

EXPLANATORY STATEMENT

Issued by Authority of Minister for Regional Health, the Hon. David Gillespie MP

Industrial Chemicals Act 2019

Industrial Chemicals (General) Rules 2019

Industrial Chemicals (General) Amendment (Minamata Convention on Mercury) Rules 2021

Authority

The *Industrial Chemicals Act 2019* (the IC Act) establishes the legislative framework for a risk-based scheme for the Commonwealth regulation of the introduction of industrial chemicals in Australia.

The IC Act regulates, among other things, the introduction and export of industrial chemicals. Section 9 of the IC Act defines *introduce* to include import into Australia. Section 10 of the IC Act broadly defines an industrial chemical to cover chemicals that have an industrial use. As set out in section 9 of the IC Act, *industrial use* means a use other than, or in addition to, use as or in the preparation of agricultural chemical products, veterinary chemical products, therapeutic goods, food intended for consumption by humans, feed intended for consumption by animals, or any use prescribed by the rules.

Section 180 of the IC Act provides that the Minister may make rules providing for matters required or permitted by the Act, or necessary or convenient in order to carry out or give effect to the Act.

Subsection 163(1) of the IC Act provides that, if an industrial chemical is the subject of a prescribed international agreement or international arrangement, the rules may prohibit the introduction or export of the industrial chemical, or impose conditions or restrictions to which the introduction or export of the industrial chemical are subject. Section 163 is enforced by the offences in section 164 which deal with the contravention of rules made for the purposes of subsection 163(1).

The *Industrial Chemicals (General) Amendment (Minamata Convention on Mercury) Rules 2021* (the Amendment Rules) are made for the purpose of subsection 163(1) of the IC Act.

Purpose

The *Industrial Chemicals (General) Rules 2019* (the IC Rules) form part of the legislative framework to establish a risk-based regulatory scheme for the introduction of industrial chemicals in Australia.

The Amendment Rules amend the IC Rules to implement Australia's obligations under Articles 3(6) and 3(8) of the Minamata Convention on Mercury (Minamata Convention), once that Convention comes into force for Australia.

Background

The Minamata Convention provides a range of obligations on parties, including measures to control the supply and trade of mercury, prohibiting specific sources of mercury such as primary mercury mining, and setting limitations and controls on specific mercury-added products and manufacturing processes in which mercury or mercury compounds are used.

In accordance with the usual division of responsibilities, it has been agreed with all Australian jurisdictions that the Commonwealth will be responsible for making the necessary legislative changes to implement the following articles of the Convention, should Australia decide to ratify:

- Article 3(6) (prohibit the export of mercury);
- Article 3(8) (prohibit the import of mercury);
- Article 4(1) (prohibit the export, import and manufacture of certain mercury-added products);
- Article 4(5) (prohibit the incorporation into assembled products of certain mercury-added products).

The Commonwealth's position is that, where possible, existing subject-matter specific legislation should be used to implement Australia's obligations under the above Articles.

The regulatory regime that would be relevant for a particular import, export or manufacture will depend on the intended purpose of the mercury or mercury-added products to be imported, exported or manufactured. Specifically, it is intended that:

- the import or export of mercury for industrial purposes will be regulated by rules made under the IC Act;
- the import or export of mercury, the import, export and manufacture of mercury-added products, and the incorporation of mercury-added products into other products, for therapeutic purposes, will be regulated by the *Therapeutic Goods Regulations 1990*;
- the import or export of mercury, and the import, export and manufacture of mercury-added products, for agricultural or veterinary purposes, will be regulated by the *Agricultural and Veterinary Chemicals (Administration) Regulations 1995*;
- the import, export or manufacture of mercury-added products for industrial purposes, and the incorporation of mercury-added products into other products for purposes other than therapeutic purposes, will be regulated by rules made under the *Recycling and Waste Reduction Act 2020* (mandatory product stewardship provisions);
- the import and export of mercury will also be regulated by the *Customs (Prohibited Export) Regulations 1958* (Prohibited Export Regulations) and the *Customs (Prohibited Import) Regulations 1956* (Prohibited Import Regulations) in order to ensure appropriate border controls are in place. However, no permissions would need to be granted under the Customs legislation; rather the Prohibited Export Regulations and the Prohibited Import Regulations would simply recognise the permissions granted under the relevant subject specific legislation.

Impact and effect

The Amendment Rules amend the IC Rules to prohibit the import or export of mercury that is an industrial chemical (i.e. where the mercury is being imported or exported for an industrial use) consistent with the requirements of Articles 3(6) and 3(8) of the Minamata Convention.

A person will be able to apply for approval to import or export an industrial chemical that is mercury. The decision-maker would only be able to grant the approval consistent with the requirements of Articles 3(6) and 3(8) of the Minamata Convention.

Pre-conditions to making the Rules

The Minister is satisfied that the Executive Director has published a notice on the Australian Industrial Chemicals Introduction Scheme website that meets the requirements of subsection 163(2) of the IC Act.

Consultation

There is broad support for ratification across government, business and industry and non-government organisations. Industry has flagged the importance of ratification in ensuring certainty about mercury controls in Australia and for alignment with trading partners. Impacts to industry are expected to be low due to global movements away from mercury-containing products.

Since 2010, six consultation rounds have been facilitated by the Department of Agriculture, Water and the Environment in relation to the ratification of the Minamata Convention:

1. Regulatory Impact Statement (RIS) for Australia's signing of the Convention (2013): Targeted consultation with government agencies (federal, state and territory), industry stakeholders and non-government organisations.
2. Public consultation paper (2014): seeking views from stakeholders and the wider public on potential domestic impacts of Australia's ratification of the Convention.
3. Cost-benefit analysis consultation (2015): Targeted consultation process seeking quantified estimates of the potential impacts of ratification on business and industry, the community and government.
4. Exposure draft RIS (2016-17): Exposure draft of the RIS and CBA released for public comment. Twenty-nine submissions were received.
5. Cost-benefit analysis consultation (2017): Further targeted consultation with key stakeholders following submissions to the exposure draft RIS.
6. Final RIS and cost-benefit analysis (2020): Given previous extensive and thorough consultation, the Office of Best Practice Regulation advised that the update to the RIS and CBA would require only targeted consultation.

Details and Operation

Details of the Amendment Rules are set out in [Attachment A](#).

The Amendment Rules commence on the later of the day after the Amendment Rules are registered, and the day the Minamata Convention comes into force for Australia. However, the Amendment Rules do not commence at all if the Minamata Convention does not come into force for Australia.

Other

The Amendment Rules are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Amendment Rules are compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in Attachment B.

Details of the *Industrial Chemicals (General) Amendment (Minamata Convention on Mercury) Rules 2021*

Section 1 – Name

1. Section 1 provides that the name of the instrument is the *Industrial Chemicals (General) Amendment (Minamata Convention on Mercury) Rules 2021* (the Amendment Rules).

Section 2 – Commencement

2. Section 2 provides that the Amendment Rules commence on the later of the day after the Amendment Rules are registered and the day the Minamata Convention on Mercury, done at Minamata on 10 October 2013 (Minamata Convention), comes into force for Australia. However, the Amendment Rules do not commence at all if the Minamata Convention does not come into force for Australia.
3. The table in subsection 2(1) also requires the Minister to announce, by notifiable instrument, the day the Convention comes into force for Australia.
4. The note below the table explains that the table relates only to the provisions of the Amendment Rules as originally made. It will not be amended to deal with any later amendments of the Amendment Rules. The purpose of this note is to clarify that the commencement of any subsequent amendments is not reflected in this table.
5. Subsection 2(2) clarifies that any information in column 3 of the table is not part of the Amendment Rules. Information may be inserted in this column, or edited in this column, in any published version of the Amendment Rules. It is intended that the commencement date will be inserted into column 3 once the Minamata Convention comes into force for Australia and the Amendment Rules commence.

Section 3 – Authority

6. Section 3 provides that the Amendment Rules are made under the *Industrial Chemicals Act 2019* (IC Act).

Section 4 – Schedules

7. This section provides that each instrument that is specified in a Schedule to the Amendment Rules is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.
8. This enables the amendment of the *Industrial Chemicals (General) Rules 2019* (the IC Rules).

Schedule 1 – Amendments

Industrial Chemicals (General) Rules 2019

Item 1 – Section 5

9. Item 1 of Schedule 1 to the Amendment Rules amends section 5 of the IC Rules to insert a definition for *Minamata Convention*.
10. The term *Minamata Convention* is defined as the Minamata Convention on Mercury done at Minamata on 10 October 2013, as in force for Australia from time to time. This is permitted by section 180 of the IC Act, which allows incorporation of any matter contained in any other instrument or other writing as in force or existing from time to time.
11. The note included under the definition of *Minamata Convention* explains that the Convention is in the Australian Treaty Series and provides a link to the Australian Treaties Library.

Item 2 – Before paragraph 11(a)

12. Subsection 163(1) of the IC Act provides that, if an industrial chemical is the subject of a prescribed international agreement or international arrangement, the rules may prohibit the introduction or export of the industrial chemical, or impose conditions or restrictions to which the introduction or export of the industrial chemical are subject. Section 163 is enforced by the offences in section 164 which deal with the contravention of rules made for the purposes of subsection 163(1).
13. The definition of *prescribed international agreement* in section 9 of the IC Act allows the rules to prescribe international agreements. Prescribed international agreement means an international agreement to which Australia is a party and that is prescribed for the purposes of paragraph (b) of the definition of *prescribed international agreement*.
14. Section 11 of the IC Rules prescribes a number of international conventions for the purpose of the definition of *prescribed international agreement* in section 9 of the IC Act.
15. Item 2 of Schedule 1 to the Amendment Rules amends section 11 of the IC Rules to insert new paragraph (aa). New paragraph 11(aa) has the effect of prescribing the Minamata Convention as a *prescribed international agreement* within the meaning of that term in section 9 of the IC Act.
16. This means that the Minamata Convention is a *prescribed international agreement* for the purposes of subsection 163(1), with the effect that the rules may prohibit the introduction or export of mercury (where the mercury is an industrial chemical), or impose conditions or restrictions to which the introduction or export of the mercury (where the mercury is an industrial chemical) are subject.

Item 2A – After section 12

17. Item 2A of Schedule 1 to the Amendment Rules inserts new section 12A of the IC Rules. New section 12A has two purposes.

Paragraph 12A(a)

18. The IC Act regulates industrial chemicals only. Subsection 10(1) of the IC Act defines the term *industrial chemical* as:
- chemical element that has an industrial use;
 - a compound or complex of a chemical element that has an industrial use;
 - a UVCB substance that has an industrial use;
 - a chemical released from an article where the article has an industrial use;
 - a naturally-occurring chemical that has an industrial use;
 - any other chemical or substance prescribed by the rules for the purposes of this paragraph that has an industrial use.
19. Subsection 10(3) of the IC Act clarifies that the IC Act only applies in relation to an industrial chemical to the extent that the industrial chemical is used, or proposed to be used, for an industrial use.
20. Elemental mercury is an industrial chemical as it is a chemical element that has an industrial use (paragraph 10(1)(a) of the IC Act).
21. However, the definition of mercury in the Minamata Convention also includes ‘mixtures of mercury with other substances, including alloys of mercury, with a mercury concentration of at least 95% by weight’.
22. New paragraph 12A(a) prescribes, for the purposes of paragraph 10(1)(f) of the IC Act, ‘mixtures of mercury with other substances, including alloys of mercury, with a mercury concentration of at least 95% by weight’ as an industrial chemical.
23. This ensures that all elemental mercury and mercury mixtures that are covered by Article 3 of the Minamata Convention will, of themselves, be an *industrial chemical* for the purposes of the IC Act, and can therefore be regulated under this framework to the extent that they are being imported or exported for an industrial use.
24. New paragraph 12A(a) does not have any effect on how other industrial chemicals that are contained in mixtures are regulated by the IC Act. In such cases, it will continue to be the industrial chemicals contained in the mixtures that are regulated, rather than the mixtures themselves.
25. In contrast, the terms of Article 3 of the Minamata Convention require that certain mercury mixtures are themselves regulated, in addition to regulating elemental mercury. For this reason, new 12A(a) prescribes those mercury mixtures as industrial chemicals in their own right.

26. Where mercury is being imported or exported for a use other than an industrial use, the IC Act and the IC Rules will not apply. Instead, it is intended that such import or export will be regulated by the subject matter specific legislation relevant to the particular purpose of the import or export. This will be the *Therapeutic Goods Regulations 1990* (TG Regulations) or the *Agricultural and Veterinary Chemicals (Administration) Regulations 1995* (AVCA Regulations), depending on the purpose involved.

Paragraph 12A(b)

27. The IC Act generally regulates industrial chemicals by requiring such chemicals that are to be introduced (imported or manufactured) into Australia to be categorised and the introducer registered under the Australian Industrial Chemical Introduction Scheme (AICIS) prior to introduction.
28. As noted above, the IC Act does not ordinarily regulate mixtures of chemicals as an industrial chemical in its own right. Accordingly, such mixtures are not, of themselves, ordinarily required to be categorised or be relevant for registration requirements under Parts 2 and 3 of the IC Act before they are introduced to Australia (even though the individual chemicals that make up the mixtures may need to be).
29. The definition of mercury in Article 3 of the Convention means it is necessary for certain mercury mixtures to be prescribed as an industrial chemical in their own right (see new paragraph 12A(a)). However, such mercury mixtures will only need to be regulated, in their own right, for the purposes of implementing the Minamata Convention. The Australian Government's policy is that the introduction into Australia of these mercury mixtures will not require categorisation or be relevant for registration requirements for the purposes of the AICIS scheme in Parts 2 and 3 of the IC Act.
30. New paragraph 12A(b) achieves this policy intent by prescribing the relevant mercury mixtures as an excluded introduction for the purposes of paragraph 11(2)(e) of the IC Act. Subsection 11(1) of the IC Act provides that the IC Act, other than Parts 1, 4, 7, 9, 10 and Division 4 of Part 6, does not apply to an excluded introduction.
31. Importantly, this has the effect that the categorisation and registration requirements in Parts 2 and 3 of the IC Act will not apply to mercury mixtures that have been prescribed as an industrial chemical by new paragraph 12A(a). However, as section 163 is located in Part 9 of the IC Act, the requirements of IC Rules that are inserted by the Amendment Rules will apply to the relevant mercury mixtures that are prescribed to be industrial chemicals, consistent with Australia's obligations under the Minamata Convention.

Item 3 – After Part 1 of Chapter 6

32. Item 3 of Schedule 1 to the Amendment Rules inserts new Part 1A of Chapter 6 of the IC Rules. New Part 1A consists of new section 70A.

Section 70A

33. New section 70A inserts definitions for *mercury* and *non-Minamata mercury* for the purpose of Chapter 6 of the IC Rules. Chapter 6 of the IC Rules is where the new

prohibitions on the import and export of mercury, for the purposes of implementing Australia's obligations under the Minamata Convention, will be located (see item 5).

34. The term *mercury* is defined as elemental mercury (Hg(0), CAS No. 7439-97-6) and includes mixtures of mercury (including alloys of mercury) with a mercury concentration of at least 95% by weight, but would exclude non-Minamata mercury. This definition is consistent with the definition of mercury as used in Article 3 of the Minamata Convention.
35. The intention is that, consistent with Australia's obligations under Article 3(6) and 3(8) of the Minamata Convention, only mercury that falls within this definition will be subject to the new prohibitions on import and export of mercury.
36. The term *non-Minamata mercury* covers the categories of mercury to be used for laboratory-scale research or as a reference standard (such as use for the calibration of equipment), naturally occurring trace quantities of mercury present in products such as non-mercury metals, ores or mineral products (including coal) or in products derived from such products, and unintentional trace quantities of mercury in chemical products. The concept of *non-Minamata mercury* is relevant to the definition of *mercury*, as it covers the categories of mercury that are excluded from that definition, and therefore will not be regulated under the IC Rules. This is consistent with Australia's obligations under the Minamata Convention, which do not extend to these categories of mercury.

Item 4 – Before section 71

37. Item 4 of Schedule 1 to the Amendment Rules is a consequential amendment to the amendments made by item 5.
38. Item 4 amends the IC Rules to insert a new heading before section 71. The new heading distinguishes the requirements for the introduction and export of chemicals other than mercury (existing sections 71 to 75) with the new requirements for the import and export of mercury (new sections 75A to 75E).
39. The existing requirements for chemicals other than mercury are now Division 1 of Part 2 of Chapter 6, while the new requirements for mercury are Division 2 (see item 5).

Item 5 – At the end of Part 2 of Chapter 6

40. Item 5 of Schedule 1 to the Amendment Rules amends the IC Rules to insert a new Division 2 at the end of Part 2 of Chapter 6. New Division 2 consists of new sections 75A, 75B, 75C, 75D and 75E.
41. The purpose of new Division 2 is to implement Australia's obligations under Articles 3(6) and 3(8) of the Minamata Convention in respect of *mercury* that is an industrial chemical (i.e. mercury that is being imported or exported for an industrial use). Mercury will be defined in new section 70A of the IC Rules (see item 3).

Section 75A – Importation of an industrial chemical that is mercury must be approved by the Executive Director

42. New section 75A is made for the purposes of paragraph 163(1)(b) of the IC Act.
43. New section 75A has the effect of prohibiting the import into Australia of mercury that is an industrial chemical unless the Executive Director has approved the import. The Executive Director's approval must be in writing and must be obtained before the mercury is imported.
44. The purpose of new section 75A is to implement Australia's obligations under Article 3(8) of the Minamata Convention, which requires Parties to not allow the import of mercury unless certain conditions are met.
45. New subsection 75A(2) provides that the prohibition in section 75A does not apply to imports of mercury from a Party to the Minamata Convention. This exclusion reflects the scope of Australia's obligations under Article 3(8) of the Minamata Convention, which do not extend to imposing controls of imports from countries that are Parties to the Convention. Import of mercury from Parties to the Convention would, therefore, not require the Executive Director's approval.
46. Where mercury is not an industrial chemical, the prohibition on import in new section 75A does not apply. Instead, it is intended that an equivalent prohibition on import will be imposed under the AVCA regulations (for mercury that is a chemical product, or that is to be used in a proposed or existing chemical product within the meaning of the *Agricultural and Veterinary Chemicals Administration Act 1994* (AVCA Act)) or under the TG Regulations (for mercury that is a therapeutic good within the meaning of the *Therapeutic Goods Act 1989* (TG Act)), depending on the purpose of the import.
47. The note under new subsection 75A(1) explains that new section 75C requires applications to import mercury that is an industrial chemical to be made to the Executive Director in writing.

Section 75B – Export of an industrial chemical that is mercury must be approved by the Executive Director

48. New section 75B is made for the purposes of paragraph 163(1)(b) of the IC Act.
49. New section 75B has the effect of prohibiting the export into Australia of mercury that is an industrial chemical unless the Executive Director has approved the import. The Executive Director's approval must be in writing and must be obtained before the mercury is exported.
50. The purpose of new section 75B is to implement Australia's obligations under Article 3(6) of the Minamata Convention, which requires Parties to not allow the export of mercury unless certain conditions are met.
51. Where mercury is not an industrial chemical, the prohibition on export in new section 75B does not apply. Instead, it is intended that an equivalent prohibition on export will be imposed under the AVCA regulations (for mercury that is a chemical product, or that is to

be used in a proposed or existing chemical product within the meaning of the AVCA Act) or under the TG Regulations (for mercury that is a therapeutic good within the meaning of the TG Act).

52. The note under new section 75B explains that new section 75C requires applications to export mercury that is an industrial chemical to be made to the Executive Director in writing.

Section 75C – Applying for approval to import or export an industrial chemical that is mercury

53. New section 75C sets out the requirements for a person to apply to import or export mercury where it is an industrial chemical.
54. New subsection 75C(1) provides that a person may apply, in writing, to the Executive Director, for approval to import or export an industrial chemical that is mercury.
55. The note after subsection 75C(1) refers the reader to the general requirements relating to applications in section 167 of the Act.
56. New subsections 75C(3) to (5) deal with the circumstance where the Executive Director requires additional information to determine whether to approve or not approve a person's application to import or export mercury that is an industrial chemical. Subsection 75C(3) allows the Executive Director to request further information for the purposes of considering the application from the applicant by written notice given to the applicant. Subsection 75C(4) requires an applicant who has received a notice under subsection 75C(3) to provide the requested information within the period specified in the notice. The period specified in the notice must not be less than 10 working days after the day the notice is given. Subsection 75C(5) has the effect that if the applicant does not comply, within the specified period, with a notice requesting additional information, the Executive Director may take the application to be withdrawn. This means the application need not be further assessed.

Section 75D – Decision on application to import an industrial chemical that is mercury

57. New subsection 75D(1) requires the Executive Director to consider, in accordance with section 75D, an application for approval to import mercury, and to make a decision on the application as soon as reasonably practicable following receipt of the application.
58. New subsection 75D(2) requires the Executive Director, in considering the application, to have regard to any further information provided by the applicant under subsection 75C(4).
59. New subsection 75D(3) provides that, after considering the application, the Executive Director must decide to approve, or not approve, the importation of the mercury.
60. New subsection 75D(4) sets out the criteria that must be satisfied before the Executive Director can approve an application to import mercury that is an industrial chemical.

61. The Executive Director can only approve an application to import mercury that is an industrial chemical if he or she is satisfied both that Australia has consented to the import, and that the exporting party has provided written certification that the mercury is not sourced from primary mercury mining and is not excess mercury from the decommissioning of chlor-alkali facilities.
62. The requirement for consent can be satisfied by either Australia providing the exporting Party with written consent to the specific import (i.e. on a case-by-case basis), or by Australia having a general notification of consent in force in accordance with Article 3(7) of the Minamata Convention.
63. The requirements in new subsection 75D(4) reflect Australia's obligations under Article 3(8) of the Minamata Convention.
64. New subsection 75D(5) requires the Executive Director to give the applicant written notice of the decision and, if the decision is to refuse the application, the reasons for the decision.

Section 75E – Decision on application to export an industrial chemical that is mercury

65. New subsection 75E(1) requires the Executive Director to consider, in accordance with section 75E, an application for approval to export mercury, and to make a decision on the application as soon as reasonably practicable following receipt of the application.
66. New subsection 75E(2) requires the Executive Director, in considering the application, to have regard to any further information provided by the applicant under subsection 75C(4).
67. New subsection 75E(3) provides that, after considering the application, the Executive Director must decide to approve, or not approve, the export of the mercury.
68. New subsections 75E(4) and (5) set out the criteria that must be satisfied before the Executive Director can approve an application to export mercury that is an industrial chemical. Consistent with Australia's obligations under Article 3(6) of the Minamata Convention, there are different criteria depending on whether the proposed export is to a Party to the Convention or a non-Party to the Convention.
69. Subsection 75E(4) has the effect that where the proposed export is to a country that is a Party to the Minamata Convention, the Executive Director can only approve the application if he or she is satisfied both that the importing Party has provided written consent to the export, and that the mercury is being exported for a use allowed to the importing Party under the Convention or for environmentally sound interim storage (as set out in Article 10 to the Convention).
70. Subsection 75E(5) has the effect that where the proposed export is to a country that is not a Party to the Minamata Convention, the Executive Director can only approve the

application if she or she is satisfied that the importing Party has both provided written consent to the export, and has provided written certification demonstrating that:

- it has measures in place to ensure the protection of human health and the environment, and to ensure compliance with Articles 10 and 11 of the Minamata Convention; and
- the mercury will be used only for a use allowed to the importing Party under the Convention, or for environmentally sound interim storage (as set out in Article 10 to the Convention).

71. The requirements in new subsections 75E(4) and (5) reflect Australia's obligations under Article 3(6) of the Minamata Convention.

72. New subsection 75E(6) requires the Executive Director to give the applicant written notice of the decision and, if the decision is to refuse the application, the reasons for the decision.

Item 6 – At the end of section 78

73. Item 6 of Schedule 1 to the Amendment Rules would amend section 78 of the IC Rules to add new paragraphs (d) and (e). This amendment has the effect that a decision to not approve the import or export of mercury (under new sections 75D and 75E, respectively), will be reviewable decisions under the IC Act and IC Rules. An applicant will therefore be able to apply for internal merits review and, in some circumstances, external merits review by the Administrative Appeals Tribunal, in respect of such decisions.

Statement of Compatibility with Human Rights

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

Industrial Chemicals (General) Amendment (Minamata Convention on Mercury) Rules 2021

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

Overview of the instrument

The *Industrial Chemicals (General) Amendment (Minamata Convention on Mercury) Rules 2021* (the Amendment Rules) is made under the *Industrial Chemicals Act 2019* (the IC Act).

The Amendment Rules give effect to Australia's obligations under Articles 3(6) and 3(8) of the Minamata Convention on Mercury by prohibiting the import of an industrial chemical that is mercury into Australia and the export of an industrial chemical that is mercury from Australia unless the Executive Director has approved the import or export. The Executive Director would only be able to grant the approval consistent with the requirements of Articles 3(6) and 3(8) of the Minamata Convention.

The *Industrial Chemicals Act 2019* (the IC Act) sets out the legislative framework for the Commonwealth regulation of the introduction of industrial chemicals in Australia. Section 9 of the IC Act defines *introduce* to include import into Australia. Section 10 of the IC Act broadly defines an industrial chemical to cover chemicals that have an industrial use. As set out in section 9 of the IC Act, *industrial use* means a use other than, or in addition to, use as or in the preparation of agricultural chemical products, veterinary chemical products, therapeutic goods, food intended for consumption by humans, feed intended for consumption by animals, or any use prescribed by the rules.

Section 180 of the IC Act provides that the Minister may make rules providing for matters required or permitted by the Act, or necessary or convenient in order to carry out or give effect to the Act. The *Industrial Chemicals (General) Rules 2019* (IC Rules) form part of the legislative framework to establish a risk-based regulatory scheme for the introduction of industrial chemicals in Australia.

Subsection 163(1) of the IC Act provides that, if an industrial chemical is the subject of a prescribed international agreement or international arrangement, the rules may prohibit the introduction or export of the industrial chemical, or impose conditions or restrictions to which the introduction or export of the industrial chemical are subject. Section 163 is enforced by the offences in section 164 which deal with the contravention of rules made for the purposes of subsection 163(1).

The Amendment Rules are made for the purpose of subsection 163(1) of the IC Act and amend the IC Rules.

Background

The Minamata Convention on Mercury aims to protect human health and the environment from anthropogenic emissions and releases of mercury and mercury compounds. Australia signed the Minamata Convention on 10 October 2013. The Convention entered into force globally on 16 August 2017.

The Minamata Convention provides a range of obligations on parties, including measures to control the supply and trade of mercury, prohibiting specific sources of mercury such as primary mercury mining, and setting limitations and controls on specific mercury-added products and manufacturing processes in which mercury or mercury compounds are used.

In accordance with the usual division of responsibilities, the Commonwealth is responsible for implementing the following articles of the Convention:

- Article 3(6) (prohibit the export of mercury);
- Article 3(8) (prohibit the import of mercury);
- Article 4(1) (prohibit the export, import and manufacture of certain mercury-added products);
- Article 4(5) (prohibit the incorporation into assembled products of certain mercury-added products).

The Commonwealth's position is that where possible, existing subject-matter specific legislation is being amended to implement Australia's obligations under the above Articles. The regulatory regime that would be relevant for a particular import, export or manufacture will depend on the intended purpose of the mercury or mercury-added products to be imported, exported or manufactured.

Relevantly, it is intended that the import and export of mercury for industrial purposes will be regulated by rules made under IC Act. The Amendment Rules give effect to this policy.

It is also intended that separate amendments will be made to the *Agricultural and Veterinary Chemicals (Administration) Regulations 1995*, *Customs (Prohibited Export) Regulations 1958*, *Customs (Prohibited Import) Regulations 1956*, and the *Therapeutic Goods Regulations 1990*, as well as rules made under the *Recycling and Waste Reduction Act 2020* (mandatory product stewardship provisions), to fully implement Australia's obligations under the Convention.

Human rights implications

This legislative instrument engages the following human rights:

- the right to health under Article 12(1) of the *International Covenant on Economic, Social and Cultural Rights* (the ICESCR); and
- the right to protection from arbitrary interference with privacy under Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR).

Right to Health

Article 12(1) of the ICESCR makes provision in relation to the right to health, specifically the right to the enjoyment of the highest attainable standard of physical and mental health.

Article 12(2)(b) includes the improvement of all aspects of environmental hygiene as a step to be taken to achieve the full realisation of the right to health. In its *General Comment No 14 (August 2000)*, the United Nations Committee on Economic Social and Cultural Rights states that this encompasses the prevention and reduction of the population's exposure to harmful substances such as harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health (at [15]).

Mercury exposure is a global health concern. Every year, as much as 9,000 tons of mercury are released into the atmosphere, in water and on land. The largest source of mercury emissions is artisanal and small-scale gold mining, followed closely by coal combustion, non-ferrous metal production and cement production. Mercury is also found in many commercial products such as batteries, fluorescent lamps, cosmetics, pesticides, thermometers and dental amalgams. High amounts of mercury exposure can lead to long-term and sometimes permanent neurological damages.

The Amendment Rules amend the IC Rules to prohibit the import of mercury that is an industrial chemical into Australia, and the export of mercury that is an industrial chemical from Australia, unless the Executive Director has approved the import or export. The Executive Director would only be able to grant the approval consistent with the requirements of Articles 3(6) and 3(8) of the Minamata Convention. This prohibition promotes the right to health by aiming to protect human health and the environment from harmful anthropogenic emissions and releases of mercury and mercury compounds. The prohibitions are considered necessary to ensure that Australia's obligations under the Minamata Convention are fully implemented.

For these reasons, the Amendment Rules are consistent with the right to health in Article 12(1) of the ICESCR.

Right to Privacy

Article 17 of the ICCPR prohibits arbitrary or unlawful interference with an individual's privacy, family, home or correspondence, and protects a person's honour and reputation from unlawful attacks. The right to privacy can be limited to achieve a legitimate objective where the limitations are lawful and not arbitrary. For an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the circumstances. The United Nations Human Rights Committee has interpreted the requirement of 'reasonableness' as implying that any interference with privacy must be proportionate to a legitimate end and be necessary in the circumstances. While the United Nations Human Rights Committee has not defined 'privacy', the term is generally understood to comprise freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy.

The Amendment Rules amend the IC Rules to require a person to provide information or documents as part of an applications for approval to import or export an industrial chemical that is mercury. The Amendment Rules also empower the Executive Director to request

further information from an applicant to inform their consideration and decision on an application for approval to import or export an industrial chemical that is mercury. Requiring persons to provide information or documents may incidentally require the provision of personal information. The collection, use, storage, and disclosure of personal information may engage the right to freedom from arbitrary or unlawful interference with privacy.

The collection of this information is necessary for the legitimate objective of regulating the import and export of mercury that is an industrial chemical, consistently with Australia's international obligations under the Minamata Convention. The information required to be provided by exporters is limited to that information that is considered necessary to ensure Australia's obligations under the Minamata Convention are met.

Further, a person who provides further information 'opts in' to the regulatory system. A person who has opted in should expect that a certain amount of personal information about the way their business operates will need to be provided to gain the benefits of that system. In addition, many importers and exporters will be corporations, for which the right to privacy does not apply.

For these reasons, this limitation to the right to privacy is reasonable, necessary and proportionate to achieve legitimate objectives and is consistent with the right to privacy in Article 17 of the ICCPR.

Conclusion

This legislative instrument is compatible with human rights because it promotes the right to health under Article 12(1) of the ICESCR and, to the extent that it limits the right to protection from arbitrary interference with privacy under Article 17 of the ICCPR, those limitations are reasonable, necessary and proportionate to achieve the legitimate aims of the instrument and the IC Act.

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