

Environmental Protection (Industrial Chemicals) Regulations 2023

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Consultation Draft

Environmental Protection (Industrial Chemicals) Regulations 2023

Made by the Governor in Executive Council.

Part 1 — Preliminary

1. Citation

These regulations are the *Environmental Protection (Industrial Chemicals) Regulations 2023*.

2. Commencement

These regulations come into operation as follows —

- (a) Part 1 (other than regulations 3 and 4) — on the day on which these regulations are published on the WA legislation website;
- (b) the rest of the regulations — on the day after that day.

3. Terms used

- (1) In these regulations —

article has the meaning given in the *Industrial Chemicals Act 2019* (Commonwealth) section 9;

CAS number has the meaning given in the *Industrial Chemicals Act 2019* (Commonwealth) section 9;

Commonwealth Environment Department means the Environment Department as defined in the *Industrial Chemicals Environmental Management (Register) Act 2021* (Commonwealth) section 7;

end use has the meaning given in the *Industrial Chemicals Act 2019* (Commonwealth) section 9;

generalised end use has the meaning given in the *Industrial Chemicals Act 2019* (Commonwealth) section 9;

industrial chemical has the meaning given in the *Industrial Chemicals Act 2019* (Commonwealth) section 10;

industrial chemicals minimum standards means *The IChEMS Minimum Standards*, as in force from time to time, published by the Commonwealth Environment Department on its website;

listed means —

- (a) in relation to an industrial chemical or a product or article containing an industrial chemical —
 - (i) the chemical is identified in a relevant Schedule of the Register; or
 - (ii) a class of chemicals to which the chemical belongs is identified in a relevant Schedule of the Register;

or

- (b) in relation to a relevant end use — the relevant end use is specified in a relevant Schedule of the Register;

Register means the instrument, as in force from time to time, made under the *Industrial Chemicals Environmental Management (Register) Act 2021* (Commonwealth) section 22(1);

relevant agency means the Department;

relevant end use, in relation to an industrial chemical or a product or article containing an industrial chemical listed in a Schedule of the Register, means the end use, or generalised end use, specified for the chemical in the Schedule;

relevant scheduling requirement, in relation to an industrial chemical or a product or article containing an industrial chemical listed in a Schedule of the Register, means —

- (a) if a scheduling requirement and relevant end use is specified for the chemical in the Schedule — the scheduling requirement specified for the chemical, product or article, as the case requires, in relation to the relevant end use of the chemical; or
- (b) if a scheduling requirement is specified in the Schedule for the chemical and no relevant end use is specified for the chemical in the Schedule — the scheduling requirement specified for the chemical, product or article, as the case requires;

scheduling decision has the meaning given in the *Industrial Chemicals Environmental Management (Register) Act 2021* (Commonwealth) section 11(3);

scheduling requirement —

- (a) means each of the following that is specified on the Register and that has come into effect —
 - (i) a prohibition;
 - (ii) a restriction;
 - (iii) a risk management measure;but
- (b) does not include the industrial chemicals minimum standards;

use has the meaning given in the *Industrial Chemicals Act 2019* (Commonwealth) section 9.

- (2) If a term used in a scheduling requirement is given a meaning in the Act or subregulation (1), the term has the same meaning in the scheduling requirement as it is given in the Act or these

regulations whether or not any other meaning is given to the term under —

- (a) the *Industrial Chemicals Environmental Management (Register) Act 2021* (Commonwealth); or
- (b) the Register.

4. Application

- (1) In this regulation —

excluded introduction has the meaning given in the *Industrial Chemicals Act 2019* (Commonwealth) section 11 (other than section 11(2)(c) and (d));

export has the meaning given in the *Industrial Chemicals Act 2019* (Commonwealth) section 9;

manufacture has the meaning given in the *Industrial Chemicals Act 2019* (Commonwealth) section 9.

- (2) These regulations do not apply to —

- (a) an export of an industrial chemical or a product or article containing an industrial chemical; or
- (b) an import of an industrial chemical or a product or article containing an industrial chemical; or
- (c) an excluded introduction of an industrial chemical or a product or article containing an industrial chemical; or
- (d) use of an industrial chemical or a product or article containing an industrial chemical by an individual if the use —
 - (i) is solely for the individual's personal or domestic use; or
 - (ii) is not for a purpose of carrying on an enterprise within the meaning of the *A New Tax System (Goods and Services Tax) Act 1999* (Commonwealth) section 195-1.

- (3) Despite subregulation (2)(a), (b) and (c) these regulations apply in relation to any of the following unless excluded under subregulation (2)(d) —
- (a) an industrial chemical —
 - (i) after the chemical's import or excluded introduction, including the chemical's use in producing a product or article containing the chemical or in manufacturing another industrial chemical; and
 - (ii) if the chemical is exported — until the export of the chemical;
 - (b) a product or article containing an industrial chemical —
 - (i) after the product's or article's import or during the product's or article's production; and
 - (ii) if the product or article is exported — until the export of the product or article.

Part 2 — Duties of persons using industrial chemicals or products or articles containing industrial chemicals

5. Duty to minimise risk of environmental harm and pollution

- (1) A person using an industrial chemical or a product or article containing an industrial chemical must take all reasonable measures necessary to minimise the risk of environmental harm and pollution from the use of the chemical, product or article.
- (2) In determining what measures are reasonable for the purposes of subregulation (1), regard must be had to all of the following —
 - (a) the industrial chemicals minimum standards;
 - (b) any of the following that are applicable for the chemical, product or article —
 - (i) a scheduling decision (other than a scheduling requirement);
 - (ii) a relevant scheduling requirement unless the person has an exemption under regulation 8(1) from the requirement;
 - (c) any code, standard, instruction, specification or administrative procedure, as in force from time to time, published by any of the following in relation to the chemical, product or article —
 - (i) the Department;
 - (ii) the Commonwealth Environment Department;
 - (d) the likelihood of the environmental harm or pollution occurring;
 - (e) the degree of environmental harm or pollution that might result;
 - (f) any other relevant matter.

- (3) A person commits an offence if the person fails to comply with subregulation (1).

Penalty for this subregulation:

- (a) if the offence involves an industrial chemical, or a product or article containing an industrial chemical, listed in Schedule 1 of the Register — a fine of \$5 000;
- (b) if the offence involves an industrial chemical or a product or article containing an industrial chemical, and a relevant end use, listed in Schedule 2 of the Register — a fine of \$10 000;
- (c) if the offence involves an industrial chemical or a product or article containing an industrial chemical, and a relevant end use, listed in Schedule 3 or 4 of the Register — a fine of \$15 000;
- (d) if the offence involves an industrial chemical or a product or article containing an industrial chemical, and a relevant end use, listed in Schedule 5, 6 or 7 of the Register — a fine of \$20 000;
- (e) in any other case — a fine of \$20 000.

6. Duty to comply with relevant scheduling requirements

- (1) A person who uses an industrial chemical, or a product or article containing an industrial chemical, listed in a Schedule of the Register must comply with a relevant scheduling requirement unless the person has an exemption under regulation 8(1) from the requirement.

- (2) A person commits an offence if the person fails to comply with subregulation (1).

Penalty for this subregulation:

- (a) if the offence involves an industrial chemical, or a product or article containing an industrial chemical, listed in Schedule 1 of the Register — a fine of \$5 000;

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- (b) if the offence involves an industrial chemical or a product or article containing an industrial chemical, and a relevant end use, listed in Schedule 2 of the Register — a fine of \$10 000;
- (c) if the offence involves an industrial chemical or a product or article containing an industrial chemical, and a relevant end use, listed in Schedule 3 or 4 of the Register — a fine of \$15 000;
- (d) if the offence involves an industrial chemical or a product or article containing an industrial chemical, and a relevant end use, listed in Schedule 5, 6 or 7 of the Register — a fine of \$20 000;
- (e) in any other case — a fine of \$20 000.

Part 3 — Exemptions

7. Terms used

In this Part —

exemptible industrial chemical means an industrial chemical set out in Schedule 1;

exemptible person means a person who uses, or may use, an exemptible industrial chemical;

prescribed international agreement has the meaning given in the *Industrial Chemicals Act 2019* (Commonwealth) section 9;

prescribed international arrangement has the meaning given in the *Industrial Chemicals Act 2019* (Commonwealth) section 9.

8. CEO may grant exemptions

- (1) The CEO may exempt an exemptible person from complying with 1 or more relevant scheduling requirements in relation to an exemptible industrial chemical by —
 - (a) giving written notice to the person; or
 - (b) publishing notice on the Department's website.
- (2) Despite subregulation (1), the CEO must not grant an exemption in relation to a relevant scheduling requirement for an exemptible industrial chemical if the requirement is also provided for in any of the following —
 - (a) a prescribed international agreement;
 - (b) a prescribed international arrangement.
- (3) The CEO may grant an exemption under subregulation (1) subject to 1 or more conditions specified in the notice.
- (4) In deciding whether to grant an exemption under subregulation (1), the CEO must have regard to the following in

relation to the exemption (including any conditions to which the exemption would be subject) —

- (a) whether the granting of the exemption would result in a standard of environmental risk management at least equivalent to the standard which would have been required had the exemption not been granted;
 - (b) whether exceptional circumstances justify the granting of the exemption;
 - (c) the likelihood of any environmental harm or pollution occurring if the exemption is granted;
 - (d) the degree of any environmental harm or pollution that might result if the exemption is granted;
 - (e) any other relevant matter.
- (5) If the CEO grants an exemption under subregulation (1), the CEO must specify in the notice the period for which the exemption applies.
- (6) If the CEO publishes a notice under subregulation (1) in relation to an individual, the CEO must redact the name of the individual to whom the exemption applies from the published version of the notice.

9. Amending or cancelling exemptions

- (1) The CEO may, by written notice given to a person, cancel or amend an exemption granted to the person under regulation 8(1).
- (2) The CEO must provide reasons for cancelling or amending an exemption in the notice referred to in subregulation (1).
- (3) The CEO may, by notice published on the Department's website, cancel or amend an exemption granted to a person under regulation 8(1) other than an exemption granted by giving the person written notice.

- (4) The amendment or cancellation takes effect —
 - (a) on the day after the day on which the notice is given to the person or published; or
 - (b) a later day specified in the notice.

10. Exemptions expire at end of exemption period or on failure to comply with conditions

Unless cancelled under regulation 9, an exemption granted to a person under regulation 8(1) expires at the earlier of —

- (a) the end of the period stated in the notice of the exemption referred to in regulation 8(5); or
- (b) the time the person fails to comply with 1 or more conditions to which the exemption is subject.

11. Applications for exemptions

- (1) An exemption under regulation 8(1) may be granted —
 - (a) on application by an exemptible person made in the manner and form approved by the CEO; or
 - (b) on the CEO's own initiative.
- (2) Before determining an application for an exemption under regulation 8(1), the CEO may require the applicant to provide any further information the CEO considers relevant to the application in any particular case.
- (3) The CEO must provide reasons for granting or refusing to grant an exemption made on application to the applicant.

Part 4 — Compliance notices

12. Term used: compliance notice

In this Part —

compliance notice has the meaning given in regulation 13(1).

13. Inspectors or authorised persons may give compliance notices

- (1) An inspector or authorised person may give a notice (a *compliance notice*) to a person if the inspector or authorised person believes on reasonable grounds that the person —
 - (a) uses, or is likely to use, an industrial chemical or a product or article containing an industrial chemical; and
 - (b) is contravening or is likely to contravene —
 - (i) regulation 5(1); or
 - (ii) regulation 6(1).
- (2) A compliance notice given to a person under subregulation (1) must be in a form approved in writing by the CEO and contain the following information —
 - (a) the name of the person to whom the notice applies;
 - (b) each industrial chemical or product or article containing an industrial chemical in relation to which the notice applies;
 - (c) the contravention referred to in regulation (1)(b) for which the notice is given;
 - (d) if the contravention relates to a relevant scheduling requirement — each relevant scheduling requirement with which the person must comply;
 - (e) what the person must do in order to remedy the contravention;
 - (f) a statement specifying when the person must —
 - (i) comply with the notice; and

- (ii) notify the CEO that the person has complied with the notice;
 - (g) a statement that a failure to comply with the notice is an offence under regulation 14;
 - (h) a statement that the person may have a right of review under regulation 15;
 - (i) contact details of an inspector or authorised person who the person may contact about the notice.
- (3) A statement under subregulation (2)(f) in a compliance notice given to a person must include a time for compliance that is at least 2 days after the day on which the notice is given unless there are circumstances that justify immediate compliance.

14. Offence: failure to comply with compliance notices

- (1) A person who is given a compliance notice must comply with the notice.
 - (2) A person commits an offence if the person fails to comply with subregulation (1).
- Penalty for this subregulation: a fine of \$5 000.

15. Review of compliance notices

- (1) A person given a compliance notice may apply in writing to the CEO for a review of any of the following —
 - (a) the decision to give the notice;
 - (b) a time for compliance stated in the notice;
 - (c) any matter specified in the notice with which the person must comply.
- (2) An application under subregulation (1) must —
 - (a) be made no later than 21 days after the notice is given; and
 - (b) set out the reasons for a review and be accompanied by any supporting material.

- (3) In conducting a review, the CEO is not bound by the rules of evidence and may inform themselves on any matter as the CEO thinks fit.
- (4) In deciding an application for a review in relation to a compliance notice, the CEO may do any of the following —
 - (a) cancel the compliance notice;
 - (b) affirm the compliance notice;
 - (c) amend the compliance notice.
- (5) The making of an application for a review in relation to a compliance notice does not operate to stay the notice.
- (6) The CEO must notify the person in writing of the decision under subregulation (4) in relation to the person's application.

Part 5 — Defences

16. Defences for failure to comply

- (1) It is a defence to a charge for an offence under regulation 5(3), 6(2) or 14(2) for a person to prove —
 - (a) that the failure to comply was for the purpose of preventing danger to human life or health or irreversible damage to a significant proportion of the environment; and
 - (b) that as soon as practicable after the failure to comply, the person notified particulars of the failure in writing to the CEO.
- (2) It is a defence to a charge for an offence under regulation 5(3), 6(2) or 14(2) for a person to prove —
 - (a) that the failure to comply was for the purpose of complying with any other requirement under a written law with which it would be impossible to comply simultaneously with the relevant requirement under these regulations; and
 - (b) that as soon as practicable after the failure to comply, the person notified particulars of the failure in writing to the CEO.
- (3) The defence under subregulation (1) or (2) is not available to a person unless the person notifies the CEO of the person's intention to rely on that defence within 21 days after the day on which —
 - (a) the relevant court hearing notice is served on the person; or
 - (b) if no court hearing notice is served on the person in respect of the relevant offence — the person is informed of the place and time at which the person is alleged to have committed that offence and of the nature of that offence.

Part 6 — Miscellaneous

17. Giving notices by electronic means

(1) In this regulation —

relevant form of the notice includes —

- (a) a notice (whether or not as an attachment); or
- (b) a link to a uniform resource locator (URL) from which a notice can be downloaded;

working day means a day other than a Saturday, a Sunday or a public holiday throughout the State.

(2) A notice required or permitted under these regulations to be given by an inspector, authorised person or the CEO to a person may be given to the person by emailing the relevant form of the notice to an email address or faxing it to a fax number —

- (a) provided by the person for the giving or service of notice; or
- (b) if no email address or fax number is provided as referred to in paragraph (a) —
 - (i) appearing on recent correspondence addressed by or on behalf of the person to the person giving the notice, or otherwise notified to the person giving the notice; or
 - (ii) published by the person to whom the notice is to be given.

(3) In the absence of proof to the contrary, a notice that is given to a person in accordance with subregulation (2) is taken to be given on the next working day after the email or fax was sent.

(4) This regulation is in addition to the *Interpretation Act 1984* sections 75 and 76.

Schedule 1 — Exemptible industrial chemicals

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Item	Name	CAS number

Clerk of the Executive Council