

Agricultural and Veterinary Chemicals Legislation Amendment Bill 2012

Introduced into the House of Representatives on 28 November 2012

Portfolio: Agriculture, Fisheries and Forestry

Committee view

1.1 The committee considers the monitoring and investigatory powers in the bill are extensive and a major encroachment on the right to privacy and seeks further information from the Minister before forming a view on the compatibility of the bill with human rights.

1.2 The committee considers that provisions in the bill which compel the disclosure of information or production of documents contain protections that make them consistent with the right not to incriminate oneself under article 14 of the International Covenant on Civil and Political Rights (ICCPR).

1.3 The committee seeks further clarification from the Minister as to whether provisions imposing a civil penalty and reverse onus offences are consistent with the rights in article 14 of the ICCPR.

Overview

1.4 This bill proposes a large number of amendments to four pieces of legislation to implement reforms to the system of regulation of agricultural and veterinary ('agvet') chemicals, to improve the efficiency of the current regulatory arrangements and provide greater certainty that chemicals approved for use in Australia are safe.¹ It seeks to do this by:

- requiring the Australian Pesticides and Veterinary Medicines Authority (APVMA) to have regard to a risk framework when approving and registering agvet chemicals;
- implementing a mandatory re-approval and re-registration scheme for agvet chemicals to identify any problematic chemicals (currently there is no requirement for existing agvet chemicals to be regularly reviewed);
- improving assessment processes for agvet chemicals, approvals, registrations and reconsiderations.

1 The four statutes amended are the *Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994* (the Collection Act), *Agricultural and Veterinary Chemicals Act 1994*, *Agricultural and Veterinary Chemicals (Administration) Act 1992* (the Admin Act), *Agricultural and Veterinary Chemicals Code Act 1994* (the Agvet Code).

- improving APVMA's ability to enforce compliance with its regulatory decisions, by providing it with graduated range of compliance enforcement powers, a number of new offences and a power to apply statutory conditions to regulations and approvals;
- improving data protection provisions to make them simpler and more consistent and extending data protection eligibility to a greater range of data;
- empowering any Commonwealth agency to issue notices regarding levy assessments and receive levy payments from chemical companies (currently only the APVMA can do so).

Compatibility with human rights

1.5 The bill is accompanied by a detailed self-contained statement of compatibility which identifies the principal rights promoted by the bill or limited by its provisions. The statement of compatibility notes that the bill promotes the right to health and a healthy environment, by regulating agvet chemicals. The legislation may also be viewed as a means of protecting the right to life guaranteed by article 6 of the ICCPR.

1.6 The statement of compatibility notes that bill contains a large number of provisions, in particular relating to monitoring and enforcement, which engage human rights. The principal rights engaged are the right to privacy, freedom from self-incrimination and the presumption of innocence.

Right to protection against arbitrary or unlawful interferences with privacy

1.7 The statement of compatibility notes that the bill 'provides for the use of extensive investigation and monitoring powers by officers of the APVMA (including entry, search and seizure)'.² The statement recognises that the exercise of these powers may involve a limitation on the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence contained in article 17 of the ICCPR. It also notes that in order for limitations on the enjoyment of this right to be non-arbitrary, they must be aimed at achieving a legitimate objective and be reasonable, necessary and proportionate. It maintains that these powers are necessary in the pursuit of important public health goals and that there are adequate procedural safeguards against the abuse of these powers.

1.8 The bill provides for extensive powers to enter onto premises in order to monitor whether legislation is being complied with or to investigate potential breaches of the law relating to agvet chemicals. This applies to commercial and residential premises, where the residential premises are also used for commercial purposes.

2 P. 11 of the statement of compatibility.

1.9 *Monitoring powers*: there are four proposed ways an inspector may enter premises:³

- with the consent of the occupier, to determine if relevant legislation is being complied with;
- under a monitoring warrant, if a magistrate is satisfied that 'it is reasonably necessary' that inspectors have access to the premises to determine if relevant legislation is being complied with, information supplied under the legislation is correct or if a levy is payable;
- if the conditions of a chemical manufacturing licence allow an inspector to enter premises (the bill also inserts a new section making it a condition of a manufacturing licence that inspectors must be allowed to enter premises to exercise monitoring powers); or
- if an inspector (authorised in writing by the APVMA) has reasonable grounds for suspecting it is necessary to enter and use monitoring powers to prevent imminent risk to persons of death, serious injury or serious illness.

1.10 *Investigating powers*: there are two proposed ways an inspector may enter premises:⁴

- with the consent of the occupier, if there are reasonable grounds for suspecting that there may be evidential material on the premises; or
- under an investigating warrant, if a magistrate is satisfied 'that there are reasonable grounds for suspecting that there is, or there may be within the next 72 hours, evidential material on the premises'.

1.11 The powers available to an inspector are extensive and include powers to search, to direct persons on the premises to undertake specific acts, to request information and documents, and to secure material for up to seven days if the inspector believes on reasonable grounds that it is necessary to preserve it from concealment, loss or destruction. It is an offence to refuse to comply with a request to provide information or produce a document, and reasonable and necessary force against things may be used in executing a warrant. An investigation warrant also specifies that it includes powers to seize evidential material of the kind specified in the warrant and other material if the inspector believes on reasonable grounds that it affords evidence of the commission of an offence and it is necessary to seize it to

3 See Schedule 3 and proposed new sections 69EAB of the *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Admin Act) and sections 126, 131 and 131AA of the *Agricultural and Veterinary Chemicals Code Act 1994* (Agvet Code).

4 See Schedule 3 and proposed new sections 69EB of the Admin Act and section 132 of the Agvet Code.

preserve it. The inspector is also empowered to ask questions of a person or to ask the person to produce a document; a failure to comply is an offence, and no provision is made in relation to the possibility of the person incriminating themselves by this action.

1.12 The statement of compatibility states that these powers are necessary in order to protect the health and safety of human beings, animals and the environment from potentially harmful chemicals. It argues that there are adequate safeguards as exercise of these powers is subject to judicial warrant or consent.

1.13 The committee:

- (a) notes the powers conferred under a warrant are extensive and a major encroachment on the right to privacy, and require a clear justification as a necessary and proportionate measure;**
- (b) seeks clarification as to whether the new licence condition requiring all licence holders to admit entry to an inspector applies to existing licence holders, and if so, what steps have been, or will be, taken to inform licence holders of this new condition;**
- (c) seeks clarification as to why the threshold for the issue of a monitoring warrant is that entry is considered 'reasonably necessary' when the international standard is that an encroachment on a right should be 'necessary' if it is to be justified; and**
- (d) seeks clarification as to the practical difference between the powers that may be exercised under a monitoring warrant and those that may be exercised under an investigation warrant.**

Right not to incriminate oneself

1.14 The bill inserts a number of new powers to demand the production of information or documents, even if the provision of them may tend to incriminate the person asked to provide them. Article 14 of the International Covenant on Civil and Political Rights provides some minimum guarantees in criminal proceedings, including the freedom against self-incrimination, which gives immunity against being compelled to give evidence or to supply information that would tend to prove one's own guilt.

1.15 A number of new sections⁵ have been inserted into existing legislation that provide that a person may not refuse to provide information, answer a question

5 Schedule 3, clause 14 inserts a replacement section 34 in the *Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994* and Schedule 3, clause 283 inserts a new Division 2 in the *Agricultural and Veterinary Chemicals Code Act 1994*, see particularly new sections 130, 130B and 130C.

asked by an inspector or produce a document, on the ground that to do so might incriminate or expose the person to a penalty. In some cases, failure to do so is an offence. However, in each case both a use and derivative use immunity is provided – so that any information, answer or document obtained as a direct or indirect consequence of providing them is not admissible in evidence against the person in criminal proceedings or in civil proceedings for a civil penalty.

1.16 The statement of compatibility states that these provisions are necessary to ensure the regulator has complete information to enable it to protect human health and the environment.

1.17 The committee considers that these provisions, which compel disclosure of information or production of documents but which also provide a use and derivative use immunity, are consistent with the right not to incriminate oneself.

Criminal offences, civil penalty provisions and criminal process rights

1.18 The various statutes which make up the legislative scheme for the regulation of agvet chemicals create a number of criminal offences. Some of these are strict liability offences, others impose legal or evidential burdens on a defendant in relation to certain matters.

1.19 In addition, the bill provides for existing offences under the legislation to be also ‘civil penalty provisions’.⁶ This would allow APVMA to apply to a civil court for an order that a person pay to the Commonwealth a pecuniary penalty. This could be up to three times higher than an amount payable as a fine were the person prosecuted under a criminal offence. When hearing such applications the court applies the civil rules of evidence and procedure.

1.20 Where a person has been convicted of an offence, a court may not also make a civil penalty order against the person for conduct that is substantially the same as the conduct constituting the offence. However, the same does not apply where a person has had a civil penalty made against them - a person can still be prosecuted, whether or not a civil penalty order has been made against them. There are also restrictions on the use of material disclosed in civil penalty proceedings in subsequent criminal proceedings relating to the same conduct.

1.21 In civil penalty proceedings a person may be subject to triple the pecuniary penalty that could be imposed by fine if the matter were dealt with as a criminal offence (most of the relevant criminal provisions provide only for a fine, rather than the possibility of imprisonment). Thus, a person may be subject to a much larger

6 See, for example, the *Agricultural and Veterinary Chemical Code Act 1994*, new section 145A and 145AA, 145AF, 145B, 145BB, 145BC. Similar provision is made under the new *Part 7AB—Enforcement 15 Division 1—Civil penalty orders of the Agricultural and Veterinary Chemicals (Administration) Act 1992* (new sections 69EJ to 69EJS).

penalty, imposed in proceedings in which the civil standard of proof (balance of probabilities) is employed rather than the criminal standard (proof beyond reasonable doubt). While incarceration is not an option under civil penalties, these are still a serious form of punishment that can have serious financial implications and cause reputational damage to an offender.

1.22 The explanatory memorandum states:

The Bill also provides for existing offence provisions to also be civil penalty provisions, and to allow the APVMA to apply to the court for a civil penalty order against a person who has contravened a civil penalty provision. The financial disincentives to misconduct provided by civil penalties are a more proportionate and effective enforcement tool, reflecting the practice of other areas of (particularly, corporate) regulation under Commonwealth legislation.⁷

1.23 Notwithstanding the new provisions are not criminal offences, this is not determinative of the issue as to whether the conduct and penalties are ‘criminal’ for the purposes of article 14 of the ICCPR. If they do involve the determination of a criminal charge, then the rights set out in article 14 as applicable to criminal proceedings would apply – including the requirement that the case be proved beyond reasonable doubt.

1.24 In determining whether the imposition of a penalty for particular conduct involves determination of a ‘criminal charge’, international jurisprudence has identified the following factors to be taken into account: the classification of the act in domestic law, the nature of the offence, the purpose of the penalty, and the nature and the severity of the penalty. Classification as ‘civil’ under Australian law is not determinative. Where a prohibition is general in application, where the penalty is punitive and intended to deter (rather than award compensation for loss), and any financial penalty is significant, it may well be classified as involving a criminal charge and penalty for the purposes of article 14 of the ICCPR.

1.25 In the present case, there appears to be no difference in the conduct involved or in the rationale of the provisions – the only differences are the increased penalty to which a person is subject in civil penalty proceedings, and the lesser standard of proof that is required. The choice of which type of proceedings takes place appears to be at the discretion of the APVMA.

Double jeopardy (article 14(7), ICCPR)

1.26 Further, the new provisions that provide that a person may be proceeded against for a criminal offence after the person has been the subject of a civil penalty

7 P. 4 of the explanatory memorandum.

order,⁸ raise questions around double punishment for the same conduct, contrary to article 14(7) of the ICCPR. Article 14(7) provides:

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

1.27 New provisions⁹ that provide that the same evidence cannot be used in criminal proceedings against an individual if already used in civil penalty proceedings appear to limit this possibility, but it is not clear whether the practical effect of this provision is to rule out the possibility of a criminal conviction where a civil penalty order has already been made.

1.28 The committee intends to write to the Minister to seek clarification as to:

- (a) why the civil penalty provisions which correspond to offences constituted by the same conduct and which are subject to three times the maximum pecuniary penalty that may be imposed for the corresponding offence, should not be considered to involve ‘criminal charges’ under article 14 of the ICCPR and thus be required to be dealt with in proceedings which observe the guarantees applicable to criminal proceedings (including the requirement that the case against the defendant be proved beyond reasonable doubt); and**
- (b) whether the effect of new sections 69EJJ of the *Agricultural and Veterinary Chemicals (Administration) Act 1992* and 145BB of the *Agricultural and Veterinary Chemicals Code Act 1994* is to permit a person to be the subject of a civil penalty order and found guilty of an offence based on the same or substantially similar conduct and, if so, whether this is consistent with the ICCPR.**

Right to be presumed innocent

1.29 The bill specifies that a number of offences contained in the existing legislation are strict liability offences. Strict liability offences engage the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault. The statement does not mention these offences or provide any justification for them.

1.30 A number of existing offences also place evidential or legal burdens on the defendant in some circumstances. The statement of compatibility refers to earlier

8 See new sections 145B and 145BC to be inserted into the *Agricultural and Veterinary Chemical Code Act 1994*.

9 See proposed new section 145BC of the *Agricultural and Veterinary Chemical Code Act 1994* and new section 69EJK of the *Agricultural and Veterinary Chemicals (Administration) Act 1992*.

statements of the committee about the implications for the presumption of innocence of offences which cast a burden on the defendant.¹⁰

1.31 The statement of compatibility identifies one change from the existing offences, namely a new strict liability offence of 'possessing, having custody of, or other dealing with' a product that has been suspended in contravention of instructions provided in notices.¹¹ In effect, the new provision is an amalgam of two earlier provisions. It places a legal burden of proof on a person charged, requiring that the person prove that when they had the product, that they did not know, and could not reasonably be expected to have known, of the existence of the notice.

1.32 The statement of compatibility argues that this reverse onus is permissible, given that the relevant facts 'would be peculiarly within the knowledge of the defendant'. This may be so in relation to the actual knowledge of the defendant. However, whether the defendant could reasonably be expected to have known of the existence of the notice is an objective test that does not necessarily require information peculiarly within the knowledge of the defendant.

1.33 The committee intends to write to the Minister to seek clarification as to whether it is a justified encroachment on the presumption of innocence to impose a legal burden of proof on a defendant to prove that they could not be reasonably expected to know of the existence of a notice, and whether the imposition of an evidential burden would be more appropriate.

Civil penalty provisions and reverse onus provisions

1.34 The statement of compatibility notes that 'the new civil penalty provisions within the Bill place the same evidential or legal burden on a defendant in the same circumstances as the existing offences.'¹² The discussion above has raised the issue of whether, notwithstanding their designation as 'civil', these civil penalty provisions may involve the determination of a criminal charge for the purposes of article 14 of the ICCPR, and thus benefit from the presumption of innocence in article 14(2) of the ICCPR. If this is the case, then the reverse onus provisions would be subject to the analysis set out above. Even if the civil penalty provisions were not held to be 'criminal', the guarantees of the right to a fair hearing in article 14(1) of the ICCPR would still apply and an assessment of the fairness and reasonableness of requiring the defendant to discharge evidential or legal burdens of proof would need to be undertaken.

10 Second Report of the Committee, paras 1.21 to 1.22.

11 See proposed new section 45C of the *Agricultural and Veterinary Chemical Code Act 1994*.

12 See p. 13 of the statement of compatibility.