



Proposed Reforms to Environmentally Hazardous Chemicals Legislation - Discussion Paper

prepared by

**EDO NSW
August 2015**

About EDO NSW

EDO NSW is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO NSW has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO NSW is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

EDO NSW is part of a national network of centres that help to protect the environment through law in their [states](#).

Submitted to:

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Introduction

This submission provides feedback on the NSW Government's *Proposed Reforms to Environmentally Hazardous Chemicals Legislation - Discussion Paper (Discussion Paper)*.¹

As a community legal centre specialising in public interest environmental law, EDO NSW welcomes the opportunity to comment on the proposed changes to the *Environmentally Hazardous Chemicals Act 1985 (EHC Act)* and the *Environmentally Hazardous Chemicals Regulation 2008 (EHC Regulation)*. We have a strong interest in the regulatory framework for hazardous chemical management, and have contributed to a range of consultations over an extended period of time.² EDO NSW and the Total Environment Centre (**TEC**) also made a joint submission to the EPA's 2003 review and discussion paper on the EHC Act.

As an overarching comment, EDO NSW supports the reduction of duplication in legislation as long as measures to achieve this reduction do not lower environmental standards. We also note the need to reflect changes in NSW legislation since 1985 (such as revised pollution laws, contaminated land laws and increased powers and penalties); and complement changes in federal relations (such as federal chemical assessment laws). Our comments on this Discussion Paper therefore focus on areas where we believe care must be taken to avoid a reduction in standards as a result of any changes.

Objects of the EHC Act

EDO NSW supports the introduction of objects to the EHC Act. We note the proposal that "The objects section will... require proper production, handling, storage, use, transport, treatment and disposal of environmentally hazardous chemicals to protect human health and the environment".

First, we believe that an additional object must be the requirement to make decisions under the EHC Act in line with the principles of Ecologically Sustainable Development (**ESD**). Principles of ESD that are particularly relevant to hazardous chemicals include the precautionary principle, improved valuation (e.g. lifecycle costs), and the polluter pays principle. A reference to ESD principles in the EHC Act objects would reinforce the link between the EPA and its duties under the wider NSW pollution law framework.³

Second, we would also support objects for continuous improvement, public awareness, and progressive "phasing-out" of hazardous chemicals, to encourage the "use of newer, safer chemicals" (Discussion Paper p 8). For example, the EPA's 2003 discussion paper noted:

Agreed objectives could guide the development of broader policy approaches to chemicals management through mechanisms that promote:

- *risk reduction, for example through life-cycle management and product stewardship of chemicals*
- *substitution of hazardous chemicals with more benign products*
- *community awareness, understanding and responsibility with regard to chemicals.*

¹ Available at: <http://www.epa.nsw.gov.au/pesticides/haz-chem-sub.htm>

² For example, Submission regarding the Agriculture and Veterinary Chemicals Legislation Amendment (Removing re-approval and re-registration) Bill 2013, Submission on the National Chemicals Environmental Management (NChEM) Scheme 2006. These submissions are available at: http://www.edonsw.org.au/law_reform.

³ See the *Protection of the Environment Administration Act 1991* (POEA Act) (NSW), s 6; and the *Protection of the Environment Operations Act 1997* (POEO Act) (NSW).

We support such issues being dealt with in the EHC Act objects and, perhaps more importantly, operationalised in the Act.

The TEC made similar proposals in our joint submission in 2003, which remain relevant:

The objects of the Act:

- (1) *To establish processes for the assessment, control and reduction of use of hazardous chemicals and their waste products to prevent harm to human health or some other aspect of the environment during their life cycle.*
- (2) *To ensure that chemicals are assessed, controlled and, consumption of hazardous chemicals reduced, to satisfy the needs and concerns of the citizens of New South Wales and in accordance with ecologically sustainable development principles as defined within the POEO Act (1997).*
- (3) *To ensure the community has access to and, is made aware of, relevant and meaningful information about chemicals that will enable them to make informed choices and to avoid products containing harmful chemicals and, that there is an acknowledgement of consumers 'right to know'.*
- (4) *That the control of chemicals is to be based on continuous improvement and benchmarked against international best practice including the adoption of the principle of reducing to harmless levels the discharge into the air, water or land of substances likely to cause harm to the environment.*
- (5) *To monitor and report on the status of hazardous chemical management on a regular basis.*
- (6) *To assist in the achievement of the objectives of the various NSW environmental Acts.*

State Based Assessment

A key focus of the review is to remove “obsolete provisions relating to the assessment of industrial chemicals as assessments are now undertaken nationally by NICNAS”.⁴

EDO NSW supports a system that allows risk management decisions at a national level to be automatically adopted in the EHC Act, by reference to a national register of decisions, where this does not lower management standards for hazardous chemicals.

However, EDO NSW has previously noted a range of limitations with the NICNAS scheme and can see merit in retaining a NSW assessment process that supplements NICNAS.

The *Industrial Chemicals (Notification and Assessment) Act 1989 (NICNAS Act)* provides for the assessment of all industrial chemicals new to Australia (with some exemptions), and assesses those chemicals already in use on a priority basis. All new and existing chemicals – whether assessed or not – are listed on the Australian Inventory of Chemical Substances (**AICS**). However newly assessed chemicals may not be added for up to five years.

As NICNAS did not commence until 1990, most of the 40,000 chemicals on the AICS have never been formally assessed. Information on the assessment process is not publicly available until the chemical has been added to AICS. Any chemical included in the AICS may be imported into or used in Australia without obtaining an ‘assessment certificate’, unless it is subject to conditions included in the AICS.

Where an assessment is undertaken, certain matters must be taken into account. These matters vary depending on whether it is a preliminary or full assessment. Both assessments

⁴ Discussion Paper, page 6

must consider whether the chemical has the ‘intrinsic capacity to cause’ any adverse impacts on the environment or humans. However, only a full assessment must consider ‘any risk to the environment arising from the use of the chemical or from the discharge of waste products resulting from [its] manufacture’. The NICNAS Director is not obliged to impose conditions of use on a chemical, even after an assessment report has indicated that it is likely to be harmful to the environment and human health.

As the Productivity Commission noted in its 2008 report (referred at Discussion Paper, p 5):

The effectiveness of NICNAS assessments is limited given that the majority of currently used industrial chemicals have been grandfathered onto the scheme without prior assessment. Review of those chemicals has proceeded slowly to date and needs to be accelerated. (Research Report - Chemical and Plastics Regulation, p 53)

Therefore, EDO NSW is concerned that removing provisions for state-based assessment, and relying entirely on NICNAS (or other federal measures), may not provide effective environmental protection. This is of particular concern when so few chemicals have been assessed under NICNAS, and where full disclosure of information on the chemicals is not required. It also potentially closes off future policy options, such as NSW undertaking assessments by agreement on behalf of NICNAS or the Council of Australian Governments.

NSW must maintain provisions to allow for state-based assessment of chemicals where they have been inadequately assessed at the national level or where they are unlikely to be assessed at that level. Use of those chemicals may not form a national priority but may be a state priority, for example. We note the comment in the Discussion Paper that the “EPA will also have the ability to add a chemical [to the relevant Schedule] that is identified as being of concern in NSW so that it can take action on it” (p 7) but given the focus on removing assessment provisions, it is unclear how this system will work in practice.

Transparency in decision making

EDO NSW strongly supports the proposal to amend the Act to provide for relevant EHC Act registers to be made available online, improving transparency in decision making.

In contrast, the proposals to allow the Chair of the EPA to approve and amend CCOs following consultation with the independent EPA Board, but without any mandatory upfront public consultation process, has the potential to reduce transparency and accountability. We understand *draft* CCOs will be subject to 4 weeks consultation (Discussion Paper, p 9). This is supported alongside earlier public consultation; and a requirement that submissions be published unless there are specific reasons not to, such as public safety or by request.

Similarly, we note the proposal that:

The amended EHC Act will provide the EPA Board with the power to grant an exemption from provisions of the EHC Act in special circumstances, including where compliance with specific requirements would not be practical and non-compliance with the provision(s) will not significantly affect public health, property or the environment.

The need for this discretion and the scope of exemptions in ‘special circumstances’ it could create are unclear. For example, in what circumstances have such exemptions in other EPA legislation been used (if at all)? What are the negative impacts in the absence of such an exemption? We do not support this proposal in the absence of a clearer rationale. If it does proceed, any such amendments must require that the decision is supported by a publicly available Statement of Reasons demonstrating that the decision was made on the best available science.

Licensing

The Discussion Paper proposes aggregating ‘dual licences’ under EHC Act and the POEO Act. If EHC Act licences are brought under the Environmental Protection Licence (pollution licence) scheme as proposed, we recommend that:

- the ‘lifecycle’ approach to hazardous chemical licensing be properly carried over;⁵
- licence conditions be reviewed and updated (including to set clear limits on chemical use in accordance with recommendation 9 of the Legislative Council’s EPA inquiry;⁶ and
- environmental monitoring conditions for hazardous chemicals that are brought under pollution licences (whether new or existing conditions) be subject to mandatory disclosures under s 66(6) of the POEO Act (which may require amending s 66(6)).

In its joint 2003 submission EDO NSW noted the lack of criteria under Part 4 of the EHC Act. We recommended the following factors be considered for hazardous chemical licensing:

- *significant impact on human health and/or the environment*
- *alternatives to use of the chemical for that activity (to minimise the actual use of hazardous chemicals in industry and in the community)*
- *whether the applicant is a fit and proper person*
- *public submissions*
- *whether the application includes a waste reduction/harm minimisation plan*

Other Issues

We make the following summary comments with regard to key regulatory changes proposed.

Issue summary (EPA Discussion Paper p 6)	EDO NSW comment
<i>The introduction of Schedules of chemicals determined to be environmentally hazardous. Chemicals listed on the Schedules may be subject to regulatory controls.</i>	Supported – but the EPA should be required to nominate <i>which</i> regulatory controls will apply to listed chemicals, within a specific reasonable period.
<i>Enabling the adoption and implementation of national chemical risk management decisions in NSW, with provision for local (NSW) exceptions.</i>	Supported subject to comments above.
<i>Streamlining provisions for making and amending Chemical Control Orders (CCOs). It is proposed to allow the Minister to delegate approval and amendment of CCOs to the CEO/Chair of the EPA.</i>	See comments above.

⁵ For example, in its joint 2003 submission EDO NSW argued 3 benefits of the EHC Act licensing approach:

- *EHC Act licenses have a unique focus and relate to a specific chemical, rather than a specific activity or location ...*
- *Licences are a vital tool for ensuring public access to important and relevant [chemical] information.*
- *... [L]icenses are a tool that can be tailored to suit individual circumstances ...*

⁶ We note the NSW Government response (August 2015) to the Inquiry supported recommendation 9.

Issue summary (EPA Discussion Paper p 6)	EDO NSW comment
<i>Removal of licensing duplication where a licensee already holds an EPL issued under the POEO Act.</i>	Supported subject to comments above.
<i>Repeal of obsolete provisions relating to the assessment of industrial chemicals as assessments are now undertaken nationally by NICNAS.</i>	Not supported unless an alternative state based assessment process is available – see comments above.
<i>Enabling the EPA to convene an ad-hoc independent expert advisory panel or to call upon an expert when specific independent advice is needed, with the ability to recover costs where appropriate.</i>	Support expert external assistance subject to criteria for qualifications, community representation (see below) and circumstances when panels will be used.
<i>The obsolete Hazardous Chemicals Advisory Committee to be formally abolished.</i>	We note the de facto disbanding of this advisory committee since 2003 and that other issue-based committees exist. New provisions for consultation on CCOs etc. should include a mandatory call for community representation on expert panels
<i>Providing a mechanism for an exemption to be granted from provisions of the EHC Act where special circumstances may affect the capacity of members of the regulated community to comply with requirements under the Act and an equivalent environmental outcome can be achieved.</i>	Not supported – see comments above.
<i>Enabling regulations or CCOs to include notification requirements for specified chemicals.</i>	Primary, mandatory notification requirements should be set out in the EHC Act rather than regulations. Additional detail can be provided in regulations. If training and competencies are desired (p 14), timeframes could be set within which the regulations should address this (e.g. 'generic controls' or within a time after scheduling, for chemical-specific controls)
<i>Changing the structure of the fees for technology assessments with all fees to be indexed annually.</i>	Cost recovery and indexing supported.
<i>Alignment of authorised officer powers with those in the POEO Act whilst retaining those powers particular to the EHC Act.</i>	Supported.
<i>Broad alignment of offence and penalty provisions with equivalent provisions in other legislation administered by the EPA.</i>	Supported. Also, any applicant appeal rights in relation to CCO decisions should be accompanied by equitable appeal rights for communities.
<i>Introduction of an objects section to bring the EHC Act in line with modern legislation.</i>	Supported subject to comments above (we propose more specific objectives, and operationalising these in decision-making).
<i>Technical, consequential and machinery changes including updates to definitions.</i>	Supported – see comments above (e.g. carry over of EHC Act provisions to POEO Act for licensing; and monitoring data).