

GENE TECHNOLOGY AMENDMENT BILL 2005

Committee

The Chairman of Committees (Hon George Cash) in the chair; Hon Kim Chance (Minister for Agriculture and Food) in charge of the bill.

Clauses 1 to 3 put and passed.

Clause 4: Section 72A amended -

Hon MURRAY CRIDDLE: I move -

Page 2, line 19 - To delete the words “may be in the nature of a tax and not” and insert instead -
must

The amount of the charge prescribed for a financial year may be in the nature of a tax and not be related to the cost of providing the service. I have an issue with applying a tax that does not have a ceiling. It could end up as any figure and be above the cost of the service. We have had the debate about fees, charges and the like, and this one very closely reflects the position put in that argument. Will the minister explain the issue of the tax? I have examined the Constitution. It will be interesting to see how the committee deals with this. I want the minister to explain why the tax should be open-ended and the intention of the tax.

The CHAIRMAN: Before the minister responds, the amendment is out of order. This is a taxing bill and the Legislative Council does not have the power to amend a taxing bill. For the sake of providing Hon Murray Criddle with an explanation, I am happy for the minister to respond. However, I will rule the amendment out of order and give reasons following the minister’s comments.

Hon KIM CHANCE: Thank you, Mr Chairman, I acknowledge the advice you have given the committee. This is, nonetheless, an important question and the committee is entitled to understand the reasons for this provision and why the particular wording has been used.

If the amendment were not out of order and we were able to proceed with it, the only outcome of its adoption would be to make the bill irrelevant. The effect of this amendment would be to forever quarantine this charge from the possibility of it ever being deemed a tax - that is, to provide an absolute guarantee that it could not be deemed a tax - which would mean that this bill would not be necessary. This bill exists only as a result of section 46(7) of the Constitution Acts Amendment Act 1899, which provides that a bill imposing taxation shall deal only with the provision of taxation.

The amending bill is needed only to the extent, or in the possibility, that the charge might be deemed to be a tax.

Hon Murray Criddle: Why is it a tax?

Hon KIM CHANCE: It is not a tax, but I will get to that. It is a belts and braces issue. Its introduction is perhaps over-cautious; however, it is a safeguard to ensure the charges referred to in this bill remain valid, even in the event of a future change in definition. However, by current definitions, this charge is not a tax. That is not to say that at some time in future - it could be six months hence - the definitions of a charge or a fee for service, and what barriers separate that from what is accurately deemed to be a tax, might change. Retrospectively, it would sweep away the validity of many of the charges and fees that were deemed to be charges and fees and not taxes. It is even worse than I suggested. The Gene Technology Bill and a range of other legislation could be deemed to be invalid because of the way the definition has changed. It could be judged that what was taken to be a charge at the time and was, therefore, included in the main bill, was not included in the special tax bill. That would make the whole bill invalid. That is why parliamentary counsel adopts the safeguard mechanism. Members will have observed this operating over recent years: Where a charge is imposed, they take the same approach to that charge as if it were a tax. That is the reason that wording is used. The wording prior to Hon Murray Criddle’s amendment is -

The amount of the charge prescribed for a financial year may be in the nature of a tax and not be related to the cost of providing any service.

It is not an admission that it is a tax and it is not an admission that it ever will be, but in the event that the definition is changed and it is deemed to be a tax this is sending a warning to the legislature that it may be a tax. It is a belts and braces issue. It is surprising that this has not come up before. Perhaps it has and I have not noticed. I do not remember having this debate before, and it is a very interesting debate. If it is not a tax, it does not need this little bill because it could have been included in the main bill. If it is later determined that what we thought was a charge is actually a tax, the whole legislation is invalid. I can see the Deputy Chairman of the Joint Standing Committee on Delegated Legislation frowning deeply, because he is imagining what could happen in that event. I admit that it is scary stuff. This is the belts and braces approach to avoid such a thing

happening. Although the charge is not a tax under the current definition, in the event of a change in definition leading to the charge then being deemed a tax, that charge would then become invalid and, as a result, the whole of the legislation could also become invalid.

The CHAIRMAN: We are dealing with the amendment proposed by Hon Murray Criddle. Does Hon Ray Halligan want to comment on the amendment, recognising that I will rule it out of order in a moment for reasons that I will give?

Hon RAY HALLIGAN: In view of what the Minister for Agriculture and Food said, I would like to clarify the situation. It is an interesting aspect of this bill, now that it has been explained to me. It is something that is likely to be used as a precedent and may occur in future bills. I am interested to hear what the Minister for Agriculture and Food has said about this clause and about the fee - this amount of money that is being asked of someone that may be a tax; this belt and braces amount of money. From the point of view of all governments, when fees are to be charged invariably that is by way of regulation. The reason is that the fees can be altered far more easily by regulation than by amendment to the primary act.

Hon Kim Chance: We can only do that if we have the head powers of the act which enable that.

Hon RAY HALLIGAN: Admittedly. The minister will find that the greater majority of acts have the power to make regulations. Invariably, if fees are to be charged they will be in those regulations. However, the proviso is that those fees should be cost recovery only. Therefore, the costs must be known, but that is a completely separate issue, which I will not go into now. The minister appears to be explaining that the government is putting something into the primary legislation and not calling it a tax, but it may be a tax. By the sound of things, it will be a figure and I know not what that figure will be. It may well be under the cost of providing that service, in which case it could have been imposed by regulation rather than through primary legislation. However, it may also be that the figure to be charged is in excess of the cost of providing the service, in which case, by the definition of the Joint Standing Committee on Delegated Legislation it is a tax. The best place for it is in the primary legislation. It seems to me, as the minister suggested, that it is definitely belt and braces. The government is backing it each way. The government is covering itself by putting it in the primary legislation and then, provided there is a figure in the legislation, it does not have to justify whether it is a tax or a recovery of cost.

Hon Kim Chance: We are saying this dog is a dog and not a horse, but if later it is designated as a horse, then it is still a dog.

Hon RAY HALLIGAN: The whole point is that it matters not what is designated. Do not worry about definition. The joint standing committee gets this all the time - it is told some charge is cost recovery and, when we ask what the costs are, we find that it is a tax. Is there a definite figure in the bill?

Hon Kim Chance: No.

Hon RAY HALLIGAN: When will that figure be decided? Will it go through by regulation?

Hon Kim Chance: Yes.

Hon RAY HALLIGAN: The definite figure is not in the primary legislation?

Hon Kim Chance: No. It will be prescribed by regulation.

Hon RAY HALLIGAN: The minister is trying to say that the figure in the regulation, because of the provision in the primary legislation, is to be considered cost recovery. That is what it sounds like to me. I can assure the minister that that will not be accepted. If we find that it is over and above cost recovery, irrespective of the definition, a motion of disallowance will be moved.

Hon Kim Chance: The legislation before us has not yet been amended by Hon Murray Criddle's motion, and it cannot be. However, it provides that it can be a tax.

Hon RAY HALLIGAN: That is exactly what I am getting at. What the minister is saying to this committee is that even if the figure in the regulations is in excess of cost recovery, the legislation will allow the government to ignore it.

Hon Kim Chance: Because it is a tax.

Hon RAY HALLIGAN: This is a Henry VIII clause.

Hon Kim Chance: It is not a Henry VIII clause.

Hon RAY HALLIGAN: It is, because even if the costs are \$10, the government can regulate that the fee will be \$10 000. The government can alter that as often as it likes; therefore, it is a Henry VIII clause. If it is a tax, it should come through this place as a definite figure and it can be argued, debated and decided. It should not be done through the backdoor.

Hon Kim Chance: The regulations can be disallowed in either house.

Hon RAY HALLIGAN: That is what I said. If the minister tries to make out that it is not a tax, that is exactly what will happen.

The CHAIRMAN: Order! I allowed the debate to run on because it is a novel approach. Hon Ray Halligan has three minutes remaining and then I will rule the amendment out of order.

Hon RAY HALLIGAN: I understand that, Mr Chairman. It is an important precedent and I thank the Chairman for allowing me to continue to make my remarks. However, it is particularly important if the drafter of this believes that he or she can go down this path. It sound very much like a Henry VIII clause to me - I will confirm that with others at a later stage - and it is not the way to do things. It is improper and I urge the minister to look into it further and find the correct way of bringing forward fees of this nature.

Ruling by Chairman

The CHAIRMAN: Order! We are dealing with amendments moved by Hon Murray Criddle. I rule that the amendments proposed by Hon Murray Criddle are out of order. The Legislative Council is restrained by section 46(2) of the Constitution Acts Amendment Act 1899 as follows -

The Legislative Council may not amend Loan Bills, or Bills imposing taxation, or Bills appropriating revenue for the ordinary annual services of the Government.

The long title of the Gene Technology Amendment Bill 2005 describes the bill as -

An Act to amend the Gene Technology Act 2005 to impose certain charges referred to in section 72A of that Act to the extent that any such charge may be a tax.

Clause 4 of the bill proposes to insert two subsections into proposed section 72A of the principal bill, which is currently before Parliament. Proposed subsection (3) provides that prescribed charges may be in the nature of a tax and not related to the cost of providing any service. Proposed subsection (4) imposes a tax to the extent that the charges referred to in proposed subsection (3) may be a tax. Section 46(7) of the Constitution Acts Amendment Act 1899 provides that bills imposing taxation shall deal only with the imposition of taxation. The purpose of this restriction is to prevent the tacking onto taxation bills of other matters that the Council may otherwise amend.

The bill has no purpose other than to amend the principal bill, so as to impose a tax in the event that the charges prescribed by regulations made under the principal bill extend beyond cost recovery. In circumstances in which the charges extended beyond cost recovery, they would constitute a tax not authorised by Parliament. Clause 4 of the bill seeks to validate these charges, to the extent that they may be taxes, by imposing a tax. The bill imposes a tax and deals only with the imposition of taxation. It is therefore a bill that the Council cannot amend. Should Hon Murray Criddle believe that the principal bill should not be amended so as to impose a tax in the manner provided, he should seek to defeat the bill by voting against it at the third reading.

Amendment ruled out of order.

Committee Resumed

Hon MURRAY CRIDDLE: I thank the Chairman for that explanation. I seem to get into trouble with the Constitution regularly, having done so with the electoral bill. However, we need to know where we stand on these issues.

The thing that made my ears prick up was the discussion about the cost of providing the service, and producers or anybody dealing with this bill - consumers or whomever - would be worried if the charge went beyond the cost of providing the service. I understand that is when it becomes a tax. I listened carefully to the Chairman's ruling. However, I say to the minister that when a charge or a fee is applied, it would be nice to think that it was for cost recovery.

Hon KIM CHANCE: I think the point made by Hon Murray Criddle is a very valid one. I would like him to remember a similar occasion on which we debated the fee that was paid in respect of the main licence holder and the applicant for special export licences under the grain licensing arrangements within state legislation. That is a similar instance of a fixed fee being charged - in the case of the main licence holder a very significant fee, which initially was \$400 000 a year - when it was thought that the actual cost of providing the service could possibly be less than that figure. We got over that - it may even have been Hon Murray Criddle's amendment that led us to that point, I am not sure - by ensuring that the sum in excess of the cost of providing the service would be carried over to the account of the payee of the fee, and be returned on an annual basis to the fee payer. That is one way of getting over issues like that.

Clause put and passed.

Title put and passed.