



Report on enforcement strategies
associated with the
National Appliance and Equipment
Energy Efficiency Program

March 2000



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Introduction

The National Appliance and Equipment Energy Efficiency Committee (NAEEEC) requested that the Australian Competition and Consumer Commission (ACCC) conduct a review of the legal and administrative enforcement mechanisms in relation to the national energy efficiency program administered by all jurisdictions in Australia in accordance with the National Greenhouse Strategy.

Terms of reference

The terms of reference for this review were as follows:

1. The ACCC is to examine the present mechanisms for enforcing the energy efficiency rating system and assess whether the current State based legislative regime is adequate.
2. The ACCC is also to consider the extent to which Commonwealth legislative tools & remedies (such as those provided under the *Trade Practices Act 1974*) might be appropriated under the scheme to promote compliance.

It should be noted that this report expresses the views of the ACCC *within the terms of reference* for this review. Wider issues of potential relevance to the ACCC have not been considered at this time.

Process

As part of this process officers from the ACCC conducted interviews with various industry participants, State regulators and consumer associations in Melbourne, Sydney, Canberra and New Zealand. The full list of interviewee's appears in [Appendix 1](#). These interviews were conducted on a confidential basis and the information gathered has been incorporated anonymously into this report.¹

On the basis of these interviews and background research a draft report was prepared and supplied to NAEEEC and interviewee's for comment. This final report has incorporated feedback received from stakeholders and ACCC Commissioners.

¹ Retailers were not interviewed as part of this process as the issues significant to this review were the regulatory regime and other processes that occur outside the retail level. This issue is discussed further in the section 'Retailer Sector'.

Background²

Appliance market and industry structure

The Australian appliance market is essentially a national one and there are only minor variations in the types of appliances sold by region. The major manufacturers hold 70% to 80% of the clothes washer, dishwasher and refrigerator markets, and approximately 90% of the clothes dryer market. The balance is imported from a wide range of sources including Europe, the USA and Asia.

Energy labelling

Energy labelling refers to the placement of labels on domestic electrical appliances that give a rating of the energy efficiency of that machine. The two key items of information on the energy labels are the comparative energy consumption (currently expressed as kWh/year) and the “star rating”. The comparative energy consumption is an estimate of the annual energy consumption of the appliance, based on the tested energy consumption (measured against the relevant standard) together with information about the typical use of the appliance in the home. The star rating gives a quick comparative assessment of the model’s energy efficiency. The star rating is a measure of energy service per unit of energy consumption and is calculated using an algorithm which takes into account energy consumption and volume or capacity.

Energy labelling for major appliances was first proposed in the late 1970’s by the State governments in New South Wales and Victoria. When the Commonwealth Government raised the matter with the appliance industry in 1982, there was some resistance on the grounds that any program should be uniform nationally rather than risk different State approaches and that any scheme should be voluntary rather than mandatory.

The introduction of energy labelling was endorsed by the then Australian Minerals and Energy Council (AMEC – now ANZMEC) in 1985. New South Wales and Victoria announced in 1985 that they would make energy labelling mandatory in those States. Energy labelling for refrigerators and freezers became mandatory in 1986. In 1987 and 1988, room air-conditioners and dishwashers were included in the regulations. Victoria introduced labelling for clothes dryers in 1989 and clothes washers in 1990. In 1991 South Australia introduced labelling regulations for all five major appliances.

The energy labelling regulations require peel-off labels on all units offered or displayed for sale (suppliers label all units on the production line).

The star rating system is a "closed" rating system in that all units, however efficient or inefficient, rate from 1 to 6 stars. This has the advantage of good consumer comprehension, but has also led to “crowding” at the top of the range. It is understood that the star rating system is to be revised shortly to address a number of issues, including ‘crowding’. It is anticipated that the new label will come into operation on 1 April 2000.

² Parts of this section are reproduced from *Appliance Efficiency Programs in Australia: Labelling and Standards*, Harrington & Wilkenfeld 1997 in *Energy & Buildings – Special Edition* devoted to Energy Efficiency Standards for Appliances, Volume 26/1, 1997, Published by Elsevier, Lausanne, Switzerland, McMahon J & Turiel I (Eds). The ACCC acknowledges the kind permission to use this material.

Consumer recognition of energy labelling

The Australian energy labelling program is widely regarded as among the most informative and salient in the world. Label recognition is very high among recent and prospective appliance purchasers. Recognition of the label among randomly surveyed adults is consistently over 65% throughout Australia. Awareness among appliance buyers is even higher: in 1993 nearly 90% of recent and intending appliance purchasers said they were aware of the energy label, and 45% said they used the information on it to compare appliances prior to purchase (GWA et al 1993).

National Greenhouse Reduction Strategy

The original national appliance and equipment energy efficiency program was created under the National Greenhouse Reduction Strategy (NGRS), endorsed by the Council of Australian Governments (COAG) in December 1992. The NGRS stated that:

Governments will develop, in consultation with the manufacturing industry, and implement as soon as practicable a national scheme for mandatory energy labelling for major domestic appliances.

Governments will develop, in consultation with manufacturing industry, and implement nationwide energy performance standards for major domestic appliances, after considering the costs and benefits involved. ANZMEC will be the coordinating body for this initiative.

The 1998 National Greenhouse Strategy includes these original measures as well as new measures first announced by the Prime Minister on 20 November 1997.

Noting that the measures have been developed against the background of Australian national circumstances and its national interest, the Prime Minister stated that the Commonwealth Government will work with the States, Territories and industry to develop energy efficiency codes and standards for appliances and equipment. The Prime Minister also forecast the implementation of an improved labelling program and minimum energy performance standards for industrial and commercial appliances and equipment.

While the regulatory scheme ostensibly provides national coverage, there are significant differences between the various State and Territory regimes. While the Commonwealth Government has no direct power to enforce the scheme, its lead agency in this policy area, the Australian Greenhouse Office (AGO), plays a significant role in national greenhouse response policy and program funding.

Current regulatory regime

Australian Standards test and performance criteria

The energy labelling program currently relies on Australian Standards to define test procedures for the measurement of energy consumption, and to set minimum performance criteria which appliances must meet before qualifying for labelling.

Part 1 of each relevant Standard outlines the testing procedure to be undertaken in relation to each of the regulated electrical appliances.

Part 2 of each relevant Standard now provides performance criteria for each of the regulated appliances. This part of the Standard, while drafted by the relevant Standards committee, is

under the effective joint control of the energy labelling regulators from each state who have to approve the Standard prior to publication

The regulatory impact and competition aspects of the energy labelling scheme have been addressed by a number of regulatory impact statements prepared for the Commonwealth Office of Regulation Review (GWA 1999a, GWA 1999b, OCEI 1997). These have been prepared in accordance with the *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard Setting Bodies* as agreed to be the Council of Australian Governments.

In all cases the public benefits derived from a mandatory system of energy labelling have been found to outweigh any potential negative impact. Energy labelling also has a potentially pro-competitive effect on the marketplace by providing consumers with information that would not otherwise be available.

One manufacturer interviewed for this report is concerned that the Standards are too prescriptive and should be performance based as prescriptive standards can smother innovation. The manufacturer noted, for example, that Standards drafted on the assumption that a static amount of power is used during a given cycle, do not account for new technology which provides for variations in the flow of power during a given cycle.

However, one of the regulators noted that manufacturers have an opportunity to comment on draft Standards and are represented on the relevant committees. The regulator also felt that Standards are required to be sufficiently prescriptive to enable approvals to be carried out efficiently within certain timeframes and at least cost. Furthermore they felt that prescriptive Standards ensure that all the required information is supplied and suitable comparisons made.

Under proposed Model Regulations, Part 2 of each Australian Standard for regulated appliances will be adopted by the various State and Territory legislation and regulations.

Registering States v non-registering States and Territories

Energy labelling is currently made mandatory in Australia by State Government legislation and regulations. The New South Wales Department of Energy is currently drafting an Administrative Guideline which outlines how the regulations will be administered by the State regulatory authorities (see discussion below). The regulations under the State Acts give force to the relevant Australian Standards and outline the requirements for energy labels for appliances. Regulations also set out offences and penalties if a party does not comply with the requirements. The nature and extent of these offences and penalties is noted below in discussion of the Victorian Government's Electricity Safety (Equipment Efficiency) Regulations 1999 (the Victorian regulations).

Manufacturers and importers of electrical appliances regulated under the energy labelling scheme must register each appliance model with one of the registering jurisdictions as a precondition of sale. Currently the registering states include New South Wales, Victoria, Queensland and South Australia. To secure registration, the manufacturer or importer must provide test reports from a recognised laboratory that the appliance meets the requirements of the relevant Standard.

One interviewee suggested that NAEEEC should consider the feasibility of specifying only National Association of Testing Authorities (NATA) or NATA Mutual Recognition Agreement laboratories for approval testing. This would, in his view, cancel out some of the

variables in the first place. While this interviewee would prefer that all laboratories were NATA accredited it accepts that similar overseas accreditation schemes are acceptable.

Western Australia and the Northern Territory are currently non-registering jurisdictions but have regulations that give recognition to appliances registered in other States³. Similar recognition exists between the registering States. Essentially, appliance models registered in one State are deemed to be registered for sale in all states.

The regulatory authority in the jurisdiction where the model is registered remains responsible for determining and pursuing appropriate action if check test results indicate that a model is non-compliant.

Check Testing Program

A program of check testing is conducted on a regular basis by NAEEEEC which commissions accredited laboratories to undertake the tests. Check testing is undertaken for all electrical appliances and equipment regulated under the energy labelling scheme. Selected models are tested to ensure that the label and/or performance claims made by the manufacturer/importer are valid for the products being sold. Regulators are informed of any failures resulting from such tests.

The check testing program was commenced in 1992 by the Victorian State Electricity Commission Demand Management Unit and devolved to the Victorian Office of Chief Electrical Inspector (OCEI) in 1994. Energy Efficiency Strategies (Victoria) and the OCEI have run the national check testing program as Program Manager and Project Manager respectively (with NAEEC funding) since 1997.

Appliance model selection for check testing is generally based on the following selection criteria:

- (a) Plan to ensure that most categories and types of appliances are included to ensure broad and consistent coverage of the entire market;
- (b) the number and turnover of models and new models in each appliance group; and
- (c) appliance groups with a demonstrated history of high levels of non-compliance.

Critique of check testing program

Terms used

Repeatability refers to the ability to obtain consistent test results in one laboratory.

Reproducibility refers to the ability to obtain consistent results between laboratories.

³ At the time of writing the Australian Capital Territory and Tasmania were in the process of introducing Energy Labelling regulations.

Critique

A number of industry participants raised concerns about both the repeatability and the reproducibility of appliance performance measures.

One regulator stated that reproducibility between test laboratories must be improved and this is being discussed between AGO and NATA. It also stated that the five new Standards have raised questions on testing procedures and these are being worked through within the Standards framework. Continuous improvement in testing methodology is needed as five new Part 2 Standards are expected to be introduced during 2000.

The regulator also noted that testing materials such as detergent, sebum, soiling agents and soil swatches have all had erratic supply and consistency problems and these issues have to be resolved by industry, laboratories, suppliers, Standards and regulators. Concern about the standard of the detergent supplied for testing washing machine performance was also raised by one of the manufacturers interviewed by the Commission.

This manufacturer also stated that batches of swatches (material that has been systematically 'soiled' for testing purposes) differed from one another and that, on occasion, swatches from the same batch would differ from one another. The manufacturer also noted that reproducibility was complicated by other factors including differences in equipment used at different laboratories and the subjective nature of some elements of the relevant standards such as the wash performance tests.

Another interviewee raised concerns that the national check testing program lacks consistency in its application and noted that reproducibility might be enhanced if only NATA or NATA approved laboratories were responsible for check testing.

Reference machines

The European solution to repeatability and reproducibility is the use of reference machines. This involves each laboratory having one of a group of specially calibrated machines which each perform to an acceptable standard. The laboratories then measure the performance of a new product with the performance of the reference machine. The idea behind this is that the new product will always be subject to the same variable factors as the reference machine so it reduces the impact of environmental variables on test results between different labs and between different tests by the same lab.

The Commission understands that moves are taking place to operationalise the use of reference machines in Australian jurisdictions but understands that there have been some difficulties encountered in establishing consistency both between the different reference machines and, on occasion, between different tests of the same machine in the same laboratory.

OCEI and Energy Efficient Strategies have proposed a six month period in the beginning of the 1999-2000 National Check Testing Program to sort out all the problems with check testing, laboratories and regulatory action. The AGO is currently reviewing this suggestion, however the Commission understands that the AGO's initial reaction is that it does not want a six-month suspension of check testing.

Enforcement

Model Regulations

As noted above, enforcement of the energy efficiency regime in Australia is the responsibility of its various State and Territory regulators. The regulations do vary from jurisdiction to jurisdiction which militates against a consistent national approach to the enforcement of the Australian Standards.

In an attempt to address this perceived lack of consistency, State and Territory governments have, in consultation with appliance manufacturers, engaged in discussions to develop a uniform 'model' set of regulations which, when agreed upon, would be implemented by each of the participating States and Territories.

One manufacturer has expressed some dissatisfaction with the consultation process in relation to the model regulations. He states that while the manufacturers had been involved in the development of the model regulation four years ago they had heard no more until February 1999 when Victoria showed them a final draft of the proposed regulation which was then put into legislative effect a few months later. The manufacturer calls upon the AGO to be more proactive and take the lead role in suggested time scales.

The Victorian government implemented the Electrical Safety (Equipment Efficiency) Regulations 1999 ('the Victorian Regulations') in May 1999 pursuant to these discussions. The model regulations are intended to both complement and give force to the appliance performance and energy labelling Standards.

Cancellation of registration – check test failure or misleading conduct

The Commission has included an excerpt from the Victorian regulations to exemplify the nature of current sanctions available to regulators in the event of a breach of the regime.

Regulation 13 of the Victorian regulations generally provides that the OCEI may cancel the registration of proclaimed electrical equipment if:

1. a sample of the equipment or the label on the equipment does not conform with the results of testing provided by the manufacturer/importer;
2. the registration holder engages in conduct that is misleading or likely to mislead the public as to the physical characteristics, energy efficiency or performance characteristics of the equipment; and
3. the registration holder provides false or misleading information relating to an application for registration or transfer of registration, to the OCEI.

The OCEI notes that it cancelled the registrations of 19 models pursuant to the 1998-1999 National Check Testing Program.

Penalty for supplying unregistered electrical appliances

Regulation 15 of the Victorian regulations provides for the imposition of a penalty, of 20 penalty units, on persons who offer to supply proclaimed electrical equipment that has not been registered in accordance with the regulations. One interviewee noted that this potential imposition of 20 penalty points may not constitute a strong enough disincentive to dissuade

those few manufacturers and importers who do contravene the regulatory regime, from complying with the regulations. The current value of a penalty unit in Victoria is \$100, hence a fine of 20 penalty units would equal \$2,000.

A wholesaler, importer or retailer who supplies a product for which registration has not been granted, or for which registration has been cancelled, may be subject to regulation 15 of the Victorian regulations.

Enforcement Strategies of Regulators

In the view of one regulator, 'the cancellation of appliance approval works adequately', with 15 days, within which the manufacturer of a failed appliance can appeal the regulator's decision, before registration is cancelled. Manufacturers/importers may be required to relabel stock in factories and in retail premises.

This regulator notes, with reference to the regulatory outcomes of the 1998/99 Program, that the four States which make approvals for energy efficiency do not approach regulatory action in the same way. This regulator believes that national model regulations based on the Victorian regulations, could overcome this by creating more national consistency.

The regulator doubts, however, that this will occur in the actual working of the energy labelling scheme, as the process is duplicated in four States. It also feels that the proposed Administrative Guideline (currently being developed by the NSW Department of Energy) also may not have the desired effect regarding consistency of action, unless it is strictly adhered to by all regulators.

Administrative Guideline

The Administrative Guideline that is currently being developed is designed to improve the workings and transparency of the current system. It is intended that manufacturers, importers and regulators will benefit from a document that gives a clear picture of how the scheme will be administered.

The Commission has a large amount of experience with the development and operation of codes of practice and guidelines for various regulatory purposes. Through this experience the Commission has found that there are a number of key elements which are crucial in ensuring that a code or guideline achieves its goals.

Firstly it must be easy to follow so that readers can understand the relevant process or find the necessary information. A number of mechanisms can be used to assist in this process. For example:

- A table of contents with clear subject headings;
- An executive summary;
- A clear statement of the scope/objective of the document;
- A specific section that contains the 'code rules' or Guideline procedures.

In our preliminary view, the NSW Department of Energy has included a lot of valuable information in the Guideline, however it is not easy to get a clear picture of the processes

being set out. To ensure that the Guideline meets its objectives it may be beneficial to incorporate some of the factors mentioned above.

In addition to the content itself there are also a number of processes surrounding a code or guideline that are important to ensure its success. Some of these measures include:

- An organisation with responsibility for administering and monitoring the code/guideline;
- Mechanisms for ensuring the code/guideline is widely distributed;
- Regular fora to ensure stakeholders are aware of developments and to allow for change proposals

In the Commissions view the Guideline might benefit from the following associated processes being developed:

- As part of the administration and monitoring of the Guideline ANZMEC could report enforcement outcomes as part of an annual report on check testing outcomes;
- Individual Ministers on ANZMEC could consider reporting particular problem companies to Parliament if all other administrative procedures have not resulted in an acceptable outcome; and
- A voluntary recall process for mislabelled appliances with trade associations.

The Guideline also needs to state whether the processes it sets out are descriptive or normative (ie are they based on what happens or what should happen). In our view the guideline should be descriptive of what has been agreed to by all parties and hence 'will' happen.

One regulator anticipates that the Administrative Guidelines should make the process more transparent and assure manufacturers that they are not being singled out for action.

Critique of Enforcement

The Commission has been informed by one interviewee that Australia enjoys the highest level of energy efficiency labelling compliance in the world. The interviewee states that the credit for this generally belongs to the manufacturers. The Commission has been told, however, that while the majority of manufacturers are willing to comply with energy efficiency regulations, there remains a minority of importers who consistently contravene the regulations.

Enforcement of regulations - general comments

The Commission received a number of comments and suggestions about the enforcement of the energy efficiency regulations. One interviewee noted that it is not aware of any 'hard enforcement actions being pursued by regulators' but felt that a 'large scale legal prosecution would probably increase consumer confidence in the scheme' by showing that breaches are pursued.

This view was echoed by another manufacturer who stated that there is 'not much policing of labelling' and that 'some State regulators take action but appear to back down when their bluff

is called.’ Another interviewee queried whether the State regulators were sufficiently equipped to take action on energy efficiency matters.

The Commission has not formed a view on this matter but notes that it is not aware of any substantive proceedings being launched to date by any of the State or Territory regulators against any manufacturers or importers of electrical appliances under the energy labelling regulatory regime.

Concern about strict compliance approach

A number of interviewees expressed concern about the variation between enforcement approaches taken by different State regulators.

Two manufacturers raised concerns about one regulator which allegedly takes a strict compliance approach to enforcing the regulations. One manufacturer suggests that this is not an appropriate strategy to adopt when it is the spirit or substance of the issue which is more relevant than strict adherence to every detail of a given Standard. He commented that strict compliance indicated a lack of familiarity with the technical issues involved in the relevant standards and a clerical or legalistic approach to enforcement. This manufacturer strongly favours the ‘greater use of discretion’ by regulators when they apply the regulations to particular circumstances.

This manufacturer also raised concerns about the strength of the initial letter with which another regulator addressed an alleged check test failure. The regulator in question appears, in its first letter to the manufacturer, to have noted the apparent failure and demanded that the manufacturer remove its product from the marketplace within 15 days. This demand was, apparently, withdrawn when the manufacturer questioned a number of technical aspects of the test upon which the regulator relied for its decision. The manufacturer states that this raises concern about whether regulators have access to the technical expertise necessary to effectively enforce the regulations.

The manufacturer compared this approach with that taken by another regulator. In another matter, the regulator informed the manufacturer that one of its products did not meet the relevant standard and invited the manufacturer to discuss the matter to resolve it. The manufacturer felt that this regulator’s approach was more reasonable though also noted that the issue raised by the second regulator had not been resolved after 4 months of discussion.

One of the regulators noted that the initial letter informing of a check test failure gives the applicant 15 business days to make a written submission as to why the registration should not be cancelled.

Another interviewee also stated that consistency of regulatory action is vital to dissuade manufacturers from forum shopping for either initial approval or re-approval after check test failure. This interviewee felt that one organisation should administer the whole Program, on behalf of NAECC, so that all manufacturers are given the same approach.

Reward v punishment

One manufacturer recommended that regulators consider the current voluntary energy efficiency scheme in Hong Kong which incorporates a reward for energy efficient products (eg. a \$100.00 rebate per product) and suggested that this was an interesting alternative to the

current system which punishes for non-compliance. The Commission understands, however, that significant differences between the policy environment in Hong Kong and that in Australia make comparisons between these regulatory regimes a difficult task.

Deregistration

The current regulatory scheme for energy labelling contains only one major sanction for non-compliance: deregistration.

A possible disadvantage with the sanction of deregistration is that it may not be a particularly strong deterrent against non-compliance. If a company has a product deregistered it can simply re-test and re-apply for registration. This process may present some cost to the relevant manufacturer or importer but it does not represent a significant reprimand, nor does it lead to any publicity surrounding the contravention which may have been serious.

The question of consumer detriment is also not addressed by deregistration. If a consumer has bought an appliance with a misleading label they will not receive any redress or compensation through the process of deregistration, despite the fact it has been established that a misrepresentation took place.

Deregistration is obviously a necessary sanction, however it is unlikely to be appropriate in all circumstances. An absence of alternative sanctions limits the capacity of regulators to select a response that is proportionate to various types of conduct which contravenes the regulations.

The majority of companies and manufacturers comply with the requirements of the energy labelling scheme. However if there are no real consequences for non-compliance there is a real possibility that less scrupulous companies will flout the law and disadvantage other traders and consumers. One manufacturer expressed the view that the regime needs some form of a 'stick' to enforce the scheme 'otherwise there is no consequence for non-compliance.'

To encourage and compel compliance in the market place it is preferable to have a range of sanctions that can be applied in appropriate situations. The availability of a greater range of sanctions in the legislation would give regulators a greater degree of discretion and flexibility when assessing a situation and allow them to select a remedy more proportionate to different circumstances.

The remedies available under the TPA (outlined below) could provide a useful model for new provisions to be incorporated into the energy labelling scheme. The TPA model contains a national approach and provides for a range of sanctions and remedies which is consistent with the desired outcomes of the energy labelling.

The availability of a range of sanctions would allow the regulators to assess the conduct and choose a response best suited to addressing the problem. If the conduct was deemed to be serious it could be appropriate to impose fines on the company, obtain refunds or other compensation for consumers who were misled and have the company undertake a compliance program to ensure the conduct would not re-occur. However, if the breach was inadvertent then a less punitive sanction, such as an enforceable undertaking could be more appropriate.

A wider range of sanctions available to all regulators, regardless of where a given product is registered, might also assist regulators to take more timely action against those few individuals and companies that breach the regulations.

Reporting on scheme – transparency and accountability

In the Commission's view, the enforcement of regulatory schemes should be both transparent and accountable. Transparency in regulatory regimes increases the credibility of the scheme in question. It also provides consumers with information, to which they would not otherwise be privy, when making consumer choice decisions. The prospect of adverse publicity which might emerge from public reports of failure to comply with the regulations will doubtless encourage some traders to adopt more risk averse compliance strategies and thus reduce the number of models which fail check tests.

The desire for some form of public reporting of failures was raised by a number of participants in this review. The matter of publication of failures in the media needs to be resolved. One regulator noted that it has power, under legislation pertaining to electrical safety issues, to issue public notices to recall and/or stop the sale of unsafe products. However this regulator has not done so to date.

Public reporting of failures might be achieved both by the publication of a statistical analysis of the scheme on a regular basis and by the publication of information about check testing failures.

One interviewee would support a move towards annual reporting on the scheme to improve transparency and give more information about failures.

Another manufacturer also stated that it would appreciate a reporting process of the current check testing regime - ie what check testing is occurring. Noting that annual reporting might be appropriate, he added that manufacturers would like to know what the success rate is for the regulators – ie. the real outcomes of enforcement action.

The Commission understands that regulators currently inform manufacturers when their appliances fail a check test. It also understands that regulators forward an Alert notice to other regulators when an appliance has been deregistered. There does not appear, however, to be any systematic mechanism which guarantees that deregistered products are not being sold at a retail level anywhere in Australia. Most regulators do carry out some form of auditing for compliance of unlabelled and deregistered products, however given the geographic size of Australia and the large number of retail outlets involved it is difficult to ascertain how successful this has been.

The Commission recommends that consideration be given to a transparent system of public reporting of the regulatory regime's enforcement outcomes.

Retail Sector

As noted earlier, retailers were not interviewed as part of this process as the issues significant to this review were the regulatory regime and other processes that occur outside the retail level.

It should also be noted that there is already a very high level of compliance at the retail level with the energy labelling scheme. This was recently documented in a study commissioned by NAEDEC (YCHW 1998) which indicated compliance rates of 92% and higher.

The main issue examined by this review is the regulatory regime and enforcement strategies for ensuring the energy rating on the label is correct – not whether the label is present.

Retailers can easily judge if an appliance is labelled, however they are not in a position to easily check whether the rating on an appliance label is correct. The costs involved with a retailer testing a single product would run to several thousands of dollars and involve highly technical reports. Given the high cost of testing it is unlikely that the potential benefits to retailers would outweigh the costs. As a result there appears to be little market incentive for retailers to directly engage in such a testing regime.

It may be possible for retailers to request test reports from suppliers, however State electrical safety regulators already require suppliers to provide test reports with each model registered. If retailers requested test reports from suppliers they would almost certainly get the same reports as the regulators – it is very unlikely that overall compliance would be enhanced by such a process.

The AGO in conjunction with State regulators has also developed a range of training and educational tools for retailers regarding energy labelling and the new label which is due to be introduced on 1 April 2000.

For the reasons discussed above, and due to resource and time constraints, retailers were not directly included in this review. However the ACCC acknowledges the important role played by retailers in the marketplace and encourages retailer involvement in the energy labelling scheme.

The Commission believes that the recommendation for a more public system of reporting (if accepted) will give retailers greater access to this important marketplace information that is currently not easily accessible. This information could allow retailers to have greater confidence that appliances being sold were complying with the energy labelling scheme.

ACCC Role & Experience

The Commission's role as the Commonwealth regulator for competition and consumer matters gives it a national perspective on enforcement and compliance issues. In this respect the Commission shares common ground with NAEEEC as a national body interested in ensuring uniform standards for energy labelling across Australia.

The following discussion outlines a range of sanctions, or regulatory tools, currently available to the Commission to assist it in seeking fast effective consumer-friendly outcomes. State and Territory regulators may benefit from the addition of some of these tools to their own regulatory toolbox.

In general the Commission is most likely to assign significant resources to a possible contravention of the Trade Practices Act (TPA) where there is:

- a blatant disregard of the law;
- significant public detriment;
- the potential for action to have a worthwhile deterrent or educative effect;
- a significant new market issue, eg arising from economic or technological change;

- a statutory obligation to act.

The Commission has been involved in enforcing the TPA for over 25 years. This enforcement action has been subject to vigorous scrutiny over time and has resulted in recognition of the need for flexible and practical remedies to take account of market place realities and developments.

As a result of this ongoing review the Commission has access to a number of remedies for non-compliance with the TPA that allow it to respond appropriately to different circumstances.

The tools available

The range of tools which the Commission uses to resolve a matter that may contravene the TPA can best be described by using the analogy of a pyramid.

Referral or advice

The Commission receives more than 50,000 complaints and enquiries each year. The vast majority of these are resolved at the base of the pyramid through advice or referral to a more appropriate agency.

Simple resolution

About 3000 complaints receive some preliminary investigation before they are resolved, usually through clarification of the requirements of the law, by advice, appropriate referral to another agency, or reference back to the business concerned and it advising the Commission that it will not continue to engage in the conduct.

Administrative resolution

Rising up the pyramid, another 1000 or so complaints require detailed investigation. It is at this level of the pyramid where actions taken by the Commission are more likely to achieve significant and lasting changes. These changes in conduct are aimed at greater compliance with the Act, not only by individual businesses but also in the wider marketplace.

Administrative resolution or settlement of apparent breaches of the Act has always been an important part of the Commission's activities. This cost effective approach often suits the Commission, the companies and individuals involved in the apparent breach and those affected.

By negotiating an administrative resolution the Commission aims to:

- have the conduct cease;
- obtain suitable redress, if appropriate, for the victims of the conduct under investigation; and
- change the trading habits of the company by identifying how the breach arose and having it take measures to ensure the conduct in question does not occur again.

An example of an administrative resolution is an enforceable undertaking.

- *Enforceable undertakings*

Section 87B of the Act provides the legislative basis for the Commission to negotiate administrative resolutions and accept undertakings which are enforceable by a Court. The provision enables acceptance of enforceable undertakings other than those that may be ordered by the Court at the conclusion of proceedings. On occasions the outcome of legal action could be a combination of Court Orders and s. 87B undertakings.

In pursuing administrative resolutions the Commission takes an 'integrated strategies' approach. This means that where appropriate all elements of the Commission's work are linked to and support each other. Instead of pursuing a particular matter or inquiry which resolves just the problems of an individual case, the integrated approach seeks to address the underlying market causes of the complaint. The Commission will resolve matters under s. 87B only where it believes that this offers the best solution available.

In deciding that administrative resolution, by way of a s. 87B undertaking, is the appropriate means by which to achieve the desired outcomes the following factors are taken into account:

- the nature of the alleged breach of the Act in terms of such factors as:
 - the type of practice;
 - the impact of the conduct on the community at large;
 - the impact of the conduct on third parties;
 - the product or service involved;
 - the size of the firm or firms involved.
- the history of complaints against the company concerned and any previous court or similar proceedings;
- the history of the complaints involving the practice, the product or the industry generally (complaint statistics have an important role here);
- the apparent good faith of the company — if the company acts in a *bona fide* way, administrative resolution is more likely to be acceptable to the Commission;
- the cost effectiveness for all parties of pursuing an administrative resolution instead of court action; and
- prospects for rapid resolution of the matter.

The Commission's decision to consider s. 87B undertakings may be the outcome of an approach from the business concerned, or based on the recommendation of staff. The Commission does not demand or require a s. 87B undertaking, but may raise it as an option, leaving it to the other party to decide whether to pursue it or not.

Legal proceedings

Legal proceedings will always be a major focus of the Commission's work. Court decisions have several significant effects including:

- corporate deterrence by both penalty and resultant publicity;

- punishing unlawful conduct;
- authoritatively establishing the gravity of breaches of the law; and
- clarifying the requirements of the law.

In taking legal action there are a range of remedies which can be sought including injunctions, action for fines or penalty, representative action or other specific orders.

When pursuing court action the appropriate remedy for the Commission to seek will be the one which both achieves an effective outcome for individuals and companies adversely affected by the conduct, and which will be effective in encouraging both specific and general compliance with the TPA.

Often legal proceedings will be settled by a negotiated settlement which may or may not need to be ratified by the Court.

- ***Civil Remedies***

If a breach of the TPA has been proven in court then the judge may order the company to undertake certain activities. These orders can include requiring the company to:

1. refund money to consumers;
2. publish corrective advertising,
3. establish compliance programs.

These measures are designed to obtain suitable redress for effected consumers and ensure that the conduct does not re-occur.

- ***Findings in proceedings to be evidence***

Section 83 of the TPA provides that in certain proceedings, a finding of fact in a court for contravention of a provision of Part V of the Act, is *prima facie* evidence of that fact. Thus the Commission may seek findings of fact in proceedings it has initiated against parties who have contravened the Act. Such findings enable third parties, for whom the contravention has caused loss or damage, to seek compensation without the need to prove the contravention once again.

- ***Criminal Sanctions***

In extreme cases the Commission may seek to impose criminal sanctions for certain types of conduct that contravene the consumer protection provisions of the TPA. Fines of up to a maximum of \$200,000 can be imposed for corporations and up to a maximum of \$40,000 for individuals. These types of sanctions can have a significant deterrent effect on other players in the market.

Commonwealth legislation

The ACCC has strong links with the State based consumer protection and fair trading bodies which is facilitated through a number of consultative forums and ongoing cooperation on operational matters. Through this experience the ACCC believes that Commonwealth legislation can play a beneficial role in helping to overcoming some of the difficulties that have

occurred when there is only State based legislation in relation to issues that have national implications. This combination of State & Commonwealth legislative regimes provides a complementary framework that ensures situations can be addressed quickly and effectively.

Energy labelling forms part of the NGRS which has predominantly national and international implications. As indicated many of the industry participants who participated in this review were supportive of the current scheme but felt it could be further enhanced by ensuring there was an overall uniform national framework.

Given this fact it may be worthwhile examining the possibility of introducing Commonwealth legislation to complement and reinforce the current State based regime.

Minimum Energy Performance Standards (MEPS)

In 1992 Australia's Energy Ministers commissioned a consultancy study to examine the introduction of minimum energy performance standards (MEPS) for electric appliances in Australia. The study recommended the introduction of uniform nationwide MEPS for refrigerators, freezers and electric storage water heaters. In March 1995, Energy Ministers agreed to the adoption of MEPS to take effect in 1999. While this report does not focus on MEPS, the Commission does note that the critiques of the regulatory regime, as it applies to energy labelling, will also be relevant to the regulation of MEPS. A significant difference, however, is the fact that while manufacturers and importers can remedy an energy labelling check test failure by re-labelling and re-registering the product, they will not have the same option for a MEPS checktest failure. Regulators should expect a more rigorous response from manufacturers and importers to allegations of check test failure.

MEPS Comment

The Commission notes that one manufacturer voiced concern that the MEPS regulations are being written around *selling* the product when it would be more appropriate for them to be written around the importation and manufacture of the product. He noted that the latter approach was effective in relation to the reduction of CFC gases program. This concern was echoed by other interviewees.

The Commission understands that the various State regulations refer to the sale or supply of electrical appliances rather than their importation and manufacture because of legislative restrictions imposed on the persons responsible for drafting the regulations.

Recommendations

Overall the current scheme appears to be working well due to the support of industry and the regulators. However, there would appear to be some areas that could be improved to ensure that the national goals of the scheme can be delivered in an ongoing and adaptable manner.

The Commission also notes that the introduction of MEPS may increase the regulatory burden on State regulators.

The following points summarise the Commission's broad recommendations in relation to the regulatory regime:

1. **Public reporting**

In the Commission's view, the prospect of adverse publicity which might emerge from public reports of failure to comply with the regulations will encourage some traders to adopt more risk averse compliance strategies and thus reduce the number of models which fail check tests.

The Commission recommends that consideration be given to a transparent system of public reporting of the regulatory regime's enforcement outcomes.

2. **A national framework**

Energy labelling forms part of the NGRS which has predominantly national and international implications. As indicated many of the industry participants who participated in this review were supportive of the current scheme but felt it could be further enhanced by ensuring there was an overall uniform national framework.

The Commission recommends that consideration be given to the possibility of introducing Commonwealth legislation to complement and reinforce the current State based regime.

The ACCC and the AGO are currently considering the possibility of entering into a cooperation agreement to formalise liaison between the two agencies. It is anticipated that such an agreement would also set out what role, if any, the Commission might play at a national level in enforcing the current regime.

3. **A wider range of sanctions**

A wider range of sanctions available to all regulators, regardless of where a given product is registered, might assist regulators to take more timely action against those few individuals and companies that breach the regulations.

The Commission recommends that consideration be given to a wider range of sanctions to allow timely and appropriate action by regulators.

4. **The Administrative Guideline**

A number of processes surrounding the Administrative Guideline might enhance its success. Some of these measures include:

- An organisation with responsibility for administering and monitoring the Administrative Guideline to promote consistency between the various State regulatory enforcement strategies;
- Mechanisms for ensuring the guideline is widely distributed;
- Regular fora to ensure stakeholders are aware of developments/changes and to allow for change proposals

The Guideline might also benefit from the following associated processes being developed:

- As part of the administration and monitoring of the Guideline ANZMEC could report enforcement outcomes as part of an annual report on check testing outcomes;
- Individual Ministers on ANZMEC could consider reporting particular problem companies to Parliament if all other administrative procedures have not resulted in an acceptable outcome; and
- A voluntary recall process for mis-labelled appliances with trade associations.

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OCEI 1997, *Regulatory Impact Statement on the proposed domestic appliance and energy efficiency regulations*, Prepared for the Office of the Chief Electrical Inspector (Vic) April 1997

YCHW 1998, *NAEEEC Energy Efficiency Rating – Shadow Shop – Final Report* Prepared for NAEEEC by Yann, Campbell, Hoare & Wheeler, November 1998

Appendix 1

List of persons interviewed by ACCC for this report:

Mr Terry Fogarty	Whirlpool
Mr Allan Driver & Mr Michael Grubert	Office of the Chief Electrical Inspector (Vic)
Mr Tim Aldrich	NSW Department of Energy
Mr Robert Wooley	Sharp
Mr Alan Sharp	Australian Consumers' Association
Mr Geoffrey Whitford & Dr Alan Law	Southcorp
Mr James Galloway & Mr David Epstein	Australian Electrical and Electronic Manufacturers Association.
Mr Richard Bollard	Fisher & Paykel
Mr Ian Lincoln	Email
Mr Shane Holt	Australian Greenhouse Office
Mr Lloyd Harrington & Robert Foster	Energy Efficient Strategies