

## Gene Technology (GM Crop Moratorium) Bill 2003

### Explanatory note

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

This Bill is cognate with the *Gene Technology (New South Wales) Bill 2003*.

### Overview of Bill

The object of this Bill is to recognise and designate New South Wales as an area in which certain genetically modified plants may not be cultivated, in order to preserve the identity of GM crops or non-GM crops, or both, for marketing purposes. The proposed Act will expire on 3 March 2006.

In order to achieve its object, the Bill:

- (a) enables the Minister to make an order (a **moratorium order**) prohibiting the cultivation in New South Wales of a specified GM food plant or class of GM food plants, and
- (b) makes it an offence (maximum penalty: in the case of a corporation, 1,250 penalty units or, in any other case, 500 penalty units or imprisonment for 2 years, or both) if a person cultivates a GM food plant in contravention of a moratorium order knowing, or being reckless as to whether, the plant is a GM food plant, and
- (c) enables the Minister to make an order (an **exemption order**) to confer exemptions from the operation of a moratorium order, and
- (d) enables the Minister to direct a person to take certain action in relation to a plant that is part of an offending crop, including destroying the plant, and
- (e) enables the Minister to seize and dispose of any plant that is part of an offending crop, and
- (f) enables the Minister to direct a person not to cultivate a plant on land on which an offending crop has been grown, and
- (g) provides for an appeal to the Supreme Court in relation to certain directions given by the Minister, and
- (h) makes it an offence (maximum penalty: in the case of a corporation, 1,250 penalty units or, in any other case, 500 penalty units or imprisonment for 2 years, or both) if a person tries to dispose of a plant that the person has reasonable grounds to suspect has been cultivated in contravention of a moratorium order, and
- (i) makes it an offence (maximum penalty: 20 penalty units) if a person suspects that a plant has been cultivated in contravention of a moratorium order and fails to notify the Director-General of the Department of Agriculture, and
- (j) confers inspectorial powers on persons appointed by the Director-General under the proposed Act.

Outline of provisions

### Part 1 Preliminary

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

**Clause 2** provides for the commencement of the proposed Act on the date of assent (except as provided by the proposed section).

**Clause 3** states the purpose of the proposed Act (which is to recognise and designate New South Wales as an area in which certain genetically modified plants may not be cultivated, in order to preserve the identity of GM crops or non-GM crops, or both, for marketing purposes).

**Clause 4** defines certain expressions used in the proposed Act.

**Clause 5** provides that for the purposes of the proposed Act, a **food plant** is a species or variety of plant

that the Minister is satisfied is, when grown in New South Wales, primarily grown to be used (whether or not after processing) as, or as an ingredient of, food for human consumption.

## **Part 2 Moratorium on cultivating certain GM plants**

### **Division 1 Moratorium orders**

**Clause 6** provides that the Minister may by order published in the Gazette (a **moratorium order**) prohibit the cultivation in New South Wales of a specified GM food plant or class of GM food plants.

**Clause 7** makes it an offence (maximum penalty: in the case of a corporation, 1,250 penalty units or, in any other case, 500 penalty units or imprisonment for 2 years, or both) if a person cultivates a GM food plant in contravention of a moratorium order knowing, or being reckless as to whether, the plant is a GM food plant.

**Clause 8** provides that the Minister may by order published in the Gazette (an **exemption order**) confer exemptions from the operation of a moratorium order.

An exemption may be conferred so as to apply to a specified person or class of persons or within a specified area or in any other specified way and it may be conferred subject to conditions or unconditionally. The cultivation of a GM food plant as permitted by an exemption order is not prohibited by a moratorium order.

**Clause 9** requires the Minister, as soon as practicable after making an order and publishing it in the Gazette, to cause notice of the order to be published in a newspaper circulating throughout the State.

**Clause 10** provides that an order takes effect on the day on which it is published in the Gazette or on a later day specified in the order.

**Clause 11** provides that an order cannot be challenged, reviewed or called into question in proceedings before any court or tribunal.

**Clause 12** requires the Director-General to keep a register of the orders made under the proposed Division. The Director-General is to cause the contents of the register to be made available for inspection free of charge by the public at the Department's head office and on the Department's website on the Internet.

### **Division 2 Enforcement of moratorium orders**

**Clause 13** provides that if the Minister is in possession of a certificate (of a type referred to in proposed section 18) that relates to a plant (the *tested plant*) and the Minister believes on reasonable grounds that the tested plant is a GM food plant specified in a moratorium order and the tested plant was not cultivated pursuant to an exemption order, the Minister may do one or more of the following:

- (a) give a written direction to the owner or person having custody or control of the tested plant or any plant that is or was part of the offending crop requiring that person to take such action in relation to the plant as may be specified,
- (b) authorise an inspector to seize and dispose of or destroy the tested plant or any plant that is or was part of the offending crop and any container in which such a plant is growing or stored if the owner or person having custody or control of the plant has been given a direction under the proposed section and failed to comply with the requirements of the direction or if the Minister considers that seizure and disposal or destruction of the plant is required urgently,
- (c) in order to prevent the contamination of future crops, give a written direction to the owner or occupier of land on which the Minister reasonably believes the tested plant or the offending crop has been cultivated, directing that person not to cultivate any plant of a species or variety specified in the direction on the land for such period as is specified. The proposed section defines **offending crop** as the crop in which the tested plant has been cultivated.

**Clause 14** makes it an offence (maximum penalty: in the case of a corporation, 1,250 penalty units or, in any other case, 500 penalty units or imprisonment for 2 years, or both) if a person who is given a written direction under the proposed Division fails, without reasonable excuse, to comply with the requirements of the direction.

**Clause 15** provides that:

- (a) a person given a written direction under the proposed Division is liable for any costs incurred in complying with the requirements of the direction, and
- (b) the owner or person having custody or control of any plant or container that is seized and disposed of or destroyed under proposed section 13 (3) is liable for any costs incurred, and
- (c) the owner or person having custody or control of any plant that is the subject of a certificate referred to in proposed section 18 is liable for the costs of the test referred to in that certificate.

Any costs incurred by the Minister are taken to be a debt due to the Minister from the person and in any proceedings for the recovery of any such debt, a certificate signed by the Minister stating the amount of the costs and the manner in which they were incurred is evidence of the matters certified.

**Clause 16** provides that a person aggrieved by a direction given to the person under proposed section 13 (2) may appeal to the Supreme Court against the direction. An appeal can be made even if the direction has been executed and an appeal does not affect a direction appealed against until the Supreme Court finally determines the appeal. On the hearing of an appeal, the Supreme Court may make an order reversing, affirming or amending the direction, remit the matter back to the Minister, make an order giving a direction that the Minister could give, make an order awarding compensation or make such other order in relation to the appeal as the Court sees fit. If the Supreme Court gives a direction that the Minister may give, the direction is taken to be a direction of the Minister under that provision (other than for the purposes of an appeal under the proposed section). An award of compensation may only be made in relation to losses suffered directly by the person given the direction appealed against and may only be made to the extent that the appeal is successful. The Supreme Court cannot award exemplary or punitive damages or damages in the nature of aggravated damages.

**Clause 17** provides that except as provided by the proposed Division, a direction under the proposed Division cannot be challenged, reviewed or called into question in proceedings before any court or tribunal.

**Clause 18** 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 or prescribed by the regulations) 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.

### **Division 3 Other offences**

**Clause 19** makes it an offence (maximum penalty: in the case of a corporation, 1,250 penalty units or, in any other case, 500 penalty units or imprisonment for 2 years, or both) if the owner or person having custody or control of a plant does any of the following if the person is aware or has reasonable grounds to suspect that the plant has been cultivated in contravention of a moratorium order or is or was part of a crop in which a plant was cultivated in contravention of a moratorium order:

- (a) transfer ownership, custody or control of the plant,
- (b) offer the plant for sale,
- (c) offer to supply the plant,
- (d) destroy the plant,
- (e) move the plant to another location, except in accordance with a permit issued by the Director-General or a direction under proposed Division 2.

**Clause 20** makes it an offence (maximum penalty: 20 penalty units) if a person, who is aware or suspects that a plant has been cultivated in contravention of a moratorium order, fails to notify the Director-General of certain matters within 2 days of becoming aware or forming that suspicion. However, a person is not

required to notify the Director-General of a matter if the person has a reasonable excuse or if the person believes on reasonable grounds that the Director-General has already been notified of the matter. A person who is required to notify the Director-General of a matter under the proposed section is not excused from that requirement because of any duty of confidentiality or other restriction on disclosure or because provision of the information may tend to incriminate the person or make the person liable to a penalty. A notification provided is not admissible in evidence in any criminal proceedings against the person who provided the notification except proceedings for an offence against the proposed section.

### **Part 3 Enforcement**

**Clause 21** provides that the Director-General may appoint any officer of the Department of Agriculture, or any person whom the Director-General considers is suitably qualified for the purpose, to be an inspector for the purposes of the proposed Act.

**Clause 22** provides that an inspector may at any reasonable time enter and inspect any premises for the purpose of ascertaining whether or not a provision of the proposed Act, or any regulation made under the proposed Act, is being or has been complied with or contravened. The proposed section sets out the powers of an inspector while on premises entered under the proposed section or under the authority of a search warrant. The proposed section does not authorize an inspector to enter any part of premises that is being used for residential purposes except with the consent of the occupier or under the authority of a search warrant.

**Clause 23** provides that a power to enter premises, or to make an inspection or take other action on premises, may not be exercised unless the inspector proposing to exercise the power is in possession of a certificate of authority, gives reasonable notice to the occupier of the premises of the intention to exercise the power (unless the giving of notice would defeat the purpose for which it is intended to exercise the power), exercises the power at a reasonable time, unless it is being exercised in an emergency, and uses no more force than is reasonably necessary to effect the entry or make the inspection. If damage caused by an inspector exercising a power to enter premises, a reasonable amount of compensation is recoverable from the Crown.

**Clause 24** provides that an inspector may by notice in writing, require a person to furnish to the inspector such information or records (or both) as the inspector requires by the notice, being information that relates to the question of whether or not the proposed Act or the regulations are being or have been contravened.

**Clause 25** provides that an inspector may require a person whom the inspector suspects on reasonable grounds to have knowledge of matters in respect of which information is reasonably required for the purposes of the proposed Act to answer questions in relation to those matters. An inspector may, by notice in writing, require a corporation to nominate a director or officer of the corporation to be the corporation's representative for the purpose of answering questions and answers given by a person so nominated bind the corporation.

**Clause 26** provides that an inspector may require a person whom the inspector suspects on reasonable grounds to have contravened or to be contravening the proposed Act or the regulations to state his or her full name and residential address.

**Clause 27** provides that a person who is required under the proposed Part to answer a question or to produce a thing is not excused from answering the question or producing that thing on the ground that it might tend to incriminate the person or make the person liable to a penalty. The answer to the question or production of the thing is not admissible in evidence against the person in any criminal proceedings (except proceedings for an offence under proposed section 29 (1)–(3)) if the person objected at the time on the ground that it might incriminate the person, or the person was not warned on that occasion that the person may object on the ground that it might incriminate the person.

**Clause 28** permits an inspector to apply to an authorised justice for a search warrant for premises if the inspector believes on reasonable grounds that a provision of the proposed Act or the regulations is being

or has been contravened on the premises, or that there is on the premises evidence of a contravention of a provision of the proposed Act or the regulations.

**Clause 29** creates a number of offences (maximum penalty: 10 penalty units or imprisonment for 3 months, or both) if a person, without reasonable excuse, neglects or fails to comply with a requirement made of the person by an inspector, or if a person furnishes any information or makes a statement in purported compliance with a requirement made by an inspector under the proposed Act, knowing that it is false or misleading in a material respect, or if a person, without reasonable excuse, hinders or obstructs an inspector, or if a person, without reasonable excuse, removes or tampers with anything that has been seized or any sample that has been taken under the proposed Act.

**Clause 30** provides that any item seized under the proposed Act is forfeited to the Crown and may be destroyed or disposed of in such manner as the Minister directs. However, if any seized item is forfeited to the Crown and the Minister is satisfied that there has been no contravention of the proposed Act or the regulations in relation to the seized item, and the seized item has not been disposed of or destroyed, the Minister must immediately cause the seized item to be delivered to such person as appears to the Minister to be the person who would, but for the forfeiture, have been entitled to it. If any seized item is delivered to a person under the proposed section, such proprietary and other interests as existed immediately before the forfeiture are revived.

**Clause 31** provides that if a person has contravened, is contravening or is proposing to contravene a provision of the proposed Act, the Supreme Court may, on the application of the Minister, grant an injunction restraining the person from doing so or requiring the person to do any act or thing necessary to avoid or remedy the contravention.

#### **Part 4 Miscellaneous**

**Clause 32** provides that compensation is not payable by or on behalf of the Crown in relation to anything that is authorised by or under the proposed Act.

**Clause 33** provides that proceedings for an offence under the proposed Act or the regulations may be dealt with summarily before a Local Court or before the Supreme Court in its summary jurisdiction. If proceedings are brought in a Local Court, the maximum monetary penalty that the Local Court may impose for the offence is 100 penalty units or such other amount as may be prescribed by the regulations.

**Clause 34** provides that an inspector or other prescribed person (*an authorized officer*) may serve a penalty notice on a person if it appears to the authorized officer that the person has committed an offence under the proposed Act or the regulations, being an offence prescribed by the regulations.

**Clause 35** provides that in any proceedings for an offence against a provision of the proposed Act or the regulations, the onus of proving that a person had a reasonable excuse (as referred to in the provision) lies with the defendant.

**Clause 36** provides for proceedings for offences in relation to officers of corporations.

**Clause 37** permits the Minister to delegate to an authorised person the exercise of any of the Minister's powers under the proposed Act or the regulations, other than the power to make an order under proposed Division 1 of Part 2, the power to give a direction or authorisation under proposed section 13 and the power of delegation. The proposed section also permits the Director-General to to an authorised person the exercise of any of the functions delegated to the Director-General by the Minister, or any of the other functions of the Director-General under the proposed Act or the regulations, other than the power of delegation.

**Clause 38** provides that for the purposes of the proposed Act, a plant may be described by its scientific name, its common name or in any other way.

**Clause 39** is a formal provision giving effect to the savings, transitional and other provisions in Schedule 1.

**Clause 40** is a formal provision giving effect to the amendments to the Acts specified in Schedule 2.

**Clause 41** enables the Governor to make regulations in connection with the proposed Act. The regulations may create offences punishable by a penalty not exceeding 100 penalty units.

**Clause 42** provides that the proposed Act expires on 3 March 2006.

Schedule 1 Savings, transitional and other provisions

**Schedule 1** contains provisions of a savings and transitional nature.

Schedule 2 Amendment of Acts

Schedule 2.1 amends the *Gene Technology (GM Crop Moratorium) Act 2003* (the proposed Act) to enable the proposed Act to be amended to take account of the proposed repeal of the *Search Warrants Act 1985* and its replacement by the *Law Enforcement (Powers and Responsibilities) Act 2002*.

**Schedule 2.2** amends the *Fines Act 1996* to permit penalty notices to be issued under the proposed Act. Schedule 2.3 and 2.4 **amend the *Law Enforcement (Powers and Responsibilities) Act 2002* and the *Search Warrants Act 1985*, respectively, to permit a search warrant to be issued under the proposed Act.**