



Australian Government

**Department of Agriculture,
Water and the Environment**

Submission on the Industrial Chemicals Environmental Management (Register) Bill 2020 and related Bills

Senate Environment and Communications Legislation
Committee Inquiry

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Contents

Purpose of this submission	3
Context	3
Establishing the National Standard	5
Consultation.....	6
Overview of Bills	7
Industrial Chemicals Environmental Management (Register) Bill 2020	7
<i>Instruments</i>	7
<i>Decisions</i>	8
<i>Advisory Committee</i>	8
<i>Consultation and information gathering</i>	8
<i>Sharing and protecting information</i>	9
<i>Sunsetting and disallowance of instruments under the Bill</i>	9
Related Bills.....	10
Implementing decisions under ICEMR	10
Attachment A: Case Study – PFAS	11
Attachment B: Outline of ICEMR decision-making	12

Purpose of this submission

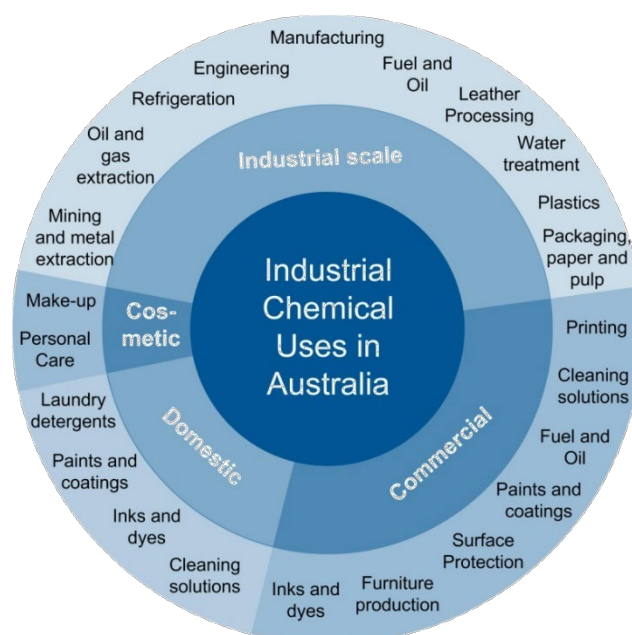
The Department of Agriculture, Water and the Environment (the department) is pleased to provide this submission for consideration by the Senate Environment and Communications Legislation Committee.

This submission provides further context for the Industrial Chemicals Environmental Management (Register) Bill (ICEMR) and related bills, highlights the extensive consultations that have occurred to develop the regulatory approach, and summarises the intended operation of the Bill, including its interaction with other relevant Commonwealth, state and territory legislation.

Context

Industrial chemicals play important roles in the Australian economy. There are more than 40,000 industrial chemicals able to be used in Australia. Their uses include plastics, packaging, cleaning products and cosmetics, IT equipment, paints and dyes, furniture and flooring. They are also used in water treatment, oil and gas extraction, mining, refrigeration and other industrial processes.

A small but significant proportion of chemicals can cause harm if they are not managed properly. When they accumulate in our soil, the air we breathe, our water and food, they can damage the health of the environment and everything that lives in it – including humans.

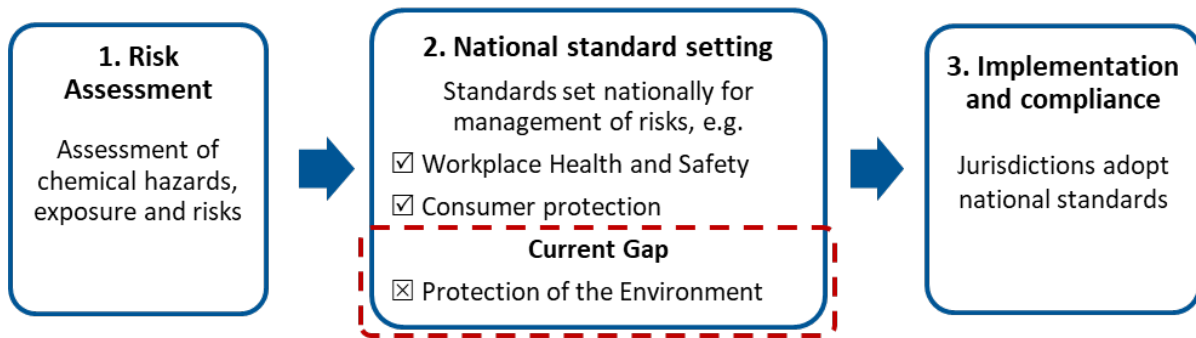


In Australia, responsibility for regulating industrial chemicals is shared between the Commonwealth and state and territory governments. Gaps and inconsistencies in the regulation of industrial chemicals have been recognised for many years, and there has been broad support for improving the way that human health and environmental risks are regulated and managed nationally. The regulation of PFAS (per- and polyfluoroalkyl substances), chemicals used in a range of everyday products as well as firefighting foams, is a good example of inconsistencies across jurisdictions (see Attachment A).

In 2006, the Council of Australian Governments (COAG) identified regulation of chemicals and plastics as a priority area for review and improvement. The Productivity Commission released the [Research Report on Chemicals and Plastics Regulation](#) in 2008. The report highlighted that management of environmental risks from industrial chemicals across Australian jurisdictions is fragmented and inefficient, and less effective than other chemical risk management regimes such as those for public and worker health and safety. Australia is falling behind comparable OECD countries in meeting international obligations for the management of chemicals.

As outlined in Figure 1 below, there are three main stages to management of industrial chemicals in Australia.

Figure 1: Australia's industrial chemicals management framework



1. *Risk Assessment* - The Australian Industrial Chemicals Introduction Scheme (AICIS; formerly the National Industrial Chemicals Notification and Assessment Scheme) undertakes scientific assessments and evaluations of industrial chemicals introduced (imported and manufactured) and used in Australia under *the Industrial Chemicals Act 2019*. AICIS provides information and recommendations about managing risks to prevent harm to the environment and human health.
2. *National standard setting* – There are existing national standard setting regimes for managing risks from industrial chemicals to public and worker health and safety (e.g. the Poisons Standard and Work Health and Safety Regulations). These regimes establish systems for scheduling chemicals with corresponding risk management approaches to be adopted by states and territories. There is currently no national standard setting framework for managing environmental risks of industrial chemicals.
3. *Implementation and compliance* – The Commonwealth and states and territories adopt standards into their respective regulatory frameworks, and are responsible for implementation and compliance within their own jurisdictions.

As there is currently no national standard-setting regime for managing the environmental risks from industrial chemicals, individual jurisdictions must separately determine if and how chemicals should be managed to protect the environment. This can result in additional costs and duplication of effort for industry (due to the need to negotiate multiple regulatory approaches), and inconsistent or inadequate protection of the environment across jurisdictions. The current system offers neither robust and reliable environmental outcomes, nor an efficient or cost-effective regulatory regime for industry. These problems were discussed in more detail in the Productivity Commission's 2008 Report.

In 2015, Australian environment ministers reviewed options for establishing a standard-setting framework in a [COAG Decision Regulation Impact Statement](#). They agreed to *establish a National Standard for environmental risk management of industrial chemicals (the National Standard) under Commonwealth legislation with automatic adoption under jurisdictional legislation for implementation and compliance*.

The Industrial Chemicals Environmental Management (Register) Bill 2020 delivers on the approach agreed by environment ministers and the recommendation of the Productivity Commission to fill this regulatory gap through the National Standard.

Establishing the National Standard

The National Standard provides a nationally consistent approach to the management of risks to the environment resulting from the use of industrial chemicals. It fills the current gap in Australia's industrial chemicals risk management framework.

The objectives of the National Standard are:

- to achieve better protection of the environment through improved management of the environmental risks posed by industrial chemicals
- to provide a nationally consistent, transparent, predictable and streamlined approach to environmental risk management of industrial chemicals for governments, industry and the community.

The National Standard covers industrial chemicals as defined under the Industrial Chemicals Act. It focuses on environmental hazards and risks from industrial chemicals and their uses, and lifecycle management of the risks identified for those chemicals in Australia.

The concept of the National Standard is similar to the existing national standard setting regimes for industrial chemicals – the scheduling systems of the Poisons Standard and Work Health and Safety Regulations. The National Standard will provide a single set of national outcomes-based measures for managing environmental risks from industrial chemicals in Australia. It will remove the need for states, territories and the Commonwealth to individually determine appropriate risk management responses. It will also provide industry and other stakeholders with a 'single source of truth' on the management requirements for particular chemicals and their uses. States, territories and the Commonwealth will adopt the decisions in their own regulatory frameworks, and implement them through their respective on-ground management, compliance and enforcement activities.

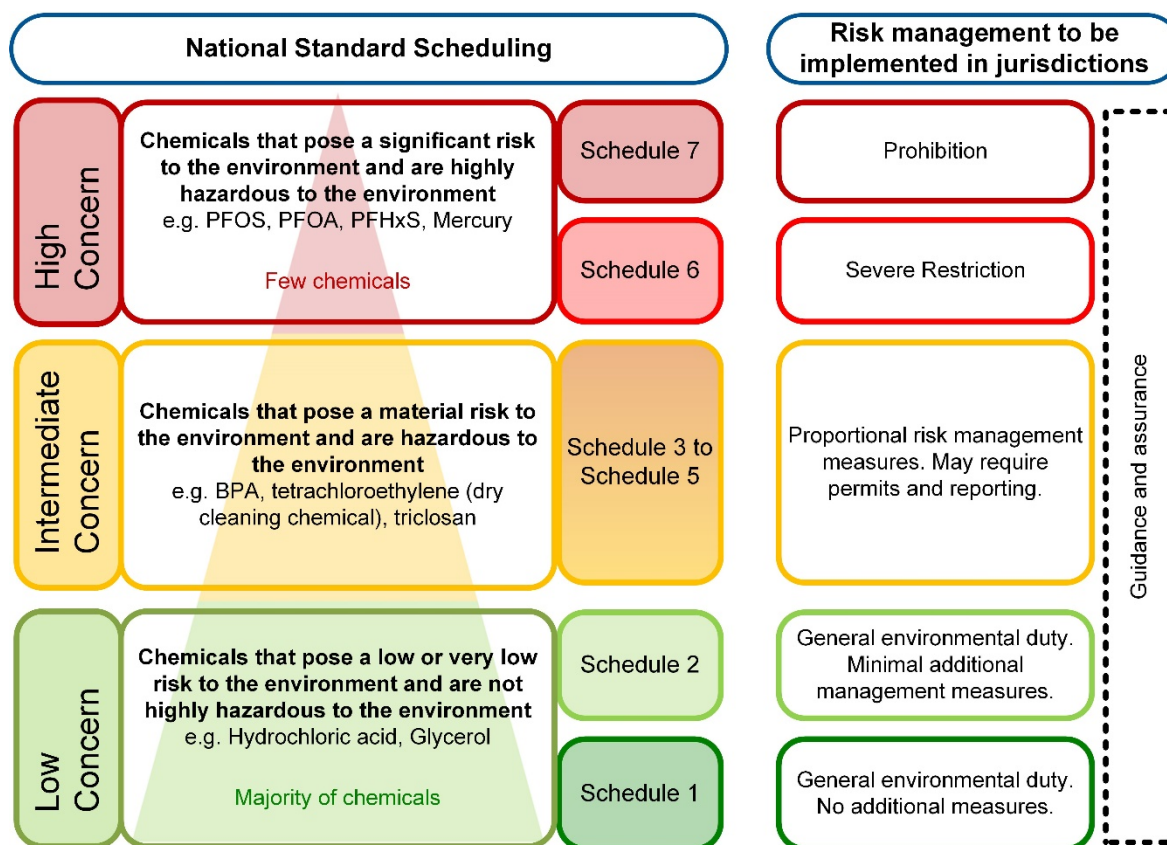
Decisions under the National Standard will set science-based standards by:

- categorising chemicals according to their level of concern to the environment based on established risk-based criteria
- identifying proportionate, outcomes-based risk management measures that will ensure chemicals do not cause harm to the environment throughout their intended lifecycle.

The National Standard will assign industrial chemicals to one of seven categories (schedules) according to their level of concern¹ to the environment. The higher the schedule, the more stringent the risk management controls required. The general structure of the National Standard is outlined in Figure 2. More information can be found on the department's [website](#).

¹ Concern includes consideration of the risk to the environment, the inherent hazard characteristics of a chemical substance, and relevant social and economic impacts for a chemical's use.

Figure 2: Structure of the National Standard



Consultation

The development and design of the legislative framework has been informed by extensive stakeholder consultation. The Australian Government has been collaborating on this reform with state and territory governments and industry groups for over a decade. The department has worked closely with the Department of Health to align the National Standard for environmental risk management of industrial chemicals with the Industrial Chemicals Act and the operations of AICIS.

Consultation has included publication of regulation impact statements, two national roadshows in Australian capital cities, working with stakeholders on the criteria for decision-making and risk management responses, and numerous meetings with industry, community groups and states and territories over the years.

An exposure draft of the Industrial Chemicals Environmental Management (Register) Bill 2020 and supporting information was released for public comment in January 2020. Eleven submissions were received, and feedback incorporated into the final legislative package.

There is broad support for the National Standard and its objectives. The department continues to work with stakeholders, particularly in developing the instruments and operational policy, prioritising chemicals for consideration under the Bill, and ensuring national consistency implementing the reforms across jurisdictions. Consultation with affected stakeholders will be ongoing as the Bill provides for mandatory consultation on decisions and decision-making criteria (known as the Principles).

Overview of Bills

Industrial Chemicals Environmental Management (Register) Bill 2020

The Industrial Chemicals Environmental Management (Register) Bill 2020 (ICEMR Bill) is the primary Bill in the legislative package. It provides the legislative basis to establish the National Standard.

The Bill allows the Environment Minister to make scheduling decisions. Scheduling decisions list industrial chemicals, or a particular use of an industrial chemical, in schedules according to their level of concern to the environment and prescribe measures to manage any risks they may pose. Risk management measures will set controls for the safe use, handling and disposal of the chemical. They can outline obligations, or prohibitions or restrictions on conduct. A standard suite of risk management measures is being developed in cooperation with states and territories, and consultation with stakeholders. These measures will be outlined in policy.

Scheduling decisions will not be enforceable on their own; the Register will be adopted by the jurisdictions in their own existing regulatory frameworks, which will provide for the implementation and enforcement of the scheduling decisions.

Attachment B: Outline of ICEMR decision-making provides a diagrammatic overview of the decision-making process.

Instruments

Once the ICEMR Bill has come into force, the Minister will make two legislative instruments:

- Industrial Chemicals Environmental Management (Register) Principles (the Principles)
- Industrial Chemicals Environmental Management (Register) Instrument (the Register).

The Principles will set out criteria for deciding which Schedule of the Register an industrial chemical (or particular use of an industrial chemical) should be assigned to, according to its level of concern to the environment. These criteria are called risk characteristics. Stakeholders have already been consulted extensively on the draft Principles and the Bill requires a further mandatory 20-business day public consultation period before the Minister makes, varies or revokes the Principles. The making of the Principles is expected to take place shortly after passage of the Bill. Draft Principles can be found on the department's [website](#).

The Register will record the scheduling decisions that the Minister has made. It will be a publicly available source of information on the potential risks posed by the uses of industrial chemicals and will list any risk management measures that are necessary to manage those risks. The higher the level of concern a chemical poses to the environment, the higher the schedule it is likely to be listed in (1 to 7). An example of the Register can be found on the department's [website](#).

Decisions

The Minister as the decision maker

The ICEMR Bill, like many pieces of environmental legislation, involves the weighing of environmental, social and economic considerations, in addition to technical matters. Some decisions may have wide-ranging socio-economic elements, including international and trade implications, that mean they are appropriately made by a Minister. It is envisaged that more routine or process-related decisions will be delegated to departmental officers.

Making scheduling decisions

When making a scheduling decision, the Minister *must* comply with the Principles. The Minister must also have regard to relevant information, including the most recent scientific risk assessment undertaken under the Industrial Chemicals Act, risks a chemical may pose to the environment and how they may be minimised, advice from an Advisory Committee (see below), relevant international obligations, and submissions and information received through consultation and information gathering.

The Minister may also have regard to other discretionary considerations when making a scheduling decision. These include other risk assessments and any environmental, social or economic matters relevant to the scheduling decision.

Scheduling decisions are expected to commence around four to six months following passage of the Bill to allow for consultation on and the making of the Principles and Register. State and territory governments are awaiting the establishment of the National Standard and are preparing to implement scheduling decisions once the legislation is in force.

Attachment A illustrates how scheduling the chemicals known as per- and poly-fluorinated substances (PFAS) under the ICEMR Bill would improve the management of risks these chemicals pose to the environment.

Advisory Committee

The ICEMR Bill will establish an Advisory Committee. The functions of the Advisory Committee will include advising the Minister on matters related to making, varying or revoking scheduling decisions and the Principles. The Advisory Committee's primary role is to provide expert advice to the Minister, including scientific advice and advice on socio-economic impacts. Its role will be important where consideration of particularly complex information is required to make appropriate risk management decisions.

The Advisory Committee will consist of a Chair and at least 3, and not more than 8, other members. Members of the Advisory Committee will be appointed based on their experience and expertise in relevant fields. The Committee must be comprised of members with a range of expertise including industrial chemistry, ecotoxicology, environmental risk management, environmental health, human toxicology, applied socio-economic analysis, ecology, chemical regulation, and environmental regulation.

Consultation and information gathering

The Minister must consult with the public for at least 20 business days before making a scheduling decision. One exception is for newly introduced chemicals that have received an assessment certificate under the Industrial Chemicals Act. Consultation is not mandatory in

this case because appropriate consultation will generally have already been undertaken under the Industrial Chemicals Act, and information on these chemicals is often confidential business information. The Minister still has the power to undertake consultation where appropriate.

The Minister may also request that a person provide information relevant to the making of a scheduling decision should they choose, or put out a public call for information.

The Minister may consult with state and territory environment ministers before making a scheduling decision. This is not mandatory, because the ICEMR Principles (which are developed in consultation with states and territories, and which must be complied with), are designed to ensure the Minister can make streamlined, consistent decisions without needing to consult states and territories on every occasion. This prevents unnecessary delays in reaching regulatory outcomes, providing certainty for businesses.

Sharing and protecting information

The ICEMR Bill provides mechanisms for receiving and sharing information (such as chemical assessment information received under the Industrial Chemicals Act), protecting information, and for the use and disclosure of protected information in limited circumstances.

These provisions allow the Minister to decide whether to publicly release information based on a weighing of the commercial interests of companies in keeping specific information confidential against the public interest in information being made available. The Bill also ensures that companies are consulted on proposed decisions to release information and have rights to reconsideration and review of decisions.

It would also be an offence for a person entrusted with protected information to use or disclose that information in a way that is not allowed for under the Bill. This ensures that companies can have confidence that their information will be treated appropriately.

Sunsetting and disallowance of instruments under the Bill

The Principles, Register and rules are exempt from disallowance and sunseting because of the operation of the *Legislation Act 2003* (Legislation Act). The ICEMR Bill facilitates the establishment and operation of an inter-governmental scheme involving the Commonwealth and one or more states or territories and authorises the Principles, the Register, and the Rules to be made for the purposes of the scheme. Where this is the case:

- subsection 44(1) of the Legislation Act provides that legislative instruments will not be subject to disallowance
- subsection 54(1) of the Legislation Act provides that legislative instruments will not be subject to sunseting.

The Principles represent a key component of the National Standard and will be developed in collaboration with the states and territories, and consultation with stakeholders. Were they to be subject to disallowance or sunseting, the collaborative interjurisdictional effort that went into the development of the National Standard could be undermined. Subsections 44(1) and 54(1) of the Legislation Act ensure the integrity of these interjurisdictional schemes is maintained.

If the Register were subject to sunseting, this would undermine the certainty that the scheme provides for industry and governments. The potential for hundreds of scheduling decisions for

industrial chemicals to sunset at the same time would create significant administrative burden. In turn, this would increase costs for industry, as the scheme will be fully cost recovered. Provisions in the ICEMR Bill allow for scheduling decisions to be reviewed and varied or revoked as necessary. It is more appropriate that this be undertaken as needed in response to technological and scientific advancements, rather than in response to sunseting.

Related Bills

It is intended that the administration of the ICEMR Bill in the Commonwealth will be cost recovered in accordance with the Australian Government Charging Framework. This decision was included in the July 2020 Economic and Fiscal Update.

The ICEMR Bill and related bills set up the framework to cost recover by providing for a scheduling charge to be imposed on introducers of industrial chemicals (importers or manufacturers). It is intended that the scheduling charge will be a levy, and that it will be collected by AICIS on behalf of the department alongside existing charging arrangements under the Industrial Chemicals Act. This is intended to streamline the cost-recovery process and minimise administrative burden for industry. The Industrial Chemicals Legislation Amendment Bill 2020 allows for the Executive Director of AICIS to undertake the collection of charges for the ICEMR Bill. Charging is expected to commence on 1 September 2021, however this is dependent on passage of the Bill and sufficient time to finalise consultation on charging arrangements and make the charging regulations. A 1 September commencement is in line with the AICIS registration year under the Industrial Chemicals Act.

The rates for charges will be established through regulations if the Bill is passed, following consultation with industry. This will include the development of a Cost Recovery Implementation Statement.

Implementing decisions under ICEMR

Jurisdictions will adopt scheduling decisions listed on the Register through their respective regulatory regimes, as agreed by environment ministers in 2015, making them responsible for implementation and compliance. The ICEMR framework is designed to provide confidence to industry and users of industrial chemicals that by undertaking the measures outlined in the scheduling decision on the Register, their activities should not harm the environment, and that they will be compliance with relevant regulations regardless of where in Australia they are using the chemical.

Scheduling decisions are anticipated to commence four to six months following passage of the Bill. Scheduling decisions will become enforceable when given effect under jurisdictional legislation. The department has been working closely with states and territories to ensure consistent implementation of the National Standard. Each state and territory will integrate the Register into the laws that protect Australia's environment and people. This work is ongoing, and this collaborative effort will ensure a nationally consistent, predictable and streamlined environmental management framework for industrial chemicals.

The Australian Government is committed to implementing the Register in areas of Commonwealth responsibility. This includes developing new legislation for the use, handling and disposal of chemicals on Commonwealth land, as well as improving controls on introduction of high concern chemicals into Australia.

Attachment A: Case Study – PFAS

What are PFAS?

PFAS stands for 'per- and polyfluoroalkyl substances', a group of over 4000 chemicals.

PFAS are used in a range of everyday products like carpets, non-stick cookware, and packaging. However the most well-known use of PFAS in Australia is in firefighting foams. Some high concern PFAS were used historically in firefighting foams at Australian defence bases, civilian airports, and firefighter training grounds.

Why are they a problem?

Some PFAS are recognised globally as chemicals of high concern - for example through the Stockholm Convention.

If released into the environment these PFAS:

- do not fully break down (persistent)
- are mobile in soil and water (can travel long distances in the environment)
- bioaccumulate in organisms, and
- are toxic to organisms including fish and rodents



How are PFAS managed currently?

Risk Assessment

AICIS has published risk assessments on the different PFAS used in firefighting foams. These assessments distinguish between the PFAS of highest concern (having all the 'problematic' properties) and those of lower concern.

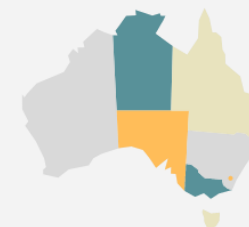
AICIS also prohibits the import and export of some PFAS unless an approval is obtained.

National Standard Setting

Because there are no national standards for managing the environmental risks of PFAS, different jurisdictions have implemented different management controls.

Implementation and compliance

Some jurisdictions have banned all PFAS in firefighting foams, others are regulating a smaller subset of PFAS, while others have no regulatory management controls.



What difference could the National Standard make?

Risk Assessment

The National Standard could use the existing (or future) information published by AICIS to schedule the different PFAS.

National Standard Setting

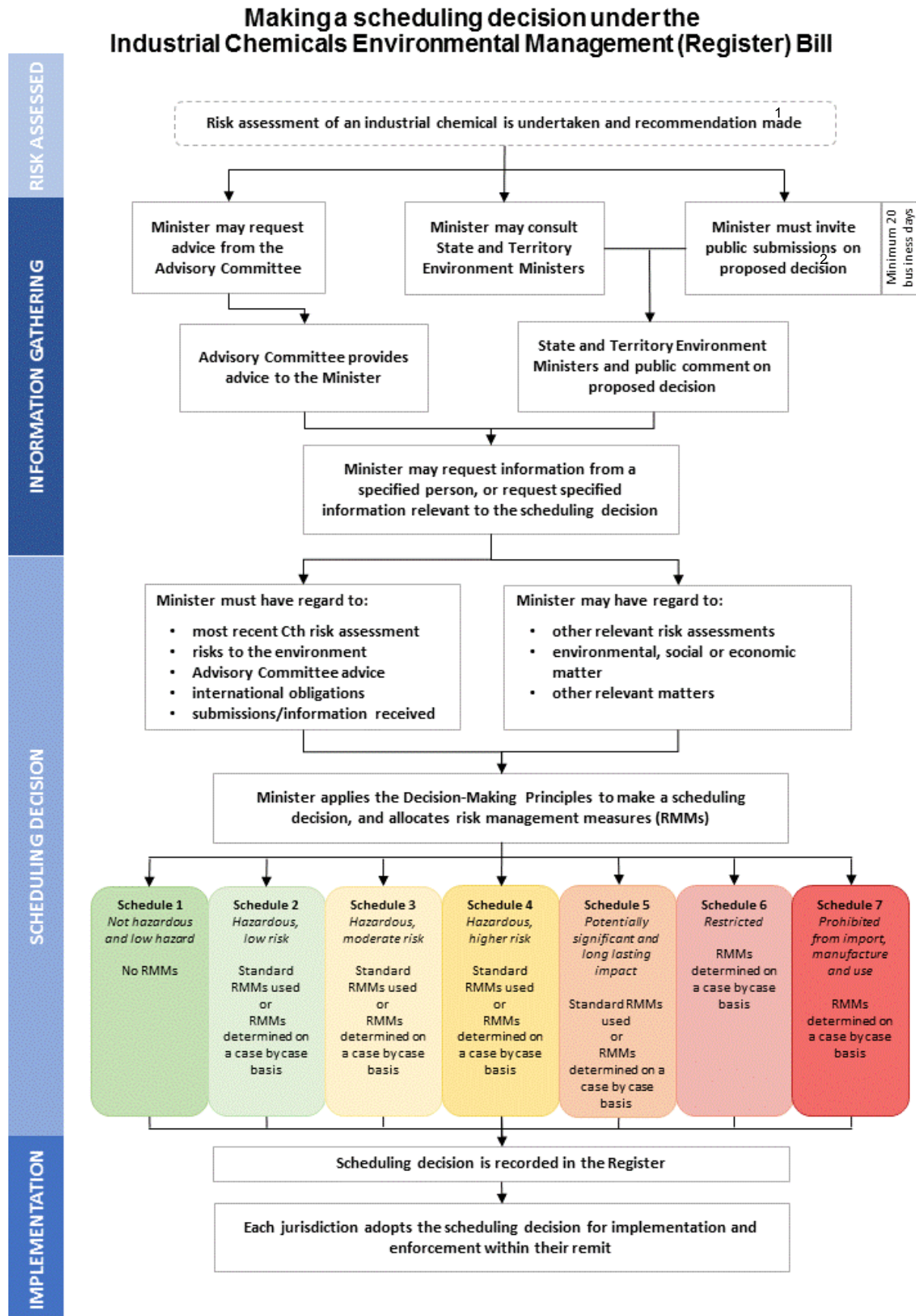
Scheduling decisions could differentiate between the PFAS of highest concern, and those of lower concern, and describe the appropriate controls necessary to manage the environmental risks. Industry would be consulted during the decision making process.

Implementation and compliance

Once scheduled, jurisdictions would use their own regulatory frameworks to implement the controls. This would lead to national consistency in the way PFAS are managed.



Attachment B: Outline of ICEMR decision-making



¹Existing processes through AICIS

²Except for chemicals with an assessment certificate issued by AICIS then the Minister is not required to consult