



Agricultural and Veterinary Chemicals (Administration) Amendment Bill 2007

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Law and Bills Digest Section

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Agricultural and Veterinary Chemical (Administration) Amendment Bill 2007

Date introduced: 10 May 2007

House: House of Representatives

Portfolio: Agriculture, Fisheries and Forestry

Commencement: Sections 1-3 commence on day of Royal Assent. Schedules 1 and 2 commence either on 1 July 2007 or on a day to be fixed by proclamation.

Purpose

The purpose of the Bill is to amend the *Agricultural and Veterinary Chemicals (Administration) Act 1992* (the AVCA Act) – which establishes the Australian Pesticides and Veterinary Medicines Authority (the APVMA) and is the legislative basis for regulating its administration. The key amendments contained in the Bill are:

- a change in the governance arrangements for the APVMA from a board template to an executive management template.
- making the APVMA subject to the provisions of the *Financial Management and Accountability Act 1997* (the FMA Act), rather of the *Commonwealth Authorities and Companies Act 1997* (the CAC Act).
- the replacement of the current governing board with a Chief Executive Officer (CEO).
- the establishment of an Advisory Board, consisting of up to nine part-time members appointed by the Minister and mandated to provide advice and recommendations to the CEO.¹

The Explanatory Memorandum makes a special point of mentioning that in crafting these amendments, care has been taken not to interfere with the continued viability of the body corporate which is the APVMA, given that State and Northern Territory legislation has conferred functions and powers upon it. The amendments have been made keeping in mind the highly valued Commonwealth and State Territory cooperative arrangements which serve as the linchpin for the national regulatory scheme for agricultural and veterinary chemicals.²

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Background

Basis of policy commitment

The amendments in the Bill respond to the relevant findings of the *Review of the Corporate Governance of Statutory Authorities and Office Holders* (the Uhrig Review) conducted by Mr John Uhrig AC in 2003. They also follow an assessment of the APVMA against the Uhrig template.³

The Uhrig Review

As part of its 2001 election platform, the Coalition Government signalled its intention to examine the efficacy of the governance arrangements of statutory authorities and office-holders.

In November 2002, the Government announced a review of the governance practices of Commonwealth statutory authorities and office-holders, with special focus on those agencies which impact on the business community. The Prime Minister, the Hon. John Howard, appointed Mr John Uhrig, AC, to head the review. The objective of the review was to examine and evaluate governance arrangements and practices and 'provide options for the Government to improve the performance and get the best from statutory authorities, their office holders and their accountability frameworks'.⁴ In doing so, the Government noted the impact that the performance of statutory authorities and office-holders has on business and the overall health of the Australian economy. In particular, the review was to focus on the areas where businesses have the right to expect the highest levels of efficiency, fairness and transparency in their dealings with government.

A key task was to develop a broad template of governance principles that, subject to consideration by government, might be extended to all statutory authorities and office holders.

As part of the process of developing a broad template, the review was asked to consider the governance structures of a number of statutory authorities and office holders with critical relationships with business and to consider best practice corporate governance structures in both the public and private sectors.⁵

The report recommended that two templates should apply to ensure good governance of statutory authorities: agencies should either be managed by a Chief Executive Officer (CEO) or by a board structure. Both templates detail measures for ensuring the boundaries of responsibilities are better understood and the relationship between Australian government authorities, Ministers and portfolio departments is made clear.⁶ However, as Uhrig explained, the purpose of the template is 'to serve as a reference point' for the development of governance arrangements and so it is 'expressed as an ideal'.⁷

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Uhrig recommended that the selection of the management template and financial frameworks to be applied should be based on the governance characteristics of a statutory authority.⁸

Responses to the Uhrig Review

For a summary of the responses and debate that followed the release of the review, please refer to Dr. Richard Grant, '[The Uhrig Review and the future of statutory authorities](#)', *Research Note*, no. 50, Parliamentary Library, 2004–05.

The Commonwealth financial framework

Nearly all Commonwealth government bodies fall under the *Financial Management and Accountability Act 1997* (the FMA Act) or the *Commonwealth Authorities and Companies Act 1997* (the CAC Act).

The FMA Act focuses primarily on the obligations and responsibilities of Chief Executives and the way officials handle public money, public property and other resources of the Commonwealth. The FMA Act applies to budget-funded authorities managed by a CEO, and establishes various management and reporting responsibilities for the CEO (sections 44–46, 49 and 51), as well as allowing the relevant Minister to give guidelines to the CEO (section 64). Furthermore, the FMA Act provides an accountability framework for CEOs to manage agency resources.

The CAC Act, on the other hand, requires directors and officers to exercise their powers and duties in the best interests of the body and for a proper purpose. Directors' duties apply to help ensure that prudent decisions are made on the resources that, as a matter of law, the body holds in its own right. The CAC Act applies to authorities that are corporate entities managed by a board. It requires the head of the board to report to the responsible Minister (sections 15–16), and to ensure that the authority's activities comply with government policies (section 28). A board structure is favoured if there is a strong commercial focus to the organisation, or if the agency is intergovernmental.

As at 15 May 2007, there were 94 FMA Act agencies and 99 CAC Act agencies.⁹ The Department of Finance and Administration publication [Governance Arrangements for Australian Government Bodies](#) (August 2005) provides further explanation on the FMA Act and CAC Act and a comparison between the two pieces of legislation.

On the basis of the findings of the Uhrig Review, Ministers and their Departments have been undertaking an assessment of their portfolio agencies against the governance templates.¹⁰ The Minister for Finance and Administration has assumed a coordinating role in these reviews.¹¹ Thus, a number of similar Acts have been passed by Parliament incorporating Uhrig Review recommendations.

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Australian Pesticides and Veterinary Medicines Authority (APVMA)

The APVMA is responsible for administering and managing the parts of the National Registration Scheme that oversee the supply and use of animal health and crop protection products in Australia. The APVMA does this with the State and Territory governments and with the active involvement of other Australian government agencies.

Within the National Registration Scheme, the APVMA assesses and registers pesticides and veterinary medicines before they can be supplied or used. All registered products must work, be safe to people and the environment and not jeopardise Australia's trade with other nations.¹²

Financial implications

The Explanatory Memorandum states that no financial impact is anticipated.

Main provisions

Schedule 1—Amendment of the Agricultural and Veterinary Chemicals (Administration) Act 1992

Definitions

It is proposed that the Governing Board of the APVMA along with the office of Director be abolished and replaced by an Advisory Board with a Chair, and a new position of CEO. **Items 1–8** repeal some definitions and insert others so as to reflect these revised governance arrangements incorporating an executive management structure.

Item 12 is a consequential amendment designed to reflect the fact that the function currently performed by the Chairperson of the Governing Board, will be vested in the CEO. **Items 15-17, 19** and **30** are also consequential amendments.

CEO's power to enter into contracts on behalf of the Commonwealth

Paragraph 7(3) (a) of the AVCA Act provides that 'the APVMA has power to do all things necessary or convenient to be done in connection with the performance of its functions'. **Item 9** proposes that a **note be inserted** at the end of paragraph 7(3) (a) stating that the CEO may also enter into contracts on behalf of the Commonwealth. This proposed insertion is made pursuant to section 44 of the FMA Act which is concerned with the special responsibilities of a CEO in promoting efficient, effective and ethical use of the Commonwealth's resources.

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Powers and functions of the APVMA endure

The Explanatory Memorandum states that the APVMA retains its existing powers under **subsection 7(3)** of the AVCA Act, including the power to enter into contracts in its own name (refer to paragraph (a)). These powers are integral to the viability of the cooperative scheme for the management of agricultural and veterinary chemicals in Australia, and they reside with the APVMA body corporate. This has been made possible as a result of each of the States and Northern Territory passing complementary laws conferring identical power on the APVMA. To give these powers to the CEO would necessitate a change to State and Territory laws.

Item 10: After section 7

The APVMA will continue to be a statutory authority of the Commonwealth with a separate legal identity from the Commonwealth. The APVMA will also retain its powers to enter into contracts; acquire, hold and dispose of real and personal property; occupy land; appoint agents; and do anything incidental to its powers. However, the effect of making the APVMA subject to the FMA Act is that the assets and liabilities of the APVMA become the assets and liabilities of the Commonwealth. The amendments proposed by **item 10** give effect to the changes and continuities mentioned in this paragraph.

Item 11: At the end of section 8 – taking advice from the Advisory Board is not considered to be consultation

The Agvet Code was introduced through Commonwealth legislation in 1994, i.e. the *Agricultural and Veterinary Chemicals Code Act 1994*. The Agvet Code regulates the registration of agvet chemical constituents or products. Section 34G of the Agvet Code makes it compulsory for the APVMA to publish a summary of the advice received from a person, body or government it consults under sections 8 or 8A of the AVCA Act, if the APVMA relies on that advice to make a decision under the Agvet Code to grant an application for registration or approval.

However, under the current AVCA Act, the APVMA is not required to publish a section 34G summary in respect of advice that the CEO receives from the APVMA governing board. **Item 11** proposes a **new subsection 8(3)** designed make it clear that the APVMA does not consult the new Advisory Board for the purposes of section 8 when the CEO requests information from the Advisory Board.

According to the Explanatory Memorandum, the rationale for this proposed amendment is that to require the CEO to publish a summary of advice received from the Advisory Board would add considerably to the APVMA costs and would lengthen registration and approval timeframes.¹³ However, given the primacy accorded to accountability by the Uhrig Review, perhaps it may have been useful for the Explanatory Memorandum to provide an estimation or description of the costs of requiring such advice to be published.

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Item 13: Proposed subsection 10(5)

Section 10 of the current AVCA Act provides that ‘the Minister may give written directions to the APVMA concerning the performance of its functions or the exercise of its powers, and the APVMA must comply with any such direction’. Significantly, subsection 10(3) requires that if the Minister does give a direction, then the Minister must provide notice setting out particulars of the direction to be published in the *Gazette* and table that notice before each house of Parliament. The current situation is that even if a direction is tabled by the Minister, it is not disallowable.

However, subsection 10(4) of the AVCA Act suspends the requirement in subsection 10(3) ‘in relation to a particular direction if the Minister determines, in writing, that compliance with the subsection is undesirable because it would, or would be likely to, be prejudicial to the national interest of Australia’.

Such a discretion does not exist under the *Legislative Instruments Act 2003*, however, the Explanatory Memorandum rationalizes that it may be of particular importance with up-and-coming issues such as the management of security chemicals. Hence, the Government has decided that a Ministerial Direction under subsection 10(1) should remain a non-legislative instrument for the purposes of the *Legislative Instruments Act 2003*. **Item 13** therefore proposes a repeal of the **existing subsection 10(5)** and **substitutes a new subsection** that explicitly provides that a direction under subsection 10(1) is not a legislative instrument.

Item 14: Proposed section 10A

The **proposed section 10A** is designed to make it clear that the general power of the Minister to give directions to the APVMA under section 10, does not also empower the Minister to direct the CEO in relation to the CEO’s performance of functions, or exercise of powers, granted generally under the FMA Act and the *Public Service Act 1999*.

Item 21: Sections 14 to 19 – Composition, powers and functions of the Advisory Board

Item 21 repeals **sections 14 to 19** which related to the directors of the previous governing board of the APVMA, and **proposes new sections** relating to the establishment, composition, functions and powers of the Advisory Board.

Proposed section 15: the Advisory Board will consist of up to nine part-time Board members.

Proposed subsection 16(1): the Advisory Board is to provide advice and make recommendations to the CEO in relation to the performance of a function or the exercise of a power of the APVMA. **Proposed subsection 16(2)** provides that the Advisory Board has the power to do all things necessary or convenient to be done for or in connection with

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the performance of its function. However, **proposed subsection 16(3)** makes it clear that the Advisory Board cannot give any directions to the CEO.

Proposed section 17 provides for the appointment of members of the Advisory Board. Board members are appointed by written instrument by the Minister on a part-time basis. **Proposed section 18** provides that a Board member holds office for a period specified in the instrument of appointment and that the period must not exceed three years.

Proposed subsection 19(1) provides that a Board member's remuneration is to be determined by the Remuneration Tribunal, or if no determination is in operation, then member is to be paid such remuneration as is prescribed.

Proposed subsection 19(3) anticipates a broad field of candidates for position of Board member. Accordingly this section provides that,

If a person who is a Board member:

- is a member of the Parliament of a State; or
- is a candidate for election to the Parliament of a State and, under the law of the State, would not be eligible to be elected as a member of that Parliament if the person were entitled to remuneration or allowances under this Act; or
- is in service or employment of a State, or of an authority of a State, on a full-time basis; or
- holds or performs the duties of an office or position established by or under a law of a State on a full-time basis;

the person must not be paid remuneration or allowances under this Act, but is to be reimbursed the expenses that the person reasonably incurs in performing duties under this Act.

Proposed subsection 17(4) provides that the Minister must consult the CEO before appointing a person as a Board member or as the Chair. This is thought to be appropriate as it is the CEO who is intended to be assisted by the advice of the Board.

Proposed subsection 17(2) provides that when appointing the nine members, the Minister must ensure that the following skill composition is achieved:

- two Board members have experience in the regulation, under State or Territory law, of chemical products; and
- one Board member has experience in the agricultural chemical industry; and
- one Board member has experience in the veterinary chemical industry; and
- one Board member has experience in primary production; and
- one Board member has experience in environmental toxicology, including knowledge of the effect of chemicals in ecosystems; and

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- one Board member has experience in protecting consumer interests; and
- one Board member has experience in public health and occupational health and safety; and
- if the Minister considers it necessary—one Board member has experience in a field relevant to the APVMA's functions.

The experiential make-up of the Advisory Board is similar to that of the current governing board, with the addition of experience in toxicology and public health. The Explanatory Memorandum states that the experiential composition of the Advisory Board is designed 'to complement the role and responsibilities of the APVMA and includes representation from each stakeholder sector'.¹⁴

Item 25: Proposed sections 23 and 24 - Disclosure of interests of board members

This item repeals section 23 and 24 under the current AVCA Act that require directors to disclose financial interests in certain circumstances, and provide for the termination of director's appointments. **New sections 23 and 24** are proposed and these sections are respectively headed '**Standing obligation to disclose interests**' and '**Termination of appointment**'.

Proposed subsection 23(1) provides that 'a Board member must give written notice to the Minister of any direct or indirect financial interest that the member has if that interest could conflict with the proper performance of the Advisory Board's function. Notice is required whether or not there is any particular matter under consideration that gives rise to an actual conflict of interest'. 'It does not matter if the interest is acquired before or after the Board member's appointment' (**proposed subsection 23(2)**).

Proposed subsection 23(3) provides that notice must be given to the Minister as soon as practicable after the Board member becomes aware of the potential for conflict of interest. **Proposed subsection 26(8)** provides that if a Board member has such an interest that could conflict with the Board's advisory role in relation to a matter being considered, or about to be considered at a meeting, then this must be disclosed so that the CEO is aware of a conflict that may adversely affect the quality of the advice provided by the Advisory Board. **Proposed 26(9)** requires that such a disclosure, and any action taken in relation to that disclosure, be contained in the minutes. Interestingly, there is no proposed amendment designed to possibly prevent a Board member from participating in the provision of advice on the matter in which they have disclosed a conflict of interest.

Proposed section 24 provides that the Minister may terminate the appointment of a Board member. It may be noteworthy that this power is entirely discretionary, and contrasts with the listed circumstances in which a director's appointment may be terminated by the Minister under existing section 24 of the current Act. The functions of the Advisory Board are to be the same as the previous board of directors and as such there does not appear to be a reason for this significant difference

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Item 28: Sections 26 and 27 – Meetings between the CEO and the Board

Proposed subsection 26(1) provides that a CEO must hold sufficient meetings with the Advisory Board as are necessary for the efficient operation of the APVMA's functions.

Proposed subsection 26(2) provides that the meetings are to be held at the times and places that the CEO determines.

Proposed subsection 26(4) provides that the CEO may determine the procedure to be followed at or in relation to meetings, including matters such as: the quorum for meetings and regulating the way in which meetings are conducted. This is designed to provide the CEO with sufficient control of the meetings so as to yield the advice required by the CEO in order to manage the affairs of the APVMA.

Proposed subsection 26(5) contributes to accountability and transparency by requiring that minutes of meetings held between the CEO and the Advisory Board are kept.

Proposed subsection 26(6) provides that the portfolio Secretary, or a person authorised by the Secretary, may attend meetings held by the CEO and the Advisory Board. This amendment has been inspired by Uhrig Review. The Uhrig report posited that:

Departments are the primary source of public sector advice to Ministers and are best placed to support Ministers in the governance of statutory authorities. In this respect, the portfolio secretary has a role akin to an advisory function within a parent company in providing advice to the CEO about the activities of the company's subsidiaries.¹⁵

It is therefore not surprising that one of the recommendations of the Uhrig Review was that:

[in order] to assist in the advisory board's considerations, particularly in relation to the background of the policy and options for implementation, adequate public sector representation should occur through the relevant portfolio secretary and statutory authority head also attending meetings.¹⁶

Proposed subsection 26(7) provides that the CEO may invite a person other than a Board member or the Secretary to attend a meeting for the purpose of advising or informing it on any matter. This amendment reflects a commitment to ensuring that the Advisory Board has access to persons with relevant knowledge and expertise so as to assist the Board in performing its function optimally.

Proposed subsection 26(10) provides that the **proposed subsections 26(1) to 26(4)** apply to hearings held by the APVMA in the same way that those provisions apply to meetings held by the CEO with the Advisory Board.

The Advisory Board may meet in the absence of the CEO with the purpose of preparing advice for the CEO. **Proposed subsections 27(1) to 27(4)** essentially mirror **proposed**

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subsections 26(1) to 26(5), while **proposed subsections 27(5) and 27(6)** mirror **proposed sections 23 and 24**.

Item 31: Remuneration and allowances of committee members

Proposed subsection 29A deals with the remuneration and allowances of Committee members. The provisions essentially mirror those proposed by **item 19** for Advisory Board members.

Item 34: Working with the Advisory Board

Proposed subsection 32A(1) provides that the CEO, in performing the duties of the office must take into account the advice and recommendations provided by the Advisory Board. This does not mean that the CEO is bound by the advice given by the Advisory Board.

Proposed subsection 32A(2) provides that the CEO must keep the Advisory Board informed of the performance of the APVMA's functions and give the Advisory Board reports, documents and information in relation to the APVMA's functions as the Chair requires for the performance of the Advisory Board's functions. Hence, the Chair of the Advisory Board cannot simply obtain any or all documents related to the APVMA's functions, but rather only those that are necessary for the Board to carry out its functions.

Proposed subsection 32A(3) provides that the CEO may attend meetings of the Advisory Board if invited by the Chair.

Items 35 and 37: CEO – appointment and remuneration

Proposed subsection 33(1) provides that the CEO is to be appointed by the Minister on a full-time basis.

Proposed 33(2) provides that a person who is a member of the Advisory Board is not eligible to be appointed as the CEO.

Proposed subsection 35(1) provides that the CEO is to be paid such remuneration as is determined by the Remuneration Tribunal, or if no determination is in operation, the CEO is to be paid such remuneration as is prescribed.

Proposed subsection 35(2) provides that the CEO is to be paid such allowances as a determined by the Minister.

Item 42: Termination of appointment of CEO

Proposed subsection 41A provides that the Minister may terminate the appointment of a CEO

- for misbehaviour or physical or mental incapacity; or

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- if the Chief Executive Officer:
 - becomes bankrupt; or
 - applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
 - compounds with his or her creditors; or
 - makes an assignment of his or her remuneration for the benefit of his or her creditors; or
- if the Chief Executive Officer is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
- if the Chief Executive Officer engages, except with the Minister's approval, in paid employment outside the duties of his or her office; or
- if the Chief Executive Officer fails, without reasonable excuse, to comply with the disclosure of interests requirement; or
- if the Minister is satisfied that the Chief Executive Officer's performance has been unsatisfactory.

Item 43: Section 42

Proposed section 42 requires that the CEO disclose to the Minister all direct and indirect financial interests that the CEO has or acquires in any business or in any body corporate carrying on any business.

Item 46: Staff and consultants

Proposed section 45 provides that staff of the APVMA are to be engaged under the *Public Service Act 1999*.

Item 48: Corporate Plan – development, approval and variation

Proposed subsection 50(1) mandates that the APVMA develops a corporate plan in written form for a period that is specified in the plan and that the plan must both define the key objectives of the APVMA in performing its functions during the period, and provide a broad outline of the strategies to be pursued by the APVMA to achieve those stated objectives.

Proposed subsection 51(1) requires APVMA to provide the Minister with a copy of the corporate plan for his or her approval on or before 1 June in each calendar year, except where exempted from this requirement by the **new subsection 51(2)**, or on a later date that the Minister allows. This advice notice of the plan enables the Minister to properly consider the plan so as to exercise his discretion in relation to the plan.

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Proposed subsection 51(3) provides that a corporate plan comes into effect on the day that it is approved by the Minister or the first day of the period to which it relates, whichever is the later.

Proposed subsection 52(1) provides that the APVMA may at any time, review a corporate plan and consider whether a variation to the plan is necessary.

Proposed subsection 52(2) provides that following a review of a plan under **52(1)** the APVMA may vary the plan provided there is Ministerial approval for the variation.

Proposed subsection 52(3) provides that the Minister may, at any time, request the APVMA to vary a corporate plan, whether or not it has come into force. And, the APVMA must comply with this request for a variation of the plan (**proposed subsection 52(4)**).

Proposed subsection 52(6) allows the APVMA to vary the corporate plan without Ministerial approval where the variation is minor. However, the Minister must be informed of this minor variation in writing as soon as practicable (**proposed subsection 52(7)**). This is consistent with moving to the Uhrig template and APVMA being subject to the FMA act rather than the CAC Act.

Finance and reporting requirements

Proposed subsection 58(2) provides that Australian Pesticides and Veterinary Medicines Special Account is a Special Account for the purpose of the FMA Act. This is necessary because the operating costs of the APVMA are recovered from the industry that it regulates through the collection of levies and fees. The Special Account provides for clear identification and reporting of those of funds.

Proposed sections 59 and 60 provide details of how the Special Account established under 58(2) is to be administered.

Concluding comments

As already noted, this Bill is one of series introduced by the Government designed to make relevant and appropriate reforms in response to observations and conclusions made by the Uhrig Report. It also responds to a recent assessment of the APVMA. The specific amendments are designed to improve and strengthen the governance arrangements of the APVMA.

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Endnotes

1. Explanatory Memorandum, p. 2.
- ² *ibid.*
3. ‘Second reading speech: Agricultural and Veterinary Chemicals (Administration) Bill 2007’, House of Representatives, *Debates*, 10 May 2007, p. 10.
4. Senator the Hon. N. Minchin, [Australian Government Response to Uhrig Report](#), media release, 12 August 2004.
5. J. A. Uhrig, AC, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, Canberra, June 2003, p. 15.
6. Senator the Hon. N. Minchin, *op. cit.*
7. Uhrig, *op. cit.*, p. 79.
8. *ibid.*, p. 12, point 6.
9. Department of Finance and Administration, ‘Chart of 94 Agencies under the Financial Management and Accountability Act 1997 (FMA Act), Chart of 99 bodies under the Commonwealth Authorities and Companies Act 1997 (CAC Act)’, http://www.finance.gov.au/Publications/docs/FMA_CACFlipchart.pdf, accessed on 22 May 2007.
10. ‘More than 160 Australian Government Agencies are being assessed against the Uhrig Report principles and templates’. Sussan Ley, MP, Parliamentary Secretary to the Minister for Agriculture, Fisheries and Forestry, ‘Second reading speech: Primary Industries and Energy Research and Development Amendment Bill 2007’, House of Representatives, *Debates*, 1 March 2007, p. 10.
11. *ibid.*
- ¹² [Introducing the Australian Pesticides and Veterinary Medicines Authority](#), p. 3.
- ¹³ Explanatory Memorandum, p. 7.
- ¹⁴ *ibid.*, p. 10.
- ¹⁵ Uhrig, *op. cit.*, p. 63.
- ¹⁶ *ibid.*, p.93–94.

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