Agricultural and Veterinary Chemicals Bill 1993
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Agricultural and Veterinary Chemicals Bill 1993

Date Introduced: 16 December 1993
House: House of Representatives
Portfolio: Primary Industries and Energy

Purpose

To provide for the application of the Code set out in the Schedule to the Agricultural and Veterinary Chemicals Code Bill 1993 as a law of the Australian Capital Territory and prescribed Territories. That Code provides a scheme for the evaluation, registration and control of agricultural and veterinary chemicals.

This Bill, which forms part of a package of seven bills, also provides that the National Registration Authority for Agricultural and Veterinary Chemicals may determine principles to be observed in the manufacture of chemical products in the Australian Capital Territory and prescribed Territories; repeals the Agricultural and Veterinary Chemicals Act 1988; and imposes formally fees and taxes prescribed by the Agricultural and Veterinary Chemicals Regulations of the Australian Capital Territory and prescribed Territories.

Background

Prior to the introduction of the Agricultural and Veterinary Chemicals Act 1988 there was no specific Commonwealth legislation for the clearance and registration of new agricultural and veterinary chemicals. The then non-statutory scheme provided for clearance and registration to be carried out by Commonwealth and State technical committees. This scheme was considered unsatisfactory as it did not eliminate duplication of laws and procedures between the Commonwealth and State's (e.g. chemicals were frequently re-assessed at State level).

Deficiencies in the pre-1988 system led to the passage of the Agricultural and Veterinary Chemicals Act 1988 which established the Australian Agricultural and Veterinary Chemicals Council (the Council). The functions of the Council included:

* granting or withdrawing clearances for the registration of chemical products for use in States and Territories for specified purposes under specified conditions;

* determining or varying the conditions to which such clearances are subject or to vary such conditions; and

* evaluating the effects of the use of chemical products in States and Territories.¹

The Council was also the national body responsible for determining major policy issues relating to the clearance and registration of agricultural and veterinary chemicals. The Council's membership included a Chairperson, representative of the National Health and Medical Research Council, representative of the Australian and New Zealand Environment Council and Council of Nature Conservation Ministers, representative of the National Occupational Health and Safety Commission, and representative from each of the States and the Northern Territory.

The system established by the Agricultural and Veterinary Chemicals Act 1988 was considered a significant improvement on the previous arrangements. For example, it's July 1990 report, the Senate Select Committee on Agriculture and Veterinary Chemicals (the Committee) said "[the
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Agricultural and Veterinary Chemicals Act 1988\([1988]\) is a welcome development for the effective regulation of agricultural and veterinary chemicals in Australia. ... In particular, the Committee welcomes the establishment of the [Council]. The previous arrangements for clearance were marked by an array of councils, committees and sub-committees and a diversity of responsibilities and functions.\([2]\)

While the system established by the Agricultural and Veterinary Chemicals Act 1988 was widely accepted, a number of deficiencies had been identified, including:

- overlap between the Commonwealth, States and Territories on certain aspects of the clearance and registration process (e.g. chemical products being cleared by the Council and then having to be registered by separate State and Territory bodies.);
- lack of identifiable avenues for complaints;
- the membership of the Council did not include a representative of consumer interests; and
- lack of a systematic national program for reviewing chemicals registered on the basis of data requirements less comprehensive than those of today.

The issue of a single national system of clearance and registration for agricultural and veterinary chemicals was considered by the Committee. While not making a recommendation for the establishment of a national system of registration, it is clear from submissions made to the Committee that a national system of registration has the support of the agricultural and veterinary industry, certain consumer groups, and the Department of Primary Industries and Energy. For example, it's submission to the Committee, Du Pont said 'The cost and effort involved in registering products and the time taken for the product to be finally registered can be significantly reduced by a more uniform approach to registration. Ideally, this could be achieved by the States giving up their powers in this area in favour of one central federal system.'\([3]\) The Australian Consumers' Association 'maintained that the lack of uniformity between States in the regulatory process was the "root of the chemical control problem". The Association observed that, even with the introduction of the Agricultural and Veterinary Chemicals Act 1988, State agricultural authorities are still responsible for registration and enforcement. It concluded that standards and monitoring procedures must be organised on a unified national basis.'\([4]\)

The Australian Federation of Consumer Organisations (AFCO), in its submission to the Committee, supported a national registration scheme. 'According to AFCO, the new Commonwealth legislation did not address the issue of State co-ordination as States would still have the option of rejecting any of the judgements of the AAACC [the Council]. Therefore, the States could still exercise control over the final registration process.'\([5]\)

In a Media Release of 2 August 1991, the Minister for Primary Industries and Energy announced that the Council had agreed on a national registration scheme for agricultural and veterinary chemicals. The Minister said that the proposal 'had first been raised at the Special Premiers' Conference in October 1990 and since then had been under investigation by the Commonwealth and State agencies with extensive consultation with the Australian Agricultural Council and the Australian Agricultural and Veterinary Chemicals Council, at the national level.' In relation to the funding of the proposed scheme, the Minister said that assessment and registration costs would be recovered from the agricultural and veterinary chemicals industry.

In a Media Release of 24 July 1992, the Minister for Primary Industries and Energy announced the establishment of the National Registration Authority for Agricultural and Veterinary Chemicals (NRA). In making the announcement, the Minister said that the 'new Authority [NRA] will register all agricultural and veterinary chemical products in Australia. This will help enhance Australia's reputation as a supplier of safe, wholesome agricultural products. The Authority will have an independent chairperson and board drawn from a range of interest groups, including State governments.'

The rationale given by the Government for establishing the NRA before the main legislation relating to the national registration scheme was 'to allow the Board of the Authority [NRA] to contribute to the development of the legislation it will administer.'\([6]\)
The Agricultural and Veterinary Chemicals (Administration) Act 1992 and the Veterinary Chemicals Amendment Act 1992 gave partial effect to the Ministers 24 July 1992 announcement. The Agricultural and Veterinary Chemicals (Administration) Act 1992 did not change the existing arrangements for the registration of agricultural and veterinary chemicals. The Minister for Primary Industries and Energy said in the Second Reading Speech to the Agricultural and Veterinary Chemicals (Administration) Bill 1992 that ‘Legislation for the new operational procedures for the national registration of agricultural and veterinary chemicals will be introduced as separate legislation in the Autumn Sittings [1993] next year.’

The Agricultural and Veterinary Chemicals (Administration) Act 1992 established the NRA to administer Commonwealth, State and Territory laws relating to agricultural and veterinary chemical products where those laws confer functions and powers on the NRA (section 3). The functions of the NRA include those conferred on it by or under the Act, the Agricultural and Veterinary Chemicals Act 1988 and by State or Territory laws (section 7). The NRA consists of a Chairperson and seven directors (section 13). Two of the directors are required to have experience in the regulation of chemical products under State or Territory law; two directors are required to have experience in the regulation of chemical products under State or Territory law; one director is required to have experience in the protection of consumer interests; one director is required to have experience in primary production; and one director is required to have experience in occupational health and safety as an officer or employee of an organisation of employees (section 14).

The NRA’s is funded from moneys appropriated by Parliament; fees received by the Commonwealth under the Agricultural and Veterinary Chemicals Act 1988; and amounts paid by a State/Territory to the Commonwealth for the purposes of the NRA (sections 58 and 60). The NRA's funds may only be used for certain purposes, including administrative expenses (e.g. discharge of debts and liabilities incurred in the performance of its functions) (section 62). The NRA may borrow money, but Ministerial approval is required where the total amount to be borrowed exceeds $500 000 (section 63). The NRA is not subject to Commonwealth, State or Territory taxation, other than Commonwealth sales tax (section 67).

The effect of the Agricultural and Veterinary Chemicals Amendment Act 1992, which amended the Agricultural and Veterinary Chemicals Act 1988, was to replace the Council with the NRA and to make the functions of the Council the functions of the NRA.

In 1993, the Agricultural and Veterinary Chemicals Act 1988 was amended by the Primary Industries and Energy Legislation Amendment Act 1993. The principal amendments related to the disclosure of information relating to agricultural and veterinary chemicals.

Section 4 of the Primary Industries and Energy Legislation Amendment Act 1993 substituted a new section 20 into the Agricultural and Veterinary Chemicals Act 1988 that extended the range of information that may be disclosed. The major changes included:

* if the NRA is reconsidering the clearance of a product, it may disclose particulars of the product;

* subject to any conditions contained in the regulations, information about the toxicology of the product may be disclosed; and

* confidential commercial information may be disclosed to the Commonwealth, State or Territory governments, or their authorities.

Where such information is disclosed, the person to whom it is disclosed is under an obligation not to intentionally or recklessly disclose the information. The maximum penalty for a breach of this condition is imprisonment for two years.

Restrictions on the information that the NRA may make available to people and bodies when evaluating chemicals, the most important being a restriction on the disclosure of commercial information provided in confidence. Such information may only be provided to courts, in the public interest or to Commonwealth, State and Territory bodies for the provision of advice to the NRA (section 20 of the Agricultural and Veterinary Chemicals Act 1988.)

A new section 34A was also inserted into Agricultural and Veterinary Chemicals Act 1988 by the Primary Industries and Energy Legislation Amendment Act 1993. Section 34A provides for the NRA...
to direct that part of a hearing be in private when considering confidential evidence or for any other reason.

This Bill forms part of a package of seven bills. The other Bills in this package include the Agricultural and Veterinary Chemicals Code Bill 1993, Agricultural and Veterinary Chemicals (Consequential Amendments) Bill 1993, Agricultural and Veterinary Chemical Products (Collection of Levy) Bill 1993, Agricultural and Veterinary Chemical Products Levy Imposition (General) Bill 1993, Agricultural and Veterinary Chemical Products Levy Imposition (Excise) Bill 1993 and Agricultural and Veterinary Chemical Products Levy Imposition (Customs) Bill 1993. Collectively, this package provides a scheme for the evaluation, registration and control of agricultural and veterinary chemicals in the Australian Capital Territory and prescribed Territories. It is the Government's intention that the Code set out in the Schedule to the Agricultural and Veterinary Chemicals Code Bill 1993 will be adopted, by the enactment of complementary legislation, by each State and the Northern Territory. Were this to occur, the evaluation, registration and control of agricultural and veterinary chemicals would be administered uniformly across Australia by the NRA.

Main Provisions

Preamble: The recitals set out at the start of this Bill give the reasons for this Bill, including:

* that the furthering of Australia's international trade and commerce, and the present and future economic viability and competitiveness of primary industry and domestic industry for manufacturing and formulating agricultural and veterinary chemical products, are essential for the well-being of the economy and require a cost-effective, efficient, predictable, adaptive and responsive regulatory system;

* that the system should, as far as is practicable, be uniform throughout Australia; and

* that uniformity could best be achieved by enacting Commonwealth legislation as a law for the Australian Capital Territory and the adoption of that legislation by the States and the Northern Territory.

Commencement: This proposed Act will commence on a day to be fixed by Proclamation, or if it does not commence within 12 months of receiving the Royal Assent, it will commence on the first day after that period [clause 2].

Object: The object of this Bill is to make a law for participating Territories (see 'Important Definitions' below) for the evaluation, registration and control of agricultural and veterinary chemical products, and for related purposes [subclause 3(1)].

Important Definitions:

* 'Corresponding Act' is defined in clause 4 to mean an Act of a State or the Northern Territory that corresponds to this proposed Act.

* 'Corresponding law' is defined in clause 4 to include a corresponding Act, or regulations made under a corresponding Act.

* 'Participating Territory' is defined in clause 4 to mean the Australian Capital Territory, or another Territory declared by the regulations to be a participating Territory.

* 'Instrument' is defined in clause 4 and includes an Act or instrument made under an Act; an award or other industrial determination or order, or industrial agreement; or an indictment, presentment, summons or writ.

Application of Agricultural and Veterinary Chemicals Code in Participating Territories: The Code set out in the Schedule to the Agricultural and Veterinary Chemicals Code Bill 1993 will apply as a law of participating Territories [subclause 7(1)]. The provisions of the proposed Code are in addition to, and will not affect, the Industrial Chemicals (Notification and Assessment) Act 1989, the National Food Authority Act 1991 and the Therapeutic Goods Act 1989 [subclause 7(2)]. The powers conferred on the NRA under the proposed Code are in addition to, and will not affect, powers conferred under
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section 65F of the *Trade Practices Act 1974* [subclause 7(3)]. (Note: Section 65F of the *Trade Practices Act 1974* provides for the compulsory recall of consumer goods.) The provisions of the proposed Code requiring the NRA to provide reasons for decisions will not affect its obligations under section 28 of the *Administrative Appeals Tribunal Act 1975* or section 13 of the *Administrative Decisions (Judicial Review) Act 1977* [subclause 7(4)]. (Note: Section 28 of the *Administrative Appeals Tribunal Act 1975* provides a right to obtain reasons for an administrative decision from the decision maker. A parallel right is provided under section 13 of the *Administrative Decisions (Judicial Review) Act 1977.*) The provisions of the proposed Code relating to disclosure of confidential commercial information will not affect the operation of the *Freedom of Information Act 1982* [subclause 7(5)].

Application of Agricultural and Veterinary Chemicals Code Regulations in Participating Territories: Regulations made under proposed section 6 of the *Agricultural and Veterinary Chemicals Code Bill 1993* will apply as regulations of participating Territories [clause 8].

Inconsistencies Between Proposed Code and Laws of Participating Territories: Regulations made under clause 25 of this Bill may provide that specified participating Territory laws have effect despite the proposed Agricultural and Veterinary Chemicals Code or specified provisions of the proposed Code. It also provides that the proposed Code, or specified provisions, has or have effect with such modifications as are prescribed [subclause 10(3)].

Agricultural and Veterinary Chemicals Code of Participating Territories: The Agricultural and Veterinary Chemicals Code of participating Territories will bind the Commonwealth, States and the Northern Territory in all their capacities [clause 13].

Commonwealth not Liable to Prosecution: Nothing in proposed Part 4 (clauses 13-16) of this Bill, or in the Agricultural and Veterinary Chemicals Code of any jurisdiction, will make the Commonwealth liable to prosecution for an offence [clause 15].

Prerogative rights/privileges of Commonwealth: Where the Agricultural and Veterinary Chemicals Code of a State or the Northern Territory binds the Commonwealth, the Australian Capital Territory or Norfolk Island, that Code will override any prerogative right or privilege of the Commonwealth [clause 16].

Commonwealth Subject to State and Northern Territory Agricultural and Veterinary Chemicals Codes: The Commonwealth, the Australian Capital Territory and Norfolk Island, within the jurisdiction of each State and the Northern Territory, will be subject to the Agricultural and Veterinary Chemicals Code of each such State and the Northern Territory [clause 14].

Corresponding Laws - Conferral of Prescribed Functions/Powers on Commonwealth Ministers: A corresponding State/Northern Territory law may confer prescribed functions and powers on a Commonwealth Minister clause 17].

Corresponding Laws - Conferral of Prescribed Function/Powers on Commonwealth Authorities and Officers: A corresponding law may confer prescribed functions and powers on Commonwealth authorities and officers [clause 18].

Jurisdiction of Federal Court and Courts of Participating Territories: Jurisdiction with respect to all civil matters arising under the Agricultural and Veterinary Chemical Code and Regulations of participating Territories is conferred on the Federal Court of Australia by [subclause 20(1)].

Subclauses 20(2) and 20(3) confer jurisdiction with respect to all civil and criminal matters arising under the Agricultural and Veterinary Chemicals Code and Regulations of participating Territories. With respect civil matters, the jurisdiction of participating Territory courts is subject to section 9 of the *Administrative Decisions (Judicial Review) Act 1977*. Section 9 of the *Administrative Decisions (Judicial Review) Act 1977* limits the jurisdiction of State and Territory courts.

Subclause 20(4) allows the Federal Court of Australia to exercise jurisdiction conferred on it by a law of a State or the Northern Territory corresponding to proposed Part 6 (clauses 20-21) of this Bill, with respect to matters arising under the Agricultural and Veterinary Chemicals Code or Regulations of that State or the Northern Territory.

Manufacturing Principles: Clause 23 provides that the NRA may determine written principles to be observed in the manufacture of chemical products in participating Territories. The principles are to
be consistent with the Agricultural and Veterinary Chemicals Codes, Regulations and laws of any jurisdiction that relates to occupational health and safety. The manufacturing principles may relate to certain matters, including:

* the standards to be maintained, and equipment to be used, at premises used for the manufacture of chemical products; and

* the qualifications and experience required of persons employed in the manufacture of chemical products.

Manufacturing principles will be subject to disallowance by Parliament.

Repeal of Agricultural and Veterinary Chemicals Act 1988: The Agricultural and Veterinary Chemicals Act 1988 is repealed by [subclause 24(1)].

Imposition of Fees and Taxes Prescribed by Agricultural and Veterinary Chemical Regulations of Participating Territories: Fees, including fees that are taxes, prescribed by the Agricultural and Veterinary Chemicals Regulations of participating Territories will be imposed formally by clause 26.

Note: It is arguable that clause 26 is constitutionally invalid. Section 55 of the Constitution provides

> Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect. ....

As this Bill deals with matters other than the imposition of taxation, it is arguable that section 55 of the Constitution is breached. Effectively, the provisions of this Bill not dealing with the imposition of taxation are of no effect.

However, it is also arguable that as clause 26 is a provision made under section 122 of the Constitution, which deals with laws made in respect of territories, section 55 issues may not arise. The authority for this proposition is Buchanan v. The Commonwealth (1913) 16 C.L.R. 315. Further, it may be noted that section 33 of the Corporation Law contains a similar provision.

It may be noted, that the issue of section 55 of the Constitution arose in relation to the Taxation (Deficit Reduction) Bill 1993. That Bill was subsequently divided into a package of eight Bills. The change to a package of eight Bill followed a report of the Senate Standing Committee on Legal and Constitutional Affairs which found that there was a real risk that the High Court would find that the Bill, once it became an Act, would breach section 55 of the Constitution.

Endnotes

3. Ibid., p. 84.
4. Ibid., p. 83.
5. Ibid.

Ian Ireland (06 2772438)
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