EXPLANATORY STATEMENT

Issued by the delegate of the Minister for the Environment and Water

Industrial Chemicals Environmental Management (Register) Act 2021

Industrial Chemicals Environmental Management (Register) Instrument 2022

Industrial Chemicals Environmental Management (Register) Amendment (2023 Measures No. 1) Instrument 2023

Authority

The *Industrial Chemicals Environmental Management (Register) Act 2021* (ICEMR Act) establishes a national framework to manage the ongoing import, export, manufacture, use, handling and disposal of industrial chemicals, in order to reduce impacts on the environment and limit people's exposure to industrial chemicals.

Subsection 22(1) of the ICEMR Act provides that the Minister may, by legislative instrument, establish a register of scheduling decisions for relevant industrial chemicals that are made or varied under Division 2 of Part 2 of the ICEMR Act.

Subsection 11(1) of the ICEMR Act allow the Minister to make one or more scheduling decisions for a relevant industrial chemical. Subsection 11(2) of the ICEMR Act provides that if the Minister makes a scheduling decision for a relevant industrial chemical, the Minister must ensure that the decision for the chemical is recorded in that register.

The *Industrial Chemicals Environmental Management (Register) Amendment (2023 Measures No. 1) Instrument 2023* (the amending instrument) is made for the purposes of subsections 22(1) and 11(2) of the ICEMR Act.

Subsection 74(1) of the ICEMR Act allows the Minister to delegate the Minister's power under subsection 22(1) to, among others, a Senior Executive Service (SES) employee or acting SES employee in the Environment Department (currently the Department of Climate Change, Energy, the Environment and Water). The Assistant Secretary of the Chemicals and Atmosphere Branch is a delegate of the Minister for the purpose of exercising the powers in subsections 22(1) and 11(2) of the ICEMR Act.

Purpose

The purpose of the amending instrument is to amend the *Industrial Chemicals Environmental Management (Register) Instrument 2022* (the Register) to record scheduling decisions made under subsection 11(1) of the ICEMR Act in relation to nine relevant industrial chemicals.

These scheduling decisions have the effect of listing one chemical in Schedule 6 of the Register, and eight chemicals in Schedule 7 of the Register. These scheduling decisions also impose risk management measures (including prohibitions and restrictions) on those listed chemicals.

It is intended that the scheduling decisions in the Register will be adopted, implemented and enforced by all Australian jurisdictions under their own legislation to create a national standard for the management of the environmental risks of industrial chemicals.

Background

The ICEMR Act establishes a national framework to manage the ongoing import, export, manufacture, use, handling, and disposal of industrial chemicals to reduce impacts on the environment and limit people's exposure to industrial chemicals.

In July 2015, the Commonwealth, States and Territories agreed to establish a National Standard for the Environmental Risk Management of Industrial Chemicals (the National Standard – now known as the Industrial Chemicals Environmental Management Standard, or IChEMS). IChEMS was intended to provide for a consistent, nation-wide approach to managing the risks that industrial chemicals may pose to the environment.

The ICEMR Act provides the legislative basis for establishing IChEMS by enabling the Minister to make scheduling decisions in relation to an industrial chemical. A scheduling decision can categorise an industrial chemical based on its risk characteristics and set out the controls applicable to the import, export, manufacture, use, handling, and disposal of an industrial chemical. Controls may include restrictions or prohibitions on any of these activities.

The Register is a legislative instrument made under subsection 22(1) of the ICEMR Act that sets out all scheduling decisions made or varied by the Minister under that Act.

The Register contains 7 schedules. These schedules are titled:

- Schedule 1 – Relevant industrial chemicals that are not appropriate for listing in the other Schedules;
- Schedule 2 – Relevant industrial chemicals that are unlikely to cause harm to the environment;
- Schedule 3 – Relevant industrial chemicals that have the potential to cause harm to the environment;
- Schedule 4 – Relevant industrial chemicals that may cause harm to the environment;
- Schedule 5 – Relevant industrial chemicals that are likely to cause harm to the environment;
- Schedule 6 – Relevant industrial chemicals that are likely to cause serious or irreversible harm to the environment with essential uses;
- Schedule 7 – Relevant industrial chemicals that are likely to cause serious or irreversible harm to the environment with no essential uses.

Risk characteristics are detailed for each of the 7 schedules in the *Industrial Chemicals Environmental Management (Register) Principles 2022* (the Principles). Under the ICEMR Act, the Minister is required to comply with the Principles when making, varying or revoking a scheduling decision for a relevant industrial chemical. Under the Principles, if an industrial chemical, or a particular use of the industrial chemical, is classified as having the risk characteristics for a particular Schedule of the Register, the Minister is required to list the industrial chemical, or use of the industrial chemical, in that schedule. Chemicals in higher schedules will usually require more active management of environmental risks, including in

some cases the imposition of prohibitions or restrictions on the import, export, manufacture, or use of the chemical.

Scheduling decisions are not enforceable in and of themselves. Following the establishment of appropriate legislative frameworks, the Commonwealth, States and Territories will be responsible for the implementation and enforcement of the scheduling decisions, recorded in the Register, within their jurisdictions. This will drive national consistency in the management of industrial chemicals through a more streamlined, transparent, efficient, and predictable approach to environmental risk management, providing better protection for the environment.

Impact and effect

The amending instrument amends the Register to record new scheduling decisions that have been made for the following relevant industrial chemicals:

- Schedule 6: Decabromodiphenyl ether and nonabromodiphenyl ether (all three congeners) (decaBDE and nonaBDE).

- Schedule 7: Benzene, 1,2,3,4,5-pentachloro- (commonly referred to as pentachlorobenzene or PeCB).

- Schedule 7: Hexabromocyclododecane, meaning 1,2,5,6,9,10-hexabromocyclododecane and including its main diastereoisomers: alpha-hexabromocyclododecane; beta- hexabromocyclododecane; and gamma-hexabromocyclododecane (commonly referred to as hexabromocyclododecane (HBCDD).

- Schedule 7: Octabromodiphenyl ether, heptabromodiphenyl and hexabromodiphenyl ether (octaBDE, heptaBDE and hexaBDE - all 12, 24 and 42 congeners respectively) (commonly referred to as octabromodiphenyl ether (octaBDE), heptabromodiphenyl ether (heptaBDE) and hexabromodiphenyl ether (hexaBDE)).

- Schedule 7: Pentabromodiphenyl ether and tetrabromodiphenyl ether (pentaBDE and tetraBDE).

- Schedule 7: Perfluorohexanesulfonic acid (PFHxS), including its linear and branched isomers, their salts and any substance containing a linear or branched perfluorohexylsulfonyl moiety that can degrade to PFHxS (commonly referred to as perfluorohexanesulfonic acid and related substances (PFHxS)).

- Schedule 7: Perfluorooctanesulfonic acid (PFOS), including any of its branched isomers, its salts, perfluorooctanesulfonyl fluoride, and any substance containing a linear or branched perfluorooctanesulfonyl moiety and capable of degrading to PFOS (linear or branched) (commonly referred to as perfluorooctanesulfonic acid and related substances or PFOS).

- Schedule 7: Perfluorooctanoic acid (PFOA), including any of its branched isomers, its salts and any related compound that contains a linear or branched perfluoroheptyl (C7H15C) group and which can degrade to linear or branched PFOA (commonly

referred to as perfluorooctanoic acid and related substances (PFOA)). The following are not covered by the PFOA scheduling decisions:
    - C8F17-X, where X = F, Cl, Br;
    - fluoropolymers that are covered by CF3 [CF2]n-R', where R'=any group, n >16;
    - perfluoroalkyl carboxylic acids and their derivatives with ≥ 8 perfluorinated carbons;
    - perfluoroalkane sulfonic acids and perfluoro phosphonic acids and their derivatives with ≥ 9 perfluorinated carbons;
    - perfluorooctane sulfonic acid and its derivatives (PFOS).

- Schedule 7: Short chain chlorinated paraffins (alkanes, C10-13, chloro), which are straight chain chlorinated alkanes with chain lengths ranges from C10 to C13 and a chlorine content of greater than 48% by weight (commonly referred to as short chain chlorinated paraffins (SCCPs)).

The effect of these scheduling decisions is to list each of these chemicals in the relevant schedule and to impose appropriate risk management measures (including prohibitions and restrictions) on those chemicals.

The amending instrument also has the effect of reordering the existing chemicals in Schedule 7, so that scheduling decisions in Schedule 7 are listed in alphabetical order by chemical. This will ensure that scheduling decisions for specific chemicals are easier to locate in the Register.

Disallowance and sunsetting

The Register is exempt from disallowance and sunsetting requirements under the *Legislation Act 2003* (Legislation Act). This is because the Register is made under the ICEMR Act, which facilitates the establishment and operation of an inter-governmental scheme involving the Commonwealth and the States and Territories and authorises the Register to be made for the purposes of that inter-governmental scheme.

Subsections 44(1) and 54(1) of the Legislation Act respectively provide that section 42 (concerning disallowance) and Part 4 of Chapter 3 (concerning sunsetting) of that Act do not apply in relation to a legislative instrument, or a provision of a legislative instrument, if the enabling legislation for the instrument facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States, and authorises the instrument to be made by the body, or for the purposes of the body or scheme.

While this means the Register will be subject to reduced parliamentary scrutiny, this is appropriate as the Commonwealth Parliament should not be able to unilaterally disallow instruments that are part of a multilateral scheme; nor (for the same reasons) should such instruments be able to sunset.

Consultation

The Register records scheduling decisions made under the ICEMR Act that will not be enforceable in and of themselves. On this basis, no consultation on this specific instrument was conducted.

However, the scheduling decisions that are recorded in the Register have been subject to public consultation consistent with the requirements of section 17 of the ICEMR Act. These consultations were open from:

- 21 July to 1 September 2023 for PFOA, PFOS, PFHxS and PeCB
- 25 September to 25 October 2023 for decaBDE and nonaBDE, octaBDE, heptaBDE and hexaBDE, pentaBDE and tetraBDE, and HBCDD and
- 9 October to 8 November 2023 for short chain chlorinated paraffins (SCCPs).

All submissions received in accordance with the section 17 notice were taken into account under paragraph 15(1)(g) of the ICEMR Act, and other information provided was taken into account under paragraph 16(1)(i).

The nine chemicals to be listed in Schedules 6 and 7 of the Register were referred to the Advisory Committee on the Environmental Management of Industrial Chemicals (the Advisory Committee). Advice provided by the Advisory Committee was taken into account under paragraph 15(1)(e).

Additionally, the listings of PFOS, PFOA, PFHxS and PeCB in Schedule 7 of the Register were informed by a call for information under section 20. This consultation was open from 19 August to 19 September 2022 for PeCB and from 19 October to 14 December 2022 for PFOS, PFOA and PFHxS. Information from these submissions was provided to the Advisory Committee and was also taken into account in making the scheduling decisions.

Section 21 of the ICEMR Act provides for consultation with state and territory Environment Ministers. State and territory governments have been consulted throughout the development of these scheduling decisions.

Consultation on the adoption, implementation and enforcement of the scheduling decisions in the Register is ongoing with both industry and States and Territories.

Details and operation

Details of the Register are set out in the Attachment.

The Register commences on the day after it is registered on the Federal Register of Legislation.

Other

The Register is a legislative instrument for the purposes of the Legislation Act.

As the Rules are exempt from disallowance, in accordance with subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*, a Statement of Compatibility with Human Rights is not required.

ATTACHMENT

Details of the *Industrial Chemicals Environmental Management (Register) Amendment (2023 Measures No.1) Instrument 2023*

Section 1 – Name

1. Section 1 provides that the name of the instrument is the *Industrial Chemicals Environmental Management (Register) Amendment (2023 Measures No.1) Instrument 2023* (the amending instrument).

Section 2 - Commencement

2. Section 2 provides that the Amending instrument commences on the day after the instrument is registered on the Federal Register of Legislation.

3. The note below the table provides that the table relates only to the provisions of the amending instrument as originally made. It will not be amended to deal with any later amendments of the amending instrument. The purpose of this note is to clarify that the commencement of any subsequent amendments is not reflected in the table.

4. Subsection 2(2) clarifies that any information in column 3 of the table is not part of the amending instrument. Information may be inserted in this column, or edited in this column, in any published version of the Amending instrument. For example, the date the amending instrument commenced will be inserted in this column once that has occurred.

Section 3 - Authority

5. Section 3 provides that the amending instrument is made under subsection 22(1) of the *Industrial Chemicals Environmental Management (Register) Act 2021* (ICEMR Act).

Section 4 – Schedules

6. Section 4 sets out that 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.

7. The effect is that the amendments made by Schedule 1 to the amending instrument amend the *Industrial Chemicals Environmental Management (Register) Instrument 2022* (the Register) as set out in Schedule 1.

Schedule 1 - Amendments

Item 1

8. Section 4 of the Register sets out defined terms for the purposes of the Register.

9. Item 1 of Schedule 1 to the amending instrument amends section 4 of the Register to insert new definition for hazardous waste permit and unintentional trace contamination. These terms are used in the new scheduling decisions inserted into the Register by items 2 (schedule 6) and 3 (Schedule 7).

Item 2

10. Item 2 of Schedule 1 to the amending instrument repeals the existing blank Schedule 6 of the Register and substitutes a new Schedule 6.

11. Schedule 6 is intended to record scheduling decisions for relevant industrial chemicals that are likely to cause serious or irreversible harm to the environment with essential uses. The note under the heading refers readers to section 5 which provides for the Schedules that make up the Register.

12. Subclause 1(1) of new Schedule 6 provides that the table set out in this Schedule sets out scheduling decisions for each relevant industrial chemical identified in column 1 of the table. The note under subclause 1(1) refers readers to subsection 14(1) of the ICEMR Act which clarifies that a relevant industrial chemical may be identified in a single way or 2 or more ways, including, for example, by specifying the CAS number for the chemical. However, the AACN must be used to identify the chemical in certain circumstances.

13. Subclause 1(2) of new Schedule 6 provides that column 2 of the table specifies one or more generalised end uses for the chemical if subsection 14(2) of the ICEMR Act applies. Subsection 14(2) of the ICEMR Act requires a generalised end use to be specified in certain circumstances. Column 2 may otherwise specify one or more end uses for the chemical. Where no end uses or generalised end uses are specified, then the scheduling decision applies to all uses of the relevant industrial chemical.

14. Subclause 1(3) of new Schedule 6 provides that column 3 of the table specifies risk management measures, including prohibitions and restrictions, that apply to the relevant industrial chemical specified in column 1 of the table and a product or article contain such a chemical. Subclause 1(4) of Schedule 7 provides that column 4 of the table sets out any explanatory information relation to that scheduling decision for that relevant industrial chemical.

15. The table under clause 1 of new Schedule 6 records scheduling decisions that have been made to list an industrial chemical in this Schedule. The scheduling decisions that have been made are on the following relevant industrial chemicals:

    - Decabromodiphenyl ether and nonabromodiphenyl ether (all three congeners) (decaBDE and nonaBDE).

Item 3

16. Item 3 of Schedule 1 to the Amending instrument repeals existing Schedule 7 of the Register and substitutes a new Schedule 7.

17. Schedule 7 records scheduling decisions for relevant industrial chemicals that are likely to cause serious or irreversible harm to the environment with no essential uses. The note under the heading refers readers to section 5 which provides for the Schedules that make up the Register.

18. Subclause 1(1) of new Schedule 7 provides that the table set out in this Schedule sets out scheduling decisions for each relevant industrial chemical identified in column 1 of the table. The note under subclause 1(1) refers readers to subsection 14(1) of the ICEMR Act which clarifies that a relevant industrial chemical may be identified in a single way or 2 or more ways, including, for example, by specifying the CAS number for the chemical. However, the AACN must be used to identify the chemical in certain circumstances.

19. Subclause 1(2) of new Schedule 7 provides that column 2 of the table specifies one or more generalised end uses for the chemical if subsection 14(2) of the ICEMR Act applies. Subsection 14(2) of the ICEMR Act requires a generalised end use to be specified in certain circumstances. Column 2 may otherwise specify one or more end uses for the chemical. Where no end uses or generalised end uses are specified, then the scheduling decision applies to all uses of the relevant industrial chemical.

20. Subclause 1(3) of new Schedule 7 provides that column 3 of the table specifies risk management measures, including prohibitions and restrictions, that apply to the relevant industrial chemical specified in column 1 of the table and a product or article contain such a chemical. Subclause 1(4) of new Schedule 7 provides that column 4 of the table sets out any explanatory information relation to that scheduling decision for that relevant industrial chemical

21. Existing Schedule 7 of the Register recorded scheduling decisions for the following three relevant industrial chemicals:

    - Hexabromobiphenyl, being chemical compounds based on the biphenyl structural element, where 6 hydrogen atoms have been replaced by bromine atoms

    - 1,3-Butadiene, 1,1,2,3,4,4-hexachloro-

    - Polychlorinated naphthalenes, including dichlorinated naphthalenes, trichlorinated naphthalenes, tetrachlorinated naphthalenes, pentachlorinated naphthalenes, hexachlorinated naphthalenes, heptachlorinated naphthalenes, octachlorinated naphthalene and any combination of those chemicals.

22. New Schedule 7 retains these existing scheduling decisions, and also records scheduling decisions for the following additional eight relevant industrial chemicals:

    - Benzene, 1,2,3,4,5-pentachloro- (commonly referred to as pentachlorobenzene or PeCB).

    - Hexabromocyclododecane, meaning 1,2,5,6,9,10-hexabromocyclododecane and including its main diastereoisomers: alpha- hexabromocyclododecane; beta-hexabromocyclododecane; and gamma-hexabromocyclododecane (commonly referred to as hexabromocyclododecane (HBCDD).

    - Octabromodiphenyl ether, heptabromodiphenyl and hexabromodiphenyl ether (octaBDE, heptaBDE and hexaBDE - all 12, 24 and 42 congeners respectively) (commonly referred to as octabromodiphenyl ether (octaBDE), heptabromodiphenyl ether (heptaBDE) and hexabromodiphenyl ether (hexaBDE)).

- Pentabromodiphenyl ether and tetrabromodiphenyl ether (pentaBDE and tetraBDE).

- Perfluorohexanesulfonic acid (PFHxS), including its linear and branched isomers, their salts and any substance containing a linear or branched perfluorohexylsulfonyl moiety that can degrade to PFHxS (commonly referred to as perfluorohexanesulfonic acid and related substances (PFHxS)).

- Perfluorooctanesulfonic acid (PFOS), including any of its branched isomers, its salts, perfluorooctanesulfonyl fluoride, and any substance containing a linear or branched perfluorooctanesulfonyl moiety and capable of degrading to PFOS (linear or branched) (commonly referred to as perfluorooctanesulfonic acid and related substances or PFOS).

- Perfluorooctanoic acid (PFOA), including any of its branched isomers, its salts and any related compound that contains a linear or branched perfluoroheptyl (C7H15C) group and which can degrade to linear or branched PFOA (commonly referred to as perfluorooctanoic acid and related substances (PFOA)). The following are not covered by the PFOA scheduling decisions:
    - C8F17-X, where X = F, Cl, Br;
    - fluoropolymers that are covered by CF3 [CF2]n-R', where R'=any group, n >16;
    - perfluoroalkyl carboxylic acids and their derivatives with ≥ 8 perfluorinated carbons;
    - perfluoroalkane sulfonic acids and perfluoro phosphonic acids and their derivatives with ≥ 9 perfluorinated carbons;
    - perfluorooctane sulfonic acid and its derivatives (PFOS).

- Short chain chlorinated paraffins (alkanes, C10-13, chloro), which are straight chain chlorinated alkanes with chain lengths ranges from C10 to C13 and a chlorine content of greater than 48% by weight (commonly referred to as short chain chlorinated paraffins (SCCPs)).

23. New Schedule 7 also has the effect of ordering the scheduling decisions listed in the schedule by alphabetical order by chemical. This will ensure that scheduling decisions for specific chemicals are easier to locate in the Register.