

Lawyers and Dysfunction

By DAVID LEYONHJELM

On 31 October the APVMA lodged an appeal against the decision of the Federal Court which found it acted unlawfully when it cancelled the registrations of 47 Imtrade products in May last year.

It will be many months before the case is heard and a decision known. For anyone interested, progress can be monitored via the Federal Court's website.

The appeal will be expensive. Full Federal Court appeals require fancy legal teams and the losing side usually pays most of the legal costs of their opponent.

Imtrade is also now suing the APVMA for damages. That could be expensive too. If it succeeds, the APVMA will be obliged to pay the damages awarded (Imtrade says it will seek punitive as well as compensatory damages) plus the company's costs.

Following my article in October's Rural Business, the APVMA and Imtrade made legal threats to the editor and publisher of the magazine regarding the suggestion that Imtrade may have bribed APVMA staff. The outcome of that was their retraction and apology published in the last issue.

I was not a party to the retraction or apology, which were made in my absence. I do not believe there were valid grounds for them and I cannot be bluffed. Speaking for myself, I retract nothing and do not apologise.

Had the APVMA taken legal action against the editor or publisher, or indeed if it chose to go after me, it would have cost more money, ultimately including payment of our legal costs too.

Fairly obviously, all of this could have been avoided if the APVMA had applied natural justice at the time it discovered Imtrade had supplied a false company name and address in China as its manufacturer.

It does not surprise me the Federal Court found the APVMA acted unlawfully. There were no safety or trade considerations; it was a matter

of supplying false information of no material significance. As the Court pointed out, there were plenty of other options to deal with such a situation, including criminal prosecution. Innocent third parties were adversely affected by the decision to cancel Imtrade's registrations. Courts take a dim view of that.

In case you haven't guessed already, I believe the APVMA's appeal is doomed to fail. For what it's worth I expect Imtrade's claim for damages will succeed too, notwithstanding its less than clean hands.

All this highlights the fact that some key people at the APVMA are making decisions that have expensive implications, ultimately, for chemical registrants. Every time the APVMA resorts to the courts, it costs a lot of money. Using 'self-help' instead of going to court is potentially worse.

On top of the financial risk, now quite high, the people involved in the cases are sure to be distracted from their normal activities. The performance of the organisation will inevitably suffer.

That would be less concerning but for the fact that chemical registrants believe poor service and higher costs are already typical of the APVMA these days. Several even described it to me as dysfunctional and, relevantly, blamed lawyers for its deterioration.

One school maintains the APVMA model is inherently flawed. Its so-called board, for example, is simply advisory and no longer has the ability to direct the Chief Executive, determine policy or hold anyone accountable. The organisation answers to a politician. Yet it relies entirely on chemical registrants for its funding, including (subject to any insurance) the payment of damages claims and legal fees.

Another claims there is a dysfunctional culture within the organisation, reflected in a legalistic, pedantic, excessively cautious approach.

There are certainly signs of an organisation in crisis. There are significant staff shortages

including, until recently, a complete lack of staff in a key chemistry section. I am told a nasty dispute between two senior staff has spilled into the court system. I am also told staff turnover is high and temporary staff are being appointed for terms that are shorter than the time needed to become familiar with their roles. Registrants are also openly questioning the competence of certain personnel, something I have not heard much of before.

In that context it is relevant that my source for the suggestion that the APVMA's pursuit of Intrade might have been motivated by bribery is someone who works at the APVMA. I hope to get more details, in which case I will pass them on to the police.

It is also relevant that a plan to outsource aspects of the APVMA's workload to external reviewers, as occurs in New Zealand, seems to have been abandoned.

A dysfunctional APVMA that is resistant to criticism (as its letter in the last edition of Rural Business shows), slow and petty in its performance, motivated by personal considerations and unnecessarily litigious is not what Australian agriculture needs or chemical registrants should be asked to pay for. The claim that it "necessarily takes time and should not be rushed", made in its letter, suggests it does not understand this.

A serious rethink of the regulator's purpose is called for, followed by a review of whether it is performing cost effectively. However, unless it applies Shakespeare's advice about lawyers, the impetus for this might have to originate from outside the organisation.