
5 Electricity, gas, water and waste services

Key points

- Major national reforms to the regulatory frameworks covering electricity and gas supply commenced more than 15 years ago, but certain key reforms are still to be finalised, or have only recently been introduced. In many areas therefore, further reforms are best left until sufficient time has elapsed to allow an assessment of the effectiveness and efficiency of the new arrangements. Nevertheless, some actions should be taken now:
 - the Australian Energy Regulator (AER) should examine ways to reduce the cost and complexity of regular access reviews for determining price/revenue caps
 - retail price regulation is distorting consumption and investment decisions and should be abolished by state and territory governments as soon as effective competition has been demonstrated. Until they are phased out, retail tariff regimes should be revised to allow pass through to consumers of energy cost increases associated with a Carbon Pollution Reduction Scheme. Governments should amend the Australian Energy Market Agreement to ensure stronger and clearer commitments to competition reviews by the Australian Energy Market Commission; and an ongoing price monitoring role for the AER
 - regulators should review their consultative processes against best practice consultation principles and work closely with industry to identify how consultation could be improved, including through better coordination of reviews
 - all levels of government need to work cooperatively to reduce the burden associated with excessive reporting obligations. The Standard Business Reporting initiative may provide a good model for achieving such improvements.
- While playing an important leadership role in pursuing greater national consistency, the Australian Government has only limited direct responsibility for the regulation of waste, water, sewerage and drainage services. Many of the concerns raised relate to state/territory responsibilities and consequently are out of scope for this review.
- Few concerns were raised in relation to water regulation and these are best addressed as part of the major COAG work program in this area.
- Concerns about the regulation of waste services were examined only recently by the Commission in its Waste Management Report. The recommendations and regulatory principles developed in that report should be considered in the current development of a National Waste Policy.

5.1 Industry background

This chapter covers the following industries:

- electricity supply
- gas supply through mains systems
- water supply, storage, treatment and distribution
- sewerage and drainage services
- waste collection, treatment and disposal services, including remediation of contaminated materials and materials recovery activities.

Key statistical data for these industries are provided in table 5.1.

In all the aggregate measures presented in table 5.1, the electricity supply industry dominates. The Australian Bureau of Agricultural and Resource Economics notes that with ‘around \$100 billion in assets, the electricity industry ranks as one of Australia’s largest, making a direct contribution of 1.5 per cent to gross domestic product’ (ABARE 2008, p. 38). The electricity and gas industries account for approximately 14 per cent of engineering and construction activities in Australia, the third largest after roads and heavy industry (including mining) (Construction Forecasting Council, reported in MCE ETSLG 2009).

In the energy sector, substantial industry restructuring, vertical separation and ownership changes occurred with competition policy reforms (see section 5.2). More recently there has been a trend toward some ownership consolidation, including retail market convergence between electricity and gas, with many energy retailers offering both electricity and gas services.

The rest of this chapter is organised as follows:

- electricity and gas supply (section 5.2)
- water supply, sewerage and drainage services (section 5.3)
- waste collection, treatment and disposal services (section 5.4).

In each section, a brief overview of the relevant regulatory framework is provided before discussing the specific concerns raised.

Table 5.1 **Key industry data**
2006-07

	<i>Employment</i>	<i>Income</i>	<i>Net capital expenditure</i>	<i>Value added</i>
	no.	\$m	\$m	\$m
Electricity generation	9 517	12 791	2 911	4 896
Electricity transmission	2 442	1 592	1 261	1 426
Electricity distribution	28 853	15 562	4 852	7 800
On selling electricity and electricity market operation	5 159	18 829	517	1 383
Electricity supply (total)	45 970	48 774	9 541	15 505
Gas supply	2 479	6 358	256	1 062
Water supply, sewerage and drainage services	26 461	13 207	5 351	6 711
Waste collection, treatment and disposal services	24 615	8 447	491	3 141
Electricity, gas, water and waste services (total)	99 525	76 786	15 639	26 418

Source: ABS Cat. No. 8155.0 *Australian Industry, 2007-08*.

5.2 Electricity and gas supply

Overview of regulation

The states and territories have the power to make laws with respect to electricity and gas supply. Since the early 1990s governments have cooperated to progressively introduce major reforms to improve the efficiency and competitiveness of energy markets. The reform process was driven by National Competition Policy Agreements and later the implementation of the 2004 Australian Energy Market Agreement (AEMA), and revisions to that agreement in 2006. Specific reforms have included:

- the establishment of the National Electricity Market (NEM) which links the Australian Capital Territory, New South Wales, Victoria, South Australia, Queensland and Tasmania¹

¹ The NEM is a wholesale market (pool) into which generators sell their electricity, mainly to retailers which buy electricity for resale to business and household customers. The six participating jurisdictions are physically linked by an interconnected transmission network. Western Australia is monitoring developments and will consider harmonisation with, and adoption of, national institutions where appropriate and beneficial for the State. The Northern Territory is currently considering the merits of harmonisation with national arrangements for electricity (CRC 2009a).

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- corporatisation or privatisation of state owned utilities and structural separation of previously vertically integrated suppliers
 - allowing customers to choose their suppliers (retail contestability)
 - the development of consistent national regulation of natural gas (except WA) and electricity (except WA and NT) transmission and distribution infrastructure through National Energy Market Legislation (box 5.1)
 - convergence of gas and electricity markets and the establishment of a single set of National Energy Market Institutions to administer the regulatory frameworks (box 5.2).

The states and territories currently maintain control of licensing; rules and codes governing technical safety functions; service reliability standards; land use and planning approvals or policies; retail price regulation; and various regulations to protect consumers. However, several of these areas are under review or transitioning to national arrangements.

All three levels of government are involved to varying degrees in making and enforcing environmental laws. This is the main area of direct Australian Government regulatory responsibility impacting on the energy sector, in particular the mandatory renewable energy target legislation and the associated creation of a market for renewable energy certificates. Under the target (overseen by The Office of the Renewable Energy Regulator) all electricity retailers and wholesale buyers have a legal liability to contribute towards the generation of additional renewable energy.

Since 2001, the energy reform agenda has been led by the Ministerial Council on Energy (MCE), which consists of energy ministers from all Australian jurisdictions.

Energy market reforms are ongoing. The new Australian Energy Market Operator (AEMO) only commenced operations very recently (box 5.2) and certain previously agreed regulatory and governance reforms are still to be implemented. Further potential areas of reform are the focus of reviews and consultative processes. Key streams of the current reform program include:

- the transfer of non-price retail regulation to the national framework via the development of a *National Energy Customer Framework*
- removal of retail price caps where there is effective retail competition
- harmonisation of energy supply industry technical and safety regulation
- a national framework for transmission reliability standards.

Table 5.2 sets out the institutional arrangements that will apply once the agreed transfer of regulatory functions from the states and territories is complete.

Box 5.1 Summary of national regulation

Australian Energy Market Agreement (AEMA), 2004 — agreement between the Australian, state and territory governments set the agenda for a transition to national energy regulation and introduced new governance arrangements. Revisions to the Agreement in 2006 included streamlined regulatory, planning, governance and institutional arrangements for the National Energy Market (NEM).

National Electricity Law (NEL) — is the Schedule to the *National Electricity (South Australia) Act 1996*, which establishes the governance and enforcement framework and key obligations surrounding the NEM and the regulation of access to electricity networks. The NEL is applied by state and territory application legislation in NSW, Vic, Qld, SA, Tas and the ACT.

National Electricity Rules (NER) — made under the NEL, these set out the detail of the rules for the operation of the NEM, power system security, access to electricity networks, connection to networks and methods to be used for pricing network services.

National Gas Law (NGL) — is the Schedule to the *National Gas (South Australia) Act 2008* which establishes the governance and enforcement framework and key obligations surrounding the access to gas pipelines and establishes a gas market bulletin board.² The NGL is applied by state and territory application legislation in NSW, Vic, Qld, SA, Tas, the NT and ACT. It provides the overarching regulatory framework for the gas transmission and distribution sectors (replacing the Gas Pipelines Access Law and the National Gas Code). The NGL transferred the regulation of covered distribution networks outside WA from state and territory regulators to the AER (see institutions — box 5.2) and covered transmission pipelines outside WA from the ACCC to the AER.

National Gas Rules (NGR) — made under the NGL, these deal with the details of the access regime and bulletin board. The NGL and NGR took effect from 1 July 2008.

Source: AER (2008), ABARE (2008).

² The gas market bulletin board is a website, covering major gas infrastructure in southern and eastern Australia, that facilitates trade in gas and pipeline capacity by providing information on the state of the gas market, system constraints and market opportunities. Information provision by relevant market participants is mandatory, including pipeline capacity and production and storage capabilities.

Box 5.2 National Energy Market Institutions

(i) Policy

Ministerial Council on Energy (MCE) — the sole governance body for initiating and developing Australian energy market policy reforms for consideration by COAG. It also monitors and oversees implementation of energy policy reforms agreed by COAG.

Special-purpose bodies have been created by COAG and MCE to develop and implement specific reform packages for the energy sector.

(ii) Rules development

Australian Energy Market Commission (AEMC) — responsible for the rule making process under the National Electricity Law and National Gas Law, and making determinations on proposed rules and market development in the NEM. The AEMC also undertakes reviews (on its own initiative or as directed by the MCE) of the energy market framework and provides policy advice to the MCE on electricity and gas market issues. The AEMC is funded by the states and territories that are party to the AEMA.

(iii) Regulator and market operator

Australian Energy Regulator (AER) — Electricity: enforces the National Electricity Law and Rules, monitors the wholesale electricity market and regulates electricity transmission (since 2005) and distribution networks (since January 2008) in the NEM. (The regulation of distribution networks in Western Australia and the Northern Territory remain under state/territory jurisdiction.) Gas: (since July 2008) enforces the National Gas Law and Rules, and regulates covered gas transmission and distribution pipelines (except in WA). The AER is fully funded by the Australian Government.

Australian Energy Market Operator (commenced 1 July 2009) — AEMO merged the roles of the National Electricity Market Management Company (NEMMCO) with the gas market operators in NSW, the ACT, QLD, Victoria and South Australia to form a single, industry-funded national energy market operator for both electricity and gas. AEMO assumed NEMMCO's responsibility for the day-to-day operation and administration of the power system and electricity wholesale spot market in the NEM; the registration of participants, the scheduling and dispatch of generators, the management of transmission constraints and the financial settlement of trades in the market. It is also responsible for the operation of the gas bulletin board and is the National Transmission Planner.

Source: AER (2008), ABARE (2008).

Several participants, whilst supportive of the energy regulatory reform process, are concerned about delays in achieving full implementation of reforms. For example, Origin Energy made the following comments in relation to the agreed goals of a National Energy Customer Framework and retail price deregulation:

... in both cases obstacles remain to full implementation, because momentum has been lost or earlier commitments appear to have been overwhelmed by more immediate

pressures. As a result, from Origin’s perspective, commitments made in the COAG and MCE processes have for some time not been matched by practical outcomes at the jurisdictional level.

With benefits so close at hand it is vital that a renewed commitment be made to these goals and the reforms implemented in full. The resources required to drive reforms such as these are considerable. If the reforms are not implemented in full these cost cannot be recouped. (sub. DR89, p. 2)

Table 5.2 Energy regulation after implementation of national framework

	<i>Qld</i>	<i>NSW</i>	<i>ACT</i>	<i>Vic</i>	<i>SA</i>	<i>Tas</i>	<i>NT</i>	<i>WA</i>
Gas transmission	Australian Energy Regulator (Monitoring and enforcement of national energy laws)							Economic Regulation Authority
Gas distribution								
Electricity wholesale								Utilities Commission
Electricity transmission								
Electricity distribution								
Retail (non-price)								
Retail pricing	QCA	IPART	ICRC	ESC	ESCOSA	OTTER and GPOC		
Rule changes	Australian Energy Market Commission							
General Competition regulation	Australian Competition and Consumer Commission							

^a ESC, Victorian Essential Services Commission; ESCOSA, Essential Services Commission of South Australia; GPOC, Government Price Oversight Commission; ICRC, Independent Competition and Regulatory Commission; IPART, Independent Pricing and Regulatory Tribunal; QCA, Queensland Competition Authority; OTTER, Office of the Tasmanian Energy Regulator.

Source: AER (2008).

Access reviews

Several participants submit that access arrangement reviews are too complex and costly and further that the burden of meeting associated information requests is increasing. There is a particular focus in submissions on the gas access arrangements.

The Australian Pipeline Industry Association (APIA) considers that access arrangement reviews every five years are very expensive and ‘often result in limited benefits’ (sub. 12, p. 12). Envestra, a gas distributor company, states that ‘regulatory reviews are becoming more forensic, with regulators requiring more information’ (sub. 13, p. 3) and the Energy Industry (Joint Submission) considers that the increasing complexity and cost is partly attributable to:

... an increasing tendency for regulatory pricing decision processes to evolve from high-level reviews of the reasonableness of proposed access terms or prices, into a detailed review of all aspects of the commercial operations of regulated infrastructure. As an economic regulator’s expertise in this field is limited, these reviews are increasingly characterised by opposing expert views provided on detailed operational aspects of planned network investments, efficiency assumptions, and expected labour costs. (sub. 23, pp. 8-9)

Envestra also submits that the associated cost of this regulatory burden is unregulated with regulators ‘passing on their significantly increasing costs via increased licence fees’ (sub. 13, p. 3). While it is true that in some jurisdictions regulators recover the costs of access arrangement reviews through fees charged to service providers, this is a matter for state and territory governments and is therefore outside the scope of this review. This will, however, become less of an issue moving forward as the AER, which is fully funded by the Australian Government, progressively assumes responsibility for access arrangement reviews.

Assessment

Generally, the most cost-efficient means for the supply of electricity transmission and distribution and gas distribution services is by a single entity. This is because of the natural monopoly supply characteristics, whereby very large capital costs result in the average costs of provision declining as output increases.

Access regulation aims to capture the efficiency benefits of provision by a single provider, but reduce the risks of monopoly profits and efficiency losses arising where the owner of the asset takes advantage of its market power at the expense of users. An outline of the current access arrangements for electricity and gas supply is provided in box 5.3.

Box 5.3 **Outline of energy access arrangements**

Electricity transmission and distribution

The revenues and pricing of transmission and distribution businesses in the NEM are subject to periodic review by the AER, applying a framework set out in the National Electricity Rules. For transmission businesses, a revenue cap is determined for each network, which sets the maximum allowable revenue a network can earn during a regulatory period — at least five years. In setting a revenue cap, the AER factors in forecast efficient capital costs and an allowance to cover efficient operating and maintenance costs. The regulatory scheme provides incentives for efficient transmission investment and for businesses to reduce their spending through efficient operating practices. There is a service standards/quality incentive scheme to ensure that efficiencies/cost savings are not achieved at the expense of network performance/service quality.

The framework for distribution networks is broadly similar to that used for transmission, but there is a degree of variability in how prices or revenues are regulated (e.g. cap on (weighted average) prices or cap on total or average revenue); the use of incentive mechanisms to encourage distribution businesses to manage their operating and capital expenditure efficiently; and in the treatment of taxation in determining returns on capital.

Gas transmission and distribution pipelines

The National Gas Rules, which took effect on 1 July 2008 (replacing the Gas Pipeline Access Law and National Gas Code (Gas Code)), provide the overarching regulatory framework for the gas transmission and distribution sectors. For ‘covered’ pipelines the Gas Rules require the service provider to develop access arrangements (and submit them to the regulator for approval) that set out the terms and conditions of access, which must comply with the provisions of the Gas Rules and underpinning legislation, including pricing principles, ring-fencing requirements and rules for associate contracts. The regulatory approach is broadly similar to that applied to electricity networks. The regulator aims to determine revenue outcomes that cover efficient costs, including asset depreciation, operating expenditure and a proxy for a commercial return on capital and the Gas Rules provide for incentive mechanisms to reward efficient operating practices. A key difference is that the Gas Rules set reference (benchmark) tariffs for reference services that are commonly sought by customers rather than revenue caps. The reference tariff is intended to form a basis for negotiation between the pipeline owner and customers, but is enforceable if a party notifies the regulator of a dispute. Service providers must publish reference tariffs (prices) and other conditions of access on their website.

The legislation allows for light regulation in some circumstances, in which case the pipeline provider is obliged only to publish prices and other terms and conditions of access on its website. The National Competition Council has the role of determining whether a pipeline is subject to light regulation.

Source: AER (2008) and AEMC (2009b).

The AER has been progressively assuming responsibility for regulation of electricity transmission (since 2005), electricity distribution (since January 2008) and gas transmission and distribution (since July 2008). Transitional arrangements apply to the ongoing administration of certain existing access determinations by state and territory regulators. The AER only concluded its first five-year access determinations for electricity distribution services — for NSW and the ACT — at the end of April 2009. Thus, it is important to note that the concerns raised about the complexity of price reviews are based to a large extent on the experience with processes that have been followed by state and territory regulators. That said, the Energy Industry (Joint Submission) points out that ‘the trend towards increasingly complex and lengthy decisions does not seem to have been affected by the movement of responsibility of some economic regulation ... to the Australian Energy Regulator’ and it suggests that the problem is a ‘systemic, rather than transitional issue’ (sub. 23, pp. 9-10).

Virtually all access regimes set controlled prices or revenue by reference to an assessment of costs. The current ‘building-block’ approach used in the energy sector involves building up a cost base for the facility from its individual components. The cost base generally includes return on capital, depreciation and operating expenses. This approach is seen as objective and transparent, and results in prices which closely track individual service provider costs. But it has been regularly criticised for being extremely information intensive and inefficient. It can impose substantial administrative costs for regulators and compliance costs for owners of covered infrastructure. It requires regulators to obtain and validate information on the asset base of the facility, expected capital expenditure, the cost of capital and efficient operating and maintenance costs. Within the broad building-block approach there are many possible variations in terms of the rate of return allowed, the method of calculating it, the way assets are valued, treatment of risk, depreciation methods and so on. Some of these variations are reflected in the differences in the current approaches of the jurisdictional regulators.

In 2004, the Productivity Commission completed a review of the Gas Code, which proposed several changes to address industry concerns that the regime was deterring investment. This led to the development of new National Gas Law and Gas Rules, with provisions to enhance regulatory certainty for investment and the introduction of a new classification of covered pipeline, subject to a ‘light regulation’ option.

The Gas Rules include a coverage test to allow for an independent review of whether there is a need to regulate a particular pipeline. Substantial new investment in gas pipelines has led to improved interconnection between gas basins and retail markets in the south-eastern states. This is generating alternative sources of supply, making the market more contestable and limiting the ability of pipeline operators to

exercise market power. The coverage process has led to the lifting of economic regulation — in whole or part — from several major pipelines.³ Only one new pipeline constructed during the current decade is covered (AER 2008). Pipelines that are not covered are subject only to the general anti-competitive provisions of the *Trade Practices Act 1974*. Access to non-covered pipelines is a matter for the access provider and an access seeker to negotiate, without regulatory intervention.

In broad terms, there are two potential sources of unnecessary burdens associated with current access arrangements. Firstly, there are those that are a consequence of the particular methodological approach chosen, and secondly, there are those that stem from aspects of the decision-making process, within the broad parameters dictated by a chosen methodology. Options for addressing both these sources of burden are discussed in turn below.

Alternative methodologies

Various reviews have considered alternatives to the current building-block approach for determining energy access arrangements, including:

- The Expert Panel on Energy Access Pricing (Chaired by Roger Beale) (2006)
- Australian Energy Market Commission (AEMC) Review of Electricity Transmission Revenue and Pricing Rules (2006)
- Exports and Infrastructure Taskforce (2005)
- Productivity Commission Review of the Gas Access Regime (2004)
- Productivity Commission Review of the National Access Regime (2001)

Regulatory impact analysis, evaluating the costs and benefits of various options, was also carried out prior to the introduction of the current arrangements (see for example, MCE 2006).

Currently, the AEMC is conducting a review of whether the Energy Rules (for electricity and/or gas) should be amended to allow the use of a Total Factor Productivity (TFP) based methodology as an alternative approach for the determination of prices and revenue. Such a review was recommended by the Expert Panel on Energy Access Pricing. The AEMC's final report will be presented to the MCE in December 2009.

³ The National Competition Council is the coverage review body, but the final decision on coverage is made by government. Decisions are open to review by the Australian Competition Tribunal.

Under a TFP-based approach, a long-term, industry-wide measure of total factor productivity (TFP) is used as a substitute for the firm-specific forecasts of cost and demand used in the current methodology. TFP is an all encompassing measure of the long term, industry-average rate of change of both cost and demand circumstances, relative to the economy-wide rate of change (as captured by the CPI or GDP deflator). Under this approach, if a firm performs better than the average for the industry it retains some or all of the gains, providing an incentive for firms to improve their performance.

As part of their review, the AEMC will be assessing the advantages and disadvantages of the current building-block approach. This will include an examination of the following deficiencies raised by stakeholders in early consultations:

- the information asymmetries facing regulators in applying a building block approach to service providers' proposals
- its firm specific, rather than industry, focus in setting prices to recover efficient costs
- the adversarial nature of the decision-making process and its impact on the behaviour of parties and the outcomes of the process
- the costs (to all parties) of conducting and participating in an assessment of a revenue proposal or access arrangement proposal
- and the frequency, likelihood and costs of reviews and appeals of regulatory decisions under the building-block approach.

Participants in the AEMC Review suggested that TFP may not be the best solution to the deficiencies in the building-block approach. Some service providers considered that the introduction of a TFP methodology would increase their regulatory costs and that savings that may arise from not using a building-block methodology would not be significant. In particular, service providers expressed concern about any additional reporting requirements that may arise and further some claimed that the necessary conditions to implement a TFP do not exist in either the distribution or (especially) the transmission sector (AEMC 2009a).

Many participants, therefore, suggested that the AEMC should expand the scope of their review to consider other alternatives. The AEMC concludes that this would not be appropriate, based on a number of considerations, including amongst others, that:

... a well considered assessment of other possible revenue and price methodologies would extend the scope of the review and the necessary resources considerably; and both the National Electricity Law (NEL) and the National Gas Law (NGL) refer specifically to the making of rules in regard to the building block approach and TFP and no other methodology. (AEMC 2009a, p. 6)

Decision-making processes

The AER has sought to reduce the compliance costs imposed on business through measures to improve the efficiency of access arrangement decision-making processes, including by:

- the publication of various guidance documents and the use of checklists and prescriptive templates to gather information — this is designed to clarify information requirements and to ensure a common information base
- requesting all required information upfront — this is designed to speed up the decision-making process by reducing ‘stop-the-clock’ delays whilst the regulator is waiting for defects in submissions to be addressed
- compliance with legislated time limits for decision-making processes
- pre-proposal submission conferences/meetings — these provide an opportunity for the parties to discuss the development of the service provider’s proposal to ensure information requirements are clearly understood and to reduce the risk of wasted effort or poorly focused submissions.

The ‘all up front’ approach to information requests can tend to result in too much information being submitted ‘just in case’. While the pre-proposal discussions are one important way of mitigating this tendency, the Energy Industry (Joint Submission) highlighted that the problem can be exacerbated by the nature of decision review processes. Decisions made by the AER in relation to access arrangement proposals are subject to a ‘limited’ merits review by the Australian Competition Tribunal and/or judicial review by the Federal Court of Australia. Other than the AER, a party to a review may not raise any matter that was not raised in submissions or introduce new material and this can create perverse incentives with respect to information included in access proposals.

Scope for reform

All parties accept that access arrangement reviews will inevitably be costly, information intensive exercises. However, given the very heavy burden for both industry and government, further consideration should be given to making these reviews more efficient.

In the longer term, an independent and public review should examine alternative methodologies for determining maximum revenues or prices. However, it is clear from the discussion above that significant effort has previously been invested in evaluating possible alternatives and there are advantages and disadvantages with the different approaches that need to be carefully weighed up. The objective is to have a process that leads to decisions that encourage efficient investment in gas and

electricity services, and their efficient operation and use to the benefit of users, final consumers and the wider community. Ultimately, the total community benefits derived from the access arrangement determination process must outweigh the aggregate costs imposed on service providers, regulators and other parties. In any future consideration of alternative frameworks the possibly substantial transition costs and uncertainty associated with any change would also need to be taken into account.

More immediately, the AER should consider measures to reduce the complexity of the review process and the volume of information required from businesses. Whilst there is clearly a need for a robust, transparent process of verifying data and assumptions in proposals put forward by regulated entities, there may be scope for the AER to be more targeted in its checking. The focus of the process should be on developing a more sophisticated system that creates the right incentives for the service provider to submit realistic proposals rather than ambit claims. More specifically, consideration could be given to:

- eliminating the need to justify, by way of the submission of detailed information, parameters that have not significantly changed since a previous determination
- a strengthened presumption of acceptance where a proposal from a regulated entity meets broadly specified criteria. Recognising that with many access terms and conditions there can be a range of reasonable values, rather than a single right value, the regulator would only overrule ‘unreasonable estimates’ that sit outside that range.

In a similar vein, there may be merit in the suggestion made by the Energy Industry (Joint Submission) for a ‘fast-track’ process in certain circumstances. This might be the case, for example, ‘where future access charges fall within historical trends, or are based on asset investment programs that have been independently assessed as prudent’ (sub. 23, p. 10).

Although there are clearly some advantages associated with a process whereby the parties agree up front on all the information that needs to be submitted, it may be that in some circumstances there would be greater efficiencies if the parties were to agree on a sub set of information only being provided at a later stage on request, if required. This would be based on an assessment that the likelihood that such a need would arise is such that the *expected costs* associated with preparation of the information and inclusion in initial submissions outweighs the *expected benefits*.

With respect to reviews of decisions, the Commission notes that the current arrangements were implemented after an extensive consultation process and the preparation of a regulation impact statement assessing the costs and benefits of alternatives (MCE 2005). This assessment also took into account recommendations

made by the Productivity Commission, in its *Review of the Gas Access Regime* (PC 2004), in relation to gas appeal processes. In determining the optimal design of review processes, a number of considerations need to be taken into account, including regulatory certainty, accountability, transparency, timeliness, costs imposed on industry and government, minimising the risk of ‘gaming’ and ultimately how best to optimise the likelihood that correct decisions are made. Moving to an alternative ‘full’ merits review system might address the perverse incentive to include all possible information up front, but such a system also has serious shortcomings, including uncertainty, cost and increased scope for gaming. The current system is an attempt to balance the competing interests involved.

Energy retail price regulation

The Energy Retailers Association of Australia (ERAA, sub. 19) is concerned about the lack of progress in some states in phasing out retail price regulation. It is also concerned that, where price regulation continues, that there will be insufficient flexibility to cover costs associated with various prospective government policies, in particular the carbon pollution reduction scheme (CPRS).

In arguing for retail price deregulation, Origin Energy highlighted some of the costs associated with the existing regime:

Retail price regulation imposes a considerable regulatory burden on retailers and governments, with no demonstrable countervailing benefit for consumers. The process required to set retail prices is costly and replete with risk: consumers have no way of knowing that costs projections will be accurate or cost-reflective. Retailers face ongoing financial risk and uncertainty in the face of a diverse set of objectives and approaches to price regulation. Efficient retail pricing is achieved through competitive markets. In a monopoly environment, regulation of revenues is unavoidable; where competition is effective the associated cost and risk cannot be justified. (sub. DR89, p. 2)

The Energy Industry (Joint Submission) also calls for the removal of retail price regulation in contestable energy markets, referring to a study undertaken for the Energy Supply Association of Australia by CRA International (ESAA 2007), which found:

... price regulation in contestable retail energy markets is likely to confer little or no public benefit but impose considerable direct and indirect costs, thus reducing overall welfare. (Energy Industry (Joint Submission), sub. 23, p. 10)

Assessment

While non-price retail energy regulatory functions are transferring to the National Energy Customer Framework (see below), under the Australian Energy Market Agreement (AEMA) retail energy price regulation remains the responsibility of the states and territories (COAG 2006b).

States and territories have agreed (AEMA 2006, clause 14.11) to phase out retail price regulation for electricity and natural gas where effective retail competition can be demonstrated. The AEMC is reviewing the effectiveness of competition in jurisdictions and advising, where effective competition exists, how that jurisdiction can phase out their retail price regulation. However, the relevant state or territory government makes the final decision on this matter. AEMC reviews have been completed for Victoria and South Australia and the next reviews scheduled were for New South Wales in 2009 and the ACT in 2010. The NSW review was deferred in light of the NSW Government's announced plans to sell government owned power retailers. The New South Wales Government has indicated that this review will be conducted in 2011 (AEMC 2009b). The timetable for reviewing the effectiveness of competition in other jurisdictions has not been determined at this stage.

The review of Victorian retail markets found that competition is effective in both the electricity and gas markets (AEMC 2007). In response to the review, the Victorian Government abolished retail price caps from January 2009. Provision was made for the Essential Services Commission of Victoria to undertake expanded price monitoring and report publicly on retail prices. Retailers will also be required to publish a range of their offers to assist consumers in comparing energy prices. The Government retains a reserve power to reinstate retail price regulation if competition is found in the future to be no longer effective.

The AEMC's review of retail energy competition in South Australia was concluded in December 2008 and a report presented to the South Australian Government and the MCE for consideration (AEMC 2008d). The review found that competition is effective for small electricity and gas customers, however, competition was more intense in electricity than in gas (AEMC 2008c). The review recommended that regulation of retail energy prices should end no later than December 2010 for electricity and June 2011 for gas. In April 2009, the South Australian Minister for Energy responded to the AEMC report. He pointed to 'differing views on the level of effective competition in the South Australian energy market' and stated that 'the South Australian Government does not accept the AEMC's recommendation for the removal of price control at this time' (Conlon 2009).

In recognition of the potential for significant impacts on the energy sector as a result of climate change policies, the MCE requested that the AEMC review the electricity

and gas markets in all states and territories. The *Review of Market Frameworks in Light of Climate Change Policies* is seeking to test whether energy market frameworks are resilient to the changes in behaviour that will result from the implementation of a Carbon Pollution Reduction Scheme (CPRS) and an expanded national Renewable Energy Target (expanded RET).

The review will provide its final advice to the MCE in September 2009. In December 2008, the AEMC published the 1st Interim Report for consultation (AEMC 2008b). A key finding of the report was the need for flexibility in the regulation of retailing:

The CPRS introduces a new, and potentially uncertain, cost into the supply chain for wholesale electricity. In addition, higher wholesale costs also mean higher prudential costs for retailers.

We do not consider that the current retail price regulation arrangements are sufficiently flexible to be able to cope with these potentially large and rapid changes in retailer costs. ...

While there are a number of processes underway to investigate potential changes to address these issues, we consider that there is a risk if these reforms are not progressed and implemented in line with the introduction of the CPRS and expanded RET. (AEMC 2008b, p. vi)

The Commission endorses the AEMC's findings. The Commission has previously argued that retail price caps should be removed as soon as effective competition has been established (PC 2005c, 2005d, 2008b). This would improve the efficiency of energy markets by allowing more cost-reflective tariff arrangements to be introduced, thereby improving the incentive for new investment and the incentive for consumers to use energy commensurate with its economic cost. Where governments consider there is a need to protect certain groups of consumers from the effects of higher energy prices, then consistent with the AEMA, this is best done 'through clearly specified and transparently funded state and territory community service obligations that do not materially impede competition' (AEMA 2006, Clause 14.11(b)).

Where regulation needs to be maintained as a transitional measure, governments should revise retail tariff regimes to ensure they are efficient and allow retailers appropriate flexibility to pass on costs associated with the introduction of a CPRS or other policies to address climate change. In this regard, the Commission welcomes the recent amendments to the AEMA to specify that, where retail prices are regulated, energy cost increases associated with the CPRS and the Renewable Energy Target will be passed through to end-use consumers.

Extensive work will need to be undertaken to develop methodological approaches to enable the practical implementation of the COAG commitment to allow pass

through of higher energy costs. In the short term there is still uncertainty regarding the CPRS policy itself. Once the policy is determined, however, developing a uniform methodology or effective jurisdictional based differentiated methodologies will be problematic. The AEMC notes:

Carbon will be another input cost to the wholesale price of energy. It will be difficult for regulators to separate changes in wholesale energy costs caused by the, potentially volatile, price of carbon from changes in other wholesale costs, including those arising from the displacement of high carbon intensity (lower base cost) sources of energy by low carbon intensity (higher base cost) sources such as gas and renewables.

Existing price setting processes are focused on periods of between one and three years. In the CPRS environment costs will be less predictable requiring the approaches to cost identification and price setting used by regulators, in each state and territory, to be modified. Modifications will be necessary to ensure timely response to changes in costs so as to avoid excessive rents by retailers or margin squeeze leading to retailer exit and consequential market disruption. (AEMC, pers. comm., 12 June 2009)

The AEMC's 2nd Interim Report of its *Review of Market Frameworks in Light of Climate Change Policies*, released in June 2009, included the following draft recommendation:

By the time the CPRS commences all jurisdictions retaining retail price regulation should have developed an adjustment mechanism for energy and carbon related costs which:

- can be invoked as frequently as six monthly subject to a cost change threshold;
- is symmetrical to allow adjustment for increasing or decreasing costs; and
- optimally can be initiated by retailers where costs are rising.

The case for this additional flexibility is strongest if products enabling retailers to hedge carbon-inclusive energy cost risk do not emerge in the short to medium term. This is more likely in the initial years of the CPRS. (AEMC 2009b, pp. 49-50)

The Commission considers that the MCE should commission the AEMC to undertake further work with the state and territory regulators to identify suitable approaches to cost identification and determining how retail tariff regimes should be modified to be responsive to the higher costs related to the CPRS. Where there are clear efficiencies from doing so, regulators should agree to consistent approaches and methodologies for regulating retail prices across jurisdictions.

In the current AEMA, there does not appear to be a clearly established process for follow up reviews of competition where an initial review by the AEMC has recommended the removal of price regulation, but that recommendation has not been accepted by the relevant jurisdiction, as has occurred in South Australia. Origin Energy suggested that in such circumstances the jurisdiction must provide:

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- A transparent rationale for their decision, using evidence to identify where competition is inadequate;
 - Proposed steps to be taken by the jurisdictional government to address remaining limitations in the competitive environment;
 - A date within the next twelve months by which to report on progress in addressing limitations in the competitive environment as identified, with new measures proposed, if required; and
 - A date within the next twelve months by which time a new decision on removing price regulation will have been taken. (sub. DR89, p. 4)

The Commission considers that, at a minimum, the AEMA should be amended to make it clear that the current commitment to biennial reviews ‘until all retail energy price controls are phased out’ (AEMA 2006, clause 14.11(a)(iii)) also applies where, after an initial review, the effectiveness of competition is disputed between the AEMC and the relevant government. Such subsequent reviews would need to focus, in particular, on rigorous data collection and analysis in relation to the elements of the earlier reviews that were contentious.

Even where, after an AEMC review, a government decision has been taken to remove retail price regulation, it is important that follow up monitoring occurs to ensure that effective competition prevails in the energy markets. The AEMA states that the phase out of retail price regulation ‘may involve a period of price monitoring’ (clause 14.14(b)) and allows for:

... the exercise of a reserve price regulation power by the State or Territory where effective competition for categories of users ceases, provided that the power is only exercised in accordance with a regulatory methodology promulgated by the AEMC, and is subject to review by the AEMC of the effectiveness of competition in accordance with clause 14.11.

The recent decision by the Victorian Government, made explicit provision for price monitoring by the state regulator. Similar considerations will apply when other jurisdictions decide to phase out price regulation. There would be advantages in a national approach to price monitoring overseen by the AER. Where price monitoring indicated competition may no longer be effective the AER (or the MCE) could request the AEMC to conduct a further review.

RECOMMENDATION 5.1

The Australian Energy Market Agreement should be amended to:

- *provide a clear timetable for future reviews by the Australian Energy Market Commission (AEMC) of the effectiveness of competition in energy markets in those states and territories not yet reviewed by the AEMC*
- *clarify the process for follow up reviews of competition in those jurisdictions where an initial review by the AEMC has recommended the removal of price regulation, but that recommendation has not been accepted by the relevant jurisdiction*
- *require ongoing price monitoring by the Australian Energy Regulator, for a period of at least three years, where retail price regulation has been removed.*

RECOMMENDATION 5.2

The Ministerial Council on Energy should commission ongoing work involving the states and the Australian Energy Market Commission to consider how the cost identification process used by existing regulators in each state will need to be modified to be responsive to changes in costs as a result of the Carbon Pollution Reduction Scheme.

Reporting obligations

Concerns relating specifically to the information requests associated with Access Reviews are discussed above, but more generally several participants in the energy sector are concerned about what they perceive to be excessive information collection and reporting requirements, including duplication and excessive prescriptiveness (in terms of the nature, timing and format of data). There is also concern that the reporting burden is increasing, with current proposals for additional information gathering powers for regulators, which business considers are unnecessary.

The following quotes are illustrative of the concerns raised in submissions by participants from the energy sector:

... AER is requiring parties to resubmit material already submitted to the AER, even if it is part of an earlier submission to the ongoing regulatory process. Often information requests require the provision of information that has already been provided for a different purpose or is available through a simple web search. ... such requests amount to requiring market participants to conduct research work for regulators rather than an appropriate information request. (APIA, sub. 12, p. 14)

Energy distribution businesses have been served with notices that are up to 30-40 pages long, requiring in many cases the provision of information which the regulated business does not collect for its normal commercial operations, and the categorisation of existing information in a manner not consistent with current business systems. (Energy Industry (Joint Submission) sub. 23, p. 7)

As an example of the simple direct costs of these increasing obligations, in 2007 gas transmission operator GasNet sought specific allowance of around \$90 000 per annum for additional regulatory compliance staffing and auditing resources to deal just with increased workload associated with the new information reporting requirements under the new *National Gas Law*. While the AER approved in-principle the need for such additional resources, delays in the entry into force of the Law meant that such costs were deferred in that specific case. With the new Laws now in place, however, it can be expected that similar increased reporting costs are now being encountered by electricity and gas transmission and distribution businesses operating under the new national framework. These costs will ultimately in turn affect the profitability and competitiveness of private sector energy producers and consumers. (Energy Industry (Joint Submission) sub. 23, p. 7)

Additional information gathering powers have been proposed in the draft legislation for the Australian Energy Market Operator (AEMO) in relation to their role as the National Transmission Planner (NTP), preparation of the Gas Statement of Opportunities (GSOO) and gas Bulletin Board. ... The current arrangements have proven to be effective, and the need for less efficient, intrusive information gathering instruments is neither justified nor warranted. (Energy Networks Association, sub. 43, p. 4)

The Packaging Council of Australia (PCA) has similar concerns in relation to the multiple state and Commonwealth energy and water regulation reporting requirements. These concerns are also assessed generally in this section. The PCA notes that various schemes have differing objectives and standards of data gathering and reporting which creates confusion and unnecessary cost. This is particularly a concern for firms operating across a number of jurisdictions. The PCA also comments on the increase in reporting requirements:

This has given rise to overly complex regulation and the sense that data collection and reporting requirements are sometimes established “for the sake of it” without the information being used in any coherent policy way. (sub. 17, p. 2)

General concerns about inconsistencies and overlaps in energy efficiency and greenhouse gas reduction policies are discussed separately below, but the PCA raised specific concerns about information gathering and reporting obligations in relation to the various schemes:

Each State currently has differing standards of data gathering and reporting and differing time lines for both reporting and for changes to the thresholds [that determine businesses reporting and compliance obligations].

The impact of these differences is confusion and added costs. ... For larger organisations, operating many sites over a number of States, it has presented significant

challenges to allocate appropriately trained and experienced staff to enable understanding of the organisation's obligations and how to comply. At a corporate and site level there is a fundamental need to understand the raft of reporting requirements and differing obligations and align such obligations with existing company data gathering and reporting. ...

All ... schemes [with the exception of the Victorian Environmental Resource Efficiency Plan] require reporting in a specific manner, and some with external independent verification. (PCA, sub. 17, p. 3)

Assessment

Businesses accept that extensive information is often necessary in order for the regulators to make appropriate decisions in the interests of the broader community, and that the regulated firms are generally the only or best source of such information. It is essential, however, that requests for information from business are the minimum necessary consistent with the efficient achievement of regulatory objectives.

The Commission has not been able to undertake an assessment of concerns relating to *specific* information requests or reporting obligations. Insufficient evidence was provided during consultations to enable a proper evaluation and, in any case, such an assessment would be beyond the capacity of this broad ranging review.

Regulators such as the AER and the AEMC are aware of the need to minimise reporting burdens. The AEMC considers regulatory burdens and costs when considering changes to the rules and the AER endeavours to tailor information requests to take account of standard business record keeping processes. Moreover, wherever significant new reporting obligations have been imposed it has been necessary for the regulators (or the MCE) to undertake regulatory impact analysis and associated consultation with business.

Nevertheless, the concerns raised with this review indicate that current reporting obligations are not optimal. More needs to be done to ensure information requests are streamlined and better coordinated. Regulators should not be requesting information from businesses where such information has already been provided or provided in a slightly different format or is publicly available. There needs to be a greater discipline on regulators to research available information and liaise effectively with other regulatory bodies.

Concerns about excessive reporting obligations are not new and have been raised over many years and across most areas of regulation. Similar concerns were raised, for example, with the Regulation Taskforce (2006) and in the Commission's two previous reviews of regulatory burdens (PC 2007, 2008a).

Governments have been responding by developing initiatives such as Standard Business Reporting (SBR), the National Greenhouse and Energy Reporting (NGER) System and the Online System for Comprehensive Activity Reporting (OSCAR).

SBR is discussed in some detail in appendix B. It is still in the development phase and is not expected to be implemented until 2010. Although initially it will be limited to reporting of financial information to certain Commonwealth and state and territory agencies, the Commission considers that there is scope for fundamental elements of the SBR model to be applied across a broad range of regulatory areas in the future. These elements are:

- making forms and information requests clearer, easier to understand and more consistent
- introducing a single secure way to interact on-line with multiple agencies and improving collaboration and data sharing
- adopting a common reporting language
- direct electronic communication of data and pre-filling of forms

Specifically in relation to concerns about reporting obligations for climate change related measures, governments have taken a number of steps to reduce the burden.

Commonwealth, state and territory governments are working, through COAG, toward streamlining of reporting of greenhouse gas emissions and energy data through a single national reporting point, the National Greenhouse and Energy Reporting (NGER) System. Governments have agreed to a nationally consistent approach for existing and future greenhouse and energy programs, outlined in the NGER Streamlining Protocol, and are in the process of amending mandatory and voluntary reporting requirements to streamline data collection for their programs with the NGER System.

The COAG objective to streamline greenhouse and energy reporting requirements to reduce the red tape created by multiple and varying program reporting requirements is closely aligned with that of the Standard Business Reporting (SBR) ... (Department of Climate Change, sub. DR81, p. 4)

The Commonwealth Department of Climate Change is also working on the establishment of the Australian Climate Change Regulatory Authority (ACCRA), which will administer the NGER System, the Carbon Pollution Reduction Scheme and the Renewable Energy Target. The rationalisation of regulatory responsibility for these three areas of climate change regulation within a single regulatory body will allow for standardisation of reporting and should create efficiencies and reduce the costs of reporting for participating entities. The new regulator will be established upon passage of the Carbon Pollution Reduction Scheme Bill 2009.

The online reporting tool for greenhouse and energy reporting (OSCAR) has been developed to meet the objectives of calculating and generating energy and emissions reports to various government programs, many with differing reporting programs. One aim of OSCAR is to facilitate the cross-program sharing of data to reduce the burden of duplicative reporting. The PCA considered that further development of OSCAR was required in order to address business concerns:

This has long been presented as the key reporting tool through which energy and water tracking will be streamlined and made more efficient and effective. In reality the system has been under development and consultation for a number of years, it is still limited in its use, is not compatible with State-based requirements and requires the allocation of significant resources and training. (sub. 17, p. 4)

The Department of Climate Change has been undertaking substantial developments to OSCAR to ensure it is ready for the significant increase in the number of entities reporting through the tool and further development will commence in the second half of 2009 to support the approach outlined in the NGER Streamlining Protocol. To assist corporations to meet their greenhouse and energy reporting obligations under the NGER Act, the Department has released new user guides and e-learning material and has been conducting training sessions around the country (Department of Climate Change, sub. DR81).

As these systems become fully operational and businesses become more familiar with them, they are likely to significantly reduce the compliance burden associated with greenhouse and energy reporting. Whilst the approach adopted seems broadly consistent with the objectives and underlying principles of SBR, the Commonwealth Department of Climate Change should liaise closely with the Treasury Department to ensure that the different reporting systems are consistent wherever possible, and developed in such a way as not to preclude closer integration in the future.

More generally, regulators need to periodically review and justify the existing reporting burdens they impose on business. Any proposals to impose new burdens must be subjected to a rigorous business compliance cost assessment as part of a broader regulatory impact analysis.

All levels of government need to work cooperatively to reduce the burden associated with reporting obligations by:

- *eliminating unnecessary requests for information, including where possible reducing the frequency of requests*
- *where appropriate, and agreed with business, sharing information between regulators*
- *standardising the language and forms used, and the type of data requested and wherever possible aligning reporting obligations with existing company data gathering and reporting*
- *facilitating on-line submission of information.*

Reforms to reporting obligations impacting on energy, water and waste services should, as far as possible, be consistent with the systems being developed as part of Standard Business Reporting (SBR) so as to facilitate an extension of the SBR taxonomy and the use of SBR services for report creation and delivery in those sectors in the future.

National Energy Customer Framework

States and territories maintain responsibility for regulating the activities of electricity and gas retailers and there are significant differences between the jurisdictions in the obligations they impose. These differences (for example in relation to: terms and conditions of contracts; frequency and content of bills; and the information reporting requirements of jurisdictional regulators) increase the compliance burden for retailers operating across more than one jurisdiction and with the introduction of retail contestability, retailers are increasingly operating across a number of jurisdictions. The Energy Retailers Association of Australia (ERAA) submits that:

... current consumer protection arrangements governing the retailing of gas and electricity are complex, divergent and inefficient. (sub. 19, p 3)

Under the proposed National Energy Customer Framework (NECF), certain retail (non-price) regulatory functions will transfer to a national regulatory framework administered and enforced by the Australian Energy Regulator and the Australian Energy Market Commission. However, there is currently no commitment from Western Australia to apply the national framework, nor from the Northern Territory to apply the national framework in respect of electricity.

The main objectives for the creation of the NECF are to streamline the regulation of energy distribution and retail regulation functions in a national framework and develop an efficient national retail energy market including appropriate consumer protection.

Participants raise various concerns in relation to the proposed NECF, including:

- that it will introduce major new ‘heavy handed’ enforcement powers and compliance obligations on gas transmission pipelines that are unnecessary and inconsistent with the original intention of the Framework (APIA, sub. 12)
- the potential for regulatory burden to arise during the transition to the new regime (Energy Industry (Joint Submission), sub. 23)
- that it will not address burdens from residual areas of consumer protection frameworks which will remain under state/territory control (Energy Industry (Joint Submission), sub. 23)
- the reforms are taking too long to finalise and implement (ERAA, sub. 19).

Assessment

The Commission has not conducted a detailed assessment of these concerns because they relate to prospective changes. Moreover, the proposed new NECF and its various components has been the subject of very extensive and ongoing stakeholder consultation. The proposed National Framework was also assessed in the Commission’s recent *Review of Australia’s Consumer Policy Framework* (PC 2008b). In response to the Commission’s review, Australian governments agreed to a new consumer policy framework, comprising a single national (generic) consumer law and streamlined enforcement arrangements. A consultative process on the proposed reforms has been conducted in parallel with consultation on the development of the industry-specific NECF.

The MCE agreed in December 2007 that legislation to give effect to the NECF would be introduced to the South Australian Parliament by September 2009. The First Exposure Drafts of the NECF, including a first draft of the National Energy Retail Law, Regulations and Rules were only released for consultation at the end of April 2009. The Exposure Drafts were released by the MCE Standing Committee of Officials, but the policy positions contained in the package had not yet been endorsed by Energy Ministers. A further round of consultation on a Second Exposure Draft is expected to occur late in 2009, prior to the legislative package being finalised and introduced to the South Australian Parliament in the 2010 Spring session.

Stakeholders have expressed concerns about delays and the lack of a clear timetable for the implementation of the NECF. The Energy Supply Association of Australia (ESAA), for example, submitted:

... without a clear timeframe for transition there is a significant risk that this important reform process will be further delayed and that the Council of Australian Government's commitment to a single, national framework will not be delivered. esaa considers there is scope for the MCE to work closely with jurisdictions following the current round of consultation to further clarify the timeframe and develop appropriate incentives for transition to the NECF. (sub. DR79, p. 3)

The MCE (2009b) has agreed that each participating jurisdiction will develop NECF implementation plans for consideration at the MCE meeting at the end of 2009, with a view to providing greater certainty for stakeholders about when the NECF will come into operation.

The Commission notes that some matters will initially remain under the control of the states and territories, and will transition to the national framework at a time that will be subject to the discretion of each jurisdiction. Even once the proposed national customer framework is fully implemented, the states and territories will retain control of many areas of regulation. In addition, detailed implementation of some of the measures encompassed by the national framework will also be left to individual states and territories to determine. Thus, significant jurisdictional variations in requirements will continue. Origin Energy stated:

To the extent that jurisdictional variations remain and retailers are required to manage different systems in each state, the NECF will have failed to achieve its core objective – a national regime. (sub. DR89, p. 6)

In light of the retention of state and territory control over many important matters, the Commission in its Consumer Policy Review described the proposed new policy framework as 'a hybrid, rather than a truly national regime' (PC 2008b, p. 471). The Commission recommended, amongst other things, that Australian governments agree to a longer term goal of a single set of consumer protection measures for energy services to apply across Australia, but leave their development and implementation until the process of creating national energy markets is further progressed. The Commission continues to advocate the pursuit of this longer term goal.

In the meantime the priority for governments should be to ensure that the proposed NECF is implemented as quickly as possible and with jurisdictional variations kept to a minimum. As always, however, the desire for quicker implementation should not come at the expense of good process and achieving the best outcomes. The concerns raised by participants with this review reinforce the need for the proposed

reforms to be subjected to regulatory best practice processes, including effective consultative processes (see below).

Origin Energy, however, emphasised that the balance now must be towards expediting the implementation process, whilst at the same time ensuring that jurisdictions account for and justify exceptions and work toward their elimination:

The process of review has been so extensive it is inconceivable that the balance of interests reflected in the NECF should require further detailed scrutiny and input. In light of this painstaking balancing of interests that has occurred over many years, jurisdictions looking to vary this framework must be explicit about their objectives.

To this end, timelines should be established for jurisdictions to achieve full implementation. In the interim, jurisdictions should keep transparent records of outstanding exceptions to the national regime; the justification for these; and steps proposed to eliminate these exceptions. (sub. DR89, p. 6)

It is also vital, as part of this process, that the development of the NECF legislation fully takes into account the interaction between the industry-specific regime and the generic National Consumer law. The regimes must be complementary and ensure there is no duplication, overlap or conflicting requirements.

Again, consistent with best practice regulatory processes as set out in the COAG Best Practice Regulation Guide (COAG 2007b), the new Framework must include a review clause that would ensure its effectiveness and efficiency in meeting its goals, including avoidance of unnecessary compliance burdens, is subject to independent evaluation within five years of implementation. The Commission notes that COAG has, consistent with the Commission's previous recommendation (PC 2008b), agreed to a process for reviewing all industry-specific consumer regulation (Treasury 2009).

Multiplicity of climate change policies and programs

As in the previous two annual reviews of regulatory burdens, major concerns have been raised about the large number of inconsistent and overlapping climate change and energy efficiency policies and programs.

The Energy Retailers Association of Australia (ERAA, sub. 19), for example, considers current state and territory energy efficiency policies are uncoordinated, inconsistent, duplicative, ineffective and costly. Similarly, the Energy Industry (Joint Submission) highlights the 'increasing number of overlapping energy efficiency and greenhouse focussed regulatory and market-based schemes ... being developed and implemented at Commonwealth, State and Territory, and local government levels' (sub. 23, p. 11).

Assessment

COAG is making progress in addressing inconsistent and overlapping climate change and energy efficiency policies and programs through a number of initiatives.

The recently announced *National Partnership Agreement on Energy Programs* (COAG 2009b) has the objective of achieving greater consistency across Commonwealth, state and territory government energy efficiency policies and programs by removing duplication and overlap.

COAG has committed to a cooperative national response to address climate change, including support for a national emissions trading scheme and a nationally-consistent set of complementary policies and measures that achieve emissions reductions at least cost. The Commission has previously noted that, with the introduction of a national emissions trading scheme, other policies and programs would be needed only to fill any gaps beyond the scheme's reach or satisfy rationales not achieved through the scheme (PC 2008d).

At its November 2008 meeting, COAG endorsed a set of principles and a process for jurisdictions to review and streamline their existing climate change mitigation measures, with the aim of achieving a coherent and streamlined set of climate change measures in 2009 (COAG 2008c).

The Commission supports these principles developed by COAG, and notes in particular that for regulatory measures to satisfy the criteria:

- they must meet best-practice regulatory principles, including that the benefits outweigh the costs
- consideration should be given to regulatory and compliance costs imposed on the community.

In *The Strategic Review of Australian Climate Change Programs*, completed in July 2008 ('the Wilkins Review'), all Australian Government climate change programs were assessed against a set of principles (aligned with those subsequently endorsed by COAG) to determine whether they were complementary, transitional or non-complementary to the Carbon Pollution Reduction Scheme (CPRS):

Of the 62 programs reviewed during the Wilkins Review, four had ceased by the conclusion of the Review in July 2008 and an additional 13 programs were scheduled to cease by June 2010. The Government has rationalised the delivery of the remaining climate change programs to more effectively combat climate change and better support the CPRS. ...

The Government has since, in June 2009, concluded the Solar Homes and Community Program, which previously provided support for installation of solar panels. It also

announced, in June 2009, the phased conclusion of the Remote Renewable Power Generation Program. (Department of Climate Change, sub. DR81, p. 5)

The Commonwealth Department of Climate Change is taking steps to reduce the burden associated with reporting obligations for climate change measures, including the establishment of a single new regulatory body for three areas of climate change regulation (see discussion of reporting obligations above).

Several states have commenced evaluations of their climate change policies. The Commission urges all governments to ensure that rigorous and transparent assessments of all their climate change mitigation and energy efficiency measures, consistent with the agreed COAG principles, are completed as quickly as possible. This will minimise the scope for unnecessary regulatory burdens under existing frameworks and importantly avoid the imposition of additional burdens associated with the interaction of these measures with an emissions trading scheme, once implemented. Measures should only be retained where they are shown to be complementary and they generate additional net benefits for the community. The same rigorous criteria must also be applied before introducing any new measures.

Renewable energy schemes

The Australian Government's Mandatory Renewable Energy Target (MRET) Scheme has the objective of encouraging increased generation of electricity from renewable energy sources. In 2007, the Government committed to ensuring that at least 20 per cent of Australia's electricity supply is generated from renewable sources by 2020.

Under the MRET, electricity retailers and other large purchasers of electricity ('liable parties') are required to meet a share of the renewable energy target in proportion to their share of the national wholesale electricity market. The legislation provides for the creation of renewable energy certificates (RECs) by generators of renewable energy. The RECs, once registered, are traded and sold to liable parties who may surrender them to the Renewable Energy Regulator to avoid paying a shortfall charge for non-compliance.

Concerns about the renewable energy certificates scheme were raised by Rheem Australia in last year's *Annual Review of Regulatory Burdens on Business: Manufacturing and Distributive Trades*. Rheem submitted that undue complexity was leading to substantial administrative costs for participating businesses as well as uncertainty about the tax treatment of the certificates (PC 2008a, pp. 145-7).

The Commission decided to defer consideration of renewable energy schemes until this year because most of the businesses affected by the scheme are energy retailers and wholesale purchasers of electricity. However, no specific new concerns were raised in submissions to this year's review.

Assessment

Australian governments have agreed to implement a new expanded national renewable energy target (RET) scheme. The new scheme brings both the national MRET scheme and existing state-based targets into a single national scheme, designed to meet the Government's 20 per cent by 2020 renewable energy target (COAG 2009a). It is expected that the expanded RET scheme will be implemented through Commonwealth legislation in 2009, with increased targets commencing in 2010 and increasing annually thereafter.

An extensive consultation process has been conducted to inform the design of the Scheme, including the opportunity for stakeholders to comment on exposure draft legislation. Rheem and major energy industry stakeholders have participated in this ongoing consultation process. Given this parallel review activity, the Commission does not intend to comment on specific aspects of the RET schemes.

However, the Commission has previously expressed strong reservations about the merits of renewable energy targets, with an effective emissions trading scheme in place:

A MRET operating in conjunction with an ETS would not encourage any additional abatement, but still impose additional administration and monitoring costs. To the extent that the MRET is binding (which is its purpose) it would constrain how emission reductions are achieved — electricity prices would be higher than otherwise and market coordination about the appropriate time to introduce low-emissions energy technologies would be overridden. If it was non-binding, it would simply increase administrative, compliance and monitoring costs. Moreover, it would also help to foster a perception that governments are amenable to interfering with the least cost abatement objective of the ETS. This could encourage other potential beneficiaries to seek special programs that neither increase abatement nor reduce its cost. (PC 2008d, p. xvii)

The Department of Climate Change states that the scheme has been 'designed to operate in tandem with the CPRS' (sub. DR81, p. 5). This is despite the findings of Professor Ross Garnaut in the Final Report of *The Garnaut Climate Change Review*:

Implementing the expanded MRET alongside the emissions trading scheme means that these two policy instruments, with their differing objectives, will be interacting in the electricity market. This clash of objectives will potentially be detrimental to electricity

users (households and businesses) and electricity producers (incumbent and new providers). (Garnaut 2008, p. 354)

There is an interesting and seemingly perverse consequence of expanding MRET at the same time as the emissions trading scheme is to be implemented. Having both schemes operating side by side could see an increase in coal-fired power generation (by more than 2000MW) as gas-fired plants are crowded out by MRET. This would not occur if the emissions trading scheme were operating without MRET. (Garnaut 2008, p. 356)

The Commission notes that the Wilkins Review of Australian Climate Change Programs (see above) recommended that the RET should be regarded as a transitional program. Notwithstanding that the CPRS will be ‘the primary driver of renewable energy’ (Department of Climate Change, sub. DR81, p. 5), it is expected that the RET will operate for another 20 years, not ending until 2030. Therefore, the operation and design of the RET must continue to be regularly evaluated (along with all other ongoing climate change-related policies), to ensure consistency with best practice regulatory principles, including achieving net benefits for the community.

Solar feed-in tariff schemes

The Energy Retailers Association of Australia (ERAA, sub. 19) has several concerns about state-based solar feed-in tariff schemes:

- they are not cost-effective or efficient
- they can compromise the achievement of other policy objectives (eg keeping energy prices low to protect consumers)
- they have been implemented in a haphazard, inconsistent way.

Assessment

Most states and both territories offer solar feed-in tariff schemes, but tariffs and terms and conditions vary widely. A feed-in tariff is a premium rate paid for electricity fed back into the electricity grid from a designated renewable electricity generation source like a rooftop solar system.

At its November 2008 meeting, COAG agreed to a set of national principles to apply to new feed-in tariff schemes and to inform reviews of existing schemes (COAG 2008c, p. 10). The COAG decision requires further action by the MCE, including to promote consistency in feed-in tariff policy with previous COAG agreements, particularly the Australian Energy Market Agreement, but also agreements relating to competition policy and climate change. The MCE, at its 10

July 2009 meeting, agreed to a work program to give effect to the COAG principles (MCE 2009b).

While the intention of the national principles is to promote national consistency of schemes across Australia, the Commission is concerned that governments have not made a strong enough commitment to a more uniform approach. The principles are very broad and jurisdictions appear to retain substantial discretion to determine their own approach to scheme design.

As is the case with renewable energy schemes more generally, feed-in tariff schemes need to be re-examined in the context of a broader consideration of climate change and energy efficiency/greenhouse reduction strategies and specifically the introduction of a CPRS.

The Commission has serious doubts about the efficiency, in the context of an emissions trading scheme, of renewable energy measures that distort markets by favouring particular technologies (PC 2008d). Should such measures be retained, at a minimum, governments should commit to a timetable for achieving a harmonised national solar feed-in tariff scheme.

Concerns relating to the regulatory and policy framework

Concerns are raised about fundamental aspects of the regulatory or policy frameworks governing electricity and gas supply, including:

- the coverage of some economic regulation is too broad, either because it fails to take account of current market realities, or because it duplicates/overlaps with general laws:
 - APIA (sub. 12) considers that ring fencing (structural and operational separation) requirements in gas are no longer necessary and that regulation of the gas transmission sector does not adequately consider competitive pressure or countervailing powers that constrain market power. It expressed the view that the general access provisions in Part IIIA of the Trade Practices Act should be sufficient for the transmission sector.
 - the Energy Industry (Joint Submission, sub. 23) points out that a failure to fulfil the commitment, contained in the Australian Energy Market Agreement, to certify industry-specific access regimes has created the potential for infrastructure to be covered both by the national access regime under Part IIIA and the access regime set out in the National Electricity Law and associated statutory rules:

Until this issue is resolved, owners of nationally significant energy assets are required to contemplate the application of two existing access regimes applying to a single set of assets. (sub. 23, p. 5)

- the split of responsibilities between national and state/territory regulation creates inefficiencies, including inconsistencies and overlap or duplication (Energy Industry (Joint Submission), sub. 23):
 - Envestra (sub. 13) is concerned that the retention by the states and territories of responsibility for certain areas of regulation (in particular licensing) results in overlap with national requirements, for example a doubling up of compliance reporting to both the AER and state regulators. Envestra also considers that the jurisdictional regulators have too much discretion in their licensing powers (for example, in relation to service and reliability standards imposed on energy distributors)
 - even where areas of regulation are nominally covered by the national regime, specific derogations lead to differences between jurisdictions. The Energy Networks Association (sub. 43) notes, for example, that exemptions from national electricity rules mean each state has differences in regulations.
- excessive convergence of electricity and gas regulation. APIA (sub. 12) claims that the MCE has gone too far in its efforts to develop common (consistent) regulatory frameworks for gas and electricity by failing to adequately recognise the fundamental differences between gas and electricity markets.

Assessment

The current national frameworks and the retention of certain regulatory powers for the states and territories, reflect the outcomes of *policy* decisions and, in relation to many areas of regulation, the relatively recent implementation of positions agreed between the jurisdictions. Implementation of the current arrangements followed comprehensive reviews and a very extensive process of consultation with stakeholders.

In relation to the economic regulation of gas pipelines, the Commission notes that the current National Gas Law and Gas Rules embody many of the recommendations it made, with a view to enhancing regulatory certainty for investment, in the 2004 Review of the Gas Access Regime. As discussed above, the legislation now allows for light regulation in certain circumstances. Further, significant new investment in gas pipelines has improved supply options and market contestability. This has led to a reduction in the number of pipelines subject to economic regulation.

Any decisions to make changes to address the concerns raised with this review, would need to be based on a thorough analysis of *all* the costs and benefits of

alternative options. Addressing questions such as the appropriate split of regulatory responsibilities between the states/territories and the national regime; the most efficient degree of commonality in the regulatory frameworks and institutional arrangements covering electricity and gas; and the coverage of economic regulation, are beyond the scope of this study.

Moreover, jurisdictions have already committed to reviews once all the previously agreed national regulatory reforms have been implemented and have been in place for sufficient time to allow a proper assessment of their effectiveness and efficiency. The Commission notes that some major reforms have either occurred only quite recently (for example, the transfer of responsibility for regulation of gas transmission and distribution pipelines to the Australian Energy Regulator took effect less than one year ago) or are still to be finalised (for example, the National Energy Customer Framework).

The first of the foreshadowed reviews is of derogations and jurisdictional differences. Much has been achieved already in creating greater consistency in regulation of electricity and gas supply services, and the NECF and harmonisation of technical and safety regulation will represent further major advances once implemented. However, more needs to be done to eliminate unjustified differences in the regulatory regimes across the jurisdictions. In April 2009, COAG restated its commitment that the MCE should review, and remove or harmonise, all derogations, and other state-specific differences from the broader national energy framework. Originally this review and reform process was to have been completed by June 2008, but it was delayed to allow for the transfer of all national energy functions to the national legislation, including the implementation of the NECF. The Commission concurs with the following statement by the COAG Reform Council in its March 2009 Report to COAG:

... the MCE should develop a new timetable against which this task may be assessed to ensure that it will be done expeditiously, as a key part of creating a genuinely national energy market. The Council will expect an ambitious timetable to be in place by the time of its 2010 Report to COAG. (CRC 2009a, p. 20)

The second review that governments have previously committed to is of energy market governance arrangements. It was anticipated that this review would occur five years after the new national framework was fully implemented. While it is understandable that a specific timetable or deadline for this review has not been determined because there is uncertainty regarding finalisation of the implementation of previously agreed national reforms, governments should seek to commit to such a timetable as soon as practicable.

The review of Part IIIA scheduled to commence by 2011 may provide an opportunity to consider the coverage of energy access regimes. However, it may be

appropriate for the Australian Energy Market Commission to specifically review economic regulation of the gas supply industry and provide advice to the Ministerial Council on Energy on whether there may be scope for the wider application of a lighter-handed regulatory approach.

Consultation and other regulatory process concerns

Some of the strongest and most widespread concerns relate to aspects of the *processes* for developing new regulatory proposals or amending existing frameworks, including:

- that generally there is too strong a presumption in favour of regulatory solutions to perceived problems, without evidence of market failure — examples provided by the Australian Pipeline Industry Association (APIA) included:
 - the National Gas Bulletin Board and the Short Term Trading Market
 - the *proposed* Gas Statement of Opportunities
 - new enforcement powers under the proposed National Energy Customer Framework (sub. 12)
- an excessive number of reviews is imposing an onerous burden on businesses and industry associations that are required to respond to consultation opportunities (Energy Networks Association (ENA), sub. 43)
- a lack of coordination in reviews and consultative processes results in overlapping and duplicative work streams (ENA, sub. 43; APIA, sub. 12)
- there are instances where consultation does not occur early enough (ENA, sub. 43; APIA, sub. 12)
- industry views contributed through consultations are not adequately considered or reflected in government responses and the Government does not provide sufficient justification where it decides not to implement review recommendations (APIA, sub. 12)
- governments do not involve industry enough in the design and development of regulations or alternatives to regulation (APIA, sub. 12).⁴

Some other process-related concerns were raised by a single participant during the consultation period after the release of the draft report. These related to:

- aspects of the enforcement of regulations

⁴ This last issue was also raised as a concern by Queensland Recycling, Alex Fraser, (sub. 25), in relation to waste services regulation.

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- the accountability of regulators
 - inadequate opportunities for review of regulatory decisions
 - the need for greater transparency and guidelines by market regulators.

As these latter concerns were not addressed in the draft report and were not presented in a public submission, the Commission was not able to test whether they were more widely held by industry nor consult with regard to an appropriate response. Accordingly, the Commission has not been able to fully address them in this report.

Assessment

The above concerns would be addressed by ensuring that, consistent with existing best practice principles:

- all proposals for new or amended regulations are subjected to rigorous ex ante process requirements, including best practice consultation
- new regulations should only be introduced where there are demonstrated net benefits and existing general regulatory frameworks or alternatives to regulation are shown to be inadequate
- regulators responsible for the administration and enforcement of regulations are accountable and their processes and decisions are: transparent; consistent; and open to appeal and review
- regulations are reviewed to assess their actual effectiveness and efficiency in meeting policy objectives.

For regulatory decisions made by the Australian Government, best practice principles and requirements are set out in the *Best Practice Regulation Handbook* (Australian Government 2007a). In the case of intergovernmental regulatory proposals, being developed by Ministerial Councils (including the Ministerial Council on Energy) and National Standard-Setting Bodies, the relevant principles are contained in the *COAG Best Practice Regulation Guide* (COAG 2007b).

The Office of Best Practice Regulation (OBPR), within the Australian Government Department of Finance and Deregulation, monitors and reports on compliance with the Australian Government's best practice requirements and also has a similar role, at the direction of COAG, in relation to intergovernmental regulation making and the development of national standards. With respect to the COAG requirements, a regulation impact statement (RIS), assessed by the OBPR, is required at two stages:

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- the first for community consultation with parties likely to be affected by the regulatory proposal
 - the second or final RIS, reflecting feedback from the community, for the decision-making body.

In its most recent published report, the OBPR reported that the Ministerial Council on Energy (MCE) complied in full with the COAG best practice regulation requirements in 2007-08 (OBPR 2008a, p. 47). However, for decisions made between 1 April 2006 and 31 March 2007, the COAG RIS requirements were not met by the MCE at the consultation stage and/or the decision-making stage in four cases (OBPR 2007, p. 81).

The OBPR notes that the depth of analysis required for consultation is lower than that at the decision-making stage:

In many cases, the RIS for consultation focuses on the identification of the problem, objectives, and a range of feasible options (non-regulatory and regulatory), and a preliminary impact analysis of the options. A RIS for the decision-making stage should reflect the additional information and views collected from those consulted, and provide a more complete and robust impact analysis. (OBPR 2007, p. 71)

The Commission recognises that for the early consultation stage RIS, there will often be considerable uncertainty surrounding the likely design and final implementation details of options being considered, making the collection of data and estimation of likely impacts problematic. It is therefore not reasonable to expect as complete an analysis as is required for the final RIS for the decision maker. However, it is at this early stage of the process that well informed feedback from stakeholders has the greatest potential to improve the efficiency and effectiveness of the final proposal. To the extent possible, the consultation RIS should incorporate compliance cost analysis in preliminary form, based on the best available data at the time, with ranges and sensitivity analysis used to account for uncertainty.

Consultative processes

Effective consultation is clearly a vital element in best practice regulation making and the ongoing administration of regulation. Industry knowledge, including information about the likely compliance costs associated with different options, can contribute to better solutions and to a higher level of support for, and compliance with, measures once implemented.

Industry of course wants to have its views taken into account, indeed concerns are raised about businesses not being involved enough in the process or their views not being adequately considered (see, for example, the views of APIA and QLD

Recycling, Alex Fraser, stated above). On the other hand, if there are too many calls for input from business or if consultations are uncoordinated, or otherwise inefficient, (also evidenced by concerns outlined above) industries ability to effectively participate in the process is compromised.

The Commission heard much evidence of review fatigue, with businesses and industry groups stating that they simply couldn't keep up with the extensive and wide-ranging consultation processes they are requested to participate in. As an indication of the burdens placed on their industry, APIA lists 24 separate consultative processes that participants in the gas transmission industry had been involved in, from the time this year's annual review of regulatory burdens was announced at the end of November 2008. APIA submits:

The sheer volume of consultation processes leads to the difficult position of having to choose between processes. Many of the consultation processes are accompanied by hundreds of pages of documentation for comment. Typically, lack of participation in a process is taken by Government to be seen as approval or non-concern with the proposed changes. The reality is few companies have the capacity to devote the necessary resources to remain across the issues and consultation processes involved. Furthermore, in making a choice between consultation processes, the 'value' of participation is considered — that is, whether industry has any expectation that its views might actually be considered or whether the consultation is a token exercise. (sub. 12, p. 6)

As noted by the AEMC, however, much of the pressure for reform comes from the industry itself. For example, a high proportion of the proposals for changes to the national energy rules, and consequent consultative processes, are driven by the industry.

Many of the concerns about consultative processes have been raised with the previous two annual reviews of regulatory burdens on business and before that with the Regulation Taskforce on Reducing the Regulatory Burdens on Business. In responding to the Taskforce Report in 2006, the Australian Government adopted a whole-of-government policy on consultation, which sets out best practice principles that need to be followed by all agencies when developing regulation. The policy is based on seven principles, including the following that are particularly relevant to the concerns raised by participants:

- Appropriate timeliness — '... stakeholders should be given sufficient time to provide considered responses'
- Transparency — 'policy agencies need to explain clearly the objectives of the consultation process, the regulation policy framework within which consultations will take place and provide feedback on how they have taken consultation responses into consideration'

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- Accessibility — ‘stakeholder groups should be informed of proposed consultation, and be provided with information about proposals, via a range of means appropriate to those groups’. (Australian Government 2007a, p. 4)

Other principles cover: continuity; targeting; consistency and flexibility; and evaluation and review. The Government’s Consultation Requirements and the best practice principles are set out in the *Best Practice Regulation Handbook* (Australian Government 2007a). There would be merit in refining the Consultation Policy and the best practice principles to make more explicit reference to the need for coordination between agencies in their requests for feedback from stakeholders.

In February 2006, COAG committed to improving mechanisms for consultation with business and other stakeholders. The Best Practice Regulation Guide (COAG 2007b) now also makes reference to the Australian Government’s best practice consultation principles.

The Australian Government has implemented related mechanisms to support more effective consultation. These include the requirement for annual regulatory plans⁵ and the establishment of a Business Consultation Website.⁶ These mechanisms should, in principle, facilitate better coordination between departments and agencies so as to avoid major consultation exercises affecting a particular sector occurring in parallel.

There also needs to be effective cooperation and coordination between regulatory agencies in different jurisdictions. There should be an expectation that all relevant regulators across Australia take into account other consultation processes that may be impacting on stakeholders before determining their consultation timetable.

The Commission acknowledges that energy regulators do already endeavour to coordinate their review and consultative processes, for example through meetings and exchanges of information. These arrangements between the AER, AEMC and the National Electricity Market Management Company (the Australian Energy Market Operator since July 2009) are formalised in Memorandums of Understanding. Moreover, there will be times when overlaps are unavoidable, for example where reviews or consultative processes have legislated timetables.

⁵ Departments and agencies responsible for regulatory changes are required to publish an Annual Regulatory Plan, containing information about recent changes to business regulation and proposed regulatory activity, including consultation opportunities and an expected timetable.

⁶ The website was established to: enable registration of relevant stakeholders prepared to be consulted on particular regulations, automatically notify stakeholders of relevant consultation opportunities, include information about new and upcoming changes to regulation, and provide links to current and past consultation processes (www.consultation.business.gov.au).

That said, the concerns raised suggest there may be scope to do more. Governments could, for example, consider the establishment of a single national consultation database or a series of linked databases that would enable easier and early access to information about planned consultations.

In relation to the specific concern regarding inadequate feedback being given to stakeholders on how consultation responses have been taken into consideration, the Commission found evidence to suggest that both the AER and the AEMC are generally following good practice. The use of tables setting out stakeholder concerns issue by issue and the regulatory body's responses appear to be a very transparent mechanism for communicating how consultation feedback has been considered. It is important, however, that such practices are employed consistently by these bodies and also by the Ministerial Council on Energy and its Working Groups. Similarly, when responding to the recommendations of reviews, governments should be transparent in justifying where decisions are taken not to accept those recommendations. This is consistent with existing RIS requirements.

More generally, the Ministerial Council, its working groups and national energy regulators need to ensure that their consultative processes are consistent with established best practice principles. The Australian Government's best practice consultation principles should be amended to explicitly refer to the need for coordination between agencies seeking feedback from the same stakeholders, and wherever possible the avoidance of overlapping/parallel consultation and review processes.

The Commission also encourages energy regulators to objectively and critically review their own consultation practices against the best practice principles with a view to identifying where improvements can be made. Such a review would be best conducted in close cooperation with business and could include round-table discussions that provide an opportunity for regulators and stakeholders to discuss their specific concerns. The Commission notes that since the draft report, the AEMC has been seeking the views of stakeholders, via a survey, on its overall performance, including the effectiveness of consultation and communication.

Other issues

The following issues have not been assessed in detail because they relate to state and territory responsibilities and/or are subject to current review and are therefore considered out of scope for this review.

Energy transmission planning and permitting

The Energy Industry (Joint Submission) raises concerns about inconsistencies in state and territory approaches to transmission planning and permitting:

Inconsistent State and Territory approaches, and complex processes in some jurisdictions have the potential to hamper the timely provision of new or upgraded transmission services. (sub. 23, p. 14)

COAG agreed in 2007 to enhance transmission planning arrangements — through the development of a national transmission planning function (NTPF) — to address concerns that the current jurisdiction-by-jurisdiction approach to planning did not adequately reflect investment priorities for the national electricity market as a whole. At the request of the MCE, the AEMC developed a detailed implementation plan for the NTPF to be undertaken by the Australian Energy Market Operator (AEMO).⁷ The NTPF commenced operation with the establishment of the AEMO in July 2009. The Commission notes that the AEMO is to publish an annual national transmission network development plan outlining efficient development of the power system (including a long-term strategic outlook), however, it is not intended for the development plan to replace local planning and it would not be binding on transmission businesses or the AER.

The MCE has signalled an intention to review the effectiveness of the new transmission planning arrangements after five years of operation.

Energy technical and safety regulation

Energy specific technical and safety regulation is a state and territory responsibility. The MCE, at its June 2008 meeting, agreed to establish the Energy Technical and Safety Leaders Group (ETSLG) to undertake work towards improving the consistency of state and territory regulations — such as occupational health and safety requirements — and specifically to develop a Harmonisation Plan. A Discussion Paper, setting out a proposal for progressing a harmonised legislative framework within which state and territory energy supply industry technical and safety regulation will operate was released for consultation in February 2009 (MCE ETSLG 2009).

Based on the options presented in the discussion paper, the Energy Networks Association (ENA, sub. 43) and the Energy Industry (Joint Submission, sub. 23) are concerned that the proposed harmonised regime will be overly prescriptive, with

⁷ The AEMC *Final Report to the MCE on the National Transmission Planning Arrangements Review* was published in July 2008 (AEMC 2008a).

input-based regulation being adopted, rather than a more flexible outcomes focused approach.

Given that these concerns are about prospective changes and are currently the subject of a review process, the Commission does not intend to make specific recommendations in this area. However, it is important that the work of the ETSLG on harmonisation of regulations is consistent with regulatory best practice processes and regulatory design principles as required under the COAG Best Practice Regulation Guide (COAG 2007b), including that regulations should not be unduly prescriptive. Performance and outcomes-focused regulation will generally (but not always) be more efficient because of the flexibility they afford businesses to adopt compliance strategies that are the most cost-effective. It is essential that a rigorous process of consultation and impact analysis is used to determine the approach that generates the highest net benefits for the community as a whole. An important element of this process will be estimating and fully taking into account the compliance burden associated with different options.

Following consideration of stakeholder comments on the discussion paper, the ETSLG has been developing an Energy Technical and Safety Harmonisation Enhancement Plan. A draft of this plan is expected to be released in September 2009, together with a consultation Regulation Impact Statement (MCE 2009b). A Final Harmonisation Plan is likely to be presented to MCE early in 2010.

Inconsistencies in regulation of gas meters

Envestra raises the specific issue of inconsistencies between jurisdictions in regulatory requirements for gas meters:

Envestra supplies gas meters to its customers in Victoria and in Albury, New South Wales. But while the same make and model of gas meter is purchased for both jurisdictions, Envestra must maintain separate stocks of gas meters to service its 23 000 Albury consumers and its 525 000 Victorian consumers. This is because New South Wales legislation requires gas meters installed in that state to be stamped with a NSW seal of approval. The additional administrative and operational burden of complying with the NSW legislation is ultimately borne by Albury consumers. (sub. 13, p. 2)

Governments have been working for nearly two decades to achieve greater consistency in trade measurement regulation between jurisdictions. By 2006 all states and territories had adopted Uniform Trade Measurement Legislation. However, continuing inconsistencies and different interpretations prompted COAG to identify trade measurement as a high priority regulatory 'hot spot'. Work has been progressing on the implementation of a national system of trade measurement

to be administered by the Commonwealth through the National Measurement Institute (NMI). The new system is to commence on 1 July 2010.

These reforms will not, however, address the issue of inconsistencies in gas meter regulations. The National Measurement Act was amended in 1999 to include Part VA, which provided for the Commonwealth to carry out type (pattern) approval of utility meters and initial verification.⁸ Initially all classes of meters were exempt with the intention being that the exemption would be lifted for particular classes of meter once the necessary infrastructure was developed. The exemption has been lifted for certain water meters and progress has been made towards lifting the exemption for domestic electricity meters. NMI plans to address gas meters once work on water and electricity meters is further developed. NMI has already taken part in certain international meetings on gas meter standards.

The Commission also notes that the ETSLG discussion paper (MCE ETSLG 2009, p. 17) uses gas meters as an example of regulatory inconsistency and specifically calls for stakeholder comments on such inconsistencies.

Any gas meter that can legally be used in one Australian jurisdiction should be able to be used in any other jurisdiction without modification. Reform needs to be expedited and should be pursued by the Ministerial Council on Energy through its current work on harmonising energy technical and safety regulation in consultation with the Ministerial Council of Consumer Affairs, which has been overseeing national trade measurement reforms.

5.3 Water supply, sewerage and drainage services

Overview of regulation

The Australian Government has limited *direct* involvement in the regulation of water supply, sewerage and drainage services. These services are regulated at the state and local government level. The Australian Government does, however, play a major leadership and coordination role in relation to national policies and programs relating to water. In April 2008, the Australian Government announced funding under the National Plan on Water (Water for the Future) to address: action on climate change; using water wisely; securing water supplies; and supporting healthy rivers and waterways (DEWHA 2009a).

⁸ These changes were made following the Kean review of Australia's Standards and Conformance Infrastructure (Keane 1995). Monitoring of meters in use remains the responsibility of state and territory authorities.

There are various existing and prospective national reforms and governance structures, including the Intergovernmental Agreement on a National Water Initiative (NWI) (box 5.4).

The COAG Working Group on Climate Change and Water has a key role in progressing reforms and advising COAG. It has been focusing on four priority areas: addressing over allocation and improving environmental outcomes; enhancing water markets; urban water reforms; human resources, skills and information (NWC 2008b).

Concerns about water regulation

Perhaps reflecting the major parallel review and reform agenda, few concerns were raised with this review in relation to water regulation.

The Minerals Council of Australia (MCA, sub. 9) is concerned about national water access reform and made a number of specific suggestions for enhancing efficiency in the allocation and pricing of water and improving access by the minerals industry (similar concerns were submitted by the MCA to the Commission's *Annual Review of Regulatory Burdens on Business: Primary Sector* (PC 2007)). The MCA also calls for the National Water Initiative (NWI) to be implemented in full and for the Australian Government to ensure adequate resourcing to expedite water reform.

The Packaging Council of Australia (PCA, sub. 17) has concerns about excessive, overlapping and overly prescriptive water regulation reporting requirements. These concerns were addressed in the general discussion of reporting requirements in section 5.2.

Assessment

In assessing various water regulatory issues impacting on the primary sector (PC 2007), the Commission examined progress in water reform and found that this area was very much a work-in-progress, with an extensive policy agenda and agreed processes for developing regulatory regimes.

Box 5.4 National regulatory and institutional frameworks for water

Intergovernmental Agreement on a National Water Initiative (NWI), 2004 — overseen by COAG and being implemented over a ten year period, the NWI sets out the objectives, outcomes and actions for national water reform. The overall objective is to achieve a nationally compatible market, regulatory and planning based system of managing water resources for rural and urban use that optimises economic, social and environmental outcomes. All signatories (including the Australian Government) agreed to prepare an Implementation Plan, including steps and timelines for implementation of key actions under the NWI.

National Water Commission (NWC) — an independent statutory body established under the *National Water Commission Act 2004*. Its role is to drive the national water reform agenda and it provides advice to COAG and the Australian Government. The main functions of the NWC are to: assess governments' progress in implementing the NWI; assist with implementation of certain elements of the NWI; and administer the Water Smart Australia and Raising National Water Standards programs.

Murray-Darling Basin Authority — established under the *Water Act 2007*, the Authority reports to the Federal Minister for the Environment and Water Resources. It is required to prepare a 'Basin Plan' for adoption by the Minister, which includes limits on the quantity of water that may be taken from Basin water resources, and rules about trading of water rights.

Natural Resource Management Ministerial Council (NRMMC) — comprising Australian, state and territory and NZ government ministers with responsibility for land and water management,⁹ the Council is tasked with overseeing implementation of the NWI agreement (particularly the actions that require national coordination). NRMMC is supported by a Standing Committee of Department Heads/CEOs of relevant government agencies.

National Water Initiative (NWI) Committee — comprises senior officials from each jurisdiction, the Environment Protection and Heritage Council (EPHC) Standing Committee, the NWC, and the Primary Industries Standing Committee.

Australian Competition and Consumer Commission (ACCC) — has a role in regulating the water market and water charging. In relation to Murray-Darling Basin water resources, the ACCC is responsible for: advising the Murray-Darling Basin Authority on the development of water trading rules; advising the Minister for the Environment and Water Resources on regulated water charge rules and water market rules; and monitoring and enforcing the water charge rules and water market rules.

Access to some Water and Sewage Infrastructure can be subject to the National Access Regime, Part IIIA of the Trade Practices Act.

Bureau of Meteorology — national coordination role for water data and information.

Source: DEWHA (2009a), NWC (2008a, 2008b).

⁹ Papua New Guinea and the Australian Local Government Association have observer status.

The Commission emphasised the need for new regulatory frameworks for property rights and trading in water to be developed in accordance with best practice principles to ensure that fragmentation, overlap and complexity are overcome. In particular, the Commission recommended that ‘the new national framework for property rights and trading in water should facilitate market transactions so that scarce resources go to their highest value uses and any exemptions from the framework should be fully justified’ (PC 2007, Response 3.35). This was accepted by the Australian Government in its response to the report (Australian Government 2008a).

The Commission is currently undertaking a study into alternative market mechanisms for water recovery in the Murray Darling Basin. The terms of reference require the Commission to examine the impacts of water recovery on water markets and transaction and compliance costs of water recovery for program applicants and the Government. The Commission has also been asked to consider the scope to go beyond open tender processes as the principal way of purchasing water entitlements and options for overcoming any impediments to new and established water purchase mechanisms. The final report is to be completed by late January 2010.

At its November 2008 meeting, COAG agreed to:

- a number of initiatives to improve the operation of water markets and trading through faster processing of temporary water trades
- coordinate water information and research through the development of a national water modelling strategy
- adoption of the enhanced national urban water reform framework to improve the security of urban water.

Given the substantial parallel and ongoing review and reform activity and the Commission’s earlier consideration of water issues, these matters are not considered further in this report. It is essential that governments continue to assign a high priority to reforms in the water area. This should include ensuring that sufficient resources are assigned to ensuring the timely implementation of measures to enhance efficiency and reduce unnecessary regulatory burdens.

5.4 Waste collection, treatment and disposal services

Overview of regulation

State and territory and local governments are primarily responsible for regulation of waste services. State and territory regulations, for example, cover the licence conditions for constructing and operating a landfill. State and territory governments have developed waste minimisation strategies, imposed landfill levies and subsidised recycling. They also have a role in the coordination and direction of local government actions. Local governments typically have responsibility for land-use planning and development approvals and the collection and disposal of municipal solid waste.

The Australian Government does, however, have a leadership role and/or actively participates in national packaging and other environmental initiatives that are relevant to waste services, with a particular focus on developing consistent national approaches. The Australian Government also regulates the export and import of hazardous waste, consistent with international commitments and is responsible for a number of bilateral and multilateral trade agreements, which have a bearing on the management of waste.

The main vehicle for achieving national coordination is the Environment Protection and Heritage Council (EPHC). The Commonwealth, state and territory environment Ministers recently agreed to develop a National Waste Policy (discussed below). The major Commonwealth legislation, national agreements and coordination mechanisms are outlined in box 5.5.

Concerns about waste regulation

Various concerns are raised in relation to aspects of waste regulation, including:

- inconsistencies in waste regulations within and across jurisdictions, including differences in definitions and classifications (Packaging Council of Australia (PCA), sub. 17 and QLD Recycling, Alex Fraser, sub. 25)
- there are multiple government bodies at local, state and Federal level and a lack of clarity with respect to legislative boundaries and jurisdictional responsibilities (QLD Recycling, Alex Fraser, sub. 25)
- governments are introducing new measures without sufficient consideration of existing laws (QLD Recycling, Alex Fraser, sub. 25)

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- waste regulations are inappropriately being used to address perceived upstream environmental issues and regulations to manage the use and disposal of used packaging are often not proportionate to the potential environmental impacts (PCA, sub. 17)
 - procurement specifications/standards are inconsistent and too prescriptive and often rule out recycled content that would meet an objective performance outcome at lower cost (QLD Recycling, Alex Fraser, sub. 25)
 - environmental risks associated with the dumping in land fill of lighting waste containing mercury are not being fully or consistently taken into account (CMA Eco Cycle, sub. 24)
 - the inappropriate classification of secondary resource material as waste results in excessive and inequitable (relative to equivalent materials) licensing requirements and associated record keeping and reporting (QLD Recycling, Alex Fraser, sub. 25).

Concerns that governments do not involve industry enough in the design and development of regulations or alternatives to regulation (QLD Recycling, Alex Fraser, sub. 25 and APIA, sub. 12) are discussed in section 5.2 above.

The PCA also raises a number of specific concerns in relation to the National Packaging Covenant. These are discussed under a separate heading below.

Several state or local government specific concerns (that are beyond the scope of this study) are also raised by QLD Recycling, Alex Fraser (sub. 25), including:

- the poor standard of administration of planning laws
- lengthy timeframes for gaining approvals
- a lack of sanctions on unlicensed operators.

Assessment

Most of the concerns raised with this review were also raised with the Commission's *Waste Management Inquiry* in 2006 and many were also examined as part of the Senate Inquiry into the management of Australia's waste streams, in 2008. The Government's response to the Final PC Report was released in July 2007 (Australian Government 2007b).

Box 5.5 Commonwealth waste-related legislation, national agreements and coordination mechanisms

Hazardous Waste (Regulation of Exports and Imports) Act 1989 (Cth) — controls the trade of hazardous waste (including municipal solid waste) in an environmentally sound manner and to protect human beings and the environment. Implements Australia's obligations under the Basel Convention.

Environment Protection and Heritage Council (EPHC) — comprises Ministers from all Australian jurisdictions and New Zealand (incorporates the NEPC). The NEPC Service Corporation provides support and assistance to both EPHC and NEPC.

National Environment Protection Council (NEPC) — a statutory body comprising the environment Ministers from all Australian jurisdictions. Established under the *National Environment Protection Council Act 1994* the NEPC has the objective of reducing distortions to businesses and markets from differences between the states and territories in their environment protection measures and has the power to introduce NEPMs.

National Environment Protection Measures (NEPMs) — a regulatory device for developing a common set of rules that are then applied by the states and territories either through adoption of consistent policies and/or regulation.

Movement of Controlled Waste National Environment Protection Measure (NEPM) — provides a framework for developing and integrating state and territory systems for the management of the movement of controlled wastes between states and territories, including ensuring that such wastes are properly identified, transported, and handled in ways that are consistent with environmentally sound practices.

National approach to the reuse and recycling of industrial wastes — EPHC has developed a national approach to the reuse and recycling of materials such as bauxite residues, steel slag and fly ash, which may be used as a fertiliser or soil conditioner.

National Waste Minimisation and Recycling Strategy (NWMRS) — published by the (previous) Australia New Zealand Environment and Conservation Council (1992).

National Kerbside Recycling Strategy — developed to advance some of the policy actions outlined in the NWMRS, including recycling targets agreed between governments and industries for certain containers and packaging.

Source: DEWHA (2009b), EPHC (2009) and (PC 2006b).

At the November 2008 meeting of the Environment Protection and Heritage Council (EPHC), the Commonwealth, state and territory environment Ministers agreed to develop a National Waste Policy and as part of this process a comprehensive report will be compiled on current actions and emerging issues. The Australian Government Department of the Environment, Water, Heritage and the Arts (DEWHA) is leading this project. A consultation paper was released in April 2009 (DEWHA 2009c) and a series of public consultation sessions were held across Australia during April and May 2009. The consultation process sought input from

business, governments and the broader community on the potential scope of, and process for, developing a national waste policy and on priority issues that should be considered. A discussion paper, *Draft National Waste Policy Framework — less waste more resources*, was released for public comment in July 2009 (DEWHA 2009b). The intention is to reach agreement on the new policy at the EPHC meeting in November 2009.

In light of the recent reviews and the work in progress in developing a National Waste Policy, the Commission has not assessed the concerns raised in detail. The development of a National Policy is a further opportunity to assess the effectiveness and efficiency of current approaches, including addressing inconsistencies across jurisdictions and other sources of unnecessary burdens on businesses.

In developing a National Waste Policy, governments must ensure full compliance with the *COAG Best Practice Regulation Guide* (COAG 2007b), including the requirement for regulatory impact analysis. This would include, where regulatory measures are proposed, demonstrating that government intervention is justified and that regulation is the best option. In addition, the recommendations and policy principles developed in the Commission's *Waste Management Inquiry Report* (PC 2006b) should be taken into account. The selected principles set out in box 5.6 are based on the Commission's report. While these are largely consistent with the Government's response (Australian Government 2007b), not all the Commission's recommendations were accepted by the Government.

In response to the specific concerns raised by participants with this review and consistent with the Waste Management Report, the Commission considers that the development of a National Waste Policy should include:

- an assessment of the effectiveness and efficiency of existing waste management regulation
- agreement on a national definition of waste and a national waste classification system and consideration of the applicability of an SBR-type taxonomy (appendix B)
- a review of processes that may result in inconsistent or inequitable treatment of certain materials
- an exploration of opportunities to achieve further consistency in regulatory standards applying to waste
- an examination of the scope to make greater use of performance-based and risk-based standards and classification systems
- ensuring information collection and reporting obligations imposed on business are the minimum necessary to effectively achieve regulatory objectives and there is national consistency in the data requested and the definitions used (see section 5.2 and appendix B).

Box 5.6 Some guiding principles for waste policy

- Waste management policy should primarily be focused on reducing, to acceptable levels, social and environmental risks
- Government intervention should only be considered where it would lead to net benefits to the community after considering all financial, environmental and social costs and benefits
- Specific waste management responses must be the most effective and efficient way of addressing an identified problem — alternative options, including ‘do nothing’, must always be considered
- Waste classification systems and exemption processes must be well designed to ensure that opportunities for the recovery and recycling of materials are not unduly constrained by the classification of those materials as waste
- Product standards and specifications for government purchasing should be performance-based wherever possible so as to avoid any discrimination in favour of virgin products or materials over recycled
- Upstream environmental protection and resource conservation goals may be more effectively and efficiently addressed using direct policy instruments. The case for using waste management policies to address these goals must be justified, on a case-by-case basis, using cost-benefit analysis
- All waste policies, strategies and support measures should be as transparent as possible
- Information requests and data collection should be coordinated and consistent across jurisdictions wherever possible and data should only be collected where there is a clear policy need.

Source: The principles are based on the *Waste Management Inquiry Report* (PC 2006b), with some reformulation for brevity and relevance to this study.

In addition, the Commission considers that National Waste Policy should be careful not to compromise a focus on net community benefit by giving undue attention to the use of the waste hierarchy as a rigid set of priorities for waste treatment, arbitrary target setting for resource recovery, maximising ‘resource efficiency’ (when the more appropriate approach would be to account for all resources not just physical resources), and the use of landfill levies for achieving unrelated objectives.

National Packaging Covenant

The Packaging Council of Australia (PCA) while generally supportive of the NPC — describing it as ‘a successful co-regulatory scheme to efficiently and effectively measure and promote environmental improvement in packaging’ (sub. 17, p. 7) —

sees scope to significantly improve the Covenant framework. PCA's specific concerns in relation to the NPC, include:

- objectives are not clear or specific
- coverage is too wide, diminishing its effectiveness
- too much reporting is required against too many KPIs and some KPIs are redundant
- superfluous and impractical reporting requirements and data gathering that does not assist in achieving NPC objectives
- some jurisdictions have either extended or sought to introduce regulations that would conflict with the Covenant.

The mobile phone company Vodafone (sub. 47) is also concerned about the possible introduction of a new audit process under the NPC that would place an additional burden on business.

Assessment

The National Packaging Covenant (NPC) is a voluntary (co-regulatory) product stewardship measure whereby producers assume part of the responsibility for their product and its packaging throughout its lifecycle. While voluntary, the Covenant is backed up by the National Environment Protection (Used Packaging) Measure, which imposes requirements on those organisations that do not sign up to it. Regulatory responsibility for the NPC lies with a council composed of representatives from government (including the Australian Government), industry associations and the community.¹⁰

The NPC was examined by the Commission in its 2006 *Waste Management Inquiry Report* (PC 2006b). Concerns about the NPC were also raised in last year's *Annual Review of Regulatory Burdens on Business: Manufacturing and Distributive Trades* (PC 2008a), including the burden of reporting requirements, inappropriate targets and low levels of monitoring, auditing and enforcement.

An independent Mid-Term Performance Review of the NPC conducted last year (Lewis 2008) was presented to the Environment Protection and Heritage Council in November. The Commission notes that, as part of the consultation process for the review, certain stakeholders raised concerns about the time and cost involved in the collection and reporting of data.

¹⁰ For further information see PC (2008a, pp. 167-168).

Overall, the Mid-Term Review found that the NPC has made significant progress towards meeting its targets and there was strong support amongst signatories and other stakeholders for a continuation of the Covenant beyond 2010. However, the report also identified various actions that could be taken to improve the effectiveness, efficiency and transparency of the NPC, including to enhance compliance and the quality and completeness of reporting. Possible design improvements for a future NPC were also identified, including in relation to KPIs and data collection and reporting systems. The EPHC, at its May 2009 meeting, requested that the NPCC continue developing and drafting a new Covenant for consideration at its November 2009 meeting, ensuring that it ‘contains well developed protocols for the evaluation of the performance of individual members’ (EPHC 2009). The Department of Environment, Water, Heritage and the Arts has advised that the burden of reporting requirements, inappropriate targets and low levels of monitoring, auditing and enforcement are issues being looked at as part of the drafting of the new Covenant Mark III. It also noted that the PCA is represented on the NPCC and is directly involved in the drafting of a post 2010 Covenant (DEWHA, pers. comm., 30 July 2009).

The NPC is being considered in the context of the new National Waste Policy (see above), particularly in relation to the possible development of a national approach to product stewardship generally (DEWHA, pers. comm., 30 July 2009). This process should include a comprehensive consideration of the costs imposed on businesses as well as the community benefits and whether alternative measures could deliver greater net benefits. In particular, much stronger evidence should be brought to bear on the need for the NPC (and other product stewardship or extended producer responsibility schemes). Any additional net community benefits generated by the schemes, over and above general waste regulations, must be clearly articulated. Such evidence would need to be part of a regulation impact statement process before any decision is taken on the National Packaging Covenant Mark III or alternative approaches.