

Australian Capital Territory

Environment Protection Amendment Regulation 2021 (No 1)

Subordinate law SL2021–26

made under the

Environment Protection Act 1997, s 166 (Regulation-making power)

EXPLANATORY STATEMENT

Overview

This explanatory statement relates to the *Environment Protection Amendment Regulation 2021 (No 1)* (the Amendment Regulation). It has been prepared in order to assist the reader of the Amendment Regulation. It does not form part of the Amendment Regulation and has not been endorsed by the Assembly.

This statement must be read in conjunction with the Act and the Amendment Regulation. It is not, and is not meant to be, a comprehensive description of the Amendment Regulation. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Background

The Australian Pesticides and Veterinary Medicines Authority (APVMA) is a Commonwealth Government agency that assesses agricultural and veterinary (agvet) chemical products and decides on their subsequent registration. The APVMA regulates agvet chemicals up to the point of retail sale. The use of agvet chemical products after the point of sale is regulated by states and territories under their respective legislation.

In 2008 the Productivity Commission Report on Chemicals and Plastics Regulation determined that the effectiveness of agvet arrangements is enhanced by state and territory implementation via the template Agvet Code, which is a schedule to the *Agricultural and Veterinary Chemicals Code Act 1994* (Cwlth).

In 2013 the Commonwealth entered into an agreement with states and territories which provides that each state and territory will implement nationally consistent regulation on the following:

- minimum licensing requirements for chemical users;
- minimum competency requirements for chemical users;

- monitoring of chemical residues in produce and resulting traceback violations;
- minimum controls on access to chemicals at and after the point of retail sale, including restrictions on usage; and
- recordkeeping requirements for chemical sale and use and associated user audits.

Implementation of these reforms was agreed to by Commonwealth, state and territory Agricultural Ministers in 2018. The Amendment Regulation implements these measures in the ACT.

The Amendment Regulation amends the *Environment Protection Regulation 2005* (the Regulation).

Amendments to the Environment Protection Regulation 2005

Agvet chemical products are dealt with under Part 6 of the Regulation, which provides for when agvet chemical products are taken to cause environmental harm for the purposes of section 5(b) of the *Environmental Protection Act 1997* (the Act). In addition, the Regulation provides that it is an offence to store or use agvet chemical products in a way not authorised by the Australian Pesticides and Veterinary Medicines Authority (APVMA).

The amendments update Part 6 of the Regulation by implementing agreed national harmonisation reforms for the use of agvet chemicals.

The Amendment Regulation:

- inserts new definitions;
- inserts new provisions referring to the use of registered agvet chemical products in accordance with instructions on the approved label for the product;
- inserts new provisions to declare certain laws an ‘eligible law’ for the purposes of the Agvet Code;
- clarifies and updates provisions in relation to circumstances when agvet chemical products are taken to cause environmental harm;
- amends existing offences related to the use and storage of agvet chemical products;
- creates new offences in relation to the disposal of agvet chemical products, and record keeping and required training for the use of agvet chemical products; and
- inserts new requirements in relation to record keeping and training for the use of agvet chemical products.

Costs and Benefits

The amendments aim to improve national consistency in relation to the safe and effective control and use of agvet chemicals after the point of sale.

No significant appreciable costs are anticipated as a result of the amendments.

Key stakeholders that may be impacted by the amendments include farm businesses, urban and non-urban land managers, and fee-for-service providers. Those operating

across state and territory borders are expected to benefit from consistent regulatory requirements.

Detailed analysis of potential costs and benefits is presented in the associated regulatory impact statement.

Offences and Penalties

The Amendment Regulation introduces new strict liability offences related to the disposal of, and record-keeping and required training for, the use of agvet chemical products.

The new offences are subject to a maximum penalty of 10 penalty units. The penalties are proportionate and reasonable for offences of a regulatory nature. In addition, the use of strict liability offences in the amendments is consistent with similar existing offences in the Regulation and in comparable regulatory schemes in other jurisdictions.

The application of strict liability engages the presumption of innocence under section 22 (1) of the *Human Rights Act 2004* because it allows for an offence to be proven without the need to prove a fault element. The offences are intended to deter people from failing to comply with safe use and disposal practices, record keeping and training requirements in relation to agvet chemical products. These requirements are central in supporting the prevention of serious detriment to human health and the environment.

The use of strict liability offences is appropriate because the offences only apply to people who know or ought to know their legal obligations. Agvet chemical products must be registered under the Agvet Code and are used in an agricultural or veterinary setting in which a permit, training, qualification or authorisation is required. The regulatory framework for the use of agvet chemical products ensures that people who use such products in these settings are on notice that they must abide by certain laws, including in relation to prohibited behaviour under the Regulation.

In addition, Section 23 (1) (b) of the *Criminal Code 2002* (the Criminal Code) provides a specific defence to strict liability offences of mistake of fact. Section 23 (3) of the Criminal Code provides that other defences may also be available for strict liability offences, which includes the defence of intervening conduct or event, as provided by section 39 of the Criminal Code.

Human Rights

The Amendment Regulation is consistent with the *Human Rights Act 2004*.

Justification for the use of strict liability offences and consequent limitation on the right to be presumed innocent is set out in the preceding discussion on offences and penalties.

Clause notes

Clause 1 Name of regulation

This clause names the regulation as the *Environment Protection Amendment Regulation 2021 (No 1)*.

Clause 2 Commencement

This clause provides that the Amendment Regulation commences 6 months after its notification day and that the naming and commencement provisions automatically commence on the notification day as per the *Legislation Act 2001* (Legislation Act), s 75 (1).

Clause 3 Legislation amended

This clause provides that the Amendment Regulation amends the *Environment Protection Regulation 2005*.

Clause 4 Part 6

This clause substitutes Part 6 of the Regulation.

New Division 6.1 Interpretation

New section 53 provides new definitions for the following terms:

- agricultural chemical product
- agvet chemical product
- agvet code
- agvet permit
- approved label
- instruction
- registered
- veterinary chemical products

New section 53A provides for when a registered agvet chemical product is taken to be used in accordance with the instructions on the approved label for the product. This provision is relevant for determining when certain offences may apply under sections 54, 55 and 55A of the regulation.

The Agvet Code requires that all supplied agvet products must have a label attached to the container, which must state the relevant particulars, must not contain information that is contrary to the relevant particulars, and must comply with all conditions of label approval. The APVMA cannot register an agricultural or veterinary chemical product without also approving a label for containers for the product. Similarly, the APVMA cannot approve a label for containers for an agricultural or veterinary chemical product without also registering the product. All of the key information required to be set out on labels for containers for agricultural and veterinary chemical products is outlined in the Agricultural Labelling Code and the

Veterinary Labelling Code (including the requirements of the Agvet Code and the Agvet Code Regulations).

New section 53B provides that sections 55 (Use of agricultural chemical products) and 55A (Use of veterinary chemical products) of the Regulation are declared to be an eligible law for the Agvet Code, section 109, definition of permit, paragraph (b). This means that the APVMA may issue a permit allowing a person to do something with an agvet chemical product that would otherwise be an offence under sections 55 and 55A.

New Division 6.2 Agvet chemical products causing environmental harm

New section 54 provides that an agvet chemical product is taken to cause environmental harm if it enters the environment, unless it is used in accordance with an agvet permit, or, for a registered agvet chemical product, if it is used in accordance with the instructions on the approved label.

This section is relevant to provisions under the *Environment Protection Act 1997* which make it an offence for a person to pollute the environment causing environmental harm.

New Division 6.3 Using agvet chemical products

New section 55 (1) provides that it is a strict liability offence for a person to store, use or dispose of a registered agricultural chemical product if it is not done in accordance with the instructions on the approved label for the product.

New section 55 (2) provides that it is a strict liability offence for a person to store, use or dispose of an agricultural chemical product if the product is not a registered agricultural chemical product.

However the offences will not apply if the person holds an agvet permit for the product and the storage, use or disposal is in accordance with the permit.

New section 55A provides for the same strict liability offences and exceptions to offences as subsections 55 (1) and (2), but in relation to the storage, use and disposal of registered and non-registered veterinary chemical products. A further exception applies so that the offence of storage, use or disposal of a registered veterinary chemical product which is not in accordance with instructions on the approved label *will not apply* to a veterinary practitioner, or a person acting in accordance with instructions of a veterinary practitioner, in relation to treating an animal in their care.

New section 55B provides that it is a strict liability offence if a person uses an agricultural chemical product and fails to either: record the required information about the use, make the record within 48 hours after the use, or keep the record for 2 years after the date of the use. The provision provides what required information must be recorded, and states that recording requirements do not apply for a household or home garden product used in certain circumstances, or if the product is used to sanitise pool or spa water.

New Division 6.4 Training requirements for use of certain agvet chemical products

New section 55C provides the following definitions for division 6.4:

- approved VET course unit of competence
- registered training organisation
- restricted agvet chemical product
- schedule 7 poison
- statement of attainment
- VET course

New section 55D provides that the Environment Protection Authority (the authority) may, by notifiable instrument, declare a restricted agvet chemical product, or an agvet chemical product containing a schedule 7 poison to be a declared agvet product. Such declarations are relevant for determining when certain offences may apply under sections 55F – 55K.

New section 55E provides that the authority may, by notifiable instrument, approve a VET course unit of competency for provisions of the Regulation which are relevant for determining when certain offences may apply under sections 55F – 55L.

New section 55F provides that it is a strict liability offence for a person to use a declared liquid fumigant. However, the offence does not apply if a person holds the specified qualifications.

New section 55G provides that it is a strict liability offence for a person to use a declared vertebrate poison. However, the offence does not apply if a person holds the specified qualifications, or if the declared vertebrate poison is in the form of a prepared bait and used in accordance with an environmental authorisation.

New section 55H provides that it is a strict liability offence for a person to use a declared avicide. However, the offence does not apply if a person holds the specified qualifications, or has successfully completed an approved avicide training course. In addition, the authority may approve, by notifiable instrument, a VET course unit of competency or other training course for this section (an approved avicide training course) if satisfied that it includes appropriate training in relation to identifying and managing pest birds.

New section 55I provides that it is a strict liability offence for a person to use a declared industrial timber treatment. However, the offence does not apply if a person holds the specified qualifications.

New section 55J provides that it is a strict liability offence for a person to use declared termiticide as a pre-construction termiticide product. However, the offence does not apply if a person holds the specified qualifications. The meaning of ‘use of declared termiticide as a pre-construction termiticide’ is also defined.

New section 55K provides that it is a strict liability offence for a person to use an agricultural chemical product that contains a schedule 7 poison where the product is not a declared liquid fumigant, a declared vertebrate poison, a declared avicide, a

declared industrial timber treatment, or a declared termiticide. However, the offence does not apply if a person holds the specified qualifications. In addition, the offence does not apply if the person uses the product as part of a farming or grazing activity under the supervision of another person (the supervisor) who holds a specified qualification and who fulfils certain supervision requirements, and if the person uses the product not more than 4 days in the last month and 12 days in the last year.

New section 55L provides that it is a strict liability offence for a person other than a veterinary practitioner to use a registered veterinary chemical product that contains a schedule 7 poison. However, the offence does not apply if a person holds the specified qualifications. In addition, the offence does not apply if the person holds a FeedSafe accreditation for manufacturing animal feed and uses the product in manufacturing animal feed at a place where an accredited animal feed manufacturer holds a FeedSafe accreditation for manufacturing animal feed. The terms ‘FeedSafe accreditation’ and ‘SFMCA’ are defined.

Clause 5 Section 67 (2) (a)

This clause provides for the omission of the *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cwlth), under section 67 (2) of the Regulation.

Section 67 (2) of the Regulation provides that the Legislation Act, section 47 (6) will not apply to certain laws. The Legislation Act, section 47 (6) provides, in part, that where a law of another jurisdiction is applied as in force from time to time, the law, each amendment of the law, or the law as remade and amended, will be taken to be a notifiable instrument. Disapplying the Legislation Act, section 47 (6) to the laws listed under section 67 (2) of the Regulation means that those laws do not need to be notified under the Legislation Act.

The *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cwlth) is omitted because reference to this legislation is no longer relevant due to amendments to section 55 of the Regulation, under Clause 4 of the Amendment Regulation.

Clause 6 New section 67 (2) (fa) and (fb)

This clause inserts the following laws under section 67 (2) of the Regulation:

- the *National Vocational Education and Training Regulation Act 2011* (Cwlth); and
- the Poisons Standard.

The effect is that section 47 (6) of the Legislation Act will not apply to these laws as far as these laws are applied under the Regulation. This means that these laws do not need to be notified under the Legislation Act.

Clause 7 Dictionary, new definition of agricultural chemical product

This clause inserts a new definition of *agricultural chemical product* for part 6 of the Regulation.

Clause 8 Dictionary, definitions of agvet chemical product and agvet code

This clause substitutes the definition of *agvet chemical product* and *agvet code* to align with amendments to section 53 of the Regulation, under clause 4 of the Amendment Regulation.

Clause 9 Dictionary, new definitions

This clause provides for the insertion of definitions for the following terms:

- agvet permit;
- approved label;
- approved VET course unit of competency;
- instruction;
- Poisons Standard;
- registered;
- restricted agvet chemical product;
- schedule 7 poison;
- statement of attainment;
- VET course; and
- veterinary chemical product.