Agricultural and Veterinary Chemicals Legislation Amendment Bill 2012

Introduced into the House of Representatives on 28 November 2012; before Senate
Portfolio: Agriculture, Fisheries and Forestry
PJCHR comments: Report 1/13, tabled on 6 February 2013 and Report 3/13, tabled on 13 March 2013
Response dated: 27 February 2013

Summary of committee view

2.1 The committee thanks the Minister for his detailed response. The information provided adequately addresses the committee's concerns about the compatibility of the monitoring and investigatory powers in the bill with the right to privacy in article 17 of the International Covenant on Civil and Political Rights (ICCPR) and of the reverse onus provisions with the right to be presumed innocent in article 14(2) of the ICCPR.

2.2 The committee considers that some of the civil penalty provisions in the bill may best be properly characterised as 'criminal' in nature, particularly where the maximum pecuniary penalty imposed by a civil penalty provision is triple the maximum fine that may be imposed for the corresponding criminal offence. As such, the committee has concerns that, where a person may be subject to a pecuniary penalty for a civil penalty in addition to punishment under a criminal offence for the same or substantially the same conduct, this may be inconsistent with the right not to be tried or punished twice for the same offence under article 14(7) of the ICCPR.

Background

2.3 This bill proposes 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.

2.4 The committee sought further information from the Minister about the compatibility of monitoring and investigatory powers in the bill with the right to privacy in article 17 of the International Covenant on Civil and Political Rights (ICCPR) and whether provisions imposing a civil penalty and reverse onus offences are consistent with the fair trial rights in article 14 of the ICCPR.

2.5 The Minister responded by letter dated 27 February 2013.[1] In its *Third Report of 2013*, the committee thanked the Minister for his response and stated that it had

1 PJCHR, *Third Report of 2013*, p 97.

decided to defer finalising its views on the human rights compatibility of the bill to enable closer examination of the issues in light of the information provided in the Minister's response.

2.6 The Minister's response is attached.

Committee's response

2.7 The committee thanks the Minister for his detailed response. Following the adoption of its interim *Practice Note 2* on civil penalties, the committee has taken the opportunity in its comments on this bill to indicate the types of issues that it would like to see addressed in statements of compatibility accompanying bills that introduce or incorporate civil penalties regimes, as set out below.

Right to privacy and reverse onus provisions

2.8 The committee considers that the information provided by the Minister adequately addresses the committee's concerns about the compatibility of the monitoring and investigatory powers in the bill with the right to privacy in article 17 of the International Covenant on Civil and Political Rights (ICCPR) and of the reverse onus provisions with article 14(2) of the ICCPR.

Civil penalty provisions

2.9 The committee notes with appreciation the detailed discussion of issues relating to civil penalty provisions in the Minister's letter.[2] The Minister's letter noted that:

> The financial incentives to misconduct provided by civil penalties are a more proportionate and effective enforcement tool than sole reliance on criminal proceedings or criminal convictions, as the stigma of a criminal conviction can have impacts beyond the particular offence (for example, exclusion from future business opportunities). The use of civil penalty orders also reflects the practices of other areas of (particularly, corporate) regulation under Commonwealth legislation. The provisions in the Bill that relate to civil penalties are consistent with the recommendations in the Australian Law Reform Commission Report 95 (ALRC 95). They are also consistent with the Regulatory Powers (Standard Provisions) Bill 2012.[3]

2 Letter from the Minister for Agriculture, Fisheries and Forestry, Senator the Hon Joe Ludwig to Mr Harry Jenkins MP, 27 February 2013, pp 9-10: see PJCHR, *Third Report of 2013*, pp 139-140.

3 Letter from the Minister for Agriculture, Fisheries and Forestry, Senator the Hon Joe Ludwig to Mr Harry Jenkins MP, 27 February 2013, p. 9 (footnote omitted): see PJCHR, *Third Report of 2013*, pp 139.

2.10 The committee recognises that the approach adopted in the legislation draws on the work of the Australian Law Reform Commission (ALRC) in its 2002 report *Principled Regulation: Federal Civil and Administrative Penalties in Australia*.[4] However, the committee notes that, in its otherwise comprehensive report, the ALRC did not consider the relevant human rights issues in any detail against the relevant international standards.

2.11 The bill provides that existing offence provisions are also to be civil penalty provisions. The maximum penalties for criminal offences that have corresponding civil penalty provisions under the bill range from 30 penalty units ($5,100) to 300 penalty units ($51,000).

2.12 *Classification of the provision under domestic law:* The committee notes that the civil penalty provisions are classified as 'civil' under domestic law and procedures to enforce the civil penalties are to be governed by the rules and procedures relating to civil proceedings. As the committee has noted in its interim *Practice Note 2*, the classification under domestic law and the consequences are relevant but given relatively little weight when the domestic law classifies a provision as 'civil'.

2.13 *Nature of the civil penalty:* The committee notes that the context in which these provisions have been introduced is a regulatory one, being the regulation of agvet chemicals. New section 69EJ sets out the procedure for obtaining a civil penalty order, which provides that a court, in determining the pecuniary penalty, may take into account all relevant matters, including in relation to individuals the nature and extent of the contravention; the nature and extent of any loss or damage suffered because of the contravention; the circumstances in which the contravention took place; whether the person has previously been found by a court to have engaged in any similar conduct; and the extent to which the person has cooperated with the authorities. This provision indicates that there are punitive elements involving an assessment of culpability in the imposition of a civil penalty order, as well as other elements.

2.14 *Severity of the penalty:* Where significant penalties are imposed, this may be sufficient to justify characterising the penalty as criminal. New subsection 145AA(2) provides that the penalty for contravention of civil penalty must not exceed three times the amount of the maximum monetary penalty that could be imposed by a court on conviction for an offence constituted by the same conduct.

4 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95, December 2002.

2.15 This means that the pecuniary penalties that may be imposed by a court on individuals under some provisions[5] could reach the level of 900 penalty units ($153,000). This is a significant penalty and may be viewed as rising to the level of severity sufficient to be 'criminal' even in a regulatory context.

2.16 *Nature and severity combined:* As the committee commented in its interim *Practice Note 2*, it may be appropriate to take into account the cumulative effect of the nature and severity of the penalty if it is not clear that either the nature or the severity of a penalty considered separately leads to the conclusion that it is 'criminal'.

2.17 The committee considers that those civil penalty provisions which have a parallel criminal offence and for which the maximum civil pecuniary penalty is three times more than the maximum fine for the criminal offences (where a fine is the only punishment provided for the offence), might reasonably be characterised as 'criminal'. As a result, proceedings for their enforcement would therefore be required to comply with the guarantees that apply to criminal proceedings under articles 14 and 15 of the ICCPR, including the right to be presumed innocent and not to be tried or punished twice for the same offence.

Right to be presumed innocent

2.18 If a civil penalty provision is characterised as 'criminal', then article 14 will apply, including the right to be presumed innocent until proven guilty according to law, on the criminal standard of proof. The Minister's letter notes:

> For civil penalty provisions, the standard of proof placed on the prosecuting regulator is derived from the civil standard – the balance of probabilities – but can rise depending on the seriousness of the offence. The degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved. This approach has been enshrined in legislation in section 140 of the *Evidence Act 1995* (Cth)…'.[6]

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5 See, eg, provisions of the AgVet Code contained in the *Agricultural and Veterinary Chemicals Code Act 1994*.

6 Letter from the Minister for Agriculture, Fisheries and Forestry, Senator the Hon Joe Ludwig to Mr Harry Jenkins MP, 27 February 2013, pp 8-9: see PJCHR, *Third Report of 2013*, pp 138-139.

Section 140 of the *Evidence Act 1995* provides:

(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.

(2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:

2.19 The committee notes the Minister's comments in this regard. It acknowledges that the issue of enhanced scrutiny of evidence in some civil matters is a complex point and will continue to give consideration to this issue.

Double jeopardy

2.20 As the committee noted in its earlier comments, proposed new sections 69EJH (to the *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Admin Act)) and section 145B (to the *Agricultural and Veterinary Chemicals Code Act 1994)* provide that if a person has first been convicted of a corresponding offence, a court may not subsequently make a civil penalty order against the person in relation to the same, or substantially the same, conduct as that constituting the criminal contravention. However, the bill provides that criminal proceedings may be commenced against a person for conduct that is the same or substantially the same as conduct that would constitute contravention of a civil penalty provision, even if a civil penalty order has been made against the person in relation to that conduct.

2.21 The Minister's letter notes this, but draws attention to proposed new sections 145BC of the Agvet Code and 69EJK of the Admin Act which provide that evidence given in civil proceedings is not admissible in criminal proceedings (other than those relating to the falsity of the evidence). The committee noted in its initial comments that it was not clear whether the practical effect of these provisions was to rule out the possibility of such a criminal conviction where a civil penalty order has already been made.[7] The Minister maintains that the 'sum effect of these provisions is to prevent a person from being subject to a civil penalty order and found guilty of an offence based on the same or substantially the same conduct.'[8]

2.22 However, at the same time the Minister's letter notes that 'criminal proceedings not related to falsifying evidence must rely upon evidence gathered during independent investigations, not evidence from prior civil proceedings.'[9] This clearly leaves open the possibility that a person may be punished twice for the same conduct, even if the conviction can only be based on independently sourced material and not evidence admitted at the civil penalty proceedings. This may raise human

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(a) the nature of the cause of action or defence; and

(b) the nature of the subject-matter of the proceeding; and

(c) the gravity of the matters alleged.

7 PJCHR, *First Report of 2013*, para 1.37

8 Letter from the Minister for Agriculture, Fisheries and Forestry, Senator the Hon Joe Ludwig to Mr Harry Jenkins MP, 27 February 2013, p 10: see PJCHR, *Third Report of 2013*, p 140.

9 Letter from the Minister for Agriculture, Fisheries and Forestry, Senator the Hon Joe Ludwig to Mr Harry Jenkins MP, 27 February 2013, p 10: see PJCHR, *Third Report of 2013*, p 140.

rights compatibility issues under article 14(7) of the ICCPR, which provides for the right not to be tried or punished twice for the same conduct.

2.23 The committee notes the detailed explanation provided by the Minister of the background to and rationale for the civil penalty provisions in the bill. The committee considers that, in light of these explanations, most of the civil penalty provisions would not be characterised as 'criminal' for the purposes of human rights law.

2.24 However, the committee is still concerned that, where the maximum pecuniary penalty imposed by a civil penalty provision is triple the maximum fine that may be imposed for the corresponding criminal offence, such civil penalty provisions might reasonably be characterised as 'criminal' when they involve pecuniary penalties of up to 900 penalty units. As a result, proceedings for their enforcement would be required to comply with the guarantees that apply to criminal proceedings under articles 14 and 15 of the ICCPR.

2.25 The committee has concerns that, where a civil penalty is classified as 'criminal' in nature, and where a person may be subject to a pecuniary penalty for a civil penalty contravention in addition to punishment under a criminal offence for the same or substantially the same conduct,[10] this may be inconsistent with the right not to be tried or punished twice for the same offence.

10 See, for example, sections 69EJH of the Admin Act and section 145B of the AgVet Act.

Senator the Hon. Joe Ludwig

Minister for Agriculture, Fisheries and Forestry
Senator for Queensland

REF: MNMC2013-01120

Mr Harry Jenkins MP
Chair, Joint Parliamentary Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Jenkins

Thank you for your letter of 6 February 2013 regarding consideration of the Agricultural and Veterinary Chemicals Legislation Amendment Bill 2012 by the Joint Parliamentary Committee on Human Rights (the committee).

The committee sought clarification of a number of matters in the Bill and its associated explanatory material. To assist the committee, I have included additional information in Attachment 1. The contact officer in the department for any further information on this Bill is Marc Kelly and he may be contacted on 6272 5485 or marc.kelly@daff.gov.au.

I consider that the Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Thank you for seeking clarification of these matters and I look forward to receiving the committee's further views on the Bill.

Yours sincerely

Joe Ludwig

Minister for Agriculture, Fisheries and Forestry
Senator for Queensland

27 February 2013

Enc.

Parliament House, Canberra ACT 2600 Telephone: 02 6277 7520 Facsimile: 02 6273 4120

Attachment

Information for the Joint Parliamentary Committee on Human Rights for the Agricultural and Veterinary Chemicals Legislation Amendment Bill 2012

General clarification

The Agricultural and Veterinary Chemicals Legislation Amendment Bill 2012 (the Bill) makes amendments to the *Agricultural and Veterinary Chemicals Act 1994* (Agvet Act), *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Admin Act), the *Agricultural and Veterinary Chemicals Code Act 1994* (Code Act), including the Schedule to that Act (Agvet Code) and the *Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994* (Collection Act) (collectively called agvet chemical legislation).

As noted by the Joint Parliamentary Committee on Human Rights (the committee) the Bill promotes the right to health and a healthy environment, by regulating agricultural and veterinary chemicals (agvet chemicals). Agvet chemicals are designed to destroy pests and weeds, and prevent or cure diseases. They may be dangerous and are typically poisonous substances that may have deleterious consequences for human health and the environment.

Given the necessity of protecting the community and the environment from the hazards of agvet chemical products, measures in the Bill may limit human rights but only as is reasonable and necessary to manage the risks associated with these chemical products.

The APVMA has been consulted in preparing this response. The explanatory material for the Bill and this response was developed with regard to the information available on assessing human rights compatibility and *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* published by the Attorney-General's Department (AGD guide). While this response recognises the committee's view that previously settled conventions and guides are not determinative of human rights compatibility and may now need to be re-assessed for the purposes of human rights compatible legislation and practice, current guidance has been referenced where this is relevant.

1.23 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;

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Necessary and proportionate monitoring and investigation powers

Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR) prohibits arbitrary or unlawful interference with an individual's privacy, family, home or correspondence, and protects a person's honour and reputation from unlawful attacks. This right may be subject to permissible limitations where those limitations are provided by law and non-arbitrary. In order for limitations not to be arbitrary, they must be aimed at a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

As noted by the committee, the Bill provides for the use of extensive investigation and monitoring powers by officers of the APVMA (including entry, search and seizure) (see amendments proposed for Part 7AA of the Admin Act and Part 9 of the Agvet Code in Schedule 3 of the Bill). These powers are consistent with those available to other Commonwealth product regulators and are consistent with powers currently available in the

Admin Act and the Agvet Code. The amendments in the Bill separate the monitoring and investigative powers, improve clarity, provide for a graduated approach to entry search and seizure, and bring agvet chemical legislation into line with other modern Commonwealth legislation of similar intent.

Entry Powers

Compliance with the Admin Act, the Collection Act and the Agvet Code is essential to protect the health and safety of human beings, animals and the environment. Under sections 69EAB and 69EB of the Admin Act and sections 131 and 132 of the Agvet Code, APVMA officers have the power to enter any premises to find out if these Acts are being complied with.

The powers in the Admin Act and the Agvet Code allow APVMA inspectors to enter residences when they are also used for commercial purposes, as long as either the occupier has consented to the entry or the entry has been made under a monitoring warrant. Sections 69ED of the Admin Act and 133 of the Agvet Code provide that consent can be withdrawn at any time by the occupier. Section 131AA also authorises APVMA inspectors to enter premises without consent or without a warrant to prevent imminent risk to persons of death, serious injury or serious illness (for example, occupiers of the premises).

While monitoring powers will limit the right to privacy, this limitation will only occur in relation to commercial premises and residential premises where they are also being used as commercial premises for the manufacture or supply of agvet chemicals. These occupiers will be aware of their need for compliance with the agvet chemical legislation in order to protect the health and safety of human beings, animals and the environment.

The Bill protects against arbitrary abuses of power as the entry, monitoring, search, seizure and information gathering powers are conditional upon consent being given by the occupier of the premises or prior authorisation under warrant, except where necessary to prevent imminent risk to persons of death, serious injury or serious illness. Where entry is based on the consent of the occupier, consent must be informed and voluntary and the occupier of premises can restrict entry by authorised persons to a particular period. Additional safeguards are provided through provisions requiring authorised persons and any persons assisting them to leave the premises if the occupier withdraws their consent.

The Bill also provides constraints on the issuing of a monitoring or investigation warrant. For example, the Bill specifies that an issuing officer of a warrant to enter premises for the purpose of monitoring or investigation must be a judicial officer. Also, in the case of an investigation warrant, an issuing officer may issue an investigation warrant only when satisfied, by oath or affirmation, that there are reasonable grounds for suspecting that there is, or may be evidential material on the premises. An issuing officer must not issue a warrant unless the issuing officer has been provided, either orally or by affidavit, with such further information as they require concerning the grounds on which the issue of the warrant is being sought. Such constraints on this power ensure adequate safeguards against arbitrary limitations on the right to privacy in the issuing of warrants.

An authorised person cannot enter premises unless their identity card and a copy of the warrant under which they are entering are shown to the occupier of the premises. APVMA inspectors may only be appointed as inspectors if they have appropriate qualifications and training. These measures provide for transparency, managerial oversight and mitigate arbitrariness and risk of abuse of the investigative powers.

Powers of APVMA Inspectors

The Bill also provides the APVMA with powers to seek and obtain information to ensure ongoing compliance with agvet chemical legislation. These powers replace the previous powers of entry, search and seizure in the Admin Act and the Agvet Code. The new powers have been included in both the Admin Act and the Agvet Code, and the powers in the Admin Act can be exercised for the purposes of the Collection Act. The exercise of these powers is also subject to warrant or consent unless there are reasonable grounds for suspecting that it is necessary to exercise the monitoring powers to prevent an imminent risk to persons of death, serious injury or serious illness.

As for authorised officers in other Commonwealth product regulatory schemes, the Bill provides for APVMA inspectors to have powers that include asking questions, seizing evidential material, including documents and electronic equipment, as well as powers to photograph, take measurements or run tests. These powers reflect the role of APVMA inspectors as the front line in protecting human health and safety, animals and the environment from risks associate with agvet chemical products, particularly in remote, rural or regional areas where agvet chemical products are used more intensively. For example, the monitoring and investigation powers include the authority to operate electronic equipment (sections 69EAD and 69EBB) and to secure evidence (section 69EAE) or seize things (section 69EBC).

Evidence may be secured for up to seven days and electronic equipment (that is not evidence) may be secured for up to 72 hours. These represent longer periods than are usually provided to other regulators and are necessary to allow the APVMA to practically exercise its investigative powers in remote, rural and regional areas of Australia where chemical products are used (for example, sections 69EAE, 69EDD). Undertaking these activities in remote areas requires APVMA inspectors (and electronic equipment experts) to travel long distances to and from implicated premises and securing authorities need to provide for these operational requirements.

Summary

Overall, the investigative powers and monitoring powers are reasonable, necessary and proportionate to achieve the legitimate objective of protecting human health and the environment. Adequate safeguards and limitations on the use of these powers in the Bill ensure that such lawful interferences are not arbitrary or at risk of abuse in practice. In addition, the APVMA is bound by the *Privacy Act 1988* (Cth) in collecting, handling and disclosing personal information and this Act confers rights designed to protect privacy. These rights and obligations are set out in 11 information privacy principles (IPPs) contained within the Privacy Act.

Self-incrimination

Article 14(3)(g) of the ICCPR protects the right to be free from self-incrimination by providing that a person may not be compelled to testify against him or herself or to confess guilt. The right to be free from self-incrimination may be subject to permissible limitations, provided that the limitations are for a legitimate objective, and are reasonable, necessary and proportionate to that objective. Generally, an abrogation of the right against self-incrimination is more likely to be considered permissible where it is accompanied by both a use and derivative use immunity.

Answering Questions

The committee notes that an APVMA inspector is empowered to ask questions of a person or to ask the person to produce a document and that a failure to comply is an offence. If an inspector enters premises with the occupier's permission, the inspector is permitted to ask the occupier to answer questions and produce documents that relate to the inspector's reasons for entering the premises. However, as the inspector's right to be present on the premises is based on the consent of the occupier, it is not an offence to refuse to comply with an inspector's request.

The committee has indicated that no provision is made in relation to the possibility of the person incriminating themselves in answering questions put to them by an APVMA inspector. The Bill provides that an occupier may only be compelled to answer questions put to them by an APVMA inspector if an APVMA inspector enters premises under warrant (see subsections 131F(3) and 132G(3), item 285 of Schedule 3 of the Bill, as well as sections 69EAH(3) and 69EC(3), item 64 of Schedule 3 of the Bill). While compulsory questioning engages the right against self-incrimination in article 14(3)(g) of ICCPR, the privilege against self-incrimination is available to a natural person where the inspector asks questions when they enter premises under a warrant or with consent. The Bill only abrogates this privilege for a natural person when answering questions put by an inspector in the context of a section 130 notice which the committee has found is consistent with the right not to incriminate oneself (paragraph 1.27).

In the exercise of their functions, inspectors are subject to a range of obligations aimed at protecting the rights and interests of the occupiers of premises, including:

- the inspector must inform the occupier of premises that consent for access is voluntary, may be refused, subject to time limitations or withdrawn. If consent is withdrawn, the inspector and any person assisting him or her must leave the premises (for example, section 69ED, item 64 of Schedule 3 of the Bill)
- where a warrant has been obtained, the inspector must, before entering the premises, announce that he or she is authorised to enter the premises, show his or her identity card and give the occupier of the premises the opportunity to permit entry into the premises (for example, section 69EDA, item 64 of Schedule 3 of the Bill)
- when executing a warrant, the inspector must be in possession of the warrant (for example, section 69EDB, item 64 of Schedule 3 of the Bill), although persons assisting the inspector may remain on the premises while the warrant is in force, even if the APVMA inspector has left the premises
- the inspector must provide a copy of the warrant to the occupier who is present and inform him or her of the rights and responsibilities of the occupier (for example, section 69EDC, item 64 of Schedule 3 of the Bill).

Summary

The privilege against self-incrimination remains available to a natural person where the inspector asks questions when they enter premises under a warrant or with consent.

The Committee:

...

(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;

The Australian Pesticides and Veterinary Medicines Authority has advised that existing licence conditions require access to be provided for inspectors and for transparency. New paragraph 126(4)(aa)(item 274 of Schedule 3 of the Bill) provides for this condition in the primary legislation rather than require it to be applied on a licence by licence basis. This access is necessary as it would be impractical to require a warrant for the routine monitoring that necessarily occurs for manufacturing quality and licensing purposes. This approach is also consistent with the AGD guide (licensed premises) and the approach taken for human therapeutic goods (paragraphs 40(4)(b),(c) and (d) of the *Therapeutic Goods Act 1989*)).

The Committee:

...

(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.

Overall, the use of monitoring warrants and investigation warrants provide for a graduated approach to the warrants available for monitoring compliance, gathering information and gathering evidence in investigating potential offences or contraventions. This is consistent with the contemporary approach in other Commonwealth legislation.

A monitoring warrant is used for general surveillance activities to monitor compliance or encourage compliance (for example, new section 143, item 306 of Schedule 3 of the Bill). With these warrants, the powers for inspectors are more limited than for an investigation warrant (for example, seizure is not authorised and only securing is provided for), there is a longer execution timeframe (6 months maximum) and a lower 'reasonably necessary' test applies for the judicial officer issuing the monitoring warrant. These measures are consistent with the general compliance monitoring purpose of a monitoring warrant. As compliance monitoring is an essential component of the agvet chemical regulatory system, the Bill provides for monitoring warrants to support this activity.

An investigation warrant is a more coercive power (for example, new section 143A, item 306 of Schedule 3 of the Bill). It provides for seizure of evidential material, a shorter execution timeframe (1 week maximum) and a higher 'reasonable grounds' test to apply for the judicial officer issuing the investigation warrant. As investigations of potential offences or contraventions and the gathering of evidential material are an essential component of the agvet chemical regulatory system, the Bill provides for investigation warrants to support this activity.

This approach is consistent with the AGD guide. The AGD guide, developed by the Criminal Justice Division of the Attorney-General's Department, assists officers to frame criminal offences, infringement notices and enforcement provisions that are intended to become part of Commonwealth law, including relevant principles and precedents. While the committee's approach is that previously settled conventions and guides are not determinative of human rights compatibility, it does include useful reference material and background for provisions.

Section 8.7 of the AGD guide states that a monitoring warrant regime may be appropriate where it is necessary to monitor or audit compliance with legislative requirements. A monitoring warrant differs from a search warrant (investigation warrant in the Bill), which is used to investigate suspected offences. A monitoring warrant scheme may be useful where

there is a need to monitor compliance with legislation in circumstances where no offence is suspected.

The AGD guide also states that 'A set of principles for framing monitoring warrant provisions has been followed in Commonwealth legislation for several years. This has been designed to ensure a broad range of powers is available to facilitate effective monitoring, without raising concerns about improper use of these powers. This approach should continue to be followed unless there are clear reasons for departure.'

1.38 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) Act1 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.

....

The Committee's views raise wider issues about the use of civil penalty provisions in Commonwealth compliance and enforcement schemes and which the Bill introduces into the Agvet Code and the Admin Act (and which apply for the Collection Act). The following analysis is provided as a basis as to why these provisions are compatible with human rights.

Article 14 of the ICCPR – what constitutes a criminal charge

In interpreting the international human rights treaties, Australia considers that it should consider in good faith the views of treaty bodies established under the treaties. Although the views of the United Nations Committees, including those expressed in General Comments and Recommendations are not binding on States parties, they are generally treated as a persuasive source of guidance. In General Comment 32, the Human Rights Committee set out its views in relation to Article 14(1) of the ICCPR. It stated:

> Criminal charges relate in principle to acts declared to be punishable under domestic criminal law. The notion may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity [citing Communication No. 1015/2001, *Perterer v. Austria,* para. 9.2].[1]

There is little other jurisprudence from the Human Rights Committee as to when it considers that an act designed as civil in domestic law may be found to constitute a criminal charge as a result of the nature of the purpose of the law, its character or its severity.

Australia is not a party to the *European Convention on Human Rights 1950* (Convention). As a result, it is not bound by the jurisprudence of the European Court of Human Rights (Court).

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[1] Human Rights Committee, General Comment 32, *Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32, 23 August 2007.

However, we note that Article 6 of the Convention does not have the same wording as Article 14 of the ICCPR. Also, the Court has held that there are three key criteria[2] for determining whether a matter should be characterised as a criminal charge:

- the domestic classification of the offence[3]
- the nature of the offence (including whether the proceedings are instituted by a public body with statutory powers of enforcement, whether the matter has a punitive or deterrent purpose, whether the law applies to a specific group or is generally binding in nature, whether the imposition of the penalty is dependent upon a finding of guilt, how similar procedures are treated in other Council of Europe Member States and whether an offence creates a criminal record),[4] and
- the severity of the potential penalty (imposition of penalties including fines which can be commuted into a period of imprisonment in particular have been found to constitute a criminal penalty by the Court).[5]

Double jeopardy

The relevant article is 14(7) of the ICCPR:

> 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 for each country.

Under the ICCPR prohibition on double jeopardy, a person who has been convicted or acquitted of a criminal charge must not be re-tried for the same or substantially the same offence. The prohibition on double jeopardy is limited to proceedings in relation to a 'criminal charge'. However the approach under international and comparative human rights law has been to look at the substance and the effect of the proceedings themselves, rather than their label. Accordingly, it may be possible for a civil penalty provision which subjects a person to a significantly high penalty that is intended to be punitive or deterrent in nature to constitute a 'criminal charge' for the purposes of the prohibition on double jeopardy.

Double jeopardy does not arise in the Bill because there is no means of commuting a civil penalty order for contravention of a civil penalty provision into a criminal sanction. A civil penalty order can only be made by a court and it is a debt payable to the Commonwealth and recoverable through debt collection activities. It does not constitute a criminal charge and no criminal record can arise from the order or non-payment of the civil penalty order.

Civil and Criminal Proceedings

For civil penalty provisions, the standard of proof placed on the prosecuting regulator is derived from the civil standard — the balance of probabilities — but can rise depending on the seriousness of the offence. The degree of satisfaction for which the civil standard of proof

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[2] *Engel and Others v the Netherlands*, Application no. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, 8 June 1976.

[3] See, for example, *Ozturk v The Federal Republic of Germany*, Application no. 8544/79, 21 February 1984 and *Ezeh and Connors v United Kingdom*, Applications no. 39665/98 and 40086/98, 15 July 2002.

[4] See, *Jussila v Finland*, Application no. 73053/01, 23 November 2006, *Bendenoun v France*, Application no. 12547/86, 24 February 1994, *Benham v United Kingdom*, Application no. 1380/92, 10 June 1996, *Ozturk v The Federal Republic of Germany*, Application no. 8544/79, 21 February 1984 and *Ravnsborg v Sweden*, Application no. 14220/88, 23 March 1994.

[5] *Ezeh and Connors v United Kingdom*, Applications no. 39665/98 and 40086/98, 15 July 2002, *Ozturk v The Federal Republic of Germany*, Application no. 8544/79, 21 February 1984, and also *Lutz v Germany*, Application no. 9912/82, 25 August 1987.

calls may vary according to the gravity of the fact to be proved. This approach has been enshrined in legislation in section 140 of the *Evidence Act 1995* (Cth), which states:

> 140 (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
>
> (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
>
> (a) the nature of the cause of action or defence; and
>
> (b) the nature of the subject-matter of the proceeding; and
>
> (c) the gravity of the matters alleged.

The Bill 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 than sole reliance on criminal proceedings or criminal convictions, as the stigma of a criminal conviction can have impacts beyond the particular offence (for example, exclusion from future business opportunities). The use of civil penalty orders also reflects the practice of other areas of (particularly, corporate) regulation under Commonwealth legislation. The provisions in the Bill that relate to civil penalty provisions are consistent with the recommendations in the Australian Law Reform Commission Report 95 (ALRC 95)[1]. They are also consistent with the Regulatory Powers (Standard Provisions) Bill 2012.

Taking into account the ALRC Report and other Commonwealth legislation (including the *Evidence Act 1995*), the inclusion of civil penalty provisions and providing for civil penalty orders in agvet chemical legislation that correspond to offences for the same conduct is considered to be compatible with human rights as:

- their inclusion is aimed at furthering the purposes of the legitimate objective of protection of human health and safety, animals and the environment;
- double jeopardy does not arise because a civil penalty order for contravening a civil penalty provision cannot be commuted to a criminal sanction;
- a civil penalty order for contravening a civil penalty provision can only be made by a court and this ensures such orders are not arbitrary or at risk of abuse in practice.
- the amount of a civil penalty order is subject to safeguards with judicial determination of the amount of the order having regard to the *Evidence Act 1995*, as well as relevant matters in subsections 69EJ(5) and 145A(5), and which together ensure that such orders are not arbitrary or at risk of abuse in practice;

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[1] http://www.alrc.gov.au/report-95. Principled Regulation: Federal Civil and Administrative Penalties in Australia. The provisions in the Bill that relate to civil penalty provisions are consistent with the recommendations in the Australian Law Reform Commission Report 95 (ALRC 95) that was tabled March 2003 and considered federal regulatory and penalties schemes. While the focus was on civil and administrative penalties, it was necessary for the ALRC to consider how they differ from, and are similar to, criminal sanctions. As part of developing the report, the ALRC was required to have regard to 'Australia's obligations under international law and Australia's commitment to human rights and civil liberties'. This Report dealt with the theory of penalties and their role in government regulation. It looks at why penalties are used, how they vary and the role of fault in distinguishing between criminal sanctions and regulatory contraventions.
The ALRC 95 Report includes a detailed characterisation of civil and criminal proceedings (page 81) and included recommendations in relation to civil penalties and offences and proceedings relating to their enforcement (page 422).

- they provide for a graduated means of enforcement that reflects other Commonwealth legislation and reduces reliance on the need for criminal proceedings and the potential stigma of a criminal conviction (and its consequences).

Sections EJJ and 145BB

Proposed sections 69EJI of the Admin Act (item 66 of Schedule 3 of the Bill) and 145BA of the Agvet Code (item 308 of Schedule 3 of the Bill) stay civil proceedings, where criminal proceedings are commenced for an offence of the same conduct or substantially the same conduct. These provisions also dismiss civil proceedings where these proceedings are not resumed because the person is convicted of the offence. Similarly, sections 145B of the Agvet Code (item 308 of Schedule 3 of the Bill) and 69EJH of the Admin Act (item 66 of Schedule 3 of the Bill) prevent a civil penalty order being made against a person for the same conduct or substantially the same conduct for which the person has been convicted of an offence.

Criminal proceedings may be commenced for conduct that is the same or substantially the same as that which would constitute a contravention of a civil penalty provision even if a civil penalty order has been made. However, as provided for by sections 145BC of the Agvet Code and 69EJK of the Admin Act, any evidence given in civil proceedings is not admissible in any criminal proceedings, other than evidence relating to the falsity of evidence. This ensures that information or documents produced during civil proceedings are not relied upon to support subsequent criminal proceedings, unless they are criminal proceedings relating to falsifying evidence in civil proceedings. While it is appropriate to allow criminal proceedings after civil proceedings have ended, given the overriding importance of the criminal justice system, criminal proceedings not related to falsifying evidence must rely upon evidence gathered during independent investigations, not evidence from prior civil proceedings.

The sum effect of these provisions is to prevent a person from being subject to a civil penalty order and found guilty of an offence based on the same or substantially the same conduct, provided that the person did not provide false evidence in relation to previous civil proceedings and that any evidence for subsequent criminal proceedings is gathered independent of the civil proceedings. This approach is also consistent with the recommendations in the ALRC 95 report (page 422) and is compatible with human rights.

1.43 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.

With two exceptions, the amendments in the Bill ensure minimal changes to existing offences so as not to disturb the existing provisions dealing with the evidential burden and legal burden. The exceptions are new section 45C of the Agvet Code (Schedule 3 of the Bill) and to a lesser degree new section 47E (Schedule 2 of the Bill).

Section 47E mirrors current section 54. New section 47E contains the same defence as in current section 54 with the same evidential burden for the defence. The current sections 45A and 55 have been amalgamated into new sections 45A, 45B and 45C. Just as is provided for in existing sections 45A and 55, new section 45C provides for a strict liability offence for possessing, having custody of or other dealing with a suspended or cancelled active constituent or chemical product in contravention of the instructions in the notices provided to persons or notices which have been published. The amount of the penalty (300 penalty units) is for the same amount as the current sections 45A and 55. The defences in the existing

subsections 55(5) and (6) have been retained as subsections 45C(3) and (4). The defence and the reversal of the onus of proof in subsection 45C(4) mirrors the current defence and onus of proof in current subsection 55(6).

Subsection 45C(4) provides a defence to a defendant who has not been given a notice that he or she either did not know and could not reasonably have been expected to have known of the existence of the *Gazette* notice or that the possession etc was not in accordance with the instructions in the *Gazette* notice. This is an additional defence to the defence of honest and reasonable mistake of fact and although the defendant bears the legal burden is broader in scope. This is because it is not concerned with the requisite state of mistaken belief but is judged against the standard of what could be reasonably expected. The provision imposes the legal burden of proof on the defendant and this must be discharged on the balance of probabilities that the person did not know and could not reasonably be expected to have known of the existence of the notice.

The current and proposed defence is that the defendant did not know *and* could not reasonably be expected to have known of the existence of the notice. The Committee acknowledges that the actual knowledge of the defendant in relation to the existence of the notice 'would be peculiarly within the knowledge of the defendant' but states that 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. The Senate Standing Committee for the Scrutiny of Bills also commented on this provision in that '...given that what a defendant may reasonably be expected to have known is not capable of clear definition ...'.

The issue turns on whether the defendant should be expected to prove, on the balance of probabilities, that they could not reasonably be expected to have known of the existence of a notice about dealing with suspended or cancelled chemical products or constituents. The suspension or cancellation of chemical products or constituents may be necessary to achieve the legitimate objective of the protection of human health and the environment. Agvet chemical products may be dangerous poisons and are supplied by persons who are expected to have the special knowledge and special facilities to supply them.

It would not be likely that the defendant's knowledge of 'what they could reasonably be expected to have known' may be uncovered through the normal course of an investigation. In addition, the objectivity of this test will depend on the particular circumstances. More importantly, reducing the current legal burden to an evidential burden could be regarded as undermining the integrity of the agvet chemical regulatory system as it would reduce the need for suppliers to have systems in place to remain aware of the status of chemical products for supply.

While it is acknowledged that the placing of a legal burden on a defendant should be kept to a minimum, this specific circumstance of dealing with suspended or cancelled products is considered a situation where the defendant should continue to bear this burden. This is on the basis that dealing with these suspended or cancelled products may be a concern for human health and the environment and the current and proposed burden on the defendant only extends to proving, on the balance of probabilities, that they could not reasonably be expected to have known of the existence of a notice about dealing with these products.

In summary, while subsection 45C(4) is a new section, it does not represent a new obligation or an altered regulatory burden for regulated entities or any change for any person's human rights. On this basis and recognising the defence and the reversal of the onus of proof in new subsection 45C(4) mirrors the defence and onus of proof in existing subsection 55(6), new subsection 45C(4) is considered reasonable, necessary and proportionate and is consistent

with the legitimate objective of protecting human health and the environment. It also results in the least impact on all parties to which the current and amended offence provisions relate.