



14 May 2012

RIA Benchmarking Study  
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Dear Review Team

### **Regulatory Impact Analysis: Benchmarking**

The Plastics and Chemicals Industries Association (PACIA) is the peak national body representing the chemistry industry. PACIA members include chemicals manufacturers, importers and distributors, logistics and supply chain partners, raw material suppliers, plastics fabricators and compounders, recyclers, and service providers to the sector.

PACIA is pleased to provide the following information for consideration in the review.

#### **1. Strong support for Regulatory Impact Analysis**

PACIA has long supported Regulatory Impact Analysis as critical to informing regulatory decision making. PACIA also supports the activities of the Office of Best Practice Regulation (OBPR) and has welcomed both outreach from the OBPR (industry visits in 2011) and responsiveness to recent issues raised by PACIA.

#### **2. Failure to undertake Regulatory Impact Analysis**

During 2007 PACIA, and others, raised the need for the National Industrial Chemical Notification and Assessment Scheme (NICNAS) to reconsider proposals for annotation of the Australian Inventory of Chemical Substances to ban or restrict allowable uses of certain lead compounds, noting the lack of regulatory impact analysis and other issues.

In its 2007-08 Annual Report, the Office of Best Practice Regulation identified that NICNAS had a non-compliant proposal which required a post-implementation review.

“The National Industrial Chemicals Notification and Assessment Scheme (NICNAS) did not comply with the Government’s best practice regulation requirements in 2007 -08. A RIS was required but was not prepared for a proposal to change the Australian Inventory of Chemical Substances to restrict the allowable uses for certain lead compounds.

The Australian Inventory of Chemical Substances (AICS) – Annotation of the AICS (gazetted 5 February 2008) will require a post-implementation review within one to two years.”

Office of Best Practice Regulation 2008, [Best Practice Regulation Report 2007-08](#), Department of Finance and Deregulation, Canberra.

The Office of Best Practice Regulation's Annual Report 2010-11 was published on 13 December 2011 and contains the following entry at page 62:

### 5.1.11 Health and Ageing

| Title of regulatory proposal  |                |                        |                      |              |                |
|---|----------------|------------------------|----------------------|--------------|----------------|
| Description of regulatory proposal  | Reason for PIR | Date of implementation | Date PIR to commence | PIR status   | PIR compliance |
| <b>Australian Inventory of Chemical Substances restriction on the use of certain lead compounds</b> |                |                        |                      |              |                |
| <i>Restriction on the use of certain lead compounds in industrial surface coatings and inks</i>     | Non-compliant  | 5 February 2008        | February 2010        | Not started* | Non-compliant  |

Office of Best Practice Regulation 2011, [Best Practice Regulation Report 2010-11](#), Department of Finance and Deregulation, Canberra

PACIA notes that NICNAS is not a risk-management regulator. NICNAS provides information and makes recommendations about chemicals to Commonwealth, State and Territory bodies with responsibilities for the regulation of industrial chemicals (e.g. with regard to Poisons Scheduling, jurisdictional Poisons Control, Work Health and Safety, and the Environment).

From a policy perspective this matter remains problematic. Had there been proper referral to appropriate agencies then a chain of actions would have commenced for established processes of consideration (including regulatory impact analysis) and regulatory underpinning of decisions by the States and Territories. This has not occurred.

On 7 February 2012 NICNAS posted the following consultation on its website:

*Voluntary Call For Information on the Impact of Restricting the Concentration of Lead Compounds in Industrial Surface Coatings and Inks*<sup>1</sup>

The survey closed on 27 April 2007.

PACIA contends that it is totally unacceptable for a survey to be undertaken some 5 years after the regulatory decision. Such a survey is not a substitute for a decision which was required to be informed by regulatory impact analysis.

PACIA believes that there needs to be increased sanctions for non-compliance with Regulatory Impact Statement requirements. The "naming and shaming" in OBPR Best Practice Regulation Reports does not appear to have behaviour modifying outcomes. The Review Panel will also appreciate the poor perception by the regulated community and stakeholders of regulators who appear to approach non-compliance with immunity.

### 3. Lack of understanding of when to undertake Regulatory Impact Analysis

In November 2011 NICNAS issued a Draft Assessment Report for the chemical hexabromocyclo-dodecane (HBCD) which contained the following recommendations:

#### **Recommendation 4 (to industry)**

Manufacturers and importers of flame retardant articles should voluntarily phase out the import and use of HBCD chemical, and articles containing the chemical, as an interim measure to support the objectives of the Action Plan in Recommendation 6.

<sup>1</sup> [http://www.nicnas.gov.au/About\\_NICNAS/Reforms/Lead\\_Compounds.asp](http://www.nicnas.gov.au/About_NICNAS/Reforms/Lead_Compounds.asp)

## **Recommendation 6 (to the to the Standing Council for Environment and Water (SCEW))**

It is recommended that the SCEW develop an Action Plan to reduce and eventually eliminate HBCD levels in the Australian environment, giving consideration to the fact that HBCD is currently under discussion for listing in the Stockholm Convention. The Action Plan should constitute a national approach involving federal, State and Territory agencies and should address the introduction of HBCD into Australia as a chemical entity in products and in articles. The Action Plan should include, but may not be limited to:

- a. measures to discontinue introduction of HBCD into Australia for further processing over a 5-year period
- b. measures to discontinue introduction of HBCD into Australia as part of finished articles
- c. monitoring import and release of HBCD over a 5-year period
- d. developing guidelines, in partnership with industry, for managing or disposing of existing stocks and articles containing HBCD
- e. coordinating with National Waste Policy to ensure that the plan addresses the issues posed by HBCD and disposal of articles containing HBCD
- f. evaluation of the effectiveness of the reduction program by analysing sediments for HBCD levels at regular intervals.

The recommendations were made in the absence of regulatory impact analysis and the NICNAS HBCD Draft Assessment did not consider the consequences of the recommendations. Some considerations include:

- the lack of suitable, tested, and approved alternatives
- substitution where the alternative may not have characteristics that are “less than those associated with HBCD products”
- if products do not contain a flame retardant then the significant potential consequences for:
  - damage to human life
  - damage to the environment (fires)
  - damage to property
- impacts on building materials, life-cycle-analysis, carbon footprint, and consequences of substitution
- impacts on the building, automotive, electrical, appliance, and other sectors
- impacts on trade including compliance with World Trade Organisation requirements
- impacts on businesses at various level in the supply chain

PACIA and others made submissions on the NICNAS HBCD Draft Assessment and at the same time PACIA sought certain clarifications on RIS requirements from OBPR.

Advice to PACIA was received from OBPR on 23 February 2012. NICNAS modified its recommendations in its “decisions” published on 30 January 2012. PACIA did not challenge the modified recommendations at the Administrative Appeals Tribunal.

A case study of this example was provided to the NICNAS Industry Government Consultative Committee on 14 March 2012. There are a range of important learning opportunities and PACIA would be pleased to provide additional information if that would be of assistance to the Review Group.

It is not clear to PACIA why there is lack of clarity or understanding by regulators as to when regulatory impact analysis should be undertaken. There are possibly a range of reasons that the Review Group may wish to explore.

#### 4. Benefits in Regulatory Impact Statement not delivered

In February 2010 PACIA developed a *Case Study for Regulatory Reform: Implementation of the Australian Dangerous Goods Code 7<sup>th</sup> edition and attendant legislation*. A copy of the case study is appended to this letter.

The case study identifies that the Regulatory Impact Statement developed for the implementation of ADG7 and attendant regulation cited a number of benefits; including:

- Closer harmonisation with maritime and air transport codes with a reduction in intermodal difficulties and inefficiencies will reduce costs for importers/exporters.
- Increased frequency in the revision cycle to ensure the Code is kept up to date with international practices.
- A more frequent revision cycle will reduce the impact on industry since fewer changes will be required.

These benefits have not been delivered to date. However, the National Transport Commission has started working on some of the problems identified in the case study and, at least, has published a corrected Australian Dangerous Goods Code that is available in a useable form.

At present there are no requirements for post-implementation reviews of regulatory decisions that require regulatory impact analysis. Consequently, there is no quality control of information that has been used to support decisions. Non delivery of stated benefits could significantly change the cost-benefit consideration.

The Review Group will also be aware of the ongoing implementation of Work Health and Safety legislations which had been sold to stakeholders with the promise of consistent and concurrent implementation. Again these benefits have not been delivered.

#### 5. Poor quality Regulatory Impact Analysis

The Safe Work Australia [2009 Regulatory Impact Statement](#) (published January 2010)<sup>2</sup>, which provides the basis for changed proposals to include agricultural and veterinary chemical products under workplace labelling provisions, has been disputed as inadequate, misrepresenting and factually incorrect by not only industry but also by government Departments and Agencies.

A range of fundamental problems with the SafeWork RIS include:

- A basis for the changed position on agricultural and veterinary chemicals is cited as:

*“The proposed Standard discontinues this exemption [for agvet chemicals] on the grounds that a principle of OHS laws, and the GHS, is for communication of all hazards on labels consistent with the ILO Convention” (p.ix) (underlining added)*

At the time of preparation of the RIS, Australia, North America, Japan and most of Europe had not ratified ILO Convention C170.

- Criticism of a primary government regulator is used to attempt to justify the SafeWork RIS positions
- Trade information with New Zealand is factually incorrect
- Interventions to include agricultural and veterinary chemical product labelling under workplace labelling provisions create unnecessary regulatory duplication with the requirements of the Australian Pesticides and Veterinary Medicines Authority

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<sup>2</sup> Regulatory Impact Statement: Proposed Revisions to the National OHS Framework for the Control of Workplace Hazardous Substances and Dangerous Goods

- Inadequate consultation, including with key affected government Departments and Agencies
- Lack of evidence supporting assumptions and costs
- Misconstrued trade benefits
- Lack of recognition of Productivity Commission recommendations and the COAG decisions of 29 November 2008

The topic of Safe Work Australia and agricultural and veterinary chemicals labelling was noted in the Department of Agriculture, Fisheries and Forestry Briefs to the Incoming Government<sup>3</sup>

Further information can be provided if it would be of assistance to the Review Group.

## 6. Recommendations

PACIA is pleased to make the following recommendation to the Review:

- a) There is need to place increased responsibility and accountability on regulatory bodies for RIS compliance
- b) There is need for cultural change in regulatory bodies to recognise the importance and value of regulatory impact analysis in regulatory decision making
- c) There is need for increased sanctions for RIS non-compliance to ensure that regulatory decision making is adequately informed
- d) Post-implementation reviews are needed to ensure that assumptions and benefits contained in RISs are 'real' and delivered
- e) There is need to support and strengthen the work of the Office of Best Practice Regulation to improve the quality of regulatory impact analysis and RIS compliance.

Should additional information be required please do not hesitate to contact me.

PACIA looks forward to the finalization of the review and presentation of the report.

Yours sincerely

Geoff MacAlpine  
**Director Industry Development**

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<sup>3</sup> Volume 3 – Current Issues, page 27)

# A Case Study for Regulatory Reform: Implementation of the Australian Dangerous Goods Code 7<sup>th</sup> edition and attendant legislation

## Purpose

There appear to be a range of common issues that arise in regulatory reform that are impediments to achieving successful outcomes that conform to *better regulation* principles.

It is helpful to use a Case Study to identify tangible examples of key issues. In many instances the nature of the issues is not unique and understanding why they occur and how they may be rectified offers an important learning opportunity.

In the case of the Productivity Commission's roadmap recommendations for reform of chemicals and plastics regulation and subsequent Council of Australian Government decisions and directions there are clear expectations that the outcomes will deliver an improved regulatory environment towards achieving COAG's goal of *A Seamless National Economy*.

Some issues for reflection in the following Case Study include:

- Ways to achieve consistency of implementation – template/model legislation, incentives
- What motivates jurisdictions to deviate from an agreed national model
- Completion of tasks verses achieving outcomes
- Non-delivery of benefits identified in Regulatory Impact Statements
- Whether COAG decisions and directions are taken seriously by the relevant bureaucracies
- Accountability

## Background

The implementation of the Australian Dangerous Goods Code 7<sup>th</sup> edition and attendant legislation was considered by the Productivity Commission in its report on chemicals and plastics regulation<sup>1</sup>. The Commission made relevant recommendations on transport safety that are detailed at Attachment 1. The Council of Australian Governments (COAG) considered the recommendations and made certain decisions that are detailed at Attachment 2.

## COAG expectations

In summary, COAG's decisions on ADG7 and attendant regulation implementation were intended to deliver:

- the Australian Dangerous Goods Code 7<sup>th</sup> edition freely available on the web to facilitate accessibility and support compliance
- a common implementation date of 31 December 2008 with a 12 month transition
- nationally consistent implementation of ADG7 and attendant regulation by all jurisdictions
- an independent review of the consistency with which the Australian Dangerous Goods Code is adopted, and of the regulatory outcomes produced by the implementation of the associated legislation and regulations
- continuing responsibility for policy development and monitoring of the Australian Dangerous Goods Code with the National Transport Commission (NTC)

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<sup>1</sup> Productivity Commission 2008, *Chemicals and Plastics Regulation*, Research Report, Melbourne.

## Assessment of achievement of COAG deliverables

1. The Australian Dangerous Goods Code 7<sup>th</sup> edition to be made freely available on the web to facilitate accessibility and support compliance

The 6<sup>th</sup> edition of the Australian Dangerous Goods Code is posted on the NTC website as 3 files (Volume 1, Volume 2 and Corrigendum) with a combined size of less than 3.5Mb.

Conversely, ADG7 has been posted on the NTC website as 17 files with a combined size of more than 90Mb. The complexity and size of the files makes them generally regarded as unusable. There is no technical reason for the files to be of such an unusable size.

Whilst the “task” set by COAG, as an early harvest reform to publish ADG7 on the internet has been completed it has been done in such a way as to make access difficult and not practical as a common reference i.e. a task completed with no acceptable outcome.

2. A common implementation date of 31 December 2008 with a 12 month transition

The agreed implementation timeframe was not met by any state or territory. At February 2011, Tasmania and Northern Territory do not have legislation in place.

Staggered introduction has been occurring since early 2008.

Additionally because implementation has not been consistent between jurisdictions industry has borne a significant burden of trying to understand and implement compliance strategies to cater for differences. This is incongruous given the clear instructions provided by the Council of Australian Governments.

This defeats the aim of uniform, concurrent implementation and seamless interstate transport and creates a legally difficult situation for companies with operations throughout Australia.

3. Nationally consistent implementation of ADG7 and attendant regulation by all jurisdictions

Industry continues to work to identify differences between the NTC Model Act, NTC Model Subordinate Law and legislation introduced in each of the jurisdictions. The following examples are not intended to be comprehensive but are indicative of jurisdictional differences:

- South Australia has not incorporated the provisions of the Model Act
- South Australia and Western Australia have not included the Tools of Trade provisions from the Model Subordinate Law
- South Australia and Western Australia have continued with 3 year Dangerous Goods Licenses compared to 5 years in the Model Subordinate Law
- Whilst Queensland Regulations allow for issue of licences for up to 5 years, in practice it appears that they are still being issued for 3 years
- Queensland ignition source distances for tanker deliveries at service stations are different to the provisions of ADG7
- Western Australia has introduced additional requirements for approved emergency responders
- ADG7 in various places references particular clauses of the Model Subordinate Law. However none of the State and Territory legislation uses the same numbering convention as the Model Subordinate Law. Nor are they the same as each other. When transporting dangerous goods in a particular jurisdiction, the legal obligation is to do so in accordance with that jurisdiction’s legislation, not the Model Subordinate Law. In 54 places ADG7 makes reference to particular clauses in the Model

Subordinate Law. Without cross references, there is no assurance that those needing to find the referenced clause in the State legislation be sure of doing so.

Inconsistencies in implementation undermine compliance and the safety outcomes sought, rather than facilitating it. Clearly this task has been made much more complex and difficult by the disappointing move away from developing template legislation (as occurred with ADG6) to model legislation with ADG7.

4. An independent review of the consistency with which the Australian Dangerous Goods Code is adopted, and of the regulatory outcomes produced by the implementation of the associated legislation and regulations

On 1 November 2010 the National Transport Commission sought feedback from stakeholders on ADG7 implementation. It is however believed that an *independent review* may have more closely aligned with the instruction of the Council of Australian Governments.

5. Continuing responsibility for policy development and monitoring of the Australian Dangerous Goods Code with the National Transport Commission (NTC)

There are key issues concerning correction of errors in the Code, updating for international alignment and resolving implementation issues. There does not appear to be a current process for these issues to be addressed.

- *Lack of a corrigendum:* There are a range of known errors in the text and tables of ADG7 (more than 60) yet a corrigendum has not been issued. This remains an ongoing problem for industry and regulators alike.
- *Currency:* ADG7 is based on a 2009 edition of a United Nations document. There have been ongoing developments and ADG7 will be misaligned with the UN plus other international Codes for transport of dangerous goods by air and sea commencing in 2011. This will adversely impact on companies importing and exporting.

The Regulatory Impact Statement developed for the implementation of ADG7 and attendant regulation cited a number of benefits; including:

- Closer harmonisation with maritime and air transport codes with a reduction in intermodal difficulties and inefficiencies will reduce costs for importers/exporters.
- Increased frequency in the revision cycle to ensure the Code is kept up to date with international practices.
- A more frequent revision cycle will reduce the impact on industry since fewer changes will be required.

These benefits have not been achieved.

This short Case Study is not intended to be a comprehensive treatment of the topic but rather to serve to identify issues with implementation.

In this Case Study, the National Transport Commission and the jurisdictions have not delivered on any of the expected deliverables and it is likely that it will take many years and considerable additional expense to fix.

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## Productivity Commission recommendations on transport safety

The Productivity Commission, in its 2009 report on chemicals and plastics regulation<sup>2</sup> made the following recommendations:

### Recommendation 7.1

The Australian Transport Council should commission an independent public assessment of the consistency with which the Australian Dangerous Goods Code is adopted by jurisdictions, and of the regulatory outcomes produced by their implementation of the associated legislation and regulations. The review should commence not later than twelve months after the reforms have been implemented by all jurisdictions.

### Recommendation 7.2

Responsibility for policy development and monitoring should remain with the National Transport Commission, reporting to the Australian Transport Council.

Once proposed revised governance arrangements have become operational in the transport and workplace relations arenas, the Australian Transport Council should undertake a public review, involving consultation with all stakeholders and including consideration of necessary funding, to determine the most appropriate forum for developing and implementing future national dangerous goods transport policy.

### Recommendation 7.4

The National Transport Commission should price all modes of provision of the Australian Dangerous Goods Code at avoidable cost, including free provision on the internet. The resultant revenue loss for the National Transport Commission, together with any compensation payable to the Code distributor, should be offset by increased jurisdictional contributions. Pricing of the Australian Explosives Code should also follow these principles.

The Productivity Commission identified the following additional actionable proposals:

### National Transport Commission funding for the development of dangerous goods transport regulations

The Australian Transport Council should consider the cost to the National Transport Commission (NTC) of developing and maintaining dangerous goods regulation as part of the scheduled legislative review of the NTC in 2008.

### Transition period for the introduction of the ADG7 package

Given the delays and uncertainty surrounding the introduction of ADG7 and the move to model legislation, the Commission considers a 12 month transition period is appropriate. This period should commence after fulfilment of the COAG directive for jurisdictional implementation of the ADG7 package by December 2008.

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<sup>2</sup> Productivity Commission 2008, *Chemicals and Plastics Regulation*, Research Report, Melbourne.

## Council of Australian Governments decisions on transport safety

COAG, July 2008

At its July 2008 meeting COAG agreed to certain matters arising from the COAG Ministerial Taskforce on Chemicals and Plastics Regulatory Reform – for high priority early harvest reforms to be completed by December 2008:

*Reform 1: Nationally consistent implementation by all jurisdictions of the 7th edition of Australian Dangerous Goods Code and attendant regulation within a 12 month period.*

*Recommendation: COAG agrees to the nationally consistent implementation by all jurisdictions of 7<sup>th</sup> edition of Australian Dangerous Goods Code and attendant regulation within a 12 month period, and directs that all jurisdictions are to adopt the Code and supporting legislation and regulation by December 2008 and directs the Australian Transport Council to report its completion to the December 2008 COAG meeting.*

*Reform 2: The 7th edition of the Australian Dangerous Goods Code be made free on the Internet. Recommendation: COAG agrees to make the 7th edition of the Australian Dangerous Goods Code available on the internet for free, by 31 December 2008, and asks the Australian Transport Council to consider a submission by the National Transport Commission on the implementation of the decision including the funding and contractual implications.*

COAG, November 2008

### Productivity Commission Recommendation 7.1:

*COAG agrees to this recommendation.*

*The Australian Transport Council (ATC) agreed to update model dangerous goods legislation (ADG7) in August 2008 with a common implementation date of 31 December 2008 and a 12 month transitional period. Implementation is now a state and territory responsibility and most jurisdictions are expected to meet that timeframe, apart from the NT, the ACT and Tasmania.*

*COAG notes that the ATC currently requires the National Transport Commission (NTC) to independently monitor, assess and report on the implementation of agreed national road transport reforms including the implementation of the Australian Dangerous Goods Code (ADG Code) and its associated model legislation.*

*COAG welcomes the agreement by the ATC that the National Transport Commission will undertake an independent review of the consistency with which the Australian Dangerous Goods Code is adopted, and of the regulatory outcomes produced by the implementation of the associated legislation and regulations. The review will commence within 12 months of the implementation of the reforms, but no later than the first half of 2010.*

### Productivity Commission Recommendation 7.2

*COAG agrees that responsibility for policy development and monitoring of the Australian Dangerous Goods Code (ADG Code) should remain with the National Transport Commission (NTC) and that it should continue to report to the Australian Transport Council (ATC) on these matters. COAG also notes that a legislative review of the NTC and its operations is due by September 2009. COAG considers this will provide an opportunity to consider the most appropriate forum for developing and implementing future dangerous goods transport policy.*

### Productivity Commission Recommendation 7.4

The Commonwealth Government agrees that the revised Australian Explosives Code will be made available free of charge on the internet by 31 December 2008.