SUBMISSION

CHEMICALS AND PLASTICS REGULATION

PRODUCTIVITY COMMISSION ISSUES PAPER
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INTRODUCTION

Solvay Interox Pty Ltd is a manufacturer of industrial chemicals with a production facility located in Banksmeadow in New South Wales. Our products most of which are classified as hazardous chemicals and dangerous goods are sold in all states and territories. Interstate storage facilities have been established with transport companies and major customers. Solvay Interox provides advice to the transport companies and customers in respect of safety and environmental aspects of the storage, handling, use and disposal of our products.

Solvay Interox welcomes the opportunity to comment on the issues raised in the Productivity Commission Issues Paper on Chemical and Plastics Regulation. Following are comments on a number of the questions raised in the Issues Paper.

ISSUES

Over Regulation

The Plastics and Chemicals Industries are required to comply with significant regulation imposed directly by all levels of government and indirectly such as through water authorities who must regulate their customers to meet their licence and other requirements. Examples of areas of concern where problems are encountered include:

- Impractical and impossible duties of care;
- Excessive number of regulations;
- Change frequency (some inappropriate requirement remain in place while others change too often);
- Administrative requirements (Too much red tape);
- Lack of national consistence;
- Inconsistent interpretation by regulators;
- Emphasis on prosecution by some regulators, and
- Inadequate advice/assistance regimes.

Practicality

Hazards are an intrinsic part of all activities and the risks they impose can be reduced but not eliminated. This has been accepted in the Issues Paper which on page 13 states that ‘risk prevention is not possible’. This should be recognised in all legislative controls on the plastics and chemical industry. However this is not currently the case in all jurisdictions. In NSW the OHS Act imposes an absolute duty of care on employers to provide a safe place of work. The NSW Government recognised that this is impossible and in the OHS Regulation requires that ‘an employer must eliminate any reasonably foreseeable risk’ but provides that ‘if it is not reasonably practical to eliminate the risk, the employer must control the risk’. In effect, compliance with the Regulation does not ensure compliance with the Act.

> **In regulating the plastics and chemicals industry, governments should focus on establishing requirements which are reasonable, practical and achievable in the workplace.**

Prescriptive/Performance Based Legislative Mix

The risk management approach to regulating the chemicals and plastics industry is recognised as an appropriate approach. However, although this is being applied in most jurisdictions, the regulations tend to include detailed and specific obligations. This leads to a situation where the process can become more important than the outcome. Companies with effective risk management systems in place can still be prosecuted because of a failure to comply with some minor administrative task which has little effect on the safety, environmental, etc. risks of the business.

> **Regulatory requirements should be performance based with minimal prescribed requirements to enable effort to be concentrated in areas which will result in improved performance.**

Support Documentation

Much of the risk management based legislation is supported by Codes of Practice and other documentation providing advice on how the legislation is to be applied. While the legislation (Acts and Regulations) undergo due process, the Codes, etc. are generally prepared by the department administering the legislation and need not undergo suitable review. These can effectively be issued as policy documents. There is also concern about the legal status of the subsidiary documentation. For example, in New South Wales, the preamble to the industry codes of practice supporting the OHS Act and Regulation states:

> "A person or company cannot be prosecuted for failing to comply with an approved industry code of practice. However, in proceedings under the OHS Act or OHS Regulation, failure to observe a relevant approved code of practice can be used as evidence that a person or company has contravened or failed to comply with the provisions of the OHS Act or OHS Legislation."

In effect this requires full compliance with the prescriptive Code of Practice regardless of the outcome of the risk management process. Full compliance with an industry Code of Practice does **not** however protect against prosecution. Many companies, particularly SMEs, would prefer to be able to comply with a code of practice where full compliance can be used in defense of a prosecution.

> **Industry codes of practice should undergo full judicial review and should be designated as 'deemed –to-comply'.**

Responsibilities

The performance of a company is dependent on all persons contributing to the processes performed. These include the employers and the employees together with suppliers, consultants, contractors, employee representatives, regulators, etc. Duties of care should apply independently to all parties. There is generally too much emphasis on the duties of the employer. In many prosecutions where an employee has failed to comply with company policy and procedures, the company is prosecuted for failure to fully implement the policy. Seldom would the offending employee be subject to prosecution or even be fined.

> **The duties of each of all responsible parties should be defined. Where penalties apply, these should apply independently to all relevant parties and, when applicable, all offending parties should be prosecuted.**

Offences

In some jurisdictions, strict liability offences exist. This is a denial of natural justice in that the onus of proof is reversed and the transgressors are deemed guilty unless they are able to provide evidence to establish their innocence. Some legislation creates strict liability criminal offences which can result in custodial sentences with no or limited grounds for appeal.

> **Regulation of the plastics and chemical industry should create civil duties not criminal offences. Any offence which is considered so serious that the penalties prescribed in the regulations are inadequate should be referred for trial under criminal law where standard presumptions and protection are available.**
>
> **No absolute or strict liability offences should be created. In all cases the presumption of innocence should be paramount.**

Penalties

In some cases the penalties are based on the outcome. Any industrial death is considered to be a serious offence even if it has resulted from some minor non-compliance.

> **Penalties for non compliance with regulation should 'fit the crime'. The penalty should be applied based on the seriousness of the transgression not on the seriousness of the outcome.**

Regulatory Impact Statements

The quality of RIS remains of significant concern. In many cases it would appear that the decision has been made and the RIS is prepared in a manner which justifies the decision. In general the benefits are overstated and are often subjective. Costs are often underestimated. An example is the RIS which accompanied the draft variation to the National Environment Protection (National Pollutant Inventory) Measure. Industry were consulted and estimated that the additional cost of compliance would average $8300 pa. A figure of $2800 for the first year and $1400 pa thereafter was used. Other costs were considered to be negligible. Benefits were not (or could not be?) quantified and were 'improved credibility and trust, a driver for competition and knowledge of waste issues'.

> **Impact assessment should be more accurate and rigorous.**

National Consistency – Requirements

For companies with operations or involvement in more than one state or territory, the importance of national consistency cannot be overstated. The status of regulation of security sensitive ammonium nitrate offers an excellent example of how not to implement legislation. Many other examples exist including:

- The roll out of the MHF legislation which, after many years, has yet to be implemented in all states. Implementation has also been inconsistent with differences in licensing and registration requirements of particular importance. Fees vary significantly between states.
- The requirements for design and item registration of plant vary significantly between states and not all state registrations are accepted by the other states. The attached WorkCover NSW Position Paper indicates that NSW does not accept registrations from Victoria, Queensland and Tasmania. This creates additional costs and delays when items of plant are move across state borders.

Except for locational concerns (e.g. proximity to residential areas, etc.) it is difficult to identify justification for variations in regulatory requirements between states.

National consistency should be the goal of all regulation with the states and territories being required to justify any variations.

Terminology should be consistent and clearly defined to ensure uniform application across jurisdictions.

The Australian Dangerous Goods Code and Model Legislation might be considered as a model for achieving national consistency. Model legislation prepared centrally could be taken up as template legislation in all jurisdictions with the requirement to change details of the controlling authority where necessary.

National Consistency – Reporting and Penalties

Even when the legislative requirements are consistent between states, there are often differences in the reporting requirements and penalties applicable in the different jurisdictions. Significant additional costs are incurred particularly where different information is to be provided at different times or frequencies.

Reporting requirements and penalties should be standardised to enable companies which operate in more than one state to establish systems that are consistent across all operations.

International Consistency

International consistency of regulation of the plastics and chemicals industry should be considered a worthwhile aim but should not be sought 'at all cost'. There are many differences between Australian and international conditions (e.g. climate, culture, etc.) which may make international requirements inappropriate in Australia. Some aspects of international consistency (e.g. GHS) are considered to be worthwhile providing the application is consistent and the implementation is coordinated.

The application of good international regulatory principals should be considered as part of the legislative process and implemented where appropriate and justified.

Globally Harmonised System (GHS)

The UN GHS for the Classification and Labelling of Chemicals aims to provide a basis for provision of globally uniform health and safety information for chemicals. Implementation of the GHS within Australia and our trading partners will provide trade and other benefits. However, these benefits will accrue only if and when all of Australia's major trading partners have adopted the system. The timing of the adoption of GHS should be coordinated with our major trading partners. There is no advantage and significant costs to implementation of GHS in isolation.

Australia should adopt GHS in conjunction with and in the same time frame as our major trading parties.

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