I was discussing with the adviser just then. The Department of Industry and Resources, I am informed, has at least a notional entry in respect of payroll tax. However, I do not want to provide that as advice in isolation. I will be happy to defer this clause as well, since we are deferring the bill anyway, and I can clear that up in Hon Barry House’s mind, not to mention mine.

Hon Murray Criddle; Hon Kim Chance; Deputy Chairman; Hon Barry House; Hon Bruce Donaldson; Chairman

Further consideration of the schedule, as amended, postponed until after consideration of the title, on motion by Hon Kim Chance (Leader of the House).

Schedule 3: Amendment of other written laws -

Hon KIM CHANCE: I move -

Page 42, lines 16 and 17 - To delete "*Financial Administration and Audit Act 1985*" and insert instead -
Financial Management Act 2006

Amendment put and passed.

Hon KIM CHANCE: I move -

Page 42, lines 18 to 22 - To delete the lines and insert instead -

[* *Act No. 76 of 2006.*

For subsequent amendments see Act No. 77 of 2006.]

Amendment put and passed.

Schedule, as amended, put and passed.

Title -

Hon KIM CHANCE: I move -

Page 1, line 9 - To delete "to" in the first place where it occurs.

Amendment put and passed.

Title, as amended, put and passed.

The CHAIRMAN: If the committee reports progress, there are two matters outstanding - new clause 31 and schedule 2.

Progress reported and leave granted to sit again.