



Australian Government

Department of Health and Ageing
NICNAS

NICNAS's ENFORCEMENT POLICY

This policy provides guidance to industry about our principles and approaches to enforcement and the tools available to NICNAS when taking enforcement action.

The aim of this policy is to provide a consistent framework for decisions by NICNAS to refer non compliance for investigation and prosecution or to take other enforcement action.

This document is not a legal document and should not be relied on as such. It is provided for the purposes of information and does not limit the discretion of NICNAS to take any action it sees fit under the *Industrial Chemical (Notification and Assessment) Act*, 1989 and associated legislation. It reflects the current policies of NICNAS, which may change from time to time, with all changes being notified publicly. Please contact your solicitor for legal advice.

Introduction

The National Industrial Chemicals Notification and Assessment Scheme (NICNAS) is the Australian Government's regulatory body for industrial chemicals. It was established in 1990 under the *Industrial Chemicals (Notification and Assessment) Act 1989* (the Act) to aid in the protection of people at work, the public and the environment from the harmful effects of industrial chemicals.

ENFORCEMENT POLICY

NICNAS's enforcement policy determines the way NICNAS uses its powers to regulate the industrial chemicals industry. NICNAS ensures its integrity is maintained by working in partnership with the chemical industry and maintaining community trust in the scheme. It must also use its powers in a way that is, and is seen to be, firm, fair and consistent. If enforcement action is considered necessary, NICNAS will ensure that the principles of procedural fairness are applied.

The primary objectives of NICNAS's enforcement activities are to:

- protect the community, industry and the environment by ensuring that importers, manufacturers and exporters of industrial chemicals comply with the Act;
- educate the industry about their regulatory obligations through fostering a spirit of cooperation and partnership; and

- take appropriate enforcement action against those who deliberately contravene the Act or those who flagrantly disregard their regulatory obligations.

Our Principles

In most cases our Compliance Officers will act in an informal way when dealing with those who have duties under the legislation . If enforcement action is deemed necessary, an appropriate response will be determined and applied. This response will depend on the seriousness of the breach.

NICNAS will:

- consult the industry and the community on the development of clear guidelines and regulatory requirements;
- provide information and advice in plain language on the rules we apply. We will disseminate this information as widely as possible;
- work actively with industry especially small and medium sized businesses, to assist them to comply with the Act;
- make compliance as straightforward as possible by ensuring that any action we require is proportionate to the risks; and,
- carry out its duties in a fair, equitable and consistent manner.

ENFORCEMENT TOOLS

NICNAS takes enforcement action when it detects non-compliance with obligations imposed by the Act. The tools available to NICNAS in taking enforcement action are:

1. Informal Action:

- advice;
- warning;
- requiring a person to provide information;
- inspection;
- revoking permit certificates.

2. Formal Action:

- injunctions;
- prosecution.

DECIDING TO TAKE ENFORCEMENT ACTION

NICNAS officers may identify non-compliance through their own monitoring and audit activities, for example when issuing a Compliance Notice following an inspection. Information with regard to alleged instances of non-compliance may also come from the industry or the community and any such allegations will be followed up by NICNAS. All allegations of non compliance are checked to determine whether a contravention of the Act has occurred.

NICNAS may opt to terminate a preliminary inquiry or an investigation with a recommendation that no further action be taken, for example, if the identity of the

alleged offender cannot be ascertained or if there is insufficient evidence to establish that non-compliance took place.

IMPARTIALITY, CONSISTENCY AND FAIRNESS

Enforcement decisions made by NICNAS must be impartial and must be seen to be impartial. The decision made and action taken should be capable of being justified in terms of this policy. The decision to take enforcement action will not be influenced by:

- the race, sex, national origin or political association, activities or beliefs of the non compliant person;
- personal feelings of NICNAS officers concerning the non compliant person or any other individual who has been affected by that person's acts;
- possible political advantage or disadvantage to the Government or any political group or party;
- public perception or the possibility of public, industry or political criticism; or,
- the possible effect of the decision on the personal or professional circumstances of those responsible for the decision.

INFORMAL ENFORCEMENT ACTION

Circumstances where informal enforcement action is appropriate

Informal enforcement action is appropriate where the following factors are present:

- the non compliance was inadvertent and not deliberate;
- the non compliant person has a constructive attitude to complying with the regulatory obligations;
- the non-compliant person has not previously been involved in similar instances of non compliance; and/or,
- it is determined that informal enforcement action will provide an adequate deterrent effect.

Circumstances where informal enforcement action is not appropriate

Informal enforcement action is generally not an appropriate response to serious contraventions of the Act (for example: introducing a new chemical without a valid certificate, knowingly or recklessly) where the following factors are present:

- the contravention is deliberate or demonstrates reckless disregard of the rules
- the contravention is part of a pattern of contraventions committed by the person; and/or,
- the contravention seriously endangers human health or the environment.

FORMAL ENFORCEMENT ACTION (PROSECUTION)

NICNAS should investigate, with a view to referring the matter to the Commonwealth Director of Public Prosecutions (DPP), any contraventions that:

- are deliberate and serious or demonstrate a reckless disregard of the Act;
- form part of a pattern of similar contraventions; and/or,
- seriously endanger human health or the environment.

In any matter where an investigation results in findings of admissible, reliable and substantial evidence of a contravention of the type referred to above, the matter will be referred to the DPP for prosecution.

It is inevitable that a prosecution will impact on the rights of the alleged offender and the community generally. The decision to continue a prosecution is important and takes into account factors beyond those that influence an investigator. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system. To apply the law in a fair and impartial manner, it is necessary to consider:

- a) the rights of the alleged offender;
- b) the interests of the Australian Government; and,
- d) the interests of the community.