

Chemical Weapons (Prohibition) Regulations 1997 No. 84

EXPLANATORY STATEMENT

Statutory Rules 1997 No. 84

Issued by the Authority of the Minister for Foreign Affairs

Chemical Weapons (Prohibition) Act 1994

Chemical Weapons (Prohibition) Regulations

The *Chemical Weapons (Prohibition) Act 1994* ("the Act") gives effect to certain of Australia's obligations as a State Party to the Convention on the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction ("the Convention"), which Australia ratified in May 1994, and which enters into force on 29 April 1997. The Convention bans the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons and provides for the destruction of all existing stocks of chemical weapons.

Section 104 of the Act provides in part that the Governor-General may make Regulations prescribing matters required or permitted by the Act to be prescribed; or necessary or convenient to be prescribed for carrying out or giving effect to the Act. The Chemical Weapons (Prohibition) Regulations ("the Regulations") prescribe such arrangements in a manner consistent with Australia's obligations under the Convention.

Under the Convention a State Party has the right to produce or use toxic chemicals and precursors for activities not prohibited under the Convention. However, to provide assurance of compliance with treaty obligations the Convention provides for a verification regime involving initial and annual declarations and a system of onsite inspections, which will be conducted by inspectors of the Organization for the Prohibition of Chemical Weapons ("the Organization"), which is based in The Hague, and which will implement the Convention.

The purpose of the regulations is to :

(i) prescribe details of the system of permits and notifications set up by the Act to facilitate collection of information on industrial and other chemical activities in Australia which must be included in declarations to the Organization, as well as onsite inspections. In particular, the Regulations prescribe when the operator of a facility must apply to renew a permit, or make a notification; the timing and content of regular reports that must be made by the operator of a permit facility; and the records which must be kept by an operator to facilitate the making of permit renewal applications and notifications;

(ii) prescribe matters affecting procedures for on-site "clarification" inspections carried out pursuant to the Act;

- the Convention establishes procedures for short notice challenge inspections to be carried out by the Organization where serious concerns exist about compliance. It also provides for States Parties to co-operate directly to resolve concerns, including through on-site inspections, carried out by Australian national inspectors, or bilaterally with representatives of the State Party seeking clarification. The Act provides for clarification inspection procedures to be based on the challenge inspection procedures set out in the Verification Annex to the Convention, with such modifications as are prescribed in the Regulations. The purpose of these modifications is to tailor challenge inspection procedures to the aims of a clarification inspection, and the roles of participants in such an inspection;

- (iii) prescribe privileges and immunities to be enjoyed by Organization inspectors in the course of verification activities, as provided for in the Convention and the Act;
- (iv) prescribe certain requirements relating to tasks of the Director of the Chemical Weapons Convention Office - the office responsible for implementing the Convention in Australia, and for functioning as the national liaison point with the Organization;
- (v) prescribe penalties for offences against the Regulations.

Details of the Regulations are set out in the Attachment.

The Regulations commence on the day that the applicable sections of the Act commence. This will occur on 29 April 1997, the date on which the Convention enters into force.

PART 1 - PRELIMINARY

Regulation 1 - Citation

1. Regulation 1 provides for the Regulations to be cited as the Chemical Weapons (Prohibition) Regulations.

Regulation 2 - Commencement

2. Regulation 2 provides that certain of the Regulations commence on the day that the authorising provision of the Act will enter into force. Pursuant to section 48 of the *Acts Interpretation Act* 1901, the remainder of the regulations commence on gazettal.

Regulation 3 - Interpretation

3. Regulation 3 provides definitions for terms used in the Regulations.

PART 2 - PERMITS, NOTIFICATIONS AND RECORDS

Regulation 4 - Renewal of Permits

4. Section 20 of the Act sets out the procedures for applications for renewal of permits. These procedures provide for a person to apply to the Minister for a permit for the following calendar year, by giving a renewal application not later than a prescribed period before the end of the calendar year.
5. Regulation 4(1)(a) prescribes the period beginning on 1 January and ending on 14 September in each year as that within which a person must apply for renewal of a permit in respect of declarable Schedule 1 activities. Part VI of the Verification Annex to the Convention requires that declarations, which will be based on information provided in such applications, shall be made not later than 90 days before the end of each year.
6. Regulation 4(1)(b) prescribes the period beginning on 1 January and ending on 14 October in each year as that within which a person must apply for renewal of a permit in respect of permit activities, other than declarable Schedule 1 activities. Parts VII and VIII of the Verification Annex to the Convention require that declarations, which will be based on information provided in such applications, shall be made not later than 60 days before the end of each year.

7. Regulation 4(2) provides for the above-mentioned prescribed periods to be extended, so that a person first applying for a permit on or after 15 September or 15 October in a year, may simultaneously apply for renewal of the permit.

Regulation 5 - Notifications

8. Where a Schedule 1, 2 or 3 facility has been issued a permit in respect of the facility during a year, but there is no requirement for a permit for the following year, section 28 of the Act provides that the operator of the facility must notify the Minister that this will be the case. Also, the operator of an Other Chemical Production ("OCP") facility must notify the facility to the Minister if it produced unscheduled discrete organic chemicals in above-threshold quantities during the year before the notification. Section 29 of the Act provides that a person must notify a facility referred to in section 28 to the Minister by giving written notice in an approved form at a prescribed time.

9. Regulations 5(1) and 5(2) provide that a notification under section 28 must be given before 15 September in a year in relation to any declarable Schedule 1 activities, and before 15 October in a year in relation to any other notifiable activity in relation to Scheduled chemicals.

10. Regulation 5(3) provides that a notification under section 28 must be given before 1 March in a year in relation to production of unscheduled discrete organic chemicals during the previous year. Part IX of the Verification Annex to the Convention requires that declarations, which will be based on information provided in such notifications, shall be made not later than 90 days after the beginning of each year.

11. Regulation 5(4) provides that a notification under section 28 in relation to activities during 1996 must be made within 7 days after the entry-into-force of the Convention. Parts VII, VIII and IX of the Verification Annex to the Convention require that declarations, which will be based on information provided in such notifications, shall be made not later than 30 days after entry-into-force of the Convention.

Regulation 6 - Reporting requirements

12. Section 30 of the Act sets out the particulars which the operator of a facility, for which a permit has been issued or which has been notified to the Minister during a particular year, must give to the Director in a form and at such intervals as are prescribed. The particulars relate to the location, ownership and operation of the facility; the plant or plants comprising the facility; the chemicals dealt with at the facility and the purposes to which they are put; and other matters relevant to declarations made by Australia to the Organization.

13. Regulations 6(1) and 6(2) specify the contents of a written report which is to be made by the operator of a Schedule 1 facility before 1 March in each year. The contents of the report are based around the requirements of paragraphs 15 and 19 of Part VI of the Verification Annex to the Convention. Regulation 6(1) also applies to facilities which require a permit under the Act for activities with Schedule 1 chemicals, but which will not be included in declarations pursuant to Part VI.

14. Regulation 6(3) specifies the contents of a written report which is to be made by the operator of a Schedule 2 facility before 1 March in each year. The contents of the report have been designed for the purpose of meeting the requirements of paragraphs 6, 7 and 8 of Part VII of the Verification Annex to the Convention.

15. Regulation 6(4) specifies the contents of a written report which is to be made by the operator of a Schedule 3 facility before 1 March in each year. The contents of the report have

been designed for the purpose of meeting the requirements of paragraphs 6, 7 and 8 of Part VIII of the Verification Annex to the Convention.

Regulation 7 - Record Keeping

16. Section 30 of the Act also provides that the operator of a facility must keep such records as are required by regulations. Regulation 7 requires that records are kept sufficient to enable the preparation of reports, in relation to permit facilities as specified in Regulation 6, and in relation to OCP facilities as specified in the Act.

17. Regulations 7(1), 7(2) and 7(3) require that the operator of a permit facility must keep a record of the information set out in Regulations 6(1), 6(2), 6(3) and 6(4) as is applicable for the facility, and must maintain these records for 4 full calendar years in the case of a Schedule 2 facility, and for 2 full calendar years in any other case.

18. Regulation 7(4) requires that the operator of an OCP facility must keep a record of the annual production quantity for unscheduled discrete organic chemicals, as well as the annual production quantity for PSF chemicals at each relevant plant, and must maintain such records for 2 full calendar years.

PART 3 - VERIFICATION PROCEDURES

Regulation 8 - Clarification procedures - subsection 49(3) inspections

19. A State Party to the Convention, rather than request a challenge inspection, may seek clarification from another State Party, directly or through the Organization, concerning the question whether there has been a breach of the Convention at particular premises. If a facility or location in Australia is the subject of such a request, the Director may conduct an inspection of the premises. Such an inspection may be conducted in the same manner as a challenge inspection, subject to such modifications as are prescribed.

20. Regulation 8 prescribes modifications which would remove from the inspection process those challenge inspection procedures related to the timely negotiation and monitoring of an inspection site perimeter by the Organization inspection team and the inspected State Party. In the case of an inspection carried out pursuant to subsection 49(3) of the Act, there would be unlikely to be such a perimeter defined. Also, perimeter monitoring would not normally be necessary during such an inspection.

Regulation 9 - Clarification procedures - subsection 49(10) inspections

21. A State Party to the Convention, rather than requesting a challenge inspection, may seek clarification from another State Party, directly or through the Organization, concerning the question of whether there has been a breach of the Convention at particular premises. If a facility or location in Australia is the subject of such a request, the Director may with the agreement of the owner or manager of the premises, arrange with his or her counterpart in the State Party seeking clarification, to conduct a joint inspection of the premises with foreign country inspectors nominated by the other State Party. Such inspections may be conducted in the same manner as a challenge inspection, subject to such modifications as are prescribed.

22. Regulations 9(a), 9(b), 9(c) and 9(d) prescribe modifications which would remove from the inspection process those challenge inspection procedures related to the timely negotiation and monitoring of an inspection site perimeter by the Organization inspection team and the inspected State Party. In the case of an inspection carried out pursuant to subsection 49(10) of the Act,

there would be unlikely to be such a perimeter defined. Also, the resources required to apply perimeter monitoring would not normally be available during such an inspection.

23. Regulation 9(e) prescribes modifications which would remove from the inspection process those challenge inspection procedures related to the presence of a third party observer, as none would be likely to be present during an inspection carried out pursuant to subsection 49(10) of the Act.

24. Regulation 9(f) prescribes modifications which would vary challenge inspection procedures, so that the mandate for an inspection carried out pursuant to subsection 49(10) of the Act is agreed by the Director and his counterpart in the State Party seeking clarification.

25. Regulations 9(g), 9(h), 9(i) and 9(j) prescribe modifications which would vary challenge inspection procedures, so that a foreign country inspector is afforded only those powers appropriate to the nature of an inspection carried out pursuant to subsection 49(10) of the Act.

PART 4 - PRIVILEGES AND IMMUNITIES OF AN INSPECTOR

26. Section 101 of the Act provides in part that an Organization inspector is to have privileges and immunities as are prescribed for the purposes of the section, and facilitates the according of privileges and immunities set out in paragraphs 11 to 14 of Part II of the Verification Annex to the Convention.

Regulation 10 - Application of this Part

27. Regulation 10 prescribes the circumstances in which Part 4 of the Regulations is to apply. This ensures that the privileges and immunities are used for the sake of the Convention, and not for the personal benefit of the individuals themselves.

Regulation 11 - Privileges and Immunities of an inspector carrying out an inspection in Australia

28. Regulation 11 prescribes the privileges and immunities to be enjoyed by an Organization inspector in the course of inspection activities in Australia. The privileges and immunities set out in this regulation are consistent with the requirements of paragraphs 11 and 12 of Part H of the Verification Annex to the Convention, and are those considered necessary for the effective exercise by an Organization inspector of his or her function.

Regulation 12 - Samples and approved equipment

29. Regulation 12 prescribes limitations on the privileges and immunities to be enjoyed by Organization inspectors consistent with paragraphs 11(d), 29 and 54 of Part H of the Verification Annex to the Convention. These limitations aim to protect the rights of the inspected state party in relation to sample taking and analysis, and use of only approved inspection equipment at an inspection site. They aim also to ensure that any hazardous samples are transported in a safe manner.

Regulation 13 - Application of the *Public Order (Protection of Persons and Property) Act 1971* to Organization inspectors

30. Regulation 13 prescribes certain elements of the privileges and immunities to be enjoyed by an Organization inspector, in terms of the provisions of the *Public Order (Protection of Persons and Property) Act 1971*.

Regulation 14 - Waiver

30. Paragraph 14 of Part II of the Verification Annex to the Convention provides for the Director-General of the Organization to waive the immunity of an inspector from jurisdiction where he or she is of the opinion that immunity would impede the course of justice, and that it can be waived without prejudice to the implementation of the provisions of the Convention.

31. Regulation 14 prescribes that if the Organization waives a privilege or immunity set out in Regulation 11, that provision does not apply to the inspector.

PART 5 - MISCELLANEOUS

Regulation 15 - Register of permits and notifications

32. Section 98 of the Act provides that the Director must keep in an prescribed form a Register of Permits and Notifications and enter in the Register particulars of all permits and renewals, transfers and revocations of permits.

33. Regulation 15 prescribes the form of the Register as electronic database files, and that their structure is sufficient to record relevant information on all permit and OCP facilities.

Regulation 16 - Notices

34. Subsection 104(c) of the Act provides for the Regulations to prescribe the manner in which any notification by the Director under the Act or the Regulations is to be made.

35. Regulation 16 prescribes that the Director must effect a notification by giving a person a notice in writing, addressed to the person, and delivered, sent by pre-paid post, or faxed to the person or the person's last known address.

Regulation 17 - Reports

36. Subsection 104(e) of the Act provides for the Regulations to make provision for the making of reports to the Organization in compliance with Australia's obligations under the Convention.

37. Regulation 17 prescribes that declarations and reports are to be provided by the Director in accordance with Australia's obligations under the Convention.