

## **4 LEGISLATIVE MECHANISMS**

### **4.1 Coordination between Commonwealth and State authorities**

#### **4.1.1 Commonwealth and State interdependence**

The management of pesticides in Australia is composed of two interdependent components. The first is a National Registration Scheme concerned with the assessment, approval, registration and labelling of pesticide products. The second component is conducted at the state level, which involves the establishment and enforcement of controls over the use of pesticides.

#### **4.1.2 The National Registration Scheme**

The National Registration Scheme was established in July 1991 with the cooperation of the Commonwealth, State and Territory agencies to provide a single national assessment and registration scheme for agricultural and veterinary chemicals and to remove previous duplication and inconsistencies across jurisdictions. The National Registration Scheme places responsibility on the Commonwealth for evaluation, registration and review of agricultural and veterinary chemicals. To administer the Scheme, the National Registration Authority for Agricultural and Veterinary Chemicals was established under the *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth) and was conferred its full range of powers by the *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) ('Agvet Code'). To apply the Agvet Code to New South Wales, the *Agricultural and Veterinary Chemicals (NSW) Act 1994* was enacted as complementary legislation.

Under the Scheme, all pesticides used in NSW must be registered by the National Registration Authority before they can be manufactured, supplied, sold or used. Before a pesticide is registered, it must undergo a rigorous assessment process to ascertain a pesticide's impacts on the environment, human health and trade and effectiveness of the pesticide for its intended use. A significant aspect of the registration process is the specification of label directions that are relevant to each product, pest and situation of use. The responsibilities of the National Registration Authority for control over agricultural and veterinary chemicals extend to and include the point of retail sale.

### 4.1.3 Control of use

The states and territories maintain responsibility for the establishment and enforcement of controls over pesticide use such as licensing of users and spraying activities. The state based responsibilities are designed to ensure that pesticides are used in accordance with National Registration Authority requirements and without causing injury or damage to a person's health and property, the environment and trade.

As part of its responsibilities with respect to New South Wales, the Environment Protection Authority's role is:

- Education – to ensure that all those applying pesticides are aware of their legal responsibilities and are aware of the consequences of misapplying pesticides;
- Control of use under the *Pesticides Act 1978* – to enforce the control over the use of pesticides once they have been sold, and for guiding users on the appropriate and responsible use of pesticide products;
- Regulation under general NSW Environment Protection Authority legislation – as pesticides can affect other areas within the oversight of the NSW Environment Protection Authority including pollution, waste and clean water, other enforcement mechanisms are available;
- Research – pioneering toxicity studies on pesticides;
- Working with local communities – mediation to assist resolution of conflicts between stakeholder groups.

## 4.2 Review of the *Pesticides Act 1978*

### 4.2.1 Discussion paper overview

The *Pesticides Act 1978* (NSW) has been in existence for over twenty years and in this time there have been substantial changes in community expectations about the use of pesticides which has coincided with land use changes.<sup>1</sup> Other land uses and activities including residential and commercial development increasingly surround areas previously dominated by agricultural uses, and are incompatible with the traditional approach to pesticide use.<sup>2</sup> Many Australian and overseas jurisdictions have found the need to respond with firmer regulation of pesticide use.

Further, the introduction of the National Registration Scheme for the registration and labelling of pesticides has precipitated the need to review and update the change in nature of State government responsibilities.

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<sup>1</sup> Improving Pesticide Management in NSW: Discussion paper, Environment Protection Authority, Item 1, p.1.

<sup>2</sup> For example, Submission No.13, Mr Johnston, Alstonville, p.2.

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Finally, the NSW Environment Protection Authority has submitted that a principle concern is the inability of the Act to prevent serious harm from pesticide misuse unless the harm was intentional or the use was clearly contrary to a specific label direction. Effectively, this means that negligent misuse is not an offence.<sup>3</sup> Accordingly, the Protection Authority submits that amendments to current legislation could usefully:

- remove duplication with the National Registration Scheme;
- ensure proper use of pesticides;
- address community concerns relating to the potential adverse impacts of pesticides on human health, property, trade and the environment; and
- provide ongoing policy development in pesticide management and provide greater consistency with other environmental legislation.

#### 4.2.2 Consistency of objectives

The Long Title of the *Pesticides Act 1978* states the following:

An Act to control the sale, supply, use and possession of pesticides; to control the application of pesticides and fertilisers from aircraft; to provide for the prevention of certain foodstuffs containing prohibited residues from becoming available for consumption;

Although the Long Title provides an overview of the scope of the Act there are currently no stated objectives. To achieve consistency with the *Protection of the Environment Operations Act 1997*, the NSW Environment Protection Authority has suggested that the objectives may include:<sup>4</sup>

- risk reduction;
- ecologically sustainable development;
- duty of care for pesticide users; and
- cross-sectoral input to policy making.

#### 4.2.3 Registration of pesticides

As indicated by its Long Title, the scope of the *Pesticides Act 1978*, includes control of registration, sale and supply of pesticides and the issue of permits. The application of the Agvet Code to NSW introduced new provisions concerning the registration, sale and labelling of pesticides and also introduced some new definitions. The original provisions in the *Pesticides Act 1978* were not repealed.

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<sup>3</sup> Submission No.37, Environment Protection Authority NSW, Part 2, p.3.

<sup>4</sup> Submission No.37, Environment Protection Authority NSW, Part 2, p. 3.

To circumvent the duplication between the *Pesticides Act 1978* and the Agvet Code, a regulation was later introduced<sup>5</sup> to suspend the operation of the conflicting provisions concerning registration (ss. 8–22), sale (ss. 29 and 30(1)) and labelling (ss. 34–36, 38, 41, 42(1) and 44) in the *Pesticides Act 1978*.

The discussion paper proposed to formally repeal these outmoded sections of the Act to avoid duplication and confusion and to update it in line with the National Registration Scheme<sup>6</sup>. In so doing, the discussion paper suggested an administrative measure to formally repeal provisions that are effectively inoperative.

An incidental administrative matter raised by the NSW Environment Protection Authority concerns the removal of the reference to the Registrar of Pesticides in the *Pesticides Act 1978*. As the National Registration Authority regulates the “registration” of pesticides, the title is redundant.<sup>7</sup> The Standing Committee notes that the *Pesticides Act 1978* refers to the Agvet Code for its definition of a pesticide as an “agricultural chemical product” (as explained in section 2.1) and that this is a more accurate concept than the traditional use of the term “pesticide”. Further, considering other state jurisdictions have adopted the new concept, the NSW Environment Protection Authority may wish to consider reviewing use of the term “pesticide” in the Act and substitute this with “agricultural chemical product”.

### Recommendation 7

**The Standing Committee recommends that the outmoded provisions of the *Pesticides Act 1978* be repealed including those concerning registration and approval of pesticides.**

### Recommendation 8

**The Standing Committee recommends that wherever the term “Registrar of Pesticides” appears in the Act should be replaced with references to the NSW Environment Protection Authority.**

## 4.2.4 Current offences

The discussion paper outlined that the misuse of pesticides occurs when people do things with pesticides that<sup>8</sup>:

- are contrary to a label or pesticide permit or order directions;

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<sup>5</sup> Clause 9 of the *Agricultural and Veterinary Chemicals (NSW) Regulation 1995*.

<sup>6</sup> Improving Pesticide Management in NSW: Discussion paper, Environment Protection Authority, Item 2, p.2.

<sup>7</sup> Submission No.37, Environment Protection Authority NSW, Part 2, p.11.

<sup>8</sup> Improving Pesticide Management in NSW: Discussion paper, Environment Protection Authority, Item 3, p.2.

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- cause a risk of harm or actual harm to people or damage to property; or
- cause a risk of harm or actual harm to the environment.

The current provisions under the *Pesticides Act 1978* dealing with these offences are ss.33 and 37. Section 33 states that unless required by an order, a person shall not, in preparing for use, using keeping or disposing of a registered pesticide, **wilfully or carelessly** disregard any instruction on any label affixed to a container in which the pesticide is situated (emphasis added).

Section 37 provides that a person shall not **wilfully and without reasonable cause** do anything likely to cause a risk of injury to a person by a pesticide or damage by a pesticide, to the property of another (emphasis added).

The NSW Environment Protection Authority recognised that in light of the main misuses, the current offence provisions limit the ability to ensure the proper use of pesticides. In practice few cases involve such deliberate misuse.<sup>9</sup> In consideration of such issues, the discussion paper proposed measures to deal with misuse of pesticides in ways consistent with other jurisdictions and to avoid costly problems for industry and the community.<sup>10</sup>

## 4.2.5 Offences

### 4.2.5.1 Use of pesticides contrary to directions on labels or permits

The discussion paper stated that following label directions is the minimum standard of behaviour for pesticide users given that the failure to follow directions could lead to serious harm to persons, property or the environment and could impose adverse effects on trade.<sup>11</sup>

The current requirement by s.33 for a wilful or careless disregard requires some degree of intention on the part of the user. The discussion paper indicated that, in line with other states, the offence should occur regardless of the user's intentions and impose a strict liability.

Although the labelling of pesticide containers is not within the jurisdiction of the NSW Environment Protection Authority, most submissions received by industry groups, agronomists and growers criticised the adequacy of pesticide labels. There is a general consensus that many of the pesticide labels currently in use are either

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<sup>9</sup> See for example, *Bray v Death* (unreported 2 March 1994 NSW Supreme Court) where the high standard of proof for a "wilful" act is outlined; Submission No. 37, Environment Protection Authority NSW, Part 2, pp.3-4.

<sup>10</sup> Improving Pesticide Management in NSW: Discussion paper, Environment Protection Authority, Item 3.1, p.3.

<sup>11</sup> Improving Pesticide Management in NSW: Discussion paper, Environment Protection Authority, Item 3.1, p.3.

ambiguous or fail to give instructions that are capable of being explicitly followed.<sup>12</sup> In its submission, Independent Agricultural Services suggested,

...labelling must be clear and consistent to avoid confusion in the field. A national standard for labels should be implemented according to ISO/Australian Standards guidelines.<sup>13</sup>

A suggestion advanced by several submissions was for Material Safety Data Sheets to be included with all pesticides sold whether attached to the container or issued by the retailer.<sup>14</sup> In this instance, the lack of space for labels on containers would no longer be a concern.

A number of submissions expressed concern with tighter offences for disregarding label directions and the impact on pesticide users with low literacy levels or from non-English speaking backgrounds.<sup>15</sup> It was suggested that an offence to disregard label directions raises an issue of natural justice particularly in the Sydney Basin where a large proportion of pesticide users cannot read English.<sup>16</sup> One submission considered that a consultation process be conducted to obtain knowledge of all languages spoken by users of particular pesticides and that, either labels have a multilingual component or that a toll free phone service be established where pesticide use information could be obtained in the relevant language.<sup>17</sup>

As the proposed provision imposes a strict liability offence for failing to follow the label directions, various organisations including NSW Agriculture believe that there is an obligation on the NSW Environment Protection Authority to identify instructions on labels more clearly and therefore should make appropriate recommendations to the National Registration Authority to address these issues.<sup>18</sup>

A number of submissions from industry and environmental groups have called for the ability to use lower than prescribed concentrations of pesticides without the consent of the National Registration Authority.<sup>19</sup> Pesticide application at lower rates is currently unlawful as it is an offence under s.33 to disregard label instructions. The NSW Environment Protection Authority has proposed to permit usage at lower concentrations or lower usage rates, however there will be no intention for orders to duplicate or overrule the responsibilities of the National

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<sup>12</sup> See for example, Submission No.66, Dr Parker, p.6.

<sup>13</sup> Submission No.37, No.87 Independent Agricultural Services, p.2.

<sup>14</sup> Submission No.10, Goddard Spraying Services, p.2; Submission No.37, No.61, Total Environment Centre, Nature Conservation Council, Inland Rivers Network, Australian Conservation Foundation, National Parks Association and Friends of the Earth, p.2.

<sup>15</sup> For example, Submission No.33, NSW Health, p.7.

<sup>16</sup> Submission No.66, Dr Parker, p.2

<sup>17</sup> Submission No.37, No.41 Dr Hart, District Veterinarian, p.2.

<sup>18</sup> Submission No.37, No.103 NSW Agriculture, p.2.

<sup>19</sup> See for example, Submission No.58, Cooperative Research Centre for Weed Management Systems, p.3.

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Registration Authority in setting nationally consistent controls on labelling.<sup>20</sup> (The regulatory aspect of this issue is further discussed at section 4.2.9.1)

Some submissions raised concerns that pesticide use at lower rates may lead to pest resistance.<sup>21</sup> NSW Agriculture advised the NSW Environment Protection Authority that this would rarely be the case. Where resistance may occur, the NSW Environment Protection Authority has suggested implementing regulations that would prescribe pesticides for which lower use would not be permitted.<sup>22</sup> This initiative is in accordance with the view of Avcare, a representative body of 38 manufacturers and 4 distributors of agricultural and veterinary chemicals in Australia. Approximately 90% of pesticide sales in Australia are attributable to members of Avcare.<sup>23</sup> In its submission to the Standing Committee, Avcare supported use of a product at less than maximum rate unless the label expressly prohibits such use.<sup>24</sup> A few submissions received from agricultural groups and Cotton Consultants Australia, (the cotton industry agronomists representative body) were not against below label rates but argued that such applications should remain under the control of the National Registration Authority so that industry and research consultation is maintained in relation to resistance management strategies.<sup>25</sup>

The Avcare submission noted that no regulatory agency in Australia has addressed the issue of 'minor use'.<sup>26</sup> A minor use may occur where a pesticide is suitable for use to spray a crop but the use is not identified on the label because the use may not have been originally contemplated. Registration of these uses may not occur due to present economic disincentives such as where, a new product containing an existing active constituent which is off-patent or a new use of an existing off-patent product is registered, the registration data becomes immediately available to all competitors (permitting copying) at zero research and development cost.<sup>27</sup> There may be no economic benefit for a chemical company to pursue registration because the intellectual property is not adequately protected.<sup>28</sup>

The proposed amendments imposing strict liability will create an offence for growers of a range of crops where legitimate pesticide usage is required but for which approval of such uses cannot be resolved. In her submission, Dr Frances Parker addressed this issue on behalf of growers in the Sydney Basin:

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<sup>20</sup> Improving Pesticide Management in NSW: Discussion paper, Environment Protection Authority, Item 3.9, p.7.

<sup>21</sup> For example, Submission No.37, Australian Environmental Pest Managers Association Ltd, p.4.

<sup>22</sup> Submission No.37, Environment Protection Authority NSW, Part 2, p.5.

<sup>23</sup> Submission No.40, Avcare, p.v.

<sup>24</sup> Submission No.40, Avcare, p.33.

<sup>25</sup> Submission No. 25, Cotton Consultants Australia, p.2.

<sup>26</sup> A minor use is defined as a use of a pesticide that is not economically viable (eg. a small market) for the manufacturer to develop, register and include on a product's label.

<sup>27</sup> Submission No.40, Avcare, Appendix 5, p.5.

<sup>28</sup> Submission No.28, Rapid Solutions, p.11.

Many crops, in particular Asian vegetables, are classed as minor crops and frequently there are no registered pesticides available for use on these specific crops. This means that farmers must use unregistered pesticides to control pest and disease. They are faced with a dilemma, use pesticides illegally, or face economic ruin because of the loss of their crops and their livelihood.<sup>29</sup>

Avcare have urged that the NSW Environment Protection Authority address this issue before introducing legislative changes.<sup>30</sup>

The Standing Committee supports measures by the NSW Environment Protection Authority in consultation with the National Registration Authority and other States and Territories to develop a consistent standard for the labelling of pesticides. The Standing Committee supports the important work of the Premier's Taskforce on Market Gardening by People of Non-English Speaking Background in the Sydney Basin in drawing attention to the significant safety issues surrounding pesticide labelling and compliance, by growers from non-English speaking backgrounds or with low literacy levels.

### **Recommendation 9**

**The Standing Committee will, as part of its review process (refer to Recommendation No.45), consider the issues of growers from non-English speaking backgrounds or with low literacy levels, developments in compliance with pesticide labelling by these growers and the progress of the Premier's Taskforce.**

### **Recommendation 10**

**The Standing Committee recommends that the *Pesticides Act 1978* be amended to create an offence for use of a pesticide contrary to the directions on a pesticide label or permit.**

### **Recommendation 11**

**The Standing Committee recommends that pesticide labels provide clear instructions for use, and that until a consistent standard for labels is implemented, purchasers of pesticide products with non-compliant labels should be provided with material safety data in the form of durable sheets or other relevant media.**

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<sup>29</sup> Submission No.66, Dr Parker, p.6

<sup>30</sup> Submission No.40, Avcare, Appendix 5, p.5.

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**Recommendation 12**

The Standing Committee recommends that lower concentrations or lower usage rates of pesticides be permitted by way of a “Pesticide Order” under the *Pesticides Act 1978* where the usage is not inconsistent with label directions and is approved by the National Registration Authority.

**Recommendation 13**

The Standing Committee recommends that the NSW Environment Protection Authority commence consultation with the National Registration Authority and Avcare to address the issue of minor use, intellectual property rights and impediments to the registration process. The consultation should be conducted with a view to increasing the accessibility of pesticides suitable for minor use.

**4.2.5.2 Use or disposal of a pesticide that causes actual harm or damage to persons, property or the environment**

There is no provision in the present legislation relating to the unintentional misuse of pesticides causing injury or harm.

It is outlined by the discussion paper that although a person may diligently follow directions about the use of pesticides, they may fail to take account of other relevant and “readily knowable considerations” and cause actual harm to people or property.<sup>31</sup> There should be no degree of intention required for an offence.

The offence would be intended to encourage users to plan their spraying activities, exercise proper care and take into account important considerations such as sparing in suitable weather conditions.<sup>32</sup> Accordingly, the discussion paper advocates that an offender may use as a defence that they were “following specific instructions” on a label, order or permit to avoid harm or damage.

A number of submissions have indicated that the provision should not only control disposal of pesticides but also disposal of pesticide containers.<sup>33</sup> However, it is argued that stricter legislation on disposal will not necessarily achieve appropriate disposal of containers.

As discussed at section 3.4.3.3, the **drumMUSTER** industry based initiative supported by Avcare and initiatives of certain catchment management

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<sup>31</sup> Improving Pesticide Management in NSW: Discussion paper, Environment Protection Authority, Item 3.2, pp.3-4.

<sup>32</sup> Submission No. 37, Environment Protection Authority NSW, Part 2, p.4.

<sup>33</sup> Submission No.37, No.28, Mr Flack, p.2.

committee's<sup>34</sup> have experienced limited success as the potential user compliance in returning empty and clean pesticide containers appears low. A recent initiative by Nufarm Australia may overcome the low compliance issue. In evidence before the Standing Committee, Mr Peter Howat, Manager, Research and Development at Nufarm Australia related that "basically 100 per cent" of containers on which deposits were taken were returned.<sup>35</sup> Before the option of formally regulating disposal of containers is examined, it will be necessary to evaluate the success of Nufarm Australia in its industry-based initiative.

The Committee recognises that attempts are being made by industry to reduce inappropriate disposal of pesticide containers. The NSW Environment Protection Authority should conduct a consultation process with industry groups to ensure the success of these initiatives.

#### **Recommendation 14**

**The Standing Committee recommends that the *Pesticides Act 1978* be amended to create an offence to use or dispose of a pesticide so as to cause harm or damage to people or property. (See Recommendations 20 and 22 for discussion of "harm")**

#### **Recommendation 15**

**The Standing Committee recommends that the NSW Environment Protection Authority cooperate with industry to develop initiatives that encourage responsible container disposal. As part of its review (Recommendation 45), the Standing Committee will consider the Authority's progress in this area.**

#### **Recommendation 16**

**The Standing Committee recommends that the *Pesticides Act 1978* be amended to create an offence for inappropriate disposal of a pesticide container.**

#### **4.2.5.3 Intentional or negligent pesticide use or disposal resulting in actual or potential harm to persons or property**

The main focus of the discussion paper concerning the offence for deliberate or negligent use of pesticides resulting in harm to people or property is to deal with

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<sup>34</sup> Submission No.37, No.46, Mr Roby, p.4, referring to the Richmond Catchment Management Committee, Empty Chemical Container Collection Project results.

<sup>35</sup> Evidence of Mr Howat, Nufarm Australia Ltd, 26 July 1999, p.187.

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off-target damage.<sup>36</sup> As a degree of intention is required (similar to the current s.37), it is intended that this is a more serious offence attracting a higher penalty than where no intention is required. An offender will be required to prove that “all reasonable precautions” were taken to avoid harm.

A joint submission by environmental groups suggested clear guidance on what “reasonable precautions” should entail by stating that,

... ‘reasonable precautions’ must be given a minimum set of factors which must be considered by all those using pesticides and not be left at the general description of ‘proper and reasonable pesticide application’.

It must be stated in the Act that as a minimum requirement, weather conditions, the proximity of people to the spray area, methods of application to avoid non-target drift, buffer zones, identification of ecologically sensitive areas and occupational health and safety requirements be addressed.<sup>37</sup>

#### **Recommendation 17**

**The Standing Committee recommends that the *Pesticides Act 1978* be amended to create an offence for the intentional or negligent pesticide use or disposal resulting in harm to people or property. (See Recommendations 20 and 22 for discussion of “harm”)**

#### **Recommendation 18**

**The Standing Committee recommends that the NSW Environment Protection Authority, investigate methods to institute an unwanted chemical container disposal system in urban and rural environments.**

#### **4.2.5.4 Intentional or negligent pesticide use or disposal which threatens or harms the environment**

The discussion paper proposed that a person will be in breach of the Act where there was a degree of intention to misuse pesticides resulting in harm to the environment.<sup>38</sup> It would be an offence where “foreseeable harm” to the environment occurred. As a degree of intention is required (similar to the current

<sup>36</sup> Improving Pesticide Management in NSW: Discussion paper, Environment Protection Authority, Item 3.3, p.4.

<sup>37</sup> Submission No.37, No.61, Total Environment Centre, Nature Conservation Council, Inland Rivers Network, Australian Conservation Foundation, National Parks Association and Friends of the Earth, p.3.

<sup>38</sup> Improving Pesticide Management in NSW: Discussion paper, Environment Protection Authority, Item 3.4, p.4.

s.37), it is intended that this is a more serious offence attracting a higher penalty than where no intention is required.

As with the previous provision, an offender will be required to demonstrate that reasonable precautions were taken to prevent harm. Such precautions would include “following proper and responsible pesticide application practice”.

The discussion paper explained that “in framing the offence it needs to be clearly recognised that *some harm to the environment is an unavoidable* consequence of proper and reasonable pesticide application practice” (emphasis added). As indicated by a joint submission from a number of environmental groups<sup>39</sup>, this statement appears prima facie contradictory to the intention of the provision with respect to what is “harm”.

A serious concern raised by a large majority of submissions was the ambiguity and uncertainty of the terms “harm”, “threatens” and “environment”. Presently, the other States or Territories do not have provisions relating to “harm to the environment.”

In relation to the difficulty of defining “harm”, NSW Agriculture expressed that:

It would be inconsistent, for example, to suggest that any human exposure to a pesticide represents harm or risk of harm when standards of pesticide exposure are already set for potable water, for consumption on foodstuffs (MRL’s, ADI’s) or for airborne exposure (workplace exposure guidelines). Similarly, what level of contamination would the EPA suggest was likely to cause harm or risk of harm to the soil biota, native flora or fauna or other environmental compartments.<sup>40</sup>

A submission from NSW Health advised that one Public Health Unit considered that a risk of harm exists when a person’s exposure exceeds international health criteria such as an acceptable daily intake (ADI) or provisional tolerable weekly intake (PTWI). However, other units suggest that the major difficulties in measuring or assessing such exposure to pesticides is that it may only be for a brief time. Acceptable daily intakes and PTWI’s are based on long term, chronic exposure and even if ADI’s and PTWI’s were exceeded for a short period his need not be an indication of “risk of harm”.<sup>41</sup>

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<sup>39</sup> Submission No.37, No.61, Total Environment Centre, Nature Conservation Council, Inland Rivers Network, Australian Conservation Foundation, National Parks Association and Friends of the Earth, p.3.

<sup>40</sup> Submission No.37, No.103 NSW Agriculture, p.3.

<sup>41</sup> Submission No.33, NSW Health, p.5.

A number of submissions called for a “scientifically established” clarification of harm.<sup>42</sup> The NSW Environment Protection Authority in its submission to the Committee recognised the need for a scientific reference point for “harm” where it stated that:

...consideration could be given to a provision that persons may be prosecuted if there is evidence that they have caused excessive pesticide residues in agricultural produce. Excessive residues would be those that exceed maximum residue limits in the National Food Standard Code<sup>43</sup>. A defence could be provided where pesticide users are able to show that they had only used the pesticide according to label or permit directions<sup>44</sup>

To achieve clarity and avoid confusion with respect to the definitions of “harm”, a number of submissions from agricultural groups, NSW Agriculture and Avcare suggest that consideration be given to either the alternative expressions of “injuriously affects” in s.40 of the Victorian *Agricultural And Veterinary Chemicals (Control Of Use) Act 1992* or “adversely affects” in s.30 of the Tasmanian *Agricultural and Veterinary Chemicals (Control of Use) Act 1995*. For example, s.30(1) of the Tasmanian Act states:

30 (1) A person must not carry out or cause to be carried out agricultural spraying which *adversely affects* any person, plants, stock, agricultural produce, water bodies, groundwater or soil, on premises, or any premises, not owned or occupied by the person carrying out or causing to be carried out the agricultural spraying unless that person has obtained the permission of the owner or occupier of premises...

(2) In this section, “adversely affects”, in relation to plants, stock, agricultural produce, water bodies, groundwater or soil on premises, or any premises, means creating a residue of an agricultural chemical product in excess of the prescribed level in, or on the plants, stock, agricultural produce, water bodies, groundwater, soil or premises.

In the corresponding regulation, clause 45(1) of the *Agricultural and Veterinary Chemicals (Control of Use) Regulation 1996*, the “prescribed level of residue which adversely affects” these resources is:

- the Maximum Residue Limit in the case of stock and agricultural produce;
- the Drinking Water Guidelines in the case of water used as or to provide drinking water for stock, other animals and humans;

<sup>42</sup> For example, Submission No.37, No.28, Kevin J Martin & Sons, p.1

<sup>43</sup> The National Food Standards Code is adopted into NSW law under the NSW *Food Act 1989*.

<sup>44</sup> Submission No.37, Environment Protection Authority NSW, Part 2, p.4.

- a level determined by the Registrar<sup>45</sup> for groundwater or soil where a likely contamination of agricultural produce would occur to stock or plants in contact with the soil or groundwater;
- a level determined by the Registrar in the case of premises where it is likely that contamination of agricultural produce might occur from storage, processing or in contact with the premises or where anything on those premises would be rendered unsuitable for its normal use; and
- a level determined by the Registrar for stockfood where a likely contamination of stock fed on that stockfood could result.

Alternatively, the Victorian Act states:

40. (1) A person must not carry out agricultural spraying which injuriously affects-

- (a) any plants or stock outside the target area; or
- (b) any land outside the target area so that growing plants or keeping stock on that land can be reasonably expected to result in the contamination of the stock or of agricultural produce derived from the plants or stock..

(2) It is a defence to a prosecution under sub-section (1)(a) to prove that the plants or stock have no economic value.

However, despite these provisions (and those of Queensland or South Australia), there is no general reference to harm to the “environment” from pesticide misuse. NSW Agriculture is “not convinced” that a workable definition of environment for the purposes of this section was likely.<sup>46</sup>

Neither the discussion paper nor the submission by the NSW Environment Protection Authority seek support for the definition of “harm to the environment” by reference to other pre-existing legislation. Since other jurisdictions do not provide a definition for “harm to the environment” and since consistency in other respects is proposed with the *Protection of the Environment (Operations) Act 1997*, it is presumed that the definition of “harm to the environment” in that Act would apply to the amended *Pesticides Act 1978*. Section 147 of the *Protection of the Environment (Operations) Act 1997* refers to the “Meaning of material harm to the environment” in the context of a duty to notify pollution incidents,

(1) For the purposes of this Part:

(a) harm to the environment is material if:

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<sup>45</sup> The Regulation provides at clause 45(2) that any determination is to be published in the Gazette or newspapers in areas relevant to where a determination by the Registrar is made.

<sup>46</sup> Submission No.37, No.103 NSW Agriculture, p.3.

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- (i) it involves actual or potential harm to the health or safety of human beings or to ecosystems that is not trivial, or
  - (ii) it results in actual or potential loss or property damage of an amount, or amounts in aggregate, exceeding \$10,000 (or such other amount as is prescribed by the regulations), and
  - (b) loss includes the reasonable costs and expenses that would be incurred in taking all reasonable and practicable measures to prevent, mitigate or make good harm to the environment.
- (2) For the purposes of this Part, it does not matter that harm to the environment is caused only in the premises where the pollution incident occurs.

The definitions to Schedule 1 in the *Protection of the Environment (Operations) Act 1997* provide,

In this Act:...

harm to the environment includes any direct or indirect alteration of the environment that has the effect of degrading the environment and, without limiting the generality of the above, includes any act or omission that results in pollution.

In its response to concern raised about the term “environment” through its public consultation process, the NSW Environment Protection Authority attempted to provide a clarification of “environment” for the purposes of the Act in its submission to the Committee. The Authority’s submission stated that it could, for example, exclude air, water or noise pollution as these mediums are already protected under the *Protection of the Environment (Operations) Act 1997*.<sup>47</sup> Additionally, the environment “outside the property boundaries” in which the pesticide is applied would be protected, so that “off-property” harm by a pesticide application would be an offence. However, “within the boundaries of the target property” on which the pesticide is applied, only the harm caused deliberately or negligently to threatened species and critical habitat defined under the *Threatened Species Conservation Act 1995*, and other resident or migrating fauna could be an offence. It may be an offence if reasonable practical measures could have been taken to prevent harm.

An example provided by the NSW Environment Protection Authority in this instance is where an insecticide applied to a field, kills non-target pests, this would not be an offence as there was no reasonable practical measure which could be taken to prevent this harm. If however, the insecticide harms birds that were clearly present and feeding, then practical measures could have been, but were not taken to avoid the harm.<sup>48</sup>

<sup>47</sup> Submission No.37, Environment Protection Authority NSW, Part 2, p.5.

<sup>48</sup> Submission No.37, Environment Protection Authority NSW, Part 2, p.5.

It was submitted by Avcare, that despite the intentions of the discussion paper to deal with pesticide misuse consistent with other jurisdictions,<sup>49</sup> the NSW Environment Protection Authority proposals in their totality go beyond any other Australian legislation in creating penalties for environmental and other damage arising from pesticide misuse.<sup>50</sup> Avcare submits that, although the discussion paper seeks consistency with the *Clean Waters Act* and the *Waste Minimisation and Management Act*, it is the objective of those Acts to protect certain aspects of the environment and not regulate the use of products that can cause damage. Accordingly, as it is the objective of the *Pesticides Act 1978* to control use of products that can potentially cause damage, the objectives are different and should not be confused.<sup>51</sup>

A further concern raised in submissions was that the provision for the protection of the environment does not duplicate or overlap other environmental laws. To address this concern, the NSW Environment Protection Authority will address issues such as providing an exemption from the *Pesticides Act 1978* where a person holds a license under another environmental instrument which permits activities which may harm the environment.<sup>52</sup>

The Standing Committee considers the impact of pesticide exposure on human health is more severe on children and that special consideration should be given accordingly within the definition of harm.

### **Recommendation 19**

**The Standing Committee recommends that the *Pesticides Act 1978* be amended to create an offence for the intentional or negligent pesticide use or disposal that threatens or harms the environment.**

### **Recommendation 20**

**The Standing Committee recommends that clear and unambiguous definitions be provided for the words “harm” and “environment” in the *Pesticides Act 1978*.**

### **Recommendation 21**

**The Standing Committee recommends that the *Pesticides Act 1978* reflect the greater sensitivity of children to pesticide exposure within the definition of harm.**

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<sup>49</sup> Improving Pesticide Management in NSW: Discussion paper, Environment Protection Authority, Item 3, p.3.

<sup>50</sup> Submission No.40, Avcare, Appendix 5, p.3.

<sup>51</sup> Submission No.20, Avcare, Appendix 5, p.1.

<sup>52</sup> Submission No.37, Environment Protection Authority NSW, Part 2, p.5.

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**Recommendation 22**

The Standing Committee recommends that in defining the concepts of “harm” and “harm to the environment”, the NSW Environment Protection Authority consider relevant provisions in the Tasmanian *Agricultural and Veterinary Chemicals (Control of Use) Act 1995*, the Victorian *Agricultural And Veterinary Chemicals (Control Of Use) Act 1992* and the New South Wales *Protection of the Environment (Operations) Act 1997*.

**4.2.6 Penalty provisions**

The current penalty provisions in the *Pesticides Act 1978* for serious pesticide misuse, being failure to follow the label (s.33) or wilfully causing risk of injury (s.37) impose a fine of \$22,000 (200 penalty units) for an individual, or \$44,000 (400 penalty units) for a corporation.

The discussion paper proposes two levels of penalties based on whether there was a failure to follow the label or unintentionally causing harm (see 3.2.5.1 and 3.2.5.2), or where there is an intentional or negligent action causing actual or risk of harm or damage (3.2.5.3 and 3.2.5.4).<sup>53</sup> The current penalty under s.37 for wilful or careless misuse would be retained for the proposed lesser unintentional offences being a maximum of \$44,000 for corporations and \$22,000 for individuals. The more serious offences with intent would be in line with Tier 2 offences under the *Environmental Offences and Penalties Act 1989*, being \$60,000 for individuals and \$125,000 for corporations.

Since the release of the discussion paper, the *Protection of the Environment (Operations) Act 1997* was passed which includes substantial increases in penalties for environmental offences to enhance the deterrent value. The equivalent Tier 2 offences carry a maximum penalty of \$120,000 for individuals and \$250,000 for corporations.

In response to this, the NSW Environment Protection Authority in its submission to the Committee, proposed that another option be considered regarding penalty levels to reflect the new legislation. The submission contends,

Failure to institute penalties in the *Pesticides Act* that are more in accordance with the *Protection of the Environment (Operations) Act 1997* would mean that agricultural producers would be subject to substantially different levels of penalties for environmental offences depending on the aspect of their operations caused the problem. It

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<sup>53</sup> Improving Pesticide Management in NSW: Discussion paper, Environment Protection Authority, Item 3.6, p.5.

could also be inferred that pesticide misuse is a less serious environmental issue.<sup>54</sup>

The NSW Environment Protection Authority further states that while the more serious offence would apply to intentional or negligent harm, the less serious offence for unintentional harm or failure to follow the label could be set at a correspondingly lower level of \$60,000 for individuals and \$120,000 for corporations. There is no equivalent provision to this in the *Protection of the Environment (Operations) Act 1997*.

A significant number of submissions received from agriculture industry groups expressed concern with respect to penalty levels and requested that consideration be given to situations where a “corporation” may be a small family owned business trading under a corporate name and not a large corporation (both of which are subject to the same maximum penalty). Industry groups also argued that it would not be equitable to penalise family businesses at a penalty commensurate with corporations because they generally have fewer resources.<sup>55</sup> All Members of the Standing Committee expressed concern that the Court take into account the financial position of families and family owned corporations when issuing penalties for corporations.

One submission from Dow AgroSciences suggested that offence penalties should be reduced significantly where the offender makes a voluntary disclosure about the problem or demonstrably cooperates with officials. It is argued that this would decrease cover-up behaviour and provide for a more efficient management of incidents.<sup>56</sup>

The courts generally give due consideration to such matters as admission of guilt and ability to pay penalties. The establishment of a “maximum” level provides judicial discretion to impose a penalty far less if necessary in the circumstances presented. The Standing Committee recognises the requirement for a stronger deterrent to potential offenders and that agricultural producers should be subject to penalty levels for environmental offences consistent with offenders under other legislation.

### Recommendation 23

**The Standing Committee recommends that the penalties for serious breaches of the *Pesticides Act 1978* be amended to introduce penalty levels consistent with the *Protection of the Environment (Operations) Act 1997*.**

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<sup>54</sup> Submission No.37, Environment Protection Authority NSW, Part 2, p.8.

<sup>55</sup> For example, Submission No.37, No.83, Macquarie River Food & Fibre, p.1; Submission No. 17, NSW Farmers’ Association, Appendix A, p.6.

<sup>56</sup> Submission No.9, Dow AgroSciences, p.7; citing M. Mortimer, “Queensland Department of Environment and Heritage Directions in Setting and Enforcing Water Quality Standards”, 30 May 1995.

## 4.2.7 Minor offences

### 4.2.7.1 Local Court imposed penalties

Where minor breaches currently occur under the *Pesticides Act 1978*, a prosecution must be lodged in a Local Court pursuant to s.59 of the Act. The maximum penalty a local court may impose for an offence is \$5,500 (s.59(1A)).

The introduction of the *Protection of the Environment (Operations) Act 1997* has heralded maximum fines that may be imposed by a Local Court of \$11,000 (s.215(2)). The NSW Environment Protection Authority's submission to the Committee contends that to maintain consistency with that Act, the penalty should be increased accordingly.<sup>57</sup>

#### Recommendation 24

**The Standing Committee recommends that the *Pesticides Act 1978* be amended so that maximum penalties for minor offences imposed by a Local Court are consistent with the relevant provision under the *Protection of the Environment (Operations) Act 1997*.**

### 4.2.7.2 Penalty infringement notices

Currently, the *Pesticides Act 1978* does not provide for enforcement measures other than prosecution. Where a minor offence does not justify court time, the discussion paper advocates the option to issue penalty notices as used for Tier 3 offences under the *Environmental Offences and Penalties Act 1989*<sup>58</sup> with a maximum penalty of \$600. The introduction of the *Protection of the Environment (Operations) Act 1997* also made available to authorised officers, the ability to issue penalty notices with a maximum fine of \$1,500.<sup>59</sup> The *EPA Prosecution Guidelines* identifies offences liable for issue of penalty notices. These Guidelines may be applicable under the *Pesticides Act 1978* in the following instances:

- failing to read instructions on a label;
- using a pesticide contrary to a label;
- using an unregistered pesticide;
- failing to comply with a pesticide order;
- making prohibited claims about a pesticide;
- failing to comply with a direction of an inspector;

<sup>57</sup> Submission No.37, Environment Protection Authority NSW, Part 2, p.8.

<sup>58</sup> Improving Pesticide Management in NSW: Discussion paper, Environment Protection Authority, Item 3.8, p.6.

<sup>59</sup> Section 222; the offences are listed in Schedule 1 to the *Protection of the Environment Operations (Penalty Notices) Regulation 1999*.

- storing a pesticide other than in a container that bears the registered label; and
- failing to comply with a compliance notice.

The NSW Environment Protection Authority's submission contends that penalty infringement notices save time, avoid legal costs and no criminal conviction is recorded. Further, those aggrieved with being issued a penalty infringement notices may elect to have the matter heard in a court.<sup>60</sup>

A number of submissions from environmental groups, grower industry groups and an agronomist raised concerns with the amount and types of offences categorised as minor particularly with respect to use of an unregistered pesticide.<sup>61</sup>

The NSW Environment Protection Authority discussion paper proposed to delegate the power to issue penalty notices to other public authorities such as local councils after further consultation. The majority of submissions received including industry, environment and community groups were opposed to the delegation of the NSW Environment Protection Authority's power. The submissions indicated the concerned that local authorities may not possess the expertise nor be in a position to exercise powers impartially where conflicts of interest may occur within local government.<sup>62</sup>

During the NSW Environment Protection Authority's own consultation process, it was noted that a "strong opposition" was expressed to the delegation of the NSW Environment Protection Authority's power. Accordingly, the NSW Environment Protection Authority has acknowledged that it will limit consideration of the power to issue penalty infringement notices to the NSW Environment Protection Authority only.<sup>63</sup>

The Standing Committee recognises that an additional enforcement tool is required where administrative expedience outweighs the gravity of the offence. The Standing Committee concurs with the view that the issue of penalty notices should be undertaken by a designated officer of the NSW Environment Protection Authority.

### Recommendation 25

**The Standing Committee recommends that the *Pesticides Act 1978* be amended to introduce a system of penalty infringement notices that are clearly defined from offences applicable for serious pesticide misuse. For example, failure to read instructions on a label may draw an offence under both provisions.**

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<sup>60</sup> Submission No.37, Environment Protection Authority NSW, Part 2, p.9.

<sup>61</sup> For example, Submission No. 25, Cotton Consultants Australia, p.2; Submission No.37, No.26, Gunnedah Chemical Liaison Committee, p.3.

<sup>62</sup> For example, Submission No. 17, NSW Farmers' Association, Appendix A, p.7

<sup>63</sup> Submission No.37, Environment Protection Authority NSW, Part 2, p.9.

### 4.2.7.3 Non-punitive options

Many submissions across all sectors raised the need for not only punitive provisions but also for the option of other non-monetary penalties. Such provision would empower the courts to deliver more appropriate penalties with greater flexibility.

Options that may be considered include:

- compulsory training and education of users;
- requirement to conduct an environmental audit;
- requirement to implement measures or activities to remediate occurrences of environmental harm; and
- pay reasonable remediation costs and expenses incurred by a public authority.

It is recognised across all stakeholder groups that appropriate training is the most effective preventative mechanism for reducing pesticide misuse. Some submissions expressed surprise that given the proposed stricter penalties, that this is not backed by suitable education programs<sup>64</sup> (refer to section 3.4 regarding education and training).

#### Recommendation 26

**The Standing Committee recommends that the *Pesticides Act 1978* be amended to provide the NSW Environment Protection Authority and Local Courts with discretionary powers to compel an offender, where appropriate, to undertake penalty measures such as education or remediation in addition to, or instead of fines.**

### 4.2.8 Sentencing guidelines

The *Pesticides Act 1978* does not currently provide guidelines to the Court on matters to consider for determining penalties.<sup>65</sup> The discussion paper indicates that as a result, low penalties have been imposed for serious misuse of pesticides.<sup>66</sup>

Accordingly, the discussion paper proposes to alleviate this issue by enacting a provision similar to the *Environmental Offences and Penalties Act 1989*, where the following matters may be considered be a Court:

- the harm or likely harm caused to a person or the environment, or damage or likely damage caused to a person's property;

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<sup>64</sup> See for example, Submission No.40, Avicare, Appendix 5, p.2.

<sup>65</sup> Part 3, Division 2 of the *Pesticides Act 1978* only provides prosecution guidelines.

<sup>66</sup> Improving Pesticide Management in NSW: Discussion paper, Environment Protection Authority, Item 3.7, p.6.

- practical measures that may have been taken to prevent, control, abate or mitigate that harm;
- the reasonable foreseeability of the harm that was or could be caused;
- the extent to which the person charged had control over the commission of the offence; and
- whether the person who committed the offence had complied with the order of an employer or supervisor.

The introduction of the *Protection of the Environment (Operations) Act 1997* has not changed the matters to be considered by a court in imposing a penalty.<sup>67</sup>

In addition, the Standing Committee supports the need to consider children's health in the proposed guidelines. In imposing penalties, consideration should be given to offences that are committed where children are "reasonably expected" to be present.

### **Recommendation 27**

**The Standing Committee recommends that the *Pesticides Act 1978* be amended to provide guidelines to the courts on matters to consider for determining penalties.**

## **4.2.9 Pesticide orders and compliance notices**

### **4.2.9.1 Pesticide orders**

The current *Pesticides Act 1978* confers significant powers on the Registrar of Pesticides to make orders to control the application of pesticides and fertilisers by aircraft (ss.49A – 49E). There are no similar provisions specifically relating to orders over pesticide application on the ground.<sup>68</sup>

To remedy the situation, the discussion paper proposes to clarify the powers of the Registrar to make orders relating to the manner of use of a pesticide for both ground and aerial applications.<sup>69</sup> It is proposed that an order would be made in the following circumstances where it would prevent:

- danger to health of the public;
- undue risk to the environment;
- damage to property; and
- adverse effect on the trade of agricultural produce.

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<sup>67</sup> Section 241.

<sup>68</sup> There is a general power to make "pesticide orders" under ss.26-28.

<sup>69</sup> Improving Pesticide Management in NSW: Discussion paper, Environment Protection Authority, Item 3.9, p.7.

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Before any order is made, the NSW Environment Protection Authority may be required to consult with a Pesticide Advisory Committee and where appropriate seek wider community advice.<sup>70</sup> Orders would be introduced statewide or regionally through the formal gazettal process following consent of the Minister. The orders would not be applied specifically to individuals or properties.

The discussion paper identifies one such order as permitting the use of pesticides at a lower concentration, lower application rate, or at less frequent intervals than specified on the label unless specifically precluded by directions on the label (refer to section 4.2.5.1). However, as stated earlier, the discussion paper also explains that there will be no intention for orders to duplicate or overrule the responsibilities of the National Registration Authority in setting nationally consistent controls on labelling. A submission from the Cooperative Research Centre for Weed Management Systems, contended that it is possible to vary optimal dosage rates depending upon growing and environmental conditions. It is argued that this has the significant benefits of reducing costs, reducing residues and extending the commercial life of herbicides by reducing the selection pressure for herbicide resistance.<sup>71</sup>

NSW Health expressed concern however, that permitting lower concentration rates will in effect conflict with the powers of the National Registration Authority as it is not only charged with responsibility for setting nationally consistent controls on directions on labels, but also ensures efficacy of the pesticide when used according to label instructions. The submission queries whether the Registrar would consult with the National Registration Authority and chemical companies before making orders.<sup>72</sup>

The Australian Beef Association submitted that specific conditions under which aerial or ground spraying should take place should be implemented as a pesticide order. This includes conditions such as wind velocity, humidity, temperature and droplet size.<sup>73</sup>

#### **Recommendation 28**

**The Standing Committee recommends that the *Pesticides Act 1978* be amended to empower the NSW Environment Protection Authority, through pesticide orders, to control ground based application of pesticides.**

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<sup>70</sup> Submission No.37, Environment Protection Authority NSW, Part 2, p.10.

<sup>71</sup> Submission No.58, Cooperative Research Centre for Weed Management Systems, pp.5-7.

<sup>72</sup> Submission No.37, No.111, NSW Health, p.2.

<sup>73</sup> Submission No.34, Australian Beef Association, p.2.

#### 4.2.9.2 Compliance notices

While pesticide orders have a broader focus, a provision for site specific compliance notices is also proposed where urgent action is required to prevent harm or clean up contamination from pesticides. The *Pesticides Act 1978* does not currently provide the NSW Environment Protection Authority with power to issue compliance notices to individuals or properties. The discussion paper proposes to confer power on the NSW Environment Protection Authority to issue compliance notices requiring action to<sup>74</sup>:

- prevent, prohibit or cease an activity which, if it is allowed to proceed would be likely to harm people, property or the environment; or
- clean up contamination caused by pesticide use.

Examples of situations where a notice would be issued include:

- where an unregistered pesticide is being used or a pesticide is being applied contrary to the label;
- where faulty equipment needs to be fixed or re-calibrated;
- where a pesticide is used in unsafe circumstances (eg. high winds or sensitive sites) – a notice could place time or other restrictions on spray operations;
- where pesticides have been used or stored in a potentially harmful way.

It is proposed that there would be rights of appeal against a notice except for notices requiring clean up action or where urgent action is required to prevent harm.

Part 4 of the *Protection of the Environment (Operations) Act 1997* provides for various “environment protection notices” which cover clean-up, prevention and prohibition actions. In its submission to the Standing Committee, the NSW Environment Protection Authority considered that a similar provision could be inserted in the *Pesticides Act 1978* in terms of the scope of such notices and the constraints on the NSW Environment Protection Authority. A notice could be applied where the NSW Environment Protection Authority “reasonably suspects” that the manner in which the activity is carried out could cause a risk of harm to health, property, the environment and trade.

#### Recommendation 29

**The Standing Committee recommends that the *Pesticides Act 1978* be amended to empower the NSW Environment Protection Authority to issue site specific compliance notices where urgent action is required to prevent harm and/or remediate contamination from pesticides.**

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<sup>74</sup> Improving Pesticide Management in NSW: Discussion paper, Environment Protection Authority, Item 3.9, pp.7-8.

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#### 4.2.10 Banning use of unsuitable aircraft

The *Pesticides Act 1978* does not expressly prohibit the use of aircraft that are not endorsed for use by the Civil Aviation Safety Authority Australia. The discussion paper advocates prohibiting the use of any aircraft for agricultural spraying that is not endorsed for spraying by Civil Aviation Safety Authority Australia.<sup>75</sup> The offence would include attaching spray equipment to prohibited aircraft also. The amendment would leave Civil Aviation Safety Authority Australia with responsibility for determining the suitability of aircraft.

A specific target of the proposed provisions is to prevent the use of ultra light aircraft. The discussion paper claims that such aircraft are unstable and can contribute excessively to spray drift.

Submissions received by the Standing Committee revealed quite disparate views regarding the banning of ultralight aircraft use. Submissions in favour of the ban, particularly from environmental groups and aerial operators expressed concern at the danger such aircraft present with respect to air safety and spray drift and that regulation of aircraft suitability should remain with Civil Aviation Safety Authority Australia.

Agricultural industry groups and ultralight operators on the whole suggested that in appropriate weather conditions for spraying, an ultralight can perform in a competent, responsible and cost effective manner. It was argued that the NSW Environment Protection Authority should be more concerned with the efficacy of application rather than the type of aircraft used. Specifically, the Ricegrowers Association submitted that banning non-endorsed aircraft would constrain innovation in application techniques and that:

The intention [of the Act] should not be to restrict application methods but to ensure that the operator is competent. Therefore aircraft should not be treated separately from other ground-based application methods.<sup>76</sup>

The Standing Committee appreciates the need to not only ensure the safety of pesticide application methods but also that widely varying views have been advanced regarding their use. Further investigation should be conducted by the NSW Environment Protection Authority before a final decision is made.

The Standing Committee expressed the concern that ultra light aircraft retro fitted with pesticide application equipment are not operating in accordance with aircraft manufacturing design.

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<sup>75</sup> Improving Pesticide Management in NSW: Discussion paper, Environment Protection Authority, Item 3.5, p.5.

<sup>76</sup> Submission No. 37, No.105, Ricegrowers' Association of Australia, p.2.

### Recommendation 30

The Standing Committee recommends that aircraft used for aerial spraying purposes must be accredited by the Civil Aviation Safety Authority of Australia as suitable for aerial spraying purposes. Further, that the Civil Aviation Safety Authority of Australia conduct a comprehensive consultation process to evaluate the suitability of aircraft such as ultra light aircraft for pesticide application.

## 4.2.11 Pesticide licenses

### 4.2.11.1 Ongoing licences

The changes proposed to licensing arrangements are of administrative and not substantive concern. Presently, if there is a need to vary the conditions of a pesticide license issued to a pilot or aerial operator, it must be cancelled under s.22N and reissued under s.22F. The discussion paper proposes to allow for ongoing licences where amendments to the conditions of a licence may be made without cancellation of the licence.<sup>77</sup> It is also proposed to introduce appeal provisions for licensees and applicants for licences.

### 4.2.11.2 Approaches to Licensing

Three approaches to licensing of pesticide applicators exist within the New South Wales pesticide industry. Firstly, urban pest and weed control contractors are licensed by the WorkCover Authority of NSW. Under the *Occupational Health and Safety Act 1983*, the WorkCover Authority of NSW administers the *Hazardous Substances Regulation 1996*.<sup>78</sup> WorkCover Authority of NSW licences apply to urban pest control and non-agricultural fumigation procedures.<sup>79</sup>

Secondly, ground-based agricultural pesticide applicators are not required to be licensed.<sup>80</sup> Thirdly, aerial agricultural pesticide applicators are licensed by the NSW Environment Protection Authority. In all other Australian States Public Health Departments administer urban pest control licensing while the Agriculture (Primary Industry) Departments administer agricultural pest and weed control licensing.<sup>81</sup> Queensland and Victoria have made the carrying of Public Liability Insurance compulsory as part of pesticides licensing.<sup>82</sup>

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<sup>77</sup> Improving Pesticide Management in NSW: Discussion paper, Environment Protection Authority, Item 4.1, p.8.

<sup>78</sup> Submission No 2, Additional, WorkCover, p.1.

<sup>79</sup> Submission No 2, Additional, WorkCover, p.2.

<sup>80</sup> Submission No 28, Rapid Solutions, p. 4.

<sup>81</sup> Submission No 28, Rapid Solutions, p.5.

<sup>82</sup> Submission No 28, Rapid Solutions, p.5.

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Mr Graham Hellier, of Rapid Solutions, Pest and Weed Control Contractors, in his submission supported the licensing of all pesticide applicators:

Clearly there is a very good reason to license Agricultural Contractors as occurs in all other states.<sup>83</sup>

#### 4.2.11.3 Licensing of urban pest applicators

Rather than splitting the licensing of pesticides between Health and Agriculture, as is done in other states at present, it may be more efficient to place responsibility for licensing with one organisation.

A number of urban pest control companies and a major industry body, the Australian Environmental Pest Managers Association (NSW Branch), recommended the transfer of responsibility for licensing urban pest and weed controllers from the WorkCover Authority of NSW to the NSW Department of Health. Mr Brian Inall, Chairman of the Australian Environmental Pest Managers Association (NSW Branch) stated:

In relation to the administration of pest control licensing, we believe that WorkCover is not the appropriate regulatory authority. We believe that not from the point of view that we are dissatisfied with WorkCover's administration..WorkCover cannot ensure public health best practice it is out of WorkCover's bailiwick and urban pest control works basically hand in hand with public health or in the pursuit of public health objectives.

In relation to national consistency, all other major States are administered by public health authorities, and we feel that, in pursuit of national consistency, that would be a sensible thing to do. This is why we are recommending that licensing in New South Wales be administered by public health, to facilitate compliance with public health best practice.<sup>84</sup>

The Standing Committee acknowledges that a greater consistency in the approach to licensing and administrative efficiencies are likely if the administrative responsibility for licensing all pesticide applicators in New South Wales resided with one State government agency. The Standing Committee considers that the NSW Environment Protection Authority would more appropriately manage the WorkCover Authority of NSW's licensing responsibilities for urban pest and weed controllers. Reasons to substantiate this view relate firstly to the organisational

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<sup>83</sup> Submission No 28, Rapid Solutions, p.4.

<sup>84</sup> Evidence of Mr Inall, Australian Environmental Pest Managers Association (NSW Branch), 5 August 1999, p.394.

focus of NSW Department of Health. The Department is largely Area Health Service based with a degree of autonomy between Area Health Units that may not provide for a coordinated, centralised and consistency approach to pesticide applicator licensing. Secondly aerial agricultural pesticide applicators are already licensed by the NSW Environment Protection Authority, which enables greater consistency in licensing of urban and rural pesticide applicators through administration by one government agency. Thirdly administrative efficiencies and set up costs can be avoided by devolving licensing to the NSW Environment Protection Authority that already has a licensing framework established.

### Recommendation 31

**The Standing Committee recommends that WorkCover Authority of NSW's administrative responsibility for licensing of urban pest and weed controllers be transferred to the NSW Environment Protection Authority. The transfer should not only include the transfer of responsibility from WorkCover Authority of NSW to the NSW Environment Protection Authority but also the corresponding resources including funding, persons or positions, records and data needed to maintain existing responsibilities.**

## 4.2.12 Prosecutions

### 4.2.12.1 Environment Protection Authority powers

Under s. 59 of the *Pesticides Act 1978*, the consent of the Minister is required before a prosecution may proceed. The discussion paper proposes that proceedings under the *Pesticides Act 1978* should be undertaken with the consent of the NSW Environment Protection Authority, in accordance with the principle in the *Protection of the Environment Administration Act 1991*, that the prosecution process should be independent of Ministerial direction<sup>85</sup>

A few submissions received, including one from the NSW Farmers' Association argued that the responsibility of the Minister should not be delegated:

It is the Parliament which is responsible for the legislative process, not their supporting Departments. Minister's responsible for the implementation of regulations also require feedback first hand, on whether or not a piece of legislation is achieving the desired result.<sup>86</sup>

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<sup>85</sup> Improving Pesticide Management in NSW: Discussion paper, Environment Protection Authority, Item 4.2, p.8.

<sup>86</sup> Submission No. 17, NSW Farmers' Association, Appendix A, p.8.

#### 4.2.12.2 Third party standing - prosecutions

An issue not canvassed in the discussion paper but which received prominence in submissions from both environment and industry groups was the right for third parties to commence prosecutions as is permitted under s.219 of the *Protection of the Environment (Operations) Act 1997*.<sup>87</sup> A number of industry groups expressed concern regarding vexatious complainants that would seriously undermine community confidence in the regulation of pesticide use.

The Act permits third parties to institute proceedings for an offence with the leave of the Land and Environment Court. The Court however will not grant leave unless it is satisfied that:

- the NSW Environment Protection Authority has decided not to take any relevant action or has not made a decision on whether to take such action within 90 days after the person requested the NSW Environment Protection Authority to institute the proceedings, and
- the NSW Environment Protection Authority has been notified of the proceedings, and
- the proceedings are not an abuse of the process of the Court, and
- the particulars of the offence disclose a prima facie case of the commission of the offence.

A number of submissions supported a third party complaint mechanism where the NSW Environment Protection Authority would commence action in response to a complaint where necessary.<sup>88</sup> In correspondence to the Standing Committee, the NSW Farmers Association stated that there were two main factors why the NSW Environment Protection Authority should not be able to launch prosecutions independent of Ministerial direction:

The first is that this is a procedure...that is common in other legislation (such as Prevention of Cruelty to Animals Act) and acts as a discipline on Departments to prevent Ministerial embarrassment. In its absence, the potential exists for somewhat questionable prosecutions to be launched by the EPA that fail, leading to questions about the legislation, and the competence of the Minister and the Department.

The second factor is the propensity for staff within the EPA to initiate prosecutions in a vindictive fashion, where the prosecution is based more on a clash of personalities than on the substance of an alleged breach. If Ministerial approval is not required before a

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<sup>87</sup> For example, Submission No.37, No.106, Richard Jones MLC, p.2.

<sup>88</sup> For example, Submission No.37, No.26, Gunnedah Chemical Liaison Committee, p.4.

prosecution is launched, there is a much greater degree of power transferred to ground-level inspectorial staff.<sup>89</sup>

In light of the critical prerequisites to initiating a third party prosecution and the judicial consideration required by the Land and Environment Court, it is unlikely vexatious complaints would succeed.

#### **4.2.12.3 Third party standing – restraint of breach or potential breach**

The powers of third parties to initiate proceedings to restrain a breach or potential by pesticide users was not raised in the discussion paper but was also the subject of a significant number of submissions from environment and industry groups.

There is currently no expressed third party standing in the *Pesticides Act 1978*. Other environmental legislation including ss.252 and 253 of the *Protection of the Environment (Operations) Act 1997* include injunction powers for either an alleged breach of the Act (or regulations) or in relation to harm to the environment.

In support of such a provision, the NSW Environment Protection Authority has stated:

Community conflict over pesticide use is a major issue particularly in rural NSW, and this ongoing conflict is a significant drain on public resources. Explicit provision for open standing to restrain a breach of the Act would give those members of the community who are dissatisfied with specific lack of compliance with the Act by pesticide users with a mechanism to bring their grievance before the Court.<sup>90</sup>

As with third party prosecutions, concerns were raised by a number of agricultural industry submissions concerning economic loss resulting from vexatious claims by disgruntled members of the community.<sup>91</sup> In addressing these concerns, the NSW Environment Protection Authority has stated that:

To the extent that all applicants would be required to provide rigorous evidence to the Court in order for their claim to succeed and be prepared to pay damages for losses incurred by the other party if their case is unsuccessful, vexatious actions would be discouraged.<sup>92</sup>

The NSW Farmers' Association opposes the provision of third party restraint powers. In correspondence to the Standing Committee, the Association stated:

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<sup>89</sup> Tabled document, NSW Farmers, dated 19 September 1999.

<sup>90</sup> Submission No.37, Environment Protection Authority NSW, Part 2, p.12.

<sup>91</sup> Submission No.37, No.91, Mr Haynes, p.1

<sup>92</sup> Submission No.37, Environment Protection Authority NSW, Part 2, p.12.

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While it may be proposed that the initiator of the restraint order would be required to pay compensation, the practical reality of such arrangements seriously disadvantages landholders. Firstly experience in other jurisdictions has shown that the potential threat of a restraint order can be as damaging to a landholder as the reality.

Secondly, activist groups intent on stopping what is otherwise a legal activity have in the past ensured that the restraint proceedings are initiated by an individual with no assets, or by someone who is prepared to use bankruptcy proceedings to avoid paying any subsequent damages. It is also important to bear in mind that damages...may amount to millions of dollars, and even if the individual who launched the prosecution had the assets, the awarding of damages can be a long, drawn-out process that would provide little immediate recompense to farmers.<sup>93</sup>

It is the view of the NSW Environment Protection Authority that even if the provision were not actually used, it would encourage a more conciliatory approach to conflicts and may assist in resolving long-standing disputes. The third party powers would nevertheless allow for “test” cases to come forward where the NSW Environment Protection Authority has not considered prosecution or where restraint is warranted.<sup>94</sup>

Third party standing for restraining breaches or potential breaches of environmental legislation has existed since the enactment of the *Environmental Offences and Penalties Act 1989*. Provisions under this Act establish two safeguards against vexatious complaints. The first being that the claimant must satisfy the Court that a breach of the *Environmental Offences and Penalties Act 1989* has occurred in a preliminary hearing prior to a defendant being summoned. Secondly the Court may require the claimant to undertake an agreement to pay for damages if the claim is not proven, prior to imposing an injunction. The NSW Environment Protection Authority has advised that only 4 injunctions have been imposed to restrain a breach of the *Environmental Offences and Penalties Act 1989* since the Act’s inception.<sup>95</sup>

### 4.2.13 Ministerial Powers

Currently, decision making powers with respect to fee variations, insurance approvals, appointment of inspectors, suspensions of licences, appeals, delegation of powers and approvals for destruction of pesticides reside with the Minister. The

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<sup>93</sup> Tabled document, NSW Farmers, dated 19 September 1999.

<sup>94</sup> Submission No.37, Environment Protection Authority NSW, Part 2, p.12.

<sup>95</sup> Correspondence of NSW Environment Protection Authority, 20 September 1999.

discussion paper argues that these are mostly administrative matters that are more appropriately administered by the NSW Environment Protection Authority.<sup>96</sup>

#### 4.2.14 Powers of inspectors

The *Pesticides Act 1978* confers extensive powers to inspectors for entry, search and seizure under ss.53-55 and 72. Section 54 contains a penalty of \$5,000 for obstructing an inspector from entering a property and making inquiries and s.55 imposes a \$2,000 penalty for failure for an accused to provide identification and address.

The discussion paper argues that stronger powers are required by pesticide inspectors to enable them to perform their duties more effectively.<sup>97</sup> It advocates that similar powers should be given to inspectors as those powers conferred on inspectors in other areas under the NSW Environment Protection Authority's jurisdiction, including the *Waste Minimisation and Management Act 1985* and the *Pollution Control Act 1970*.

Additional powers the discussion paper advocated include allowing inspectors to:

- use reasonable force with the aid of police;
- detain certain articles and substances without actual removal from the identified property;
- make relevant enquiries to ensure compliance with the Act;

Presently, if a person is required under s.53(5) to provide information that may incriminate them, the information cannot later be used in any proceedings against them. There is currently no penalty attached for failure to answer questions in this respect. The discussion paper proposes to create an offence for failure to answer questions of inspectors after they are informed that it is an offence for failing to answer. The privilege from self-incrimination would remain.

This proposed amendment prompted serious concerns from a number of submissions regarding whether the powers of inspectors would exceed those of police. In particular, suggestions were made that a person should have the right to seek legal advice as would occur in a normal criminal matter.<sup>98</sup> The Roads and Traffic Authority sought clarification that power of entry will not be exercised prior to written notice being given and suggested that inspectors comply with the provisions of the *Search Warrants Act 1985*.<sup>99</sup>

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<sup>96</sup> Improving Pesticide Management in NSW: Discussion paper, Environment Protection Authority, Item 4.2, p.8.

<sup>97</sup> Improving Pesticide Management in NSW: Discussion paper, Environment Protection Authority, Item 4.3, p.9.

<sup>98</sup> Submission No.37, No.21, Mr Hamparsum, p.1

<sup>99</sup> Submission No.37, No.100 Roads and Traffic Authority, p.1.

In relation to this concern, s. 53(1) of the *Pesticides Act 1978* already empowers inspectors to enter any place except a dwelling-house (unless imminent danger to a persons health is suspected) without the need for a search warrant or a police officer present. If required to enter a dwelling-house on reasonable grounds that a breach of the Act may occur, or has occurred, s.72 of the Act requires an inspector to apply for a search warrant and in that instance an inspector must be accompanied by a police officer.

The proposal to empower inspectors to use reasonable force with the aid of police is to facilitate an inspector's duties where an offender impedes an investigation, for example the ability to enter premises where a gate may be deliberately locked. As the presence of a police officer is required in such situations, an independent party is present and therefore inspector powers would not exceed police powers.

It is also proposed to extend the length of time seized property may be held by the NSW Environment Protection Authority from 6 months (s.62) to 12 months or until conclusion of proceedings. It is intended to permit a Local Court to not only extend the seizure period but to also order the return of the property to the owner upon application. This would provide seizure powers consistent with those in the *Stock Medicines Act 1989* and the *National Parks and Wildlife Act 1974*.

With the introduction of the *Protection of the Environment (Operations) Act 1997*, the NSW Environment Protection Authority submission further supported the following additional powers and responsibilities to inspectors<sup>100</sup>:

- an offence to not give name and address;
- the ability to serve a notice on an occupier requiring assistance to be given; and
- powers to be exercised at a reasonable hour, except in an emergency.

In its submission, the Victorian Department of Natural Resources and Environment expressed concern that the discussion paper did not raise the issue of possible inter-state mutual recognition of licences for pilots and reciprocal powers for interstate inspectors when pursuing investigations across borders. Investigations into pesticide misuse from aerial spraying may lead to situations where the offender operates from interstate and the collection of information relating to offences currently stops at the state borders.<sup>101</sup>

The Standing Committee recognises that while the powers of inspectors are already extensive more powers are required in situations where an offender actively impedes an investigation.

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<sup>100</sup> Submission No.37, Environment Protection Authority NSW, Part 2, p.11.

<sup>101</sup> Submission No.37, No.88 Natural Resources and Environment, p.1.

**Recommendation 32**

The Standing Committee recommends that the *Pesticides Act 1978* be amended to provide inspectors with stronger powers to permit them to more effectively conduct their duties.

**Recommendation 33**

The Standing Committee recommends that the NSW Environment Protection Authority consult with corresponding Commonwealth, State and Territory agencies with regard to inter-state mutual recognition of licences for pilots and reciprocal powers for interstate inspectors when pursuing investigations across borders.

**Recommendation 34**

The Standing Committee recommends that the NSW Environment Protection Authority increase the number of pesticide inspectors servicing New South Wales and that the NSW Government provide additional funding to the Authority to meet such costs.

## **4.2.15 Shared liability**

### **4.2.15.1 Commercial applications**

Before pesticide application occurs, a decision making process usually occurs between the grower (occupier), a consultant or agronomist and the pesticide applicator (eg. the pilot in an aerial spraying operation).

As the applicator is directly responsible for application of the pesticide, if spray drift occurs, the sprayer is prima facie liable for an offence under s.37 for misuse since that person committed the physical act. It may be however that the misuse occurred due to insufficient information provided by the grower or consultant or the sprayer is directed to spray in inappropriate weather conditions or circumstances. It is apparent that there may be joint culpability between the parties.

However, the *Pesticides Act 1978*, does not provide for shared liability in contractual arrangements. Under s.62 of the Act, employers are jointly liable for offences committed by employees. This employer liability however does not extend to situations with contractor arrangements. Therefore the grower and the consultant would avoid liability for an offence. Similarly, an aerial agricultural chemical operator who contracts with a pilot to conduct spraying would also not be liable where the pilot commits an offence.

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Consequently, the discussion paper proposes to legislate for the liability of<sup>102</sup>:

- Employers, including spray operators, for the offences committed by their contractor's, agents and employees; and
- Growers for the offences of persons contracted (or the employees, contractors or agents of the contracted person) to apply pesticides to the grower's property. In the case of the grower, it would be a defence that, the offence committed was due to causes over which the grower had no control and the grower took reasonable precautions and used due diligence to prevent the offence being committed.

Noticeably, the discussion paper does not make a clear reference to the liability of consultants or agronomists who are contracted to provide specialist advice and direction on optimal pesticide application upon which the grower relies. The submission from the NSW Environment Protection Authority clarified this issue by stating:

...a provision should be considered which ensured that the occupier or consultant would not be liable if the offence occurred as a result of causes beyond their control and that they took reasonable precautions to try to prevent the offence.<sup>103</sup>

The NSW Environment Protection Authority submission indicates that where a consultant is engaged, the grower is not necessarily excluded from liability. It contends that,

In rural areas, farmers can be expected to be aware of the requirements for pesticide use and bring such matters to the attention of contractors.<sup>104</sup>

In its own consultation process, the NSW Environment Protection Authority acknowledged broad support (including aerial applicators) for the extension of liability to occupiers of land and consultants. It was demonstrated that the liability would create a responsibility for the occupier to communicate relevant information to the pesticide applicator concerning surrounding environmentally sensitive areas or crops and prevent undue commercial pressure being applied to applicators.

A number of submissions raised concerns at the extent of liability for occupiers, employers or growers for the actions committed by contractors where the grower relies on the expertise of the contractor. Such a view was raised by independent agricultural consultancy services,

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<sup>102</sup> Improving Pesticide Management in NSW: Discussion paper, Environment Protection Authority, Item 4.4, p.9.

<sup>103</sup> Submission No.37, Environment Protection Authority NSW, Part 2, p.6.

<sup>104</sup> Submission No.37, Environment Protection Authority NSW, Part 2, p.6.

It is important to clearly define the boundaries of liability for the application of pesticides.<sup>105</sup>

The Avcare submission suggested that where a landholder relies on the expertise of others, particularly contractors, the proposed defence should involve the landholder proving:

- There was no control over the pesticide application process; and
- reasonable precautions and due diligence was applied to prevent the offence being committed.<sup>106</sup>

This approach would be similar to the defences contained in s. 62 of the *Tasmanian Agricultural and Veterinary Chemicals (Control of Use) Act 1995*.

#### Recommendation 35

The Standing Committee recommends that the *Pesticides Act 1978* be augmented to provide for joint or shared liability of all parties responsible for an offence where a breach of the Act occurs. To ensure equitable and effective implementation of this concept, the Standing Committee proposes the following:

- All parties involved in the application of a pesticide which results in the commission of an offence may be liable under the *Pesticides Act 1978*;
- The *Pesticides Act 1978* should be amended to clearly define the boundaries of responsibility of each party for the application of pesticides;
- The parties should include the grower or occupier who is responsible for the application target area, the consultant or agronomist responsible for providing specialist advice and direction on the use of a pesticide, the pesticide applicator including the pilot in an aerial spraying operation or ground based operator, and any employee, employer or contractor of the parties responsible for the offence;
- In each case, it may be a defence that, the offence committed was due to causes over which the party had no control, took all reasonable precautions and used due diligence to prevent the offence being committed.

### 4.2.16 Record keeping

Currently under s.49B the *Pesticides Act 1978*, only aerial operators must keep records of pesticide use. The NSW Environment Protection Authority has indicated that where there has been a risk to public health, damage to property or a residue violation in produce, the information collected from users does not only

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<sup>105</sup> Submission No.37, No.87 Independent Agricultural Services, p.5.

<sup>106</sup> Submission No.40, Avcare, Appendix 5, p.8.

assist in investigating complaints of pesticide misuse, but is also critical for use by medical practitioners and regulatory authorities to prevent health risks and adverse impacts on trade.<sup>107</sup>

Under reg.6 of the Victorian *Agricultural And Veterinary Chemicals (Control Of Use) Regulations 1996*, all non-professional users of Schedule 7 and certain prescribed agricultural chemical products are required to maintain detailed written records of pesticide applications. In addition to these record keeping measures, reg.7 requires professional aerial and ground operators to record further details for all applications of agricultural chemical products.

A number of submissions from various groups indicated the need for record keeping to provide information:<sup>108</sup>

- where risks must be monitored;
- to the public about chemical burden on the environment;
- about the potential exposure of pesticides to the community; and
- for direct access of records by the public.

The NSW Environment Protection Authority supports the requirement for all commercial users of pesticides, including growers, to keep records of pesticide applications and that these records should be available for inspection or copying by the NSW Environment Protection Authority. The NSW Environment Protection Authority has implied that it is not willing to support providing the community with direct access to records.

The record keeping requirement would be consistent with a number of departmental and industry initiatives. Departmental initiatives include the voluntary requirements of the WorkCover, *Codes of Practice for the Safe Use and Storage of Pesticides* and NSW Agriculture's advisory booklet on the principles of *Spray Drift Management*. Industry initiatives incorporating record keeping include the wine industry's *Winecare* program, the agricultural industry *Cattlecare* and *Flockcare* programs.

At the Dubbo hearings of the Committee, Mr Peter Howat of Nufarm Australia, (Australia's largest chemical supplier) was asked for his view on the registration of pesticide users at the point of sale. He stated that,

Certainly, for schedule 7 poisons, I believe it is something that we should do, and we do do now. For the remainder of the products, I don't believe so. I think, with the courses that we have, both in the accreditation for resellers and for the farm care course, I don't believe

<sup>107</sup> Submission No.37, Environment Protection Authority NSW, Part 2, p.7.

<sup>108</sup> Submission No.37, No.82, Ms Cranny, p.2; No. 116, Environmental Defender's Office, p.6

we need to go further than that in terms of registration for every usage.<sup>109</sup>

The Environmental Defender's Office advocates that full reporting of agricultural chemical use be required by both individual pesticide users and commercial pest control operators, that is, those in the business of pest control for hire, ground and aerial applicators, structural operators and professional gardeners. This would involve monthly or quarterly reports on pesticide use to the NSW Environment Protection Authority. As part of this scheme, every such commercial pesticide operator would be required to obtain an operator identification number from the NSW Environment Protection Authority so that it can track the quantity of regulated pesticides applied each period. Individual pesticide users would only require such identification where amounts of regulated pesticide used exceed a set threshold. Under the scheme, commercial pest control operators would be required to report the use of pesticides within seven days of completion of the application.<sup>110</sup> The information collected would assist the NSW Environment Protection Authority in collecting relevant information for management with respect to risk assessment in areas, community health, worker health and safety, water contamination and pest management in specific regions.

A record keeping initiative implemented by a number of aerial spray operators is the use of Global Positioning Satellite (GPS) marking systems. Mr Peter Middlebrook of Middlebrook Air Services gave evidence to the Committee that since the installation of this system in his aircraft, not only has accuracy of application improved to within a metre, but also that,

...complaints have decreased by 80 per cent, because we could prove that is where we were, and we could say that was a vexatious complaint. Before that, we had to go through every complaint and justify.

Mr Middlebrook advised that a complainant cannot allege falsification of records as there is no physical way of altering the geographical position on earth.<sup>111</sup> The initial system cost \$50,000 with software and subsequent units cost between \$28,000 and \$30,000. Previously, whenever a complaint was made, two staff were tied up for three to four days assisting the NSW Environment Protection Authority until all the facts were collected.<sup>112</sup> Undergoing less investigations would mitigate the initial capital outlay.

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<sup>109</sup> Evidence of Mr Howat, Nufarm Australia Ltd, 26 July 1999, p.191.

<sup>110</sup> Submission No.37, No.111 Environmental Defender's Office, p.6.

<sup>111</sup> Evidence of Mr Middlebrook, Middlebrook Air Services, 27 July 1999, pp.248-249.

<sup>112</sup> Evidence of Mr Middlebrook, Middlebrook Air Services, 27 July 1999, p.249.

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**Recommendation 36**

The Standing Committee recommends that the *Pesticides Act 1978* be amended to require all statutory, professional and commercial users of pesticides, including primary producers, keep records of pesticide applications and that these records should be available for inspection and/or copying by the NSW Environment Protection Authority. Accordingly the NSW Environment Protection Authority should develop a proforma document for recording relevant information.

**Recommendation 37**

The Standing Committee recommends that the NSW Environment Protection Authority be empowered to provide records of pesticide applications for research purposes to other statutory bodies including NSW Health and the Department of Urban Affairs and Planning.

**Recommendation 38**

The Standing Committee recommends that aerial applicators be strongly encouraged implement Global Positioning Satellite marking systems as a record keeping device for use by aerial applicators. The Standing Committee recognises that such systems would not only provide irrefutable and time-saving evidence to investigators, but would also benefit applicators in defence of offences arising from pesticide applications.

**Recommendation 39**

The Standing Committee recommends that areas identified for aerial pesticide application be validated by a Global Positioning Satellite marking system (handheld or other).

**4.2.17 Liability in domestic applications**

The discussion paper did not include the issue of liability for offences in residential situations. A criticism made of the discussion paper by several organisations including the Environmental Defender's Office<sup>113</sup> was that in primarily focussing on agriculture, it omitted to explicitly consider the problems associated with the use and disposal of domestic and urban pesticides.

In its submission, the NSW Environment Protection Authority considers the issue of occupiers of land used exclusively for residential purposes.<sup>114</sup> The submission

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<sup>113</sup> Submission No.37, No.116 Environmental Defender's Officer, p.3.

<sup>114</sup> Submission No.37, Environment Protection Authority NSW, Part 2, p.6.

proposes that an occupier should not be liable unless the occupier gave a direction to the applicator and that the occupier knew it would result in an offence being committed. The exclusion of liability would recognise the substantial knowledge gap between pest control operators and the persons who engage them in residential areas.

#### **Recommendation 40**

**The Standing Committee recommends that the NSW Environment Protection Authority conduct a public education program in the use, management and disposal of pesticides in non-farming situations.**

### **4.2.18 Statutory Advisory Committee**

The discussion paper recognised that there are a significant number of interest groups concerned with pesticides and the responsibilities of government and industry.<sup>115</sup> Accordingly, a statutory advisory committee was proposed to provide a source of community feedback to the Minister and the NSW Environment Protection Authority on pesticide policies and management. A slightly revised version of the proposed membership of this advisory committee was advanced to the Standing Committee in a subsequent submission by the NSW Environment Protection Authority. The submission suggests a committee chaired by the NSW Environment Protection Authority with 12 members with expertise and representation as follows:

- Environment and community: environmental impact of pesticide application, catchment management, promoting ecologically sustainable development, and local government
- Industry: pesticide product supply and management, pest control operators' practices, the use of pesticides in agriculture, aerial pesticide application practices; and
- State government: NSW Agriculture, WorkCover NSW, NSW Health, Department of Urban Affairs & Planning.<sup>116</sup>

It is also suggested that a nominated representative from NSW National Parks and Wildlife, Department of Land and Water Conservation and Rural Lands Protection Boards and a representative with experience in the use and exposure of pesticides by consumers could be invited from time to time as required to provide relevant input on specific issues. It is argued that this representation would provide a balance of government, industry, community and environment representatives.

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<sup>115</sup> Improving Pesticide Management in NSW: Discussion paper, Environment Protection Authority, Item 5, p.10.

<sup>116</sup> Submission No.37, Environment Protection Authority NSW, Part 2, p.6.

Almost all submissions received which commented on advisory committees were positive about the need to establish such a body. Various views were advanced on the membership of the advisory committee. Significant support across interest groups was received for the involvement of representatives from catchment management organisations and rural lands protection boards. Some submissions also suggested that direct stakeholders only be included and that community representatives without expertise in pesticide management should be excluded.

#### **Recommendation 41**

**The Standing Committee supports the establishment of a statutory advisory committee in accordance with the revised model proposed by the NSW Environment Protection Authority.**

#### **Recommendation 42**

**The Standing Committee recommends that the NSW Environment Protection Authority review and report on the membership and structure of the statutory advisory committee in 12 months of its establishment to determine its effectiveness and the level of stakeholder satisfaction.**

### **4.2.19 Notification of neighbours**

The *Pesticides Act 1978* does not currently require pesticide users to notify neighbours of spraying operations and the discussion paper did not raise this as an issue for consideration.

The NSW Farmers' Association has recognised that many of the problems that arise in communities regarding pesticides can be attributable to the lack of communication between the user of pesticides and their neighbours.<sup>117</sup> It advocates that although pesticide users should be encouraged to take all reasonable steps to inform their neighbours of impending pesticide application, there should be no legal compulsion to do so.

In contrast, a number of submissions including the Environmental Defender's Office considered that it is essential that the community receive adequate notification prior to the application of significant quantities of scheduled pesticides by either air or ground application for effective pesticide regulation.<sup>118</sup> The submissions suggested that it be a duty of the person intending to use pesticide to notify neighbouring properties in writing between 24 and 48 hours prior to application.

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<sup>117</sup> Submission No.37, NSW Farmers' Association, p.3.

<sup>118</sup> Submission No.37 No. 116 Environmental Defender's Officer, p.15; No.39, Ronda Kelson, p.1.

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The importance of a regulated notification was illustrated in the Dubbo hearings of the Inquiry. Evidence was received that organic producers are often situated adjacent to conventional producers and as there is no formal notification process, the onus is on an organic producer to put up indicators to measure the level of drift in an effort to maintain certification. Legally there is nothing to protect organic growers.<sup>119</sup>

The Standing Committee recognises that certain chemicals possess serious risks of injury or damage from chemical trespass and that these risks should be evaluated and regulated by the National Registration Authority.

#### **Recommendation 43**

**The Standing Committee recommends that the NSW Environment Protection Authority consult with the National Registration Authority to ensure labels on pesticides incorporate notification requirements where they are not already provided and where appropriate.**

#### **Recommendation 44**

**The Standing Committee is concerned to ensure that an additional obligation for notification with respect to labelling (see Recommendation 43) be required where pesticide application is planned near schools, bus routes and environmentally sensitive areas or where a reasonably foreseeable risk of chemical trespass may occur.**

### **4.3 Concluding comment**

The Standing Committee recognises that a number of regulatory amendments have been proposed for the *Pesticides Act 1978* by the NSW Environment Protection Authority in its discussion paper and by the Standing Committee in this report. The Committee is also mindful of the importance and sensitivity of pesticide issues to the community. In light of these matters, the Committee foresees benefits being achieved through maintaining a watching brief over the implementation of amendments to the *Pesticides Act 1978*. The Standing Committee canvassed this concept with the NSW Environment Protection Authority during the inquiry process. Dr Neil Shepherd, Director-General, NSW Environment Protection Authority made the following comments regarding this issue:

The earliest one can realistically review a piece of legislation, particularly one that is complex and controversial, would be three to four years. Then you can have a meaningful review. Anything

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<sup>119</sup> Evidence of Ms Beverley Smiles, Central West Environment Council, 26 July 1999, p.174.

earlier than that means the thing has not had time to bed down at all. I recommend strongly that you suggest a longer period for the formal review but we would not have a difficulty coming back on an annual basis and saying this is how it is working, these are the things we think are still issues, and obviously there is an opportunity then for you to get other advice.<sup>120</sup>

#### **Recommendation 45**

**The Standing Committee on State Development will:**

- **monitor the implementation of amendments to the *Pesticides Act 1978* and the impacts of such amendments for a four year period (until 30 September 2003);**
- **accept and consider any representations made to the Committee concerning amendments to the *Pesticides Act 1978* during that period; and**
- **table any additional report in the Legislative Council from time to time.**

#### **Recommendation 46**

**The Standing Committee recommends that the NSW Environment Protection Authority provide to the Standing Committee on State Development annual reviews outlining the progress and impact of any amendments to the *Pesticides Act 1978*. The first review should commence from enactment of the amendments until 30 September 2000, with reviews conducted annually thereafter to and including 30 September 2003.**

#### **Recommendation 47**

**The Standing Committee recommends that NSW Agriculture provide to the Standing Committee on State Development annual reviews that identify impediments and enhancements to productivity and competitiveness experienced by the New South Wales agricultural industry emanating from amendments to the *Pesticides Act 1978*. The first review should commence from enactment of the amendments until 30 September 2000, with reviews conducted annually thereafter to and including 30 September 2003.**

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<sup>120</sup> Evidence of Dr Shepherd, NSW Environment Protection Authority, 21 June 1999, p.86.

