
10 National security: regulation of ammonium nitrate

Key points

- In 2004, Australian governments agreed to a set of principles for the regulation of ammonium nitrate. The proposed control measures were intended to improve national security by reducing the potential for ammonium nitrate to be obtained for illegitimate purposes (terrorism), but allow continued access for legitimate users — primarily miners and farmers.
- States and territories have not implemented the principles consistently. As a result, the arrangements for controlling security sensitive ammonium nitrate (SSAN) are imposing unnecessary administration and compliance burdens. Extending these regulatory arrangements to other chemicals of security concern could have significant costs for business, and should therefore not be considered.
- Further, farming groups argue that the resulting regulations have unnecessarily reduced the availability of ammonium nitrate fertilisers.
- The regulations vary across jurisdictions due to fundamental differences in state and territory government attitudes to the appropriate legislation to use, licence coverage, and approaches to assessing the probity of applicants.
- To enhance security outcomes of the current arrangements, Commonwealth, state and territory governments should commit to a nationally coordinated system for background checking of individuals seeking access to SSAN.
- The efficiency of the current arrangements could also be improved by the states and territories progressing regulatory reforms that reduce other inconsistencies.
- Australian governments are working to establish a framework for assessing the security risks and appropriate control measures associated with chemicals of security concern. Such a framework should include governance arrangements that ensure measures are implemented consistently across jurisdictions. Once established, this framework should be used to re-examine the SSAN controls.

In response to growing concerns about terrorism, in 2002 the Council of Australian Governments (COAG) made a commitment to improve security arrangements for the storage, sale and handling of hazardous materials. The regulation of ammonium nitrate was made a priority because of the ease with which the substance could be obtained and potentially used as an explosive for the purposes of terrorism.

In Australia, ammonium nitrate is primarily used as an oxidising agent for explosives in the mining sector. To a far lesser extent, it is used as a fertiliser in the agricultural sector. Internationally, there have been accidental explosions and deliberate terrorist acts involving ammonium nitrate, resulting in significant numbers of deaths. Therefore, the substance poses risks for both public safety and national security.

In 2004, COAG agreed to a set of Principles for the Regulation of Ammonium Nitrate (agreed principles) to address the security risks (COAG 2004a). The objective of the agreed principles was to provide a nationally consistent approach, which involved limiting access to ammonium nitrate to only those persons with a demonstrated legitimate need for the product. The agreed principles were to guide the states and territories in their regulation of ammonium nitrate, given that the control of dangerous goods and explosives is their responsibility.

The agreed principles lay down core regulatory requirements for licensing the use, manufacture, storage, supply, import and export of security sensitive ammonium nitrate (SSAN). Under this approach, states and territories were given the flexibility to determine the appropriate legislative arrangements for implementing the agreed principles. All states and territories have now adopted SSAN regulations.¹

In 2006, the Regulation Taskforce raised concerns about how ammonium nitrate regulations have been implemented across Australia, and whether the stated policy objectives have been met. Given this, COAG requested that the Productivity Commission assess the efficiency of existing arrangements for SSAN as part of this study.²

10.1 The case for regulating ammonium nitrate

Ammonium nitrate is widely used as an explosive ingredient. In isolation, it is relatively stable, however, its oxidising properties allow it to support explosions if mixed with fuel and initiated with an explosive charge. In fact, the mixture of ammonium nitrate and fuel oil, commonly referred to as ANFO, is the most widely used commercial explosive in the world (COAG 2004c).

¹ The WA Government proclaimed SSAN regulations on 1 March 2008, which will be phased in over a 12-month period.

² The terms of reference state that the Commission is required to examine the efficiency of existing arrangements for SSAN, taking into account the requirement to achieve the Government's national security outcomes, and having regard to the work being progressed by COAG's Review of Hazardous Materials.

Ammonium nitrate is also used as a fertiliser. In certain physical environments it can be a highly efficient means of improving the nitrogen content of soil. However, this use only accounted for around 5 per cent of all ammonium nitrate sales in Australia prior to the introduction of the new regulatory controls on SSAN (COAG 2004c).

Traditionally, ammonium nitrate has been regulated to mitigate the safety concerns associated with accidental explosions. Such explosions can occur when the ammonium nitrate is present in sufficient concentrations in fertiliser products to support the combustion of other materials, even in the absence of air.

There have been major accidents around the world involving ammonium nitrate, which have resulted in significant explosions and fatalities. For example, in 2007, an accident involving a truck carrying 25 tonnes of ammonium nitrate explosive resulted in an explosion that killed 28 people and injured 154 others in Mexico City (Herald Sun, 12 September 2007). Other recent incidents have included explosions in a fertiliser factory in France in 2001, a train wagon in North Korea in 2004, and a truck containing ammonium nitrate fertiliser in Romania in 2004 (COAG 2004c).

Governments around the world have recognised the security risks posed by the use of ammonium nitrate for terrorist purposes. A notable example is the Oklahoma City bombing in 1995 — two tonnes of ammonium nitrate were used to destroy a government building, killing 168 people and injuring 500 others.

Ammonium nitrate has also been linked to terrorist organisations active in Australia's region. In Singapore, police arrested 13 members of Jemaah Islamiyah for planning attacks that would have used ammonium nitrate truck bombs (COAG 2004c). Further, attacks such as the Bali bombings on 12 October 2002, and the bombing outside the Australian Embassy in Bali on 9 September 2004, demonstrate that terrorist groups have targeted Australian interests.³

Internationally, a range of regulatory approaches have been adopted to mitigate the security risks posed by ammonium nitrate. Some countries, such as the United Kingdom, have taken a light-handed approach, emphasising education, training and information sharing rather than legislative controls. In contrast, Indonesia, South Africa, Peru and Colombia have banned the use of ammonium nitrate fertilisers (box 10.1). Differences in the reliance on ammonium nitrate fertilisers, and in the capacity of regulators to administer more complex regulatory regimes, may account for some of the divergence in approaches.

³ There is no evidence that ammonium nitrate was used in either of these attacks.

Box 10.1 International approaches to regulating ammonium nitrate

In the United States, about half of the 1.8 million tonnes of ammonium nitrate sold each year is used for fertiliser (COAG 2004c). However, only a few states have introduced regulations for controlling the sale of ammonium nitrate fertilisers. These regulations require retailers to be licensed, obtain valid identification from the buyer, keep transaction records and report any suspicious purchases. Retailers in other US states have adopted a voluntary security campaign, Be Aware America, where they report suspicious transactions involving ammonium nitrate.

In 2007, the Department of Homeland Security introduced national standards for chemical facilities of high risk. These standards, which are still being implemented, impose tight security measures, with the certification of chemicals stores requiring the implementation of security plans and inventory management procedures.

Canada is in the process of implementing regulations that are somewhere in between the voluntary approach and the COAG agreed principles. Under the proposed Canadian regulations, retailers will be required to obtain valid identification of farmers, such as a pesticides licence, and determine whether the amounts of ammonium nitrate fertiliser purchased are consistent with the farms' needs. The regulations also impose some requirements on the security arrangements for storage facilities and record keeping through the supply chain (NRCan 2006).

The UK Government has taken a light-handed approach to regulation, even though it is one of the greatest users of ammonium nitrate fertilisers in the world. Specifically, it has taken a layered approach to security of ammonium nitrate fertiliser, utilising regulation and industry partnerships to achieve security outcomes. It manufactures and imports about four million tonnes of ammonium nitrate products per year (NaCTSO 2007). It restricts the types of ammonium nitrate fertilisers that can be sold — they must be certified as detonation resistant, and must satisfy other technical requirements pertaining to porosity and particle size. Further, farmers are provided with advice regarding appropriate storage and security measures for their ammonium nitrate fertilisers. The Government also supports the Fertiliser Industry Assurance Scheme, which is a voluntary scheme for businesses to improve ammonium nitrate fertiliser supply chain security (NaCTSO 2007).

Indonesia, South Africa, Peru and Colombia have all banned the use of ammonium nitrate fertilisers. Other countries have imposed bans on the fertilisers based on their ammonium nitrate content. For example, China has banned the use of 100 per cent ammonium nitrate fertilisers, while in the Republic of Ireland and Northern Ireland, fertilisers containing more than 79 per cent ammonium nitrate are banned.

The New Zealand Government has not introduced controls on ammonium nitrate fertilisers due to the relatively low usage of the substance. However, the Government has introduced controls on other essential elements of an explosive device — such as detonators and primers — that can be used to set off an ammonium nitrate based explosion (Dawson, P., ERMZ, New Zealand, pers. comm., 8 September 2007). Such controls are standard in Australia and internationally.

10.2 The principles and practices of regulating ammonium nitrate in Australia

In late 2002, in response to concerns about ammonium nitrate (and other hazardous materials) being used for terrorist purposes, COAG commenced a review of the security risks associated with the use of hazardous materials, and how such risks could be mitigated.⁴ The aim of the review was to enhance national security by limiting opportunities for, and enhancing detection of, the illegal or unauthorised use of hazardous materials by improving regulations and other controls (SCCRHM 2008).

The *Report on the Regulation and Control of Ammonium Nitrate* was completed by mid-2004. Based on this analysis of the existing arrangements, the report (SCCRHM 2004) concluded the following:

- The unregulated sale of ammonium nitrate fertilisers posed the most serious risk to national security, and measures should be introduced to control their sale.
- The security risks from manufacturing ammonium nitrate products and their use in the mining sector were not significant.
- Banning access to ammonium nitrate products is not feasible for the mining sector and would have detrimental impacts on certain sections of the agricultural sector, primarily small horticulturalists and dairy farmers.
- The importation, storage and transportation of ammonium nitrate should be improved, and there would be benefit in establishing nationally uniform security standards for these activities.

The 2002 review steering committee recommended the development of a licence and permit system to control the availability of ammonium nitrate (SCCRHM 2004).⁵ State and territory governments would be required to administer the system because they have responsibility for dangerous goods and explosives legislation.

⁴ The review comprised four priority areas: explosive precursors, including fertilisers (ammonium nitrate); radiological sources; harmful biological materials; and other hazardous substances (chemicals of security concern). On 13 April 2007, COAG agreed to recommendations relating to the control of radiological materials and biological agents. The review of the other hazardous substances (chemicals of security concern) is due to be considered by COAG later in 2008.

⁵ The review's steering committee was chaired by a representative from the Department of the Prime Minister and Cabinet, and comprised representatives from the Attorney-General's Department, the Department of Transport and Regional Services, and the NSW, Victorian and Queensland governments.

On 25 June 2004, COAG agreed to:

... a national approach to ban access to ammonium nitrate for other than specifically authorised users. The agreement will result in the establishment in each jurisdiction of a licensing regime for the use, manufacture, storage, transport, supply, import and export of ammonium nitrate. (COAG 2004a)

To achieve this outcome, COAG (2004a) endorsed a set of agreed principles that set out the policy aims, as well as the minimum requirements for the licensing and permit system.⁶ The policy aims were to ensure that:

- the approach to limiting access to SSAN is nationally consistent
- safety and security concerns are addressed at all stages of the ammonium nitrate supply chain
- the framework used to control SSAN could be applied to other materials that pose security concerns.

Under the agreed principles, SSAN is defined as:

... ammonium nitrate, ammonium nitrate emulsions and ammonium nitrate mixtures containing greater than 45 per cent ammonium nitrate, excluding solutions. (These include dangerous goods under the Australian Dangerous Goods Code with the UN numbers 1942, 2067, 2068, 2069, 2070, 2071, 2072, 3375 and 3139 where applicable.) (COAG 2004a, attachment D, p. 1)⁷

The agreed principles require that an authorisation be obtained at each stage of the supply chain — the use, storage, manufacture, supply, transport, import, export or disposal of SSAN. To obtain an authority, an entity (person or company) must demonstrate a legitimate need for the SSAN product and prove their probity through police and Australian Security Intelligence Organisation (ASIO) background checks (COAG 2004a).⁸

The agreed principles then specify the minimum information provision, reporting and security planning requirements that should underpin the authorisation of the various activities. The mix of these requirements depends on the activity.

⁶ On 25 June 2004, the Office of Regulation Review endorsed a classified version of the *Regulatory Impact Statement in Relation to the Regulation and Control of Ammonium Nitrate*. In 2006, the Office of Regulation Review became the Office of Best Practice Regulation.

⁷ This definition classifies calcium ammonium nitrate — a fertiliser that is not classified as a dangerous good — as SSAN. However, ammonium nitrate products that are classified as Class 1 explosives are excluded from SSAN-specific regulation and continue to be regulated as explosives (AG 2006).

⁸ Listed examples of legitimate need for SSAN include use in: a commercial production process; mining; quarrying; research and laboratory use; and commercial farming. It is further noted that household and domestic use will not constitute a legitimate need (COAG 2004a).

For example, the import or export licensing requirements are largely focused on information management. The relevant entities are to inform the relevant regulator and the Australian Customs Service of the quantities and exact movements (for example, vessel identification) of the SSAN products. In contrast, the requirements for manufacturing, storing and transporting SSAN are focused on the implementation of approved security plans based on a risk assessment. For example, the manufacturing security plan should provide ‘details of the ingredients used, and their sourcing of dangerous goods’, whereas transport requires ‘precautions to ensure [SSAN] is secure for the duration of the entire journey’ (COAG 2004a, attachment D, pp. 4–5).

Requirements for authorising the supply, use and disposal of SSAN are primarily focused on information and record management, to ensure that all SSAN products can be accounted for.

State and territory officials also developed a range of ammonium nitrate guidance notes to act as national standards that could be used to assist states and territories in the development of consistent legislation and regulations.⁹ These guidance notes have also been made publicly available, to assist businesses to better understand their responsibilities under the SSAN regime. However, the guidance notes do not take precedence over requirements specified in state and territory legislation.

Implementation of the agreed principles

In drafting the legislative arrangements, states and territories were given flexibility to implement the requirements of the agreed principles, particularly in relation to:

- the choice of legislation and structure of the regulation
- licence design and coverage
- arrangements for background checks.

Differences in the regulatory framework

In the *Report on the Regulation and Control of Ammonium Nitrate* (SCCRHM 2004) it was recommended that state and territory governments use their explosives legislation to control SSAN because it was perceived to be a security risk due to its potential to be used in explosives. In addition, using explosives legislation

⁹ Guidance notes have been prepared for transport (AG 2004a), storage (AG 2004b), agricultural use (AG 2004c) and the siting of new facilities (AG 2004d).

would expedite the implementation of regulatory controls in some jurisdictions,¹⁰ and ensure that governments met the stated objective of bringing their explosives security requirements into line with the SSAN controls (SCCRHM 2004).

While some jurisdictions have used explosives legislation, others have used dangerous goods legislation (table 10.1). Dangerous goods legislation could provide greater flexibility for jurisdictions to use their SSAN regulatory regime to control other security sensitive hazardous substances that have no explosive (or explosive precursor) properties. Being able to use the SSAN regulatory regime to control other hazardous substances was one of the stated policy aims for the agreed principles.

Table 10.1 SSAN legislation by jurisdiction

<i>Jurisdiction</i>	<i>Relevant legislation</i>	<i>Classification of SSAN</i>	<i>Enforcement date^a</i>
New South Wales	<i>Explosives Act 2003</i>	Explosive precursor	1 January 2006
Victoria	<i>Dangerous Goods (Amended) Act 2004</i> Dangerous Goods (HCDG) Regulations 2005	High consequence dangerous good	1 January 2006
Queensland	<i>Explosives Act 1999</i> Explosives Regulation 2003	Explosive / Security sensitive explosive	1 July 2005
South Australia	<i>Explosives Act 1936</i> Explosives (Security Sensitive Substances) Regulations 2006	Explosive / Security sensitive substance	25 July 2006
Western Australia	<i>Dangerous Goods Safety Act 2004</i> Dangerous Goods Safety (Security Risk Substances) Regulations 2007 ^b	Security risk substance	31 December 2008
Tasmania	<i>Security-sensitive Dangerous Substances Act 2005</i> Security-sensitive Dangerous Substances Regulations 2005	Security sensitive dangerous good	21 May 2006
Northern Territory	<i>Dangerous Goods Act</i> Dangerous Goods Regulations	Security sensitive substance	20 October 2004

^a This is the date from which the licensing requirements for SSAN became enforceable, not the date when the legislation was enacted. ^b Regulations were proclaimed on 1 March 2008 and will become fully enforceable after a 12-month phase-in period.

The choice of legislation has also been influenced by the historical treatment of ammonium nitrate. For example, the SA Government has historically used explosives legislation rather than dangerous goods regulation to control class 5 oxidising agents and organic peroxides. Jurisdictions have also had to consider which agencies would be responsible for administering SSAN legislation,

¹⁰ This recommendation was primarily based on a review of the Queensland explosives legislation. It was argued that, at least under Queensland legislation, SSAN could be declared an explosive by the Chief Inspector of Explosives, which would expedite the government's capacity to introduce security controls.

and how the requirements for SSAN would interact with other reporting, labelling, storage and handling requirements within the different pieces of legislation.

Some jurisdictions have enacted dedicated regulations, while others have incorporated the regulations into existing regulations. Victoria, South Australia, Western Australia and Tasmania have enacted dedicated regulations for SSAN (or similar security sensitive substances). In contrast, New South Wales and Queensland have chosen to incorporate SSAN controls into explosives regulations, and the Northern Territory controls have been incorporated into the dangerous goods legislation.

Differences in licence design

In line with the agreed principles, all jurisdictions require that an entity wanting to use, store, manufacture, supply, transport, import, export or dispose of SSAN must be authorised. However, there is little consistency across jurisdictions in the specific licensing arrangements (table 10.2). In particular, the jurisdictions have taken different approaches to:

- the terminology used
- licence coverage
- issuing licences for unsupervised access to SSAN.

States and territories vary in some of the most basic aspects of the terminology they have adopted. For example the terminology used to categorise substances deemed to be of security concern, such as SSAN, varies across jurisdictions (table 10.1). They also vary in their use of the terms ‘licence’ and ‘permit’. In Victoria, activities are licensed, and individuals receive a permit to have unsupervised access to SSAN. In contrast, South Australia and Tasmania provide permits to conduct restricted activities.¹¹

¹¹ In this chapter, the term ‘licence’ refers to the authorisation of activities, and ‘unsupervised handling licence’ (UHL) will be used to refer to the authorisation of individuals to handle SSAN without supervision.

Table 10.2 Summary of SSAN licensing of activities by jurisdiction

	<i>NSW</i>	<i>Victoria</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>NT</i>
Single licence can cover all SSAN related activities	No	Yes	No	Yes	No	Yes	No
Licence to use allows entity to possess, use, store, transport and dispose of SSAN	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Single licensing agencies in the jurisdiction	Yes	Yes	Yes	Yes	Yes	Yes	No
Single agency oversees compliance with regulations	Yes	Yes	No	Yes	Yes	Yes	No
Licence length (years) — use licence	5	5	5	3	3	3	1
Individuals provided with unsupervised handling licence to undertake authorised activities	No	Yes	No ^a	No ^a	Yes	Yes ^b	No ^a
Agency responsible for determining ‘appropriateness’ of individuals with unsupervised access — police (P), worksafe authority (WA), employer (E)	P	WA	E ^c	WA	WA	WA	WA
Seller has responsibility of verifying validity of SSAN buyers	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Temporary recognition of licences from other jurisdictions	Yes	Yes ^d	Yes	No	Yes	Yes	Yes ^e

^a Individuals who have unsupervised access in these jurisdictions must undergo probity assessments. However, they do not receive a licence or permit from the regulator. ^b A worker is authorised to have unsupervised access to SSAN under their employer’s permit. However, this authority is not transferable to other employers. ^c If the individual seeking unsupervised access is self-employed, the regulatory authority will determine the individual’s appropriateness. ^d Victoria may not recognise a licence issued in Queensland. ^e Northern Territory will require clarification of types of police checks other jurisdictions use prior to recognition of licences (must include finger print check).

The jurisdictions also vary in the way in which they authorise multiple activities. In some jurisdictions a single licence will allow the entity to conduct multiple activities associated with SSAN. For example, in Victoria, South Australia and Tasmania, a single licence authorises an entity for any or all of the restricted activities, as long as the entity provides the relevant security plans and documentation.

In New South Wales, a single licence can be used to authorise multiple activities that are deemed to be legitimately required for a business’s operations. For example, a license to manufacture can also permit the entity to export SSAN.

In the other jurisdictions, the types of activities that can be conducted under a single licence varies. For example, in Queensland and Western Australia separate licences are required for manufacturing, importing, supplying, transporting or using SSAN. In some cases, however, more than one activity can be covered by a single licence.

In relation to use licences, the Tasmanian Government has banned the use of SSAN for agricultural purposes. Although, as set out later, the practical impact is not significant, this decision is in direct contradiction of the agreed principles and departs from the arrangements in other jurisdictions.

The states and territories have adopted different approaches for authorising individuals to have unsupervised access to SSAN. Based on the agreed principles, all jurisdictions require criminal record and politically motivated violence checks for any individual who has unsupervised access to SSAN.¹² However, the jurisdictions vary as to how that activity is authorised.

In New South Wales and Victoria, authorised individuals with unsupervised access to SSAN can be issued with an unsupervised handling licence (UHL). In Tasmania, individuals are issued with a non-transferable identity card demonstrating that they are authorised to have unsupervised access to SSAN under their employer's permit. In Queensland, the licensed employer determines whether an employee should have unsupervised access to SSAN based on their background check.

Individuals in South Australia must be listed on a licensed entity's security plan but are not issued with a physical licence. The SA Government (sub. 56) stated that issuing licences for unsupervised access to SSAN contradicts advice from ASIO. This is because such licences could potentially be forged and used to gain access to SSAN without arousing suspicion.

Differences in assessing probity

Although most jurisdictions require ASIO to conduct politically motivated violence checks, the states and territories have differing views about what information the individual should provide, what information should be used to make the assessment, and which agency or entity should determine an individual's appropriateness for having unsupervised access to SSAN (table 10.2).

In most jurisdictions, individuals must meet the standard 100-point requirement for identification. However, some jurisdictions also require individuals to provide fingerprints as part of the identification process.

In most jurisdictions, the decision to exclude an individual based on their criminal record resides with the SSAN regulator. However, these decisions will take into account the recommendation of the local the police before determining an individual's appropriateness. In some cases, the police might consider matters other than convictions — such as whether an individual has any known association with criminal activity — when making determinations about an individual's probity. In New South Wales, the police are required to conduct the criminal record check and make a determination about whether the individual is fit to receive a SSAN licence

¹² These checks are not required in Western Australia until 1 March 2009. The Northern Territory undertakes criminal record checks, but is yet to implement legislation necessary for requesting ASIO checks.

or permit. Once the legislation is enacted, the NT police will be responsible for determining an individual's probity in that jurisdiction.

Queensland is unique in its administrative arrangements for licensing. In the first instance, the entity seeking to conduct the activity has its appropriateness determined by a representative from the Department of Mines and Energy, based on the results of the ASIO and police checks. However, as noted above, it is the responsibility of the licence holder to subsequently determine an employee's appropriateness to have unsupervised access to explosives such as SSAN. In this case, the employer would have access to the results of the employee's police and ASIO checks.

Approach to licence fees and charges

There is a considerable degree of variation in licensing fees and charges across jurisdictions (table 10.3). However, it is difficult to draw clear comparisons because of differences in licence coverage and duration.

Table 10.3 Summary of SSAN licensing charges by jurisdiction^a

	<i>NSW</i>	<i>Victoria</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tasmania</i>	<i>NT^b</i>
Licence (permit) for all SSAN related activities (\$)	..	80 ^c	..	45	..	162	na
Licence to use (\$)	100	..	212	..	50	..	10
Licence length (years)	5	5	5	3	3	3	1
Licence to store (\$)	250	..	1 527.50	..	140	..	10-300 ^d
Licence to manufacture (\$)	2 500	..	1 527.50	..	300	..	10
Licence to import (\$)	2 350	..	1 206.50	..	160	..	na
Licence to supply (\$)	600	..	298.50	..	130	..	10-15
Licence to export (\$)	..	..	1 206.50	..	160	..	na
Licence to transport (\$)	1 850	..	..	..	150	..	10
Unsupervised handling licence (\$)	..	No fee	..	..	..	..	..
Police criminal record check ^e (\$)	150 ^f	40	23.10	49	150 ^f	4 232	..
ASIO check ^g (\$)	..	19	19	18	..	2 620	..

^a Charges are reported for the 2007-08 financial year. However, the grouping of licences is for convenience. The extent of the activities actually authorised by licences of the same name might not be aligned across jurisdictions. ^b Does not include cost of police and ASIO checks set by police and ASIO. ^c Victoria does not charge a fee for unsupervised handling permits, other than for a background check. ^d Charges vary for differing quantities. ^e All jurisdictions require the local authority (police) probity check. This check must be repeated every time the licence/permit is renewed. ^f This charge covers both the police and ASIO background checks. ^g All jurisdictions, with the exception of the Northern Territory, currently require applicants to undergo an ASIO 'politically motivated violence check' when issuing the initial licence/permit. This check is only required for the first licence/permit. **na** Not available. .. Not applicable.

Variation in licence charges across jurisdictions reflects differences in licence design, and differences in the level and composition of the licence uptake. For example, one would expect more licences to be issued in the states that manufacture SSAN or that have a large mining sector. Further, the resources required to assess some security arrangements will be greater than others. For example, assessing security arrangements for a manufacturing plant could be more resource intensive than assessing the security arrangements for the use of SSAN fertilisers. The cost and availability of those resources will also vary across jurisdictions.

Each jurisdiction's charges will also be influenced by differences in the application of cost-recovery practices in relation to SSAN licensing. Most jurisdictions have chosen to initially charge fees that are below full cost recovery.

The Commission's assessment

Based on a review of the relevant legislation and guidance material, most jurisdictions could demonstrate that their particular arrangements are generally consistent with the COAG agreed principles for regulating SSAN. However, there is a significant degree of inconsistency in regulatory requirements across jurisdictions.

10.3 Assessing the SSAN regulatory regime

The effectiveness and efficiency of the SSAN regulatory regime can be assessed according to:

- the extent to which the arrangements have achieved national security objectives
- the impact of the arrangements on the availability of SSAN products
- the administration and compliance costs associated with the regulations.

Achieving national security objectives

It is difficult to determine the extent to which the current arrangements have improved national security outcomes. There have been no major reported terrorist incidents involving SSAN in Australia, either before or after the controls were introduced. Whether the controls have prevented the use of SSAN for terrorist purposes is largely unknowable, as is the incremental gain over general security and law enforcement measures. That said, some features of the SSAN regime could be limiting the intended benefits for national security.

Enacting the regulations

For security measures to be fully effective on a national basis, it is important that they take force across the country at the same or a similar time. This prevents the possibility of an individual or group acquiring the relevant security sensitive substance from a jurisdiction that has lesser security measures in place. Given the porous nature of the borders between the states and territories, once SSAN is obtained for illegitimate purposes, the security of all jurisdictions is compromised. COAG expressed the need for an urgent response by all jurisdictions:

... the States and Territories would use their best endeavours to ensure the legislative arrangements for the licensing regime would be in place by 1 November 2004, with administrative arrangements to be finalised as soon as possible thereafter. (COAG 2004a)

Yet only two jurisdictions — Queensland and the Northern Territory — achieved the 1 November 2004 target. Although the Northern Territory implemented the SSAN principles for storage and transport, it is yet to enact legislation to facilitate ASIO background checks. Most other jurisdictions did not enact their legislation until late 2005. The WA Government proclaimed its SSAN regulations on 1 March 2008, and these will become fully enforceable after a 12-month phase-in period.¹³

Coordinated, national approach to probity checks

To achieve national security objectives, it is necessary to ensure that only those persons who are considered fit and proper have access to substances deemed to be of security concern. The agreed principles require that ‘the person responsible for the security of SSAN at a workplace’ and ‘any person who has unsupervised access to SSAN’ have police and ASIO background checks (COAG 2004a, attachment D, p. 2).

The agreed principles do not, however, specify what level of criminality should exclude a person from unsupervised access to SSAN, or how states and territories should share information about an individual’s security status. The variation in administrative arrangements for SSAN background checks, as well as differences in criminal codes in each jurisdiction, mean that the level of criminality that disqualifies an individual is inconsistent across jurisdictions.

In addition, there are no formal means of sharing information about the probity of individuals who have, or have sought, access to SSAN. In effect, an individual who is deemed unfit to hold a licence on security grounds, or who has had their licence

¹³ The Commission has not been provided with any evidence that suggests individuals have been exploiting the lack of SSAN controls in Western Australia.

revoked due to security concerns in one jurisdiction, could try to obtain authorisation to access SSAN in another jurisdiction.

Availability of SSAN

The availability of SSAN fertilisers for legitimate users has decreased since the introduction of the SSAN regulations. The most emphatic example was the outright ban on using SSAN fertilisers in Tasmania by the Tasmanian Government. However, the net effect has not been that large — only 139 tonnes were used on Tasmanian farms during the 2000-01 financial year (ABS 2002) — and substitute products are available (DPIW nd).

In other jurisdictions, the National Farmers' Federation (NFF) argued that the SSAN regulations have resulted in a de facto ban on SSAN fertilisers because:

... manufacturers and retailers did not produce or stock the product due to a perception that the additional costs of compliance and use (incurred throughout the supply chain and passed on to the end-user) means that the product is unaffordable to most farmers. (NFF 2007, p. 5)

Some reduction in the availability of SSAN fertilisers was expected following the introduction of the regulations. In fact, a rationalisation in the number of retailers stocking SSAN fertilisers was perceived to provide a benefit for national security if only those retailers that were familiar with the product and its appropriate uses continued to stock it (SCCRHM 2004).

However, not all of the reduction in the availability of SSAN fertilisers can be attributed to the introduction of the SSAN regulations. Some of the main domestic producers of SSAN fertilisers decided to cease supplying the product for commercial reasons prior to the commencement of the 2002 *Review of Hazardous Materials* (SCCRHM 2004).

The Commission has seen no evidence that the regulations have reduced the availability of SSAN to the mining sector.

Administration and compliance burdens

COAG (2004a) endorsed the approach of using agreed principles on the basis that the states and territories required the flexibility to develop regulatory controls and administrative processes that were consistent with their existing regulatory frameworks. However, the manner in which jurisdictions have implemented the agreed principles, and the resulting variation across jurisdictions, has imposed unnecessary burdens on both businesses and administrative agencies. These burdens

take the form of unnecessary costs and delays resulting from impediments to mutual recognition of licences, additional reporting requirements, additional storage and handling requirements, and complexity of the administrative arrangements.

Impediments to the mutual recognition of licences

Mutual recognition has the potential to reduce the compliance burden associated with variation in licensing regimes across jurisdictions. Under the principle of mutual recognition, possession of a licence from one jurisdiction is usually sufficient grounds to obtain an equivalent licence in another jurisdiction.

Australia has specific legislation covering some types of mutual recognition. The *Mutual Recognition Act 1992* (Cwlth) (MR Act) sets out states' and territories' obligations with respect to the mutual recognition of goods and registered occupations. SSAN licensing, in the context of mutual recognition, will be considered in more detail as part of the Commission's current Review of Mutual Recognition Schemes.

A preliminary analysis suggests there is ambiguity about the application of the MR Act to SSAN licensing. To the extent that SSAN licences are issued to individuals and cover activities that are equivalent between jurisdictions, they may be subject to the provisions of the MR Act. To the extent that SSAN licences are not covered by the MR Act, it is desirable that some other type of mutual recognition scheme apply.

SSAN regulations in some jurisdictions include provisions for licence recognition, but approaches vary. Victoria has explicit, comprehensive provisions regarding mutual recognition of security clearances and licences in its regulations (PACIA 2007a). Other jurisdictions have capacity within their regulations to recognise each other's licences on a temporary basis. For example, Western Australia has provisions for the recognition of Security Risk Substances transport drivers not permanently resident in that state. And, in Tasmania:

If you already have a permit, or its equivalent, issued by another State or Territory authorising you to have access to ammonium nitrate for a certain activity, it is unlikely that you would need a Tasmanian permit to use or transport SSAN for a period of less than three months. In any transaction involving ammonium nitrate you would have to produce the permit. (WST 2007)

In New South Wales, SSAN and explosives related licences from other jurisdictions are recognised, with individuals being allowed to undertake those activities that they are authorised to conduct in the primary jurisdiction. However, the relevant New South Wales regulator might also require the individual to demonstrate their competency to undertake certain activities relating to explosives.

The SA Government has also:

... built into its administrative system for SSAN a process for recognising security clearances granted in other jurisdictions to allow the granting of a reciprocal licence for specified activities involving SSAN. (sub. 56, attachment B, p. 3)

However, the SA Government stated that its capacity to recognise security clearances from other jurisdictions is currently inoperable because other jurisdictions do not have systems in place to:

... ensure any change of security status of the individual licensed in the primary jurisdiction would be immediately transferred to the secondary licensing jurisdiction (i.e. South Australia). (sub. 56, attachment B, p. 3)

Irrespective of how mutual recognition is pursued — whether under the MR Act or through some other approach — concerns about the lack of a nationally consistent approach to background checking creates a barrier to achieving the mutual recognition of licences on an ongoing basis. As previously noted, states and territories variously rely on probity determinations by the police, regulatory agencies or employers. These variations in approach create uncertainty across regulatory agencies about whether background checks from other jurisdictions should be recognised.

Another factor that frustrates mutual recognition is the variation in licence coverage that is, the scope of activities permitted under a licence. The Australian Explosives Industry and Safety Group (AEISG) stated:

The coverage of licences in different jurisdictions differ[s] markedly. As a result it is difficult to impossible to purchase a licence in the new jurisdiction which will duplicate all the functions of the licence you already hold ... (AEISG sub. 45, p. 13)

The AEISG (sub. 45) reported that up to 15 per cent of operational employees within the explosives sector spend some time every year working interstate, and would obtain similar licences (or authorisations), including repeated background checks, from each jurisdiction in which they intend to operate. It further estimated that the SSAN regulations impose compliance costs of approximately \$3 million per year for the explosives industry, and that a system of national regulation could reduce these costs by 50 per cent. These costs are exacerbated by similar inconsistencies in explosives licensing arrangements across jurisdictions (box 10.2).

The costs to business that arise from multiple licences are further inflated by time delays. For example, the Plastics and Chemicals Industries Association (PACIA) (2007a) has reported that it can take up to nine months to obtain SSAN related licences in New South Wales.

Box 10.2 Explosives legislation

The mining sector accounts for almost all security sensitive ammonium nitrate (SSAN) products used in Australia. As SSAN is used as an explosives ingredient, many firms in that sector require authorisation for access to both SSAN and explosives. As noted previously, this led some jurisdictions to incorporate SSAN arrangements into their explosives legislation.

However, like the SSAN regulatory regime, there are also many inconsistencies in explosives legislation across jurisdictions. In particular:

... the procedures for licensing explosives personnel and equipment differ substantially among jurisdictions ... [this] significantly impede[s] the movement of these resources between jurisdictions ... (AEISG, sub. 63, p. 2)

Although regulators have systems in place to help facilitate the movement of people and equipment between jurisdictions on a temporary basis, inconsistencies in regulatory requirements impede ongoing or permanent recognition of licences across jurisdictions. The introduction of SSAN regulations appears to have added an additional layer of complexity to how mining related activities are authorised.

Reporting requirements

Jurisdictions vary in the information that they require businesses to provide as part of the authorisation arrangements. The security benefits generated by some information provision requirements have been questioned by industry. In particular, AEISG (sub. 45) and PACIA (sub. 33) have questioned the value that regulators attain from the seven-day notification requirement to transport goods into or through South Australia, and Queensland's requirement that monthly sales data be provided from all levels of the SSAN distribution chain.

In South Australia, imports of SSAN from other Australian jurisdictions are treated in the same way as international imports, in that businesses are required to provide the regulator with notification of the date that SSAN will be entering the state. The SA Government (sub. 56) contends that this is necessitated by the large quantities of SSAN that pass through the state, as it is transported between manufacturers and customers on opposite sides of the country. The SA Government considered that such information assists the regulator in being prepared to respond to an emergency situation or incident involving SSAN. Under existing regulations, states and territories require the substance to be transported along routes prescribed in the licence holder's transport security plan. No other state requires notification for the transport of SSAN across their jurisdiction.

Participants in this study have provided little specific information on the costs associated with meeting the information requirements of the various regulatory

regimes. Individually, the reporting requirements are unlikely to generate significant costs, particularly now that businesses have adapted to meeting the requirements of the SSAN regulatory regime. However, these reporting requirements create an unnecessary nuisance for businesses operating nationally and provide little demonstrable benefit in relation to achieving national security objectives. Information requirements should only be imposed if there is a demonstrable net benefit.

Storage and handling arrangements

Both safety and security considerations are important for the storage and handling of SSAN. Its potential to contribute to accidental explosion, and for it to be used in explosives, makes it prudent to store it at a safe distance from built-up areas, yet there is currently no agreed position, nationally or internationally, on appropriate storage and handling controls, including satisfactory safety distances.

Participants in this study questioned the appropriateness of the storage and handling requirements for SSAN imposed by some jurisdictions with the introduction of the SSAN controls. Specifically, the requirement by some jurisdictions for SSAN to be stored and handled as an explosive could result in controls that are more stringent and more costly to adhere to than those imposed on dangerous goods. PACIA (2007a, p. 19) argued that legislation requiring SSAN products to be stored and handled as an explosive — in Queensland, South Australia and Western Australia — does ‘not reflect the scientific reality of SSANs’.

The AEISG (sub. 45) noted that prior to the introduction of SSAN controls, consequence-based measures for storage and handling were applied only to explosives, while risk management principles were applied to all other dangerous goods, and further, that the risk-based regulation had the flexibility to accommodate additional security measures if needed. It expressed concern that if the consequence-based storage measures were to be applied retrospectively to existing SSAN storage facilities the costs to industry would be significant.¹⁴

There appears to be a case for further research to clarify this issue, and for the establishment of agreed evidence-based criteria for the storage and handling of SSAN.

¹⁴ No state or territory government has indicated that it intends to apply SSAN storage controls retrospectively. However, should this position change, AEISG (sub. 45) estimated that the capital costs associated with relocating facilities to meet the regulations would be in the order of \$20 million for a 5000 tonne storage facility and that the operating costs would increase by \$15 to \$20 per tonne of SSAN.

Administrative complexity

The complexity of administrative arrangements can result in unnecessary costs for businesses. Complexity can arise from having to deal with multiple regulators within a single jurisdiction, with multiple, varying sets of regulations across jurisdictions, or with multiple, and in some places conflicting, regulatory arrangements.

PACIA (2006a) contended that legislative structures for controlling access to SSAN are more complex in Queensland and New South Wales than the other jurisdictions. In Queensland, five departments have a role in administering the control of SSAN, explosives and dangerous goods (PACIA 2007a). The responsibilities for SSAN transport safety and licence issuing are split between three agencies in New South Wales (AEISG sub. 45). This separation of regulatory responsibilities across agencies makes it more difficult for businesses to comply with SSAN controls.

For businesses that operate in more than one jurisdiction, the difficulties and costs associated with SSAN regulatory regimes are compounded. Science Industry Australia stated that:

... [state and territory SSAN requirements] for labelling, paperwork trails, reporting, monitoring and implementation dates, are far from standardised. In some cases other minor changes are laid on top of previous minor divergences to create larger divergences, thus increasing the burden on industry to [remain] up-to-date and compliant with (each) state/territory requirements. (sub. 51, p. 4)

Orica (2007) noted that the lack of uniformity in how jurisdictions have introduced their legislation hampered the company's efforts to assist customers to adapt to the changing regulatory and operational environment.

In addition, businesses operating in multiple jurisdictions face the ongoing costs associated with monitoring their compliance across jurisdictions. These costs are exacerbated by the variations in licence coverage and duration, and the lack of fully effective mutual recognition arrangements.

Materiality of the impact of SSAN arrangements on compliance costs

While it is clear that the current SSAN regulatory regime is not delivering national security objectives in the most effective and efficient way, the materiality of the impacts on the costs of doing business is uncertain.

There have been some impacts on the availability of SSAN fertilizers, and the costs for those farmers who continue to use them have increased. But given the relatively low usage of SSAN fertilizers in Australia and the availability in many cases of

substitute products, the extent to which the regulations have had a detrimental impact on the productivity and quality of farm produce is less clear.

AEISG (sub. 45) argued that interjurisdictional differences in the regulations are imposing some unnecessary costs on businesses in the mining sector. And, the duplicated administrative processes are undoubtedly imposing unnecessary costs on governments. However, based on the information provided to the Commission, it is difficult to assess the full extent of these costs.

Some evidence is available that costs can be reduced in parts of the SSAN regulatory regime, as set out below (section 10.4). More important, there is also a well founded concern that current SSAN regulations pose a risk of generating significant economic costs if they were to be extended to other security sensitive hazardous materials — Chemicals of Security Concern (CSCs) (section 10.5).

10.4 Improving the SSAN arrangements

The inconsistencies permeating the current SSAN regulations compromise both the effectiveness and efficiency of the control measures. The Commission considers that states and territories should review some of the more significant variations in the regulations.

A national approach to administering background checks and information sharing

Fully effective mutual recognition of licences across jurisdictions would improve the effectiveness and efficiency of the SSAN arrangements. However, there are a number of steps that would need to be taken in order to reduce impediments to the achievement of mutual recognition:

- Agreement on a core set of information requirements for background checking — the information considered necessary to determine an individual's probity — would enable jurisdictions to recognise each other's security checks.
- An information sharing mechanism — such as a national database — would enable all licence issuing authorities to access security checking outcomes, clearance and licensing information.
- Agreement on the criteria that would determine an individual's eligibility for access to SSAN — such as a common set of offences — would enable jurisdictions to recognise each other's security clearances.

An agreed set of information requirements for background checks, and a system of information sharing would go some way towards reducing compliance and administration burdens, and limit the capacity of individuals to obtain a licence in the least rigorous jurisdiction. Further, these are steps that could be undertaken within a reasonably short timeframe, and therefore efforts should be directed towards achieving them in the first instance.

A single system for background checking

Currently jurisdictions independently conduct background checks on individuals wishing to gain access to SSAN by requesting information from various sources, such as databases containing information relating to criminal history and other matters relevant to security. For example, National Criminal History Checks are obtained from CrimTrac and the Australian Federal Police, and politically motivated violence checks are conducted by ASIO.

Utilising a single national background checking service to conduct these checks, according to agreed information requirements, would improve the consistency of outcomes and minimise duplication. The provider of this service would request the necessary information about individuals from the relevant agencies and databases, maintain a separate database of outcomes, and provide recommendations to the respective state and territory SSAN licensing agencies.

AusCheck — a centralised government vetting agency within the Australian Attorney-General's Department — currently administers a national security checking process for Aviation Security Identification Cards and Maritime Security Identification Cards.¹⁵ As such, there would be synergies in it providing this service for jurisdictions' SSAN licensing agencies. The specific parameters for background checking for SSAN would be agreed by jurisdictions and legislated for in the *AusCheck Act 2007*.

A national database to facilitate information sharing

The establishment of a database of current, refused and revoked security clearances would also facilitate mutual recognition, because every jurisdiction would have access to the clearance information, regardless of which jurisdiction initially issued the SSAN licence. Ideally such a database would also include information on what licence/s each individual holds.

¹⁵ In contrast to dangerous goods and explosives legislation, aviation and maritime security are the responsibility of the Australian Government.

In addition to reaching agreement on the core set of information requirements that should be used for background checks, and the establishment of a national database, other challenges would remain to achieving mutual recognition. Jurisdictions would need to agree on the criteria that would determine eligibility of individuals for access to SSAN. Further, regulations would need to be amended to transfer the authority to determine an individual's probity to another agency and implement the relevant appeals processes. Once established, however, the arrangements could be extended to other security sensitive substances, such as explosives, security sensitive biological agents and radiological sources, and some CSCs as required.

RECOMMENDATION 10.1

Commonwealth, state and territory governments should implement a nationally uniform approach to conducting security checks for access to security sensitive ammonium nitrate, irrespective of other harmonisation measures. The background checking process should be managed by a single agency such as AusCheck. A database that reports current, refused or revoked security clearances should be established, and the information shared across jurisdictions.

Other measures to improve the national consistency of the current arrangements

Other inconsistencies with the current SSAN regulatory arrangements also result in unnecessary compliance and administration costs. Some beneficial amendments that should be considered include:

- removing inconsistent reporting requirements — such as South Australia's domestic importation notifications
- making licence durations nationally consistent
- basing storage requirements on agreed physical properties of SSAN, provided adequate security requirements are met
- ensuring that applications that require approvals in more than one jurisdiction (such as some security plans for transporting SSAN) can be lodged in the primary jurisdiction, then circulated to other relevant agencies (the agencies would be able to recover costs associated with circulating the plan)
- regulators committing to target timeframes for assessing licence applications (these timeframes should be reported against, but there should be no other penalties incurred if agencies fail to meet the target timeframe).

These reforms, if implemented, are likely to deliver a small, but material economic benefit. This is because:

- the benefits of having greater national consistency are mainly associated with greater recognition of licences across jurisdictions, and these could largely be attained through coordinating background checking arrangements and sharing the information nationally
- the impacts on compliance costs could be ambiguous because the ongoing savings from changing the regulations might not be significantly greater than the one-off transition costs incurred as companies change their systems
- the transaction costs involved in state and territory governments reaching agreement about regulatory amendments and then implementing the changes could be significant

Further, these amendments would only marginally improve a fundamentally inappropriate national regulatory regime. And, as the Commission argues in section 10.5, state and territory governments should not use the current SSAN regulations to control other security sensitive hazardous materials.

RECOMMENDATION 10.2

State and territory governments should consider the following improvements for achieving greater national harmonisation of the security sensitive ammonium nitrate (SSAN) regulations:

- *removing major inconsistencies in reporting requirements*
- *basing storage requirements on agreed physical properties of SSAN, provided adequate security controls are met*
- *ensuring that a single security plan can be lodged for transporting SSAN nationally*
- *making licence durations nationally consistent*
- *requiring regulatory agencies to commit to, and report on, timeframes for assessing licence applications.*

10.5 Addressing the security risks associated with other chemicals

Ammonium nitrate is not the only chemical that raises security concerns. Recognising this, COAG endorsed a report on CSCs as the fourth and final component of the review of security risks associated with hazardous materials. The

Steering Committee for the COAG Review of Hazardous Materials (SCCRHM) released the draft of this report on 11 February 2008 (box 10.3).

The *Draft Report on Chemicals of Security Concern* (SCCRHM 2008) sets out the proposed Chemical Security Management Framework (CSMF). The CSMF provides a structured process for developing and implementing control measures that are proportionate to the CSC's assessed security risk. The CSMF appears to address many of the shortcomings of the development and implementation of SSAN regulations. In particular, it provides a systematic approach for developing risk-based controls to address security concerns, and governance arrangements that promote stakeholder engagement and more appropriate ministerial accountability for the implementation of security arrangements.

While the Commission is generally supportive of the CSMF, there is some scope for improvement. Of some concern is that the Draft Report does not rule out the addition of other chemicals to the current SSAN regulatory regime. Further, some elements of the CSMF could be strengthened to ensure that the resulting control measures are efficient and nationally consistent.

Box 10.3 **Review of Hazardous Materials — Draft Report on Chemicals of Security Concern**

The Review of Hazardous Materials — Chemicals of Security Concern (CSCs) forms the final part of the COAG national review of the regulation, reporting and security surrounding the storage, sale and handling of hazardous materials.

On 30 November 2006, the Steering Committee for the Review of Hazardous Materials (SCCRHM) released a discussion paper that covered: the guiding principles for the control framework for CSCs; international approaches; the risk assessment methodology that could be used to identify and group CSCs based on their security risk; possible security control measures; and mechanisms for their implementation.

The 101 submissions, as well as feedback from workshops involving representatives from governments and industry, helped SCCRHM craft its draft report, which was released on 11 February 2008.

The draft report recommended COAG agree to a Chemical Security Management Framework that comprises:

- an agreed approach to conducting security risk assessments across all elements of the supply chain of chemicals of potential security concern based on risk and terrorist interest
- measures to improve the existing chemical security arrangements by enhancing community awareness, better engaging industry to improve existing security activities and voluntary programs, and improving the coordination between chemical regulatory and law enforcement agencies
- management and governance arrangements to allocate roles and responsibilities and establish ongoing coordination and consultation arrangements across governments and between governments and industry.

The draft report also recommended the following governance arrangements:

- The Australian Government establish a chemical security coordination unit to oversee the development of capacity building measures and work with reference groups comprising security agencies, industry and existing Commonwealth, state and territory government regulators.
- The Australian Attorney-General be the Minister responsible for the coordination of the framework. The Attorney-General will consult, coordinate and seek agreement where appropriate with a nominated Minister from each state and territory government on relevant aspects of the framework.
- An intergovernmental agreement be established that describes the roles, responsibilities and mechanisms by which governments will agree to develop and implement appropriate and nationally consistent actions for chemical security.

It is expected that SCCRHM will present its final report to COAG later in 2008.

Source: SCCRHM (2006); SCCRHM (2008).

The SSAN arrangements should not be used to control other substances

The Commission considers that any regulation of other CSCs should not be based on the current inefficient and cumbersome SSAN regime.

Many industry participants in this study were concerned about the impact that replicating these arrangements would have on the availability of other chemicals, as well as the potential costs that firms would face when required to either use less effective substitute chemicals or meet the additional handling and storage requirements (Croplife Australia Limited, sub. 35; Growcom, sub. 12). For example, PACIA stated that it:

... strongly recommends that the SSAN model NOT be used to regulate other materials identified by the COAG Review of Hazardous Materials. (sub. 33, p. 31)

And, the Fertiliser Industry Federation of Australia (FIFA 2006), estimated that if potassium nitrate — a commonly used fertiliser that can potentially be used as an explosive precursor — was effectively banned, the agricultural sector would incur a \$160 million loss in production of Australian fruits and vegetables. As potassium nitrate use would not be banned outright under the SSAN regime, this is likely to be an overestimate, nevertheless it provides some indication of the perceived costs to industry.

In addition, concerns have been raised about the additional costs that more stringent storage and handling requirements could impose, particularly for other fertilisers that are used in far greater volumes than SSAN fertilisers.

Further, based on the delays experienced in obtaining licences in some jurisdictions, some participants have questioned whether regulatory agencies would have the resources to administer these arrangements for other CSCs.

RECOMMENDATION 10.3

State and territory governments should not add any additional security sensitive chemicals to the current security sensitive ammonium nitrate regulations.

Implementing the chemical security management framework

The CSMF addresses many of the limitations of the principle-based approach used for SSAN. However, by considering certain elements of the design and implementation of the SSAN regulations, it is possible to identify some aspects of the proposed CSMF that could be refined to increase the likelihood that the resulting control measures are efficient and implemented consistently across

jurisdictions. The CSMF could then be used to re-examine controls on ammonium nitrate.

Choosing effective and efficient control measures

Compared to the framework used to develop the agreed principles for SSAN, the CSMF provides for significantly improved consideration of non-regulatory control measures, and industry consultation in the development of the policies to address the risk of chemicals being diverted for the purposes of terrorism.

PACIA (sub. 33) argued that when the SSAN agreed principles were being developed, sufficient weight was not given to the success of some co-regulatory and self-regulatory arrangements in limiting the potential for diversion of SSAN for illicit purposes. In particular, PACIA (2006a) noted the success of the co-regulatory approach adopted to address the potential diversion of illicit drug precursors (chapter 5).

PACIA (sub. 33), AEISG (sub. 45) and NFF (2007) suggested that the lack of industry consultation contributed to the failure of governments to consider non-regulatory controls for SSAN. PACIA stated that the affected industry groups were excluded from the development of the agreed principles for SSAN, and that:

Industry was not able to see any of the draft documents as they were developed, nor were they able to provide any input on practical or technical business implications of the approach under consideration. Even when a number of peak industry associations were invited to meet with PM&C to discuss the recommendations to go to COAG, industry was not provided the draft documents under consideration. (sub. 33, pp. 32-33)

Unlike the approach used for SSAN, a principle of the CSMF is that mandatory (legislation and regulation) and voluntary (such as industry standards and codes) measures for achieving security outcomes would have to be considered. Further, a national industry reference group would be established and consulted throughout the assessment of chemicals and development of risk-based control measures. The proposed chemical security coordination unit (box 10.3) would also work cooperatively with appropriate industry sectors, users, businesses and supply chains to determine control measures.

The Commission supports these features. However, consistent with good regulatory practice, it considers that as part of the CSMF, the criteria that would be used to assess alternative control measures should also be specified. For example, if more than one viable security control measure is identified through the CSMF, the alternative measures should be compared using criteria such as the costs of compliance, administration and enforcement, and the administrative simplicity of

the arrangements.¹⁶ In addition, the effectiveness of the alternative measures to achieve security outcomes, such as the expected levels of compliance, should also be compared. Ultimately, the choice and combination of criteria used and the weightings applied will depend on the chemical being assessed and the respective security risks.

Governance arrangements

The Department of the Prime Minister and Cabinet (2008) has argued for governance arrangements for the CSMF (box 10.3) that include a single body to both conduct chemical security risk assessments and develop security measures nationally, and ministerial oversight for both the policy development and implementation of recommended measures. These arrangements would be underpinned by an intergovernmental agreement (IGA).

The Commission considers that the lack of ministerial oversight contributed to the inconsistencies in the SSAN regulations across jurisdictions. This is because under the COAG (2004a) commitment, no mechanisms were set in place to ensure that states and territories implemented the agreed principles consistently.

The Commission generally supports the proposed governance arrangements, and notes that the proposal is, for the most part, consistent with the good governance frameworks (chapter 2). However, there are a number of issues that warrant further consideration.

As detailed in chapter 3, the Commission's preferred governance arrangements for chemical regulation are for hazard and risk assessment to be undertaken separately from risk management functions. It is considered, in the long term, that economies of scale and scope could be achieved by consolidating hazard and risk assessment for all chemicals in a single agency. However, the Commission acknowledges that there may be advantages to combining risk assessment and risk management where synergies exist and there is a high level of interdependence between these functions. There may also be scope for the use of expert groups to develop standards for the consideration of the ministerial group.

The Commission notes the intention to provide policy oversight through what amounts to a quasi-ministerial council made up of the Commonwealth Attorney-General and nominated ministers from each state and territory. While not explicitly stated, it is presumed that this group would meet as needed to provide

¹⁶ The *Best Practice Regulation Handbook* (Australian Government 2007) provides examples of the type of criteria that can be used to assess alternative regulatory measures.

policy oversight and consider recommendations from the chemical security coordination unit.

The Commission recognises that no particular existing ministerial council would be particularly well suited to overseeing regulation of chemicals of security concern and that the case for establishing a dedicated council for this purpose is weak. To this end the *ad hoc* nature of the Commonwealth Attorney-General consulting with nominated ministers on an as-needs basis has some merit. Further, the establishment of the Commission's proposed standing committee on chemicals would help ensure the coordination of policy covering chemicals of security concern with other national policy frameworks.

The proposed arrangements leave open how the group of ministers would reach agreement about reforms. Much will depend on the robustness of the consultation leading up to the development of the reforms and the extent to which agreement can be reached across jurisdictions. The Commission considers that consistency would be facilitated if the proposed group of ministers were required to formally approve more significant measures or regulatory reforms by way of a vote (requiring a two-thirds majority).

While the Commission strongly supports the intention to underpin these new arrangements through an IGA, the draft agreement could be tightened. The Commission considers that the IGA should commit the jurisdictions to use their best endeavours to implement agreed reforms in a uniform or nationally consistent manner, and discourage variations in all but exceptional circumstances. Furthermore, where a decision is taken to vary from the agreed reform, the relevant Minister should be required to advise the ministerial oversight body of the reasons for the decision.¹⁷

Using model or template legislation

In some instances, the security control measures proposed by the chemical security coordination unit will require the use of regulation. As discussed in chapter 2, using model or template legislation greatly enhances the likelihood that control measures will be implemented consistently across jurisdictions. In relation to achieving national security outcomes, the challenges associated with drafting model or template legislation — such as reaching agreement across jurisdictions, and drafting provisions that can be incorporated into different rootstock legislation — should be outweighed by the benefits from greater national consistency.

¹⁷ For example, such provisions exist in the intergovernmental agreement supporting the Australian Transport Council. The roles and responsibilities of the Council in relation to chemicals and plastics transport are discussed in chapter 7.

Re-examining ammonium nitrate controls under the Chemical Security Management Framework

If Commonwealth, state and territory governments agree to the proposed CSMF, the Commission considers that the framework should then be used to re-examine the controls on ammonium nitrate. Among other things, this would allow for a thorough assessment of alternative control measures that were inadequately assessed in the initial report on ammonium nitrate controls, including the use of co-regulatory or self-regulatory arrangements to prevent the substance being diverted for illegitimate purposes. Incorporation of ammonium nitrate into the CSMF would also increase the likelihood that the proposed measures for SSAN would be implemented consistently across jurisdictions.

RECOMMENDATION 10.4

Commonwealth, state and territory governments should establish an agreed framework for assessing the security risks and appropriate control measures associated with chemicals of security concern. This framework should incorporate strong governance arrangements, underpinned by an intergovernmental agreement, that ensure control measures are implemented consistently across jurisdictions. Once established, this framework should be used to re-examine the controls on ammonium nitrate.

