

Australian Capital Territory

Environment Protection (Industrial Chemicals) Amendment Regulation 2025 (No 1)

Subordinate law SL2025–17

made under the

Environment Protection Act 1997, s 166 (Regulation-making power)

EXPLANATORY STATEMENT

OVERVIEW

This explanatory statement relates to the *Environment Protection (Industrial Chemicals) Amendment Regulation 2025 (No 1)* (the **Amendment Regulation**) as made by the Executive. It has been prepared to assist the reader of the Amendment Regulation and to help inform debate on it. It does not form part of the Amendment Regulation and has not been endorsed by the Legislative Assembly.

This statement must be read in conjunction with the Amendment Regulation. It is not, and is not meant to be, a comprehensive description of the Amendment Regulation. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

The Amendment Regulation is made under s 166 of the *Environment Protection Act 1997* (the **EP Act**) and amends the *Environment Protection Regulation 2005* (the **EP Regulation**).

Background

Industrial chemicals are contained in many products in Australia and may be harmful to human health and the environment if they are not managed properly. Understanding where these chemicals come from, how they are used, and having effective controls in place, is key to minimising chemical pollution.

The use of chemicals is regulated by states and territories under their respective legislation. Chemical use is regulated in the ACT under the EP Act and the EP Regulation. This legislation is administered by the Environment Protection Authority (EPA).

The Commonwealth, state and territory governments are working together on the implementation of the Industrial Chemicals Environmental Management Standard

(IChEMS). The IChEMS is a national approach that will deliver more consistent regulation and strengthen the management of industrial chemicals across all jurisdictions. It aims to improve the way industrial chemicals are used, produced, imported, and disposed.

The Australia's industrial chemicals roadmap - Better environmental management of chemicals sets out how Australia is delivering the new IChEMS framework. It was released in March 2022, following agreement by all Australian environment ministers.

Following the creation of federal legislation, the *Industrial Chemicals Environment Management (Register) Act 2021* (Cwlth) (the **ICEMR Act (Cwlth)**), a national IChEMS register was established in December 2022. Scheduling decisions are made under the ICEMR Act (Cwlth) and include prohibitions, exemptions and risk management measures for each industrial chemical listed on the IChEMS Register.

The Industrial Chemicals Environmental Management (Register) Instrument 2022 lists industrial chemicals under seven schedules based on their risk category, from lowest to greatest risk to the environment. An Online Register is available and updated on a regular basis to facilitate access to listed chemicals and scheduling decisions.

Implementation of these reforms was agreed to by Commonwealth, state and territory Environment Ministers in 2018. The Amendment Regulation implements these measures in the ACT.

Amendments to the *Environment Protection Regulation 2005*

The Amendment Regulation introduces Part 5A – Industrial Chemicals into the EP Regulation to implement IChEMS, including offences related to compliance with IChEMS scheduling decisions for industrial chemicals.

More specifically, the Amendment Regulation provides for when certain industrial chemicals are taken to cause environmental harm for the purposes of section 5 (b) of the EP Act. In addition, it provides that a person must comply with prohibitions, restrictions and other risk management measures, including the IChEMS Minimum Standards, specified in an IChEMS scheduling decision for the manufacture or the end use of an industrial chemical, or an article or product containing an industrial chemical.

The Amendment Regulation:

- inserts new definitions.
- inserts new provisions in relation to circumstances when certain industrial chemicals are taken to cause environmental harm.
- inserts new provisions referring to compliance with IChEMS scheduling decisions for industrial chemicals.
- creates a new strict liability offence in relation to engaging in conduct that contravenes an IChEMS scheduling decision, other than the IChEMS Minimum Standards.
- creates a new offence in relation to engaging in conduct that contravenes the IChEMS Minimum Standards.
- inserts new provisions referring to exceptions to the new offences.

These amendments mean that future additions to the IChEMS Register will automatically be regulated under the ACT EP legislation, without the need for further amendments.

CONSULTATION

Implementation of IChEMS is a joint initiative between the Commonwealth, state and territory governments. IChEMS and the associated Commonwealth legislation have been subject to extensive national public and stakeholder consultation.

The IChEMS roadmap introduces industry, non-government organisations and the public to IChEMS. It sets out actions governments are taking as part of a nationwide approach to managing industrial chemicals.

An Advisory Committee on the Environmental Management of Industrial Chemicals (IChEMS Advisory Committee) was established under the ICEMR Act (Cwlth) to provide expert advice to the Environment Minister (Cwlth) on industrial chemicals regulatory scheduling decisions. It also provides advice on the register and the decision-making principles under the ICEMR Act (Cwlth). In its advice, the IChEMS Advisory Committee considers a broad range of factors, such as:

- whether there is an essential use of the chemical in Australia
- whether there are viable alternatives
- the social or economic impacts of restricting or prohibiting the use of the chemical in Australia.

COSTS AND BENEFITS

A regulatory impact statement (a *RIS*) has been prepared to accompany this regulation, in accordance with the requirements set out in section 35 of the *Legislation Act 2001*.

The RIS presents a detailed analysis of potential costs and benefits of the Amendment Regulation on part of the community.

OFFENCES AND PENALTIES

The Amendment Regulation introduces a new strict liability offence related to the manufacture, end use and risk management measures for an industrial chemical; and to the manufacture, use and risk management measures for an article or product containing an industrial chemical, that are not in accordance with the scheduling decision for the chemical. This offence excludes non-compliance with the IChEMS Minimum Standards, which is covered in a separate offence.

The new strict liability offence is subject to a maximum penalty of 20 penalty units.

The Amendment Regulation also introduces a new offence for contravening a risk management measure applying the IChEMS Minimum Standards. The IChEMS Minimum Standards are baseline requirements for the environmental management of industrial chemicals, which align with existing environment, health, safety duty of care obligations. These baseline requirements are well known to industry, and it is

likely that business that deal with industrial chemicals already meet all or most of the IChEMS Minimum Standards.

CONSISTENCY WITH HUMAN RIGHTS

Rights Engaged

The Amendment Regulation will engage the following rights:

- Section 9 – Right to life (promotes)
- Section 22 - Rights in criminal proceedings (limits)
- Section 27C - Right to a healthy environment (promotes).

Rights Promoted

1. Right to life

The new strict liability offence will promote the right to life under section 9 (1) of the *Human Rights Act 2004* (the **HR Act**). It protects the general conditions of society such as environmental degradation that are of sufficient seriousness as to impact on the right to life.

2. Right to a healthy environment

The new strict liability offence will promote the right to a healthy environment under section 27C (1) of the HR Act. It prevents environmental harm, including adverse impacts on ecosystems and biodiversity, which could interfere with the right to a clean, healthy and sustainable environment.

Rights Limited

1. Nature of the right and the limitation (s28 (a) and (c))

The new strict liability offence will limit the presumption of innocence under section 22 (1) of the HR Act because it allows for the imposition of criminal liability without the need to prove fault.

Public authorities are taking reasonable steps to protect people by regulating the manufacture and the use of industrial chemicals or an article or product containing an industrial chemical.

2. Legitimate purpose (s28 (b))

The new strict liability offence is intended to deter people from failing to comply with scheduling decisions for industrial chemicals. The IChEMS are central in supporting the prevention of serious detriment to human health and the environment, in turn supporting the right to a healthy environment.

3. Rational connection between the limitation and the purpose (s28 (d))

The use of a strict liability offence is appropriate in this case because the offence only applies to the industrial use of scheduled industrial chemicals or articles or products containing an industrial chemical. It is expected that persons or entities who deal with

industrial chemicals for industrial purposes, and to which this offence applies, know or ought to know their legal obligations. There is an assumption of responsibility by the regulated industry.

The use of strict liability offences in the amendments is consistent with similar existing offences in the EP Regulation (e.g. agvet chemical products, s55 and s55A of the EP Regulation) and in comparable regulatory schemes in other jurisdictions.

4. *Proportionality (s28 (e))*

The strict liability offence is relatively narrow in scope. It does not apply to a person or an entity contravening a risk management measure applying the IChEMS Minimum Standards. Exceptions also apply to the manufacture and use of an industrial chemical or an article or product containing an industrial chemical for purposes that do not include an industrial use by any person.

The penalties are proportionate and reasonable for offences of a regulatory nature. It aligns with the Guide to Framing Offences' recommendation that offences in subordinate instruments (such as a Regulation) should be no more than 20 penalty units (or 30 penalty units in exceptional cases).

In addition, Section 23 (1) (b) of the *Criminal Code 2002* (the **Criminal Code**) provides a specific defence to strict liability offences of mistake of fact. Section 23 (3) of the Criminal Code provides that other defences may also be available for strict liability offences, which includes the defence of intervening conduct or event, as provided by section 39 of the Criminal Code.

SCRUTINY COMMITTEE PRINCIPLES

The Amendment Regulation and explanatory statement has been developed in accordance with the Standing Committee on Legal Affairs (Legislative Scrutiny Role) principles and technical and stylistic standards expected by the Assembly.

CLAUSE NOTES

Clause 1 Name of regulation

This clause names the Amendment Regulation as the *Environment Protection (Industrial Chemicals) Amendment Regulation 2025 (No 1)*.

Clause 2 Commencement

This clause provides that the Amendment Regulation commences 6 months after its notification day.

Clause 3 Legislation amended

This clause provides that the Amendment Regulation amends the *Environment Protection Regulation 2005*.

Clause 4 New part 5A

This clause inserts a new Part 5A.

New section 52A provides new definitions for Part 5A as follows:

- end use
- IChEMS register
- IChEMS scheduling decision
- industrial chemical
- industrial use

New section 52B provides that an industrial chemical or an article or product containing an industrial chemical listed in the IChEMS register, schedules 6 and 7, is taken to cause environmental harm if it enters the environment, unless it is manufactured or used in accordance with all applicable IChEMS scheduling decisions for the industrial chemical in the IChEMS register, schedules 6 and 7.

This provision is relevant for determining when certain offences may apply under new section 52C.

This section is relevant to provisions under the *Environment Protection Act 1997* which make it an offence for a person to pollute the environment causing environmental harm.

New section 52C provides for compliance with scheduling decisions for industrial chemicals. It provides that a person must comply with an IChEMS scheduling decision that specifies that the manufacture of an industrial chemical or an article or product containing an industrial chemical is prohibited or restricted; or that an end use for an industrial chemical or of an article or product containing an industrial chemical is prohibited or restricted; or a risk management measure for an industrial chemical or end use of an industrial chemical; or a risk management measure for an article or product containing an industrial chemical.

The Industrial Chemicals Environmental Management (Register) Instrument 2022 (IChEMS Register) establishes a register of scheduling decisions for relevant industrial chemicals under the *Industrial Chemicals Environmental Management (Register) Act 2021*.

The Register has 7 Schedules as follows, noting no industrial chemicals have been listed for schedules 4 and 5 at this stage.

- 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.

IChEMS Minimum Standards are part of all schedules and were agreed to by Commonwealth, State and Territory environmental regulators as published by the Australian Government's Department of Climate Change, Energy, the Environment and Water and as existing from time to time.

This provision is relevant for determining when certain offences may apply under sections 52D and 52E of the regulation.

New subsection 52D(1) provides that it is a strict liability offence for a person to engage in conduct that contravenes an IChEMS scheduling decision mentioned in Section 52C, other than a risk management measure applying the IChEMS Minimum Standards. It determines tiering penalties according to the schedule the industrial chemical is listed under, accounting for the likelihood and severity of the environmental harm the industrial chemical can cause.

New sections 52D(2) provides that an exception provided in an IChEMS scheduling decision is taken to be an exception to an offence against subsection 52D(1). For example, some scheduling decisions include exceptions to the import, export, manufacture and use of certain industrial chemicals for research or laboratory purposes.

New subsection 52D(3) provides additional exceptions against subsection 52C(1), more specifically to the manufacture and use of an industrial chemical or an article or product containing an industrial chemical for purposes that do not include an industrial use.

This provision is relevant to ensure the strict liability offence under subsection 52C(1) only applies to the industrial use of scheduled industrial chemicals or articles or

products containing an industrial chemical i.e., to persons or entities who know or ought to know of their legal obligations.

New subsection 52E (1) provides that it is an offence for a person to engage in conduct that contravenes an IChEMS scheduling decision mentioned in Section 52C that is a risk management measure applying the IChEMS Minimum Standards. It determines tiering penalties according to the schedule the industrial chemical is listed under, accounting for the likelihood and severity of the environmental harm the industrial chemical can cause.

New subsection 52E (2) provides exceptions against subsection 52E (1), more specifically to the manufacture and use of an industrial chemical or an article or product containing an industrial chemical for purposes that do not include an industrial use.

Clause 5 Dictionary, new definitions

This clause provides the cross referencing for the new definitions for Part 5A.