

EXPLANATORY STATEMENT

Issued under the authority of the Assistant Minister for Health and Aged Care

Industrial Chemicals Act 2019

Industrial Chemicals (General) Amendment (Rotterdam Convention) Rules 2023

Authority

The *Industrial Chemicals Act 2019* (IC Act) establishes the Australian Industrial Chemicals Introduction Scheme (AICIS), a risk-based scheme for the Commonwealth regulation of the introduction of industrial chemicals into Australia.

Section 180 of the IC Act provides that the Minister may make rules prescribing matters required or permitted by the Act, or necessary or convenient for carrying out or giving 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 on the introduction or export of the industrial chemical. 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 (Rotterdam Convention) Rules 2023* (the Amending Rules) are made for the purpose of subsection 163(1) of the IC Act.

Purpose

The *Industrial Chemicals (General) Rules 2019* (General Rules) form part of the legislative framework to establish a risk-based regulatory scheme for the introduction of industrial chemicals in Australia as well as setting out the technical and operational details of the AICIS.

The Amending Rules amend the General Rules to give effect to Australia's obligations under the *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* (Rotterdam Convention). The purpose of the Amending Rules is to update the list of chemicals in the General Rules that are subject to the Prior Informed Consent (PIC) procedure as a consequence of the recent listing of two additional chemicals in Annex III of the Rotterdam Convention.

Background

The Rotterdam Convention is a global treaty to manage chemicals in international trade. Countries that ratify the Rotterdam Convention agree to the PIC procedure, wherein countries must decide whether to allow imports of certain hazardous chemicals, and under what conditions. Australia is a Party to the Rotterdam Convention and as such its obligations include decisions regarding whether Australia will uphold changes made

periodically. Substances that are subject to the PIC procedure are listed in Annex III of the Rotterdam Convention (indicative list of chemicals publicly available at <https://www.pic.int/TheConvention/Chemicals/AnnexIIIChemicals>).

Decision Guide Documents (DGDs) for the addition of two entries to Annex III were dispatched to Parties on 21 October 2022. Parties have nine months, or until 21 July 2023, to submit a response regarding import conditions for the new chemicals. The chemicals added to Annex III of the Rotterdam Convention are:

- decabromodiphenyl ether (decaBDE); and
- perfluorooctanoic acid (PFOA), its salts and PFOA-related compounds.

Decabromodiphenyl ether

Decabromodiphenyl ether (decaBDE; CAS No. 1163-19-5) is used in fire retardant polymers/resins for wire insulation, conveyor belts, plastic boxes for housing electronics, awnings, paper foil laminate used in home insulation, adhesives, architectural foam, carpet backing, tarpaulin/canvas and other textiles.

In 2004, decaBDE represented 42 % (180 tonnes) of all polybrominated flame retardants imported to Australia. It was declared a Priority Existing Chemical under the *Industrial Chemicals (Notification and Assessment) Act 1989* by notice in the Commonwealth Chemical Gazette of 7 June 2005. The human health and environmental risk assessment found that decaBDE is persistent in soil, air and sediment, bioaccumulative in some organisms, and it is not acutely toxic to aquatic species or mammals. Chronic developmental neurotoxicity in mammals has been reported.

The chemical is also listed on Annex A of the *Stockholm Convention on Persistent Organic Pollutants* (Stockholm Convention).

Perfluorooctanoic acid (PFOA), its salts and PFOA-related compounds

Perfluorooctanoic acid (PFOA) (CAS No. 335-67-1), its salts and PFOA-related compounds comprise a group of fully fluorinated organic compounds: PFOA, its salts, and substances with the potential to degrade to PFOA in the environment. This group of substances is also listed on the Stockholm Convention.

PFOA chemicals are used in a wide variety of consumer and industrial applications including dyeing processes, firefighting foam, and paint, and may also be present in finished goods such as textiles, carpets, and non-stick metal cookware. These chemicals are of concern due to their persistence, bioaccumulation, toxicity, and potential for long range transport. AICIS, previously the National Industrial Chemicals Notification and Assessment Scheme, assessed the human health and environmental risks of PFOA and its direct precursors under the Inventory Multi-tiered Assessment and Prioritisation framework. PFOA is hazardous to human health (toxic to reproduction and suspected carcinogen) and to the environment (persistent, bioaccumulative and toxic) and a persistent organic pollutant.

Section 163 of the IC Act includes provisions for the prohibition or restriction of industrial chemicals that are the subject of prescribed international agreements or

arrangements, including the Rotterdam Convention. The PIC procedure and listings under Annex III of the Rotterdam Convention have specific implications to the following sections of the General Rules:

- 71 (Introduction of certain industrial chemicals subject to conditions); and
- 73 (Export of certain industrial chemicals subject to conditions).

Adopting the newly listed chemicals into the General Rules is risk-proportionate and appropriate for maintaining protections for human health and the environment.

Unless the introduction is for the purposes of research or analysis and is introduced at a volume of 100 kg in a year or less, approval by the Executive Director of AICIS in writing and payment of a fee would be required before introduction or export of these industrial chemicals. This is appropriate for these highly hazardous chemicals.

Consultation

The Joint Standing Committee on Treaties (JSCOT), at its meeting on 6 March 2023, endorsed the listings as a minor treaty action. The JSCOT agreed with the proposed decision for Australia to consent to the import of the chemicals listed in Annex III as a result of the Rotterdam Convention amendments, subject to requirements applied under Australian regulations.

As a pre-condition to the Amending Rules, as specified in subsection 163(2) of the IC Act, the Executive Director has published a notice on the AICIS website meeting the requirements specified. The notice:

- identified the international agreement;
- listed the names of the industrial chemicals subject to the international agreement; and
- required Australian industrial chemical introducers to give information to AICIS on any introduction or export of the chemicals in Australia.

While providing prior notice to the regulated industry, no consultation for the Amending Rules occurred.

Reliance on subsection 33(3) of the *Acts Interpretation Act 1901*

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations, or by-laws), the power is construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Regulatory impact assessment

The Office of Impact Analysis (OIA) advised that the proposal is unlikely to have a more than minor regulatory impact and the preparation of a regulatory impact statement is not required (OIA23-05103).

Commencement

All provisions will commence the day after the Amending Rules are registered on the Federal Register of Legislation.

Details

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

The Amending 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](#).

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

Details of the *Industrial Chemicals (General) Amendment (Rotterdam Convention) Rules 2023*

Section 1 Name of the Instrument

Section 1 states that the name of the instrument is the *Industrial Chemicals (General) Amendment (Rotterdam Convention) Rules 2022*.

Section 2 Commencement

All provisions will commence the day after this instrument is registered on the Federal Register of Legislation.

Section 3 Authority

Section 3 states that the instrument is made under the *Industrial Chemicals Act 2019* (the IC Act).

Section 4 Schedules

Each instrument that is specified in a Schedule to this instrument 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.

Schedule 1 – Amendment of the Industrial Chemicals (General) Rules 2019

Item 1 – Amendment to Division 1, Part 2 of Chapter 6

Item 1 of Schedule 1 to the Amending Rules amends Division 1, Part 2 of Chapter 6 of the Industrial Chemicals (General) Rules 2019 is proposed to be amended to include two additional chemicals on the list of industrial chemicals subject to terms of the Rotterdam Convention.

The chemicals subject to the Rotterdam Convention are listed in two places in the General Rules: subsection 71(2) and subsection 73(2).

In both subsections, the list should be modified periodically to reflect changes made to the list of chemicals covered by Annex III of the Rotterdam Convention, depending on Australia's agreement to the change.

On 22 October 2022, Annex III to the Rotterdam Convention was amended to include two additional substances:

- decabromodiphenyl ether (decaDBE); and
- perfluorooctanoic acid (PFOA), its salts and PFOA-related compounds

As a Party to the Rotterdam Convention, Australia is required to submit a response regarding our commitment to upholding the appropriate import conditions for the newly added chemicals.

The preferred Australian import response is to amend the General Rules to add these chemicals to reflect the change.

Statement of Compatibility with Human Rights

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

Industrial Chemicals (General) Amendment (Rotterdam Convention) Rules 2023

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*.

Overview of the legislative instrument

The *Industrial Chemicals Act 2019* (IC Act) establishes the Australian Industrial Chemicals Introduction Scheme (AICIS), a risk-based regulatory scheme for the Commonwealth regulation of the introduction of industrial chemicals in Australia.

The *Industrial Chemicals (General) Rules 2019* (General Rules) form part of the legislative framework for AICIS, as well as setting out the technical and operational details of the AICIS.

The scheme is designed to be proportionate to risk, and to promote safer innovation by encouraging the introduction of lower risk chemicals. It also encourages greater harmonisation with international approaches to the regulation of industrial chemicals and provides for the use of assessments of comparable international regulators.

The *Industrial Chemicals (General) Amendment (Rotterdam Convention) Rules 2023* (Amending Rules) make amendments to the General Rules to reflect the decision made by the Rotterdam Convention to include two additional chemicals on the list of chemicals that are subject to the Prior Informed Consent (PIC) procedure, wherein countries must decide whether to allow imports of certain hazardous chemicals, and under what conditions. Chemicals that are subject to the PIC procedure are listed in Annex III to the Rotterdam Convention.

Chemicals subject to the PIC procedure (Annex III chemicals) are published in the General Rules, Division 1, Part 2 of Chapter 6, regarding international agreements and arrangements for the movement of chemicals into and out of Australia. The list is published twice in the General Rules: subsection 71(2), Introduction of certain industrial chemicals subject to conditions, and subsection 73(2), Export of certain industrial chemicals subject to conditions.

Approval by the Executive Director of AICIS would be required in writing before introduction or export of these industrial chemicals.

Human rights implications

The Amending Rules engage the human rights contained in Article 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), which sets out the right to the enjoyment of the highest attainable standard of physical and mental health.

Right to health

This instrument engages the right to health as set out in Article 12 of the ICESCR by assisting with the progressive realisation by all appropriate means of the right of everyone to the enjoyment of the highest attainable standard of physical and mental 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]).

This instrument specifies requirements for importers and exporters of hazardous chemicals, including a requirement that the Executive Director of AICIS must provide written approval before a chemical can be introduced. These requirements increase protections of human health and the environment, promote the continued protection of public health, and improvement of environmental and industrial hygiene. Tighter regulation of the most hazardous substances will also encourage the introduction of newer and safer chemical products for consumers.

The Amending Rules amend the General Rules to require approval in writing from the Executive Director and a fee before a person is authorised to introduce either decaBDE or PFOA, its salts or related compounds. This prohibition promotes the right to health by aiming to protect human health and the environment from the hazardous properties of these chemicals.

DecaBDE is a polybrominated flame retardant that meets the definition of a persistent, bioaccumulative and toxic (PBT) substance. This means that it persists for a very long time in the environment and that it accumulates in the body and along the food chain. DecaBDE exposure has been shown to result in neurotoxicity in mammals, including humans.

PFOA, its salts and PFOA-related compounds are considered PFAS substances (per- and poly-fluoroalkyl substance). PFOA is a persistent organic pollutant, meeting the definition of PBT. It also has the potential to affect endocrine function and is considered carcinogenic and is classified as toxic to reproduction.

The requirement for written approval from the Executive Director before introduction of such substances is therefore necessary to ensure that Australia's obligations under the Rotterdam Convention are fully implemented. For these reasons, the Amending 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 Amending Rules amend the General Rules to require a person to apply directly to the Executive Director in writing before introducing or exporting certain chemicals, as part of the prior informed consent (PIC) procedure. The Amending 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 introduce an industrial chemical that is named in subsections 71(2) or 73(2). 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 of decaBDE and PFOA, its salts and PFOA-related compounds, consistent with Australia’s international obligations under the Rotterdam Convention.

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 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

The legislative instrument is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate for the protection of human health and the environment.

The Hon Ged Kearney MP

Assistant Minister for Health and Aged Care