Supplementary Submission by the Environment Protection and Heritage Council's NChEM Working Group

in response to the

Draft Report of the Productivity Commission Study into Chemicals and Plastics Regulation

June 2008

Introduction

In previous submissions to the Productivity Commission Study, the Standing Committee of the Environment Protection and Heritage Council (EPHC) and the EPHC NChEM Working Group have described the main elements of the National framework for Chemicals Environmental Management (NChEM), which is intended to deliver a more effective and efficient national system for chemicals environmental management. NChEM has been endorsed by the EPHC and is being implemented already. The NChEM proposal for an enhanced regulatory role for the National Industrial Chemicals Notification and Assessment Scheme (NICNAS) , however, has been referred by the EPHC to the COAG Ministerial Taskforce on Chemicals and Plastics Regulation Reform, which the Productivity Commission study will inform.

The enhanced regulatory role proposed for NICNAS was to redress the current gap in regulatory arrangements for the environmental management of chemicals. Unlike other sectors, such as the workplace, transport and poisons scheduling, there is no body which can provide single national mandatory decisions on managing chemicals in the environment. As a result, the protection of the environment and human health, through exposure to chemicals in the environment, is at risk.

The Productivity Commission, in its draft report, commented favourably on some aspects of NChEM but considered that it was not appropriate for NICNAS to be given risk management decision making powers. The Commission's preferred alternative, if the need were demonstrated, was the establishment of a new standard-setting body reporting to the EPHC.

The EPH Standing Committee (EPHSC) and the Department of the Environment, Water, Heritage and the Arts (DEWHA) have provided written responses to the Commission commenting in detail on the draft report. The DEWHA response includes suggestions on how the environmental standard-setting body might be made operational.

Since then, the Commission and the NChEM Working Group have held a workshop to clarify environmental matters arising from the draft report. Some new ideas were generated in the workshop. This supplementary submission documents these new ideas, particularly those relating to possible regulatory models.

Improving the Regulatory Model

Discussion at the workshop was conducted within the policy and regulatory framework described by the Commission in Box 2, page xxix and Table 1, page xxxii of the draft report (reproduced below).

Box 2 **The Commission's proposed institutional and regulatory approach**

- Formulation of strategic policy and oversight of the institutional and regulatory arrangements — a national function, to be undertaken by ministerial councils supported by intergovernmental agreements.
- Assessment of the hazards and risks of chemicals — a national, science-based function to be undertaken under statutory independence.
- Risk management standard setting — a national function to be undertaken by independent statutory agencies within the policy frameworks of the ministerial councils.
- Administration of agreed standards and monitoring of their impact — jurisdiction-specific functions to be undertaken by their own or delegated agencies.

Table 1 **The Commission's preferred institutional arrangements for key chemicals regulation frameworks[a]**

Issue	*Poisons scheduling*	*Workplace safety*	*Transport of dangerous goods*	*Agricultural and veterinary products*	*Chemicals in the environment*	*Chemicals of security concern (CSC)*
Policy oversight	Australian Health Ministers' Conference	Workplace Relations Ministers' Council	Australian Transport Council	Primary Industries Ministerial Council	Environment Protection and Heritage Council	Attorney General (AG) and nominated state and territory ministers
	Intergovernmental Agreement (IGA) required	IGA required	Maintain existing IGA Review effectiveness of new model regulations	Negotiate national approach to control-of-use, with constrained exemptions for local conditions	IGA required if case established	IGA required — include formal voting SSAN to be re-evaluated under new CSC framework
	Standing Committee on Chemicals (coordinates policy development and makes recommendations to appropriate policy oversight body)					
Hazard and risk assessment	NICNAS and OCS	NICNAS with reference to EU and UN	UN modified by NTC consultation and CAP decisions	APVMA (with OCS and DEWHA)	NICNAS and APVMA (with OCS and DEWHA)	Chemical Security Unit in AG Dept. (with security agencies)
Standard setting and risk management	Establish expert based poisons scheduling committee	Establish independent body to replace ASCC — expert based not representative	National Transport Commission retains administration of ADG7 for now	Add control-of-use standard setting to APVMA's roles	Establish independent body if case for NChEM is made	Risk based measures to be developed for individual chemicals of security concern
Administration and enforcement	S&Ts to reference all scheduling decisions and regulations	S&Ts adopt model codes and standards in uniform or nationally consistent manner	No change to current arrangements	S&Ts administer and enforce control-of-use regs. through service level agreements	S&Ts would adopt national standards and enforce them	All S&Ts to use AusCheck national security checking system

a Other ministerial councils and policy frameworks not shown include those for food safety, therapeutic goods, drug strategy and consumer products.

This framework has several positive features (see earlier EPHSC, NChEM Working Group and DEWHA submissions) which are compatible with NChEM.

The key issue referred by the EPHSC to the COAG Ministerial Taskforce was the need for a mechanism to produce a single nationally consistent set of decisions on environmental risk management for each chemical of concern. These decisions should follow good governance and be statutory so that they could be picked up automatically by state and territory legislation, rather than continuing to rely on voluntary mechanisms which are unlikely to be durable and reduce consistency.

This decision-making function, envisaged for NICNAS in the original NChEM proposal, could be served by the Commission's proposed environmental standard-setting and risk management body. As discussed in the DEWHA submission, the two models have different pros and cons. The NICNAS option does not require the creation of a new body (including administrative and policy support) but, if not applied across all sectors of industrial chemicals management, would be inconsistent with the other sectors and, if upfront state and territory advice is not taken up by NICNAS, it might be more likely to result in decisions considered impractical by the implementing environment agencies. On the other hand, a new environmental standard setting body would need some additional resources and preferably a statutory basis, which would require legislative change, but would be consistent with the other sectors and be more accountable in its decisions to the EPHC.

Options for the creation and operation of the environmental risk management and standard setting body are discussed in the DEWHA submission. In preparation for the workshop, the NChEM Working Group developed further options, stimulated by a consideration of the overall regulatory model proposed by the Commission.

In particular, the NChEM Working Group considered:

(i) whether the NChEM approach of environmental agency involvement throughout the NICNAS assessment was a model that might be useful to other sectors;
(ii) whether the Commission's draft model should be further developed to facilitate a more integrated outcome for risk management decisions for an individual industrial chemical, rather than the sector by sector approach now prevalent; and,
(iii) whether the model made clear through what route Commonwealth actions should be implemented, such as import and export controls?

This resulted in the development of an enhanced model illustrated in Figure 1 (attached), built upon the Commission's draft model.

Stages in the Enhanced Model

Stage A

In common with the Commission's model, the new model uses the NICNAS legislation, the *Industrial Chemicals (Notification And Assessment) Act 1989* (Cwlth) (ICNA Act), as the entry point for the assessment of a new industrial chemical, or the assessment of a priority existing chemical. The new model works within the parameter proposed by the Commission that NICNAS should not have a risk management decision making role. It suggests, however, that it would be more efficient and cost effective for the overall regulatory process if NICNAS produced, as it currently does, not only the hazard and risk assessment but also risk management recommendations. These would be recommendations only, not decisions, and would be passed to the decision making bodies in each of the sectors (poisons, workplace, transport, environment, product safety).

Allowing NICNAS to produce risk management recommendations would mean that the sectoral decision making bodies would not have to start from scratch in considering possible risk management decisions. It also would allow them to see what recommendations were proposed

for other sectors, thereby reducing the possibility of incompatible chemical management decisions arising from the different sectors.

To date, there has been delayed or limited uptake by the sectors of the NICNAS recommendations in the absence of a statutory mechanism to compel or collate decisions, and/or where the recommendation was not easily implementable by the States and Territories. For the environment sector, this is partly addressed in the NChEM model by requiring involvement of the environment agencies throughout the assessment process so that the environmental recommendations are well targeted, practical and useful and have the ownership of the agencies which must implement them. The NChEM Working Group considers that such involvement should be mandatory in the NICNAS legislation, rather than purely voluntary or relying on weak MOUs which depend more on ongoing goodwill and thus do not represent good governance arrangements.

Other sectors may wish to consider similar arrangements to ensure that the NICNAS assessment process is of maximum benefit both to the implementing agencies and to industry which ultimately pays for the assessments of their commercial products.

Stage B

The model illustrated in Figure 1 recognises that other sectors already have formal decision making processes, with environment being the only sector lacking a clear mechanism. Options for developing an environmental mechanism are discussed later.

An addition to the Commission's draft model proposed in Figure 1 is that when each of the sectors comes to a draft decision(s) on an individual chemical, that draft decision would be conveyed to each of the other sectors to ensure that the decisions of different sectors were not in conflict. Bilateral discussions between sectors would resolve incompatibilities before final decisions were taken, if necessary with the facilitation of the Standing Committee on Chemicals that has been proposed by the Commission.

It would be desirable that different sectors consider the relevant chemical according to the same timeline, however this would not be essential. As already discussed, the risk of incompatible decisions would be lessened by the provision of NICNAS risk management recommendations which had been developed in a genuinely cooperative manner with the different sectors.

Stage C

When the decisions on individual chemicals emerge from the different sectors, they would be provided to NICNAS for collation and publication. Ideally, this would occur within an agreed timeframe, with opportunities for extension of time under transparent and clearly defined circumstances.

This would enable the creation of a single repository for all statutory and policy management decisions relating to that chemical. Whether this should be in the Australian Inventory of Chemical Substances (AICS) or in a new on-line database is a matter for further discussion. Essential features would be accuracy, currency and ease of access for industry, community and government.

Having the decisions collated within the NICNAS legislation also would provide a convenient reference point for the statutory adoption by states and territories of actions to be implemented under their own legislation (for sectors such as the environment where such a reference point is currently lacking). This would therefore provide the linkage needed for state and territory environment agencies as originally envisaged in NChEM. It would not affect other sectors which already have a suitable reference point, such as the workplace sector.

The Role of NICNAS

In such a model, NICNAS would provide hazard and risk assessment, risk management advice, the collation of the decisions made within each sector (to provide both a statutory reference point and a central information repository for all regulatory/policy advice about each chemical) and, as now, much of the administrative service necessary to keep the regulatory process running for industrial chemicals at the national level.

The NChEM Working Group considers that there may be additional national functions that could be conducted more efficiently through the NICNAS legislation than elsewhere. For example, the risk management decisions will sometimes require actions directed at the Commonwealth rather than the states and territories, such as preventing the import of certain chemicals to Australia or their export. While this control is effected ultimately through amendments to the Customs regulations, it is preferable to have these regulations linked to specific Commonwealth legislation. It would seem simpler to have this ability embedded in the NICNAS legislation on behalf of all the sectors rather than having stand alone Commonwealth legislation for each sector.

Currently, for example, there is no Commonwealth environmental legislation that would be well suited to an import or export restriction for industrial chemicals on environmental grounds. There is currently legislation that can control the import and export of hazardous waste and ozone depleting chemicals on environmental grounds, but these Acts are restricted in the range of chemicals to which they apply.

Creating such a provision within the NICNAS legislation would not give NICNAS an independent decision making power, as it would simply be providing a statutory 'hook' for implementing a decision made within one or more of the sectors. The legislative mechanism to impose such control should be straightforward once the decision is taken. The current provisions within the NICNAS legislation which give some ability for NICNAS to restrict imports or manufacture through annotating or removing from AICS under some circumstances are extremely cumbersome and only effective in very limited circumstances.

Conducting Benefit-Cost Analyses

It is not obvious from the Commission's draft model at what point a benefit-cost analysis (BCA) to maximise net community benefit (including environmental benefits) should be conducted in the assessment process, and when such an analysis should be considered necessary because of the significance of the chemical and the impact of the proposed regulatory action. As noted in previous submissions, it would be costly, time consuming and inefficient if BCAs were conducted for every chemical assessment.

If there is a case where a BCA is clearly required then it would seem most efficient and cost effective to have the BCA incorporate the proposed risk management actions for all sectors, rather than having each sector perform a separate BCA.

If this is agreed, then the logical alternatives in the model proposed in Figure 1 for the timing of a BCA for an individual chemical are either when NICNAS prepares its risk management recommendations or when the decisions of all sectors are collated.

If option 1 is chosen, the BCA would inform the decision making process of the sectors, which would have advantages in choosing amongst alternatives. There remains the possibility of a sector modifying the recommendation. This would be less likely if sectors have been involved in the NICNAS assessment, as envisaged in the NChEM process. Whether modifying a recommendation required a new BCA would be determined on a case by case basis, dependent on the scale and direction of the change.

If option 2 is chosen, an adverse BCA outcome could require reconsideration by the relevant sector or sectors of the risk management decisions and, potentially, a reconsideration of the

BCA. Again, this would be unlikely if sectors have been involved throughout the assessment and expert advisors have assisted in the decision-making processes within sectors.

In either case, the Figure 1 model suggests that the conduct, or coordination, of the BCA would most efficiently be done by NICNAS. This could be incorporated in its legislation with a requirement, if necessary, for the formation of a steering committee involving sectoral representatives.

The NChEM Working Group considers that the costs associated with the assessment of an individual chemical should, as now, be met through a cost recovery process funded by those who benefit commercially by its introduction, rather than by the taxpayer. This would include the conduct of any BCA.

Decision Making Mechanisms for the Environment Sector

The submission by DEWHA has described how some of the operational issues arising from the establishment of a risk management and standard setting body for chemicals in the environment could be addressed.

As described in the DEWHA submission, the establishment of national guidelines, policies and standards is a typical function of EPHC in the policy dimension or by the National Environment Protection Council (NEPC) if a statutory basis is required. The recent review of the *National Environment Protection Council Act 1994* (NEPC Act) has suggested changes to the NEPC Act which, if enacted, could facilitate the establishment of a statutory committee dealing with chemicals management with characteristics similar to those suggested by the Commission. This body could be restricted to providing recommendations to the NEPC or be given delegation to make some statutory decisions in its own right for administrative efficiency. Whether National Environment Protection Measures (NEPMs) would be an appropriate mechanism for dealing with a wider range of decisions on environmental management of chemicals would require further consideration when redesigning the NEPC Act.

The model put forward in Figure 1 provides an alternative option for producing a single national statutory decision on environmental management of chemicals. If the Director of NICNAS is required in the amended NICNAS legislation to act upon the instruction of the NEPC with regard to environmental decisions (or, alternatively, the Commonwealth Environment Minister with the agreement of the state and territory Environment Ministers if that is administratively more convenient), then the NICNAS Act could provide a more suitable and streamlined statutory location for the recording of the environmental risk management decisions, rather than needing a NEPM or new Commonwealth environmental legislation. As discussed earlier, the NICNAS legislation would then provide the location from which those environmental risk management decisions requiring state or territory action could be taken up automatically for implementation under state or territory legislation.

If the environmental risk management decisions required Commonwealth action, such as import or export bans, NICNAS could implement the action directly (via the appropriate Commonwealth agency such as Customs) as discussed earlier (see ***The Role of NICNAS***).

Conclusions

In the spirit of providing further ideas for enhancing the draft model proposed by the Commission, the NChEM Working Group would welcome consideration by the Productivity Commission of the following enhanced framework for industrial chemicals:

a) NICNAS continue to have the role of hazard assessment, risk assessment and the preparation of risk management recommendations for industrial chemicals *(continued provision of the risk management advice will save time and money as the decision making bodies will not have to start from scratch)*;
b) the ICNA Act be amended to require NICNAS to involve appropriate agencies from each of the sectors in the assessment process *(this will increase the likelihood that the risk management recommendations are realistic and able to be implemented)*;
c) the regulatory decision making role be taken by appropriate processes and statutory bodies within each sector, under the guidance of the appropriate Ministerial Council *(this reflects the Productivity Commission draft model)*;
d) the regulatory decision making bodies provide each other with their draft decisions on individual chemicals *(this will reduce the chance of incompatible decisions)*;
e) the regulatory decision making bodies where possible harmonise the timing of their consideration of the same chemical *(this will facilitate consultation and potentially provide industry with faster and more integrated decisions and greater predictability)*;
f) the ICNA Act be amended to require NICNAS to collate the decisions of the different sectors in an online accessible format *(a national, authoritative repository where all decisions relevant to that chemical can be viewed would assist all parties – industry, community and government)*;
g) the ICNA Act be amended to allow the Director of NICNAS to implement Commonwealth actions where required by the decisions of the individual sectors, such as import and export restrictions *(this would be more efficient than each sector developing Commonwealth legislation - it would not give NICNAS independent decision making powers but would be more administrative in character)*;
h) NICNAS coordinate the conduct of a BCA when preparing its Assessment Certificate (or for reviews of existing chemicals) for those cases where it is considered necessary *(it would be more efficient, cost effective and accurate to conduct a BCA considering the needs of all sectors rather than multiple single sector BCAs – it would not preclude supplementary single sector BCAs if needed)*;
i) it would be appropriate that NICNAS's assessment of new and existing chemicals (all that is currently involved) – plus the collation and publication of risk management decisions, preparation of BCAs, and administration of any import and export restrictions; as well as actions related to the assessment of individual chemicals by the environmental standard-setting body - be subject to full cost recovery.

Specifically for the environment sector, the NChEM Working Group suggests:

a) the NChEM consultation process be mandatory for the NICNAS assessment, preferably in the ICNA Act, or at least in a strong MOU;
b) risk management decisions from the environmental statutory risk management and standard setting body (approved by [or under delegation from] Environment Ministers) be collated and published by NICNAS in an approved repository established under the ICNA Act;
c) the environment risk management decisions requiring statutory actions for implementation by the states and territories be automatically adopted. This would be established between a linkage in state and territory legislation to the environmental decisions collated in the ICNA Act;

d) an environmental statutory risk management and standard setting body be established to develop advice for Environment Ministers (possibly under the auspices of NEPC if needed for statutory legitimacy) on environmental controls, national standards, guidelines and policies on managing chemicals in the environment;

e) national frameworks on managing chemicals in the environment be implemented, once agreed by Environment Ministers (or their delegates) through appropriate mechanisms, such as guidelines, standards, agreements or a new NEPM; and

f) the environment risk management decisions requiring statutory actions for implementation by the Commonwealth, such as import or export restrictions, be implemented through the amended ICNA Act.