

## The Regulation of Agricultural and **Veterinary Chemicals**

The Agricultural and Veterinary Chemicals (New South Wales) Bill 1994

by

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### Introduction

The purpose of this paper is to provide a brief overview of the regulation of agricultural and veterinary chemicals in Australia with particular reference to the introduction of the Agricultural and Veterinary Chemicals (New South Wales) Bill 1994.

### Development of Regulation of Agricultural and Veterinary Chemicals: Australia-Wide

According to the study undertaken by the Public Interest Advocacy Centre, at least 20,000 toxic chemicals are imported into Australia annually and an additional 700 are manufactured locally. These products in turn are made into at least 200,000 brand name chemicals. Amongst these are about 440 pesticides which are available for use on farms, market gardens and orchards.<sup>1</sup>

The registration of agricultural and veterinary chemicals in Australia began in the 1930s. The focus of the early schemes was on preventing the sale of defective products, and the bodies responsible for regulation of chemicals were independent state and territory organisations. In 1969 an informal arrangement was decided upon, under the auspices of the then Australian Agricultural Council (AAC) by which the Commonwealth and the states agreed on a two-stage process for approval procedures. The Commonwealth government took responsibility for evaluation and issuing of clearance certificates for the chemicals, and the states assumed responsibility for registration. In theory, and in practice, however, this meant that a manufacturer of a pesticide would have to register his/her product in every state in order for it to be available for use Australia-wide.<sup>2</sup>

The evaluation process was co-ordinated through two technical sub-committees within what was, at that time, the AAC's Standing Committee on Agriculture. Once a chemical product was cleared, applicants were required to apply to either the states or to the territories for registration under the legislation.

Public Interest Advocacy Centre, Toxic Maze, Paper no.1 "Commonwealth Notification and Assessment Scheme for Agricultural and Industrial Chemicals" (International Business Communications, Sydney, 1991), p.1; Kate Short, Quick Poison, Slow Poison: Pesticide Risk in the Lucky Country (Envirobook, Sydney, 1994), p.107.

Toxic Maze, Paper No.1, p.2.

### The 1988 Commonwealth Legislation and the Establishment of the Australian Agricultural and Veterinary Chemicals Council (AAVCC)

Although this informal clearance system operated relatively successfully there was increasing evidence to the contrary and corresponding public disquiet over the widespread use of pesticides and their penetration into the food chain. Concerns over the use of pesticides internationally were highlighted in the early 1960s by Rachel Carson in her book *Silent Spring*.<sup>3</sup> Within NSW controversy developed, during the 1970s and the 1980s, over the extent of DDT spraying on cotton in the Namoi Valley, the use of pesticides on banana plantations in the Coffs Harbour area and, most recently, the chemical residues from cattle dip sites.<sup>4</sup>

In 1986 the federal Minister for Primary Industry, John Kerin, announced that he would review the clearance procedures for agvet chemicals. Some of the projected purposes of the legislation were: to reduce duplication of effort between the states; promote standardisation of control measures; improve control over chemical use in agriculture; and provide for further rationalisation of the registration process.

Concerns over this issue came to a head in 1987 when excessive levels of DDT were found in exports of Australian beef to the USA, thus constituting a serious threat to an important market for Australian exports.

In response to this the Commonwealth government secured the passage of the Agricultural and Veterinary Chemicals Act 1988. The legislation was based on an agreement between the Commonwealth, the states and the territories under which the states would not register agricultural and veterinary chemicals unless Commonwealth clearance was granted. However, clearance could only be given where a voluntary application had been made: in other words the legislation was not coercive. The body established by the legislation to be responsible for the clearance of chemical products was the Australian Agricultural and Veterinary Chemicals Council (AAVCC). The membership of the Council was representative of all institutions responsible for the clearance of agricultural and veterinary chemicals in Australia. Each state and the Northern Territory were represented as well as each of the relevant federal bodies which played a part in the clearance process: the

Rachel Carson, Silent Spring (Hamish Hamilton, London, 1963).

Alan Gilpin, Environment Policy in Australia (University of Queensland Press, Brisbane, 1980), pp.212-213; Short, op.cit., p.143; Cattle Tick Dip Site Management Committee, Report on the Management of Contaminated Waste at Cattle Tick Dip Sites in North-East NSW (NSW, 1992).

National Health and Medical Research Council (NHMRC), the Australia and New Zealand Environment and Conservation Council (ANZECC) and the National Occupational Health and Safety Commission (NOHSC).

As well as being responsible for the evaluation of agricultural and veterinary chemicals proposed for sale and use in Australia, the AAVCC was also the national organisation responsible for deciding all major policy issues relating to the clearance and registration of agvet chemicals and was the principal management body overseeing the development of a uniform national approach to the assessment and regulation of farm chemicals.<sup>5</sup>

At its first meeting in 1989, however, the AAVCC decided to limit the range of products coming within the new arrangements for clearance. Basically the AAVCC decided that the Commonwealth would only evaluate new chemical products and major extensions of the use of chemicals. Consequently products with minor label changes, and products for which clearance and registration were sought on the basis that they were similar in composition and purpose to a currently registered product continued to be dealt with directly by the states.

### The Senate Select Committee on Agricultural and Veterinary Chemicals and the National Registration Authority

In late 1988 the Senate established a select committee to inquire into the adequacy of arrangements, under the new legislation, for administration and co-ordination systems for agricultural and veterinary chemicals and to examine the economic, social and environmental impact on Australia of agvet chemicals. In its report, delivered in July 1990, the committee declared that in its opinion the legislation and regulatory processes dealing with these chemicals could be improved. It also believed that any new regulatory system needed to be open, accessible and accountable. To realise these aims the committee recommended that consideration be given to the establishment of a national system of clearance and registration of agvet chemicals.

In July 1990 a Special Premiers Conference highlighted control over agvet chemicals as an area for change. This decision stimulated the development of a national registration scheme.

Following this initiative the AAVCC produced a paper which member organisations could present to their governments. The paper concentrated on

Toxic Maze, Paper No.1 "Commonwealth Notification and Assessment Scheme for Agricultural and Industrial Chemicals", p.1.

matters where Commonwealth-State agreement was essential before national registration could proceed, issues such as the scope of future legislation, arrangements for control of use and administrative and operational details of the proposed scheme.

In August 1991 the Commonwealth, state and territory governments announced the establishment of a national registration scheme by which the federal government would be responsible for the registration of agvet chemicals up to the point of sale, and the states and territories would be responsible for controlling the use of such chemicals in regard to licensing pest controllers, aerial spraying and other related matters. The federal government also agreed that a national registration scheme would include a review of existing chemicals.<sup>6</sup>

During the first half of 1992 the Commonwealth conferred with the states and territories over the assumption of responsibilities involved in the administration of such a scheme. Those responsibilities were, however, divided. It was agreed that submissions for registration would be dealt with by the Commonwealth but that actual registration of agvet chemicals would remain the province of the states and territories.

In the latter half of 1992 the federal government secured the passage of the Agricultural and Veterinary Chemicals (Amendment) Act 1992 which provided for the establishment of a National Registration Authority (NRA), replacing the AAVCC, and having additional functions - principally that of coordinating a national compliance program and facilitating the standardisation of uniform state procedures for controlling the use of agvet chemicals. The legislation came into effect in June 1993.

NRA's role, as David Farrier has written, is to "investigate, evaluate and to decide whether to grant clearances to agricultural chemical products, including plant pesticides and herbicides, and veterinary chemical products, including animal pesticides". The authority is composed of a chairperson and seven other directors appointed by the Commonwealth Minister for Primary Industries. Two directors are obliged to have experience in regulating chemicals under State law; two are obliged to have experience in the agricultural and veterinary chemicals industry; one other director must have experience in consumer protection; one director must have experience in primary production; and one director is obliged to have had experience in

Toxic Maze, Paper No.1 "Commonwealth Notification and Assessment Scheme for Agricultural and Industrial Chemicals", p.19.

Agricultural and Veterinary Chemicals Code Bill 1993, Explanatory Memorandum, pp.2-3.

occupational health and safety as an employee of a union.8

#### Law and Administration in NSW

The principal act governing the use of agricultural and veterinary chemicals in NSW is the *Pesticides Act 1978*. This legislation has been described by Douglas Fisher as "the most comprehensive legislation in Australia on the topic". The Act, according to Fisher, has three principle aims: to protect the health of people using pesticides; to protect public health on a general level; and to protect the environment.<sup>9</sup>

Section 5, sub-sections 1 and 7, not only define a pesticide for the purposes of the Act but give the Minister responsible the power to declare a substance to be a pesticide.<sup>10</sup>

Acceptance of the AAVCC as the national clearing authority was provided for by the passage, in 1990, of section 5B of the Act. Appointment of a Registrar of Pesticides is provided for in Section 7 of the Act.<sup>11</sup>

The Act prohibits the sale and use of unregistered pesticides and provides for a system for pesticide registration, and a system of authorisation to sell and use pesticides. The responsibility for deciding whether a pesticide can be registered rests with the Registrar of Pesticides.<sup>12</sup>

David Farrier, The Environmental Law Handbook: Planning and Land Use in New South Wales (Redfern Legal Centre Publishing, Sydney, 1993), p.299. There is no obligation for environmental groups to be represented. See p.12.

D.E. Fisher, Environmental Law in Australia: An Introduction (University of Queensland Press, Brisbane, 1980), p.163.

Pesticides Act 1978, Sections 5(1) and 5(7). Section 5(1) defines a pesticide as "any substance or organism that is manufactured, represented, sold or used as a means for directly or indirectly: (a) destroying, stupefying, repelling, inhibiting the feeding of, or preventing infestation by attacks of, any pest; (b) attracting any pest for the purposes of its destruction; (c) destroying vegetation or altering its natural development, productivity, quality or reproductive capacity; or (d) destroying or rendering ineffective, or regulating the effect of, a fungus or any other parasitic vegetation, bacteria or a virus on or in: (i) any substance other than a manufactured food or beverage; or (ii) any form of life except where it is in a livestock or on or in man, and any substance or organism specified or described and declared to be a pesticide in an order published under subsection (7)".

ibid., Sections 5B and 7.

Pesticides Act 1978, Sections 8-31. Sections 9-11 provide for the details which must be included in an application for the registration of a pesticide, label or container for a pesticide. Section 13 deals with registration of a pesticide. Section 14 outlines the circumstances in which the Registrar may refuse to register a pesticide. Section 16, as amended in 1990,

Offences under the Act are dealt with in Sections 29-39. These sections deal with the sale of unregistered pesticides, supply of unregistered pesticides, use of unregistered pesticides, disregard of label instructions and the need for pesticides to conform to required standards.<sup>13</sup>

Protection of personal health and property is dealt with through Section 37 of the Act which states that "A person shall not wilfully and without reasonable cause do anything likely to cause: (a) a risk of injury by a pesticide, to himself or another; or (b) damage by a pesticide, to the property of another."<sup>14</sup>

Limiting pesticide residues in food is dealt with in Section 50(1) which states that "When an inspector believes on reasonable grounds that a quantity of a prescribed foodstuff contains a prohibited residue he may, with the consent of the Registrar, serve a notice in or to the effect of the approved form on: (a) the owner of the food-stuff; (b) the occupier of the place where the foodstuff is situated; or (c) the person who appears to the inspector to be the person in charge of any vehicle, aircraft or vessel in or on which the foodstuff is situated." <sup>15</sup>

Inspectors, and their powers, are provided for under Section 53.16

Offences by companies, and by employers, are dealt with under Sections 62 and 63.17

contain provisions for registration by the NSW Registrar of Pesticides once the AAVCC has cleared the chemical. Section 18 requires the NSW Registrar of Pesticides to maintain a register of all pesticides registered for use in NSW. Section 20, as amended in 1990, provides for cancellation of registration if the AAVCC has withdrawn clearance. Section 22A-22C deals with applications to the Registrar of Pesticides for aerial spraying permits (Section 49E deals with prohibition of aerial spraying). Section 23 provides for the Registrar to issue a permit to use an unregistered pesticide in special circumstances and Section 24 provides for the Registrar to refuse to issue a permit, or to refuse to renew a permit, to use a pesticide if the Registrar deems that personal or public safety may be harmed by its use. Section 27 allows the Registrar to make exemptions for persons to undertake actions normally prohibited under the Act, through issuing a Pesticide Order - to be published in the Government Gazette.

ibid., Sections 29-39.

ibid., Section 37.

ibid., Section 50(1).

ibid., Section 53.

ibid., Sections 62 and 63.

### The National Registration Scheme and Enabling Legislation

A national registration scheme for agricultural and veterinary chemicals still requires an appropriate legal basis. The legislative realisation of this has been achieved by the drafting of seven Commonwealth Bills and a model state Bill. Extensive consultation was undertaken by the Commonwealth with several interest groups and with officials from the appropriate state government agencies. The Commonwealth Bills were introduced into the House of Representatives in December 1993 and passed by the Parliament in March of this year.

The operational heart of the federal legislation is the Commonwealth's Agricultural and Veterinary Chemicals Code Act 1994 (the Agvet Code), passed as one of the seven Bills introduced into the federal Parliament, to be administered by the National Registration Authority. In future, pesticides will be cleared by the National Registration Authority (NRA) on the basis of the Agvet Code. This effectively gives the Commonwealth control over registration and supply of pesticides up to the point of sale. After sale the use of the pesticide falls under the state jurisdiction of (in the case of the NSW) the Pesticides Act 1978.

The Agricultural and Veterinary Chemicals Code consists of 11 parts. The major parts deal with the following matters:

- Approvals and Registration: in particular approval of active constituents for proposed or existing chemical products; registration of chemical products and approval of labels for containers for chemical products (Part 2)
- Compensation for Provider of Certain Information in respect of Continued Registration of Certain Chemical Products: in particular receipt of compensation from anyone else who wishes to use information, supplied by a person to the NRA in relation to a chemical product, in connection with an application to register another chemical product (Part 3)
- Control of Chemical Products: in particular the restriction of the possession of unapproved constituents and unregistered products; the restriction of the supply of unapproved constituents or unregistered products; the restriction of the supply of approved constituents or registered in contravention of the conditions of their approval or registration (Part 4)

- Analysis of Chemical Samples: in particular the procedure by which samples or substances are to be analysed and how the evidence of the results of this analysis may be given in proceedings under this code (Part 5)
- Recall Notices: in particular the way in which the NRA may issue recall notices requiring persons who have, or have had, stocks of chemical products in their possession to stop supplying the products and enforce the taking of action in relation to products as directed by the NRA (Part 6)
- **Permits**: in particular the issuing of a permit to exempt a person from the provisions of the Act, in respect of their wish to use an active constituent in a way which would be prohibited by the Act (Part 7)
- Manufacture of Chemical Products: in particular the prohibition of the manufacture of certain chemical products and provision for the licensing of manufacturers of other chemical products (Part 8)
- Enforcement (Part 9)<sup>18</sup>

The scheme will become effective nationally when each of the states and territories adopts the Agricultural and Veterinary Chemicals Code through passing the model Bill.

NSW has an important part to play in the national registration strategy since NSW and Victoria are the two states with the highest rate of pesticide use.

The Agricultural and Veterinary Chemicals (New South Wales) Bill 1994, the model Bill under which NSW will adopt the Agricultural and Veterinary Chemicals Code as administered by the NRA, was introduced into the NSW Parliament in May 1994. The Hon. Ian Causley M.P., Minister for Agriculture and Fisheries, in introducing the Bill, stated that "This bill provides for the State Government's ratification of a scheme for the national registration of agricultural and veterinary chemicals ... The national registration scheme provides the opportunity for significant improvements in efficiency and an overall reduction in the time required for registration of agricultural and veterinary chemicals Australia-wide. There are considerable advantages for manufacturers if their products are approved, and access is gained to the Australian market-place through one national registration

Agricultural and Veterinary Chemicals Code Act 1994.

process."19

The Bill 1994 consists of 11 Parts and 1 Schedule. In brief the major parts cover the following areas:

Part 2 deals with the application of the Agricultural and Veterinary Chemicals Code as a law of NSW.

Part 3 allows for the adoption of the Commonwealth's Agricultural and Veterinary Chemicals Code Act 1994, and associated regulations, as the Agvet Code or Agvet regulations of NSW.

Part 4 concerns the binding of the Crown by the Agvet Code of NSW, and by the Agvet Codes of the other states and territories.

Part 5 covers the application of Commonwealth administrative laws to matters arising under the Agvet Code and Agvet Regulations of NSW.

Part 6 deals with the conferral on the Federal Court of Australia jurisdiction in all civil matters arising under the Agvet Code or the Agvet Regulations of NSW.

Part 7 concerns the confirmation that the NRA has the functions and powers expressed to be conferred on it under the proposed Act or under the Agvet Code of NSW.

Part 8 deals with such matters as manufacturing principles determined by the NRA; powers of delegation vested in the Commonwealth Minister; conferral of powers and functions of inspectors on certain State officers; application of fees and taxes; provision to the NRA of documents or substances held by the existing registration authority for NSW; exemptions for liability for damages; regulations; allowing of laws of NSW to be eligible laws for the granting of permits under the Agvet Code of NSW.

Part 9 covers the fees and taxes required for the purposes of applications and other matters.

Part 10 deals with the conferral on the Commonwealth Director of Public Prosecutions of the power to initiate and undertake prosecutions for offences against the Agvet Code or Agvet Regulations of NSW.

<sup>19</sup> Hansard, 13 May 1994, p.2657.

### **Issues for Consideration**

The Bill contributes to the improvement of procedures for the registration of pesticides in Australia. It rationalises the system for registration by having one National Registration Authority - an innovation which should simplify procedures for manufacturers in getting their products to the market place.

Environmental and other public interest groups, on the other hand, have raised at least 5 matters for consideration in regard to the national registration scheme, as follows:

Environmental Representation. As described on page six of this note, the seven directors of the NRA have experience in the fields of chemicals regulation, manufacturing of agricultural and veterinary chemicals, consumer protection, primary production and occupational health and safety. Public interest groups have complained that there is no position for a director with experience regarding the effect of chemicals on the environment.<sup>20</sup>

Right of Outside Groups to Appeal. The prerogative of appeal against the registration of a chemical lies with the NRA. The preamble to Division 4 of Part 2 of the Agvet Code, which deals with reconsideration of approval or registration, states that the "NRA may invite the public to propose approved active constituents or registered chemical products for reconsideration." This would be realised by the NRA's placing in the Government Gazette, or in any other way it thinks appropriate, notices inviting persons to propose that active constituents of certain chemicals be reconsidered (Section 30(1)). Public interest groups have submitted that there does not appear to be any means for outside groups to approach the NRA directly in regard to the reconsideration of registration of a chemical.<sup>21</sup>

Public Comment on Pesticides. Section 89(1) of the Agvet Code states that "A person must not, without reasonable excuse, do, or cause or permit to be done, any of the following: (a) publish or communicate any false or misleading information about a chemical product; (b) expressly or impliedly claim that the NRA recommends the use of a chemical product ..." The penalty for such an offence is \$3,000. While this section clearly applies to manufacturers who may publish false claims for their products, environmental groups consider that it also appears to have implications for non-specialist

See Agricultural and Veterinary Chemicals Bills: National Registration Scheme, submission by Sue Fenwick on behalf of the Public Interest Advocacy Centre, Australian Consumers' Association, Australian Federation of Consumer Organisations and Householders for Safe Pesticide Use (Public Interest Advocacy Centre, Sydney, 1993), pages 1-2.

<sup>&</sup>lt;sup>21</sup> ibid., p.10.

commentators on the use of pesticides such as environmental groups and journalists.<sup>22</sup>

Commercial Confidentiality. Section 162(1) of the Agvet Code states that "Except in the performance of functions or duties, or the exercise of powers, under this Code, a person who is or has been a director, the Chief Executive Officer, or a member of the staff, of the NRA, or is or has been a consultant to the NRA ... must not intentionally or recklessly disclose, directly or indirectly, to another person any information about an active constituent for a proposed or existing chemical product, about a chemical product or any of its constituents, or about a label for containers for a chemical product, that: (a) the person knows to be confidential commercial information; and (b) was acquired by the person in the performance of such functions or duties or the exercise of such powers." The penalty for such an act is 2 years' imprisonment. This section, and accompanying subsections, according to public interest groups, appears to isolate disclosure of information considered commercial in confidence from conventional public interest inquiry.<sup>23</sup>

Data Used in Evaluating Pesticides. The format of the registration process appears to incline the NRA towards reliance on data supplied by the chemical companies. Section 11, of Division 2 of Part 2 of the Agvet Code, which deals with "applications for approval and registration", states that an "application must: (a) be in writing in or to the effect of the approved form; and (b) contain, or be accompanied by, any information that the NRA requires". Environmental groups consider that this appears to indicate that the NRA will base its evaluation of pesticides on information supplied by the pesticide companies - not employ its own assessment basis.<sup>24</sup>

Agricultural and Veterinary Chemicals Bills: National Registration Scheme, submission by Arnold Ewald on behalf of the Toxic Chemicals Committee of the Total Environment Centre (Total Environment Centre, Sydney, 1993), p.4.

Public Interest Advocacy Centre, submission, p.6.

Total Environment Centre, submission, pp.3-5.





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The Legislative Assembly of New South Wales: 1941 to 1991 by David Clune, Occasional Paper No 1 Feb 1993

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Title	Number
Anti-Discrimination (Homosexual Vilification) Amendment Bill 1993 by Tony Clark	031/93
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Bank Integration Bill 1992 by Tony Clark	004/92
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Courts Legislation (Mediation And Evaluation) Amendment Bill 1994 by Rebekah Jenkin	026/94
Credit (Amendment) Bill 1993 by Tony Clark	023/93
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Crimes (Detention After Arrest) Amendment Bill 1994 by Gareth Griffith	025/94
Crimes (Domestic Violence) Amendment Bill 1993 by Tony Clark	025/93
Crimes Legislation (Dangerous Articles) Amendment Bill 1994 by Sharon Rose	018/94
Crimes Legislation (Unsworn Evidence) Amendment Bill 1994 by Gareth Griffith	008/94
Crimes (Registration of Interstate Restraint Orders) Amendment Bill by Tony Clark	001/93
Criminal Procedure (Indictable Offences) Amendment Bill 1994 by Gareth Griffith	027/94

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Dairy Industry (Amendment) Bill 1993 by John Wilkinson	035/93
Disability Services Bill 1993 by Tony Clark & Jaleen Caples	006/93
Election Funding (Amendment) Bill 1993 by Rebekah Jenkin	037/93
Endangered and Other Threatened Species Conservation Bill 1993 by Tony Clark	017/93
Environmental Planning and Assessment (Amendment) Bill 1994 by Rebekah Jenkin	016/94
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Gaming and Betting (Race Meetings) Amendment Bill 1994 by Sharon Rose	003/94
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Hospital Development Projects Review Bill 1993 by Tony Clark & Jaleen Caples	008/93
Industrial Relations (Amendment) Bill 1993 by Tony Clark	014/93
Industrial Relations (Contracts of Carriage) Amendment Bill 1993 by Tony Clark	021/93
Industrial Relations (Sick Leave) Amendment Bill 1992 by Tony Clark	001/92
Industrial Relations (Sick Leave) Amendment Bill 1993 by Tony Clark	032/93
Legal Aid Commission (Amendment) Bill 1994 by Gareth Griffith	001/94
Liquor (Amendment) Bill 1993 by Tony Clark	009/93
Lotteries and Art Unions (Amendment) Bill 1994 by Gareth Griffith	004/94
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Native Title (New South Wales) Bill 1994 by Rebekah Jenkin & Gareth Griffith	019/94
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Noxious Weeds Bill 1993 by Tony Clark	004/93
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Strata Titles (Leasehold Staged Development) Amendment Bill 1992 by Tony Clark	008/92

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### (d) Statistics

Title	Number	
Quarterly Statistical Bulletin by Jan Newby	Vol 1 No 1 October 1993	
	Vol 1 No 2 March 1994	
	Vol 1 No 3 May 1994	
Electorate Profile by Jan Newby	No 001/94: Parramatta	