
3 National policy formulation and system governance

Key points

- Chemicals policy formulation is fragmented and inconsistent. Policy tends to be developed in isolation within particular regulatory regimes (public health, workplace safety, transport, agriculture, environment protection and national security).
- Progress in developing consistency within these regimes is patchy.
 - In some cases, such as in the regulation of transport of dangerous goods, the governance arrangements are working well.
 - In other cases, national frameworks are incomplete (for example, environment protection) or are insufficiently developed to achieve the consistent outcomes warranted (for example, workplace safety).
- The Commission's proposed governance framework for the various regulatory regimes will help improve national consistency. It has four components:
 - policy development and oversight
 - assessment of chemical hazards and risks
 - risk management standard setting
 - administration and enforcement of standards.
- However, insufficient consideration is given to the effectiveness and efficiency impacts across the regulatory system as a whole.
- It is not realistic to try to amalgamate chemicals regulations under a single body of regulation or a single national regulator.
 - Chemicals regulation is grafted onto underlying regimes which have differing focuses, and hence is not a strong unifying influence in an institutional sense. This places a premium on coordination mechanisms.
- While there are various mechanisms to provide some coordination across the regulatory regimes, there is no governance mechanism currently in place to develop an integrated approach to national chemicals policy.
- The Commission recommends that a Standing Committee on Chemicals should be created. This committee would comprise senior officials representing all ministerial councils that have a responsibility for chemicals regulation. It would be a forum for promoting consistency of chemical-specific policy settings across all relevant regimes, and would make recommendations for specific actions by individual ministerial councils.

Chemicals and plastics policy in Australia has long been regarded as fragmented and inconsistent. This is partly because there are numerous policy making bodies, regulators and agencies involved at both the Commonwealth and state and territory levels. Although some national frameworks have been developed and there are some signs that more consistency may yet emerge, this is largely happening within individual regimes. This chapter looks at the arguments for developing a governance system that will improve high-level policy formulation and coordination, and facilitate a nationally uniform chemicals and plastics regulatory framework.

3.1 Background

In commissioning this study the Australian Government asked the Productivity Commission, among other things, to consider the effectiveness and efficiency of current institutional arrangements and make recommendations about a best practice governance framework. The Commission's recommendations will be considered by a ministerial taskforce established by Council of Australian Governments (COAG) to achieve a streamlined and harmonised system of national chemicals and plastics regulation. Thus, while the Commission makes a number of recommendations about specific reforms in later chapters, it is also being asked to consider high-level policy processes.

Findings of previous reviews

The need to develop a national chemicals policy has been a recurring theme in reviews of the chemicals and plastics industries over many years. These reviews almost invariably note that chemicals regulation is fragmented and inconsistent, and that a national policy is required.

A recent prominent review involved an Australian Government initiated 'Action Agenda' for the chemicals and plastics industry. A group of industry and government representatives — the Chemicals and Plastics Action Agenda Steering Group — was established to advise on priorities for the Action Agenda. The Steering Group made ten recommendations on regulatory reform, including that a national chemicals policy be developed. What this policy was meant to comprise, and how it would be implemented, were not addressed in great detail other than that the policy would 'focus on mutual commitment to a consistent national approach' for, among other things, environmental quality, and workplace and consumer health and safety (CPAASG 2001, p. 32).

To facilitate this process further, various industry groups commissioned the Allen Consulting Group (ACG 2003) to examine alternative models for chemicals industry regulation. The ACG recommended the creation of a new Ministerial Council (or if this was to prove difficult, attaching the responsibility for chemicals regulation to the then Industry and Technology Ministerial Council (now defunct)). It also recommended that the ministerial council should facilitate the development of a series of intergovernmental agreements (IGAs) (ACG 2003). The ACG recognised that achieving national uniformity in regulation would be extremely difficult and protracted, and hence that national consistency and cooperation were likely to be more pragmatic approaches.

More recently, chemicals industry regulation was addressed by the Taskforce on Reducing Regulatory Burdens on Business (Regulation Taskforce 2006). Noting business concerns with duplication and inconsistency in chemicals regulation, the Taskforce agreed with the idea of a national chemicals policy, implying that it should achieve national uniformity, or at least improve national consistency in regulation. Attention was directed to a number of issues including information sharing to reduce duplication and improve consistency with international standards (Regulation Taskforce 2006). While the Taskforce argued for the development of a national policy by a (now established) ministerial taskforce, it did not explicitly address the governance frameworks that might be needed to achieve a national policy.

Regulation of chemicals and plastics is fragmented

The regulatory regimes for chemicals and plastics outlined in the following chapters contain a large number of separate regulators with very limited coordination between them. Chemicals and plastics producers are required to deal with these regulators separately. There are several reasons for this fragmentation of chemicals regulation in Australia.

First, under the Constitution, the Commonwealth has powers over trade and corporations, but the states (and territories) have most of the constitutional powers to directly regulate the use of chemicals.

Second, regulation of chemicals has traditionally been organised around distinct end uses. Thus separate regimes are in place for industrial chemicals, agricultural chemicals and veterinary medicines, pharmaceutical and therapeutic goods, and food. Similar institutional arrangements apply in other countries. Merging some or all of these regimes, just to harmonise chemical regulation, could compromise the purpose of these different streams of regulation. For example, chemical contamination of food is an important public health issue, but it is only one among

many relevant regulatory issues concerning food, and hence is best considered through that particular regulatory lens.

Third, chemicals regulation largely exists within, or is grafted onto, generic regulatory frameworks that govern public health, occupational health and safety (OHS), transport safety, agriculture, the environment and national security. Chemicals regulation is a means to an end; it manages the risks that chemicals might pose to the achievement of broad social and economic objectives — such as achieving a safe workplace, safe disposal of waste, or achieving effective and efficient transport — but it is managing only one source of risk. Thus while there are genuine reasons for regulating chemicals at various stages of their lifecycle, chemical regulation is not of itself a strong unifying influence in an institutional sense.

Fourth, there is some industry self-regulation of chemicals. While this is in some cases quite effective, it adds to the variety of requirements that industry seeks to comply with.

The net result is that there are numerous Acts, regulations and codes, and there are many different regulators, government agencies and industry groups involved in chemical regulation. Some of this fragmentation is not only unavoidable, but desirable, in the sense that issues concerning a particular location or issue is devolved to those most appropriate to manage it. However, as this study concludes, in many instances the issues are national in nature, and a much greater degree of consistency across jurisdictions and regulatory frameworks is warranted. This means that good governance arrangements and associated coordinating mechanisms are important in developing a more systematic, integrated approach.¹

3.2 A best practice governance framework

In the Commission's view, the governance framework needs to be built on clear objectives, responsibilities, and processes at each of the four broad levels of the regulatory task, as follows:

- policy development and regime oversight
- assessment of chemical hazards and risks
- risk management standard setting

¹ For the purpose of this study, the term 'governance framework' refers to how the responsibilities of, and relationships between, different bodies and jurisdictions are organised to form a system of regulation. A related concept is corporate governance, which refers to the arrangements used to govern a specific organisation.

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- administration and enforcement.

Policy development and oversight of the regime is a high-level responsibility. In circumstances where responsibilities are held jointly by the Commonwealth, states and territories, and where the states have not referred their powers to the Commonwealth, policy formulation should reside at the ministerial level (supported by officials) and be held jointly by all jurisdictions to ensure their ongoing commitment to national coordination. An effective means of achieving this has been to assign responsibility to a ministerial council established under the auspices of COAG. Ministerial councils, supported by their respective standing committees of officials, should provide broad policy direction and be responsible for formally adopting policy relevant standards (see below).

Chemical hazard and risk assessment is a science-based task best undertaken by an independent national body of technical experts. Independence from policy making is desirable to ensure assessments are confined to the facts. A national body is preferred because the alternative of sub-national jurisdictions duplicating the chemical assessments of others is inefficient, as is any divergence in assessments. The economies of scale and scope available to a national body also enable it to maintain greater technical expertise, rather than have this scarce resource scattered amongst multiple jurisdictions and multiple agencies.

Standard setting involves designing the risk management rules by which chemicals and plastics are regulated. This also tends to be most effectively and efficiently undertaken by an independent national body made up of experts in the field, rather than representatives of the jurisdictions and stakeholders. However, unlike chemical assessment, this process needs to be constrained by the policy settings of the ministerial council. Jurisdictions should provide input, as it is important that they are all committed to the outcomes and prepared to adopt the standards. The standards should also align with community attitudes to risk and may need to be set sufficiently wide, or with appropriate exemptions, to encompass local conditions.

One characteristic of the chemicals regulatory regime is the diversity in the types of standards. There are policy-relevant standards that generally govern how chemicals are managed and standards that are set at the chemical-by-chemical level, with variations in between. The former warrant high-level policy decision making, a regulation impact statement (RIS), and ministerial council endorsement of the standards. The latter are best made by standard-setting bodies operating largely autonomously but within a defined policy environment. As a rule, these bodies may not need to undertake RISs though this will depend on how substantially their

decisions impact on the economy.² For example, depending on how a poison is scheduled, the impacts on business and consumers could be routine, or could be substantial, thus warranting a RIS (chapter 5).

The governance arrangements for standard setting should provide for appropriate multijurisdictional and public consultation, including, in some cases, the establishment of a more formal advisory group of representatives from governments, industry, the workforce, and the wider community. It would be inappropriate to give a decision-making role to such a group because they represent the interests of particular stakeholders. Rather, the members of the standard-setting body should be appointed on the basis of their knowledge and experience in making objective, evidence-based decisions in the public interest.

Whether administration and enforcement of regulations is best undertaken by a national body or sub-national regulators is less clear cut than for other regulatory tasks. A national regulator could be the best option if there are significant economies of scale and scope. On the other hand, if knowledge of local conditions and preferences is crucial to ensuring regulatory effectiveness and efficiency, it may be more appropriate to have sub-national regulators administering the national scheme. In this respect, states and territories also attach importance to their ability to respond quickly to local incidents, and to manage risks in accordance with local exposure pathways and environmental conditions. On balance, the Commission has tended to favour sub-national regulators in relation to chemicals and plastics.

The remainder of this chapter focuses on the first of the four broad levels of the regulatory framework: policy development and regime oversight. The Commission's preferred approach, outlined below, should be read in conjunction with table 3.1, which identifies and illustrates the various intergovernmental arrangements.

3.3 Policy development and regime oversight

Ministerial councils

Most areas of chemicals and plastics policy have elements that are most efficiently dealt with through a coordinated national approach (table 3.2). Ministerial councils established under the auspices of COAG play an important role in bringing together Commonwealth, state and territory ministers (and in some cases New Zealand

² COAG guidelines state that regulatory assessment is not required for regulations that are 'minor or machinery in nature'. (COAG 2007, p. 3)

Government ministers) to facilitate consultation and cooperation, to jointly develop policy, and to oversee regulatory regimes and other joint actions. Examples of the role of ministerial councils in policies related to chemicals and plastics regulation include the Primary Industries Ministerial Council, which oversees national regulation of agricultural and veterinary chemicals (chapter 8), and the Australian Transport Council, which oversees national regulation for the transport of dangerous goods (chapter 7).

Table 3.1 Intergovernmental arrangements^a

<i>Coordination option</i>	<i>Description</i>	<i>Examples</i>
Transfer of powers to the Commonwealth		
Referral of powers to the Commonwealth	States refer their authority to legislate on a matter to the Commonwealth, making it the sole legislator and regulator (using subsection 51(xxxvii) of the Constitution)	<ul style="list-style-type: none"> • Victoria's referral of industrial relations powers to the Commonwealth • Regulation of financial products and services by ASIC
Conferral of powers to the Commonwealth	States confer some of their functions and powers to the Commonwealth so it can regulate on their behalf (differs from a referral of powers because states retain the right to regulate themselves or at least retain some role in the regulatory process)	<ul style="list-style-type: none"> • Controls on the supply of agvet chemicals up to the point of sale by the APVMA • Regulation of genetically-modified organisms by the OGTR • OHS regulations for offshore petroleum facilities by NOPSA
Interjurisdictional coordination of legislation		
Template legislation (sometimes called 'applied legislation' or 'incorporation by reference')	The legislation of one or more jurisdictions (for example, states and territories) applies legislation enacted by another jurisdiction (for example, the Commonwealth)	<ul style="list-style-type: none"> • State and territory adoption of the Agricultural and Veterinary Chemicals Code • Commonwealth dangerous goods transport regulations applied by NSW, Victoria & SA
National model regulations	Legislation is drafted as a model for individual jurisdictions to use in drafting their own regulations	<ul style="list-style-type: none"> • OHS model regulations developed by the ASCC • New dangerous goods transport regulations (ADG7) developed by the NTC
National codes of practice	Codes of practice (often addressing technical matters) that all jurisdictions refer to in their regulations	<ul style="list-style-type: none"> • List of Designated Hazardous Substances maintained by the ASCC • Food Standards Code maintained by FSANZ • Australian Explosives Code (for most states/territories) and old ADG Code (6th edn)

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Table 3.1 (continued)

<i>Coordination option</i>	<i>Description</i>	<i>Examples</i>
Legislative instruments		
Legal obligation on agencies to consult other relevant bodies	One agency is required to inform others about a particular issue	<ul style="list-style-type: none"> • APVMA notification to FSANZ about maximum residue levels (MRLs) • OGTR requirement to consult APVMA, AQIS, FSANZ, NICNAS and TGA about applications to release GMOs into the environment
State/territory flexibility within a national system of regulation	States and territories vary some rules under a national system of regulation to better suit their local circumstances and preferences	<ul style="list-style-type: none"> • State/territory variations in the National Building Code
Mutual recognition	Jurisdictions recognise, on a reciprocal basis, status given by another jurisdiction	<ul style="list-style-type: none"> • Mutual Recognition Agreement between jurisdictions
Coordinating bodies		
Ministerial council	Council of ministers (supported by senior officials) of each jurisdiction develops policy, oversees formulation of nationally consistent regulations, and in some cases regulatory decisions	<ul style="list-style-type: none"> • Oversight of the APVMA by the Primary Industries Ministerial Council, and of the NTC by the Australian Transport Council
National advisory agency	National agency provides advice on matters relevant to multiple regulators or jurisdictions	<ul style="list-style-type: none"> • NICNAS (advises ASCC, NTC, NDPSC, states and territories) • NDPSC (advises states and territories on poison scheduling) • Commonwealth health and environment departments provide (technical advice to the APVMA and NICNAS on chemical assessments)
Interagency committee	Committee for agencies to coordinate their actions and discuss common issues	<ul style="list-style-type: none"> • APVMA–state/territory Registration Liaison Committee • NICNAS–state/territory MOU Group

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Table 3.1 (continued)

<i>Coordination option</i>	<i>Description</i>	<i>Examples</i>
Coordination agreements		
Intergovernmental agreement for a regulatory regime	A written agreement between jurisdictions defining the governance arrangements and coordination mechanisms to be used to regulate a specific issue	<ul style="list-style-type: none"> • Intergovernmental agreements leading to national regulatory regimes coordinated by APVMA, FSANZ, NTC and OGTR
Statement of common principles	Governments agree to a common set of principles for regulating a particular issue	<ul style="list-style-type: none"> • COAG Principles for the Regulation of Ammonium Nitrate
MOU between agencies	Written agreement between agencies as to how they will coordinate their actions	<ul style="list-style-type: none"> • NICNAS–ASCC for OHS matters • Victoria WorkSafe–EPA for major hazard facilities
Specific forms of coordination		
Merge agencies/ consolidate functions within a given jurisdiction	Amend administrative arrangements to consolidate functions in fewer agencies	<ul style="list-style-type: none"> • Victoria's reorganisation of regulatory responsibilities following the Longford Gas disaster
Incentive payments	Jurisdictions are given financial incentives to implement a national system of regulation	<ul style="list-style-type: none"> • Incentive payments associated with national transport reforms
Exchange of information	Regulators (within and across jurisdictions) exchange information	<ul style="list-style-type: none"> • Product safety regulators
Enforcement coordination	Jurisdictions coordinate their enforcement	<ul style="list-style-type: none"> • Competent Authorities Panel for the ADG Code (managed by DITRDLG)
Single government contact for a given jurisdiction	A single agency acts as an intermediary to assist firms in complying with the requirements of multiple regulators	<ul style="list-style-type: none"> • Government 'one-stop shops' to facilitate major investment projects

^a Acronyms in this table are defined in the list of abbreviations at the front of the report.

In some cases, the governance arrangements are working well, and align closely with best practice. For example, the transport model vests decision making in the ministerial council, and is underpinned by a strong IGA to implement regulations as uniformly as possible and to report back to the ministerial council where states diverge from the model regulations. Appointments to the standard-setting body — the National Transport Commission — are based on expertise not representation, the standards are based on UN standards, and the Competent Authorities Panel maintains consistency on an ongoing basis (chapter 7).

In other cases, governance arrangements have not worked as well. Although the Australian Safety and Compensation Council (ASCC) is a tripartite body under the Workplace Relations Ministers' Council (WRMC), it has developed and declared standards and codes which are subsequently, though somewhat inconsistently, adopted by individual jurisdictions. The Commission's preferred governance model suggests that this is inappropriate on three grounds: declaration for policy-relevant standards should be the responsibility of the ministerial council; ASCC membership should be based on knowledge and experience, not representation; and the standards should be adopted in a uniform or nationally consistent manner (chapter 6). COAG's communiqué from 3 July 2008, and the associated IGA for regulatory and operational reform in OHS addresses these concerns in part (COAG 2008c) The creation of a statutorily independent body providing advice to the WRMC, explicit decision making procedures for ministers, and a very tight constraint on jurisdictions maintaining agreed model regulations are positive features. However, maintenance of a tripartite approach to membership of the body to replace the ASCC remains a concern (chapter 6).

The Commission also has concerns about the proposal to develop a national framework for the environmental management of chemicals by augmenting the powers of the National Industrial Chemicals Notification and Assessment Scheme (NICNAS). Establishing an independent body under the policy guidance of the Environmental Protection and Heritage Council (EPHC) that would set standards (to be referenced by the states and territories), and clarifying NICNAS's role as an assessment body, is the Commission's preferred approach (chapter 9).

The proposed governance arrangements for developing and implementing controls to regulate chemicals of security concern have some sound features including a role for the Australian Attorney-General and nominated state and territory ministers in developing policy, and an IGA that commits the parties to joint development and implementation of appropriate controls. However, the absence of a formal voting mechanism is a concern (chapter 10).

Table 3.2 Selected institutional arrangements for chemicals regulation^{a,b,c}

	<i>Australian Health Ministers' Conference</i>	<i>Workplace Relations Ministers' Council</i>	<i>Australian Transport Council</i>	<i>Primary Industries' Ministerial Council</i>	<i>Environment Protection and Heritage Council</i>	<i>Council of Australian Governments</i>
Role of Ministerial Council (and relevant standing committees)	Oversees drugs and poisons scheduling policy	Oversees ASCC but has tended to rubber stamp declarations of codes and standards. WRMC will have a much more explicit and formal role under recently agreed COAG reforms	Oversees the National Transport Commission; votes on enactment of model legislation	Provides policy direction to the APVMA and oversees state and territory control-of-use regulation	Oversees the development of a framework for national chemicals environmental management (NChEM)	Oversees policy on chemicals of security concern including security sensitive ammonium nitrate (SSAN) directly
Standard-setting body	Yes — National Drugs and Poisons Scheduling Committee — includes representatives from government, industry and consumer groups	Yes — ASCC a tripartite, non-statutory body that can declare standards, but this is to be replaced by a statutorily independent body	Yes — National Transport Commission, a statutory agency. Commissioners appointed on the basis of expertise	Yes — the APVMA sets conditions-of-use on agvet products; also assesses and registers agvet products	No	No
Intergovernmental agreement	No	Yes — COAG's commitments to establishing a national OHS arrangement are spelt out in an IGA	Yes — jurisdictions commit to implement agreed reforms uniformly and consistently and to report back on any divergences	Yes — underpins the creation and operation of the APVMA, a national regulator created through conferral of powers	Yes — concerns the adoption and further development of NChEM, subject to Ministerial Taskforce on Chemicals	None specifically — though principles for regulating security SSAN were agreed by COAG
State and territory adoption of national codes and standards	Most poisons scheduling decisions adopted by reference, but states and territories may apply additional controls (for example, for licensing and storage)	Varies by jurisdiction and code/standard: some referenced, some rewritten, some jurisdictions have not acted on all codes (for example, major hazard facilities)	A high degree of uniformity has been achieved through template legislation, but now moving to model regulation approach	Template legislation to underpin APVMA and Agvet code But jurisdictions separately regulate control-of-use and this varies	No formal link, but jurisdictions take varying action in response to recommendations of NICNAS	Inconsistent application of SSAN principles

^a Other ministerial councils that have an interest in chemicals regulation include: the Ministerial Council on Consumer Affairs and the Australia and New Zealand Food Regulation Ministerial Council. ^b NICNAS also makes recommendations to most of the standard-setting bodies shown (the exception being the APVMA, which undertakes its own assessments). ^c Acronyms in this table are defined in the list of abbreviations at the front of the report.

Intergovernmental agreements

Intergovernmental agreements play a pivotal role in establishing and maintaining national frameworks where policy responsibility is shared by the Commonwealth, states and territories. They generally set out the objectives and scope of responsibility of the council and of the various members, the governance arrangements including decision-making and voting rules, legislative commitments, institutional support and cost sharing. Overall responsibility for implementing such an agreement resides with the relevant ministerial council.³

Intergovernmental agreements are clearly essential where a national regulator is established by conferral of powers, as in the case of the Australian Pesticides and Veterinary Medicines Authority (APVMA). Such IGAs typically address the commitment of the parties to pass legislation to allow the creation of the national regulator and to maintain that legislation consistently over time.

Intergovernmental agreements in areas where individual jurisdictions have retained their powers generally commit the parties to use their best endeavours to adopt agreed changes in standards in a uniform or nationally consistent manner (for example, transport). They may also contain undertakings to maintain agreed regulations in a nationally consistent manner. For example, the transport IGA requires the Australian Transport Council (ATC) and National Transport Commission (NTC) to be notified of any ‘exceptional circumstance’ changes that a jurisdiction unilaterally makes, together with a statement of reasons. The IGA recently agreed by COAG to underpin a national approach to OHS regulation will bind the signatories even more tightly. It requires that they will not amend or introduce legislation that would materially affect the operation of proposed model legislation unless the WRMC expressly endorses it, in which case all jurisdictions would be required to follow suit.

Voting rules are an important feature of IGAs, legislation or other documentation that establish multilateral institutions. One of the better examples appears to be the OHS IGA signed on 3 July 2008, which requires a two-thirds majority for decision making (although a consensus decision is required for the declaration of national model legislation, regulations and codes of practice). Another example is transport, where there are several sets of voting rules: a simple majority vote at the ministerial council is required to approve most measures; while a two-thirds majority is

³ For example, transport regulation is nationally coordinated according to the Inter-Governmental Agreement for Regulatory and Operational Reform in Road, Rail and Intermodal Transport. This makes the Australian Transport Council — the ministerial council for transport — the governing body for nationally coordinated arrangements (chapter 7).

required to approve a recommendation on road user charging principles. A unanimous vote is required to delegate the council's powers and functions to a minister (chapter 7). In contrast, a single member of the ministerial council for food regulation can call for a review of measures developed by its national standard-setting body (chapter 5).

Intergovernmental agreements can establish institutional structures, which are then embodied in legislation, such as the NTC and the APVMA. Supplementing the agreements, there can also be a set of formal arrangements in place which clarify the roles and responsibilities of agencies within the member jurisdictions, and the coordination mechanisms between them. This can involve one or more memoranda of understanding (MOU) between agencies, an interagency committee, the power to exchange confidential information, and/or a legislative requirement to consult other agencies about a particular issue.

The Commission considers that more widespread use of IGAs and MOUs is warranted in promoting consistent national frameworks for regulating chemicals. Agreements underpinning the proposed national frameworks for the environmental management of chemicals and the regulation of chemicals of security concern will be important in this respect.

Legislative arrangements

Whereas a referral of powers by the states to the Commonwealth ensures national uniformity, it is rarely used. Nationally coordinated regulations, where power has been retained by the states, can be achieved through other legislative arrangements:

- Conferral of powers to the Commonwealth — this has often been effective in establishing a national body that administers uniform regulations. States retain the option of regulating independently at some future time.
- State/territory regulation based on national standards — a national standard-setting body drafts regulations that states and territories incorporate or translate into their own legislation.

A regulatory system can draw on both of the above approaches. For example, agricultural and veterinary chemicals are currently subject to both a conferral of powers for chemical assessment and standard setting, and state/territory regulation for administration and enforcement (chapter 8).⁴

⁴ A conferral of powers can also be implemented using either a template or model approach. An example of the template approach is the national controls on the supply of agricultural and veterinary chemicals up to the point of retail sale (managed by the APVMA) (chapter 8). An example of the model approach is the national licensing regime for genetically modified

Where administration and enforcement is to occur at the sub-national level, the regulations drafted by a national body can be translated into state/territory law using either template legislation or national model regulations. The template approach could be considered best practice because it essentially involves a single piece of legislation being applied to every jurisdiction, thus minimising inconsistencies across jurisdictions. However, the negotiations required to reach common agreement on the template Act can be protracted and, in practice, referencing does not prevent jurisdictions from omitting or amending selected parts of the template.

Under the model approach, each jurisdiction separately adapts the text of nationally agreed regulations into their own laws. This increases the administrative burden and creates an opportunity for individual jurisdictions to unilaterally deviate from nationally agreed standards, possibly unintentionally because of different institutional structures, legislative drafting conventions and interfaces with other local legislation. The greatest strength of the model approach is its flexibility, but this is also its greatest weakness. Jurisdictions have an incentive to compromise on negotiating the model knowing that it could subsequently be amended anyway.

Sometimes a combination of template and model approaches is used. Under this arrangement, each jurisdiction specifies the broad regulatory requirements in its own legislation (model approach), but all refer to a common national code of practice for detailed technical requirements (template approach).⁵ Such an arrangement can produce the greatest level of national uniformity at the operational level, through a single code, while recognising the diversity of the underlying legislation.

Corporate governance

Another important consideration is how well specific agencies responsible for chemical assessment, standard setting, or administration and enforcement are governed. The Australian Government commissioned a report on corporate governance in the public sector, known as the Uhrig Review (Uhrig 2003). It concluded that it is generally inappropriate for Commonwealth statutory authorities to have a governing board, where they have limited powers to act unilaterally (box 3.1). Instead, it was recommended that the executive management of statutory authorities report directly to the relevant minister. A governing board was, however,

organisms, which relies on state and territory legislation closely modelled on a Commonwealth Act (managed by the Office of the Gene Technology Regulator).

⁵ For example, each state and territory has its own legislation for food safety, but they all refer to the Australia New Zealand Food Standards Code for technical requirements.

considered appropriate for authorities not entirely the responsibility of the Commonwealth, or which undertook predominantly commercial operations.

While the Uhrig Review did not generally favour a governing board for statutory authorities, it noted that there could be a case for having an advisory board that reports to a minister:

The creation of an advisory board on the implementation of policy will be useful in circumstances where the government is introducing policy which has the potential for significant impact on the community. Through an advisory board the government can receive feedback on how to implement policy in the most effective manner ... Where an advisory board is appropriate ... the board should operate based on references from a minister and should report directly to the minister with its findings. (Uhrig 2003, p. 93)

Commonwealth guidelines on governance arrangements for government bodies take a slightly different approach by envisaging that advisory boards report to an authority's chief executive or, where it exists, governing board:

Advisory boards can provide a forum for the representation of stakeholder views without the stakeholders being involved in the governance of the body. It can also provide a useful consultative mechanism for the chief executive ... The advisory board's main role might be to provide perspectives from key stakeholders, eminent persons and/or business and broader community interests ... (DOFA 2005b, p. 38)

For example, in line with the Government's response to Uhrig, the APVMA's corporate governance arrangements were realigned. A governing board was abolished and in its place an advisory board to the chief executive was created:

The role of the Advisory Board is to provide advice and make recommendations to the CEO. The Advisory Board does not have decision-making power, but assists to inform the CEO and provides an expert consultative mechanism. (APVMA nd)⁶

The Commission considers that such advisory boards can be useful in ensuring the effectiveness of the operation of the relevant organisation. Their appropriateness is considered on a case-by-case basis in following chapters.

⁶ Prior to 1 July 2007, the APVMA had a governing board comprising a similar range of skills and experiences to those of its current advisory board. The governing board was disbanded in response to the recommendations of the Uhrig Review.

Box 3.1 The Uhrig Review of corporate governance

In 2002, the Australian Government commissioned a review of corporate governance of Commonwealth statutory authorities and office holders. The resulting report — known as the Uhrig Review — concluded that most statutory authorities should not be governed by a board because it is not feasible for the minister and/or Parliament to give a board full power to act, including to set policy. It was noted:

Where a board has limited power to act, its ability to provide governance is reduced and its existence adds another layer, potentially clouding accountabilities. (Uhrig 2003, p. 6)

The appropriate governance structure for most statutory authorities was deemed to be an 'executive management template' in which the executive management — headed by a chief executive or one or more commissioners — reports directly to the responsible minister. This included statutory authorities administering regulation.

The alternative of having a governing board (the 'board template') was only considered to be appropriate if either:

- the statutory authority undertakes predominately commercial operations (because a board is more likely to be given the necessary powers to govern such an authority)
- the Commonwealth does not fully own the equity of the authority, or is not solely responsible for outcomes (in which case it is unlikely that all parties will agree to an Australian Government minister solely governing the authority on their behalf). The main examples of this were said to be where there are multiple accountabilities, or where funding is predominantly from private sources (such as industry levies).

In 2004, the Australian Government endorsed the Uhrig Review's recommendation that boards should only be used when they can be given full power to act. It also announced that it would implement the recommended governance templates. This was subsequently reflected in official guidelines on the governance arrangements for Commonwealth bodies.

Source: DOFA (2005a); Uhrig (2003).

3.4 Developing a national chemicals policy

Currently there is no single forum for developing a national chemicals policy. Instead, there are various forums or mechanisms that provide for some coordination of policy development and service delivery both at the national level and at the state and territory level. As the Environment Protection and Heritage Standing Committee (EPHSC) has noted:

Responsibility for system-wide chemical policy is unclear. No single agency, Minister or Ministerial Council at either Australian Government or State and Territory level has a designated policy leadership or oversight role in relation to chemicals. This can result in a system that is reactive rather than proactive in identifying and managing chemical issues and can result in inconsistencies of approach between sectors. (sub. 20, p. 25)

The Queensland Government commented similarly and suggested that:

A coordinated approach to policy development should be considered as one of the first steps taken in addressing the proliferation of, and inconsistency in, chemicals and plastic regulation. (sub. 66, p. 2)

Some Ministerial Councils already include mechanisms for cross portfolio consultation on important matters. For example, the Product Safety and Integrity Committee, a committee of officials supporting the Primary Industries Ministerial Council:

... involves representatives of other ministerial councils which have an interest in managing agricultural and veterinary chemicals:

- the Workplace Relations Ministers' Council
- the Australian Health Ministers' Conference and
- the Environment Protection and Heritage Council. (PSIC nd)

Cross portfolio coordination can also be achieved through the use of taskforces or working groups to develop whole of government responses on an *ad hoc* basis. For example, in response to perceived inadequacies in the national management of the environmental impact of chemicals, the EPHC in 2002 established the National Taskforce on Chemicals Management and Regulation. The Taskforce comprised representatives from ministerial councils covering the environment, health, primary industries and workplace relations. And as noted, a special ministerial taskforce has been formed to develop a policy response to this report and to consider proposed reforms to the environmental management of chemicals (chapter 9). But this taskforce will be disbanded when it has done its job.

Various MOUs and service level agreements assist agencies within individual jurisdictions to coordinate their activities. For example, NICNAS and the Australian Safety and Compensation Council (ASCC) have an MOU to facilitate the application of OHS policy to NICNAS's assessments. And at the state level, an MOU between WorkSafe Victoria and the Victorian Environmental Protection Agency covers the joint inspection of major hazard facilities.⁷ These arrangements have the effect of codifying the contractual obligations of each party.

Administrative arrangements have also helped coordinate policy development and service delivery. For example, in Victoria, many chemicals and plastics regulations are brought together under WorkSafe, including those covering OHS, transport, and major hazard facilities. Informal networks of officials within and across jurisdictions also facilitate policy development and service delivery. However, these can wax and wane as personnel change.

⁷ This MOU is currently being renegotiated.

A standing committee on chemicals

The Commission considers that while the mechanisms discussed above are generally necessary, they are not sufficient to achieve the level of policy coordination required, and hence there is a strong case for the creation of a new governance mechanism. Options include the establishment of either a new ministerial council on chemicals, or a body to coordinate policy advice to the existing ministerial councils, such as a standing committee.

Creating a new ministerial council would give chemicals policy much greater prominence but might not achieve a high degree of coordination. Most ministerial councils have a one-on-one correspondence between the policy area and the portfolio ministers who are members (for example, the Workplace Relations' Ministerial Council and employment ministers). As chemicals policy encompasses so many areas, it would be difficult to identify appropriate ministerial representation. In this respect it is instructive to observe that the COAG Ministerial Taskforce on Chemicals and Plastics Regulation Reform has membership drawn from portfolios such as: Environment and Climate Change; Industry and State Development; Transport, Trade, Employment and Industrial Relations; and Employment Protection and Regional Development. Whichever portfolio was chosen for a new council, ministers would have little knowledge of, and control over, regulations not within their direct portfolio interests. Furthermore, COAG generally discourages the creation of new ministerial councils (box 3.2).

The more effective option would be to establish a formal mechanism for coordinating policy advice on the range of chemical issues that are addressed by the relevant ministerial councils and other policy groups. As the Department of Agriculture, Fisheries and Forestry has stated:

Further rationalisation of the regulatory requirements of different portfolios/agencies could be achieved by establishing a mechanism for cross-portfolio discussion of policy approaches or for generating awareness and understanding of programs and initiatives already in place which could be used to meet common risk management objectives. Improved cross-portfolio coordination would acknowledge that, whilst ... some of the risk management objectives of the different chemical regulatory schemes are the same or similar, they have different purposes and, therefore, they also cover other aspects. (sub. 39, pp. 11–12)

The APVMA is of a similar view (sub. 59, p. 37).

Box 3.2 COAG guidelines for the creation of new ministerial councils

1. There should be a presumption against the creation of new Ministerial Councils.
2. If a new Council is to be created, the following tests should apply.
 - Could the work proposed for the new Council be done by an existing Council?
 - If not, could the new Council be brought under the umbrella of an existing Council or under an arrangement with an existing Council?
 - If not, is there scope for adjustment and/or rationalisation of the work of existing Councils to encompass the work proposed for the new Council?
3. If it is considered necessary to create a new Council:
 - Heads of Government must formally agree to its creation and terms of reference
 - it should be supported by existing Secretariats, wherever possible
 - it must comply with the Broad Protocols and General Principles for the Operation of Ministerial Councils
 - consideration should be given to inserting a sunset clause in its terms of reference.
4. If legislation is considered necessary to confer functions and powers on a Council, the Council should not specifically be named in the legislation, allowing for greater flexibility in the roles and responsibilities of statutory Councils.

Agreed to by COAG on 8 June 2001.

Source: COAG (2001).

The Commission is of a similar view and considers that this could be best implemented through a dedicated standing committee of officials that includes representation across all relevant ministerial councils. The committee would:

- be a forum for exchange of ideas and information
- provide recommendations to the respective ministerial councils on how chemicals policy initiatives that have cross-portfolio implications might be best progressed
- provide an ongoing monitoring role — after the Ministerial Taskforce on Chemicals and Plastics Regulation Reform has been wound up — in gauging the effectiveness and efficiency of chemicals regulation in the future
- oversee the development of RISs where regulations have implications for more than one regulatory regime, though carriage of the preparation of the RIS would continue to reside with the portfolio or standard-setting body most affected.

In the draft report, the Commission proposed that, for administrative reasons, such a standing committee on chemicals would need to report to a particular ministerial

council. It was suggested that as many chemical regulatory issues impact on human health in one way or another, there was some merit in establishing a standing committee on chemicals under the Australian Health Ministers' Conference (AHMC). However, it was stressed that it be set up with a charter that ensures it operates as a cross-portfolio coordinating committee.

The broad idea of creating such a committee received widespread support from many study participants, though there were some concerns:

- The committee should not become another layer of bureaucracy in an already complicated system (for example, Croplife, sub. DR80, p. 2; SA Government, sub. DR110, p. 4; Queensland Government, sub. DR121, p. 8).
- The committee should not replace other successful coordinating mechanisms, such as Product Safety and Integrity Committee (PSIC) (Victorian Government, sub. DR112, p. 6).
- Some industry participants were concerned about stakeholder input (for example, ACCI, sub. DR92, p. 4).
- The committee could create such a focus on chemicals that this could lead to inconsistencies in the way other dangerous goods were regulated for transport purposes (Australian Railways Association, sub. DR95, p. 9).
- Who the committee would be accountable to and the idea of housing it under the AHMC in particular.

The Commission shares the concern that this should not add to red tape. Rather its focus should be on developing a sound cross-portfolio perspective that would feed into better policy making by the stakeholder ministerial councils. It would not have a decision-making role and would not replace existing standing committees. Nor need it impinge on existing cross-portfolio consultation mechanisms set up under particular portfolios (such as the PSIC), though the Commission considers that governments should keep an open mind about this and rationalise the number of bodies where it is effective and efficient to do so.

The Commission appreciates industry concern about having appropriate stakeholder input. Industry groups have long fought for a coordinated approach to chemical policy and understandably would be concerned if its voice was not being heard. However, the Commission considers that stakeholder input is best achieved either through properly constituted governance arrangements within each of the policy portfolios (that is, that industry has an advisory role in developing but not setting standards) or through general consultative arrangements. Given that the standing committee on chemicals would be a coordinating mechanism it would not be necessary to establish its own formal consulting arrangements.

With respect to the Australian Railways Association's concern that a focus on chemicals could lead to inconsistencies, the Commission's view is that the transport of dangerous goods would continue to be the responsibility of the NTC and that it would continue to cover all dangerous goods, not just chemicals.

No issue attracted as much attention as the governance arrangements under which the standing committee on chemicals would operate. Some participants welcomed the suggestion that it be housed under the AHMC (for example, the SA Government, sub. DR110, p. 3). Others thought that, given its focus on ongoing regulatory reform, it should be responsible to the Chair of the COAG Business Regulation and Competition Working Group (for example, CPLG, sub. DR113, p. 21). Other possibilities were that it report to the WRMC (a view implied by the Victorian Government on the basis that workplace issues were paramount, sub. DR112, p. 6), or that it report directly to COAG itself (for example, Queensland Government, sub. DR121, p. 8; APVMA, sub. DR105, pp. 4–5; DAFF, sub. DR120, p. 6).

The Commission had proposed that it 'report' to the AHMC but only for administrative reasons, presuming that alignment with a particular ministerial council would give it greater legitimacy. However, the suggestion that it would be accountable directly to COAG also has merit. This would allow the standing committee on chemicals to operate more independently in providing advice to stakeholder ministerial councils and lessen the risk of capture. And as some participants have emphasised, if differences between portfolios remained, having the standing committee on chemicals report to COAG would allow those differences to be addressed at that level.

Having the standing committee on chemicals make recommendations to all ministerial councils, but being accountable to COAG would make it a more neutral arrangement. However, this leaves the question of where it would draw administrative support from. A Commonwealth Government agency would seem appropriate given the emphasis on a national approach to regulation. Whichever portfolio department was chosen there would be a risk that it could be captured to some extent, particularly if the department was also providing support for one or more of the standard-setting bodies. But even then a degree of independence can be created through having a clear charter for the standing committee on chemicals emphasising that it must provide advice that is in the broad public interest.

On balance, the Commission considers that the Department of Innovation, Industry, Science and Research would be an appropriate department to provide secretariat support. It has had a long association with chemicals regulatory reform, and is providing support for the current Ministerial Taskforce (chaired by one of the two ministers it serves, the Minister Assisting the Finance Minister on Deregulation, and

the Minister for Small Business, Independent Contractors and the Service Economy). When the Ministerial Taskforce completes its work the department could seamlessly move into supporting the standing committee on chemicals.

The implementation of any new governance structure like this will be most effective if it is supported by the various stakeholders and, to this end, a ‘heads of agreement’ that would set out the responsibilities of the standing committee on chemicals to the respective ministerial councils would seem appropriate. So too would a sunset clause requiring that the effectiveness and efficiency of the standing committee on chemicals be reviewed after five years.

This committee would help ensure that all ministerial councils are provided with appropriate policy advice on system-wide regulatory issues. But much would still depend on effective communication between respective councils and agencies, and on the arrangements that the states and territories put in place in their own jurisdictions.

RECOMMENDATION 3.1

Subsequent to the COAG Ministerial Taskforce on Chemicals and Plastics Regulation Reform having completed its reference, the Commonwealth, states and territories should establish a Standing Committee on Chemicals comprising representatives of all ministerial councils that have responsibility for chemicals regulation. It would:

- ***provide an ongoing forum for assessing:***
 - ***the consistency of chemicals-specific policy settings across the various areas of concern, including public health, workplace and on-farm safety, transport safety, environment protection and national security***
 - ***the effectiveness and efficiency of the overall chemicals-specific regulatory system***
- ***oversee the consistent application of chemical hazard and risk-assessment methodologies and international standards such as the Globally Harmonised System of Classification and Labelling of Chemicals***
- ***support the coordinated development of regulatory proposals that have cross-portfolio implications, including the conduct of regulatory impact assessments***
- ***make recommendations for specific actions by relevant ministerial councils***
- ***be supported by a secretariat in the Department of Innovation, Industry, Science and Research.***

