



EDOs of Australia

EDOs of Australia
ABN 85 763 839 004
C/- EDO NSW
Level 5, 263 Clarence Street
Sydney NSW 2000 Australia
www.edo.org.au
T: +612 9262 6989

30 March 2016

NICNAS Reforms
GPO Box 58
Sydney NSW 2001

Dear NICNAS Reforms Group

Re: Consultation Paper 2 – Implementing reforms to the National Industrial Chemicals Notification and Assessment Scheme (NICNAS)

Environmental Defenders Offices of Australia (**EDOA**) welcomes the opportunity to comment on the Australian Government Department of Health's *Consultation Paper 2 – Implementing reforms to the National Industrial Chemicals Notification and Assessment Scheme (NICNAS) (Consultation Paper)*.

EDOA consists of eight independently-constituted and managed community legal centres located across the State and Territories. Each EDO is dedicated to protecting the environment in the public interest. Specifically, we:

- provide legal representation and advice,
- take an active expert role in environmental law reform and policy formulation, and
- offer a significant community education program designed to facilitate public participation in environmental decision making

We note that this consultation paper is part of a broader effort to reform Australia's regulation and management of potentially hazardous industrial chemicals. For example, we note that the Department of the Environment is currently consulting on a national standard of environmental risk management of industrial chemicals (**National Standards Consultation Paper**). Similarly, a number of states are consulting on changes to state and territory legislation, such as the NSW proposed reforms to Environmentally Hazardous Chemicals Legislation.

Our submission addresses the following matters arising from the Consultation Paper:

- 1. Precautionary approach and public confidence**
- 2. International assessment tools and domestic impact considerations**
- 3. Purpose(s) of chemical use**
- 4. Exempt chemicals, assessments and reporting**
- 5. AICS oversight and transparency**
- 6. Compliance powers**

AUSTRALIAN CAPITAL TERRITORY GPO Box 574, Canberra 2601, T: (02) 62433460, E: edoact@edo.org.au
NEW SOUTH WALES 5/263 Clarence St, Sydney NSW 2000, T: (02) 9262 6989, E: edonsw@edonsw.org.au
NORTHERN TERRITORY GPO Box 4289, Darwin NT 0801, T: (08) 8981 5883 edont@edont.org.au
NORTHERN QUEENSLAND 1/96-98 Lake St, Cairns QLD 4870 T: (07) 4031 4766, E: edong@edong.org.au
QUEENSLAND 30 Hardgrave Road, West End QLD 4101, T: (07) 3211 4466, E: edogld@edo.org.au
SOUTH AUSTRALIA 1st Floor, 182 Victoria Square Adelaide SA 5000, T: (08) 8359 2222 E: edosa@edo.org.au
TASMANIA 131 Macquarie Street, Hobart TAS 7000, T: (03) 6223 2770, E: edotas@edo.org.au
WESTERN AUSTRALIA Suite 4, 544 Hay St, Perth WA 6000, T: (08) 9221 3030, E: edowa@edowa.org.au

1. Precautionary approach and public confidence

Given that the NICNAS assessment is proposed to be the risk assessor for the purposes of the National Standards (and therefore is likely to be the key assessor for industrial chemicals in Australia), it is critically important that the final assessment standards are appropriately *precautionary* in ensuring protection of human health and the environment. Efforts to harmonise legislation and reduce so-called red tape must not result in a reduction to this protection.

To that end, **EDOA is concerned that the NICNAS Consultation Paper foreshadows both a reduction in assessment requirements and a reduction in reporting requirements.**

While EDOA supports the use of a risk management framework and appropriately applied international standards, any reduction in regulatory assessment requirements should be accompanied by an *increase* in notification and improved transparency in all phases of industrial and hazardous chemical management. Transparency builds community confidence by ensuring the public is appropriately informed, and ensuring that decision-making can be subject to independent scrutiny.

We provide some brief comments on specific proposals below.

2. International assessment tools and domestic impact considerations

We note the proposal to incorporate greater use of international assessment tools. EDOA supports the use of such tools where they have an appropriate regulatory basis, independent oversight and transparency, as proposed in the Consultation Paper. An important consideration in applying international tools should be whether the chemicals proposed to be introduced by these assessment pathways are likely to have a different impact on Australia's unique environments, flora or fauna – for which additional consideration may be required.

We also support the use of a precautionary approach in evaluating and choosing among different international assessment tools. If different international regulators have differing regulatory assessment outcomes with respect to the same chemical, we urge that NICNAS mandates that the more precautionary outcome is adopted.

EDOA further supports the proposal that, if appropriate information cannot be obtained via international tools, the hazard ranking of the chemical should fall within the highest band of the risk matrix.

3. Purpose(s) of chemical use

There is significant ongoing community concern, as expressed to our offices, about industrial chemicals being introduced for one purpose and used for another. For example, many of the chemicals used in hydraulic fracturing (fracking) for the development of unconventional natural gas deposits (tight, shale or coal seam gas (CSG)) were originally introduced – and managed – for a wholly different purpose.

As EDOA has previously noted in a report prepared for The Australia Institute:¹

The vast majority of chemicals used in fracking have not been tested by Australia's chemical regulator, [NICNAS]. In fact, out of 23 chemicals known to be used in fracking fluids in Australia, only two have been assessed by NICNAS, and neither for their use in fracking. While these 23 chemicals have material data safety sheets (MSDSs), they are 'typically vague on the descriptions of both toxicological and ecotoxicological effects' and at least nine are known to have adverse impacts on human health and/or the environment...

The lack of effective, enforceable law to protect the environment from chemicals is arguably a systemic problem in Australia. In a report assessing chemical regulation in Australia, the Productivity Commission found that 'current regulatory mechanisms were ineffective for managing the risks of industrial chemicals to the environment,' and that 'this gap represented the most significant failing in Australia's chemicals and plastics regulatory regime.' In particular, the current NICNAS system fails to adequately regulate chemicals when they are adapted for a new purpose, for example for use in fracking fluid.

We note that the National Standards Consultation Paper states that:

The schedule to which the industrial chemical is to be assigned under the National Standard will be based on its scope of assessment. The scope of assessment is the assessed use, and volume of use. This means that each time NICNAS assesses a chemical against a different scope of assessment, it may be scheduled in a different Schedule under the National Standard. This approach is consistent with a risk-based, proportionate approach. It takes into consideration the likely release of a substance into the environment and takes into account that different uses of substances result in different releases to the environment.

EDOA supports this approach and urges that it be clearly articulated in the NICNAS assessment framework.

In relation to industrial chemicals used in CSG fracking operations, EDOA has previously recommended the following:

- a. *Require NICNAS to undertake a full hazard assessment for all chemicals used in unconventional gas and coal activities, including their impacts on human health and the environment. The assessment should be overseen by an advisory body consisting of industry and civil society representatives.*
- b. *Require compulsory disclosure of chemical ingredients of all fracking and drilling products used by constitutional corporations in Australia.*
- c. *Require the Director to prohibit all fracking and drilling chemicals deemed harmful to human health and the environment.*

We reiterate these recommendations and urge their adoption in the current reforms.

¹ *Coal and gas mining in Australia: Opportunities for national law reform* (2013), at: http://www.edonsw.org.au/coal_and_gas_mining_in_australia_opportunities_for_national_law_reform.

4. Exempt chemicals, assessments and reporting

a. Treatment of Exempt chemicals

EDOA is concerned about the Consultation Paper's proposal to allow exempt chemicals to be used without annual reporting. If the assessment requirements for this class of chemicals are to be significantly relaxed, the Australian Government (and community) must at least be notified of what chemicals are being used for what purpose. This is necessary to ensure that, if scientific knowledge regarding the effects of an exempted chemical changes (in such things as its toxicity, persistence, reactivity or interaction with other chemicals), an appropriate regulatory response can be developed in Australia as quickly as possible.

Similarly, NICNAS should have a concurrence role in the initial classification of any chemical as 'Exempt'. Rather than having to provide the information on how a chemical was categorised as 'Exempt' within 28 days on receipt of a request, the information that a proponent is relying on should be provided at the time of introduction. Moreover, NICNAS should be required to confirm that it agrees with the 'Exempt' classification within 90 days (agreement should not be 'deemed').

Given the serious implications of any accidental chemical release, if these broader reporting requirements are not adopted, any chemical that falls within either the top hazard band or exposure band for either human health or environmental impacts in the risk matrix must be categorised as a 'reported chemical'.

b. Reduced animal testing in chemical assessments

We note and support the focus on reducing the use of animal testing in the assessment of chemicals, where possible.

However, we are concerned that the Consultation Paper is using reduced animal testing to justify reducing assessment requirements. Rather, the focus should be on identifying appropriate analogues for animal testing, either in international regulation or in alternative testing regimes.

c. Acknowledging NICNAS' authority

EDOA believes that NICNAS should be allowed to determine the scope of assessment for *NICNAS-initiated* assessments and *applicant-initiated* assessments. As the independent regulator, NICNAS should maintain authority for what constitutes an appropriate assessment. NICNAS may also be able to rationalise assessments where multiple similar applications have been received or it can be reasonably foreseen that a broader assessment is warranted.

5. AICS oversight and transparency

Any expanded powers for the Director of NICNAS to make changes to the Australian Inventory of Chemical Substances (**AICS**) should be accompanied by an appropriate level of transparency and third party appeal rights, to ensure that there are sufficient checks and balances in the system.

EDOA strongly supports the proposal to increase transparency of the AICS by increasing the information that is published by NICNAS. Requests for confidentiality must be considered in light of the public interest in releasing information, consistent with federal and state freedom of information law and policies of 'open government'. Given the reduced assessment requirements, the default position should be the release of all information.

6. Compliance powers

Finally, EDOA is concerned to avoid a situation where increased NICNAS compliance powers may be used to reduce the level of prosecution. The credible threat of prosecution is an important deterrent to breaching the law. It also minimises any temptation to simply 'factor in' small penalties as a cost of doing (non-compliant) business.

While it is helpful for NICNAS to have access to a wide range of tools to deal with breaches, any serious non-compliance should still be subject to prosecution. There should be clear expectations and formal policies to ensure this is the case.

Conclusion

Thank you for considering EDOA's submission and recommendations. We would be happy to address any queries or comments regarding this submission or provide further assistance.

For further information please contact Rachel Walmsley, Policy and Law Reform Director at EDO NSW, on ph: 02 9262 6989 or email: [rachel.walmsley\[at\]edonsw.org.au](mailto:rachel.walmsley[at]edonsw.org.au).

Yours sincerely,

Environmental Defenders Offices of Australia



Nari Sahukar
Senior Policy & Law Reform Solicitor, EDO NSW