

2003

**LEGISLATIVE ASSEMBLY
FOR THE
AUSTRALIAN CAPITAL TERRITORY**

Gene Technology (GM Crop Moratorium) Bill 2004

EXPLANATORY STATEMENT

Circulated by the authority of the Minister for Health

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Overview

The purpose of this Bill is to enable a moratorium to be imposed on the cultivation of certain genetically modified food plants in the ACT, in order to preserve the identity of genetically modified crops or non-genetically modified crops for marketing purposes.

The moratorium would cease on 17 June 2006.

This Bill allows for the Minister to make written orders to prohibit the cultivation of certain genetically modified food plants.

The Bill also provides for offences in relation to the cultivation and transfer of prohibited genetically modified plants.

Specific terms are defined in the Dictionary at the end of the Bill and in some places throughout the Bill.

Throughout the Bill and this explanatory statement, the term “genetically modified” will be referred to as “GM”.

This Bill is based on the NSW *Gene Technology (GM Crop Moratorium) Bill 2003*.

NOTES ON CLAUSES

PART 1 PRELIMINARY

Clause 1 – Name of Act

This is a formal provision that specifies the name of the proposed Act as the *Gene Technology (GM Crop Moratorium) Act 2003*.

Clause 2 – Commencement

Clause 2 provides that the proposed Act will take effect on the day after it is notified on the ACT Legislation Register.

Clause 3 – Dictionary

Clause 3 provides that the dictionary at the end of the proposed Act is a part of the Act.

Clause 4 – Notes

This clause provides that notes contained in the proposed Act are explanatory only and are not a part of the Act.

Clause 5 – Offences against Act—application of Criminal Code etc

This clause provides that other legislation will also apply in relation to offences against the *Gene Technology (GM Crop Moratorium) Act 2003*. The notes provided with the clause further explain examples of this.

Clause 6 – Purpose of Act

This clause outlines the purpose of this Bill as being to designate the ACT as an area in which certain GM plants may not be cultivated, in order to preserve the identity of one or both of the following:

- (a) GM crops;
- (b) Non-GM crops;

for marketing purposes.

PART 2 MORATORIUM ON CULTIVATING CERTAIN GM PLANTS

Clause 7 – Moratorium orders

Clause 7 provides that the Minister may make an order in writing (called a *moratorium order*) to prohibit the cultivation of specified GM food plants in the ACT.

A moratorium order will be a disallowable instrument.

Clause 8 – Exemptions

Clause 8 allows the Minister to make written exemptions, to exempt a person, area or anything else from the operation of a moratorium order. The cultivation of a GM food plant as permitted by an exemption order is not prohibited by a moratorium order.

An exemption will be a disallowable instrument.

An exemption may be subject to conditions and may be part of a moratorium order or may be a separate instrument.

Clause 8 also explains that the cultivation of a GM food plant as permitted by an exemption will not contravene the moratorium order.

Clause 9 – Offence—contravention of moratorium order

Clause 9 makes it an offence for a person to cultivate a GM food plant if:

- the cultivation contravenes a moratorium order; and
- and the person is reckless about whether the plant is a GM food plant and whether it contravenes a moratorium order.

The maximum penalty that can be applied for this offence is 200 penalty units and/or two years imprisonment.

Clause 10 – Orders cannot be challenged

Clause 10 excludes the rights of people affected by a moratorium order or exemption to challenge those declarations or orders in Court. However, such an order or exemption is a disallowable instrument and as such may be challenged by the Legislative Assembly.

The provision of an appeal mechanism (and the necessary provision of a stay to make the appeal meaningful) would frequently compromise the object of

the Bill which is to provide Government with the ability to respond expeditiously to the need to:

- prohibit the commercial cultivation of a GM food crop to prevent the possible contamination of non-GM produce for marketing purposes; and
- enable activities exempt from a moratorium order to proceed or continue.

Clause 11 – Directions by Minister

Clause 11 provides that where the Minister has a certificate (under clause 32) stating that an approved test has shown that a plant is a GM plant; and the Minister reasonably believes that the plant is a GM food plant to which a moratorium order applies and an exemption did not apply may take action.

In these situations the Minister may, in writing, direct a person who owns or has custody or control of the tested plant, or any plant that was part of the offending crop, to take action in relation to the plant. Sub-clauses 11(2)(a) to 11(2)(d) specify what this direction may relate to.

This clause defines ‘offending crop’ as the crop in which the tested plant was cultivated.

Clause 11 provides that in order to prevent the contamination of future crops, the Minister may give a written direction to the owner or occupier of land which the Minister reasonably believes to have been used to cultivate the tested plant or offending crop, directing that person not to cultivate any plant of stated species or variety on the land for a stated period.

Clause 11 makes it an offence if a person fails to comply with a direction given under this section. The maximum penalty is 200 penalty units and/or imprisonment for two years.

Clause 12 – Urgent seizure etc

Where a person has failed to comply with a direction under Clause 11(2) or the Minister considers that seizure and disposal or destruction of the plant is required urgently, the Minister or an inspector acting under the written authority of the Minister may seize and dispose of or destroy a plant that is or was part of the tested plant.

Clause 13 – Offence—transfer etc of certain plants

Clause 13 makes it an offence if a person who owns or has custody of a plant, and is reckless about whether the plant has been cultivated in contravention of a moratorium order or is/was part of a crop in which a plant was cultivated in contravention of a moratorium order does any of the following:

- transfers ownership, custody or control of the plant;
- offers the plant for sale;
- offers to supply the plant;
- destroys the plant; or
- moves the plant to another place.

except in accordance with a direction from the Minister under Clause 11 or with written permission from the chief executive.

The maximum penalty for the offence under Clause 13 is 200 penalty units and/or two years imprisonment.

Clause 14 – Offence —failing to report contravention of moratorium order

Clause 14 requires a person who knows or suspects that a plant has been cultivated in contravention of a moratorium order to provide certain information to the chief executive within 2 days of first having the knowledge or suspicion.

However, this clause does not apply if the person reasonably believes that the chief executive has already been given the information.

A person is not excused from giving the chief executive information under this clause because of any duty of confidentiality. And the person does not breach their duty by providing the information.

A person is also excused from giving information on the grounds that it might incriminate them.

However, this clause also provides that any information obtained directly or indirectly because of the giving of the information is not admissible in evidence against the person in a criminal proceeding (other than a proceeding for an offence against this part or against the Criminal Code in relation to false or misleading statements, information and documents).

The maximum penalty for failing to report contravention of a moratorium order is 20 penalty units.

PART 3 ENFORCEMENT

DIVISION 3.1 — Interpretation

Clause 15 – Definitions for pt 3

This clause defines 'connected' in relation to things being connected with a particular offence.

For this part, a thing has been connected with a particular offence if:

- the offence has been committed in relation to it;
- it will provide evidence of the commission of the offence; or
- it was used, is being used, or is intended to be used, to commit the offence.

It also specifies that 'offence' includes an offence that there are reasonable grounds for believing has been, is being, or will be committed.

DIVISION 3.2 — Inspectors

Clause 16 – Appointment of inspectors

Clause 16 provides for the appointment of inspectors by the chief executive.

Clause 17 – Identity cards

Clause 17 requires the chief executive to issue an inspector with an identity card and specifies what the identity card must show.

Under this clause, it is an offence for a person to fail to return their identity card within 7 days after they cease to be an inspector. It is a strict liability offence, with a maximum penalty of 1 penalty unit.

DIVISION 3.3 — Powers of inspectors

Clause 18 – Power to enter premises

Clause 18 sets out the powers of an inspector to enter premises. Inspectors may enter premises either at any reasonable time (except for residential premises), at any time with the occupier's consent, or in accordance with a warrant.

An inspector may also enter the land around premises to ask for consent to enter the premises.

Where an inspector reasonably believes that the circumstances are serious and urgent enough to require immediate entry, they can enter premises at any time without a warrant. In such cases the inspector may enter the premises with any necessary assistance and force.

Clause 19 – Production of identity card

Under Clause 19, an inspector must not remain on premises entered under Part 3 if the inspector does not produce their identity card when requested by the occupier.

Clause 20 – Consent to entry

Clause 20 sets out the obligations of an inspector when seeking consent to enter premises. The inspector must produce his or her identity card and tell the occupier the purpose of entry, that anything found and seized may be used in evidence in court and that consent may be refused.

If the occupier consents, the inspector must ask them to sign a written acknowledgement that they were told these things (as in paragraph above) and stating the time and date that consent was given. And the inspector must give a copy of the written acknowledgement to the occupier immediately.

Under sub-clause 20(4), if the question of whether an occupier gave consent for an inspector to enter premises arises in court proceedings, the court must assume that the occupier did not give consent if a written acknowledgement is not produced for evidence and it is not proved that the occupier consented to entry.

Clause 21 – Warrants

Clause 21 permits an inspector to apply to a magistrate for a warrant to enter premises. The magistrate may only issue the warrant if satisfied there are reasonable grounds for suspecting that there is a particular activity or thing connected with an offence against the proposed Act, at the premises, or may be at the premises within the next 14 days.

Clause 21 also sets out the required information to be contained in a warrant.

Clause 22 – Warrants—application made other than in person

Clause 22 allows an inspector, in urgent or special circumstances, to apply for a warrant by phone, fax, radio or other forms of communication. The clause details the steps the inspector and magistrate must take in relation to the warrant.

The clause also specifies that if the question arises in court proceedings of whether the exercise of power was authorised by a warrant, the court must assume that the power exercised by an inspector was not authorised by a warrant if the warrant is not produced in evidence and it is not proved that the exercise of power as authorised by a warrant.

Clause 23 – General powers on entry to premises

Clause 23 provides powers for inspectors on entry to premises.

An inspector may inspect, examine, take measurements, conduct tests, take samples, take photographs/films/audio/video or other recordings, seize a thing and require the occupier or persons on the premises to give the inspector reasonable help to exercise a power.

This clause, makes it an offence for a person to intentionally contravene a requirement to give reasonable help to the inspector under sub-clause 23(1)(f). The maximum penalty is 50 penalty units.

Clause 24 – Power to require name and address

Clause 24 provides that an inspector may require a person to state their name and address if the inspector finds the person committing an offence against the proposed Act or believes on reasonable grounds that a person has just committed an offence against the proposed Act.

The clause sets out what the inspector must do when making such a request.

Under this clause it is an offence for a person to contravene the requirement by not providing their name and address. The maximum penalty for this offence is 5 penalty units.

Clause 25 – Power to seize things

Clause 25 sets out the powers of inspectors to seize things when they have entered premises under the proposed Act.

Under Clause 25 an inspector can seize things:

- if specified in a warrant.
- if, on entering premises with the occupier's consent, an inspector is satisfied that the thing is connected with an offence under the proposed Act (but only if the seizure is consistent with the purpose of entry as told to the occupier when seeking consent to enter); and
- if an inspector believes on reasonable grounds that the thing is connected with an offence and that seizure is necessary to prevent the thing from being concealed, lost or destroyed, or to prevent the thing from being used to commit, continue or repeat the offence.

Under this clause, it is an offence for a person to interfere with a thing to which access has been restricted under this clause. The maximum penalty is 50 penalty units and/or 6 months imprisonment.

The clause allows an inspector to either remove the seized thing or to leave it at the premises and restrict access to it.

Clause 26 – Receipt for things seized

Clause 26 requires an inspector to provide a receipt to the occupier of the premises as soon as practicable after a thing is seized from those premises.

Clause 27 – Access to things seized

Clause 27 permits a person who would normally be entitled to the thing that has been seized to inspect it and to take extracts or copies if it is a document.

Clause 28 – Return of things seized

Clause 28 provides the circumstances in which a seized thing is forfeited to the Territory and the circumstances in which a seized thing must be returned to its owner or compensation must be paid.

DIVISION 3.1 — Interpretation

Clause 29 – Self-incrimination etc

Clause 29 provides that a person must give information or produce a document when required to under Part 3, even if doing so may tend to incriminate the person.

The answer to the question or production of the thing is not admissible in evidence against the person in any criminal proceedings (except a proceeding for an offence against this part or against the Criminal Code in relation to false or misleading statements, information and documents).

Clause 30 – Damage etc to be minimised

Clause 30 requires that, in exercising their functions under the proposed Act, an inspector take reasonable steps to ensure that they, and any person assisting them, cause as little inconvenience, detriment and damage as is practicable.

This clause outlines the steps for an inspector to take if damage is caused.

Clause 31 – Compensation—actions by inspectors

Clause 31 provides that a person may claim reasonable compensation for loss or expense resulting from the exercise, or purported exercise, of a function under this part by an inspector or anyone helping the inspector.

The clause sets out the manner in which compensation may be sought and requires that a court may only order compensation to be paid if they are satisfied that it is just to do so. The clause allows for regulations to prescribe things that the court may, must or must not consider when determining if it is just to order compensation.

PART 4 MISCELLANEOUS

Clause 32 – Certificate

Clause 32 provides that a certificate signed by the person in charge of an approved laboratory (that is accredited by the National Association of Testing Authorities, Australia) stating that a Polymerase Chain Reaction test (or such other test as may be prescribed by the regulations) has been conducted on a plant, and that the test shows that the plant has been genetically modified, is conclusive proof that the plant has been genetically modified.

Clause 33 – Review of decisions

Clause 33 provides that application can be made to the administrative appeals tribunal for review of a decision of the Minister to give a direction under Clause 11.

Clause 34 - Compensation—safety net

Clause 34 provides for reasonable compensation to be paid if the operation of the proposed Act would result in the acquisition of property from a person other than on just terms and the acquisition would be unlawful because of the Self-Government Act, section 23(1).

Clause 35 – Delegation by Minister

Clause 35 sets out which functions the Minister must exercise personally and allows the Minister to delegate any other functions to a public servant or a person prescribed under regulations.

Clause 36 – Determination of fees

Clause 36 provides for the Minister to determine, in writing, fees for the proposed Act (this determination will be a disallowable instrument).

Clause 37 – Regulation-making power

Clause 37 provides for the Executive to make regulations for the proposed Act.

Clause 38 – Expiry of Act

Clause 38 specifies that the proposed Act will expire on 17 June 2006.

Clause 39 – Administrative Decisions (Judicial Review) Act 1989, schedule 1, new clause 7

Clause 39 amends the *Administrative Decisions (Judicial Review) Act 1989* to specify that the *Administrative Decisions (Judicial Review) Act 1989* does not apply to decisions of the Minister under the proposed Act.

DICTIONARY

The dictionary at the end of the Bill defines key words and phrases that are used in the Bill and are part of the Bill. These definitions determine the meaning that is to be attributed to certain words or phrases whenever they are used in the Bill or regulations.