Australian Government
Productivity Commission

Chemicals and Plastics Regulation

Supplement to Research Report

January 2009

Lessons for National Approaches to Regulation

ISBN 978-1-74037-272-5

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An appropriate citation for this paper is:

Productivity Commission 2009, *Chemicals and Plastics Regulation: Lessons for National Approaches to Regulation*, Supplement to Research Report, Melbourne

JEL code: D, K

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Foreword

The Productivity Commission has recently completed a study of the regulation of chemicals and plastics in Australia. This is a complex area. It involves the Commonwealth and all states and territories and it cuts across many different aspects of public policy including public health, workplace safety, environment protection and national security.

Given that most of the problems that the various regulations address are not unique to any one jurisdiction, national approaches to policy development and standard setting can improve effectiveness and efficiency. The Commission's research report on chemicals and plastics regulation addressed many of these issues and proposed reforms to improve the regulatory framework. In this supplementary paper the Commission elaborates on the federalism issues arising in the research report and identifies a number of mechanisms that Australian governments have used to coordinate national approaches to regulation. The paper describes the governance arrangements, institutions, procedural mechanisms and incentive structures, assesses their strengths and weaknesses, and draws out some implications for the broader regulatory reform agenda, within the context of Australia's federal framework.

This report has been published as a supplement to the research study undertaken by the Commission into chemicals and plastics regulation.

Gary Banks AO
Chairman

January 2009

Key points

- The Productivity Commission has recently completed a research report on the regulation of chemicals and plastics in Australia. In most cases, national approaches to regulation were found to deliver significant benefits compared with each state and territory pursuing its own approach. This supplementary paper provides a more detailed examination of some of the features of these national arrangements.
- National approaches to regulation should draw on the strengths of each level of government:
  - Commonwealth, state and territory governments acting together through Ministerial Councils or other forums can provide leadership and policy frameworks for national issues.
  - The Australian Government may be best placed to play a role in policy coordination, and to undertake national risk assessments.
  - State and territory governments are often best placed to enforce regulations and respond to the needs of sub-national constituencies.
- Improvements in national consistency can be achieved through a range of mechanisms, including through jurisdictions:
  - adopting uniform regulations
  - harmonising key elements of their regulatory frameworks
  - mutually recognising other jurisdictions' regulations.
- In chemicals and plastics, the most common legislative mechanisms for achieving national consistency have been to use template or model legislation, regulations and codes of practice. The template and model approaches can be effective, but both have their weaknesses.
- Because the process of developing and implementing nationally-consistent regulations can be costly and drawn out, reform should only be pursued where there are prospects of material net benefits.
- In the past, the Commonwealth has provided incentives for state and territory governments to forgo some sovereignty so as to achieve the benefits of national consistency. This approach was effective in encouraging and enabling the reform process.

National approaches to regulation: some lessons from chemicals and plastics

The Productivity Commission has recently completed a study of the regulation of chemicals and plastics in Australia. Some of the regulatory issues facing that industry stem from Australia's federal system of government, and it is within that system that their solutions must also be found. This supplementary paper draws some lessons from the study that can be used to help develop the future framework for national approaches to regulation.

The Commonwealth Government asked the Commission to undertake the study — and propose ways to streamline and harmonise the system — to provide input for a Council of Australian Governments (COAG) Ministerial Taskforce on Chemicals and Plastics Regulatory Reform.

The Commission identified a range of issues, including inconsistency, overlaps and duplication across different regulations that are impairing the effectiveness of the regime, the efficiency of its administration, and the wider efficiency of the industry. It concluded that greater national consistency would have significant benefits for businesses and the broader community.

1. Reforming regulation

1.1 Background and policy context

Over the last quarter of a century, microeconomic reforms have made the Australian economy more productive and efficient and have led to increased standards of living. Previous rounds of reform focused on opening the Australian economy to the world (in the 1980s), and enhancing competition in domestic markets (in the 1990s). COAG has agreed that the next round of reform should include a focus on reducing the regulatory compliance and administrative costs being incurred by businesses and governments.

Regulation can improve the wellbeing of the community where it effectively and efficiently addresses economic or social issues and is the best means of doing so.

However, in some cases, regulations impose an excessive burden on the community, either because they are poorly designed or implemented, or because there are better forms of intervention available.

While it is difficult to quantify these costs with any certainty, the Commission has estimated that the costs to businesses, government and the economy as a whole of complying with regulation 'could be at least as high as 4 per cent of GDP per year — up to $35 billion in 2005-06' (Productivity Commission 2006, p. 153). Evidence from Australia and overseas suggests that reform could reduce the costs of regulation by between 15 and 25 per cent. The Commission stated:

> If a 20 per cent reduction in Australian compliance costs were to be achieved … this would result in a saving of as much as $8 billion in 2005-06 (0.8 per cent of GDP per annum). (PC 2006A, p. 153)

Chemicals and plastics regulatory reform

COAG's regulatory reform agenda identified chemicals and plastics regulation as one of the 'hotspots' that required urgent attention (box 1.1). As a consequence, in July 2007 the Australian Government requested the Commission to:

> Investigate and document the current system of regulation of chemicals and plastics in Australia, including the interrelationships between the Australian, State and Territory government agencies, and local government layers of regulation, and the effect of these relationships on economic, public health and safety, occupational health and safety, and environmental outcomes. (PC 2008a, p. v)

And to:

> … identify measures that could be introduced to achieve a streamlined and harmonised system of national chemicals and plastics regulation and any alternatives to regulation. (PC 2008a, p. v)

Box 1.1 **COAG regulatory reform priorities**

Following its meeting on 26 March 2008, COAG issued a communiqué that, among other things, proposed regulatory reform to reduce the burden on business. It was agreed that national harmonisation of occupational health and safety laws was a top priority. In addition COAG:

- sought early action on 12 'hotspots':
  - environmental assessment and approvals bilaterals; payroll tax administration; trade licences; the Health Workforce Intergovernmental Agreement; national trade measurement; rail safety regulation reform; the consumer policy framework; product safety; trustee companies; mortgage credit and advice; margin lending; and, non-deposit taking institutions
- stated that it would pursue significant progress in five other 'hotspots':
  - development assessment; building regulation; chemicals and plastics regulatory reform; Australian Business Number and business names registration; and Personal Property Securities reform
- added nine areas to its reform agenda:
  - standard business reporting; food regulation; a national mine safety framework; electronic conveyancing; upstream petroleum (oil and gas) regulation; maritime safety; wine labelling; directors' liabilities; and financial service delivery

Source: COAG 2008a.

The Commission's study took a broad approach to regulation (box 1.2). It identified several impacts arising from regulatory inconsistencies, duplication and overlaps, including:

- excessive regulatory burdens that are imposing high costs on businesses
- governments facing high costs for administering regulatory regimes
- the confusing array of regulations faced by businesses that are having the perverse effect of undermining compliance
- regulation acting as a barrier to entry to new and smaller businesses
- prescriptive regulations that are inhibiting innovation.

The Commission identified a number of mechanisms that Australian governments have used to coordinate national approaches to regulation within the context of Australia's federal framework. They range from a referral of regulatory powers by the states and territories to the Commonwealth, through to mutual recognition of state and territory regulations. This supplementary paper assesses the strengths and weaknesses of each approach in more detail, and the circumstances where they are judged to be the most appropriate.

Box 1.2 **What is regulation?**

Regulation is a broad term that encompasses a number of legal instruments. Primary legislation refers to Acts of parliament. These may be supported by subordinate legislation, which comprises rules or instruments that have the force of law, but which have been made by an authority to which parliament has delegated part of its legislative power.

Subordinate legislation includes statutory rules, ordinances, by-laws, disallowable instruments (such as regulations), standards and other subordinate legislation not subject to parliamentary scrutiny. Codes of practice or guidelines can provide technical guidance on how to meet regulatory requirements.

1.2 The costs and benefits of national consistency

State and territory governments have the power to make laws relating to much of the manufacture, use and disposal of chemicals and plastics. As explained later, the Constitution of the Commonwealth of Australia (the Constitution) gives the Commonwealth Government little direct power in this area.

In areas where they have retained constitutional power, the states (and in effect the territories, through Commonwealth legislation) may choose to implement their own regulation. Where they consider there are net benefits, they may seek to negotiate with other jurisdictions to develop a more nationally consistent approach. Separate from constitutional considerations, there are some potentially important benefits arising from state level regulation. Decentralised systems can be less prone overall to capture by vested interests, and eight separate, reasonably well-designed sub-national systems might result in a better national outcome compared with a badly-designed single national system.

Moreover, through their separate regulatory regimes, jurisdictions can compete with each other on the quality of regulations. Local innovation, learning from each other, and weeding out undesirable features that limit effectiveness and unduly restrict business, are all features of 'competitive federalism' which, over time, can lead to an overall improvement in the quality of regulations throughout Australia.

In the administration and enforcement of regulatory powers, states and territories may also be able to respond more rapidly and effectively to the needs and circumstances of their constituents than could a national government. However, such flexibility is not incompatible with national policy coordination.

Nationally consistent approaches to regulatory policy can offer significant benefits where:

- there are readily identifiable areas of common interest or sizeable economies of scale and scope arising from central provision or organisation (for example, defence, external affairs and social insurance or savings systems)
- there are significant interjurisdictional spillovers associated with the provision of a good or service at the sub-national level (for example, interstate transport systems)
- a diversity in rules or regulations is likely to give rise to high transaction costs with insufficient offsetting benefits (for example, regulation of companies that operate across state and territory boundaries)
- there is scope for the mobility of capital and labour across jurisdictions to undermine the fiscal strength of the sub-national level of government (for example, where there are differences in tax bases; or welfare entitlements)
- there are benefits from harmonisation with other countries and the capacity to learn from and benchmark our performance against overseas practices that are most likely to be realised when there is a national regime in place
- national security could be undermined by inconsistent approaches to regulation (Banks 2006; PC 2006).

In practice, the process of developing and implementing national approaches to regulation can be costly and drawn out. There is much that must be negotiated, and even with the best of intentions, no guarantee that the agreed approach will be implemented consistently and hence lead to an improvement over existing arrangements. For these reasons, the likely net benefits need to be material, to warrant proceeding in the first place.

1.3 Uniformity, harmonisation or mutual recognition?

In cases where there would be a material net benefit from implementing nationally consistent regulations, Australia's system of federation provides a diverse range of governance frameworks and administrative arrangements to draw on.

At one end of the spectrum is national uniformity, which can be achieved either through the transfer of powers to the Commonwealth, or where all jurisdictions agree to enact the same regulations. National uniformity can deliver economies of scale for governments and firms, reduce transaction costs and enhance competition within the regulated industry. However, achieving uniformity requires significant jurisdictional cooperation.

At the other end of the spectrum is mutual recognition, where a jurisdiction recognises compliance with regulations that apply in other jurisdictions. People or businesses that have satisfied regulations in one participating jurisdiction are deemed to be compliant with the relevant regulations in all participating jurisdictions. Mutual recognition can reduce barriers to interstate trade and can lead to greater competition, while retaining scope for reform through competitive federalism.

Mutual recognition can have higher administrative costs than national uniformity, as each jurisdiction has to develop and administer its own regulations, while also having mechanisms in place to ascertain equivalence of, and compliance with, the recognised regimes of other jurisdictions.

Between uniformity and mutual recognition is a broad range of approaches to harmonisation — the various processes of aligning common elements of the regulatory systems of two or more jurisdictions. They can have some of the benefits of uniform regulation, while being more easily achieved. Harmonisation can provide a common basis for regulation through the adoption of consistent definitions, standards, certification requirements, conformance assessment procedures and other technical measures that underpin regulatory regimes. Furthermore, harmonisation can simplify mutual recognition. However, the compliance and administration costs associated with differing regimes are not fully eliminated under a harmonisation approach.

All of these approaches can reduce the burden of regulation. A decision to pursue uniformity, harmonisation or mutual recognition fundamentally depends on the states and territories recognising that doing so will achieve material net benefits that warrant a national approach at the expense of some reduction in their exercise of sovereignty.

1.4 Barriers to national consistency

In many areas of regulation, a national approach would deliver significant net benefits to the Australian economy and to the community. However, this can be difficult to achieve for a number of reasons.

The Commonwealth Constitution

Under the Constitution, the Commonwealth Parliament has the exclusive power to make laws over only a relatively small number of areas, such as defence, external

affairs and corporations.[1] At Federation the states retained the power to make laws over any area where the Constitution does not specifically grant the power to the Commonwealth. There are a number of areas under section 51 where the Commonwealth can exercise powers concurrently with the states and, under Section 109, if state laws in those areas are inconsistent with Commonwealth laws, the Commonwealth law prevails.

The distribution of powers under the Constitution poses challenges to national reform and places the onus on cooperative arrangements between the jurisdictions. These challenges can be addressed through governance frameworks (such as intergovernmental agreements (IGAs) and Ministerial Councils) that commit governments to take nationally consistent approaches.

Regulatory architecture

The harmonisation of regulation is an important first step to greater national uniformity, but even this can be complicated by the fact that each jurisdiction has its own legislative drafting conventions, and its own institutional structure. For example:

- jurisdictions may have Acts that do not exist in other jurisdictions
- the scope of legislation can vary
- penalties for non-compliance and appeal mechanisms may differ
- interpretation Acts vary across jurisdictions
- terms used in legislation may have different definitions in different jurisdictions
- sections of Acts are numbered differently.

By way of example, workplace chemicals are regulated as either 'hazardous substances' (substances that are toxic to people's health) or 'dangerous goods' (goods that pose a physical hazard, such as explosion or flammability), or both. Some states (including New South Wales and Tasmania) regulate all workplace chemicals through one piece of legislation. Other jurisdictions have a Dangerous Goods Act that covers dangerous goods and an Occupational Health and Safety Act that covers hazardous substances. These differences have proven to be a stumbling block to nationally consistent regulations for the storage and handling of dangerous goods in the workplace.

[1] Its formal title is *Commonwealth of Australia Constitution Act* 1900. It should not be confused with the Constitutions of the states. This paper is only concerned with the division of powers between the Commonwealth and the states and hence its focus is on the Commonwealth Constitution.

At a more general level, some states are generally opposed to applying regulations developed by other jurisdictions, preferring instead to write their own regulations (applying another jurisdiction's regulations (or templating) is discussed in more detail in section 2). For reasons stated above, this can give rise to inconsistencies, particularly over time.

Where the states and territories have different legislation in the more generic areas that impact across their economies, such as occupational health and safety (OHS), environmental protection or industrial relations, national consistency is even more problematic. However, it can still be progressed through the harmonisation of subordinate legislation (such as regulations, standards and codes of practice), or through mutual recognition of the regulations of other jurisdictions.

Attitudes to risk

Governments (and the communities they represent) can have different attitudes to risk, and these attitudes can result in different approaches to regulation. Generally, the more risk-averse the approach of a jurisdiction, the greater the costs of complying with its regulations, and the more difficult it would be to align its regulations with those of other, less risk-averse jurisdictions.

For example, the South Australian Government requires anyone who intends to transport security-sensitive ammonium nitrate (SSAN) through South Australia to lodge a travel plan with SafeWork SA. Other states and territories do not impose this requirement. To some extent, this may reflect South Australia's geographical location as a thoroughfare between the eastern states and Western Australia. However, it might also suggest that the South Australian Government is more concerned about incidents involving SSAN than other jurisdictions, and regards the extra regulatory costs to business as a reasonable price to pay for stricter controls on the transport of a hazardous material.

1.5 National approaches need good governance arrangements

A national approach to regulation can take various forms, and the approach adopted for policy development need not be replicated in the approach to regulatory administration.

While some of the regulatory administration relating to chemicals and plastics may be most efficiently and effectively carried out by a single Australian Government agency, policy development in this area is more appropriately undertaken by all governments acting together. This can ensure that the benefits of a federal system

are retained through the ongoing policy dialogue, and that sovereignty is retained, albeit in a somewhat constrained form.

Where a national approach to policy development is likely to deliver benefits, but a transfer of powers to the Commonwealth is not pursued, the key to achieving lasting reforms is to establish governance arrangements that enable Commonwealth, state and territory governments to determine objectives and institutional settings and to have processes to collectively review and modify them as required. Through these frameworks, governments can establish the institutions, procedural mechanisms and incentive structures that will develop and maintain national consistency.

The importance of sound governance arrangements was underscored by COAG in its March 2008 communiqué that set out its regulatory reform priorities:

> The COAG Reform Agenda is underpinned by a common commitment to clear goals, genuine partnership and the governance and funding arrangements needed to deliver real reform. (COAG 2008a, pp. 2–3)

The remainder of this paper describes the governance arrangements, institutions, procedural mechanisms and incentive structures that have been developed, in response to Australia's federal system, to coordinate national approaches to chemicals and plastics regulation. It also assesses their strengths and weaknesses and draws out some implications for the broader regulatory reform agenda.

2. Developing national approaches to regulation

The Commission identified four main processes involved in the national development and administration (including enforcement) of chemicals and plastics regulation, and proposed reforms for each. The four areas are the: development of policy frameworks; setting of standards; undertaking hazard and risk assessments; and administration of the regime and enforcement of regulations. Given the focus of this paper on developing national approaches to regulation, this section only addresses the first three of these processes.

2.1 Forums for developing national policy frameworks

Chemicals and plastics regulation provides a range of examples of policy frameworks that have made varying contributions to national uniformity, harmonisation and mutual recognition.

COAG Ministerial Councils

Being the peak forum for cooperative federalism in Australia, COAG is the key body for developing national approaches to regulation; chemicals and plastics regulation included. Comprising the Prime Minister, State Premiers, Territory Chief Ministers and the President of the Australian Local Government Association, COAG can '… initiate, develop and monitor the implementation of policy reforms that are of national significance and which require cooperative action by Australian governments' (COAG 2008c).

COAG is supported by a series of Ministerial Councils made up of relevant ministers from the participating jurisdictions. There are currently more than 40 Ministerial Councils and related forums that deal with specific policy areas. These Councils provide an opportunity for ministers to oversee the formulation of nationally consistent regulations. Although COAG and its supporting Ministerial Councils have no legislative basis under the Constitution, and the agreements they reach are not legally binding, they can be effective forums for developing policy where a national perspective is called for.

A number of Ministerial Councils have responsibility for matters relating to chemicals and plastics regulation (box 2.1). These Councils oversee regulatory systems that have achieved national uniformity or varying degrees of harmonisation.

The governance arrangements that underpin the functioning of Ministerial Councils can have a bearing on their effectiveness in developing and maintaining nationally consistent regulations. These governance arrangements — which can include matters such as decision making procedures, and reporting requirements — are often set out in IGAs.

Decision making procedures

The decision making procedures set out in the IGAs relevant to chemicals and plastics, vary considerably.

Under the Inter-Governmental Agreement for Regulatory and Operational Reform in Road, Rail and Intermodal Transport (the transport IGA), a simple majority vote by the Australian Transport Council (ATC) is required to approve most measures.[2] A minister who does not vote on a proposal is taken to have approved. A two-thirds

[2] A two-thirds majority is required to approve a recommendation on road user charging principles. A unanimous vote is required to delegate the council's powers and functions to a minister.

majority vote is required for the approval of National Environment Protection Measures by members of the Environment Protection and Heritage Council.

The requirement that ministers vote has been argued to have made a significant contribution to regulatory reform in transport:

> The requirement for a formal vote to take place is of significance, as it forces Ministers to make decisions on items forwarded by the [National Transport] Commission. It also ensures that 'lowest common denominator' solutions need not apply, as a mechanism is provided which enables impasses to be overcome. (Wilson and Moore 2006, pp. 282–283)

Box 2.1 Ministerial Councils in chemicals and plastics regulation

Elements of chemicals and plastics regulation are overseen by a number of Ministerial Councils:

- The Australian Health Ministers' Conference oversees the poisons scheduling regime.
- The Workplace Relations Ministers' Council oversees the national occupational health and safety regulatory system.
- The Australian Transport Council oversees regulations relating to the transport of dangerous goods.
- The Primary Industries Ministerial Council oversees the regulation of agricultural and veterinary chemicals and products.
- The Environment Protection and Heritage Council oversees national environmental regulations, including chemicals in the environment.
- The Ministerial Council on Consumer Affairs oversees the product safety regulatory system.

Both consensus and majority vote are features of the Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (the OHS IGA) that was signed in July 2008. Model legislation, regulations and codes of practice must be agreed by consensus of the members of the Workplace Relations Ministers' Council, while other matters can be passed by a two-thirds majority (with members not voting taken to have approved).

The concern with consensus voting on national standards is that one or more jurisdictions may 'hold out', refusing to compromise their own standards or adopt a new approach to regulation to achieve national uniformity. Thus, achieving reforms through consensus voting may require compromises to effectiveness and efficiency relative to an 'ideal' approach.

In contrast with the above approaches, the Food Regulation Agreement provides for a single jurisdiction on the Australia and New Zealand Food Regulation Ministerial Council to be able to request a review of a food standard that has been developed by Food Standards Australia New Zealand (FSANZ) (the national advisory body). These rules can lead to a delay in the introduction of nationally consistent food standards.

Regardless of the voting mechanism adopted, IGAs are not legally binding on state and territory governments. As the Victorian Government submitted, during the study into chemicals and plastics:

> … no jurisdiction can be made to accept a decision that it sees as disadvantageous to its interests, even if supported by a majority of others. This, as in other inter-governmental arrangements, places the onus on officials-level coordination to work towards consensus agreement with ministerial negotiation to be used in the instances where consensus is not achieved. (sub. DR112, p. 18)

In its report on chemicals and plastics regulation, the Commission supported a model based on majority voting (combined with a presumption of approval if absent from the formal vote), as being the most effective. This model can act as a discipline to ensure that the demonstration of net benefits to jurisdictions is sufficiently robust to convince them to pursue worthwhile reforms. In conjunction with rigorous regulation assessment procedures, it also increases transparency. If, for example, a regulatory impact statement revealed that an option chosen by the majority was clearly superior to one favoured by a government in the minority, that jurisdiction might need to publicly defend any course of action it subsequently took.

Reporting requirements

The arrangements that govern the operation of Ministerial Councils can, and arguably always should, include incentives or sanctions to encourage governments to maintain their commitment to agreed reforms. These can include requirements for ongoing monitoring and reporting back to the Ministerial Council on the progress in implementing reforms.

Under the transport IGA, each jurisdiction is committed to using its 'best endeavours' to implement and maintain reforms that have received majority support from the Ministerial Council (the ATC) in a uniform or nationally consistent manner, except in 'exceptional circumstances'. In such exceptional circumstances, the jurisdiction concerned is to advise the ATC of the reasons for its decision.

The reporting requirements in the recently-signed OHS IGA are even stronger. In addition to agreeing to 'take all necessary steps to enact or otherwise give effect to

model OHS legislation … within the timeframes agreed by [Workplace Relations Ministers' Council]' (COAG 2008b, p. 8):

- The Commonwealth, state and territory governments agreed to submit to the WRMC any amendments to legislation or new legislation that could 'materially affect the operation of model OHS legislation' (COAG 2008b, p. 11), and to not proceed with the amendment or new legislation unless it is endorsed by the WRMC.
- All parties agreed that if an amendment or new legislation is endorsed by the WRMC, all parties will 'undertake all necessary steps to introduce appropriate changes to their legislation with a view to ensuring that OHS legislation remains nationally consistent' (COAG 2008b, p. 11).

The Intergovernmental Agreement on the Environment (IGAE) allows for the making of National Environment Protection Measures (NEPMs) that are intended to be implemented consistently by state and territory environment protection authorities. States and territories are required to report annually on their efforts to meet the goals set out in NEPMs. This approach has contributed to national consistency in some areas of environmental regulation, such as ambient air quality standards.

Other forums

Ministerial Councils are not the only forum available to governments to coordinate national approaches to regulation. A number of other approaches have been, or could be, used in chemicals and plastics regulation, to address specific areas of concern.

Ministerial taskforce on chemicals and plastics

In 2006, when COAG identified chemicals and plastics regulation as a regulatory 'hotspot', it established a ministerial taskforce consisting of one minister from each jurisdiction. The taskforce was established to:

> … develop measures to achieve a streamlined and harmonised system of national chemicals and plastics regulation. (PC 2008b, p. v)

With input from the Commission's research report, the taskforce identified a number of 'early harvest' reforms that were subsequently ratified by COAG and are being implemented. In addition the taskforce was instrumental in helping COAG develop a response to the Commission's report (COAG 2008d).

COAG review of hazardous materials

In response to concerns about hazardous materials (such as ammonium nitrate, an explosive ingredient) being used for terrorist purposes, in late 2002 COAG commenced a review of the security risks associated with the use of hazardous materials. This review published a report in mid–2004 that contained a number of conclusions on the risks posed by hazardous materials. On the back of the review, COAG agreed to moves to limit access to security sensitive ammonium nitrate and endorsed a set of 'agreed principles' for the development of nationally consistent regulations. The effectiveness of the 'agreed principles' approach is assessed in the Commission's report and elsewhere in this paper.

Standing Committee on Chemicals

Australia's federal system has contributed to inconsistencies, overlaps and duplication in chemicals and plastics regulation. These inconsistencies have been further exacerbated by the subordinate nature of much chemical regulation, and the differences that exist in the priorities and institutional structures that shape the regulatory approaches to broad generic issues such as workplace health and safety, food safety, environment and public health. Cutting across so many portfolios adds to the difficulties in achieving a consistent approach.

Given the complexity of the issues and that chemicals policy does not fall under any one Ministerial Council, the Commission recommended the establishment of a Standing Committee on Chemicals (SCOC). COAG has subsequently agreed to establish such a body broadly along the lines the Commission recommended. Thus it will comprise representatives of all ministerial councils that have responsibility for chemicals regulation, and will provide a forum for the jurisdictions to address issues in chemicals and plastics regulation that affect more than one portfolio area. Among other things, the Committee will make recommendations to the appropriate Ministerial Council (or COAG), and monitor the implementation of reforms (COAG 2008d).

2.2 National standard setting

Standard setting involves designing the risk management rules by which chemicals and plastics are regulated. In its report, the Commission concluded that this should be undertaken by an independent national body made up of experts in the field, rather than representatives of the jurisdictions and stakeholders. But this process needs to be constrained by the policy settings of the Ministerial Council, and allow for the jurisdictions to provide input during standard development.

Chemicals and plastics regulation employs a number of policy instruments in standard setting. Some of these are developed by national bodies (such as the Australian Safety and Compensation Council (ASCC), and the National Transport Commission) and only have force once they are implemented by a jurisdiction under its own legislation. Implementation can involve the use of model and template legislation, regulations, standards, and codes of practice (section 3). This paper refers generically to all of these instruments as 'standards' and refers to the bodies that develop them as 'standard-setting bodies'.

In its report, the Commission distinguished between 'policy-relevant' standards and 'technical' standards. The former set out the frameworks for how chemicals are managed, while the latter are set at the chemical-by-chemical level. For example, the Standard for the Uniform Scheduling of Drugs and Poisons (SUSDP) sets out rules for how different classes of toxic chemicals are to be packaged, labelled and sold and whether there should be restrictions on their use (a policy-relevant standard). Individual chemicals are then categorised or 'scheduled' based on their physical characteristics (a technical standard).

Policy-relevant standards warrant high-level policy decision making, a regulation impact statement, and Ministerial Council endorsement of the standards. But in the case of more routine technical standards it may be appropriate for Ministerial Councils to delegate some of their powers to standard-setting bodies. In most such cases, a regulation impact statement would not be necessary, although in some cases (such as certain poisons scheduling decisions) the impacts on business and consumers could justify a regulation impact statement (RIS).[3]

In the context of chemicals and plastics, standard-setting bodies are responsible for developing standards for matters such as the use of chemicals in the workplace, transport safety standards and poisons controls. A new body is being negotiated to develop standards relating to chemicals of security concern, and the Commission has recommended the development of a national environmental standard-setting body.

The membership and governance rules of standard setting bodies can influence the way they operate and the quality of the standards they recommend. One approach is for standard-setting bodies to be made up of representatives of the various jurisdictions and stakeholder groups. For example, the current ASCC is made up of representatives from each of the states and territories, the Commonwealth, the Australian Council of Trade Unions and the Australian Chamber of Commerce and Industry. The Commission considered that this approach is not conducive to the

[3] COAG guidelines state that regulatory assessment is not required for regulations that are 'minor or machinery in nature' (COAG 2007, p. 3).

development of standards that deliver the greatest possible net benefit to the community as a whole. Representative bodies are vulnerable to lobbying, and may have difficulty in objectively assessing all the issues submitted by interested parties who are not represented on the body. Their decisions may also reflect compromises arising from the wider agendas of the member bodies. As a consequence, there can be significant pressure applied by stakeholders to 'have a seat at the table'. In trading off competing interests, and neglecting others, they may not always make decisions in the broader public interest.

The Commission considered that instead, standard-setting bodies should be made up of experts in risk management, and that such bodies should be statutorily obligated to carry out their duties in the public interest. Under this model, accountability is retained by reporting to Ministerial Councils, and stakeholders can be provided with the chance to contribute through submissions and/or membership of advisory bodies.

The NTC is a good example of 'best practice' in standard setting. It is an independent national statutory authority that has responsibility for developing uniform or nationally harmonised regulations for transport. The NTC develops policy recommendations through a rigorous process that includes extensive consultation with governments and industry representatives. The recommendations are forwarded to the ATC. Ministers on the ATC can accept or reject the recommendations, but can not amend them. The NTC is jointly funded by the Commonwealth, state and territory governments.

2.3 Hazard and risk assessment in a national framework

Chemicals and plastics regulation essentially involves two tasks: assessing hazards and risks, and managing those risks. Under the Commission's preferred governance structure, risk management is addressed by national standard setting bodies overseen by Ministerial Councils, as discussed above. Hazard and risk assessment is also a function that is best undertaken at the national level, but in this case the Commonwealth has sufficient authority to undertake this itself.

The case for conducting hazard and risk assessment at the national level through Australian government agencies is compelling. First, hazards are essentially universal in nature, making assessment a national if not international proposition. While risk assessment can vary according to circumstances, assessment at a national level makes sense because it facilitates interaction with the national standard-setting bodies. Indeed risk assessment requires some understanding of the risk-management frameworks within which chemicals will be used. Second, assessment needs to be undertaken with objectivity, making government provision, or at the least oversight

of third party providers, essential. This is facilitated by using an Australian government agency. Third, assessment is a specialist task and there is limited technical expertise available. The strong economies of scale and scope suggest that national providers are likely to be a more efficient arrangement than having a number of state providers of these services.

There are two main hazard and risk assessment agencies involved with chemicals and plastics in Australia: the National Industrial Chemicals Notification and Assessment Scheme (NICNAS) and the Australian Pesticides and Veterinary Medicines Authority (APVMA).[4]

NICNAS provides scientific assessment of the hazards and risks of industrial chemicals. It assesses the properties of industrial chemicals that are new to Australia (and some chemicals that are already in use for which new concerns have emerged). It also provides recommendations to the states and territories and to national standard-setting bodies (such as the ASCC and the National Drugs and Poisons Scheduling Committee (NDPSC)) on public health, environment, and workplace safety matters.

Although recommendations to the states and territories are non-binding, the Commonwealth, state and territory governments have signed a memorandum of understanding (MOU) under which the jurisdictions undertake to implement NICNAS's recommendations wherever possible and to advise the Director of NICNAS of any consequential actions they take. However, although there is only a single provider of expert assessment, there has been inconsistency across the jurisdictions in terms of their implementation of NICNAS's recommendations, typified by the varying responses to NICNAS's recommendations on environmental safeguards.

The APVMA is currently a hybrid model. It carries out hazard and risk assessments for agvet chemical products, drawing on advice from the Office of Chemical Safety (for human health effects) and the Department of Environment, Water, Heritage and the Arts (for environmental hazards and risks) and state and territory government agencies (for product efficacy). It also sets risk management standards for agvet chemical products.

In its report, the Commission favoured a model whereby assessment bodies are generally limited to the scientific assessment of the hazards and risks posed by chemicals, and did not recommend expanding the powers of these bodies into standard setting. Standard setting is more appropriately undertaken by bodies that

[4] The Therapeutic Goods Administration assesses medicines. Medicines were excluded from the Terms of Reference for the Commission's study of chemicals and plastics regulation.

are expert in risk management and that operate within the policy frameworks established by Ministerial Councils.

However, the standard-setting bodies should formally respond to advice provided by national assessment bodies. This would enhance national consistency, and could lead to more effective risk management.

3. Mechanisms for implementing national approaches

The mechanisms for implementing national approaches to regulation vary widely. At one extreme, the states and territories can choose to refer their powers to the Commonwealth, but this has not been widely employed in chemicals and plastics regulation. Coordinated approaches to regulation where the states and territories retain their regulatory powers, but act together with the Commonwealth, have been more common. This section explores the five legislative approaches (from the referral of powers through to mutual recognition) and examines three less formal 'agreement' type mechanisms.

3.1 Referral of powers

Under Section 51(xxxvii) of the Constitution, the Commonwealth Parliament has the power to make laws with respect to 'matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States'. If one or more states refer powers to the Commonwealth, the Commonwealth becomes the legislator and regulator on that matter for those jurisdictions. If all jurisdictions refer their power, national uniformity is achieved, making this a highly effective mechanism for achieving regulatory consistency.

However, the referral of powers has been a topical issue since Federation, and there remain several unresolved issues, such as whether powers that have been referred to the Commonwealth can be revoked by the states, and the degree to which states can act concurrently (though not inconsistently) once a power has been referred. In relation to the latter, once a power has been referred to, and enacted by, the Commonwealth, section 109 of the Constitution gives this law ascendancy over an inconsistent state law, thus limiting the extent to which the states can legislate over the same matters (Tate 2005).

Given that the referral of powers is contentious, its use by the states has been somewhat limited, though with some notable exceptions such as Victoria's referral of industrial relations powers to the Commonwealth, and the referral by all states of the necessary powers to create a national approach to corporations law. Referral of

powers has not been used in chemicals and plastics regulation, but remains an option for the Commonwealth, state and territory governments.

3.2 Template legislation

A more common approach to creating national regulatory frameworks is for some or all Australian governments to pass the same or similar legislation through template or model approaches.

Template legislation (also referred to as 'applied laws' legislation) involves one jurisdiction enacting a law that is then applied by other jurisdictions as their law. The template approach can also be applied to regulations, standards and codes of practice. Template legislation can follow one of two forms. Either the Commonwealth can enact legislation that is applied in the states, or one state or territory can enact legislation that is subsequently applied in other states and territories.

A closely-related approach is adoption by reference, which involves jurisdictions referring in primary or subordinate legislation to instruments that have not been enacted by any jurisdiction. For example, this approach is used by the states and territories to adopt standards that are declared by national bodies, such as the ASCC.

The template and reference approaches have strengths and weaknesses. Their greatest advantage is that if the original legislation is applied or referred to without amendment by the states and territories, regulation is nationally uniform. Also, if all jurisdictions reference the template regulation as amended from time to time, these approaches facilitate the consistent uptake of amendments. This can be important where the template act or referenced standard is amended frequently, reducing the potential for inconsistencies to arise through inaction (or delayed action) on the part of one or more jurisdictions under alternative approaches. For example, regulations such as the scheduling of poisons need to be amended relatively frequently, making reference to a common schedule (the SUSDP) a convenient way for all jurisdictions to simultaneously adopt the same approach.

On the other hand, templating constrains the scope that individual state (and territory) parliaments have in enacting laws for the good governance of their jurisdictions. It also limits the role of individual regulatory assessment procedures in the oversight of regulation. As the COAG-endorsed *Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies* notes in the context of referencing standards in legislation, it may be the case that only the referenced version is subject to regulatory impact assessment by the individual

jurisdictions, with subsequent amendments escaping such scrutiny. The *Guide* states:

> This can have the effect of transferring regulatory power from governments to standard setters. (COAG 2007, p. 17)

Normally it would be expected that the template regulation would be evaluated through COAG-endorsed regulation impact assessment procedures, and overseen by ministers of the relevant ministerial council (or other similar body). As the parliaments of each jurisdiction must pass an act or regulation that applies the template, they also have the chance to scrutinise the template legislation. However, with most of the negotiation likely to have occurred at the ministerial council level, the scope for individual jurisdictions to negotiate a different outcome at this juncture is limited. And if reference is made to the template as amended from time to time, parliamentary scrutiny by those jurisdictions applying the template is thereafter absent. As a result, some jurisdictions are wary of adopting the template approach. For example, Western Australia has taken the decision that it will not generally adopt the legislation of other jurisdictions, preferring instead to write its own legislation.

However, the extent to which scrutiny is required varies. If variations to standards are technical and minor in nature, there should be no need to carry out a full regulatory impact assessment prior to adoption by template or reference. Nor would the absence of parliamentary oversight be such a drawback. Nevertheless, there are some exceptions where technical standards can have a substantial effect on businesses and the community. For example, classification of a chemical as a schedule 7 poison may trigger restrictions on its availability, storage and use. This could justify a full assessment of the classification decision. Amendments that affect regulatory frameworks (policy-relevant standards) should be subject to a full regulatory impact assessment and should only be declared by accountable bodies (such as Ministerial Councils). Even so, the absence of effective scrutiny by the parliaments of participating jurisdictions reinforces the necessity of the template approach having sound governance arrangements.

Another potential weakness of the template and reference approaches is that the development of templates that are acceptable to all jurisdictions can be time consuming, and adoption can be staggered over time. Consultants reviewing the *National Road Transport Commission Act* (1991) noted that in the case of transport regulations, there was an 'inherent delay in sequentially passing legislation in the Commonwealth Parliament and then replicating this approach in each other jurisdiction' (Affleck Consulting and Meyrick and Associates 2002, p. 57). If, as the Office of Best Practice Regulation recommends, each jurisdiction references the

template as it existed at a point in time, and adoption is staggered, inconsistencies can emerge.

The template approach has been used in a variety of areas in chemicals and plastics regulation:

- All jurisdictions have adopted a template Agricultural and Veterinary Chemicals Code.
- Template legislation and regulations have been used in land transport since the late 1990s. Generally this has led to a consistent adoption of the Australian Dangerous Goods Code.
- The ASCC (and its predecessor, the National Occupational Health and Safety Commission) has declared a number of national model regulations, standards and codes of practice. Some jurisdictions have adopted some of these instruments by reference. For example, Western Australia, Tasmania, the ACT and the Northern Territory directly refer to the National Code of Practice for the Labelling of Workplace Substances. Other jurisdictions (including New South Wales and South Australia) reproduce the national code of practice as a state code of practice.
- Part 4 of the SUSDP contains a regularly-updated list of substances that have been classified into various schedules on the basis of their properties. Part 4 is adopted by reference by all states and territories except Queensland.

Template approaches have been considered elsewhere but not adopted. For example, the *National Competition Review of Drugs, Poisons and Controlled Substances Legislation* (Galbally 2001) recommended that the states and territories should adopt template legislation that includes all provisions regulating the supply of medicines and poisons. Responding to the review, the Commonwealth, state and territory governments agreed to aim for regulatory uniformity; however, not through the use of template legislation, but by 'other means'.

Conferral of powers

The template approach can be used to produce national frameworks that are administered either by the individual jurisdictions or by an existing or new national regulator. Where template legislation is to be regulated by a national regulator, it is necessary for the states and territories to confer powers on the Commonwealth.[5] An authority (or official) empowered by such a conferral exercises powers on behalf of

[5] After the High Court judgement in R v Hughes (2000) 171 ALR 155, it has been the practice recently for the Commonwealth to legislate to accept the conferral of powers (Carney 2006, p. 19)

the states, acting under state law. It is, therefore, a quite different mechanism to the referral of powers under the Constitution, where the states effectively give up the powers specified in the referral. A potential weakness of the conferral mechanism is that, since it does not involve transferring powers, there is more scope for the states to regulate separately (and potentially inconsistently) in the same area.

The National Registration Scheme

The most noted example of conferral of powers in chemicals and plastics regulation concerns the National Registration Scheme (NRS) for agricultural and veterinary (agvet) chemical products. Under an IGA, the Commonwealth, state and territory governments established a national framework for the regulation of agvet chemical products. The NRS includes the assessment and registration of agvet chemicals and products, the development of conditions of use and product quality monitoring.

For its part the Commonwealth Government created an independent statutory authority in the form of the APVMA, and developed the Agricultural and Veterinary Chemicals Code (the agvet code) as a tool for registration and labelling. The agvet code, which has been adopted by template by all jurisdictions, also confers on the APVMA and its officers the authority to assess, register and regulate the labelling of agvet chemical products. The APVMA in turn can confer power on a state officer to enforce the code.

While the Commonwealth Government has the power to develop conditions of use for agvet products, it is the states and territories that regulate their use under the NRS. The conferral of some powers and not others has created inconsistencies in the way the APVMA's conditions of use are enforced. Some jurisdictions (for example, New South Wales and Western Australia) have adopted a prescriptive interpretation of conditions set by the APVMA; while others (including Victoria) have favoured a performance-based approach that allows some diversion from product label requirements.

The Commission considered that inconsistent regulatory implementation of APVMA conditions of use undermines the integrity of the code and impairs effectiveness and efficiency. As a result, the Commission has recommended that the states and territories should confer additional powers on the Commonwealth to enable the APVMA to not only develop the conditions of use, but also regulate the control of use of agvet products in a systematic way. This would not prevent the APVMA from appointing state regulators as its agents in the individual jurisdictions. COAG has subsequently directed the Primary Industries Ministerial Council to bring forward for consideration, in the first half of 2010, a proposal for a

single national framework for the regulation of agricultural and veterinary chemicals. (COAG 2008d)

The Gene Technology Regulator

Another example of the use of the conferral of powers mechanism is the establishment of the Gene Technology Regulator (GTR), and the conferral on that authority of the powers necessary to regulate gene technology at the national level. Under the IGA on Gene Technology, the Commonwealth, state and territory governments agreed that there was need for:

> … a co-operative national legislative scheme to protect the health and safety of people and to protect the environment, by identifying risks posed by, or as a result of, gene technology and by managing those risks through regulating certain dealings with genetically modified organisms. (DOHA 2006, p. 136)

Under the IGA, state and territory governments agreed, among other things, to:

> … confer functions and powers on the Regulator, the Gene Technology Technical Advisory Committee, the Gene Technology Community Consultative Committee and the Gene Technology Ethics Committee in the same terms as those in the Commonwealth Act. (DOHA 2006, p. 141)

To establish and empower the GTR, the states passed template legislation to adopt a Commonwealth Act (the Gene Technology Act 2000) that not only created the GTR, but also conferred powers on the Commonwealth to administer the Act. While this created a uniform national scheme, the IGA also allows the Gene Technology Ministerial Council to issue policy principles. The only principle issued to date allowed states to recognise areas for the purpose of preserving the identity of GM or non-GM crops for marketing purposes. Most states subsequently introduced moratoria on GM crops but these vary across jurisdictions and have been criticised for undermining the national regulator and creating uncertainty due to their inconsistency, among other things (DOHA 2006).

These two examples illustrate that the conferral of powers, when associated with the template adoption of a single code, can establish a framework for national uniformity. However, in practice, the degree of consistency this approach provides depends, among other things, on the governance structure, the matters covered by the conferral, and the ability of the states and territories to regulate concurrently over the same matters.

3.3 Model legislation

The 'model' approach to legislation, regulations, standards and codes of practice involves the drafting of a model document that each participating jurisdiction draws on in drafting its own legislative instruments.[6] The model may be drafted in various ways: as a bill of a particular jurisdiction, or as an attachment to an agreement or an act. The jurisdictions might also decide that there are core provisions that need to be adopted consistently and non-core provisions that don't.

This approach allows jurisdictions to adapt the model to suit their circumstances (including their regulatory architecture), drafting styles and political priorities, without necessarily creating inconsistencies between jurisdictions. It tends to be favoured by the states because, relative to the template model, it retains a greater degree of autonomy over the regulatory instruments concerned, both in terms of their introduction and their subsequent amendment.

The flexibility of the model approach can, however, result in inconsistencies. These can arise in the first instance when adapting the model, and over time as each jurisdiction sees fit to amend its own legislation, and do so in its own timeframe. The model approach can also have higher costs for the states and territories than the template approach, because each jurisdiction incurs the costs of drafting and maintaining legislation. Where regulatory inconsistencies emerge, the potential for cost sharing among the jurisdictions in administering the regulations would also be limited.

The model approach has been widely used in chemicals and plastics regulation, and appears to be preferred to the template approach:

- A revised regulatory framework for the transport of dangerous goods will use a model approach. Model legislation (as a schedule to the *National Transport Commission Act 2003* (Cwlth)) will be provided to guide jurisdictions in developing their own legislation — thereby replacing the highly effective template approach adopted to this point.
- The ASCC has declared a number of model regulations on OHS matters. Many of these (including the major hazard facilities standard and code of practice and the regulations for the storage and handling of workplace dangerous goods) have not been implemented consistently by states and territories.
- In the recently-signed IGA on OHS, the Commonwealth, state and territory governments have agreed to implement a nationally-uniform OHS legislative

[6] A variation on this approach is mirror legislation, where all jurisdictions enact identical legislation based on an agreed master document, but to the Commission's knowledge this approach has not been used in chemicals and plastics regulation.

framework based on national model legislation, regulations and codes of practice.

- The transport of explosives is regulated under legislation and regulations developed in individual jurisdictions, but which refer in varying degrees to the Australian Explosives Code on technical matters.
- State and territory government regulations on illicit drug precursors are largely derived from the voluntary Code of Practice for Supply Diversion into Illicit Drug Manufacture. There are inconsistencies between each jurisdiction's regulations and the Supply Diversion Code.

Overall, the experience in chemicals and plastics suggests that the model approach can be sufficient to deliver nationally consistent outcomes, although consistency has not always been achieved. In some areas of transport and OHS regulations, jurisdictions have elected to reproduce national model regulations, standards and codes of practice, often with effectively no loss of consistency. However, a number of industry participants in the Commission's study of chemicals and plastics regulation raised concerns about the use of a model approach, particularly in the context of the reforms to dangerous goods transport regulations. They argued that it allows greater scope for jurisdictions to unilaterally diverge from an agreed national approach.

3.4 Harmonising subordinate law

Although differences in the regulatory architecture of the states and territories can make it difficult to enact nationally uniform legislation, significant levels of national consistency can be achieved through harmonising subordinate legislation. This approach has been widely used in chemicals and plastics regulation.

Harmonising subordinate legislation is particularly appropriate for technical standards. While jurisdictions may have different regulatory architectures and different attitudes to risk, regulation is often underpinned by uncontroversial technical standards that can have universal application. With less institutional constraints at work, national consistency can be more readily achieved.

An example of harmonised technical standards is the regulation of hazardous chemicals in the workplace. While there are inconsistencies in state and territory OHS Acts, all impose a broad duty of care on employers to prevent workplace injury and death. To achieve this, all jurisdictions require, among other things, that hazardous substances used in workplaces carry labels that communicate their hazardous properties. The ASCC maintains the National Code of Practice for the Labelling of Workplace Substances (1994), which gives guidance on the

preparation of labels for hazardous substances. Through various means, all states and territories recognise labels that are prepared in line with this national code of practice as being sufficient to meet legislative and regulatory requirements in their respective jurisdictions.

Elsewhere, attempts to harmonise subordinate legislation have been hampered by a preference for prescriptive regulation. For example, the National Standard for the Storage and Handling of Workplace Dangerous Goods is a performance-based regulation that sets out principles for the assessment and control of the risks posed by workplace dangerous goods. Some jurisdictions use this Standard as the basis for their regulations on workplace dangerous goods. On the other hand, in South Australia the Dangerous Substances Regulations (2002) prescribe certain actions that people must take to control dangerous goods. Even though the objectives of the South Australian legislation are consistent with other jurisdictions, the prescriptive approach adopted by South Australia undermines national consistency.

3.5 Mutual recognition

Mutual recognition of the standards and approvals of other jurisdictions delivers many of the benefits of nationally uniform regulation, and in some circumstances may be much more easily achieved. It can also reduce technical and regulatory barriers to trade. Mutual recognition involves:

> … each jurisdiction recognising particular regulations created and administered by other jurisdictions, even where such regulations vary from their own rules and regulations. (ORR 1997, p. vii)

An underlying premise of mutual recognition arrangements is:

> … that regulations and standards covering goods and occupations in one state or territory meet community expectations and should be acceptable in other jurisdictions. (ORR 1997, p. 1)

Examples of mutual recognition in chemicals and plastics regulation in Australia include the following:

- Under the Mutual Recognition Agreement (MRA), all chemicals and plastics that are legal for sale in one state or jurisdiction are legal for sale elsewhere in Australia.
- State and territory legislation and regulations require that people who use SSAN have security clearances. Victoria has explicit, comprehensive provisions regarding mutual recognition of security clearances and licences in its

regulation, and some other jurisdictions have capacity within their regulations to recognise licences from other jurisdictions on a temporary basis.[7]

- Suppliers of hazardous chemicals are typically required to provide material safety data sheets (MSDS) under OHS regulations in each state. In Victoria, manufacturers and suppliers can comply if they have already prepared an MSDS for the substance in accordance with equivalent legislation, meaning 'legislation of another Australian jurisdiction relating to the use of hazardous substances at a workplace'.
- Since 2005, the auditing processes for two industry accreditation processes — the Carrier Accreditation Scheme and TruckSafe — have been mutually recognised.

The Commonwealth, state and territory governments are signatories to the MRA and, with New Zealand, the Trans-Tasman Mutual Recognition Arrangement (TTMRA) (box 3.1). Under these schemes, jurisdictions have agreed to mutually recognise regulations that affect the sale of goods and the registration of occupations. The intention was that if a good could be legally sold in one participating jurisdiction, it could be sold in all other participating jurisdictions. Likewise, a person registered to carry out a particular occupation in one jurisdiction would be entitled to be registered for the equivalent occupation in any other jurisdiction, after notifying the local registration authority.

Mutual recognition reduces the burden on businesses that operate in more than one jurisdiction by removing some of the technical barriers they face. Firms only need to satisfy one set of regulations to be permitted to sell a good in all jurisdictions. This has the potential to increase opportunities for trade and economies of scale.

For workers who are registered in particular occupations, mutual recognition can reduce the costs of moving between jurisdictions, such as those due to accreditation and retraining. This benefits workers and the firms that employ them, and could potentially have wider benefits for the allocative efficiency of the economy.

Broader mutual recognition of qualifications, accreditations and products that comply with regulations in one of the participating Australian jurisdictions would make a significant contribution to national consistency in chemicals and plastics regulation. Mutual recognition offers a workable but limited form of cooperation across independent jurisdictions. In this respect it is relevant not only to

[7] In its draft research report on mutual recognition schemes (the Mutual Recognition Agreement and the rans-Tasman Mutual Recognition Arrangement), the Commission examined whether an authorisation to use SSAN constitutes a 'registered occupation' as defined by the schemes and, if not, whether such authorisations should be brought within the coverage of the schemes (PC 2008c).

harmonising regimes within a federation, but (notwithstanding the difficulties being experienced with chemicals under the TTMRA) also has international relevance. In Australia's domestic context however, it does not offer as 'complete' a solution as national uniformity.

Box 3.1 **The Trans-Tasman Mutual Recognition Arrangement (TTRMA)**

The TTMRA between Australia and New Zealand includes a provision for 'special exemptions' that allow jurisdictions to temporarily and unilaterally exempt some matters from the scope of the agreement. These exemptions last for 12 months, and can be rolled over. Currently, special exemptions apply in a number of areas relating to chemicals and plastics, including: hazardous substances; industrial chemicals and dangerous goods; consumer product safety standards; and therapeutic goods.

The regulators of the two countries (NICNAS and in New Zealand, the Environmental Risk Management Authority) have been exploring the possibilities to wind back the special exemption for industrial chemicals under a five year program due to expire in 2009. While it appears that there are some possibilities for further harmonisation or mutual recognition, the scope is limited by the fundamental differences in the way chemicals are regulated in the two countries. The cases for the special exemption, and the possibility of introducing a permanent exemption, was considered by the Commission in its draft research report on mutual recognition schemes (PC 2008c). It recommended consideration of converting the TTMRA special exemption for hazardous substances, industrial chemicals and dangerous goods into a permanent exemption. It argued, further, that this should involve a cost–benefit analysis, based on a realistic assessment of the likelihood of achieving mutual recognition or harmonisation in the foreseeable future, given the slow progress to date.

The TTMRA also allows for permanent exemptions to accommodate cases where mutual recognition is likely to be unattainable. One such exemption relates to agricultural and veterinary chemicals. These products are not currently mutually recognised, due to significant differences between Australia and New Zealand in their environments, agricultural production systems, and what constitutes 'good agricultural practice'. The Commission supported the continuation of the permanent exemption, but added that this should not prevent the regulators from continuing to explore ways to harmonise their processes and share information (PC 2008c).

3.6 Implementing agreed principles

A less rigorous method for achieving some degree of national consistency involves governments agreeing on a set of principles that they then implement as they see fit. They may enact new regulations or adapt existing regulations to comply with the principles.

This approach has been used to implement national regulations covering the manufacture, import, export, transport, supply, storage, use and disposal of SSAN.[8] In 2004, COAG agreed to a set of Principles for the Regulation of Ammonium Nitrate that were intended to form the basis of nationally consistent regulations.

All jurisdictions have implemented regulations that require authorisation for entities that handle SSAN, but there was considerable inconsistency during the lengthy four year period of progressive implementation by the individual states. Further, there are differences between the states in classifying SSAN (various classifications include that it is an explosive, an explosive precursor, a high consequence dangerous good and so on), the matters that are covered by licences, the issuing of licences for unsupervised access to SSAN, the costs of licences to undertake various activities involving SSAN and the requirement to carry out security checks.

The differences in SSAN regulations in part reflect the fact that the regulations were grafted onto different regulatory rootstocks in the states and territories. Some jurisdictions opted to regulate SSAN under explosives legislation, while others used dangerous goods legislation. And some jurisdictions enacted dedicated regulations to deal with SSAN, while others amended existing regulations.

The agreed principles approach can establish a high-level commitment to national consistency. However, while this can be a useful starting point in situations where urgent national regulatory action is warranted, unless backed by effective institutions and incentives for implementation, it may not deliver nationally consistent regulations, as the SSAN case amply demonstrates.

3.7 Memorandums of understanding

Memorandums of understanding (MOUs) can set out agreed processes to assist with coordination between jurisdictions and between regulatory agencies (both within and between jurisdictions) and thus assist in implementing national approaches. Unlike IGAs, MOUs do not generally establish governance frameworks or policy development processes. However, effective MOUs can lay the foundations for successful coordination between regulatory agencies.

Memorandums of understanding can be either vertical (where the Commonwealth Government or a national regulatory agency makes an agreement with state and territory governments or agencies) or horizontal (where the signatories are either state and territory governments or agencies, or national regulatory agencies).

[8] SSAN is an explosive ingredient that has been used in terrorist attacks around the world.

A number of MOUs exist in chemicals and plastics regulation, and have made a mixed contribution to national consistency. Horizontal MOUs have been more successful than vertical MOUs, but these have largely operated between agencies within the same government and hence are not federal in nature. Examples of horizontal MOUs include:

- an MOU between WorkSafe Victoria and the Victorian Environment Protection Authority to coordinate some inspection and enforcement activity relating to major hazard facilities
- an MOU between the APVMA and FSANZ, which includes an attached protocol for dietary risk assessments that is used in the determination of maximum limits of agvet chemical residues in food.

These arrangements appear to have assisted the agencies involved to coordinate and share the burden of regulatory work.

Vertical MOUs in chemicals and plastics regulation have not been widely used. The only example identified by the Commission — the NICNAS MOU discussed in section 2.3 above — has had limited impact. A States and Territories Memorandum of Understanding Group was established to assist in the flow of information between NICNAS and the states and territories on OHS, environmental and health matters. However, the members of this group all come from OHS agencies, and its focus has been predictably narrow. Even then, it has not been a very effective forum for promoting the national uptake of NICNAS recommendations.

3.8 Service level agreements

'Service level agreements' are contracts that establish the terms for cooperation between agencies on certain matters. They have been used in chemicals and plastics regulation, but as is the case for MOUs, they operate largely horizontally between agencies within the one government. For example, the Office of Chemical Safety, which is part of the Office of Health Protection within the Australian Government Department of Health and Ageing, has a service level agreement with the APVMA to assess the risks to public health posed by veterinary chemicals and pesticides. Similarly, under service level agreements with NICNAS and the APVMA, the Commonwealth Government Department of the Environment and Water Resources undertakes environmental risk assessments that feed into NICNAS and APVMA assessments.

Service level agreements could, however, have a more prominent role in implementing national approaches to chemicals and plastics regulation. If, as the Commission has recommended, control of use regulation for agvet products is

transferred to the APVMA, that agency could enter into service level agreements with state agencies to enforce the regulations in those jurisdictions.

4. Funding of national approaches to regulation

There can be a variety of different organisations involved in a national approach to regulation, including regulatory agencies, standard-setting authorities and advisory bodies. Arrangements for funding these organisations can vary, depending largely on their role. Some are funded wholly by the Commonwealth Government, some are jointly funded by all jurisdictions, while others are 'self-funded' in whole or in part through levies, fees or charges.

The choice of funding model depends in part on the nature of the work being undertaken, as well as the costs and benefits of the different ways of raising the necessary revenue. Whereas government funding is appropriate for public good activities, industry funding through cost recovery provides price signals to users of regulated goods or services that help improve economic efficiency. Cost recovery can also encourage businesses to change their behaviour to reduce future regulatory costs (PC 2001). To illustrate, the development of standards that establish frameworks for risk management ('policy-relevant standards') is best funded by governments.

Whether the funding is by one or more governments also depends on several factors. For example, Commonwealth funding may assist in the early establishment of an organisation, or might be expedient where the costs are low and apportionment among the states and territories contentious. On the other hand, joint funding may result in greater engagement by all jurisdictions with the policy-making process and thereby achieve greater national consistency. Joint funding can be particularly appropriate where the national body is preparing model or template regulations that the jurisdictions subsequently adopt.

By comparison, standards that are set on a chemical-by-chemical basis ('technical standards') may be more appropriately funded through cost recovery from the firms that use those chemicals.

There are examples of each funding approach in chemicals and plastics regulation.

The NDPSC makes recommendations on the scheduling (categorisation) of medicines, agvet chemicals and household chemicals and is fully budget funded by the Commonwealth. Its recommendations are purely advisory — the states and territories are responsible for making enforceable decisions regarding drugs and poisons.

The Australian Safety and Compensation Council (ASCC) is a tripartite national body that develops and maintains national standards, model regulations and codes of practice that are intended to form the basis of nationally consistent OHS regulation. The ASCC is also currently fully funded by the Commonwealth and supported by a secretariat that resides within the Commonwealth Department of Education, Employment and Workplace Relations.

However, the OHS IGA includes provisions for the replacement of the ASCC with a statutorily independent body that will be jointly funded by the Commonwealth (which will fund 50 per cent of the budget) and the states and territories (which will fund the other 50 per cent, with contributions proportional to population). This is a positive development that may lead to greater engagement with the policy-making process.

Under the IGA establishing the NTC, the Commonwealth, state and territory governments all contribute to the funding of the NTC. The Commonwealth Government contributes 35 per cent of the budget, with the remainder being contributed by the states and territories. The larger states contribute a larger proportion of the funding than the smaller states.

In its report, the Commission recommended the establishment (through an IGA) of a national, independent standard-setting body to manage the impact of chemicals on the environment. The Commission recommended that this body should be funded along similar lines to the ASCC and the NTC. That is, the body should be fully budget-funded, with the costs shared by all jurisdictions.

Like many other regulators, the APVMA is funded principally through cost recovery, including a levy on the sale of registered agvet chemical products and through application and annual registration fees, and licensing fees from manufacturers of veterinary medicines.

NICNAS is funded along similar cost-recovery lines. Companies that manufacture or import chemicals pay registration fees to NICNAS, and fees for chemical assessment. These two sources of revenue account for the majority of NICNAS's budget.

The funding of regulatory and other agencies involved in a national framework for regulating chemicals and plastics would need to align with the principles applying to public sector agencies generally. But again, the experience within the chemicals sector points to some lessons that have wider application, including: that cost recovery can provide important price signals to those being regulated; policy development processes should be financed from general revenue; and national

approaches to policy development are most likely to succeed where jurisdictions jointly contribute.

5. Incentives for implementing national approaches

The most compelling reasons for the Commonwealth, state and territory governments to commit to national consistency in regulations are: the contribution that consistency can make to the effectiveness of the regulations; the efficiency of their administration and enforcement; and to the efficiency of the economy as a whole. However, in some reform programs, a further 'incentive' has been provided to encourage the states and territories to adopt the reforms.

Under federal systems of government, central governments tend to raise more revenue through taxation than they require to finance their own direct spending, while sub-national governments raise less revenue through taxation than they require (Anderson 2008). This is referred to as 'vertical fiscal imbalance'. The extent of the gap between revenue and spending depends on a number of factors, including the constitutional basis for various types of taxation. In Australia, transfers by the Commonwealth Government to the states and territories account for around 46 per cent of their total expenditure (with the actual proportion differing for different jurisdictions — the proportion is largest for the Northern Territory).

The distribution of the fiscal benefits from reform (often in the form of additional taxation) and the costs of reform implementation can lead to reluctance on the part of one or more states or territories to adopt reforms that would deliver benefits to the country as a whole, but impose net fiscal costs on themselves (let alone constrain, to a degree, their sovereignty). In the past, the Commonwealth Government has provided incentives for state and territory governments to undertake such reforms. The most notable example is the National Competition Policy (NCP) reforms of the 1990s.

The NCP package of reforms was agreed by the Commonwealth, state and territory governments in 1995. It included far-reaching reforms of competition laws, and reforms in areas such as electricity, gas, water and road transport. The transport reforms peripherally affected the transport of dangerous goods, including chemicals and plastics.

The NCP reforms contributed to significant increases in the productivity of the Australian economy. The Commission has previously suggested that the reforms were a key driver behind observed productivity and price changes in key infrastructure sectors in the 1990s that increased Australia's GDP by 2.5 per cent, or $20 billion (PC 2005). But a substantial proportion of the fiscal benefits of higher

productivity accrue to the Commonwealth Government in the form of higher income and company tax receipts. Because of their limited taxation powers, state and territory governments may not reap significant fiscal benefits from national reforms (and may face implementation costs and political risks).

To compensate for the costs and to distribute the benefits of NCP reforms, the Commonwealth agreed to make 'competition payments' to the states and territories, conditional on the reforms being adopted. This was achieved by including provisions in the NCP agreement that some payments would be withheld from the states and territories if they failed to meet their commitments. Progress was assessed by the National Competition Council (NCC) and some payments were withheld from jurisdictions. For example, in 2003-04, penalties totalled $180.6 million, and in 2004-05 penalties totalled $140.5 million (PC 2005, p. 33).

The Productivity Commission considered the granting (and withholding) of incentive payments to have been an important element of the success of the NCP reforms. Other organisations, governments and individuals agreed that incentive payments played an important role in the NCP reforms (box 5.1). In its assessment of the NCP reforms, the Commission stated (PC 2005, p. 152): 'competition payments have played a pivotal role in maintaining reform momentum within the States and Territories … However, the payments regime has not been without shortcomings.' The shortcomings the Commission identified included:

- Some states and territories regarded the NCC assessment process and recommendations as not sufficiently transparent.
- Some local governments felt that they should have received payments for their contributions to reform efforts.
- The Commonwealth Government was not subject to financial penalties. Some state and territory governments were critical of the Commonwealth Government's efforts in reform, and highlighted the lack of penalties for poor progress.

Although the NCP payment system was not without flaws, the NCP reforms provide an example of how incentive payments, coupled with monitoring of reform outcomes, can encourage the states and territories to undertake reforms that deliver benefits to the economy as a whole. Such an approach may help to smooth the introduction of reforms to chemicals and plastics regulation.

Box 5.1 **The National Competition Policy**

The National Competition Council (NCC), governments and commentators regarded payments for completion of agreed reforms, and penalties for failure, as an important element in the success of the National Competition Policy (NCP). For example, the NCC stated:

> Using competition payments to leverage reform outcomes in areas of State and Territory responsibility has proven highly effective. … Reform would have been far slower and less comprehensive without competition payments. These payments (now at around $800 million per year) may not be large relative to State and Territory budgets, but nonetheless represent a significant source of incremental funds. (PC 2005, p. 30)

The Queensland Government stated:

> The payments were crucial to reaching agreement on the introduction of NCP and they remain crucial if States and Territories are to continue with the current arrangements. (PC 2005, p. 152)

With regard to road transport reforms, Wilson and Moore (2005) stated:

> Whilst the initial IGAs pre-dated the National Competition Agreements, competition payments were subsequently attached to implementation of agreed road transport reforms. These payments increased the incentive to implement reforms through encouraging road agencies to allocate the required resources and empowering them in their efforts to seek parliamentary passage. … On balance, linkage of implementation of agreed reforms to competition payments probably accelerated implementation of road transport regulatory reforms (Wilson and Moore 2006, pp. 294–295).

NCP payments are no longer available to state and territory governments. However, the Commonwealth Government has signalled that 'National Partnership payments' could be used to encourage the states and territories to implement reforms with national benefits — including some of the Commission's recommendations on chemicals and plastics regulation. The 2008-09 Budget papers state:

> The Commonwealth will provide National Partnership payments to the States to support the delivery of specified projects, to facilitate reforms or to reward those jurisdictions that deliver on national reforms. … The Government also recognises the need to support the States to undertake priority national reforms. Consequently, when an area emerges as a national priority, National Partnership facilitation payments may be used to assist States to lift standards of service delivery and National Partnership reward payments will be provided to States which deliver reform progress. (Australian Government 2008)

Incentive payments that are targeted at key areas of national reform could build momentum for reforms, including achieving greater national uniformity in regulatory regimes. The effects of incentive payments would be further enhanced by systematic assessments of the progress made by jurisdictions in implementing agreed reforms — similar to the role played by the National Competition Council in assessing progress in achieving the NCP reforms.

In chemicals and plastics regulation, incentives have taken the form of either rewards for jurisdictions that implement agreed reforms or sanctions for those that do not. Both mechanisms have been shown to be effective in encouraging the development of nationally consistent policies and programs.

Any decision to use incentive payments to encourage reform should be based on a thorough assessment of the benefits and costs. Even if incentive payments are successful in encouraging the states and territories to implement agreed reforms, raising the revenue to fund the payments imposes costs on the broader community. This makes it imperative that incentive payments should only be available for reforms that are likely to deliver significant net benefits to the community.

6. Conclusions

The Commission's analysis of chemicals and plastics regulation emphasised the importance of establishing robust governance structures that embody the principles of best practice regulation. While chemicals and plastics regulation tends to be a series of sub-sets of the differing state and territory legislation covering the more generic areas, such as OHS, it provides useful lessons about various mechanisms that could be used to enhance national consistency in other areas. These include:

- Whether a decentralised state-by-state approach or a more consistent national approach is in the public interest must be considered on a case-by-case basis. A variety of factors, such as the degree to which regulatory differences impact on administration and compliance costs, interjurisdictional spillovers, institutional constraints, and the need for tailoring the regulatory response to the circumstances prevailing in individual jurisdictions, must be considered.
- Regulatory uniformity may not always be desirable or achievable, meaning that national approaches might need to draw on common regulatory elements (harmonisation), or be achieved through mutual recognition.
- Where uniformity is desirable it is best achieved through referral of powers to the Commonwealth, but this has not been pursued in chemicals and plastics regulation and is relatively uncommon in other regulatory domains. More common have been attempts to introduce a high degree of consistency through template or model legislation approaches, sometimes involving a conferral of regulatory powers from the states and territories to the Commonwealth.
- There are advantages and disadvantages to template and model approaches. Template (and the similar reference) approaches offer the potential for a high degree of consistency, but can be time consuming to implement, and reduce the exercise of sovereignty by the states (although the states retain more of their

powers than under a referral of powers). Model approaches are more flexible (for example, they can be adapted to the institutional features of particular jurisdictions) but have a greater potential for inconsistent implementation. Template or reference approaches are well suited to the consistent adoption of subordinate technical regulations that are less constrained by institutional factors. This can help harmonise the application of the higher level regulations they support.

- National approaches to regulation should draw on the strengths of each level of government or, where appropriate, use independent agencies.
  - With a national focus, but limited constitutional powers, the Australian Government is largely restricted to playing a policy coordinating role. But it might also undertake regulatory roles where there are strong economies of scale and the issues are national or international in scope. Hazard and risk assessment of chemicals is an example.
  - State and territory governments are often better placed to deliver regulatory services and to respond to the needs and circumstances of their constituents. They should contribute to national policy development, and can promote regulatory consistency by referring to or adopting common national standards.
  - Independent statutory bodies made up of experts in the field, but constrained by the policy settings of governments, and an obligation to meet best practice regulatory assessment requirements, are, in the Commission's view the most appropriate forums for developing national standards. The National Transport Commission is an example.
- Effective national approaches need strong governance arrangements covering the development of a national policy response and its subsequent implementation, monitoring and refinement. COAG Ministerial Councils have been the normal forum for these functions, but other forums can be effective.
- Governance arrangements should be formalised as much as possible through IGAs. Although the states are sovereign entities and hence are not formally bound by such agreements, they promote transparency and accountability. The more successful IGAs feature:
  - commitment to use best endeavours to implement national standards consistently under all but the most exceptional of circumstances
  - majority voting
  - joint funding of policy development and standard-setting processes
  - reporting requirements through which the jurisdictions report back to the Ministerial Council (or equivalent) on implementation issues.

- Governance arrangements that rely on the jurisdictions implementing high level principles are likely to be much less successful. The implementation of principles concerning the regulation of SSAN is an example.
- Past experience suggests that monitoring the progress of states and territories in implementing agreed reforms, and rewarding those that meet reform goals, can help to progress policies that may otherwise falter.

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