
11 Reforming national approaches

The Australian Government asked the Commission to undertake this study to assist a COAG Ministerial Taskforce to develop a streamlined and harmonised system of national chemicals and plastics regulation. The Commission's report recommends ways in which the effectiveness and efficiency of chemicals and plastics regulations can be improved, including through measures to enhance national uniformity and consistency.

This chapter summarises the Commission's views on good national governance principles for regulating chemicals, and how the present arrangements and current reform proposals compare to this ideal. It then lays out a pathway of future actions that would address remaining concerns.

11 Introduction

The design and implementation of national approaches to chemicals and plastics regulation needs to accept several realities. These include: the division of powers between the Commonwealth and the states and territories; the need to graft chemical regulation onto different legislative rootstocks that are focused on achievement of broader objectives (such as providing workplace safety); and the fact that there are different institutional structures within the states and territories. While these factors inevitably result in some complexity, they do not necessarily have to lead to the considerable degree of inconsistency and inefficiency that plagues the sector today.

Through this study the Commission has concluded that almost invariably the regulatory issues concerning chemicals and plastics are national in nature, with the hazards posed by the chemicals being, indeed, universal. There are few benefits in varying regulations from one jurisdiction to another (other than to integrate them into a jurisdiction's institutional architecture). Although risk can vary according to local circumstances, sufficient flexibility can be built into national schemes.

One counter argument, that it might be better to have regulatory competition between different regimes in different jurisdictions to reduce the risk of relying on a defective single national regime, is not a strong one in relation to chemicals regulation. In most cases, international benchmarks help to design best practice

approaches, and national collective processes for developing regulation can harness the different views of the jurisdictions to develop robust approaches. Ongoing monitoring and periodic review also act as safeguards.

Nationally consistent regulation will improve both effectiveness and efficiency, with uniformity being the ideal in many cases. One set of national rules are more effective by facilitating compliance, and efficiency is enhanced by lower compliance costs for business, and lower transaction costs in developing and implementing regulations. Of course, regulation also needs to be well designed and soundly based, and this is where appropriate governance structures, and regulatory assessment processes are important.

12 National approaches to chemicals policy

In chapter 3 the Commission presented a four-tiered governance framework for chemicals management that includes: policy development and oversight; assessment of chemical hazards and risks; risk management standard setting; and administration and enforcement of standards. In relation to chemicals assessment and regulatory administration and enforcement, the former is already being undertaken by Australian Government agencies, and the latter is best decided on a case-by-case basis, with a presumption in favour of the states and territories undertaking this task. Further improvements to national policy frameworks should focus, therefore on the policy and standard setting levels.

Previous chapters have looked at individual policy areas — such as workplace safety — and advised on the governance approaches that should apply. This chapter summarises the governance principles developed in this report focusing on: key institutional features for policy and standard setting; the achievement of consistent legislation; and standard setting processes (box 11.1).

Box 11 A national governance framework for policy and standard setting

Key institutional features

- A ministerial council (or equivalent), supported by a standing committee of officials, sets policy directions:
 - Ministers represent their respective governments, and undertake their own consultation on issues as necessary.
- The ministerial council makes decisions on policy-relevant standards.
- The ministerial council considers recommendations from:
 - a dedicated national standard-setting body (or equivalent)
 - the Standing Committee on Chemicals (proposed by the Commission).
- A national standard-setting body reports to the ministerial council.
 - Appointments to the standard-setting body should be based on expertise in the relevant area, either in a regulatory or technical sense, and not on representation.
- The standard-setting body:
 - develops policy-relevant standards for the ministerial council’s consideration and approval
 - manages directly issues that are ‘minor or machinery’ in nature that have been delegated to it by the ministerial council
 - consults with stakeholders as needed (including through advisory committees, where considered appropriate).
- An intergovernmental agreement underpins the operation of the standard-setting body (including its purpose, funding, functions, and membership) and commitment to agreed reforms:
 - All jurisdictions contribute to the funding of policy-relevant standard setting.
 - Cost recovery may apply to technical standard setting (for example, where product registration occurs).
- The ministerial council and standard-setting body adhere to COAG guidelines for best practice regulation, and engage with other ministerial councils and their institutions as required.
- The need for the ministerial council and the standard-setting body are periodically reviewed according to COAG guidelines.

Achieving consistent legislation

- Jurisdictions commit to uniform standards, and to vary from the national approach only in exceptional circumstances, and provide an explanation to the ministerial council.
- Template or reference approaches are used as widely as possible.

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Box 11.1 (Continued)

- Periodic reviews of the consistency with which national reforms are adopted are conducted.

Standard-setting procedures

- The ministerial council and standard-setting body establish criteria for deciding when an issue is not 'minor or machinery' in nature, and hence must be referred to the ministerial council for decision making and be subjected to a regulatory impact assessment.
 - As a rule, the ministerial council considers all policy-relevant standards and may need to make decisions on technical standards (such as the scheduling of a chemical) depending on the materiality of the impacts on business compliance costs or other impacts on business and individuals.
 - Consultation with the Office of Best Practice Regulation (OBPR) as necessary.
- In the case of policy-relevant standards and technical standards having a material impact:
 - Standard-setting body takes directions from ministerial council about developing new or revising old standards.
 - Standard-setting body consults widely in the development of the standard, including through preparing a consultation regulation impact statement (RIS), which is submitted to OBPR before release.
 - Standard-setting body finalises recommendations and decision making RIS and submits to ministerial council.
 - Ministerial council accepts or rejects recommended standards through formal voting. A decision requires a two thirds majority.
- In the case of technical standards of a minor or machinery nature:
 - Standard-setting body secretariat considers issues and consults as necessary.
 - Standard-setting body accepts or rejects recommended standards through formal voting. A decision requires a two thirds majority.

Some themes that emerge from this study include:

- there has been a stronger commitment to formalising national approaches, but this needs to extend to more areas of regulatory concern
- there has been a move to model approaches over templates, which may result in less uniformity
- there are mixed approaches to decision making by ministerial councils
- representational approaches to membership has been retained for several standard-setting bodies.

Each of these issues is discussed below, and a summary of the Commission's outstanding concerns is presented (table 11.1).

Commitment to formalising national approaches

Two reforms that have been occurring during this study suggest that the jurisdictions, under the guidance of COAG, are more prepared to formalise national approaches to chemical regulation through intergovernmental agreements. In particular, the omnibus intergovernmental agreement covering occupational health and safety (OHS) should result in the more consistent adoption of workplace standards covering chemicals. An intergovernmental agreement is also being negotiated to cover a planned national approach to developing measures or regulations for Chemicals of Security Concern.

Other national frameworks that could benefit from explicit intergovernmental agreements include managing the environmental impact of chemicals (under a proposed standard-setting body), and poisons scheduling. The intergovernmental agreement underpinning the National Registration Scheme for agvet chemicals will also need to be revised to allow for the additional conferral of powers on the Australian Pesticides and Veterinary Medicines Authority (APVMA) to give it the power to administer control-of-use regulations developed under the auspices of the Primary Industries Ministerial Council.

Model approaches to developing national standards

Using template or reference approaches to translate national standards into state and territory regulations achieves a high degree of uniformity, but they can be relatively more difficult to negotiate than model approaches. On the other hand, the latter are vulnerable to inconsistent adoption. Irrespective of which approach is adopted, national standards should be varied only to the extent required to adapt them to suit institutional differences in the jurisdictions.

A variety of approaches have been used in developing, and then applying, national standards. Despite some success with the template approach, the Australian Transport Council has decided to move to a model approach for the ADG7 package. This move is not without some advantages, but it carries the real risk of inconsistencies returning to the regulation of the transport of dangerous goods.

Table 11 National reforms in chemicals and plastics regulation

Policy area	Key elements of current arrangements or proposed reforms			Outstanding concerns
	Key institutional features	Consistency of legislation	Standard-setting procedures	
<i>Public health — poisons</i>	AHMC sets policy framework for scheduling of poisons. No SSB as such under proposed arrangements; new poisons committee would retain representative membership but be advisory only.	Some jurisdictions reference the schedules, some use schedules as a model. Overall consistency quite high. COAG commitment to adopt schedules uniformly. Jurisdictions can have own control-of-use regulations.	Secretary of DOHA will make decisions on scheduling (proposed) based on advice from poisons committee. Committee would consult as needed. Regulatory controls that are appended to schedule developed by AHMAC.	<ul style="list-style-type: none"> Scheduling decisions are to be made by DOHA, not an independent expert body. COAG have not committed to uniform adoption of regulatory controls for poisons. New arrangements should be reviewed within two years.
<i>Public health — illicit drugs</i>	Ministerial Council on Drug Strategy oversees policy issues. A Precursor Working Group advises on illicit drugs.	Inconsistent adoption of an industry code of practice.	Precursor Working Group has developed a risk assessment framework for rating chemicals and recommending risk-management approaches more systematically.	<ul style="list-style-type: none"> Inconsistencies can undermine effectiveness of national approach to drug strategy; hence regulations should be developed and applied uniformly. Precursor Working Group is unwieldy and representational in nature. It should be replaced by an expert-based body, and industry should be involved through consultative arrangements. Regulation of illicit drug precursors should be integrated with the proposed Chemicals of Security Concern framework.
<i>Workplace safety</i>	WRMC operating under new IGA will set policy directions and make decisions on standards. Statutory body to replace ASCC to be introduced. Tripartite membership to be retained.	Consistency has varied in the past: some standards being referenced; others used as a model. Switching to a model approach for all standards, that is, a model act and model regulations and codes of practice.	Adoption of models by consensus, but once adopted, jurisdictions wanting to change own legislation agree to WRMC voting, and if agreed by a two thirds majority, all jurisdictions must then adopt the same amendment..	<ul style="list-style-type: none"> Although new arrangements place more onus on WRMC, influence of the tripartite structure is still a concern. Planned review after six years of operation should include assessment of influence of tripartite structure. Effectiveness of new mechanism for maintaining uniformity should be assessed for possible adoption in other IGAs.

<i>Transport of dangerous goods</i>	<p>ATC sets policy direction, and votes on recommended standards.</p> <p>NTC — a statutorily independent organisation, commissioners appointed on basis of expertise.</p> <p>Long standing IGA.</p> <p>National Competition Policy incentive payments applied.</p>	<p>High degree of uniformity in adoption of template legislation passed by Commonwealth.</p> <p>ADG7 package has been developed on a model basis and is now being implemented (WA has adopted already).</p>	<p>ATC must accept or reject recommendations of NTC; it cannot amend them.</p> <p>Simple majority required.</p> <p>NTC drafts models.</p>	<ul style="list-style-type: none"> • Move to model approach for the ADG7 package could undermine the high level of consistency achieved in the past. • Independent review of consistency of adoption of ADG7 package should be undertaken 12 months after it has been implemented.
<i>Agvet chemicals</i>	<p>PIMC oversees operation of APVMA and NRS.</p> <p>IGA underpins NRS, and confers powers on the Commonwealth to regulate.</p>	<p>Agvet code adopted by template, but jurisdictions can have additional control-of-use regulations.</p>	<p>PIMC oversees the Agvet Code.</p> <p>APVMA sets technical standards (i.e. registration and labelling of agvet chemicals).</p> <p>Advisory committees assist director of APVMA to make registration decisions.</p>	<ul style="list-style-type: none"> • Varying control-of-use regulations and practices by States and territories compromises effectiveness and efficiency of national approach. Control of use should be consolidated under APVMA. • A post-implementation review should be undertaken.
<i>Environment</i>	<p>EPHC is overseeing development of a national chemicals environmental management framework (NChEM).</p>	<p>Currently there is little consistency in approaches adopted. NChEM proposal would automatically link NICNAS recommendations to state and territory controls.</p>	<p>To make NICNAS recommendations more implementable, NChEM includes: closer involvement of state and territories in assessment process; manuals for undertaking environmental assessments; and a manual of controls.</p>	<ul style="list-style-type: none"> • NChEM approach would place inappropriate responsibilities on NICNAS. • A new independent environmental standard-setting body should be introduced to deal with NICNAS recommendations. This body would have governance features consistent with the Commission's model (box 11.1).
<i>Chemicals of security concern (including SSAN)</i>	<p>Australian Attorney General and relevant state and territory ministers would consider policy on an 'as needs' basis.</p> <p>A unit within Department of Attorney General would provide support.</p> <p>IGA being negotiated.</p>	<p>SSAN regulations implemented inconsistently despite being based on 'agreed principles'.</p> <p>A new Chemicals of Security Concern (CSC) framework will facilitate a more systematic approach to development of controls or measures for other CSCs.</p>	<p>A unit within Department of Attorney General would undertake risk assessments and recommend risk management controls or measures.</p>	<ul style="list-style-type: none"> • SSAN principles were implemented in inconsistent ways that compromise effectiveness and efficiency. SSAN regulations should be reassessed within the context of the CSC framework. • Proposed CSC framework does not explicitly include formal voting by ministers. • Appropriateness of combining risk assessment and risk management in one unit within AG should be monitored.

Note: Acronyms in this table are defined in the list of abbreviations at the front of the report.

The Australian Safety and Compensation Council (ASCC), on the other hand, has traditionally relied on drafting standards or codes of practice that the jurisdictions adopt in various ways and with different degrees of consistency. A feature of the recently signed intergovernmental agreement on OHS is that a replacement body for the ASCC will develop model standards (that is, a model act, model regulations and model codes of practice). While it may appear that little will have changed over the current arrangements, the strong commitment to national uniformity in the recently signed intergovernmental agreement suggests a more consistent adoption of chemicals-related standards in the future.

In both cases, the consistency with which jurisdictions subsequently adopt model standards should be monitored and reviewed.

While model approaches are often adapted for policy-relevant standards, there is some indication that governments are prepared to uniformly adopt technical standards. For example, COAG has agreed to the states and territories uniformly implementing poisons scheduling decisions.

Decision-making mechanisms of ministerial councils

Decision-making rules used by ministerial councils are not always spelt out or, in the Commission's view, soundly based. The Commission's model was based in part on the Australian Transport Council (ATC) and its associated intergovernmental agreement, a favourable feature of which is the voting arrangement for adopting standards developed by the National Transport Commission. This requires a majority approval, and can help ensure that more rigorous standards are adopted than might be expected under a consensus approach. Transport ministers are also required to use 'best endeavours' to implement reforms consistently, and report back to the ATC where they don't, giving reasons.

The recently signed intergovernmental agreement for OHS has some positive features with respect to decision making. While decisions concerning the adoption of a model act, model regulations and model codes of practice are to be made by consensus, once agreement is reached, a very tight conformance mechanism then operates. This requires the Workplace Relations Ministers' Council to vote on whether an amendment made by a jurisdiction should be allowed, and once it is allowed, it must then be adopted by all other jurisdictions. In this case, a two thirds majority is required. The effectiveness of this newly designed mechanism should be monitored for its possible inclusion in other intergovernmental agreements.

In comparison, the proposed Chemicals of Security Concern framework is not based on a defined group of ministers, nor is voting required. While some flexibility may be needed in being able to bring appropriate ministers together to deal with particular chemicals of security concern, a formal voting mechanism would be appropriate if a regulatory solution is the proposed approach. This should be clearly spelt out in the proposed intergovernmental agreement.

Representational membership of standard-setting bodies

The Commission has long argued that the membership of national standard-setting bodies should not be representational in nature. The inclusion of stakeholders on such bodies can create conflicts of interest that compromise policy development, particularly where non-government members are representing industry or other sectional interests. In relation to jurisdictional membership, there is opportunity for them to be involved in the standard-setting process through the policy direction that ministerial councils and their standing committees provide, and through consultation with the standard-setting body during that process. This is the way the National Transport Commission has operated for some time, with considerable success.

In this study, the Commission has observed some different approaches to membership of standard-setting bodies emerging. Most notably, while substantial changes are being made to the national framework governing OHS, the body to replace the ASCC will maintain a tripartite approach. On a slightly different note, a proposal to create a poisons committee would retain a representative approach for scheduling poisons, but the role of that committee would be advisory, with decisions to be made by the secretary of Department of Health and Ageing. Over time consideration should be given to migrating both of these governance arrangements to the Commission's preferred approach.

A six year review of the operations of the new OHS arrangements has already been set by COAG. This should include the effectiveness and efficiency of those arrangements, including the influence of the tripartite approach to membership of the new standard-setting body. In the case of the poisons committee, a review within two years of its operation should consider whether it could be reconstituted as a decision making but expert based body.

13 The way ahead

As part of good regulatory practice, reviews of current and proposed reforms should be undertaken in the future. In some cases, the Commission has endorsed current and proposed reforms that contain some elements of concern, but which, nevertheless, are either an improvement over current arrangements and/or have only been achievable with the considerable good will of all parties involved. Suggesting that these should be modified would be counterproductive at this stage, but they should be reviewed as soon as is practicable after implementation. This would allow them to be aligned more closely with the Commission's governance and operational principles.

The Commission recognises that, in some circumstances financial support for the states and territories might be necessary to facilitate national reforms (PC 2005). Their use might be justified where there are transitional costs, where reform dividends accrue more to the Commonwealth than the states and territories, and where it can be demonstrated that national uniformity warrants the self-tempering of jurisdictional sovereignty. Such payments played a role in the implementation of National Competition Policy reforms in the 1990s and 2000s, including in the uniform adoption of regulations governing the transport of dangerous goods. At its March 2008 meeting, COAG announced that it would consider proposals for the use of National Partnership Payments at its October 2008 meeting (COAG 2008a).

Chemicals and plastics regulation has been an issue of concern for a long time, but some reforms have been made in recent times, and there is an active current agenda. Prompted by the establishment of the Ministerial Taskforce, and the commissioning of this study, many worthwhile reforms that were in train have been further developed. Indeed, several recommendations made by the Commission in its draft report have already been accepted by the Ministerial Taskforce and adopted by COAG (these are listed at the front of this report). The Taskforce will be meeting again shortly and will use this report to refine its priorities.