

**CHEMISTRY CENTRE (WA) BILL 2006**

*Committee*

Resumed from 5 April. The Chairman of Committees (Hon George Cash) in the chair; Hon Kim Chance (Leader of the House) in charge of the bill.

**Postponed new clause 31 -**

The new clause was postponed after it had been partly considered.

**The CHAIRMAN:** Members, we are dealing with the Chemistry Centre (WA) Bill 2006. Members will be aware that all clauses of the bill have been dealt with, with the exception of proposed new clause 31. In that regard, when the matter was last before the committee, the Deputy Chairman (Hon Graham Giffard) raised concerns regarding proposed new clause 31. The Leader of the House responded, various questions were asked, and the committee agreed that it would defer further consideration pending some further advice.

**Hon KIM CHANCE:** Does the Chair have advice for the committee?

**The CHAIRMAN:** Does Hon Kim Chance have any further advice?

**Hon KIM CHANCE:** I do.

**The CHAIRMAN:** If he gives his further advice, we may have a solution.

**Hon KIM CHANCE:** Thank you, Mr Chairman. I was not too sure whether it was coming from the table first. Honourable members will recall that in the Committee of the Whole this clause, new clause 31, was postponed so that advice could be taken on whether the clause constituted a tax. Proposed new clause 31 is set out in supplementary notice paper 121, dated 28 March 2007. I have now received advice from the Minister for Science's office, and I am able to relay the crux of that advice to the committee to assist in deliberations. In the first instance, members will note that "The Chemistry Centre is an agent of the Crown and enjoys the status, immunities and privileges of the Crown." That is from clause 5 of the bill. Members will understand that it is a principle of statutory construction that agents of the Crown enjoy immunity from statutes of general application that impose taxation, unless the Crown is bound by express words or necessary implication. New clause 31(1) clearly fits that principle by making it clear that the Chemistry Centre and any other deed or instrument to which it is a party are liable to duties, taxes or other imposts imposed by any written law. However, new subclauses (2) and (3) make clear that the immunity from the operation of the statutes of general application, which the Chemistry Centre enjoys as an agent of the Crown, is preserved in relation to statutes that impose local government rates or charges. New subclauses (4) and (6) then work together to, in effect, require a payment to be made in lieu of certain taxes, which, but for the immunity that has been preserved by new clause 31(2), the Chemistry Centre would be otherwise liable to pay. This is the first reason new clause 31 viewed in its contextual entirety cannot be characterised as a tax. It is clear that the new clause is not meant to preserve immunity from a statute that imposes taxation but on the other hand imposes a tax under a different guise.

The second reason new clause 31 cannot be characterised as a tax is the practical effect of the new clause on consolidated revenue. A test of whether something is a tax is whether it builds up consolidated revenue. The operation of this new clause will not do that because the charge will be paid by the Chemistry Centre funds, which ultimately derive from consolidated revenue. Finally, members will be aware that provisions virtually identical to proposed new clause 31 can be found in the Land Information Authority Act 2006, the Forest Products Act 2000 and the Port Authorities Act 1999. As a separate taxing act was not imposed in these instances, it seems that Parliament did not take the view that the relevant provision in each case imposed a tax. Provisions of this kind reflect current government policy on competitive neutrality by endeavouring to ensure that statutory corporations operate on a level playing field with other bodies corporate.

*Ruling by Chairman*

**The CHAIRMAN (Hon George Cash):** We are dealing with proposed new clause 31. I thank the Leader of the House for the additional advice he has provided to the committee. I do not propose to comment on the merit or otherwise of the substance of the advice just given as, notwithstanding the advice, following earlier debate on this particular new clause and having regard to the earlier concern that was raised by the Deputy Chairman (Hon Graham Giffard), I took the opportunity to again consider the issues. Accordingly, on Wednesday, 4 April 2007 the Deputy Chairman raised concerns regarding proposed new clause 31. The Deputy Chairman put the view that provisions subclauses (4) and (6) may amount to a tax. The Legislative Council may not originate a bill imposing taxation. In addition, it cannot do by amendment what it is prevented from doing by way of originating a bill. If it is prevented from originating a bill imposing taxation, it cannot amend a bill so as to impose taxation. If the amendment proposed by the minister is imposing taxation, it will be out of order as

beyond the legislative capacity of the Legislative Council. In addition, it would be contrary to section 46(7) of the Constitution Acts Amendment Act 1899, which provides in section 46(7) -

Bills imposing taxation shall deal only with the imposition of taxation.

It is clear that the bill deals with a broad range of matters relating to the establishment, powers and functions of the Chemistry Centre. The Deputy Chairman invited the minister to provide advice on this matter before making a ruling. On Thursday, 5 April 2007 the minister presented the government's argument in favour of proposed new clause 31 as follows: firstly, the wording of the proposed amendment is the same as in the Land Information Authority Act 2006; secondly, the proposed new clause 31 does not impose a tax but simply restores the liability for tax imposed by another instrument; that is, without crown immunity having been conferred by clause 5, the Chemistry Centre would have been liable for rates. Proposed new clause 31 therefore simply restores that liability. Thirdly, the proposed new clause does not impose a tax but merely transfers revenue from one agency to another. Proposed new clause 31 is in the same terms as section 72 of the Land Information Act 2006.

I now refer to the *Hansard* of 23 October 2006 when, during the Committee of the Whole stage when considering the Land Information Authority Bill 2006, Hon Kate Doust, in her capacity as parliamentary secretary representing the Minister for Housing and Works, stated on clause 72 -

Although it may not have to pay local government rates or charges, it pays an equivalent amount to the Treasurer. I understand that this is a standard provision.

Similar provisions can be found in section 32 of the Western Australian Land Authority Act 1992 and section 43 of the Forest Products Act 2000.

The following is from the preamble to a 4 November 1986 commonwealth revenue ruling No SD041: crown immunity from stamp duty - commonwealth instrumentalities, which states -

There is a common law presumption that the Crown is not bound by statute except where the statute by express words or necessary implication evinces an intention that the Crown should be bound. So far as this principle applies to stamp duty it means that generally the Crown will not be liable to duty as the Stamp Duties Act 1920 does not, for the most part, specifically bind the Crown.

Ogders states at page 281 that the imposition of charges on commonwealth entities, and commonwealth entities only, is not an imposition of taxation. The test to apply is not the legal status of the body but where the money is coming from. In this particular case, the money is being extracted from the Chemistry Centre. The Chemistry Centre is an agent of the Crown and clause 5 of the bill expressly provides that it enjoys the status, immunities and privileges of the Crown. The money is coming from a crown entity. This house supplies an interpretation to section 46 of the Constitution Acts Amendment Act 1899 so as not to restrict the ability of this house to make amendments to bills. I therefore rule that the amendment is in order, as the state is simply extracting money from its own entities. That is money that the state has already extracted from taxpayers. It is not imposing taxation in any real sense.

Having resolved that issue, the question is that proposed new clause 31 be agreed to.

*Committee Resumed*

**Hon BARRY HOUSE:** Thank you, Mr Chairman. I appreciate the advice from the Chair, and the explanation from the Leader of the House, on the Chemistry Centre (WA) Bill, and some issues that were raised a couple of months ago when the bill was debated in this house. However, there are still some outstanding questions that deserve an explanation. I am still confused about a number of things. I will start with the explanation from the Leader of the House. It seems that the Leader of the House has brought into play a new definition for a tax. It is certainly a definition that I have never heard of before. The Leader of the House said -

A test of whether something is a tax is whether it builds up consolidated revenue.

My understanding is that a tax is a levy that is applied without any direct correlation to a service. The Leader of the House may well be right; that is, a tax would by its very nature build up consolidated revenue. In fact, it would not be a very efficient tax if it did not do that!

The other point that the Leader of the House made, and that he may care to comment on, is found in the next sentence -

The operation of this new clause will not do that because the charge will be paid by the Chemistry Centre funds, which ultimately derive from consolidated revenue.

In this bill, the Chemistry Centre is being set up as a statutory authority that can derive income from other sources. That was one of the main motivating factors behind the change to the structure of the Chemistry Centre. I forget the exact figure, but I think that 50 or 60 per cent of the operating funds of the Chemistry Centre will come from consolidated revenue. We know also that the Chemistry Centre can derive funds from fee for

service, from corporate contributions, and from research organisation contributions. Therefore, not all the funds that the Chemistry Centre deals with will be from the consolidated account. Perhaps the Leader of the House can give us an explanation on that point also.

The other point that is vitally important, and that both the Leader of the House and the Chairman referred to in their explanation, is that a similar clause has been inserted in other pieces of legislation that have passed through the Parliament in recent years. We know that this house cannot initiate financial bills. However, to repeat the question that was asked when we debated this matter last time, were those similar clauses in the Land Information Authority Act, the Forest Products Act and the Port Authorities Act initiated in the Legislative Council, or were they part of those bills as they began their passage through the Parliament in the Legislative Assembly? That question has not been answered to this point. The Leader of the House may be able to clarify those points. It seems to me that there is not necessarily a difference of opinion, but perhaps a difference of interpretation, about some aspects of the explanations that we have heard tonight. I am interested that the statement from the Leader of the House draws on advice from the Minister for Science's office. That is fair enough in terms of Chemistry Centre matters. However, this is a financial matter. I would have thought that the advice that the Leader of the House would present to the table tonight would have come from the chief financial officer in this state, the Treasurer.

Perhaps that can be cleared up for me as well. In terms of whether the amendment is tacked onto the bill in this house, I think the standard procedure, if something like this comes up in Parliament, is for this house to request the Assembly to take this into consideration. I believe that has been the method used in the past, and perhaps it is a pretty obvious request if we send an amendment back to the Legislative Assembly.

In summary, on behalf of the opposition, we support the Chemistry Centre (WA) Bill, and we also support the tax equivalence regime in this particular provision. We also support the principle of competitive neutrality for statutory authorities and government agencies. However, it seems to me that some question marks are left hanging over the process employed to put this piece of legislation through the house in its final form by inserting new clause 31 as an amendment. Either the parliamentary draftsman got the process wrong by not including it upfront, or the bill partly proceeded through its passage and got to this house before the omission was realised. I do not really believe that this is the case, but it has to be floated as an option: certain powers that be may be thumbing their noses at the parliamentary process. The minister might like to comment on some of those matters.

**Hon KIM CHANCE:** The minister may or may not like to comment but I guess he has very little choice! To deal with the first point raised by Hon Barry House relating to a new definition of a tax, there are a number of tests rather than definitions of what constitutes a tax. The example Hon Barry House gave in raising this matter - that is, whether the money raised is attributed to a particular service or whether it goes into a general pool - is a test of whether a charge is a fee or a tax. If it is not attributable directly to a particular service, it is not a fee; it is a tax. That is where the line is drawn. Both could be classified as a tax to the extent that both contributed to consolidated revenue, albeit in the case of the fee that the attribution is automatically spoken for with respect to the services provided, but still ultimately provided by consolidated revenue. It is a different test. However, the ultimate test of whether something is or could be a tax, or a fee - that question is not asked here - is that they both contribute to consolidated revenue; otherwise, it is not a tax at all. I know it is a difficult concept to explain, but we are actually talking about different qualities of revenue raising and what their end use is. In the example Hon Barry House gave, he said the definition was made by the end use of the charge, and that that is what differentiated between a tax and a fee. What I have said here is yes, but ultimately if a charge does not build up consolidated revenue. In other words, if a charge is immediately hypothecated - to use that wonderful word Main Roads invented many years ago, and that as far as I know is only ever used in Western Australia - to another source and never enters consolidated revenue, it could probably be argued on that basis at least that it is not a tax, and one would then have to go into a more convoluted argument. I think that is one of the reasons Treasuries hate the concept of hypothecation so much -

**Hon Murray Criddle** interjected.

**Hon KIM CHANCE:** Do they not, former Minister for Transport, because the question of hypothecation was really a Main Roads issue?

**Hon Murray Criddle:** I will come to it.

**Hon KIM CHANCE:** Yes. I made a bit of a hash of that, but that is the best I can do in trying to answer that question.

The second question related to the last sentence of the paragraph Hon Barry House referred to, which reads that the operation of this clause will not impose a tax, because the charge will be paid by the Chemistry Centre funds, which ultimately derive from consolidated revenue. Hon Barry House asked whether the whole idea of the Chemistry Centre was that it would ultimately attract much of its business out of the private sector. Of course,

he is quite right, and that is the whole reason we are doing this. However, that relates to the question of operating funds and not the ultimate derivation of the capital of the business; that is, ultimately, who owns the business? This is a business. Notwithstanding that it will be operating in the private sector and providing services to private companies, this is a business that has one shareholder; that is, the government of Western Australia, on behalf of the Western Australian public. I think it is therefore fair to describe the derivation of funds as consolidated revenue, as it has only one shareholder.

The more difficult question was the third that was asked by Hon Barry House. That was: although it may be fair to say that virtually identical provisions to proposed new clause 31 can be found in a range of other acts, were those provisions initiated in the Legislative Council, and is that an issue? I do not know whether those provisions in those three acts were or were not initiated in the Legislative Council. It is true to say that, as we all understand it, the Legislative Council is unable to initiate a money bill. That is accepted. I do not know whether this system of introducing a clause of this nature in respect of those bills was done in that way. I would argue that proposed new clause 31 does not imitate that of a money bill. Since it does not impose a tax, it is not a money bill. That is the best I can do on that question.

In answer to the fourth question asked by Hon Barry House on why I quoted the Minister for Science's office as the source of my advice, it comes from the Minister for Science because it is that minister's bill. However, when we put those questions back to the Minister for Science, the Minister for Science obviously sought advice. I am not allowed to say where the advice came from, but legal advice was sought and I have actually read that advice. I will put it in this way: I am confident that this position is legally sound.

**Hon MURRAY CRIDDLE:** I will just make one or two observations. The only way to clearly identify that the consolidated account is covering for the amount of rates and taxes that are raised is to have a clear line item in the budget so that we actually know that that is what the money is expended for. Because the Chemistry Centre has the capacity to raise money from outside for all sorts of reasons, we would then be able to see when there has been a change in the funding from the consolidated account. The only way to overcome that would be to clearly define that the amount of money is that that covers the rates and charges. The other question I would like the minister to answer is: why has this amendment come into this house?

**Hon Norman Moore** interjected.

**Hon KIM CHANCE:** I want to know, Mr Chairman, whether I am allowed to give the answer the Leader of the Opposition proposed to me!

To answer the first question, that is a pretty fair point, but that is really a matter for the Auditor General. I think the Auditor General could quite reasonably note what the member has said. I think it is quite a fair thing to say. The second question is: why was this amendment moved in this house, and in this way?

**Hon Murray Criddle:** No; why have you amended it, given that the bill was in the other form? What inspired the government to change it?

**Hon KIM CHANCE:** That is a hard question. All I know is that I cannot tell the member anything about the genesis of new clause 31. However, when its logic is followed through, it has a clear purpose. It sets out to do what is required to be done. Perhaps there was an oversight; I really do not know the answer to that question. Just before Hon Murray Criddle spoke, I took the trouble to go back to the original bill to see whether there was something in the original bill that could have led us to this point, and there really is not. The old clause 31 is just a general clause seeking to apply the Financial Administration and Audit Act. There is actually nothing there that could lead to this construction. I really do not know its history.

**Postponed new clause put and passed.**

**Bill reported with amendments.**