

EXPLANATORY STATEMENT

Select Legislative Instrument 2013 No. 62

Industrial Chemicals (Notification and Assessment) Act 1989

Industrial Chemicals (Notification and Assessment) Amendment Regulation 2013 (No. 1)

Section 111 of the *Industrial Chemicals (Notification and Assessment) Act 1989* (the Act) provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, 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 Act establishes the National Industrial Chemicals Notification and Assessment Scheme (NICNAS), being a national system of notification and assessment of industrial chemicals for the protection of human health and the environment to deliver the safe and sustainable use of chemicals.

Consequential to the passage of the *Industrial Chemicals (Notification and Assessment) Amendment Act 2012* (the Amending Act), a number of amendments to the *Industrial Chemicals (Notification and Assessment) Regulations 1990* (the Regulations) will be required.

Consistent with the Government's cost recovery policy, NICNAS operates on a fee-for-service basis for the assessment of New Chemicals (industrial chemicals not yet listed on the Australian Inventory of Chemical Substances (AICS)).

Subsection 110(1) of the Act provides that the regulations may prescribe fees for specified NICNAS services. Subsections 110(1A) to 110(6) set out details for when fees are due, the payment schedules and other arrangements. The fees for services defined in section 110 are prescribed in the Regulations.

In addition to fees for specified NICNAS services, section 80S of the Act provides for the imposition of a registration charge on manufacturers and importers of industrial chemicals for commercial purposes. The charge is used to fund the cost of all NICNAS regulatory activities except fee-for-service activities, including providing health, safety and environmental information on hazardous chemicals and industry training.

The amount of the registration charge is based on tiers prescribed in subsection 80T(2) of the Act and is based on the value of the industrial chemical being introduced. Subsection 80T(2) of the Act was amended by the Amending Act however that particular amendment does not commence until 1 July 2013.

Commencing in mid-2010, NICNAS undertook a complete review of its cost recovery arrangements culminating in publication of the NICNAS Cost Recovery Impact Statement for 2012-13 to 2015-16 (the CRIS). The purpose of the CRIS was to demonstrate compliance with the Cost Recovery Guidelines and to outline changes to the existing cost recovery arrangements based on review outcomes to deliver a more equitable charging arrangement for business.

Key changes proposed by the CRIS, which has been agreed by Government, included:

- better alignment of fees with the costs associated with delivering NICNAS services, which includes the introduction of some new fees for service, the reclassification of some existing fees and the abolition of those fees no longer relevant;
- amendment of the annual registration charge tier structure to provide for more equitable cost recovery across small and large enterprises; and
- cost recovery to implement the accelerated assessment and prioritisation of Existing Chemicals.

The regulation makes changes consequential to amendments to the Act introducing, amending or repealing some NICNAS fees and charges for 2013 –14. The regulation amends registration fees and charges in line with the changed tier structure; repeal a fee which became obsolete in 1997 associated with applications to transfer a chemical from the public section to the confidential section of the AICS; and introduce new fees for applications for authorisations to export or import certain hazardous chemicals listed under the *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*. The costs of processing such applications were previously recovered from the general registration charge rather than from specific beneficiaries of the process.

A further consequential amendment arises from the *Model Work Health and Safety Regulations 2011* (Model Regulations), which were developed by Safe Work Australia and commenced in the Commonwealth on 1 January 2012. The amendment replaces the terms ‘Material Safety Data Sheet’ and ‘material safety data sheet’ with the new term “Safety Data Sheet”.

The regulation also:

- makes amendments to NICNAS fees and charges for 2013-14 as part of the annual review in accordance with the Consumer Price Index (CPI) and the CRIS proposals; and
- makes a minor machinery of government amendment to section 4J to bring it in line with current practice.

Details of the regulation are set out in the [Attachment](#).

The Act specifies no conditions that need to be met before the power to make the regulation may be exercised.

The regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Sections 1 to 4 and Schedule 1 to the regulation which relate to minor and machinery changes commence the day after registration of the regulation on the Federal Register of Legislative Instruments.

Schedule 2 to the regulation relates to fees and charges determined by the CRIS and commence on 1 July 2013.

Consultation

Fees and Charges

The regulation changes affecting the current NICNAS registration structure and its other fees and charges stem from a NICNAS review of its cost recovery arrangements. This culminated in a Cost Recovery Impact Statement (CRIS) which complies with the Australian Government Cost Recovery Guidelines July 2005.

The NICNAS CRIS was developed with extensive stakeholder consultation, including two phases of public consultation. Stakeholder views were taken into account in finalising the CRIS, and the CRIS was accepted by the government in 2012.

Consultation was undertaken in accordance with the government best practice principles, with an emphasis on achieving high-quality outcomes. NICNAS has a broad range of stakeholders who have different ways of measuring efficient and effective delivery of the regulatory framework for industrial chemicals. To manage these different perspectives and to make sure that the outcome of the CRIS represented an equitable, well-balanced position, a Stakeholder Engagement Strategy was developed which is available on the NICNAS website at http://nicnas.gov.au/Current_Issues/CRIS/CRIS_Engagement_Strategy_PDF.pdf.

NICNAS provided a variety of opportunities for stakeholders to contribute to the review through a mix of workshops, one-on-one consultations, online survey and written submissions. NICNAS also provided periodic updates to its established stakeholder advisory committees, the Industry Government Consultative Committee and Community Engagement Forum.

A draft discussion paper was released on the NICNAS website on 23 June 2010. The draft paper was open for written comment for approximately 6 weeks. During this time public consultation meetings were held in Sydney on Tuesday 1 June 2010 and Melbourne Friday 4 June 2010. NICNAS received over one thousand responses to an online survey, and at the request of a stakeholder in Perth, a one on one consultation was arranged.

A draft Cost Recovery Impact Statement was released on 19 October 2011 and was open for comments for approximately 6 weeks. Public consultation meetings were held in Sydney on 11 November 2011 and Melbourne on 14 November 2011.

The final CRIS is published on the NICNAS website at http://www.nicnas.gov.au/Current_Issues/CRIS.asp where full details of the process, including stakeholder submissions can be found.

Changes to the terms 'material safety data sheet' and 'Material Safety Data Sheet' to 'Safety Data Sheet'

This amendment was consequential to changes to national workplace health and safety laws undertaken by Safe Work Australia. The changes were subjected to extensive public consultation and regulatory impact analysis by Safe Work Australia. NICNAS informed stakeholders that it is undertaking minor consequential amendments to the ICNA Act and the Regulations through a notice in the *Chemical Gazette* in July 2012 and in discussions with the NICNAS Industry Engagement Group.

Certain legislative changes were required to implement the recommendations of the CRIS and the amendment arising out of the new national workplace health and safety laws. An

exposure draft was made available to industry stakeholder organisations and meetings were held in Sydney on 20 and 21 August 2012 to consider feedback on the draft Bill.

Amendments to regulation 4J

The Office of Best Practice Regulation (OBPR) determined that the changes were machinery of government in nature and no impact analysis was required. As a result, NICNAS did not undertake a formal stakeholder consultation but did announce the changes in the *Chemical Gazette* of February 2013 and invited comment from stakeholders. Only one comment was received which supported the proposals.

Authority: Section 111 of the *Industrial Chemicals (Notification and Assessment) Act 1989*

ATTACHMENT**Details of the *Industrial Chemicals (Notification And Assessment) Amendment Regulation 2013 (No. 1)*****Section 1 – Name of regulation**

Section 1 provides for the regulation to be referred to as the *Industrial Chemicals (Notification and Assessment) Amendment Regulation 2013 (No. 1)*.

Section 2 – Commencement

Section 2 provides for sections 1 to 4 and Schedule 1 to the regulation to commence the day after registration on the Federal Register of Legislative Instruments and for Schedule 2 to commence on 1 July 2013.

Section 3 – Authority

This regulation is made under the *Industrial Chemicals (Notification and Assessment) Act 1989*.

Section 4 – Schedule(s)

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments commencing on the day after registration**Item [1] – Subregulation 4J(2)**

Regulation 4J sets out the environmental effects criteria that must be met for a chemical to be defined as a non-hazardous chemical under the Act. The term ‘non-hazardous chemical’ is defined in subsection 5(2) of the Act and the term is also referred to in subsection 21(6)(c) (which includes an exception to a prohibition on introducing a new industrial chemical where the chemical is a ‘non-hazardous chemical’ and also in subsection 23A(1)(b) (which allows a manufacturer or importer to apply for a self-assessed assessment certificate for ‘a non-hazardous chemical’). The definition of non-hazardous chemical includes a condition that the prescribed criteria relating to the environmental effect of the chemical have been met, however, in an oversight in the original regulations, two provisions in the Act that make reference to a ‘non-hazardous chemical’ were overlooked and not specifically listed in subregulation 4J(2) of the Regulations.

This amendment corrects an error in the Principal Regulations by listing paragraphs 21(6)(c) and 23A(1)(b) of the Act in subregulation 4J(2). It should be noted that the legislative scheme always intended to apply the environmental effects criteria to every reference to a ‘non-hazardous chemical’ in the Act. Despite the fact that these provisions are not specifically made reference to in subsection 4J(2), the criteria must still be satisfied in each case. This is because satisfying the definition of ‘non-hazardous chemical’ in subsection 5(2) of the Act requires those prescribed criteria to be met (subsection 5(2)(c)).

It is the case that the system is currently operating in the way that it was intended (i.e. that those dealing in non-hazardous chemicals that meet the criteria in 4J are currently exempt from the offence in section 21 of the Act, despite the fact that subregulation 4J(2) does not explicitly make reference to paragraphs 21(6)(c) and 23A(1)(b) of the Act.

Items [2] to [5] – Material Safety Data Sheet

These items change the terms ‘material safety data sheet’ and ‘Material Safety Data Sheet’ to ‘Safety Data Sheet’ wherever they occur in the regulation. These terminology changes are consequent to 2012 amendments to the Act necessitated by new national work health and safety laws which commenced in the Commonwealth, New South Wales, Queensland, the Australian Capital Territory and the Northern Territory on 1 January 2012.

Schedule 2 – Amendments commencing 1 July 2013

Items [1] to [4] – Prior Informed Consent Authorisation

These items introduce application fees as determined by the CRIS for businesses seeking authorisation from NICNAS to import or export industrial chemicals under the Prior Informed Consent (PIC) procedure of the Rotterdam Convention. Contrary to Cost Recovery Guidelines, these costs are currently recovered from all registrants, rather than the specific beneficiaries of the authorisation service.

The export or import of certain hazardous chemicals listed under the Rotterdam Convention is prohibited unless the export or import is authorised by the Director of NICNAS under section 106 of the Act and under regulation 11C of the Principal Regulations. The CRIS proposed that a fee for service apply for applications for the export and import of any of the chemicals listed in the Rotterdam Convention.

For the purposes of cost recovery, authorisation of applications for export can be divided into two categories reflecting the amount of work involved in processing the applications, namely:

- Category A, where export is to a country whose status under the Rotterdam Convention is unambiguous; and
- Category B, where additional work is required to determine the destination country’s acceptance of the chemicals to be exported.

Item [1] amends regulation 2 to insert definitions of a ‘category A country’ and a ‘category B country’. As these definitions incorporate the PIC concept of an ‘import response’, item [1] also inserts into regulation 2, a definition for ‘import response’.

Items [2], [3] and [4] revise terminology to better describe the role of the NICNAS Director in the PIC process by changing the word ‘permission’ to ‘approval’ wherever it appears in section 11C.

Item [5] – Schedule 2

Schedule 2 to the regulations, prescribes the various fees and charges for NICNAS services for the relevant registration year.

This item lists the amended fees, charges and penalties determined by the NICNAS Cost Recovery Impact Statement for 2012-13 to 2015-16. The Schedule removes a fee for transfer of a chemical from the non-confidential section of the Australian Inventory of Chemical Substances (AICS) to the confidential section, a process that became obsolete in 1997, and includes new fees which are determined in the CRIS relating to approvals under PIC (Table 1) and to the increase in the number of registration tiers from three to four which is more equitable for business (Table 2).

Table 1 – Summary of fees for 2013-14 for authorisations of import/export of industrial chemicals subject to the Rotterdam Convention

| Authorisation Activity | 2012-13 Fee | 2013-14 Fee |
|------------------------|-------------|-------------|
| Export Category A | Nil | \$750 |
| Export Category B | Nil | \$1,700 |
| Import | Nil | \$1,700 |

NICNAS registration structure

Commercial introducers of industrial chemicals are required by the Act to be registered with NICNAS. The charges consist of a registration fee set to cover the administrative cost of establishing and maintaining the register, and in addition to the fee for administrative costs, a levy is imposed by NICNAS on registrants introducing industrial chemicals with an annual value in excess of \$500,000 (the threshold value).

The Amending Act increased the number of registration tiers from the current 3 to 4. In effect the current tier 1 is split into two new tiers, 1 and 2. Currently, all registrants pay an administrative fee and registrants in tiers 2 and 3 pay an additional registration levy. Under the four tier system, all registrants will pay the administrative fee which is reduced from the current \$395.00 to \$133.00, and those in tiers 2, 3 and 4 will pay the levy. The restructure provides for significant fee relief for small business and lead to a more equitable cost recovery arrangement.

Table 2 – Summary of NICNAS's Registration Fees and Charges for 2013-14

| Tier | Annual Value of chemicals manufactured and/or imported | Current Fee (Items 20 & 21) | Fee (Items 20 & 21) | 2012-13 Charge | 2013-14 Charge |
|------|--|-----------------------------|---------------------|--------------------|------------------|
| 1 | \$1 - \$99,999 | \$395 | \$133 | Nil | Nil |
| 2 | \$100,000 - \$499,999 | | | | \$262 (new item) |
| 3 | \$500,000 - \$4,999,999 | \$395 | \$133 | \$1,462 (Item 22) | \$1,724 |
| 4 | \$5,000,000+ | \$395 | \$133 | \$13,905 (Item 23) | \$18,342 |

The purpose of the increase in the charge is to:

- (a) recover the increase in costs of providing NICNAS's regulatory functions, and
- (b) fund the second year of stage one of the accelerated assessment and prioritisation of existing chemicals.

Penalties for late payment of registration fees and charges are already in place and these are increased in line with recommendations of the CRIS. Table 3 sets out the fees for registration late penalty charges under the new tier structure (item 24 of Schedule 2 of the Regulations).

Table 3 – Summary of NICNAS's Registration Late Penalty Charges for 2013-14

| Tier | Introduction Value | 2012-13 Late Penalty | 2013-14 Late Penalty |
|-------------|---------------------------|-----------------------------|-----------------------------|
| 1 | \$1 - \$99,999 | \$100 | \$105 |
| 2 | \$100,000 - \$499,999 | | \$105 |
| 3 | \$500,000 - \$4,999,999 | \$185 | \$185 |
| 4 | \$5,000,000+ | \$1,430 | \$1,850 |

Removal of obsolete fee

Section 18A of the Act refers to the possible transfer of a chemical from the non-confidential section of the Australian Inventory of Chemical Substances (AICS) to the confidential section during a transitional period in 1997. Any application for such a transfer attracted a fee. However, this provision in the Act only applied for 56 days commencing on 7 August 1997, and no longer applies. Therefore, this section will be removed from the Act as of 1 July 2013. The fee for this service is currently also listed in Schedule 2 to the Principal Regulations (Item 4) and so it is repealed.

Summary of new and amended fees

The Schedule to the Regulations contains the following list of new and amended fees, charges and penalties, in line with the CRIS. Note, the amendments to Schedule 2 have resulted in a re-numbering of the item numbers, as a consequence of the fee for item 4, application to transfer a chemical from non-confidential section of AICS to confidential section of AICS, being removed. The following list is based on the proposed item numbering.

Item 1 – application for early non-confidential listing on AICS

Item 2 – application for inclusion of chemical on confidential section of AICS

Item 3 – application to be holder of confidence of a chemical on confidential section of AICS

Item 4 – application to retain listing of chemical on confidential section of AICS

Item 5 – application for commercial evaluation permit and renewal of permit

Item 6 – application for certain information to be exempt from publication

Item 7 – application for low volume permit and renewal of permit

Item 8 – application for controlled use permit and renewal of permit

Item 9

(a) application for new chemicals assessment certificate, including fees for a standard notification, limited notification and Polymer of Low Concern (PLC) notification

(b) application for assessment certificate under an alternate state or territory law

(c) application for new chemicals assessment certificate under an approved foreign scheme, including fees for a standard notification, limited notification and PLC

(d) application for new chemicals assessment certificate accompanied by an assessment from a comparable agency, including fees for a standard notification, limited notification and PLC notification

(e) application for new chemicals assessment certificate for a chemical similar to one previously assessed by NICNAS, including fees for a standard notification, limited notification and PLC notification

(f) simultaneous application for new chemicals assessment certificate for a second chemical similar to and with similar use to first chemical notified, including fees for a standard notification, limited notification and PLC notification

Item 10 – application for self-assessed new chemicals assessment certificate

Item 11 – application to vary data requirements

Item 12 – application for early introduction of new chemical under section 30 of the Act

Item 13 – application for early introduction of low hazard and low risk new chemical under section 30A of the Act

Item 14 – application to vary assessment report

Item 15 – application to vary public report

Item 16 – application for extension of assessment certificate

Item 17 – nomination of foreign scheme

Item 18 – application for secondary notification of a new chemical

Item 19 – application for registration under section 80F of the Act

Item 20 – application for renewal of registration

Item 21 – registration charge for tier 2

Item 22 – registration charge for tier 3

Item 23 – registration charge for tiers 1 and 4

Item 24 – penalties for late renewal of registration (as discussed above at Item 5)

Item 25 – fees for application for approval to export an industrial chemical subject to the Rotterdam Convention (as discussed above at Items 1 – 4)

Item 26 – fees for application for approval to import an existing industrial chemical subject to the Rotterdam Convention (as discussed above at Items 1 – 4)

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Industrial Chemicals (Notification and Assessment) Amendment Regulation 2013 (No. 1)

This regulation is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Overview of the regulation

The *Industrial Chemicals (Notification and Assessment) Amendment Act 2012* (the Amending Act) amended the *Industrial Chemicals (Notification and Assessment) Act 1989* (the Act).

Consequential to the Amending Act, a number of amendments to the *Industrial Chemicals (Notification and Assessment) Regulations 1990* (the Regulations) will be required. Other non-consequential administrative changes will be made at the same time.

Amendments to the Regulations are as follows:

- Amendments to various fees and charges for NICNAS services;
- Amendment of the terms ‘material safety data sheet’ and ‘Material Safety Data Sheet’ to ‘Safety Data Sheet’ wherever they occur in the regulation; and
- Amendment of regulation 4J which sets out environmental criteria that must be met for a chemical to be defined as a non-hazardous chemical under the Act.

Several provisions of the Act make reference to ‘non-hazardous chemical’, and the definition of ‘non-hazardous chemical’ already exists in subsection 5(2) of the Act.

Section 5(2)(c) of the Act makes reference to prescribed criteria that need to be met to satisfy the definition of ‘non-hazardous chemical’. These criteria are prescribed in subregulation 4J(2) of the Regulations.

Subregulation 4J(2) states that the criteria must be satisfied in relation to the reference to ‘non-hazardous chemicals’ in certain provisions of the Act, however, in an oversight in the original regulations, two sections in the Act that make reference to a ‘non-hazardous chemical’ were overlooked and not specifically listed in subregulation 4J. This includes subsection 21(6)(c) (which includes an exception to a prohibition on introducing a new industrial chemical where the chemical is a ‘non-hazardous chemical’ and subparagraph 23A(1)(b) (which allows a manufacturer or importer to apply for a self-assessed assessment certificate for ‘a non-hazardous chemical’).

Despite the fact that reference to these provisions is not specifically made in subregulation 4J(2), the criteria must still be satisfied in each case. This is because satisfying the definition of ‘non-hazardous chemical’ in subsection 5(2) of the Act requires those prescribed criteria to be met (in subparagraph 5(2)(c)).

The legislative scheme always intended to apply those criteria to every reference to a ‘non-hazardous chemical’ in the Act. The system is currently operating in the way that it was intended (i.e. that those dealing in non-hazardous chemicals that meet the criteria in regulation 4J are currently exempt from the offence in section 21 of the Act, despite the fact that regulation 4J doesn’t explicitly make reference to those sections).

Human rights implications

This amendment will not make any substantive changes, it will simply provide certainty and clarity that the criteria in subregulation 4J(2) also apply to the two extra provisions that weren’t originally explicitly mentioned in subregulation 4J(2).

The amendment regulation does not engage any of the applicable rights or freedoms.

Conclusion

The amendment regulation is compatible with human rights as it does not raise any human rights issues.

The Honourable Shayne Neumann Parliamentary Secretary for Health and Ageing