

Review of the co-regulatory  
arrangement under the *National  
Environment Protection (Used  
Packaging Materials) Measure 2011*

Consultation Paper

Prepared for the Department of Agriculture, Water and the  
Environment

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### Making a submission

This Consultation Paper is designed to support stakeholders to provide feedback on:

1. The strengths and limitations of the operation of the *National Environment Protection (Used Packaging Materials) Measure 2011* (the UPM NEPM) and the Australian Packaging Covenant (the Covenant).
2. The appropriateness of the goals of the UPM NEPM and the Covenant and views on the achievement of these to date.
3. Opportunities to improve the UPM NEPM and the Covenant (or introduce an alternative arrangement) to achieve better outcomes for used packaging.

To assist stakeholders to provide feedback, a short survey has been developed and is available through the Department of Agriculture, Water and the Environment (Department) *Have Your Say* consultation platform. Stakeholders are invited to answer any of the survey questions and/or to provide a more detailed submission. Survey responses and submissions must be received no later than midnight on **5 March 2021**.

Information from submissions will be used to inform a final report to the Department but will not include information identifying individuals or businesses without their prior agreement.

Thank you for your interest and we look forward to receiving your submission.

## Chapter 1 – About this Review

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Waste is a significant global issue with countries continuously trying to improve waste avoidance and the recovery of waste through recycling, to promote a circular economy to benefit businesses, society and the environment.

Used packaging is one source of waste that has captured the attention of governments, businesses and consumers alike, with strong momentum for change to address the impact of packaging. Momentum lies in the desire to move away from the linear take-make-waste model to fundamentally rethink the way packaging is designed, used and reused in a transition towards a circular economy.

In Australia alone, a total of 5.92 million tonnes of packaging was placed on the market (POM) in 2018-19.<sup>1</sup> Of this, 89% had good recyclability (5.3 million tonnes) but 50% of packaging POM was disposed to landfill over this period.<sup>2</sup>

An important piece of Australia's framework for regulating packaging waste is the [National Environment Protection \(Used Packaging Materials\) Measure 2011](#) (UPM NEPM). The UPM NEPM was first introduced in 1999 and has continued to operate over the past 20 years with the same broad goal of minimising the overall environmental impacts of packaging.

The UPM NEPM is given effect through a co-regulatory framework that commits jurisdictions to establish a statutory basis to regulate brand owners, requiring them to meet certain obligations around action planning and reporting in relation to consumer packaging waste. The arrangement also includes a voluntary component where liable brand owners can elect to become signatories to the [Australian Packaging Covenant](#) (Covenant), as members of the Australian Packaging Covenant Organisation (APCO).

In line with the requirement for five yearly review of the co-regulatory arrangement<sup>3</sup> and the desire of governments to evaluate the effectiveness of the arrangement, mpconsulting has been engaged to conduct a review of the UPM NEPM and the Covenant. The Review focuses on:

- the extent to which the UPM NEPM and the Covenant are achieving the national environment protection goal set out within the UPM NEPM
- the need for variation or amendments to the UPM NEPM and the Covenant to improve its effectiveness
- a review of the resources available for implementing the UPM NEPM and the Covenant
- the interaction of the UPM NEPM arrangement with other relevant Commonwealth legislation
- environmental, cost and regulatory issues relevant to the optimal operation of the UPM NEPM and the Covenant including for example, governance arrangements, data collection, and reporting.

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<sup>1</sup> Australian Packaging Covenant Organisation Ltd. (APCO), [Australian Packaging Consumption and Recycling Data 2018-19](#), January 2021, p.5.

<sup>2</sup> Australian Packaging Covenant Organisation Ltd. (APCO), [Australian Packaging Consumption and Recycling Data 2018-19](#), January 2021, pp. 12, 14.

<sup>3</sup> Clause 22, *National Environment Protection (Used Packaging Materials) Measure 2011*.

The purpose of this Consultation Paper is to seek stakeholder views on the strengths, limitations and issues experienced with the operation of the UPM NEPM arrangement, including any ways the UPM NEPM arrangement could be improved (or how used packaging could be otherwise regulated) to affect better environmental protection from used packaging.

Stakeholder feedback is critical to the success of the Review and submissions to the Consultation Paper will be used in conjunction with research and analysis of relevant data to inform a report to governments on the identified issues and potential options for reform.

#### **Important note about the scope of this Review**

Acknowledging that the UPM NEPM arrangement is only one component of waste regulation, this Review is aimed at understanding how the UPM NEPM arrangement has been implemented so as to achieve its goals, rather than the broader goals of waste regulation.

To that end, the scope of this Review does not include an evaluation of:

- the [National Packaging Targets](#) (NPTs) or Australia's progress towards these
- the wide range of State and Territory initiatives designed to address waste more broadly (including, for example measures in relation to container deposit schemes and single-use plastic bags)
- other measures and initiatives designed to reduce packaging waste and/or achieve the NPTs, be they State-based initiatives, national programs or industry initiatives.

## Chapter 2 – About the co-regulatory arrangement

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The UPM NEPM is one of seven instruments created under the [National Environment Protection Council Act 1994](#) (NEPC Act) with the aim of achieving more consistent environmental protection measures between States, Territories and the Commonwealth on issues of national environment protection.

The operation of the UPM NEPM is overseen by the National Environment Protection Council (NEPC), which includes the Commonwealth, State and Territory environment ministers, supported by the Government Officials Group (GOG).

The co-regulatory arrangement comprises the UPM NEPM, the policy and legislation in each State and Territory implementing the UPM NEPM, and a voluntary, industry-led Covenant. Collectively these arrangements aim to reduce environmental degradation arising from the disposal of used packaging and conserve virgin materials through the encouragement of waste avoidance and the re-use and recycling of used packaging materials.

In practice, the arrangement has sought to achieve this aim by encouraging liable brand owners to become signatories to the Covenant, which reflects the framework established by the UPM NEPM, whereby:

- the environment protection goal is expressed as being met by ‘by supporting and complementing the voluntary strategies in the Covenant and by assisting the assessment of the performance of the Covenant’, and
- jurisdictions are required to establish a statutory basis ‘for ensuring that signatories are not competitively disadvantaged in the market place by fulfilling their voluntary commitments under the Covenant’.

In this way, businesses that are regulated under the UPM NEPM arrangement are able to opt-in to participating through the Covenant (as the voluntary arm of the co-regulatory arrangement), or to otherwise be regulated by government under the UPM NEPM as implemented by participating jurisdictions.

In summary, the co-regulatory arrangement:

- **requires States and Territories (‘participating jurisdictions’) to establish a statutory basis for recognising the Covenant and the UPM NEPM**
  - Six of the eight States and Territories have implemented legislation to reflect the UPM NEPM. Tasmania relies on the adoption of the UPM NEPM as a State Policy, and the Northern Territory has not enacted legislation that reflects the UPM NEPM.
- **requires States and Territories to establish obligations on liable brand owners in relation to the recovery, re-use and recycling of used packaging and penalties for failure to comply**
  - The precise obligations vary between jurisdictions but generally include obligations to collect and retain records of recovery data, draft and submit waste action plans that detail performance in respect of the use, recovery, re-use and recycling of materials, proposed

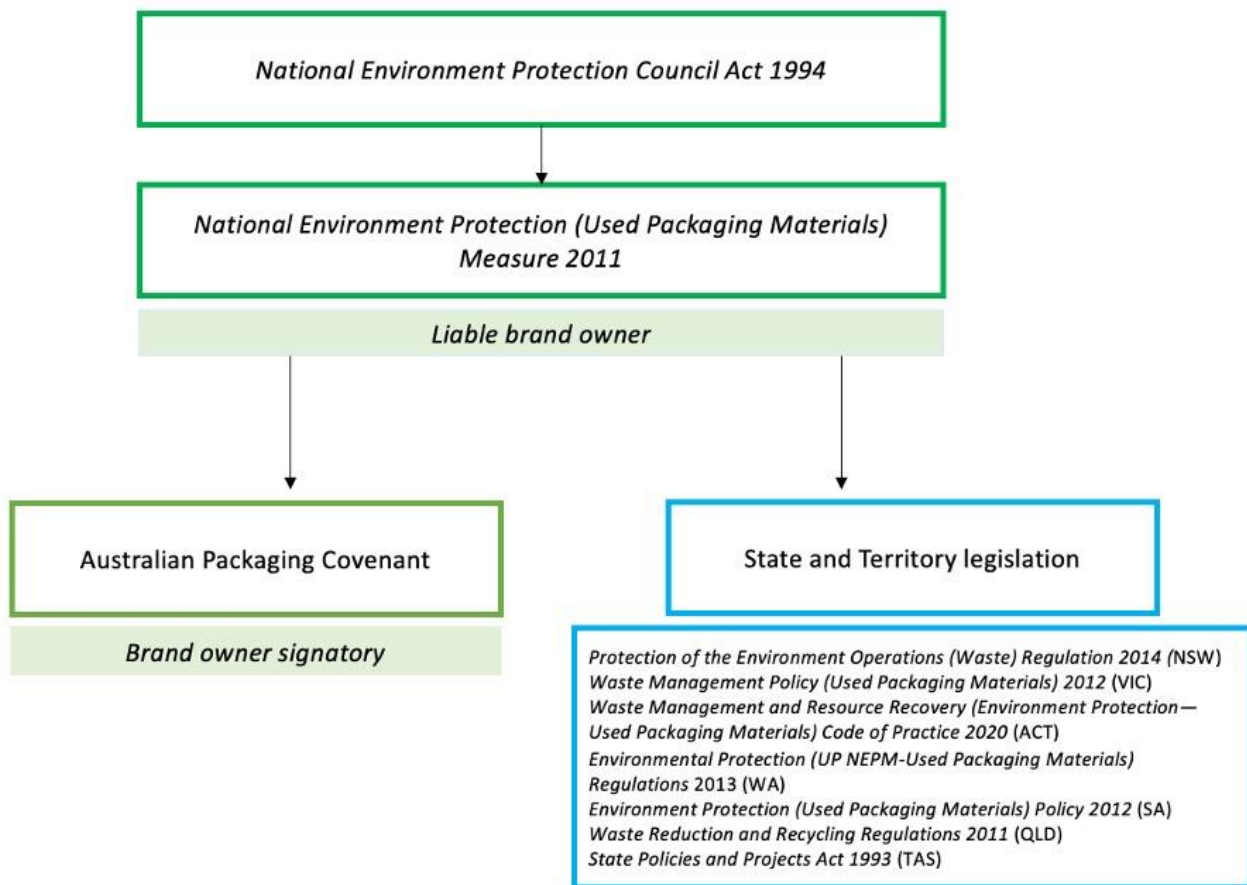
actions and performance indicators for achieving targets, and obligations to review packaging design.

- Liable brand owners may choose between meeting the obligations described in the State and Territory legislation and policies, or becoming a brand owner signatory to the Covenant and meeting the obligations described in the Covenant.
- **establishes a Covenant that describes the commitments of brand owner signatories**
  - The Covenant is an agreement between governments and businesses in the packaging supply chain that complements the UPM NEPM. Implementation of the Covenant is overseen by APCO. APCO is a national not-for-profit organisation.
  - The Covenant obliges brand owner signatories to:
    - submit an action plan and an annual report that outlines performance against the Packaging Sustainability Framework (PS Framework) and its stated action plan commitments to APCO
    - publish the action plan and annual reports on its website
    - implement design and procurement processes that drive sustainable design of packaging, consistent with the [Sustainable Packaging Guidelines](#) (SPGs). The SPGs set out 10 principles for designing, creating and choosing sustainable packaging including the use of compostable, re-usable and recyclable materials.
    - report on the actions it has taken to implement the SPGs
    - co-operate with APCO including to allow independent audits of annual reports and the implementation of action plans and assist APCO in responding to complaints
    - pay a membership fee to APCO.
  - If brand owner signatories do not comply with their obligations under the Covenant, APCO refers them to the relevant State or Territory for compliance action.
- **includes requirements relating to data collection and reporting**
  - For example, the UPM NEPM requires States and Territories to collect certain data relating to, for example, recovery of used packaging and kerbside recycling collection.

Relevant information about the co-regulatory arrangement is collected by States, Territories and APCO and consolidated into an annual report published by the NEPC . The [NEPC annual report](#) includes information about, for example, complaints received, investigations and prosecutions undertaken, the number of brand owner signatories and the recovery and utilisation rates reported by brand owner signatories in accordance with their annual report and action plans under the Covenant.

Progress towards the 2025 Targets is also now being monitored through APCO’s annual material flow analysis, and APCO will also be reporting publicly against the milestones set out in the 2025 Monitoring program.

**Figure 1: Diagram depicting the co-regulatory arrangement**



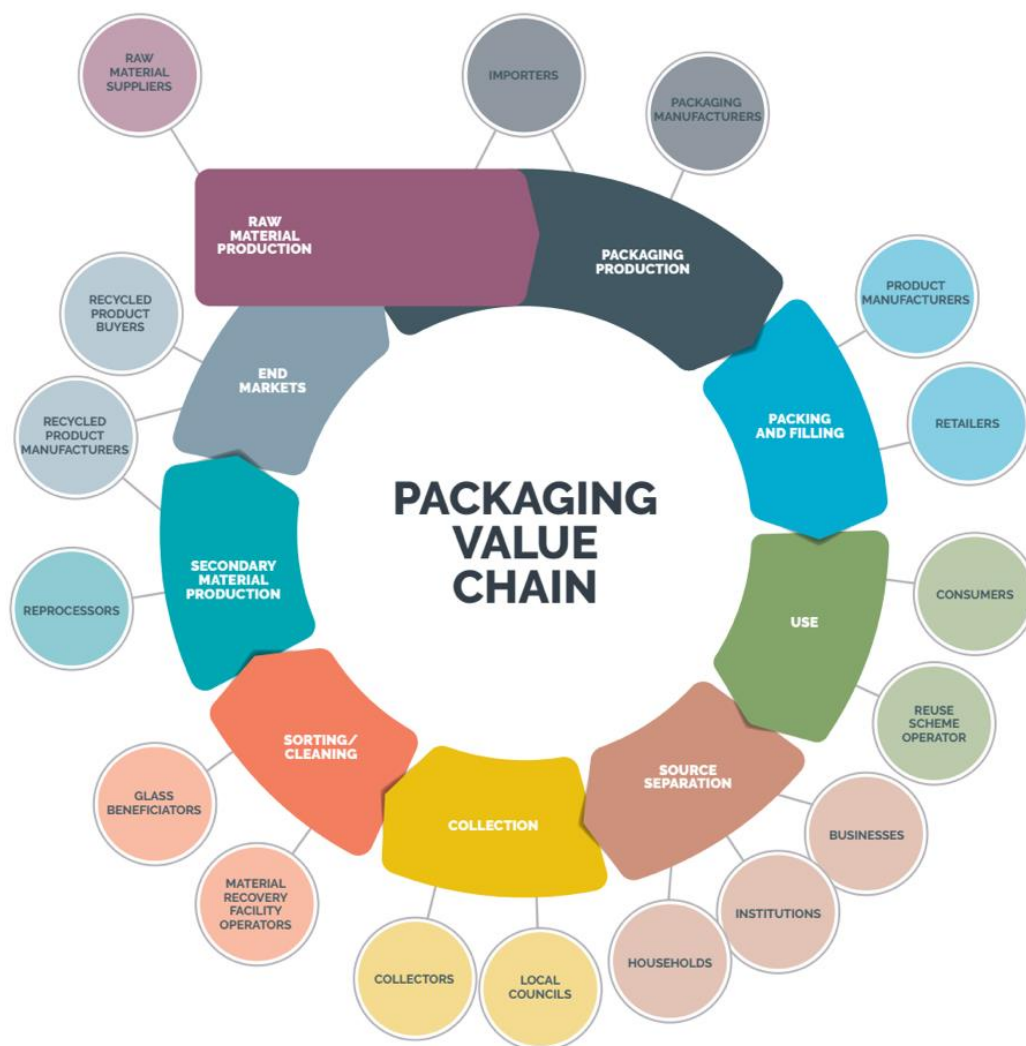
Noting the scope of the Review and its focus on the effectiveness of the UPM NEPM arrangement, the Review is mindful that there are a range of measures across Australia that have been implemented to try to reduce waste, increase recyclability, encourage product stewardship and work towards a circular economy. For example:

- At a national level, there are a range of **national waste policies and initiatives** including:
  - The [National Waste Policy and Action Plan](#) which sets a national direction for waste and recycling by providing a framework for collective, national action on waste management, recycling and resource recovery to 2030.
  - The [National Packaging Targets 2025](#) (NPTs) which were set in 2018 to provide a framework for collective, national action on waste management, recycling and resource recovery for product packaging. They include four targets:
    - 100% reusable, recyclable or compostable packaging.
    - 70% of plastic packaging being recycled or composted.
    - 50% of average recycled content included in packaging (revised from 30% in 2020).
    - The phase out of problematic and unnecessary single-use plastics packaging.
  - The recently introduced [Recycling and Reducing Waste Act 2020](#) which enacts a prohibition on the export of certain waste materials and a renewed product stewardship framework.



- There are **numerous State-based initiatives** including grants, waste levies, consumer deposit schemes, and prohibitions on single use plastic and other legislation that aims to drive consumer and business behavioural changes.<sup>4</sup>
- **Consumer awareness initiatives** including State-based messaging and the industry-led Australasian Recycling Label (ARL) Program.

In addition, the packaging supply chain, from manufacture to disposal, is complex and, as demonstrated by the diagram below, there are many businesses and individuals that influence how packaging is designed, used and disposed of<sup>5</sup>.



Against this backdrop, the Review will consider the operation and effectiveness of the UPM NEPM arrangement, noting it is only one component of a much broader set of initiatives aimed at reducing waste across the packaging value chain.

<sup>4</sup> For a summary of broader waste policy settings in each State and Territory, see Blue Environment, [National Waste Report 2020–Final](#), 4 November 2020, p. 53.

<sup>5</sup> Australian Packaging Covenant Organisation (APCO), *Our Packaging Future*, April 2020, p. 8.

## Chapter 3 – Key issues for consultation

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This Chapter summarises some of the key issues that have been identified by stakeholders (and the Review) about the operation and limitations of the UPM NEPM arrangement to date. This includes issues relating to:

- measuring the effectiveness of the UPM NEPM arrangement
- liable brand owners
- obligations of liable brand owners
- monitoring, enforcement and free riders.

Stakeholder advice is sought on these issues, along with any other issues stakeholders consider relevant to the Review.

### Measuring the effectiveness of the UPM NEPM arrangement

One of the requirements of the Review is to examine the extent to which the co-regulatory arrangement is achieving the national environment protection goal set out within the UPM NEPM. As the UPM NEPM does not include any specific targets or KPIs, this presents challenges for assessing its effectiveness.

The data that is available can provide an insight into the very high level goal of the UPM NEPM<sup>6</sup>.

Based on the data available to the Review<sup>7</sup> it appears that:

- there has been a **6% increase in the total packaging POM** in Australia between 2017-18 and 2018-19
- there has been a **small increase in the packaging that is reusable, recyclable or compostable**
- there has been an **increase of 12% in the quantity of consumer packaging recovered** between 2017-18 and 2018-19
- there has been a **small increase in Australia's post-consumer recycled content** of packaging including in plastic packaging over 2017-18 and 2018-19
- there has been a significant increase in participation in the Covenant, with the **number of APCO members increasing by 73% since 2017**.<sup>8</sup> As of 30 June 2020, APCO has 1511 members (of which 1451 are brand owner signatories), that collectively represent an 'estimated 75% of Australia's packaging market share'<sup>9</sup>

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<sup>6</sup> The goal of the NEPM is 'to reduce environmental degradation arising from the disposal of used packaging and conserve virgin materials through the encouragement of waste avoidance and the re-use and recycling of used packaging materials by supporting and complementing the voluntary strategies in the Covenant and by assisting the assessment of the performance of the Covenant'.

<sup>7</sup> Australian Packaging Covenant Organisation (APCO), [Consumption & Recycling Data – 2017-18 Baseline data](#), December 2019; Australian Packaging Covenant Organisation Ltd. (APCO), [Australian Packaging Consumption and Recycling Data 2018-19](#), January 2021; Australian Packaging Covenant Organisation Ltd. (APCO), [Annual Report 2019-20](#); Australian Packaging Covenant Organisation Ltd. (APCO), [2025 Monitoring Program](#), October 2020; Australian Packaging Covenant Organisation (APCO), [Our Packaging Future](#), April 2020.

<sup>8</sup> Number of members in 2017-18 was 874; 1467 in 2018-19 and 1511 in 2019-20.

<sup>9</sup> Australian Packaging Covenant Organisation (APCO), [Our Packaging Future](#), April 2020, p. 7.

- over the last two years, there has been a **small but steady improvement to brand owner signatory performance** against the PS Framework.

Clear KPIs, collection of reliable data and transparent reporting are critical to any co-regulatory arrangement. These foundation stones inform policy decisions, enable industry to benchmark (to drive continuous improvement) and provide confidence to all stakeholders that the arrangement is operating effectively.

Based on the Review's findings to date, there are some significant limitations with the co-regulatory arrangement in this regard. For example:

- **while the UPM NEPM describes a high level goal it does not include any high level targets or KPIs.**
  - Since the introduction of the UPM NEPM, the NPTs have been developed and adopted by APCO under the Covenant, and a [2025 Monitoring Program](#) has been put in place with milestone targets to support their achievement in the lead up to 2025. While these targets have also been adopted as part of the National Waste Policy Action Plan, they are not included in the UPM NEPM.
  - While some stakeholders have identified progress against the NPTs as a good proxy for measuring the effectiveness of the UPM NEPM arrangement, others have noted that the narrow application of the UPM NEPM arrangement (to liable brand owners) means there are limitations to using the NPTs as a proxy. This is because the achievement of the NPTs reflects the collective effort of many participants in the packaging supply chain across Australia (rather than the efforts of an individual brand owner) and because the scope of brand owner influence does not extend to all four NPTs.
- **there are no clear KPIs or targets for individual liable brand owners**
  - Brand owner signatories are required to report annually against the PS Framework which includes 13 criteria relating to matters such as packaging sustainability, closed loop collaboration and packaging design. There are seven core criteria that all brand owner signatories must report against and, six recommended criteria that are encouraged. Each criterion has five levels of performance ranging from 'getting started' to 'beyond best practice'. Brand owner signatories assess their performance against each criterion and an overall performance level/score is calculated.
  - The aggregated data shows a small increase in average scores over time, suggesting increasing engagement of signatories in actions to improve packaging sustainability. However, there is no overall target nor individual target for signatory brand owners, and no comparable framework for engaging, monitoring and reporting of non-signatories.
  - Likewise, while some States and Territories have implemented high level waste targets and incorporated the SPGs into their arrangements, there is no consolidated reporting of liable brand owner performance by States and Territories.
  - The following table summarises the changes in average score over 2 years for brand owner signatories. However, in the absence of a target score or statement of expected change (either across industry or individually) different stakeholders will have different views about whether or not the change reflects the effectiveness of the arrangement or otherwise.

**Table 1: Changes in average score for brand owner signatories between 2019 and 2020**

Packaging Sustainability Framework Criterion	2019	2020	Difference
<b>1.1 Packaging Sustainability Strategy (core)</b>	45.53%	47.96%	+2.43%
<b>1.2 Closed-loop Collaboration (core)</b>	28.67%	31.33%	+2.66%
<b>1.3 Consumer Engagement</b>	21.69%	24.14%	+2.45%
<b>1.4 Industry Leadership</b>	19.61%	23.35%	+3.73%
<b>2.1 Packaging Design and Procurement (core)</b>	32.59%	33.13%	+0.53%
<b>2.2 Packaging Materials Efficiency (core)</b>	37.33%	39.90%	+2.57%
<b>2.3 Recycled &amp; Renewable Materials (core)</b>	48.04%	51.68%	+3.64%
<b>2.4 Post-consumer Recovery (core)</b>	39.25%	46.81%	+7.56%
<b>2.5 Consumer Labelling</b>	33.45%	34.48%	+1.03%
<b>2.6 Product-packaging Innovation</b>	11.90%	13.03%	+1.13%
<b>3.1 Business-to-Business Packaging (core)</b>	18.80%	20.00%	+1.20%
<b>3.2 On-site Waste Diversion</b>	27.85%	28.14%	+0.29%
<b>3.3 Supply Chain Influence</b>	27.30%	30.51%	+3.21%

- **reliable, comparable data about consumption, recycling and recovery is unavailable**
  - While the UPM NEPM requires States and Territories to ensure that they are able to collect certain information set out in the UPM NEPM from liable brand owners and local governments (or their agents) and ‘adopt a common approach to interpretation of data gathered’, this has not occurred in practice.
  - The NEPC annual report noted that while local governments report collected data on the composition of kerbside recycling waste, ‘the amount and type of data collected in each jurisdiction varies and, therefore, no direct comparison between jurisdictions can be made’.<sup>10</sup>
  - While States and Territories may also request data from liable brand owners, this has not routinely occurred and there are no agreed data protocols.
  - The statistics used in this Consultation Paper (relating to, annual packaging consumption and recycling) were provided by APCO and are estimates that draw on a range of information sources including, some government data, national surveys of participants in the packaging chain and audits of packaging component weights.<sup>11</sup>
  - No comparable data is available for the period prior to 2017-18.
  
- **there is no available data regarding overall compliance with the UPM NEPM and the Covenant**
  - There are two types of non-compliance under the UPM NEPM and the Covenant:
    - Non-compliance by liable parties that fail to either become signatories to the Covenant or meet State or Territory requirements (i.e. free riders)
    - Non-compliance by signatories with their obligations under the Covenant.
  - APCO has provided information to State and Territory governments on liable parties potentially falling into each of these two categories of non-compliance, including a list of 1,919 potentially liable non-signatories following a brand audit in 2018, and a total of 113 withdrawn signatories referred for non-compliance over the past three years.

<sup>10</sup> National Environment Protection Council, Annual Report 2018-19, p. 46.

<sup>11</sup> Australian Packaging Covenant Organisation (APCO), *Consumption & Recycling Data – 2017-18 Baseline data*, December 2019; Australian Packaging Covenant Organisation Ltd. (APCO), *Australian Packaging Consumption and Recycling Data 2018-19*, January 2021.

- However, based on the last four published annual reports for NEPC, there have been no reported compliance actions, investigations or complaints from States and Territories under the UPM NEPM.<sup>12</sup> This does not indicate an absence of non-compliance from liable brand owners, but an absence of compliance and enforcement action by States and Territories.

## Liable brand owners

The obligations described in the UPM NEPM are intended to apply to brand owners with an annual turnover of \$5 million or greater. Brand owners with annual revenue of under \$5 million in Australia are exempt from the UPM NEPM obligations.<sup>13</sup>

There are four main issues with respect to businesses intended to be captured by the UPM NEPM arrangement:

- **the definition of ‘brand owner’ differs between jurisdictions, creating complexity for businesses operating across Australia.** For example:
  - In South Australia, the suppliers of plastic bags are included as brand owners (where it would otherwise only be the importer, manufacturer, or retailer under the UPM NEPM).
  - In New South Wales, a brand owner is a ‘brand owner of products’, which more broadly includes a business that owns the ‘product name’ (which includes a trade mark, brand name or trade name). The definition does not cover importers or manufacturers of plastic bags (as per the UPM NEPM) but rather, specifies ‘retailers’ as being solely responsible for this type of packaging.
  - Victoria, Queensland, the Australian Capital Territory and Tasmania apply the definition as set out in the UPM NEPM.
- **a brand owner is only liable if it meets the \$5 million threshold, however, stakeholders report a lack of clarity regarding the operation of the threshold**
  - There appears to be some confusion about how the \$5 million threshold applies. Stakeholders have noted slightly different definitions in different State and Territory legislation (referring variously to annual revenue, turnover or value of annual sales). Some have also noted the stated intent of the UPM NEPM (‘it is not the intention that enforceable obligations will be placed on brand owners that do not significantly contribute to the waste stream’) and consider that the threshold should apply in respect of the value of packaging waste rather than turnover.
  - In its response to questions posed by the Senate Environment and Communications Legislation Committee inquiry into the *Recycling and Waste Reduction Bill 2020*, APCO noted that ‘some liable parties have had difficulty establishing whether they are brand

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<sup>12</sup> National Environment Protection Council, *Annual Report 2018-19*, p. 46; National Environment Protection Council, *Annual Report 2017-18*, p. 46; National Environment Protection Council, *Annual Report 2016-17*, p. 47; National Environment Protection Council, *Annual Report 2015-16*, p. 38.

<sup>13</sup> [National Environment Protection \(Used Packaging Materials\) Measure 2011 – Application thresholds](#), 23 June 2006.

owners as defined in the UPM NEPM, and how the concept of ‘annual turnover’ applies to their business’.<sup>14</sup>

- **the total number of brand owners captured by the UPM NEPM arrangement is not fully understood**
  - Through the 2018 brand owner audit,<sup>15</sup> APCO identified approximately 30,000 businesses with an annual turnover of \$5 million or more. This was narrowed to 5,106 businesses using ANZSIC codes (and filtering to remove, for example, brand owner signatories, business related to those and also businesses that had ceased to trade). Of these businesses, 569 became brand owner signatories and 1,919 were referred to the States and Territories as potentially liable under the UPM NEPM.
  - While this brand owner audit provided an indication of the potential number of liable brand owners, the actual number is not known.
- **some brand owners are unaware of their liability under the UPM NEPM arrangement**
  - Stakeholders, through a range of different forums, have expressed concerns that the co-regulatory arrangement is not well known to many brand owners.
  - Through behavioural analysis conducted by the Department, interviewed non-signatory businesses reported that they ‘knew of the Covenant but had little or no understanding of the UPM NEPM’, their liability or the obligations it entailed.<sup>16</sup>

## Obligations of liable brand owners

The obligations of liable brand owners differ depending on whether the brand owner is a signatory to the Covenant or is instead choosing to meet the obligations described in State or Territory legislation or policy.

While this offers choice for liable brand owners, it also creates some confusion and challenges, particularly for those businesses operating across borders.

Some of the issues that have been identified by stakeholders include:

- **different obligations and terminology in different legislation and key documents**
  - Different, but related and interconnected terms, are used across the UPM NEPM arrangement creating challenges for liable brand owners in understanding the scope of their obligations.
  - For example:
    - key terms such as ‘recycle, reuse and recovery’ are used differently across the Covenant and UPM NEPM, creating confusion about whether the recovery and re-use of packaging

<sup>14</sup> APCO documents submitted to Senate Environment and Communications Legislation Committee inquiry into the Recycling and Waste Reduction Bill 2020, ‘Answers to questions taken on notice at public hearing on 18 September 2020’.

<sup>15</sup> Brand owner audits were not conducted in 2019 or 2020 given concerns around State and Territory resources to accommodate the number of identified possible liable brand owners. The next brand owner audit is scheduled for early 2021.

<sup>16</sup> Behavioural analysis, *Business decisions about signing up to the Australian Packaging Covenant*, May 2020.

are within the scope of the Covenant, although they are explicitly within the scope of the UPM NEPM<sup>17</sup>

- liable brand owner obligations are expressed differently in different jurisdictions including in relation to matters such as waste action plans, records and reporting.
- **there is not always a strong understanding of key terms that determine brand owner obligations**
  - Liable brand owner obligations are linked to the concept of ‘consumer packaging’ in the UPM NEPM.
  - While the definition of ‘consumer packaging’ has been largely picked up by jurisdictions (with some distinction in the use of terms such as ‘consumer products’ or ‘retail consumer products’) and is also a critical concept in the Covenant, stakeholders have expressed some uncertainty in the scope of the definition, the intended inclusion of business-to-business packaging and how the concept is interpreted by brand owners.
- **confusion for businesses operating in more than one jurisdiction or as a franchisee**
  - States and Territories have not adopted a consistent approach to franchisees, such that there is a lack of clarity regarding whether each franchisee is required to separately report to States and Territories (and provide action plans) or whether the franchisor is responsible for reporting.
  - Similarly, the UPM NEPM intends that where liable brand owners operate across jurisdictions, the brand owner should report in the jurisdiction in which it has its registered office.<sup>18</sup> However, not all jurisdictions have reflected this in their legislation, such that there is confusion for brand owners operating across jurisdictions about whether they have met their obligations across all by reporting in one. Some therefore report in multiple jurisdictions in respect of the one business (creating unnecessary regulatory burden). While liable brand owners could avoid this by becoming a signatory to the Covenant, some may not wish to do this for a range of reasons.
- **concern that the complexity of the co-regulatory arrangement and the burden created by some of the obligations may discourage small and medium sized business from participating**
  - Some businesses have noted that obligations under the UPM NEPM arrangement can be experienced as burdensome and time consuming<sup>19</sup>, particularly for those SMEs that make a smaller contribution to total packaging waste.
  - For large businesses, or those with customers who highly value sustainable packaging or those exposed to international supply chains and regulation (where there is a greater expectation of packaging sustainability), significant internal resources are dedicated to packaging design, efficient use of resources and resource recovery. However, for smaller businesses or those less motivated around sustainable packaging, the requirements of the arrangement may appear daunting and the reporting obligations onerous.

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<sup>17</sup> APCO documents submitted to Senate Environment and Communications Legislation Committee inquiry into the Recycling and Waste Reduction Bill 2020, ‘Answers to questions taken on notice at public hearing on 18 September 2020’.

<sup>18</sup> Clause 16(5), *National Environment Protection (Used Packaging Materials) Measure 2011*. While this clause cross-references clause 17, the substance of the clause appears to relate to the obligations created in clause 16 with respect to record keeping and reporting by brand owners.

<sup>19</sup> Behavioural analysis, *Business decisions about signing up to the Australian Packaging Covenant*, May 2020.

- For this reason, some businesses may choose not to become signatories to the Covenant. As discussed below, there is little consequence for these businesses if there is limited monitoring and enforcement under State and Territory UPM NEPM arrangements.
- **a lack of clarity regarding exemptions from the UPM NEPM obligations**
  - Under the co-regulatory arrangement, a liable brand owner may be exempt from the obligations described in the State and Territory legislation if the relevant jurisdiction is satisfied that arrangements exist for the industry or industry sector that produce equivalent outcomes to those achieved through the Covenant.<sup>20</sup> This provides flexibility for industry and enables liable brand owners to instead meet equivalent industry-specific requirements.
  - However, most States and Territories do not indicate how an exemption can be sought or the criteria for approval, which causes uncertainty about how to apply for an exemption, whether an exemption granted by one jurisdiction is applicable in another, whether their internal voluntary sustainability programs are equivalent to what is required under the Covenant and whether all businesses will be consistently judged on what is an ‘equivalent outcome’.
  - Where a liable brand owner has multiple forms of packaging, there can also be a lack of clarity regarding whether exemptions apply to all packaging generated by that business or only certain types of packaging. This is particularly relevant for businesses with diverse interests and varied packaging.
  - Where liable brand owners sought exemptions based on actions focused on one part of the supply chain, such as participation in an end-of-pipe recycling, it is also unclear how the other obligations of Covenant signatories would apply.
- **some important packaging initiatives are available to brand owner signatories only**
  - The Australian Recycling Label (ARL) is an on pack label system for Australia and New Zealand underpinned by the Packaging Recyclability Evaluation Portal (PREP) tool. It helps consumers better understand which bin the packaging items should go into so that end-of-life packaging can be recycled more effectively. It also assists businesses to design packaging that is recyclable at end-of-life. The program aims to increase recycling and recovery rates, contribute to cleaner recycling streams and reduce waste going to landfill.
  - However, the ARL is only available to brand owner signatories. It is not available to liable brand owners choosing to comply with State and Territory arrangements rather than becoming a signatory to the Covenant. This limits the uptake of the ARL.

## Monitoring, enforcement and ‘free riders’

State and Territory governments, as well as stakeholders more broadly, have acknowledged that to date there has not been a focus on monitoring brand owner compliance with State and Territory legislation implementing the UPM NEPM. There are a number of reasons for this including competing priorities and resource constraints.

APCO undertakes some non-compliance action (including through the issuing of show cause notices and non-compliance notices), however, ultimately APCO’s action can only result in the revocation of membership and referral to the relevant State and Territory for action. Referral to the

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<sup>20</sup> Clause 11, *National Environment Protection (Used Packaging Materials) Measure 2011*.



jurisdictions has occurred 113 times over the past three years.<sup>21</sup> While administrative action has been undertaken in some jurisdictions, no formal enforcement action (such as the imposition of penalties) has been reported by jurisdictions.

There are two key issues associated with limited (or no) monitoring and enforcement of the UPM NEPM arrangement:

- **there is a perception that compliance with the UPM NEPM arrangement is voluntary**
  - While compliance with State-based legislation that gives effect to the UPM NEPM is mandatory (and operates as the ‘regulatory safety net’<sup>22</sup>), brand owners can elect to instead participate in the Covenant.
  - Some brand owners interviewed under the Department’s behavioural analysis study stated that it appeared to them that participation with the Covenant was mandatory and that compliance with the jurisdictional arrangements could be elective.<sup>23</sup> Others have little awareness that the UPM NEPM, as implemented by States and Territories, is mandatory and that there are penalties for non-compliance. This is in part due to a lack of promotion of the arrangement, confusion about how the co-regulatory arrangement operates, as well as limited monitoring and enforcement.
  
- **failure to enforce the UPM NEPM can undermine the effectiveness of the Covenant by reducing incentives for participation and increasing the likelihood of free riders**
  - The co-regulatory arrangement is meant to ensure that free riders do not gain a competitive or unfair advantage over brand owner signatories<sup>24</sup> (in that free riders avoid the need to invest in resources and mechanisms to meet the requirements).
  - The NEPC Act Review identified that ‘free riders benefit from the NEPC endorsed and industry led regulation associated with the Covenant, while not formally joining and paying for the benefit’.<sup>25</sup>
  - Concerns regarding identification of liable brand owners, limited monitoring and failure to take enforcement action against those who are non-compliant, can all undermine confidence in the arrangement and the incentive for compliance.

### Consultation questions

Chapter 3 describes a range of issues with the UPM NEPM and the Covenant on which we seek your comments.

1. How should the effectiveness of the UPM NEPM arrangement be measured?
2. Is there clarity regarding who are liable brand owners? If not, what are the impacts of this?
3. Are the obligations of liable brand owners well understood and appropriate? If not, what are the impacts of this?

<sup>21</sup> Data provided by APCO; 38 referrals between 2017–18, 24 in the 2018-19 period and 51 in the 2019-20 period.

<sup>22</sup> Australian Packaging Covenant, p. 4.

<sup>23</sup> Behavioural analysis, *Business decisions about signing up to the Australian Packaging Covenant*, May 2020.

<sup>24</sup> See Australian Packaging Covenant, p. 15.

<sup>25</sup> Commonwealth of Australia, Terry Bailey (Independent Reviewer), *Independent review of the National Environment Protection Council Acts*, July 2019, p. 23.

4. What are some of the issues associated with monitoring, enforcement and free riders? What are the impacts of this?
5. What other issues have you identified or experienced with the UPM NEPM and/or the Covenant?
6. What is the impact of any issues on your business / operations / broader achievement of Australia's waste and environmental goals?

## Chapter 4 – Opportunities for reform

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### Objectives and reform considerations

At a high level, the objectives of any future reform are to reduce the environmental impact of packaging by driving:

- a decrease in packaging waste (waste avoidance)
- an increase in:
  - the reusability, recyclability and composability of packaging
  - the recycled content in packaging
  - the recycling, recovery and reuse of used packaging
- phase out of problematic and unnecessary single use plastic packaging.

Any reforms to the UPM NEPM arrangement (including any alternative arrangements) must support the achievement of these overarching objectives.

In developing options for reform, we recognise that:

- The waste system is a complex one and that the achievement of overarching goals and outcomes depends on the **collective impact of many** across the packaging chain (through package design, collection, processing, re-use). Any reform has to **drive industry collaboration** (across all business sizes, type and industries) to work together to achieve the positive environmental outcomes sought.
- The UPM NEPM arrangement is one of many environmental programs and initiatives aimed at the reduction of waste, and that changes to the UPM NEPM arrangement should support an **end-to-end system** and **mutually reinforce other initiatives** with common objectives.
- There are some **strengths associated with the UPM NEPM arrangement** and these strengths should continue to be leveraged. For example:
  - the UPM NEPM arrangement represents a collaborative approach providing a platform for parties to work together to achieve behaviour change. The UPM NEPM arrangement facilitates shared responsibility for packaging by describing roles for jurisdictions, local governments and liable brand owners to collectively achieve the environment protection goal
  - the UPM NEPM arrangement engages all jurisdictions (which is critical for a national, coordinated environmental response) and strong inter-governmental cooperation is facilitated by the GOG
  - a national body exists (APCO) that offers an opportunity for national co-ordination of effort (be it regulatory or co-regulatory). Significant changes have been made within APCO over the past few years, that have effectively positioned it to play a key role in implementing any reform agenda.

- There are some **significant limitations to the current UPM NEPM arrangement**, as described in the previous Chapter. Despite being in operation for over 20 years (in its current form for 9 years), key elements of the UPM NEPM arrangement have not been implemented or have not been implemented effectively. This has limited the effectiveness of the UPM NEPM arrangement and undermines confidence in the UPM NEPM arrangement moving forward.
  - A number of challenges identified in relation to the UPM NEPM arrangement are also consistent with the challenges recognised internationally with implementing regulatory frameworks for packaging waste. For example, in a recent review<sup>26</sup> of the European Union Directive on Packaging and Packaging Waste (EU Directive 94/62/EC) similar limitations were recognised.
- Any changes to the UPM NEPM arrangement (including any alternative arrangements) should be focused on how best to drive **positive behavioural change** (amongst both brand owners and other participants) while **minimising unnecessary regulatory burden** and promoting opportunities for **packaging innovation**.
  - Different businesses will have different motivations (with many motivated by consumer expectations, by economic impact and ‘doing the right thing’). Different businesses will also experience regulatory burden differently (with the disproportionate impact on small to medium enterprises (SMEs) noted by stakeholders). This may mean that different approaches are best utilised for different participants in the packaging chain, while still ensuring that the system is readily implementable and that any regulation is efficient and effective.
- Governments have a **range of levers** that they can utilise to influence behaviour (including the behaviour of brand owners), only one of which is regulation or the mandating of requirements.
  - Where regulation or co-regulation is utilised it is recognised that in a federated system, national uniformity of regulation may not be possible. However, a lack of national consistency can also undermine the objectives and the outcomes.
  - Critical for this Review (and to inform future reform options) is identifying where a lack of consistency has adversely impacted capacity to achieve outcomes and where greater consistency may strengthen engagement, participation and continuous improvement by brand owners and other participants.

## Possible areas of reform

A number of stakeholders have sought advice as to whether the Review will be recommending that the UPM NEPM be ‘mandated’. Others have queried whether the UPM NEPM should be retained or replaced with alternative regulatory or co-regulatory arrangements. Before considering this, we are first seeking to understand the existing limitations of the UPM NEPM (as discussed in the previous Chapter) and also the outcomes sought to be achieved through any changes. It is only once there is clarity regarding the expectations of liable brand owners (and the overarching outcomes sought to be achieved), that it is reasonable to consider the best way for governments to articulate these expectations and collectively drive the outcomes sought (be it through legislative or other changes).

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<sup>26</sup> See European Commission, *Effectiveness of the Essential Requirements for Packaging and Packaging Waste and Proposals for Reinforcement – Final Report and Appendices*, February 2020.

Noting the issues described in the previous Chapter, some key areas of reform identified to date include the following:

- 1. Better articulating the expectations of brand owners including performance measures for any used packaging measure**
  - Performance measures could be described collectively and for individual liable brand owners. These could build on the measures and resources developed by APCO. For example, by reference to the improvements expected to be seen against the PS Framework and the milestones set out in the 2025 Monitoring Framework.
- 2. Clarifying who would be liable brand owners under any future used packaging measure**
  - There are a number of different ways that this could be done, depending on the outcome sought. For example, some stakeholders have suggested that the threshold to establish liability should be expressed by reference to total turnover, while others have suggested that the threshold should be by reference to the value or amount of packaging waste.
  - If the threshold were to be linked to the value or amount of packaging waste, this would require all brand owners to first determine their packaging metrics and to demonstrate whether the threshold applies to them.
  - There are advantages to continuing with a threshold that is linked to total turnover as it is easier to calculate in the usual course of a business and relies on easily accessible information to identify potentially liable brand owners.
  - Where the threshold is understood to relate to total turnover, some stakeholders have also suggested lifting the threshold from \$5 million to \$20 million or \$50 million on the basis that increasing the threshold would capture fewer smaller businesses that may make a smaller contribution to packaging waste.
  - Other stakeholders have suggested that rather than changing the threshold, there could be different obligations for businesses of different size and type (discussed below).
- 3. Aligning the obligations of all liable brand owners**
  - Noting current inconsistencies between obligations of liable brand owners under State and Territory UPM NEPMs and under the Covenant (and the lack of monitoring of brand owners operating outside the Covenant), one option to strengthen the obligations of liable brand owners that are not signatories to the Covenant would be to align obligations with those of brand owner signatories under the Covenant. This would mean that the obligations described under the Covenant would apply to all liable brand owners. All liable brand owners could then be accountable to one centralised body (such as APCO).
  - The key advantages of this approach would be one organisation overseeing all liable brand owners (rather than nine different bodies as is currently the case). This would remove the free-rider effect, likely improve regulatory consistency and drive national compliance, and would mean that data collection and reporting could be undertaken at a national level.
- 4. Differentiating liable brand owner obligations based on business size, role and/or type (including to support SMEs)**
  - Consideration could be given to how the obligations could be adjusted and regulatory burden reduced for liable brand owners that are SMEs particularly those that make a

smaller contribution to the total packaging waste. For example, consideration could be given to:

- making annual reports easier to complete by differently sourced data to relieve some of the reporting burden on SMEs. This could build on steps already being taken by APCO to streamline annual reporting
  - facilitating opportunities for SMEs to partner with other businesses regarding packaging design
  - narrowing the criteria against which SMEs are required to report.
- Another option would be to differentiate obligations based on the role a brand owner plays in the supply chain (including retailers, importers, suppliers, etc) including the application of certain obligations (like compliance with the SPGs (or an equivalent)) differentiated to the extent they are applicable for certain industry sectors.

## **5. Centralising consideration of exemptions**

- The availability of exemptions is a potential strength of the co-regulatory arrangement in that, if properly designed and administered, it would permit liable brand owners to demonstrate how they are able to achieve equivalent outcomes that reflect the circumstances of the business (including the role the brand owner plays in the supply chain).
- The current issues with the implementation of exemptions (as discussed in the previous Chapter) could be addressed by APCO considering all exemptions (in line with the role of overseeing all liable brand owners as discussed above).
- Another option could be to recognise the role of product stewardship and alternative product stewardship arrangements such as a scheme established under the *Recycling and Waste Reduction Act 2020*. This could mean that brand owners could apply to be voluntarily accredited in relation to packaging as a way of demonstrating equivalent, or partially equivalent, outcomes. It would be important, however, to ensure that a whole-of-supply chain focus was maintained and that a collective impact approach was supported including through co-ordination of measures, governance and accountability.

## **6. Strengthening monitoring and enforcement and the tools available to address non-compliance**

- Many stakeholders have expressed the desire for improved compliance monitoring and enforcement of the obligations, with a number suggesting there may be benefits to a more centralised approach.
- There are a number of possible options including: States and Territories dedicating more resources to monitoring and enforcement; or tasking APCO with an enhanced role that involves either greater tools to address non-compliance (in addition to the compliance processes available under the Covenant); or acting on behalf of States and Territories, and/or the Commonwealth.

## 7. Broadening labelling (ARL) requirements

- In order to promote better recovery of packaging, there are various options for improving consumer awareness of how to properly dispose of recyclable material and driving consumer behaviour towards packaging that can be recycled.
- Options include extending the availability of the ARL, particularly where APCO takes on a national role in relation to liable brand owners or otherwise requiring information on packaging about recyclability and disposal as part of obligations.

## 8. Enhancing data collection and reporting

- While this could be achieved by centralising oversight of liable brand owners and requiring all liable brand owners to report to APCO (as discussed above), there are also other ways that this could be supported including, for example:
  - Creating a national data protocol. In order to address the limitations in data collection, a national data protocol with consistent data metrics could be developed and gathered in a centralised manner. These metrics could apply to liable brand owners under both the State and Territory arrangements and the Covenant in order to enable comparisons between the two co-regulatory arms. This may include simplifying local government reporting by requiring third parties that hold the information to supply this for the benefit of the UPM NEPM rather than from local governments.

## 9. Ensuring a used packaging measure forms part of a broader integrated strategy focused on a circular economy and end-to-end waste management

- As noted above, while the UPM NEPM arrangement focuses on liable brand owners (and their obligations), there are many participants in the packaging chain. Successful outcomes will only be achieved with the collaboration of many and coordination of efforts. This means applying a whole of supply chain lens to any reform.
- Noting stakeholder views that any used packaging measure should ensure key participants in the packaging chain are captured, particularly where goals and obligations are beyond the scope of a brand owner's influence, consideration could be given to whether the reach of any used packaging measure should go further than brand owners. Particularly where other participants in the packaging supply chain with significant influence on packaging design, use and recovery could contribute to the used packaging goals and objectives.
- Over the course of the Review, a number of stakeholders have commented on the valuable role played by APCO in coordinating efforts, supporting industry and driving a whole of supply chain focus.

## Impacts of reform and implementation

Different reform options have different impacts for stakeholders, including Government, APCO, brand owners and consumers.

Subject to stakeholder views on the areas for reform, further work would need to be undertaken to determine the preferred mechanism for implementing reform of used packaging regulation, whether under the UPM NEPM arrangement or through an alternative arrangement.

For example, there are a range of ways that the areas of reform described above could be implemented using the existing co-regulatory framework. If minimal structural change to the

framework is sought, then the UPM NEPM arrangement could be maintained with improvements to clarify and align the goals of the arrangement and the obligations of liable parties, and to better identify who is (and who should be) liable under the arrangement.

This could be achieved by amending the UPM NEPM to require jurisdictions to oblige liable parties to meet the obligations set out in the Covenant (requiring changes to jurisdictions' legislation to give effect to the change), or the requirements could be mandated through Commonwealth legislation (which could also be with the agreement of all States and Territories). To further streamline instruments that support the arrangement, obligations under State and Territory UPM NEPMs and the Covenant could be consolidated in one instrument with application to all liable parties.

In addition, responsibility for administering and regulating the co-regulatory arrangement could be placed in a single body with national oversight, such as APCO. If this approach were preferred, consideration would need to be given to re-characterising APCO (less as an industry body providing services to members and more as a co-regulatory body performing functions on behalf of governments, in respect of all liable parties).

Alternatively, and further to identifying and understanding the objectives and limitations of the UPM NEPM arrangement, a new mechanism for regulating used packaging could be adopted. Options (and variations on options) could include:

- expanding the scope of who is liable under the used packaging measure to strengthen regulation of those participants in the packaging supply chain that can influence outcomes
- removing the 'opt-in' element of the co-regulatory arrangement to regulate all liable parties under the one instrument (with opportunity to implement the measure nationally, or through mirror legislation across jurisdictions)
- mandating that a single body regulate all liable parties under the used packaging measure. A single body with national oversight could perform this function whether the measure is implemented at a Commonwealth level or through State and Territory legislation
- creating a used packaging scheme under Commonwealth product stewardship legislation.

Subject to stakeholder views on the issues to be addressed and the areas for reform to resolve those issues, further consideration would need to be given to:

- how to implement any change, including any changes needed to legislation at a Commonwealth level and across jurisdictions
- the sequencing of implementation, and the possibility of 'phasing in' obligations to support the transition to a reformed regulatory arrangement
- any costs associated with the reform
- the supporting infrastructure needed to operationalise the reforms (for example, in relation to data protocols, reporting platforms and operational details to support the ongoing role of jurisdictions under a harmonised arrangement)
- the mechanisms and resources for monitoring and enforcing the obligations of liable brand owners/parties
- accountability for monitoring and reporting on the success of the arrangement.



### **Consultation questions**

Chapter 4 describes possible areas of reform on which we seek your comments.

- 7.** Are the broad considerations appropriate for guiding areas of reform?
- 8.** Are there other key considerations that should guide areas of reform?
- 9.** For each of the broad areas of reform numbered 1 – 9 above, which do you support/not support for further consideration and why?
- 10.** Are there other key areas of reform to support the achievement of used packaging goals?
- 11.** Are there alternative arrangements or mechanisms that could better support the achievement of used packaging goals?

## **Chapter 5 – Next steps**

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The Review will closely consider submissions made through the consultation process. Where further information is needed, or where we seek to better understand issues raised or possible areas for reform identified by stakeholders, stakeholders may be contacted directly.

Following consideration of all the input, a report will be prepared. The final Review report will be made publicly available following consideration by governments.

## Acronyms and terms used in this paper

The following table describes the meaning of acronyms used for the purposes of this paper.

Term	Meaning for the purposes of this Review
<b>ANZSIC</b>	Australian and New Zealand Standard Industrial Classification
<b>APCO</b>	Australian Packaging Covenant Organisation Ltd
<b>ARL</b>	Australasian Recycling Label
<b>ART</b>	Annual Reporting Tool
<b>Brand owner</b>	Means: <ul style="list-style-type: none"> <li>• a person who is the owner or licensee in Australia of a trademark under which a product is sold or otherwise distributed in Australia, whether the trademark is registered or not, or</li> <li>• a person who is the franchisee in Australia of a business arrangement which allows an individual, partnership or company to operate under the name of an already established business, or</li> <li>• in the case of a product which has been imported, the first person to sell that product in Australia, or</li> <li>• in respect of in-store packaging, the supplier of the packaging to the retailer, or</li> <li>• in respect of plastic bags, the importer or manufacturer of the plastic bags or the retailer who provides the plastic bag to the consumer for the transportation of products purchased by the consumer at the point of sale</li> </ul>
<b>Brand owner signatory</b>	A liable brand owner that is a signatory to the Covenant
<b>Covenant</b>	Australian Packaging Covenant
<b>EPA</b>	Environment Protection Authority
<b>Free rider</b>	Brand owner or business that is a participant in the packaging chain and is not a signatory to the Covenant, and is not producing equivalent outcomes to those achieved through the Covenant. For clarity, a free rider is a business that is a brand owner that, although required to, is not a signatory to the Covenant nor complied with the UPM NEPM.
<b>GOG</b>	Government Officials Group
<b>Liable brand owner</b>	A brand owner that has obligations under the UPM NEPM arrangement
<b>NPTs</b>	National Packaging Targets 2025
<b>NEPC</b>	National Environment Protection Council
<b>NEPC Act</b>	<i>National Environment Protection Council Act 1994</i>
<b>POM</b>	Placed on the market
<b>PS Framework</b>	Packaging Sustainability Framework
<b>SMEs</b>	Small to medium enterprises
<b>SPGs</b>	Sustainable Packaging Guidelines
<b>UPM NEPM</b>	<i>National Environment Protection (Used Packaging Materials) Measure 2011</i>
<b>UPM NEPM arrangement</b>	Includes the Covenant and the legislation implemented in each participating State and Territory to incorporate the UPM NEPM