



**Australian Government**

**Department of the Environment, Water, Heritage and the Arts**

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Submission in response to the draft research report of  
the Productivity Commission study into chemicals and  
plastics regulation

Department of the Environment, Water, Heritage and the Arts

May 2008

## Summary

The Department of the Environment, Water, Heritage and the Arts (DEWHA) welcomes the opportunity to comment on the Productivity Commission's draft research report on chemicals and plastics regulation.

The department's comments should be read in conjunction with the response to the draft research report by the Environment Protection and Heritage Standing Committee (EPHSC), to which the department has contributed.

The department notes that the overarching governance model proposed by the Commission has many positive features, particularly the focus on the ministerial councils providing strategic policy and oversight for their respective areas of responsibility; the use of inter-governmental agreements to support nationally coordinated action; and the setting of standards and the assessment of chemicals as national functions. The department supports the proposed approach of having regulators in all jurisdictions operate within the national guidelines, standards and policy agreements identified by the relevant ministerial councils.

The department supports the proposal to establish a Standing Committee on Chemicals reporting to all the relevant ministerial councils in order to enhance national coordination of cross cutting chemicals issues.

With regard to the Commission's comments on the National framework for Environmental Chemicals Management (NChEM), the department notes that several operational issues remain to be clarified with the Commission. The department considers that the Commission's preferred model - which does not support a national regulatory decision making role on environmental risk management for the National Industrial Chemicals Notification and Assessment Scheme (NICNAS) but proposes instead the establishment of an independent statutory body reporting to the Environment Protection and Heritage Council (EPHC<sup>1</sup>) on environmental standards and environmental risk management - can be made operationally practicable.

The department suggests, however, that the operation of this statutory body would be facilitated by NICNAS retaining its current role in preparing risk management recommendations (which could be provided to the statutory body), but only if there is continued involvement of environment agencies in NICNAS assessments as envisaged under NChEM.

If NICNAS is not to perform the role of the national environmental risk management decision maker for industrial chemicals, then an alternative mechanism such as the proposed statutory body would be essential to provide national consistency in evidence-based decision making on environmental risks.

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<sup>1</sup> The Productivity Commission draft report generally refers to the EPHC rather than the National Environment Protection Council (NEPC), which includes only the Australian environment ministers within the EPHC and administers the *National Environment Protection Council Act 1994* (NEPC Act). At present, the EPHC does not have statutory functions, but the NEPC does. For consistency with the draft report, the department's response also refers to the EPHC as the relevant ministerial council, but notes that, strictly speaking, any future statutory function would be associated more probably with the NEPC under the NEPC Act than with the EPHC.

The department believes that applying a full assessment of costs and benefits for every new chemical application would be expensive, time consuming and of little practical benefit. If such assessments are to be used, they should be limited to chemicals of concern for which significant regulatory restrictions having significant economic impact are proposed.

The discussion of chemicals in consumer articles and cosmetics should include a consideration of their environmental impacts, as well as human health and safety, since these chemicals enter the environment during use and at end-of-life. They are a major source of concern amongst regulators worldwide for their possible effects directly on the environment, and through environmental exposure, and on human health.

The department supports the proposal to introduce a single system of national regulations for the classification, labelling, provision of material safety data sheets and risk assessment for all workplace hazardous chemicals which is based on the Globally Harmonised System of Classification and Labelling of Chemicals (GHS), since this would make nationally mandatory the provision of information on environmental hazard classification.

The EPHC is funding an analysis of the costs and benefits of the NChEM process. While the full study will not be available before the completion of the Commission's final report, the department is funding a preambular phase, including consideration of the alternative model proposed by the Commission, which it hopes to make available to the Commission before its report is finalised.

The department looks forward to discussing the results of this analysis and other aspects of the Commission's draft recommendations with the Commission, prior to completion of the Commission's final report.

## Introduction

The Department of the Environment, Water, Heritage and the Arts (DEWHA) welcomes the opportunity to comment on the Productivity Commission's draft research report on chemicals and plastics regulation.

The Commission was given the challenging task of identifying measures that could be introduced to achieve a streamlined and harmonised system of national chemicals and plastics regulation and any alternatives to regulation, while ensuring protection of human health and the environment.

It has responded with an overarching model that respects the difficulty of changing existing regulatory arrangements, while aspiring to bring greater efficiency and effectiveness. The department welcomes the strong leadership role given to the ministerial councils in establishing the policy framework for chemicals management within their sector.

To assist the Commission with finalising its report, this submission will focus on how the environmental management model proposed by the Commission might be improved and made operational.

In doing so, the department will seek to complement, rather than duplicate, the submission by the Environment Protection and Heritage Standing Committee (EPHSC) in response to the draft report. The department has contributed to the EPHSC submission, endorses its content and suggests that the department's submission and that of the EPHSC be read together.

Matters on which the department will specifically comment are:

- i. The general governance model proposed by the Commission
- ii. The application of the general governance model to NChEM
- iii. The use of cost benefit analyses
- iv. The impact on the environment of chemicals in articles
- v. The labelling of chemicals for environmental hazard
- vi. The management of chemicals listed under the Rotterdam Convention

### **i. The general governance model proposed by the Commission**

The department agrees with several key conclusions by the Commission regarding the management of chemicals in the environment. We agree with the Commission's perspective that chemicals regulation is not a strong unifying theme in its own right; rather it is one of many issues in the broader areas of health, safety, environment and national security.

We note that the Commission has concluded, as have earlier reviews, that chemicals management in Australia is fragmented and inconsistent. This has led to different institutional and regulatory arrangements in different sectors.

We agree with the Commission that current arrangements are less effective in managing risks to the environment than in managing the risks to human health and safety, and that changes are needed.

The general model of governance proposed by the Commission is illustrated in Box 2, page xxix, of the draft report (reproduced below).

**Box 2 The Commission’s proposed institutional and regulatory approach**

- Formulation of strategic policy and oversight of the institutional and regulatory arrangements — a national function, to be undertaken by ministerial councils supported by intergovernmental agreements.
- Assessment of the hazards and risks of chemicals — a national, science-based function to be undertaken under statutory independence.
- Risk management standard setting — a national function to be undertaken by independent statutory agencies within the policy frameworks of the ministerial councils.
- Administration of agreed standards and monitoring of their impact — jurisdiction-specific functions to be undertaken by their own or delegated agencies.

The application of this model to the existing chemicals frameworks is illustrated in Table 1, page xxxii, of the draft report (see below). We note in passing the model could be augmented by an additional column labelled “Chemicals in Articles” to illustrate the role proposed by the Productivity Commission for the Australian Competition and Consumer Commission (ACCC) in regulating chemicals in articles. [DRAFT Recommendation 5.5]

The department notes that the model has many positive features. It places strategic policy and oversight with the ministerial councils, appropriately recognising the importance of the ministerial councils in developing coordinated policy within Australia’s federal structure. Similarly, it recognises the fundamental importance of inter-governmental agreements in documenting agreed actions. As the department indicated in its previous submission, it believes that the nation’s environment ministers should have, and be seen to have, a leading role in determining national policies for the management of chemicals in the environment.

The model also has a degree of consistency across most of the different chemicals sectors, although the Commission has not applied the model with the same consistency to agricultural chemicals and veterinary medicines, at this stage, given the firmly established mechanisms in place.

The department fully agrees that the assessment of hazards and risks should be a national, science-based function to be undertaken under statutory independence, and that risk management standard setting should be a national function undertaken by independent statutory “agencies” within the policy frameworks of the ministerial councils. It assumes that “agencies” could encompass a relatively simple structure such as a statutory committee.

The department supports implementation of the agreed standards and an appropriate level of monitoring of impacts by the jurisdiction and agency best suited to the task, with feedback to the national level so that future assessment and risk management can be improved.

Table 1 **The Commission's preferred institutional arrangements for key chemicals regulation frameworks<sup>a</sup>**

<i>Issue</i>	<i>Poisons scheduling</i>	<i>Workplace safety</i>	<i>Transport of dangerous goods</i>	<i>Agricultural and veterinary products</i>	<i>Chemicals in the environment</i>	<i>Chemicals of security concern (CSC)</i>
Policy oversight	Australian Health Ministers' Conference	Workplace Relations Ministers' Council	Australian Transport Council	Primary Industries Ministerial Council	Environment Protection and Heritage Council	Attorney General (AG) and nominated state and territory ministers
	Intergovernmental Agreement (IGA) required	IGA required	Maintain existing IGA Review effectiveness of new model regulations	Negotiate national approach to control-of-use, with constrained exemptions for local conditions	IGA required if case established	IGA required — include formal voting SSAN to be re-evaluated under new CSC framework
	Standing Committee on Chemicals (coordinates policy development and makes recommendations to appropriate policy oversight body)					
Hazard and risk assessment	NICNAS and OCS	NICNAS with reference to EU and UN	UN modified by NTC consultation and CAP decisions	APVMA (with OCS and DEWHA)	NICNAS and APVMA (with OCS and DEWHA)	Chemical Security Unit in AG Dept. (with security agencies)
Standard setting and risk management	Establish expert based poisons scheduling committee	Establish independent body to replace ASCC — expert based not representative	National Transport Commission retains administration of ADG7 for now	Add control-of-use standard setting to APVMA's roles	Establish independent body if case for NChEM is made	Risk based measures to be developed for individual chemicals of security concern
Administration and enforcement	S&Ts to reference all scheduling decisions and regulations	S&Ts adopt model codes and standards in uniform or nationally consistent manner	No change to current arrangements	S&Ts administer and enforce control-of-use regs. through service level agreements	S&Ts would adopt national standards and enforce them	All S&Ts to use AusCheck national security checking system

<sup>a</sup> Other ministerial councils and policy frameworks not shown include those for food safety, therapeutic goods, drug strategy and consumer products.

In principle, therefore, the department sees much to support in the model proposed by the Commission. We anticipate that the challenges for the model will arise at the operational level for individual chemicals, particularly given the limited role proposed for NICNAS by the Commission which removes its ability to make risk management recommendations and to place conditions on import or manufacture of new chemicals, as expressed in DRAFT Recommendation 4.2:

***The role of NICNAS should be limited to the scientific assessment of the hazards and risks of industrial chemicals.*** [DRAFT Recommendation 4.2]

As illustrated in Table 2, for most sectors, standard setting and risk management would be carried out by an expert body reporting to the relevant ministerial council. The department believes this model, or some variant, would be relatively straightforward for environmental standard setting such as the determination of guidelines. It could be more difficult for chemical by chemical risk management given the number of chemicals to be considered. The operational issues are discussed at greater length in the discussion of NChEM.

It is the department's interpretation of the Commission's general governance model that statutory regulators would operate within the standards, guidelines, codes and other policy agreements established by the relevant ministerial council. In the case of environmental issues, for example, regulators such as NICNAS, the Australian Pesticides and Veterinary Medicines Authority (APVMA) and the Australian Competition and Consumer Commission (ACCC) would consider the policy framework established by the EPHC when making their regulatory decisions on environmental matters, and they would ensure that their decisions were consistent with that policy framework.

The department believes that such an arrangement would be beneficial for the regulators by providing clear nationally agreed standards and reference points for them in framing their decisions.

The Commission has recognised that: "Chemical policy formulation is fragmented and inconsistent. Policy tends to be developed in isolation within particular regulatory regimes (public health, workplace safety, transport, environment protection and national security)." [page 25]

To deal with this fragmentation and to provide a single forum for developing a national chemicals policy, the Commission has proposed that:

***Subsequent to the COAG Ministerial Taskforce on Chemicals and Plastics Regulation having completed its reference, the Commonwealth, states and territories should establish, under the Australian Health Ministers' Conference, a Standing Committee on Chemicals, comprising representatives of all ministerial councils that have responsibility for chemicals regulation. It would:***

- ***provide an ongoing forum for assessing:***
  - ***the consistency of chemicals-specific policy settings across the various areas of concern, including public health, workplace and on-farm safety, transport safety, environment protection and national security***
  - ***the effectiveness and efficiency of the overall chemicals-specific regulatory system***
- ***address emerging issues, such as nanotechnology***
- ***oversee the consistent application of chemicals hazard and risk-assessment methodologies***

- *make recommendations for specific actions by individual ministerial councils.* [DRAFT Recommendation 3.1]

The department supports this proposal, having noted in its initial submission the potential value of a national chemicals policy. We are aware that some concerns have been raised about the Commission’s placement of the overarching Standing Committee on Chemicals (SCOC) under the Health Minister’s Conference. The department believes that this is an appropriate choice if there has to be one ministerial council as “home” for SCOC given the pre-eminence of human health concerns; however, a feasible alternative approach would be to have SCOC formally reporting to all the relevant chemicals ministerial councils, rather than just one.

It also may be useful to make explicit that the SCOC would be providing recommendations to individual ministerial councils for consideration. The ministerial council may or may not accept the recommendation. In the unlikely event of agreement not being reached between ministerial councils on coordinated action, the matter presumably could be elevated to the Council of Australian Governments (COAG).

## **ii. The application of the general governance model to NChEM**

In previous submissions to the Productivity Commission study, the EPHSC and the EPHC NChEM Working Group have described the main elements of the National framework for Chemicals Environmental Management (NChEM), which is intended to deliver a more effective and efficient national system for chemicals environmental management. Much of NChEM has been endorsed by the EPHC and is being implemented already. The proposal for an enhanced regulatory role for NICNAS within NChEM, however, has been referred by the EPHC to the COAG Ministerial Taskforce on Chemicals and Plastics Regulation Reform, which the Productivity Commission study will inform.

As described in the earlier NChEM Working Group submission, NChEM proposes a simple, linked and nationally consistent regulatory system for managing the environmental risks of industrial chemicals. Key elements of the legislative model proposed under NChEM are:

- Increased NICNAS powers to specify mandatory environmental controls arising from their risk assessment processes. For a chemical of high environmental concern this could include banning, phasing out, or strictly controlling its use, if NICNAS’ risk assessment process identifies an unacceptable risk of environmental harm. *(This would replace the current system whereby NICNAS simply makes ‘recommendations’ on environmental management actions, which - being often unclear, non-specific or voluntary - may then be implemented in jurisdictions inconsistently, in an ad hoc manner or not at all).*
- Automatic consistent adoption of any environmental controls arising from NICNAS’ risk assessments across all States and Territories.
- Use of existing state/territory regulatory tools (e.g. licensing) where feasible. This would ensure regulatory efficiency and consistency with existing environmental protection frameworks. There may be some streamlining and modification to ensure the tools available are consistent and appropriate across Australia.



- Provision for jurisdictional exemption, but only under exceptional circumstances.

While being broadly supportive of many aspects of NChEM, the Commission has indicated it would prefer the establishment of a new standard-setting body which reports to the EPHC, if needed, rather than giving NICNAS risk management decision making powers (page xxxv).

This is consistent with the Commission's overarching model discussed above and with DRAFT Recommendation 4.2 which restricts NICNAS to the scientific assessment of the hazards and risks of industrial chemicals.

With regard to NChEM, the Commission has recommended that:

***The Environment Protection and Heritage Council (EPHC) Chemicals Working Group should continue to assess the need for a national framework for the management of chemicals in the environment.***

***If this work demonstrates that such a framework would improve effectiveness and efficiency, the Commonwealth, state and territory governments should negotiate an intergovernmental agreement to create an independent standard-setting body reporting to the EPHC.***

- ***This body would develop standards for the environmental risk management of chemicals that the states and territories would adopt by reference, and have the power to ban or phase out chemicals, subject to appropriate cost-benefit analysis.***
- ***Members of the environmental risk management standard setting body should be appointed based on their qualifications and experience. The body should be constituted to reflect the broader public interest and have the ability to appoint advisory bodies as necessary.*** [DRAFT Recommendation 8.1]

As identified in the response from the EPHSC to the draft report, several aspects of the operation of the independent standard-setting body are not yet clear. The department, together with other members of the EPHC NChEM Working Group, looks forward to discussing these aspects further during a workshop proposed by the Commission for May 2008, to assist in developing a genuinely workable proposal.

Rather than repeating the questions of clarification posed in the EPHSC response, the department would like to offer some preliminary comments and suggestions on the possible operation of the Commission's model.

Both the original NChEM model and the Commission's model agree that decisions on hazard and risk assessment and risk management should be taken nationally and adopted consistently in all jurisdictions. Both models agree that NICNAS conducts the hazard and risk assessment, with environmental expertise provided by DEWHA in conjunction with the state and territory environment agencies.

The original NChEM model suggested strengthening the NICNAS risk management recommendations so that they became risk management decisions adopted automatically by all jurisdictions.

While this model had the advantage of simplicity when applied to environmental management, which largely lacks existing frameworks, the department appreciates that an analogous role for NICNAS would be harder to apply in other sectors such as transport,

workplace relations and poisons, because these sectors already have bodies that consider NICNAS recommendations and take their own risk management decisions. The department understands why the Commission would prefer a regulatory model for environmental management that is consistent in principle with other sectors.

The department also appreciates that the Commission's model of a new body reporting to the EPHC provides a stronger role for the EPHC in standard setting for chemicals in the environment, which the department believes is appropriate. If standards are viewed as national codes or guidelines, this is similar to the operation of past and current environmental ministerial councils in setting either statutory or non-statutory standards or guidelines for air quality, water quality or other environmental issues.

This is a role not performed by NICNAS and not appropriate for NICNAS. The department believes it would be relatively straightforward to establish a standard setting body answering to EPHC, provided there were agreement on such aspects as funding, secretariat support, frequency of meetings and choice of members.

The department currently believes that the most straightforward mechanism to establish such a body is under the *National Environment Protection Council Act 1994* (NEPC Act). The NEPC Act provides for the creation of statutory committees to assist the National Environment Protection Council (NEPC consists of the Australian environment ministers within the EPHC). Under the NEPC Act, standards for features such as air quality, site contamination assessment, movement of controlled wastes and diesel vehicle emissions have been set under National Environmental Protection Measures (NEPMs). This structure would seem a logical one for creating the new body, and/or for setting the guidelines/standards required. Chemicals management would need to be added to the list of issues covered by the Act, with some specific description of the statutory body and its role, if the NEPC Act were chosen to be the instrument for establishing the standard setting body. A recent statutory review of the NEPC Act has recommended expanding the scope of matters for which NEPMs can be made.

An example of an expert, statutory advisory group is the Hazardous Waste Technical Group established under the Commonwealth *Hazardous Waste (Regulation of Exports and Imports) Act 1989*. The Technical Group advises the Environment Minister on a range of matters including individual import and export applications. It consists of approximately ten members and meets between four to six times per year, at a cost of approximately \$11,000 for each meeting. Members of the Technical Group have expertise in various aspects of hazardous waste management, including environmental and human health, public safety, and social and economic aspects. The Technical Group does not conduct formal cost benefit analyses.

The department believes that more difficult issues in the Commission's model would arise in relation to the new body's role in developing risk management decisions for individual chemicals for consideration by the EPHC (or NEPC). This is because of the number of chemicals that would need to be considered, the timeframes for decision making, and the costs of the task and source of funding for scientific assessment, with further costs if a cost benefit analysis were required for each chemical.

The Commission has suggested cost sharing amongst jurisdictions for the standards setting role. This may or may not be acceptable to jurisdictions. In some cases, even developing

high-level guidance and standards can be expensive. The decision on when and whether to develop new guidelines and standards would be the Council's choice. This is in contrast with the work flow of assessing new chemicals which would be externally driven as it is determined by the timing and number of applications from industry.

As well, the issue of the source of funding for the new body (henceforth called the 'Environment Chemicals Bureau', or ECB) to prepare decisions on all new and existing individual chemicals is likely to be contentious. NICNAS currently is funded through cost recovery from industry for the development of risk management recommendations for both new and existing chemicals. It is difficult to see why this cost should be transferred to the taxpayer through budget appropriation.

Leaving aside the issue of costs to run the ECB, the question remains whether the ECB, being responsible for risk management recommendations to the EPHC, could consider new chemical assessments within reasonable timeframes and fit within the overarching model for chemicals governance being proposed by the Commission?

The department believes that it could, when compared with other sectors.

NICNAS considers applications for the introduction of new industrial chemicals, received daily. Of these, NICNAS sends approximately 150 industrial chemicals per year to DEWHA for assessment because they are considered to have some environmental hazard. About one quarter of these prove to have significant environmental risks, that is, about 35 chemicals. Of these 35 chemicals, about 13 chemicals require environmental risk management actions which restrict or curtail use of the chemical in some circumstances.

Our understanding is that, in addition to the conditions that NICNAS can impose itself, such as for secondary notification, NICNAS currently provides its assessment report, at the end of ninety days, to the appropriate "decision making body" such as the Australian Safety and Compensation Commission (ASCC) or the National Drugs and Poisons Schedule Committee (NDPSC). That body then undertakes its decision making process on whether to adopt, modify or reject the NICNAS risk management recommendations. Presumably, the ECB proposed in the Commission's model for environmental risk management would operate in a similar way, receiving the NICNAS report at the end of the NICNAS statutory period and making decisions on risk management recommendations. It is not clear from the draft report whether the Commission envisages the ECB having the ability to make the statutory decision itself, or whether the ECB recommendation goes to the Council for endorsement.

Either way, this process would be slower than would have applied under the original NChEM model, which would have seen automatic adoption by all jurisdictions of the NICNAS risk management decisions. It could provide, however, a greater level of reassurance to the EPHC and to jurisdictions which have to implement the management actions that the most appropriate and practical risk management actions have been identified. Under the original NChEM model, there is no obligation for NICNAS to take any advice from DEWHA or other environment agencies or to act on any advice given.

Administratively, the department believes that the ECB could deal with the standards setting role relatively easily, as discussed earlier, and could also deal with the processing of risk management advice for approximately 150 chemicals per annum. As indicated above, only

about 10 per cent of the chemicals being assessed by NICNAS would be likely to require a significant amount of the ECB's time.

The department would be happy to discuss with the Commission the detailed practicalities of how the ECB might operate. In brief, the body could be a compact group, could deal with matters through correspondence and teleconferences as well as some face to face meetings (about six per year), and could be supported by administrative and technical secretariats, probably the NEPC Service Corporation for the administrative role and staff with appropriate expertise from the environment agencies for the technical role. The success of the arrangement would depend on the continued involvement of the environment agencies of all jurisdictions in the NICNAS assessments as envisaged under the NChEM model, including the preparation of the environmental assessments for NICNAS by DEWHA with advice from the state and territory environment agencies.

The department's view is that the operation of the ECB would be facilitated if NICNAS retained the role of preparing risk management recommendations as is currently the case. If the environment agencies have been involved throughout the NICNAS assessment, as envisaged by NChEM, the risk management recommendations should be practical and related to the regulatory capacities of each jurisdiction. The ECB would still need to decide whether the NICNAS recommendations were warranted, adequate and appropriate, and would have the capacity to accept, change, reject or add new risk management actions for recommendation to the EPHC. This is in accord with the roles currently played by the ASCC and the NDPSC. The alternative approach, of NICNAS providing only the hazard and risk assessment, would be much more time consuming for the members of the ECB since they would have to develop the risk management options *de novo* rather than have options already identified.

If the EPHC rejected, modified, or added to the recommendations of the ECB, it would be appropriate that it be required to provide publicly its reasons for doing so. The ECB also would monitor the implementation of the risk management decisions, based on advice received from implementing agencies, and report to the EPHC on the results.

The department notes that the Productivity Commission, in DRAFT Recommendation 8.1, suggests that:

***... "the Environment Protection and Heritage Council (EPHC) Chemicals Working Group should continue to assess the need for a national framework for the management of chemicals in the environment. If this work demonstrates that such a framework would improve effectiveness and efficiency, the Commonwealth, state and territory governments should negotiate an intergovernmental agreement to create an independent standard-setting body."***

As pointed out in the EPHSC response to the draft report, the EPHC already has identified and endorsed NChEM. The outstanding issue is the role of NICNAS and how best to ensure both national consistency in standards and also in environmental risk management action for individual industrial chemicals. It is the department's view that having a single decision making body would enhance national consistency, providing greater predictability for industry and the community. Given the Commission's concerns with NICNAS taking this role, then the department believes that an alternative mechanism such as the independent body, the ECB, is essential, rather than merely an option.

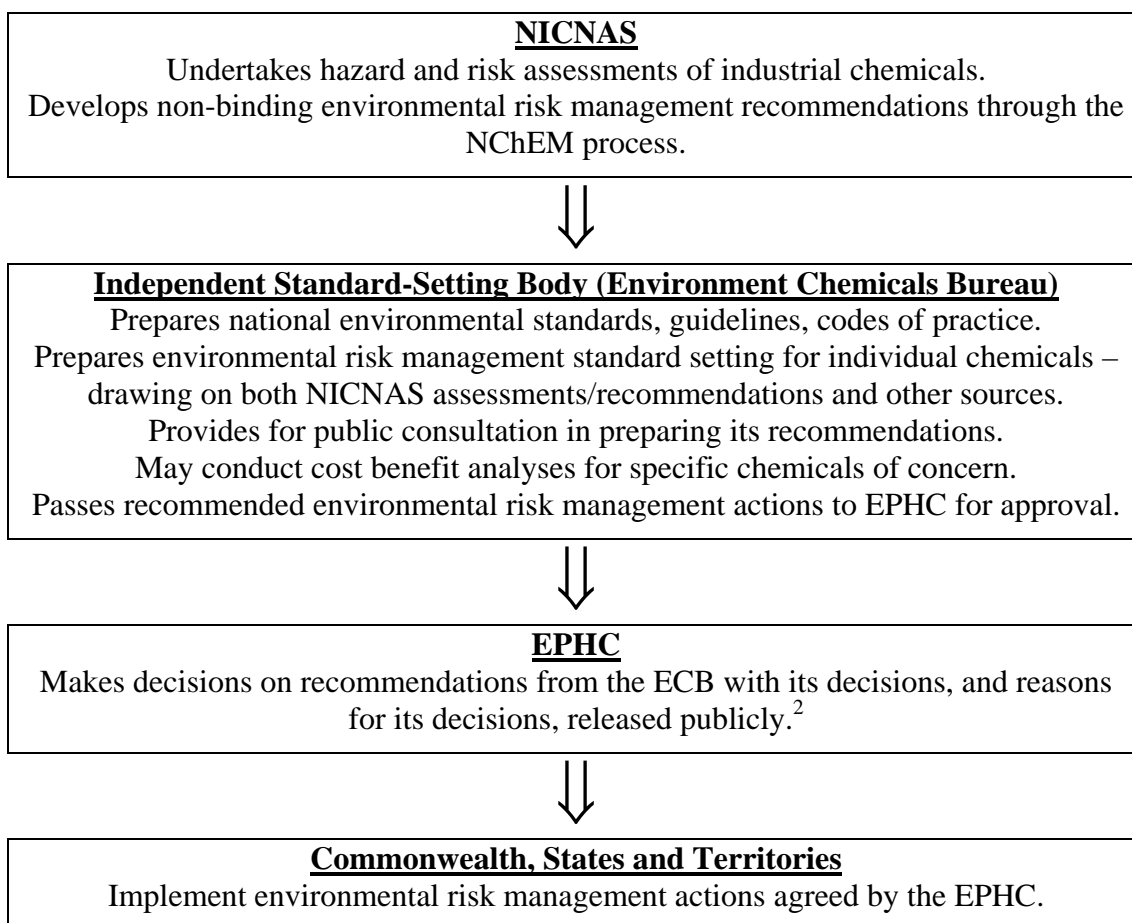
Failure to carry through with the establishment of the ECB, or a suitable alternative mechanism for decision making, would maintain the existing weakness in environmental management compared with other sectors. Furthermore the proposal to remove the ability of NICNAS to make risk management recommendations, would potentially make the problem worse by leaving no mechanism available at all for making national environmental risk management decisions. This also would have adverse impacts on industry as it could create regulatory uncertainty and increase the variability and inconsistency in decisions between jurisdictions.

The department is not aware of any OECD country that relies only on voluntary uptake of environmental risk management actions for chemicals. A voluntary scheme to regulate chemicals would also call into question Australia's ability to meet its international obligations for chemicals management. In a global environment where the international community is taking more proactive approaches to chemicals management (eg the Strategic Approach to International Chemicals Management, the European Union's Registration, Evaluation and Authorisation of Chemicals (REACH), and Canada's aggressive actions on existing chemicals), such a system would be regarded by many as a retrograde step.

As stated by the OECD Council: "the principal purpose of any assessment procedure is to identify the hazard of a chemical substance in order to determine the **conditions of its use**, thereby minimizing the risk of exposing man as well as the environment to hazard."

Recommendation of the Council of 7 July 1977 establishing Guidelines in Respect of Procedure and Requirements for Anticipating the Effects of Chemicals on Man and the Environment [C(77)97/final]

In summary, the department's understands that the Commission's proposed model, incorporating the department's suggestion, would be:



The ECB therefore would have an analogous role to the proposed expert Poisons Scheduling Committee (DRAFT Recommendation 5.1) and the independent body which is proposed to replace the Australian Safety and Compensation Council (DRAFT Recommendation 6.4) – both of which will formulate risk management strategies based on the hazard and risk assessment work separately undertaken by NICNAS.

The department believes that this regulatory model, if adopted by the COAG Ministerial Taskforce, could provide a workable and robust mechanism for ensuring consistent national action in applying environmental risk management decisions. In doing so, it would provide greater transparency and predictability for industry and the community in understanding and responding to the risk management actions.

The department notes, however, that the proposed mechanism introduces some compromises in efficiency when compared to an improved overall model, such as an integrated chemicals regulator, albeit that the latter would entail more significant structural change.

The department also notes that the Commission's model is silent on whether the risk management decisions made by the different sectors (poisons, workplace, transport and environment) for an individual industrial chemical would be co-located in one repository,

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<sup>2</sup> A faster option would be to give the ECB the ability to make the statutory decision.

possibly attached to the Australian Inventory of Chemical Substances (AICS). If this were done, all stakeholders, especially industry, would have a clearer picture of the overall risk management of each chemical. This should extend to Commonwealth functions such as import, export and manufacturing controls as well as action by state and territory jurisdictions. The Commission may wish to consider whether it would support such a one-stop-shop information source and, if so, how best this should be done.

### **iii. The use of cost benefit analyses**

The Commission has recommended in the draft report that:

*An objective of NICNAS should be to maximise net community benefit, and its assessment requirements and outcomes should be supported by analysis of the associated costs and benefits.* [DRAFT Recommendation 4.1]

If the responsibility for developing environmental risk management decisions is passed to the ECB, it logically should be the body responsible for overseeing the analysis of any associated costs and benefits of the risk management decisions, if such cost benefit analysis is pursued. Presumably, similar analyses would have to be conducted by the Australian Safety and Compensation Commission (or the body that replaces it, refer DRAFT Recommendation 6.4 ) and the National Drugs and Poisons Schedule Committee (or the Poisons Scheduling Committee, refer DRAFT Recommendation 5.1) as they take risk management decisions for workplace and human health issues, respectively, on chemical assessments referred to them by NICNAS. Alternatively, does the Commission envisage some sort of overarching cost benefit analysis encompassing all sectors of regulatory action?

Under existing NICNAS legislation, the Director has 90 days from receipt of a standard application for importation of a new chemical to produce the assessment report, including the risk management recommendations. A requirement for NICNAS or other bodies responsible for risk management decisions to conduct a full cost benefit analysis would significantly extend the time and resources needed to process a chemical application.

The department questions the practicality and benefit of applying a cost benefit analysis to the assessment of every chemical. Cost benefit analyses can be expensive, contentious and time consuming. It is difficult to see how the costs of such analyses could be justified for all chemicals or why these costs should be borne by taxpayers.

The department also has concerns about the appropriateness and efficacy of applying cost benefit analyses to substances which are hazardous to human and environmental health. In the department's experience, cost benefit analyses which need to take into account environmental issues face significant difficulties in adequately valuing the benefits of avoided costs of environmental damage. For a chemical which is to be widely used, and for which there may be varied, diffuse impacts in a range of different environments (e.g. on human health, biodiversity or ecological stability) some of which may not be evident until many years after the introduction of the chemical, this is particularly the case. Pressure to focus in cost benefit analysis on identifying the immediate and obvious benefits, rather than on properly quantifying the longer term costs, which are more difficult and expensive to assess, could result in decisions which fail to prevent significant human and environmental harm.

The department's view is that it would not be appropriate to apply cost benefit analysis to the assessment of every chemical. However, if such analyses were considered appropriate for policy reasons, then care would be needed to develop methodologies for comprehensive cost benefit analyses better suited to chemicals management than those currently available. They should be applied only to the chemicals of concern for which significant regulatory action is proposed and where substantial economic impact is expected as a result of that action (or inaction). Cost benefit analysis would therefore apply just to a small number of the prior existing chemicals already in use.

#### **iv. The impact on the environment of chemicals in articles**

Chapter 5 of the Commission's draft research report currently discusses the management of cosmetics and chemicals in consumer goods in the context of health and safety, but does not include mention of environmental considerations. Chemicals in both consumer articles and cosmetics can be released into the environment and some of these chemicals are a major source of concern amongst regulators worldwide for their possible effect directly on the environment, and through environmental exposure, on human health. An example is the presence of brominated flame retardants (BFRs) in consumer items such as electronic equipment. Some BFRs are now being found to have the characteristics of persistent organic pollutants (they are toxic, are stored in the body and travel long distances in the environment) and leach into the environment when these consumer items are disposed of. In Australia, recent surveys have found significant levels of these BFRs in the fat of Tasmanian Devils. Surveys commissioned by the department of aquatic environments, indoor environments and human blood have shown that polybrominated diphenyl ether flame retardants are widespread in Australian environments and in humans, with the highest levels in humans occurring in children under four years old.

*The Ministerial Council for Consumer Affairs should initiate the development of a broadly-based hazard identification system, based on a clearing house approach, in line with the recommendations of the Productivity Commission's 2006 report on consumer product safety (PC 2006, recommendation 9.1). It should be coordinated by the Australian Competition and Consumer Commission, and take account of health and safety issues around chemicals released from consumer articles. [DRAFT Recommendation 5.4]*

*The ACCC and NICNAS should negotiate formal arrangements for cooperation on issues regarding chemicals in consumer articles. These arrangements should include the establishment of a more systematic research program to identify and deal with the risks of chemicals in consumer articles. [DRAFT Recommendation 5.5]*

*The Australian Government should transfer responsibility for the administration and enforcement of the Cosmetics Standard 2007 (Cwlth) from NICNAS to the ACCC. [DRAFT Recommendation 5.6]*

The department believes that it is essential that any hazard identification system developed in response to DRAFT Recommendation 5.4 must include the assessment of environmental hazards. Furthermore, a number of cosmetic ingredients that currently come through NICNAS are assessed for environmental hazard, because most cosmetics are ultimately



released to the environment through sewage treatment plants. The department suggests that environmental hazard must be included in the proposed ACCC's administration and enforcement of the *Cosmetics Standard 2007*.

More broadly, the proposed role of the ACCC in managing issues relating to chemicals in consumer items is not currently reflected in Table 1, page xxxii in the draft research report (see earlier). Given the importance of these proposed changes, the department suggests that another column be added to this table in the draft research report to make clear the incorporation of the ACCC into the overall institutional arrangements.

The department recommends that the ACCC, if it is to take responsibility for chemicals in articles, involve the Office of Chemical Safety and DEWHA in providing expert advice, either directly or through NICNAS.

## **v. The labelling of chemicals for environmental hazard**

Under current regulatory arrangements in Australia, the requirement for labels and Material Safety Data Sheets to carry environmental hazard warnings is inconsistent. For example, APVMA labelling requirements do carry environmental hazard information and instructions for use to minimise environmental impacts. In contrast, the *National Code of Practice for the Preparation of Material Safety Data Sheets 2<sup>nd</sup> Edition* published by the then National Occupational Health and Safety Commission points out that:

“Provision of ecological information is a requirement of the GHS. At the time of publication of this code, there is no consistent national requirement under the Commonwealth, State and Territory hazardous substances regulations to provide this information. However, under Dangerous Goods regulation, some States and Territories require this information.”

The department therefore supports the Productivity Commission's DRAFT Recommendation 6.2 which proposes a GHS-based system which will incorporate environmental hazard information. It notes, however, that this may take a further seven years to implement. In the meantime, the department would appreciate the Commission considering developing a recommendation encouraging regulators of hazardous substances to require environmental hazard information.

*The Commonwealth, state and territory governments should replace the existing systems of regulation of workplace hazardous substances and dangerous goods with a single system of regulations for the classification, labelling, provision of material safety data sheets and risk assessment for all workplace hazardous chemicals. The new system should be based on the Globally Harmonised System of Classification and Labelling of Chemicals (GHS). Australia should not implement the new system until our major trading partners have implemented the GHS. In this context, the European Union has announced that it intends to move to a GHS-based system in 2015. [DRAFT Recommendation 6.2]*

The department already is including GHS environmental hazard classification data for labelling as part of the environmental risk assessments which it undertakes for NICNAS and the APVMA.

## vi. The management of chemicals listed under the Rotterdam Convention

On page 53 of the draft research report, the Commission suggests revised arrangements for managing Australia's domestic obligations under the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade ("Rotterdam Convention"):

*"The Rotterdam Convention, on the other hand, imposes an obligation on parties to restrict or ban the introduction or export of certain chemicals. Currently, DEWHA is the Designated National Authority responsible for international liaison and communication, with NICNAS being responsible for implementation of the Convention. The Commission considers that the responsibility for implementation could be transferred to DEWHA. This would result in an arrangement that is consistent with that applying to agvet chemicals, where the Department of Agriculture, Fisheries and Forestry is fulfilling both the Designated National Authority and implementation roles."* [page 53]

The department would be willing to exercise the implementation function and has appropriate familiarity with the Convention requirements since it leads Australia's international representation to the Convention. For the department to do so, however, may require legislative change.

The Department of Agriculture, Fisheries and Forestry (DAFF) is able to exercise an implementation role for pesticides because the Agricultural and Veterinary Chemicals (Administration) Regulations 1995 Regulation 1.4 provides for the Secretary to make an officer of the department (i.e. DAFF) an authorized officer.

NICNAS controls imports and exports of Rotterdam Convention-listed industrial chemicals under the *Industrial Chemicals (Notification and Assessment) Act 1989*, and under the subordinate *Industrial Chemicals (Notification and Assessment) Regulations 1990*.

Currently, there is no specific provision under these regulations to authorise an officer of the Department of the Environment, Water, Heritage and the Arts to exercise a Rotterdam Convention function.

## Conclusion

The department values the draft recommendations put forward by the Commission, and believes considerable progress has been made in developing a possible overarching model for the management of chemicals. The department recognises the approach taken by the Commission towards pragmatic change within the existing regulatory structure, while attempting to bring greater consistency and effectiveness.

There are three major issues the department would like to highlight in concluding its response to the draft report:

- a) It strongly supports the emphasis the Commission places on the role of the ministerial councils in developing national policy for chemicals management within each sector of responsibility. It considers it appropriate that the statutory regulators should operate within the national standards, guidelines, and codes of practice agreed by the ministerial councils. This approach currently is not as well developed for the environmental management of chemicals as it is for other sectors such as workplace, transport and poisons scheduling. As the department indicated in its previous submission, the nation's environment ministers should have, and be seen to have, a leading role in determining national policies for the management of chemicals in the environment.
- b) The Commission has accurately identified that current arrangements for industrial chemicals are less effective in managing risks to the environment than in managing the risks to health and safety, and that changes are needed. It is essential, therefore, that the current arrangements be strengthened. If NICNAS is not to have the decision making role for environmental risk management for industrial chemicals as proposed under NChEM, then a new independent statutory body reporting to the EPHC as proposed by the Commission, or an equivalent body or function, should be established. In its absence, the existing fragmented and inconsistent approach to risk management will continue or worsen, leading to adverse outcomes for industry, the environment and the community. It is the department's view that having a single decision making body enhances national consistency, providing greater predictability for industry.
- c) In the department's view, some draft recommendations in the draft report would benefit from further thought and discussion to clarify their intent and, if retained, to make them operationally practical. In this submission, the department has provided some suggestions as to how this could be done. In addition, the EPHC is funding an analysis of the costs and benefits of the NChEM process. While the full analysis will not be available before the completion of the Commission's final report, the department is funding a preambular phase, including consideration of the alternative model proposed by the Commission. The department hopes to make the early results available to the Commission before it finalises its report.

The department looks forward to continuing to work with the Commission, bilaterally and as a member of the EPHC NChEM Working Group, to help the Commission refine its recommendations and contribute to achieving a more efficient and effective system for chemicals and plastics regulation.