

TASMANIA

CHEMICAL TRESPASS BILL 2010

[Bill 36]

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**This page is part of the document and is
required for numbering purposes.**

CHEMICAL TRESPASS BILL 2010

(Brought in by Timothy Bryce Morris)

A Bill For

An Act to make the trespass of any agricultural chemicals an offence and to facilitate the recovery of damages.

Be it enacted by his Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

1. Short title

This Act may be cited as the *Chemical Trespass Act 2010*.

2. Commencement

The provisions of this Act commence on a day to be proclaimed.

3. Interpretation

In this Act –

“**Act of nuisance**” means both public and private nuisance and includes any act which has caused inconvenience or damage or which has been injurious to human health, domestic and commercial livestock, and, or, the environment, including air, land, surface and groundwater resources, or has caused personal injury to any person or interfered with his or her enjoyment of life, or detected on land, or in water resources, or affected the ability of the public to exercise rights which are common to all persons;

“**Agency**” – has the same meaning as in the *State Services Act 2000*;

“Agricultural chemical” means any chemical used for the purpose of controlling any pests in any situations including agriculture, forestry, industry, local government administration or for any domestic purpose; and includes any herbicide, insecticide, fungicide, acaricide, nematicide, rodenticide, slimicide, monofluoroacetates, plant growth regulator, or desiccant;

“Agricultural chemical trespass” means the occurrence of any agricultural chemical of any amount, such that it is:

- (a) Detectable pursuant to any method authorised by regulations made under this Act; that occurrence being in the air, detected in any surface or ground water resource;
- (b) Found in any livestock, whether domestic or commercial; or on any land in any form other than with the express and informed consent of the owner and occupier of the land;

“Agricultural spraying” means the spraying, spreading or dispersing of an agricultural chemical product whether by hand or from any machine or piece of equipment, and includes aerial spraying;

“Air” – includes any layer of the atmosphere;

“Analyst” - means an analyst appointed and holding office under section 27;

"Appeal Tribunal" means the Resource Management and Planning Appeal Tribunal, as established under the *Resource Management and Planning Appeal Tribunal Act 1993*;

“Authorized officer” – means an authorized officer under section 8;

“Council” shall mean any Council constituted as such under the *Local Government Act 1993*;

“Director” – means the Director, Environment Protection Authority holding office under section 18 of the *Environmental Management and Pollution Control Act 1994*;

“director”, in relation to a body corporate, includes –

- (a) a person occupying or acting in the position of a director or member of the governing body of the body corporate, by whatever name called and whether or not validly appointed to occupy or duly authorized to act in the position; and
- (b) any person in accordance with those directions or instructions the directors or members of the governing body are accustomed to act;

“Environment” means components of the earth, including –

- (a) land, air and water resources; and
- (b) any organic matter and inorganic matter and any living organism; and
- (c) human-made or modified structures and areas –

and includes interacting natural ecosystems that include components referred to in paragraph (a) or (b);

“Fund” – means the Environment Protection Fund established under section 97 of the *Environmental Management and Pollution Control Act 1994*;

“Forestry” includes any change to the natural or existing condition or topography of any place including the removal, destruction or lopping of trees and the removal of vegetation or topsoil, and does include forestry practices conducted in state forest and private forest reserves, as defined in the *Forest Practices Act 1985*, and the *Forest Practices (Private Timber Reserves Validation) Act 1999*

“Groundwater” means –

- (a) water occurring naturally below ground level; or
- (b) water pumped, diverted or released into a well for storage underground;

"Groundwater area" means an area of land in which any wells take, or may take, water from a single aquifer;

"Land" includes –

- (a) buildings and other structures permanently fixed to land; and
- (b) land covered with water; and
- (c) water covering land; and
- (d) any estate, interest, easement, servitude, privilege or right in or over land;

"Occupier", in relation to any place or land, means any person in addition to an owner who is in lawful occupation of that place or land, and includes any employee or other person acting under the authority of any person in lawful occupation of that place or land. Where no person is the occupier of any place or land, the owner of that place or land shall be deemed to be its occupier for the purposes of this Act;

"Officer", in relation to a body corporate, means –

- (a) a director of the body corporate; or
- (b) the chief executive officer of the body corporate; or
- (c) a receiver or manager of any property of the body corporate or a liquidator of the body corporate –

and includes, in relation to a contravention or alleged contravention of this Act by the body corporate, an employee of the body corporate with responsibilities in respect of the matters to which the contravention or alleged contravention relates;

"Owner" means –

- (a) in the case of a fee simple estate in land – the person in whom that estate is vested;
- (b) in the case of land not registered under the *Land Titles Act 1980* and subject to a mortgage – the person having, for the time being, the equity of redemption in that mortgage;

- (c) in the case of land held under a tenancy for life – the person who is the life tenant;
- (d) in the case of land held under a lease for a term of not less than 99 years or for a term of not less than such other prescribed period – the person who is the lessee of the land;
- (e) in the case of land in respect of which a person has a prescribed interest – that person;
- (f) in the case of Crown land within the meaning of the *Crown Lands Act 1976*, the Crown in right of the State of Tasmania;
- (g) in the case of Crown land that is State forest within the meaning of the *Forestry Act 1920* – the Forestry corporation as defined under section 6 of the *Forestry Act 1920*;

“Public authority” means –

- (a) any council; or
- (b) any body corporate established under an enactment having jurisdiction limited to a district, locality or part of the State; or
- (c) any body corporate established under an enactment or in the exercise or prerogative rights of the Crown to administer or control any department, business, undertakings or public institution on behalf of the State;

“Person” includes any body of persons, corporate or unincorporate, and includes a department, or other agency of Government or of the State or the Commonwealth and an authority of the State or the Commonwealth;

“Person in charge”, in relation to a vehicle, does not include a lessor, mortgagee or financial institution that has not assumed active use of that vehicle;

“Pest” means any mammal, bird, reptile, amphibian, fish, insect, arthropod, mollusc, nematode or other worm, plant or fungus, not being an organism which lives on or in human beings or in any livestock; and includes any bacterium or virus which affects

plants and whose presence on any land might be unwanted by the owner or occupier of that land any other organism which may be declared by regulations made under this Act to be a pest for the purposes of chemical trespass;

“Place” includes a waterway, and any land covered by water, and the air space above land or water;

“Police officer” – has the meaning assigned to that expression by the *Police Service Act 2003*;

“Secretary” means Secretary of the Department;

“The regulations” means the regulations made and in force under this Act;

“Vehicle” shall include tractors, fixed wing airplanes, helicopters, motorcycles, farm bikes, motorised vessels (including hovercraft and jet boats), and any other form of transport;

"Surface water" means –

- (a) water flowing over land otherwise than in a watercourse –
 - (i) after having fallen as rain or hail or having precipitated in any other manner;
 - or
 - (ii) after rising to the surface naturally from underground; or
- (b) water as mentioned in paragraph (a) that has been collected in a dam or reservoir for domestic or commercial use;

"Water resource" means a watercourse, lake or any surface water or groundwater, including bores, wells, water tanks, and other man-made water collection resources for the purpose of securing water resource for personal, or agricultural use;

"Watercourse" means:

(1) A river, creek or other natural stream of water (whether modified or not) flowing in a defined channel, or between banks, notwithstanding that the flow may be intermittent or seasonal or the banks not clearly or sharply defined, and includes –

- (a) a dam that collects water flowing in any such stream; and
- (b) a lake through which water flows; and
- (c) a channel into which the water of any such stream has been diverted; and
- (d) part of any such stream – but does not include –
 - (i) a channel declared by the regulations to be excluded from this definition; or
 - (ii) a drain or drainage depression in the contours on the land which only serves to relieve upper land of excess water in times of major precipitation;

(2) In this Act –

- (a) a reference to a watercourse is taken as a reference to either –
 - (i) the bed and banks of the watercourse; or
 - (ii) the water for the time being within the bed and banks of the watercourse – or both, depending on the context; and
- (b) a reference to a lake is taken as a reference to either –
 - (i) the bed, banks and shores of the lake; or
 - (ii) the water for the time being held by the bed, banks and shores of the lake – or both, depending on the context;

"Well" means –

- (a) an opening in the ground deeper than 3 metres below the surface of the earth excavated or used for the taking of groundwater; or
- (b) a natural opening in the ground that gives access to groundwater; or
- (c) any other excavation as may be provided by the regulations;

4. Act to bind the Crown

This Act binds the Crown in right of Tasmania and, so far as the legislative power of Parliament permits, in all its other capacities.

5. Ability to bring prosecution or action to prevent agricultural chemical trespass

- (1) Nothing in this Act affects any persons rights to bring an action against such other person for damages.
- (2) Proceedings for an offence against this Act may be commenced at any time within 3 years after the date of the alleged commission of the offence, or failure to comply with the Act or, if the court is satisfied that it is just and reasonable, at any time within 10 years after the date of the alleged commission of the offence.

6. Civil remedies not affected

Nothing in this Act shall affect the provisions of the *Criminal Code 1924* or prevent any person from seeking to pursue any rights which might be claimed pursuant to that Act.

7. Liability for nuisance not affected

Nothing in this Act shall affect the liability of any person in respect of any nuisance or the ability of any person to seek the abatement of a nuisance.

PART 1 – ADMINISTRATION

Division 1 – Powers of authorized officers

8. Authorized officers

- (1) The Director is an authorized officer for the purposes of this Act.
- (2) The Secretary of the Department may –
 - (a) Appoint State Service officers and State Service employees appointed or employed in the Department; and
 - (b) Appoint State Services and State Service employees appointed or employed in another Agency, with the consent of the Head of that Agency-

As authorized officers for the purposes of this Act, and those persons may exercise the powers and perform the functions of an authorized officer in conjunction with State Service employment.

- (3) All police officers, within the meaning of the *Police Service Act 2003*, are authorized officers.
- (4) The Secretary of the Department may, with the consent of any person, appoint that person or an employee of that person as an authorized officer.
- (5) A person appointed as an authorized officer is to be appointed on such terms and conditions as the Secretary of the Department determines.

9. Offence to hinder, &c., authorized officers and council officers

- (1) A person must not –
 - (a) hinder or obstruct an authorized officer or a council officer, or a person assisting an authorized officer or council officer, in the exercise of powers conferred by this Act; or
 - (b) use abusive, threatening or insulting language to an authorized officer or a council officer, or a person assisting an authorized officer or council officer; or

(c) refuse or fail to comply with a requirement or direction of an authorized officer or a council officer; or

(d) when required by an authorized officer or a council officer to answer a question, refuse or fail to answer the question to the best of the person's knowledge, information and belief; or

(e) falsely represent, by words or conduct, that he or she is an authorized officer or a council officer.

Penalty: Fine not exceeding 40 penalty units.

(2) A person must not assault an authorized officer or a council officer, or a person assisting an authorized officer or council officer, in the exercise of powers under this Act.

Penalty: Fine not exceeding 80 penalty units or imprisonment for a period not exceeding 2 years, or both.

10. Offences by authorized officers, &c.

An authorized officer or a council officer, or a person assisting an authorized officer or council officer, must not –

(a) Address offensive language to any other person; or

(b) Without lawful authority, hinder or obstruct or use or threaten to use force in relation to any other person; or

(c) Without lawful authority, unreasonably refuse to provide evidence of identification and authorization when so required.

Penalty: Fine not exceeding 40 penalty units.

Division 2 – Provision of detection and technical assistance

11. Obligation on the Agency to provide detection methods on request

- (1) The function of the Agency under this Act shall be to assist any person to identify and record the occurrence of any agricultural chemical trespass by the provision to that person of detection methods and equipment as from time to time have been prescribed by regulations made under this Act.

- (2) The Director shall, where appropriate, authorise the provision of analysts, veterinarians and other technical personnel, information and equipment as is considered necessary to carry out the function specified in subsection (1) of this section.

PART 2 – AGRICULTURAL CHEMICAL TRESPASS

Division 1 – Agricultural chemical trespass

12. Liability for agricultural chemical trespass

- (1) No person shall use agricultural chemicals on location in such a way as to cause an agricultural chemical trespass.
- (2) No person shall transport agricultural chemicals in such a way as to cause an agricultural chemical trespass.
- (3) For the purposes of this Act, the occupier or person in charge of vehicle at or from which a chemical escapes or is discharged, emitted or deposited is taken to have polluted the environment with the chemical (but without affecting the liability of any other person in respect of the escape, discharge, emission or depositing of the chemical pollutant).
- (4) It shall be a defence to a prosecution of the kind referred to in subsections (1) (2) and (3) of this section if the defendant can prove that the action or event to which the prosecution relates:
 - (a) was necessary for the purposes of saving human life, or
 - (b) was caused by a natural disaster; or
 - (c) was caused by an act of sabotage or vandalism.

13. Damage by spray drift

- (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 the premises.

Penalty: Fine not exceeding 200 penalty units.

- (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 or on plants, stock, agricultural produce, water bodies and resources, groundwater, soil or premises.

14. Offence to not report agricultural chemical trespass

It is an offence for any person who knows of, or participated in, an act resulting in agricultural chemical trespass to not report it to the authorities, whether the agricultural chemical trespass was caused by an accident or by negligence.

Division 2 – Emergency authorizations

15. Emergency authorizations

- (1) An emergency order may be made by the Minister for the Environment if the Minister is satisfied on reasonable grounds, having regard to all available information, that:
 - (a) The order is necessary to control a situation which has the potential to cause significant economic loss, significant environment loss, or both to Tasmania;
 - (b) The circumstances of urgency exist; and
 - (c) It is in the public interest that action be taken immediately to prevent, manage, or eradicate the situation and sufficient powers are not otherwise available to enable the situation to be effectively prevented, managed or eradicated.
- (2) The Minister for the Environment shall consult with the Minister for Health before notifying any emergency order, in the Gazette.
- (3) Any order which has resulted from consultation provided for in subsection (1) and (2) of this section shall require the Minister for the Environment to adopt the most environmentally responsible method of response.
- (4) It shall not be an offence for any person to use any agricultural chemicals in such a way as to cause an agricultural chemical trespass if the use has been pursuant to an order made by the Minister for the Environment in the event of an emergency and notified in the Gazette after consultation, as provided in section 15 (2) of this Act.

- (5) Any person who has been charged or sued in respect of any agricultural chemical trespass may plead such an order in defence of any prosecution or action which is brought in respect of such trespass.

Division 3 – Notification obligations

16. Notification of incidents

- (1) A person responsible for an activity using agricultural chemicals must notify the council and the Director, as soon as reasonably practicable but not later than 24 hours, after becoming aware of agricultural chemical trespass occurring as the result of any incident in relation to that activity, including an emergency, accident or malfunction.
- (2) Any notification referred to in subsection (1), must include details of the incident, its nature, the circumstances in which it occurred and any action that has been taken to remedy it.
- (3) A person who contravenes subsection (1) or (2) is guilty of an offence.

Penalty:

In the case of –

- (a) a body corporate, a fine not exceeding 1 200 penalty units; or
- (b) a natural person, a fine not exceeding 600 penalty units.

- (4) For the purposes of subsections (1), (2) and (3) –

(a) a person is not required to notify the council or the Director of such an incident if the person has reasonable grounds for believing that the incident has already come to the notice of the council or Director or any officer engaged in the administration or enforcement of this Act; but

(b) a person is required to notify the council or the Director of such an incident despite the fact that to do so might incriminate the person or make the person liable to a penalty.

(5) Any notification given by a person in compliance with this section is not admissible in evidence against the person in proceedings for an offence or for the imposition of a penalty (other than proceedings in respect of the making of a false or misleading statement).

PART 3 – ENFORCEMENT PROVISIONS

Division 1 – Information to be supplied

17. Power to require information

(1) The Director may, by notice in writing served on a person, require that person to provide the Director, within the period specified in the notice, with such information as the Director reasonably considers necessary in the interests of the environment.

(2) A person who is aggrieved by a requirement under subsection (1) may appeal to the Appeal Tribunal.

(3) If a person served with a notice under this section contravenes a provision of the notice, that person is guilty of an offence.

Penalty: In the case of –

(a) a body corporate, a fine not exceeding 250 penalty units; and

(b) a natural person, a fine not exceeding 100 penalty units.

18. Obligation to provide name and other particulars

(1) Any person who has been charged with agricultural chemical trespass may be required by the owner or occupier of any place on which such trespass is alleged to have occurred or any authorized officer or member of the police, to give particulars of such person's name and usual residential address and complete details of that chemical, its time of application, the quantity applied, its composition, and the method of its application.

(2) If any such person fails or refuses to comply with a requirement made under subsection (1) of this section, any police officer may caution that person and any

person who then refuses or fails to provide such information may be arrested without warrant.

- (3) Any person who fails to comply with a request under subsection (1) of this section commits an offence against this Act.
- (4) Where any person provides information pursuant to subsection (1) that shall constitute prima facie existence of those facts, unless evidence is submitted to the contrary.

19. False or misleading statements

- (1) A person must not, in making any application or giving any information under this Act –
 - (a) Make a statement knowing it to be false or misleading; or
 - (b) Omit any matter from a statement knowing that without that matter the statement is misleading.

Penalty: In the case of –

- (a) A corporation, a fine not exceeding 100 penalty units; or
- (b) Any other person, a fine not exceeding 50 penalty units.

- (2) A person must not make any statement about a chemical product, preparation or fitting or the use of a chemical product, that is false or misleading and likely to cause a person who relies on the statement to commit an offence under this Act.

Penalty: In the case of –

- (a) A corporation, a fine not exceeding 100 penalty units; or
- (b) Any other person, a fine not exceeding 50 penalty units.

- (3) A person must not make a statement that is false or misleading in answer to a question or an inquiry by an analyst, authorised officer or the Secretary.

Penalty: In the case of –

- (a) A corporation, a fine not exceeding 100 penalty units; or
- (b) Any other person, a fine not exceeding 50 penalty units.

20. Proof of intention, &c., for offences

Subject to any express provision in this Act to the contrary, it is not necessary to prove any intention or other state of mind in order to establish the commission of an offence against this Act.

Division 2 – General offences

21. Offences and penalties

- (1) Every person commits an offence against this Act who has caused or has been responsible for having caused any agricultural chemical trespass.
- (2) Every person commits an offence against this Act if they were involved in an incident of agricultural chemical trespass but have not ensured that the incident was reported to the authorities.
- (3) Every person who has committed an offence against this Act for which no other penalty is prescribed in this Act shall be liable on summary conviction;
 - (a) In the case of an individual, to imprisonment for a term not exceeding two years, or to a fine not exceeding 1, 000 penalty units or both and, if the offence is a continuing one, to a further fine not exceeding 100 penalty units for every day on which the offence continues;
 - (b) In the case of a body corporate, to a fine not exceeding 2, 000 penalty units and, if the offence is a continuing one, to a further fine not exceeding 200 penalty units for every day on which the offence continues.

22. Disqualification

A court that convicts a person of any offence against this Act or who orders a sum of money to be paid by way of damages to any person, may (in addition to or in substitution for any other penalty) disqualify that person for any period it thinks fit from using or authorising any other person to use an agricultural chemical.

23. Orders by court against offenders

(1) Where, in proceedings for an offence against this Act, the court finds the defendant guilty of a contravention of this Act that resulted in agricultural chemical trespass, the court may, in addition to any penalty it may impose, do one or more of the following:

- (a) Order the person to take specified action to make good any resulting environmental damage caused by agricultural chemical trespass, whether directly or indirectly, and, if appropriate, to take specified action to prevent or mitigate further environmental harm;
- (b) Order the person to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit;
- (c) Order the person to take specified action to publicize the contravention and its environmental and other consequences and any other orders made against the person;
- (d) Order the person to pay –
 - (i) To any public authority, including the Director, councils, police officers, analysts or any other person, that has incurred costs or expenses in taking action to prevent or mitigate agricultural chemical trespass or to make good any resulting agricultural chemical trespass; and
 - (ii) To any person who has suffered loss or damage to property, land or water resources, as a result of the contravention, or incurred costs or expenses in taking action to prevent or mitigate such loss or damage –

The reasonable costs and expenses so incurred, or compensation for the loss or damage so suffered, as the case may be, in such amount as is determined by the court.

- (2) The court may, by an order under this section, direct part or full payment of any specified penalty costs to the Fund.
- (3) The court may, by an order under this section, fix a period for compliance and impose any other requirements the court considers necessary or expedient for enforcement of the order.
- (4) An order under this section shall not affect the right of any person to recover by civil proceedings, any sum in excess of the amount paid pursuant to the order.

24. Liability of officers of body corporate

(1) Where a body corporate commits an offence against this Act, a person who is an officer of the body corporate is –

(a) subject to the general defence under this Part, guilty of an offence; and

(b) subject to subsection (2), liable to the same penalty as may be imposed for the principal offence when committed by a natural person.

(2) Where an officer of a body corporate is convicted of an offence under subsection (1), the officer is not liable to be punished by imprisonment for the offence.

(3) Where a body corporate commits an offence of contravening a provision of this Act, an officer of the body corporate who knowingly promoted or acquiesced in the contravention is also guilty of an offence against that provision.

(4) An officer of a body corporate may be prosecuted and convicted of an offence pursuant to subsection (1) or (3) whether or not the body corporate has been prosecuted or convicted of the offence committed by the body corporate.

25. Recovery from related bodies corporate

Where –

(a) an amount is payable by a body corporate under this Act or an order of a court made under this Act; and

(b) at the time of the contravention giving rise to that liability, that body and another body were related bodies corporate – the related bodies corporate are jointly and severally liable to make the payment.

26. Recovery of technical costs associated with prosecutions

Where a person is convicted of an offence against this Act, the court may, on application by the Director or a council, order the convicted person to pay to the Director or the council the reasonable costs and expenses incurred by the Director or the council in the taking of any samples or the conduct of tests, examinations or analyses in the course of the investigation and prosecution of the offence.

PART 4 – MISCELLANEOUS AND SUPPLEMENTAL

27. Analysts

- (1) The Secretary may appoint as an analyst for the purposes of this Act –
- (a) A person employed in the Department who possesses the appropriate qualifications; or
 - (b) With the approval of another Head of a State Service Agency, a State Service officer or State Service employee employed in that Agency who possesses the appropriate qualifications.
- (c) The Secretary may authorise appropriately qualified persons who are not State Service officers or State Service employees to perform the functions and exercise the powers of an analyst for the purposes of this Act.

28. Vehicles detained, etc.

Where any person has been arrested for an offence against this Act, any police officer or authorized officer may take possession of any vehicle and equipment of which that person was in charge at the time of the occurrence of the alleged offence, and may lodge it in some place of safe custody until a Magistrate orders that that vehicle or equipment or both be delivered to the owner thereof or to the person arrested under this Act.

29. Regulations

The Governor may from time to time, by Order in Council, make regulations for all or any of the following purposes;

- (a) Prescribing types of apparatus and procedures for testing necessary to prosecute to conviction any alleged agricultural chemical trespass;
- (b) Prescribing methods of detection and equipment as relate to agricultural chemical trespass necessary to prosecute to conviction any such trespass;
- (c) Providing for any organism to be declared to be a pest for the purposes of an agricultural chemical trespass;

(d) Providing for such matters as are contemplated by, or necessary to give full effect to the provisions of this Act and any regulations made hereunder and for its due administration.

30. Legal Aid provision

Notwithstanding any provision to the contrary in the *Legal Aid Commission Act 1990*, any person shall be entitled to apply for legal aid pursuant to the provisions of that Act.

31. Recovery of unpaid fees

(1) A fee not paid by the due date is recoverable from the person liable to pay it as a debt due to the Crown.

(2) The Minister, by notice in the Gazette, may impose a penalty as determined by the Treasurer for the non-payment of any fee.

32. Assessment of reasonable costs and expenses

For the purposes of this Act, the reasonable costs and expenses that have been or would be incurred by the Director, a council or some other public authority or person in taking any action are to be assessed by reference to the reasonable costs and expenses that would have been or would be incurred in having the action taken by independent contractors engaged for that purpose.

33. Administration of Act

Until provision is made in relation to this Act by order under section 4 of the *Administrative Arrangements Act 1990* the administration of this Act is assigned to the Minister for Environment.