

# Review of Energy Efficiency Regulations

Report for the Energy Efficiency and Conservation Authority

29 June 2019



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## List of abbreviations and acronyms

Authority	Energy Efficiency and Conservation Authority
AS/NZ	Australian and New Zealand
COAG	Council of Australian Governments
E3	Equipment Energy Efficiency
EEC Act	Energy Efficiency and Conservation Act 2000
GEMS	Greenhouse and Energy Minimum Standards
GEMS Act	Greenhouse and Energy Minimum Standards Act 2012
MBIE	Ministry of Business, Innovation and Employment
MEPS	Minimum Energy Performance Standards
Minister	Minister responsible for the administration of the EEC Act (currently the Minister of Energy and Resources)
Regulations	Energy Efficiency (Energy Using Products) Regulations 2002
TTMRA	Trans-Tasman Mutual Recognition Arrangement

## 1. EXECUTIVE SUMMARY

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The Regulations came into effect on 1 April 2002, creating a national framework for regulating the energy efficiency of appliances and equipment sold in New Zealand.

The Regulations have provided a nationally consistent approach to product energy efficiency and have been effective at reducing energy consumption, removing poor performing products from the market, and assisting consumers to make more informed choices when purchasing energy-using products. However, the Regulations have not been reviewed since they were first introduced, and, as a result, have not kept pace with market and technology changes.

For the Regulations to continue to fulfil their purpose and reduce the costs of living for New Zealand households and businesses, it is essential they are reviewed to ensure they remain fit-for-purpose. It is also important that the New Zealand regulatory regime is broadly aligned with the equivalent legislation in Australia, which was recently reviewed.

For these reasons, the Authority has conducted a review of the effectiveness of the regulatory regime to identify potential changes to address issues that are impacting on the successful operation of the regime, and to investigate alternative approaches to promote energy efficiency and conservation.

The review has been informed by extensive engagement with technical experts from the Authority, representatives from industry and other agencies responsible for product regulation, Australian officials, and by researching energy efficiency regimes in overseas jurisdictions as well as existing domestic frameworks for product regulations.

This report provides the review's findings and recommendations on the effectiveness of the Regulations.

A range of opportunities have been identified to enhance the regulatory regime for energy efficiency and support the achievement of New Zealand's future energy efficiency and emissions reductions goals. These opportunities can be separated into three broad groups based on their ease of implementation.

### *Amending the Regulations (approximately 12 to 18 months)*

The **first group** covers changes to improve the effectiveness of the Regulations and make them fit-for-purpose either by modifying and modernising existing clauses or inserting new ones.

These changes focus on:

- Ensuring the registration and information requirements are better aligned with the E3 registration scheme
- Extending the coverage of the Regulations to respond to market and technological changes, such as dealing with products purchased for 'commercial use', regulating online sales, and enabling the Authority to regulate 'other matters' contingent to energy performance
- Making the information that is currently included in the product standards more accessible.

Since the Authority would need to consult with affected groups and obtain policy decisions from Cabinet, the regulation-making process would likely take between 12 to 18 months.

### *Expanding the regulation-making powers (approximately 2 years)*

The **second group** covers the opportunities that could be realised if changes were first made to the regulation-making powers in section 36 of the EEC Act.

The regulation-making powers are focused on prescribing MEPS and labelling requirements for specific energy-using products. They do not appear to allow regulations to be made regarding the monitoring and inspection activities of the Authority. This is a significant gap in the regulatory regime. The regulation-making powers could be expanded to allow regulations to be introduced regarding these activities.

This change does not appear to be controversial and therefore could arguably be progressed by way of an omnibus bill (e.g. a Statutes Amendment Bill). In such a case, it would take approximately two years to progress the amendment to section 36 of the EEC Act through the Parliamentary process and make the necessary amendments to the Regulations.

*Legislative change (approximately 2 to 3 years)*

The **third group** contains issues that would need to be addressed in primary legislation and require an amendment to the EEC Act.

These changes relate to:

- Extending the Authority's powers to investigate suspected cases of non-compliance and gather material to assist potential prosecutions
- Expanding the scope of enforcement tools available to the Authority to ensure a proportionate response is made to address cases of non-compliance
- Enabling standards to be replaced without amending the Regulations (which would reduce the burden on the Cabinet decision-making process).

Given their nature, these amendments would need to be progressed by way of a piece of stand-alone legislation; so the amendment process is likely to take two to three years.

*Strategic issues*

There is a limit to what the Regulations can deliver in terms of energy efficiency because the regime currently focuses on the regulation of stand-alone appliances and equipment. The review has identified some strategic areas that have the potential to increase energy savings and conservation. These include broadening the definition of a product class; applying a system-based approach to energy efficiency regulation; requiring the mandatory labelling of energy-conserving products; and prescribing specific emission performance standards for appliances and equipment.

The Authority may wish to consider the strategic focus of the regime and decide whether these emerging opportunities would positively impact the future efficacy of the regime, taking into account the partnership New Zealand has with Australia.

*Operational issues*

Some of the issues identified during the review could be resolved by making changes to the Authority's operational procedures. The Authority could also work more closely with other government agencies to support its compliance and enforcement activities.

## 2. INTRODUCTION

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### 2.1. Governing Legislation

#### 2.1.1 Energy Efficiency and Conservation Act 2000<sup>1</sup>

The EEC Act seeks to promote energy efficiency, energy conservation, and the use of renewable energy in New Zealand. The Act provides that the Minister is responsible for, among other things, promoting public awareness in New Zealand of the importance of energy efficiency and conservation. The Minister does this by providing information and advice, fostering education programmes, and promoting practices and technologies that advance energy efficiency, energy conservation, and the use of renewable energy.

The EEC Act enables the Government to develop regulations to implement MEPS and energy performance labelling for agreed product classes. The regulation-making powers are set out in section 36, which is set out in Appendix 1.

#### ***What are Minimum Energy Performance Standards and Energy Performance Labelling?***

MEPS and energy performance labelling are regulatory measures that seek to raise the average energy efficiency of appliances and equipment and remove inefficient models from the market.

MEPS require products to meet specified minimum energy performance criteria when tested under standard conditions. Energy performance labels provide consumers with information that enables them to compare the energy use of given products relative to others in their category. These measures are complementary, designed to address different barriers to energy efficiency. They result in reduced operating costs and contribute towards reducing New Zealand's energy consumption and associated greenhouse gas emissions.

MEPS and labelling programmes are the cornerstones of energy efficiency and climate change programmes in more than 80 countries, including New Zealand's key trading partners Australia, the United States, Japan, the European Union and Canada.



#### 2.1.2 Energy Efficiency (Energy Using Products) Regulations 2002<sup>2</sup>

The Regulations create a national framework for regulating the energy efficiency of appliances and equipment sold in New Zealand. They prescribe MEPS for certain energy-using products and specify labelling requirements for specific products. The key features of the regulatory regime are:

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<sup>1</sup> The EEC Act is available at <http://www.legislation.govt.nz/act/public/2000/0014/latest/DLM54948.html>

<sup>2</sup> The Regulations are available at: <http://www.legislation.govt.nz/regulation/public/2002/0009/latest/DLM108730.html>

- Products for sale or lease in New Zealand must be tested to determine their energy performance according to New Zealand or joint AS/NZ standards
- Information showing testing results must be lodged with the Authority before a product can be sold in New Zealand, unless the product is already registered in Australia
- Products subject to energy labelling must always show the correct label when they are made available for sale or lease
- Products subject to MEPS cannot be sold unless they comply with the relevant standards
- Second-hand products and limited production/import runs are exempt from some requirements.

The Regulations have provided a nationally consistent approach to product energy efficiency. Since their introduction, they have been effective at reducing energy consumption, removing poor performing products from the market, and assisting consumers make more informed choices when purchasing energy-using products. Around 72 million regulated products have been sold since the Regulations were introduced, resulting in a total of 42 PJ of energy savings, emissions reduction of 1.66 Mt CO<sub>2</sub>-e, and \$1.027 billion in national benefits to New Zealand.

### ***Equipment Energy Efficiency (E3) Programme***

The Regulations underpin the E3 Programme, which is a cross-jurisdictional programme through which the Australia Government, state and territorial governments, and the New Zealand Government collaborate to deliver a single, integrated programme on energy efficiency standards and labelling requirements for equipment and appliances.



Twenty-two products are now subject to MEPS while seven are subject to labelling requirements (three of which are not subject to MEPS, namely clothes washers, clothes dryers and dishwashers).

## **2.2. Purpose of the review**

A key aspect of improving energy efficiency standards for appliances and equipment is an effective legal and regulatory framework. The current regime was introduced to overcome various obstacles that impacted on the uptake of energy efficiency measures. These included unreliable and inconsistent information on the energy performance of products, price signals that did not reflect the actual cost of energy consumption, and a lack of incentives in the market to encourage the purchase of energy efficient products.

Since the Regulations were first introduced, there have been incremental changes to MEPS and labelling requirements. However, the Regulations themselves have not been reviewed. There is growing concern that they will become less effective, and in some places redundant, as industry continues to innovate and improvements are made to the energy efficiency of

products in response to technological advances, international regulation and changing consumer demands.

For the Regulations to continue to fulfil their purpose and reduce the costs of living for New Zealand households, it is essential they are reviewed to ensure they remain fit-for-purpose. They should also be future-proofed to ensure they keep pace with market and technology changes.

**Review of the GEMS Act**

Given that many New Zealand businesses also operate in Australia, it is also important that the New Zealand regime broadly aligns with Australian legislation.

The Australian Government has recently conducted an independent review of their equivalent legislation that supports their involvement under the E3 Programme, namely the GEMS Act. In some respects, New Zealand’s regulations already have limited application compared to Australia, which creates issues for our cooperation under the E3 Programme. For instance, the GEMS Act regulates products that a business may import directly into the country for their own commercial use. There is a risk that the New Zealand regime will fall further behind its Australian counterpart following the GEMS Act review, which will place New Zealand at risk of becoming a dumping ground for poor performing products.

It is also crucial that we maintain broad alignment with Australia to facilitate product trade and avoid breaching the TTMRA.

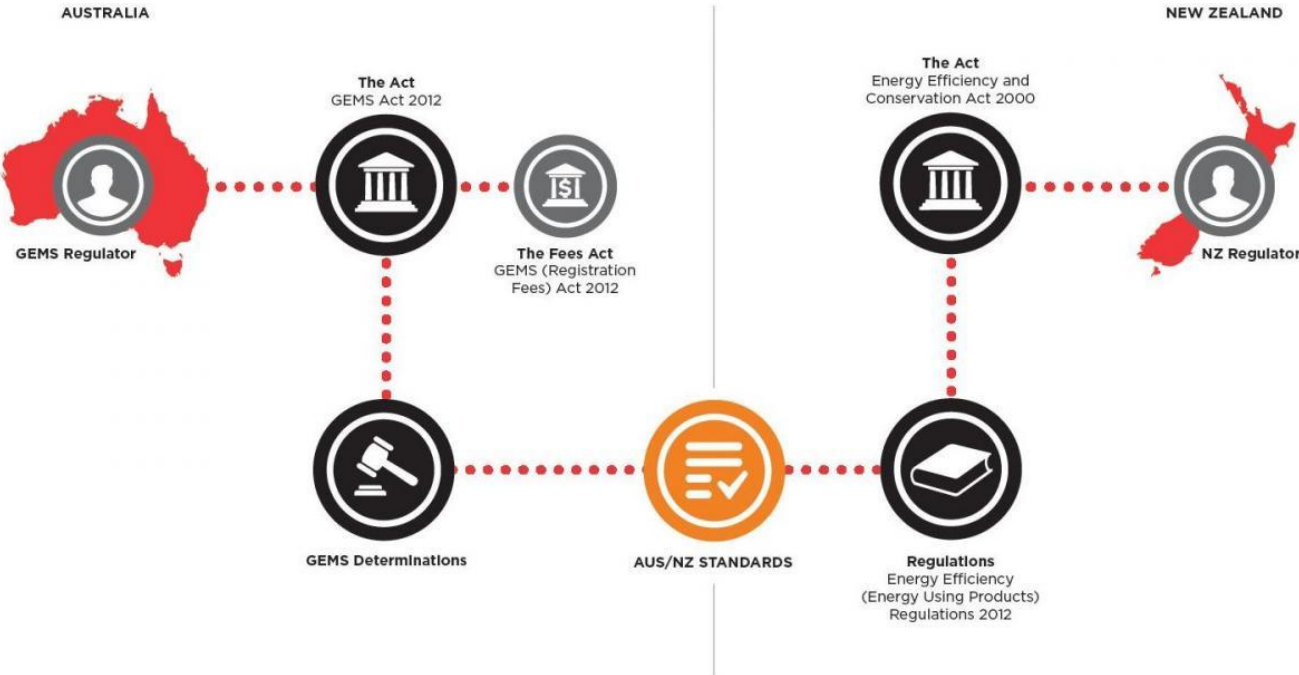


Image 1: Legislative regime for energy-efficiency in Australia and New Zealand

**2.3. Scope**

The review consists of two stages. **Stage one** involved an examination of the Regulations and the EEC Act (as far as it relates to the ability to make and administer regulations) to ensure the regulatory regime aligns with the Authority’s strategy and is compatible with Australian legislation. **Stage two** will consist of further analysis of agreed options and the publication and implementation of the recommendations, agreed to by the Authority and MBIE and subject to Ministerial approval.



This report summarises the results of **stage one** and identifies, evaluates and reports on possible changes to the regulatory regime, including whether there could be a staged implementation of the proposals.

## 2.4. Methodology

The review examines the effectiveness of the regulatory regime for energy efficiency and identifies potential changes to address those aspects that are hindering the successful operation of the regime.

These issues were identified following discussions with technical experts from the Authority and the GEMS policy team at the Australian Department of the Environment and Energy to understand how the regime works in practice. Emerging thinking was tested with representatives from industry and other agencies responsible for the regulation of energy-using products in New Zealand. Important contextual documents were reviewed along with comparable regulatory regimes outside New Zealand (namely Australia, Canada, Japan, the United Kingdom and the European Union) as well as the domestic frameworks for food, medicine, hazardous substances and other products.

After the issues were identified, a prioritisation exercise was conducted to look at whether the issues hindered the realisation of New Zealand's energy saving targets and renewable energy goals, and effective alignment with the E3 Programme. The prioritisation exercise also considered the regulatory burden on industry, the potential impacts for consumers, the integrity of the regime, and the Authority's ability to carry out its functions effectively.

## 2.5. Out-of-scope issues

The review is limited to looking at the Regulations and the regulation-making powers set out in section 36 of the EEC Act. A broader analysis of the EEC Act is out of scope, including the Energy Efficiency (Vehicle Fuel Economy Labelling) Regulations 2007.

The range of products subject to MEPS or labelling requirements is also beyond the scope of the review as well as the standards themselves.

### 3. OPPORTUNITIES TO IMPROVE THE OPERATION OF THE REGULATIONS

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There is a range of opportunities to enhance the regulatory regime for energy efficiency and support the achievement of New Zealand's future energy efficiency and emissions reductions goals. These opportunities can be separated into three broad groups based on their ease of implementation:

- Issues that can be addressed by the **amending the Regulations**
- Issues that could be resolved by **expanding the regulation-making powers**
- Issues that need to be **addressed through legislative change**

Grouping the recommendations in this way will ensure that more straightforward improvements can be realised sooner, although the exact implementation dates will depend on the complexity of specific provisions, availability of policy resource to develop the proposals fully, and other government priorities. All changes will require appropriate consultation with stakeholders.

During the prioritisation exercise (described in section 2.4 above), these opportunities were assessed as falling within the medium to high priority range. Issues considered to be of low priority are set out in Appendix 2. If the Authority decides to move forward with amending the regulatory regime, it may also wish to address these low priority issues.

#### 3.1. Issues that can be addressed by the amending the Regulations

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The regulation-making powers provide that regulations may be made to prescribe MEPS and labelling requiring for energy-using products; to require specified classes of persons to provide evidence that the relevant MEPS has been complied with; to prescribe how the product is to be tested or verified; to require information to be provided for statistical purposes; to prescribe offences for non-compliance with the regulations; and prescribe the amount of the fines that may be imposed.

These powers appear wide enough to enable the following changes to be made improve the effectiveness of the Regulations and make them fit-for-purpose, either by modifying and modernising existing clauses or inserting new ones.

##### 3.1.1 Better alignment with the E3 registration scheme

The Regulations require all regulated products sold or leased in New Zealand to comply with the relevant MEPS and labelling requirements. The importer or New Zealand manufacturer of a product must lodge summary information demonstrating compliance with the relevant standards with the Authority, unless the model is registered in Australia. The nature and format of the information the Authority requires is set out in the form prescribed in the relevant standards.

Traders are expected to have access to information about a regulated product. However, they have a defence if they did not know the energy performance characteristics of the product did not comply with the relevant standards and reasonably relied on testing information supplied by a laboratory or overseas manufacturer, which was subsequently found to be incorrect.

While these requirements are reasonably straightforward, several issues have arisen because some products are registered against the Australian standards (which allows the product to be sold in both Australia and New Zealand) while other products are registered for sale only in New Zealand. The existence of dual registration processes creates difficulties for industry and the Authority. There needs to be better alignment between the Regulations and the E3

registration scheme to provide clarity for industry and address perceived inequities between the two registration schemes.

### 3.1.1.1 Registering a product

**Issue:** The product registration process is not stipulated by the Regulations which is causing problems for the Authority and creating uncertainty for industry.

When the regulatory regime was developed, it was not envisioned that the Authority would run a register or receive applications for registrations. Instead, the Authority would receive and store information provided on a '*prescribed form*' (along with a copy of the test report for the product). The Authority would not approve applications nor endorse the way products are tested.

However, the E3 registration scheme (administered by Australia) allows traders selling regulated products in New Zealand to register those products and almost all prefer to do so. When traders go into the E3 registration system, they are asked whether they wish to register a product against the MEPS and labelling requirements in New Zealand or Australia. If they register against the New Zealand standards, the registration is referred to the Authority who assesses the information provided to see that it is complete. If any information is missing, the Authority will advise the traders accordingly, inviting them to resubmit the registration.

Although the way information is provided is different from the prescribed process (as traders do not submit information on the *prescribed form*), this practice is broadly consistent with the intent of the regulatory regime. Nonetheless, it has created issues for the administration of the regime as the process does not have the same features as its Australian counterpart. For instance, the Authority is unable to cancel a registration for non-compliance.

The Regulations could be amended to reflect the current practice. This would offer certainty to industry around the registration process, and provide the public with information about products that are available for sale in New Zealand. Registration is fundamentally important to the effectiveness of the regulatory regime as it is the first element in the broader compliance and enforcement process. Data collected through the registration process also underpins the Authority's wider work programme. Given the Authority is already accepting applications to register products to be sold in New Zealand, the regulatory burden on industry would not increase, and the implementation costs for the Authority would be minimal.

When developing the required amendments, the Authority would need to consider whether the registration process should include the following features.

#### (a) Registrant

Most products sold in New Zealand are manufactured overseas, primarily to reduce component costs. However, the registration process should only permit importers and New Zealand manufacturers to register a product. They are accountable if a product is found to be non-compliant, so they should be responsible for registering the product. This would be consistent with other domestic regimes governing product regulation.

#### (b) Registration of 2 or more models in the same family of products

The Regulations currently require traders to register each item in a product class. However, some manufacturers produce different items of the same model that have the same core

technical specifications and energy performance, but with minor cosmetic differences which do not affect performance (such as a different colour or left and right-opening doors).

The registration process should allow registrants to register two or more models in the same family of products on a single registration. This would reduce the regulatory burden on industry and assist the administration of the registration process. Traders should also be permitted to vary a registration to cover additional models of the same family of products.

#### **(c) Requirements of registrants**

The Regulations do not specify the information that needs to be provided to demonstrate compliance with the relevant MEPS and labelling requirements. This means the information provided is often incomplete, requiring the registrant to re-submit their registration application. Including more detail about the information that needs to accompany the registration would provide more certainty to industry, ensuring they are aware of their obligations, and support the Authority's compliance activities. The information could include (i) the contact details of the registrant; (ii) the model of the regulated product; (iii) the laboratory in which the product was tested; and (iv) information about the importation, manufacture and distribution of the product.

#### **(d) Fees**

Unlike Australia, the Authority does not have the legal authority to charge a fee for administering the registration process, which means the cost of this service needs to be recovered through general taxation and the levy prescribed in the Electricity Industry (Levy of Industry Participants) Regulations 2010.

The imposition of a registration fee is a common feature of regimes that regulate products in New Zealand.<sup>3</sup> Imposing a registration fee would enable the Authority to recover the costs associated with the registration process and its compliance activities more generally. It would also address an issue of equity between traders who register a product against the Australian standards (as there is a fee associated with registering a product against the Australian standards) and those that only register the product for sale in New Zealand.

If this proposal was progressed, the regulation-making powers in section 36 of the EEC Act would need to be amended to include an empowering provision authorising the Minister (or the Governor General) to set the amount of a fee through the Regulations. Such a fee should only be set at the amount necessary to recover costs and should be reviewed regularly to ensure it remains appropriate and the assumptions on which it is based remain justifiable.

#### **(e) Cancellation of product registration**

The Authority is not permitted to cancel a registration if a model is found to be non-compliant with the relevant standard. Allowing the Authority to cancel a registration would better align the process with Australia and ensure other traders do not continue to sell non-compliant and potentially unsafe products. This will have a flow-on benefits for consumers.

#### **(f) Expiry of product registration**

Products registered against the New Zealand standards are not subject to an expiry date. This causes administrative issues for the Authority, who is required to collect data on all regulated products even those that are no longer sold. This also creates an issue of equity between traders who register their products against the Australia standards and those who register in

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<sup>3</sup> Fees are payable under the Medicines Act 1981, the Hazardous Substances and New Organisms Act 1996 and the Agricultural Compounds and Veterinary Medicines Act 1997. The Food Act 2014 includes an application fee for persons wishing to be registered as an importer of food

New Zealand. The GEMS Act has a five-year time-limit on registrations, which requires traders to either re-register the product or desist from selling the product.<sup>4</sup>

Including an expiry date would require traders who wish to continue to sell a product to renew the registration. The renewal process provides an opportunity to reacquaint traders with their obligations, and advise them of any changes to MEPS or labelling requirements. The Authority would also be able to 'retire' product models, thereby reducing the administrative burden associated with collecting data. Other domestic regimes for product regulation include a time-limit for registration.<sup>5</sup> There may be compliance costs for traders associated with re-registering products and some administrative costs for the Authority, although these would be offset by savings related to not having to collect data on antiquated registrations.

### **Recommendation 1**

The Regulations could be amended to provide registrants certainty by setting out the requirements importers and New Zealand manufacturers need to meet to register products against the New Zealand standards, which could include the following features:

- Only New Zealand manufacturers and importers may register a product
- Two or more models in the same family of products may be registered on a single registration
- A registration may be varied to include additional models of the same family of products
- The information that needs to accompany the registration application could include (i) the contact details of the registrant; (ii) the model of the regulated product; (iii) the laboratory in which the product was tested; and (iv) information about the importation, manufacture and distribution of the product
- The registration of a non-compliant product may be cancelled
- Expiry after a specified time unless the trader renews the registration.

### **Recommendation 2**

- The Authority could investigate whether a fee should be charged to cover the costs associated with administering the registration process. **This would require a change to the regulation-making power in section 36 of the EEC Act.**

#### **3.1.1.2 Information to be lodged with the Authority**

Importers and New Zealand manufacturers need to supply the Authority with information before selling or leasing products within New Zealand, unless the product is already registered in Australia. The format of the information is a prescribed form, which summarises the test data and other relevant information. The Regulations do not require laboratory test reports to be sent to the Authority as long as the registrant holds them and makes them available to the Authority on request.

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<sup>4</sup> See s.48(3) of the GEMS Act (Australia) 2012

<sup>5</sup> The Agricultural Compounds and Veterinary Medicines Act 1997 provides that the regulated product may be registered for a fixed term sufficient only to achieve the purpose of the registration.

### (a) Test reports

**Issue:** The Regulations do not provide guidance on the substance and form of test reports or the period that test reports must be held by the manufacturer or importer.

The Regulations require the importer or New Zealand manufacturer to provide the Authority with a test report for a regulated product within five working days of receiving a request for the report. However, the Regulations do not provide any details around the substance or form of the report or how long it needs to be held following final product sales. For instance, it is unclear whether the report needs to be a full report or just a summary, in English, and kept in hard or electronic form. There is also uncertainty around whether the report needs to be retained indefinitely.

Providing more guidance around the substance and form of the test report will ensure the standard of reports is sufficient for the Authority to make registration decisions, which may reduce the need for applications to be resubmitted. Including a requirement for the report to be in English would avoid issues associated with the translation of the report (i.e. time delays and cost).

All traders should be required to retain a copy of the test report (not just the person who registered the product). However, they should not have to do so indefinitely. There should be a maximum retention period from the date on which the product ceases to be made available for sale. This will enable dealers to discard old test reports, thereby ensuring that digital space is not wasted and limiting the costs associated with storing documents.

### (b) Obtaining customs information

**Issue:** The Authority is not able to access customs information about regulated products that are imported into New Zealand, which impacts on its compliance activities.

The New Zealand Customs Service is not permitted to share information with the Authority relating to the number and types of regulated products that are imported into New Zealand, including the contact details of the importer. Without this information the Authority has difficulty monitoring what products are coming into the country, tracking non-compliant products, and mounting prosecutions. Obtaining Customs information about imported products would support the Authority's monitoring and enforcement activities, but this would require a change to Customs legislation.

Other approaches to obtaining Customs information could be explored. For instance, the Regulations could be amended to require importers to provide the Authority with the information directly. This could be done as part of the registration process.

Alternatively, if there is reason to believe an importer has committed an offence, the Authority could approach the New Zealand Customs Service requesting information about the specific import. Such information could be released under Principle 2 of the Privacy Act (which enables information to be shared to avoid prejudice to the maintenance of the law). The Commerce Commission relies on this approach to obtain Customs information, but only in exceptional circumstances where there is credible evidence of a breach.

### Recommendation 3

The Regulations could include more detail about the substance and form of the test report, and the length of time it needs to be retained.

#### **Recommendation 4**

The Regulations could require importers of regulated products to provide the Authority with information about the importation as part of the registration process.

#### **Recommendation 5**

The Authority could engage with the New Zealand Customs Service to identify ways that it can support the Authority's compliance activities.

### **3.1.2 Expanding the coverage of the Regulations**

Since their introduction, the Regulations have been effective at reducing energy consumption, removing poor performing products from the market, and assisting consumers to make more informed choices when purchasing energy-using products. However, consumer behaviour is changing. Many products are now purchased online or direct from the manufacturer. To meet consumer demand for the latest technology, products are also being offered for only a short time while others are custom designed to meet specific needs. The Regulations were not designed to deal with these situations. To preserve the integrity of the regime, the Regulations should be expanded to respond to these and similar market changes.

#### **3.1.2.1 Supply of products for commercial use**

**Issue:** Businesses that import non-compliant products for their own use are not required to ensure those products comply with the relevant energy performance standards.

The Regulations do not apply to products imported for a '*commercial purpose*': for instance, where a developer imports regulated products for installation in an apartment or commercial property (such as air conditioning, hot-water cylinders, lighting systems and refrigeration). This undermines the integrity of the regime as businesses can bypass the restrictions on the importation of non-compliant products. This is also problematic for third parties (e.g. those purchasing or leasing the property) as the property developer who arranged the initial installation does not pay the operating costs and are generally indifferent to the effect that inefficient products have on an occupant's electricity bills.

The scope of the Regulations could be extended to cover the use of products for a commercial purpose. This would strengthen the integrity of the regime and benefit third parties, who have limited control over the products installed but remain responsible for the energy costs. This change would align the regime with the GEMS Act.<sup>6</sup>

#### **Recommendation 6**

The Regulations could be expanded to regulate the supply of products for '*commercial use*'.

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<sup>6</sup> See s.18 of the GEMS Act 2012 (Australia)

### 3.1.2.2 Applying labelling to products sold on-line

**Issue:** Energy performance labels do not need to be displayed on products sold online.

Retailers are responsible for ensuring that all regulated products available for sale or lease carry an energy performance label. The label must be of the general appearance and layout specified in the relevant standard and accurately reflects the product's make and model number.

While the Regulations are clear that this requirement applies to the physical display of regulated products, it is unclear whether it also applies to products sold online as the relevant provision refers to the label being attached to the item, which is impossible for products sold online. This uncertainty limits the effectiveness of the labelling scheme as consumers increasingly search and purchase products online. The risk is that online customers will not be made aware of the product's energy performance and the availability of more energy-efficient models on the market.

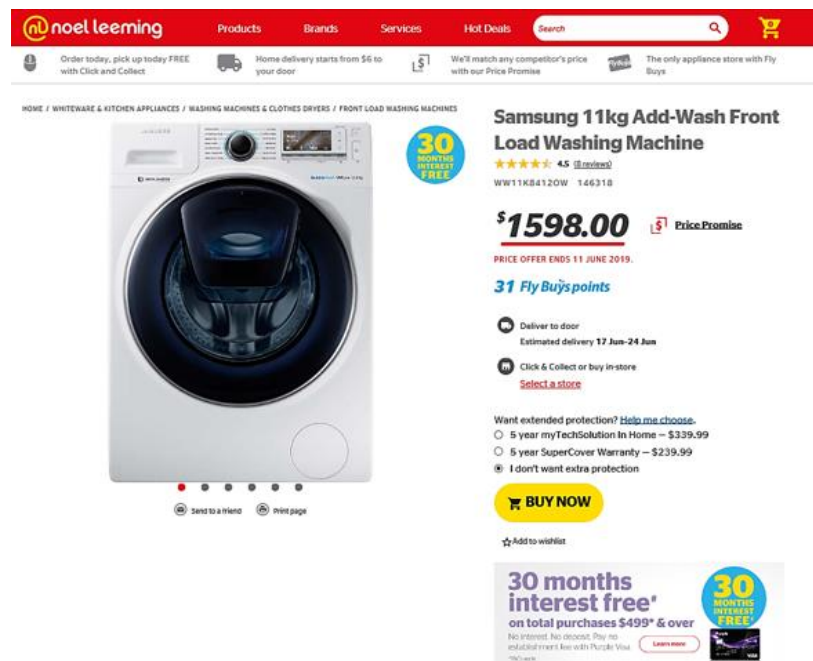


Image 3: Example of an online advert for a washing machine

The mandatory use of an energy rating icon would ensure that online customers are provided with a recognisable, consistent and credible source of energy efficiency information. This would improve the effectiveness of the regime as consumers would be provided with the information needed to select more energy efficient models. It would also improve the regime's integrity by reducing sales of inefficient products.

#### Recommendation 7

The Regulations could make displaying the energy performance labels mandatory on products sold online.



### 3.1.2.3 Providing information for statistical purposes

**Issue:** The requirement to provide statistical information is burdensome for some businesses and has led to instances of non-compliance.

Each year, importers and New Zealand manufacturers are required to provide information for statistical purposes, including the number of items of each model that are sold in, exported from or imported into New Zealand. Since most businesses gather end-of-financial-year sales data for business purposes, traders need to provide this information within four months of the end of the financial year.

The provision of statistical information is important for measuring energy efficiency progress within the New Zealand marketplace. However, some businesses lack capacity to produce this information leading to instances of non-compliance.

The costs to industry associated with providing statistical information need to be balanced against the benefits of acquiring the data. The majority of the information that is gathered is used to predict energy consumption trends, which enables the Authority and other government agencies to target their energy efficiency and conservation programmes. However, some data sets are not used to calculate energy savings so their collection serves no purpose (such as sales data relating to external power supplies and ballasts for fluorescent lamps).

Allowing the authority to exempt businesses from providing statistical information about particular products or low-volume sales would reduce the regulatory burden on industry, which would have flow-on benefits for consumers and the Authority.

#### **Recommendation 8**

The Regulations could permit the Authority to grant exemptions from providing statistical information about specific products or low-volume sales.

### 3.1.2.4 Exempting products from the MEPS and labelling requirements

**Issue:** The Authority is not allowed to grant exemptions from the MEPS and labelling requirements, on a case-by-case basis.

Certain categories of products are exempt from the requirements of MEPS and labelling, namely (i) products destined for export or in transit and (ii) second-hand products. In addition, where only 50 or fewer products are imported into New Zealand, a person can apply to the Authority for an exemption from labelling requirements.

The Authority is not permitted to grant exemptions in other circumstances, such as where businesses require products with specifications falling outside the relevant MEPS (such as an industrial air conditioner for use in a mine). In addition, the compliance process is not appropriate for products with a short market life (such as seasonal products where any delay in getting the product to market would affect potential sales) or unique/bespoke products. In such cases there is often a lack of laboratory capacity in New Zealand to test the products.

Allowing the Authority to grant exemptions on any aspect of the standards on a case-by-case basis would benefit both the Authority and traders, and would align the regime more closely

with the GEMS Act.<sup>7</sup> To mitigate the effect exemptions would have on the regime, the Authority should be able to specify conditions relating to how exempt products are to be labelled, supplied or commercially used (for instance, a condition could be that the dealer needs to be satisfied that the product will only be used for a specified purpose).

### **Recommendation 9**

The Regulations could allow the Authority to grant exemptions from any aspect of the standards on a case-by-case basis, and when doing so may specify conditions relating to how exempt products are to be labelled, supplied or commercially used.

#### **3.1.3 Product standards**

The MEPS and labelling requirements are detailed in the relevant standards. The standards are developed by joint technical committees, with representatives from industry, test laboratories and consumer groups as well as government regulators. The standards development process is consensus-based and includes a public consultation phase. Approved standards are incorporated by reference and are cited in Schedules 1 and 2.

For regulated products, the standards generally have two parts:

- test procedure and ambient conditions such as test method, performance measures and test materials, and
- technical requirements for MEPS and the features of energy rating labels.

The second part of the standards includes data on how to calculate the star rating and the comparative energy consumption (the energy number that appears on the label) for each model; details on the number of units to be tested; minimum performance requirements; application forms; check-testing procedures; the design and shape of the energy label; and how the label is to be affixed to the appliance.

##### **3.1.3.1 Information about MEPS and labelling of regulated products**

**Issue:** The information setting out the requirements that regulated products need to meet is not readily accessible.

The product standards need to be purchased from Standards New Zealand, which increases the compliance costs associated with regulated products and creates an issue of accessibility for retailers, particularly for those who have a small annual turnover of a regulated product.

Including the technical requirements in the body of the Regulations would improve the accessibility of the regime and reduce the regulatory burden on industry. The information in the standards would then be limited to the technical specifications and testing protocols. This change would align the regime more closely with the GEMS Act.<sup>8</sup>

### **Recommendation 10**

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<sup>7</sup> See s.30 of GEMS Act 2012 (Australia)

<sup>8</sup> See s.26(1) of the GEMS Act 2012 (Australia)

The Regulations could include more details about the requirements that regulated products need to meet to improve information availability for industry. The information in the standards would therefore be limited to technical specifications and testing protocols.

### 3.1.3.2 Other matters contingent on MEPS

**Issue:** The Regulations lack a ‘catch-all’ provision that offers flexibility to regulate other matters relating to MEPS and labelling.

The standards focus on the energy performance characteristics of an item in a product class. However, some standards include requirements relating to other matters to ensure that the product can perform safely and effectively while meeting energy performance requirements. For instance, the proposed Light Emitting Diode (LED) lamps standard includes requirements around safety features and the life of the product.

The extent to which contingent matters can be included in the standards is unclear. Addressing this ambiguity would help to avoid unintended outcomes relating to the environmental or human health effects of a given product (for example, ensuring a MEPS compliant fridge can chill food at safe temperatures, or an efficient lamp does not contain unsafe levels of mercury). This would better align the New Zealand regime with that in Australia.<sup>9</sup>

While this would future-proof the regime and allow for the regulation of relevant performance aspects as necessary and appropriate, some products are already subject to product safety requirements imposed by other regulators, such as Worksafe NZ. The Authority would need to work with these regulators when developing standards for contingent matters within MEPS to avoid confusion and over-regulation.

#### **Recommendation 11**

The Regulations could clarify whether standards can cover ‘other matters’ related to the performance of energy-using products.

#### **Recommendation 12**

The Authority could work with other product regulators when developing standards for contingent matters within MEPS to avoid confusion and over-regulation.

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<sup>9</sup> See Part 1 of the GEMS Act 2012 (Australia)

## 3.2. Issues that can only be resolved by expanding the regulation-making powers

The regulation-making powers are focused on prescribing MEPS and labelling requirements for specific energy-using products. They do not appear to allow regulations to be made regarding the monitoring and inspection activities of the Authority, which is a feature of some domestic regulatory regimes.<sup>10</sup>

The following issues could only be addressed through the Regulations if a change was first made to the regulation-making power. However, the Authority may wish to seek independent legal advice or engage with the Legislation Design and Advisory Committee to understand the full scope of its current regulation-making powers.

### 3.2.1 Monitoring and Inspection

The Authority provides leadership and support to improve the energy efficiency of New Zealand's homes and businesses, and encourage the uptake of renewable energy. As part of this role, the Authority needs to monitor and enforce compliance with the Regulations through four distinct, but inter-related activities:

- Engagement and enforcement activities to assist traders to comply with their obligations under the regime voluntarily
- Market surveillance activities to ensure products on display in retail premises meet the MEPS and labelling requirements
- Check testing models of regulated products to ensure they meet the relevant energy efficiency requirements, and
- Investigate cases of non-compliance, including consumer complaints received by the Authority, and gather evidence to assist potential prosecutions.

In addition to helping ensure traders understand and meet their duties, these activities enable the Authority to promote ways to comply with the regime. They improve the Authority's awareness and understanding of business processes and technology, and how they influence industry behaviour. They also enable the Authority to build rapport with industry.



#### 3.2.1.1 Monitoring and inspection activities

**Issue:** The lack of monitoring and inspection powers reduces the regime's effectiveness.

To assess compliance with the Regulations, the Authority needs to form a view on whether a product meets the relevant MEPS or labelling requirements.

Currently, compliance officers rely on an implied licence to be on retail premises, which means the owner or occupier of the premises may withdraw that license at any time and ask them to leave. This impacts on their ability to carry out their functions, including gathering

<sup>10</sup> See, for instance, the Electricity Act 1992; and the Fisheries Act 1996

evidence of non-compliance that would form the basis of further investigation or enforcement action. The absence of these powers may also lead to inconsistencies between compliance officers regarding when, why and how they detect and respond to infringements.

The current practices employed by compliance officers to enter premises during office hours to conduct non-intrusive inspections of products should be prescribed in the Regulations. This would provide clarity to retailers around the powers of compliance officers and their rights during an inspection. Such powers could include the ability to open any package containing an energy-using product; take photographs; and examine and copy relevant documents or records, including accessing a computer system on which such information may be stored.

To ensure these powers are exercised in a reasonable way, a provision could be included relating to proof of identity.

### **Recommendation 13**

The regulation-making powers could be expanded to allow regulations to be made that permits the Authority:

- To enter a place of business, during office hours, to carry out its compliance activities and examine any energy-using product
- To open any package containing an energy-using product
- To take photographs and
- To examine and copy relevant documents or records, including accessing a computer system on which such information may be stored.

#### **3.2.1.2 Check testing process**

**Issue:** The lack of any reference to the check testing process in the Regulations creates uncertainty regarding the responsibilities of regulated entities.

A two-stage check testing process is used to assist the Authority to determine whether regulated products meet the relevant MEPS and labelling requirements.

**Stage 1:** Usually, a single product is tested to check it meets the relevant MEPS or labelling requirements. If the product meets the standards, no further action is taken. If it does not, the dealer will be notified and supplied with the results of the check test.

**Stage 2:** If the dealer considers the check test results do not accurately reflect the model's performance, they may arrange for Stage 2 check testing at their expense (the Authority will advise them of how products are to be selected, how many need to be tested and where the testing is to take place). If the test results show the product meets the standards, then the model passes. The dealer is notified, and no further action is taken. If the test results reveal the product does not meet the standards, then the registration will be cancelled, and the dealer advised to remove the product from the market.

While the Authority should continue to provide guidance to industry around the check testing process, the Regulations could outline the process, particularly the maximum period for commencing Stage 2 check testing and who bears the costs of these tests. This is important

as it would prevent non-compliant traders trying to drag out the process beyond the 12-month limitation for commencing legal proceedings.

#### **Recommendation 14**

The regulation-making powers could be expanded to allow regulations to be made that outline the check testing process, including the dealer's responsibilities when a product fails and the timeframes for the various stages of the process.

#### **3.2.1.3 Retesting a regulated product**

**Issue:** The Authority does not have the power to order further testing of a regulated product to determine its energy efficiency.

It is not uncommon for the Authority to receive complaints concerning the levels of energy performance claimed for a product from third parties such as competitors, consumers, consumer groups or regulatory agencies. To investigate such complaints (and test the verity of tests report provided when a product is registered), the Authority may need to carry out further tests on the product. While this can occur through check-testing, the check-testing programme is subject to financial constraints.

To improve the regime's effectiveness, the Authority should be permitted to order the retesting of products outside the check-testing programme. This change would help identify instances of non-compliance and support subsequent prosecutions.

#### **Recommendation 15**

The regulation-making powers could be expanded to allow regulations to be made that permit the Authority to order the re-testing of products outside the check-testing programme.

#### **3.2.1.4 Designation of compliance officers**

**Issue:** The Regulations do not specify who is authorised to carry out compliance activities on behalf of the Authority.

The lack of any reference to who may carry out compliance activities on behalf of the Authority creates uncertainty for industry and often results in businesses contacting the Authority to verify that a compliance office is acting on its behalf.

To improve the transparency of the compliance regime, the Regulations could be amended to specify who may carry out such activities on behalf of the Authority. To support its compliance activities, the Authority may wish to maintain a list of compliance officers (or contact points) on its website.

#### **Recommendation 16**

The regulation-making powers could be expanded to allow regulations to be made that specify who may carry out compliance activities on behalf of the Authority.

### 3.3. Issues that need to be addressed through legislative change

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The following issues need to be addressed in primary legislation and require an amendment to the EEC Act: for instance, because they impact on the rights of an individual.

#### 3.3.1 Investigation

The Authority is responsible for enforcing breaches of the Regulations. Once a compliance officer has formed a view on the energy performance of appliances and equipment, the officer will need to investigate suspected cases of non-compliance. However, the Regulations do not provide the Authority with any powers of investigation, which limits its ability to gather evidence relating to the case that may assist potential prosecutions.

##### 3.3.1.1 Lack of investigation powers

**Issue:** The lack of any powers of investigation limits the ability of the Authority to gather evidence of non-compliance that would form the basis of enforcement action.

Unlike other bodies that regulate products in New Zealand, the Authority does not have any powers to investigate suspected cases of non-compliance. The lack of investigation powers limits the effectiveness of the Authority's enforcement activities and may lead to a decline in respect for the regime.

The Authority should explore whether it requires enhanced investigation powers to enable it to carry out its functions more effectively. Such powers could include the ability to take samples; conduct examinations, tests or inspections; require that thing not be disturbed; and take statements from any person. This would improve respect for the Authority within the industry and increase consumer confidence in the effectiveness of the regime. However, any investigation powers granted to compliance officers need to be proportionate to the outcomes sought and should only be exercisable to monitor compliance or detect breaches of the Regulations.

##### 3.3.1.2 Inspecting vehicles and dwelling houses

**Issue:** The Authority does not have the power to enter and inspect a vehicle or dwelling house where they suspect non-compliant products may be found for distribution.

During its investigations, the Authority may have cause to believe that non-compliant products are stored within a vehicle or dwelling house. However, they are unable to confirm such suspicions as they lack the power to enter and inspect such places. This undermines the integrity of the compliance regime.

The ability to inspect a vehicle or dwelling house is found in comparable regimes overseas<sup>11</sup>, and is a feature of other product regulation regimes.<sup>12</sup> This power would improve the enforcement capability of the Authority and support potential prosecutions. It would complement the proposal to regulate products sold online by recognising that dealers are

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<sup>11</sup> See s.10(3) of the Energy Efficiency Act 1992 (Canada) and reg.3 of Schedule 2 of the Energy Information Regulations 2011 (UK)

<sup>12</sup> See the Fair Trading Act 1986, the Radiocommunications Act 1989, the Hazardous Substances and New Organisms Act 1996, the Agricultural Compounds and Veterinary Medicines Act 1997 and the Food Act 2014

moving away from operating and distributing from commercial premises. Given their level of intrusiveness, the Authority would need to apply for a court warrant to inspect such places.

### 3.3.1.3 Seizure of non-compliant products

**Issue:** The Authority is not empowered to seize non-compliant products as part of an investigation.

The lack of any power to seize products currently affects the Authority's ability to mount a successful prosecution against a non-compliant trader, as the product will afford the best evidence of non-compliance.

Including powers to seize non-compliant products would support the prosecution of non-compliant traders, leading to improved consumer confidence in the regime. This power is found in comparable regimes overseas<sup>13</sup> and is a feature of some domestic regimes for product regulation<sup>14</sup>. However, there would be costs associated with the storage of products (which the Authority would need to absorb). The Authority may also be exposed to compensation claims from traders if seized products are subsequently found to be compliant.

#### Recommendation 17

The Authority should examine whether it requires enhanced investigation powers, including the ability to apply for a court warrant to enter and inspect vehicles and dwellings and seize non-compliant products

### 3.3.1.4 Delegation of investigation powers to officers of other agencies

**Issue:** The Authority is not able to delegate its powers to officers of other agencies so that they can assist with the investigation of suspected cases of non-compliance.

Like other regulatory bodies, the Authority has limited resources. If the Authority was given the power to designate officers of other agencies as 'compliance officers', this would improve the compliance capability of the Authority. A similar power is found in the GEMS Act.<sup>15</sup> While this would future-proof the Regulations, this power could only be used with the agreement of the partner agency and such officers would need to undergo appropriate training.

In the meantime, the Authority could work more closely with the Commerce Commission to investigate cases where retailers are suspected of making a false or misleading statement about the energy efficiency of a regulated product (as the Regulations already provide that such offences may be prosecuted under the Fair Trading Act 1986).

#### Recommendation 18

The Authority could be permitted to designate suitably trained officers of other agencies as compliance officers.

#### Recommendation 19

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<sup>13</sup> See the Energy Efficiency Act 1992 (Canada) and the Energy Information Regulations 2011 (UK)

<sup>14</sup> See the Medicines Act 1981, the Hazardous Substances and New Organisms Act 1996, the Agricultural Compounds and Veterinary Medicines Act 1997, and the Food Act 2014

<sup>15</sup> See s.80 of the GEMS Act 2012 (Australia)



The Authority could work more closely with the Commerce Commission to investigate cases where retailers are suspected of making a false or misleading statement about the energy performance of a regulated product.

### 3.3.2 Enforcement interventions

If an investigation confirms that an offence has been committed, the Authority must then determine what the appropriate response should be. Traders are generally willing to comply voluntarily. The barriers to full and timely compliance are often a lack of awareness or confusion about their obligations. There is a range of low-level enforcement tools the Authority may deploy to encourage behavioural change (such as informal action and compliance advice). It could also issue letters of warning to prevent re-offending.

Where the detriment is substantial, the conduct is severe or there is significant public interest (e.g., where a trader deliberately breaches their regulatory duties for economic or social advantage), the only option available to the Authority is to initiate court proceedings against an offender. No other enforcement interventions are currently available to the Authority.

#### 3.3.2.1 Graduated set of enforcement interventions

**Issue:** The lack of a graduated set of enforcement interventions prevents the Authority from selecting a proportionate response to the harm caused by instances of non-compliance.

Prosecution is a vital part of a regulator's toolkit for enforcement intervention. It not only acts as a deterrent but provides clarity on the meaning of the regulations. However, initiating a prosecution entails significant costs associated with preparing and conducting the case. For this reason, the Authority has only prosecuted one company for breaching the Regulations. In 2009, Mantipo Trading Company was fined \$15,000 (plus court costs of \$1,300 and lawyer fees of \$2,500) after supplying non-compliant air conditioning units.

The regulatory regime needs to contain more flexible enforcement tools that enable the Authority to tailor its approach to the circumstances and ensure enforcement actions are proportionate to the severity of the misconduct.

The various enforcement interventions that could be considered are detailed below:

##### (a) Stop notices

Although the Authority can issue letters of warning, it should also have the ability to issue a notice prohibiting traders from selling non-compliant products while it undertakes an investigation. In such a case, the failure to comply with the notice would be an offence. This measure would enable the removal of non-compliant and potentially unsafe products from the supply chain in a safe manner.

##### (b) Infringement notices

Most breaches are minor and sometimes inadvertent, such as incorrect labelling. Allowing compliance officers to serve infringement notices on offenders would enable the Authority to apply a proportionate response to the harm caused by non-compliance and would be a convenient and low-cost way to deal with minor offending.

Infringement schemes are widely used by other operational agencies and are considered a proportionate response to minor offending as they avoid court proceedings and the need to prove all the elements of the offence. However, there would be some costs for the Authority associated with administering an infringement scheme.

Any infringement notices would need to be set out in a prescribed form (containing prescribed particulars) and served on the offender personally or by post. The Authority should have the ability to review and cancel the infringement notice in the interests of justice. Moreover, since the imposition and enforcement of a penalty through an infringement notice involves a transfer of a traditional judicial function to the executive branch of government, it is essential that offenders can request a court to review or reduce the penalty.

#### **(c) Publication of non-compliant dealers**

The Regulations do not permit the Authority to publish the names of traders who have contravened the regime. As a result, consumers do not have awareness of the traders who may be distributing non-compliant products.

Allowing the Authority to publish the names of offenders would be an effective intervention as reputation loss poses a more significant regulatory threat than the monetary penalty that businesses may face for non-compliance. Such an enforcement measure is found in the GEMS Act and comparable overseas jurisdictions and is a feature of other domestic regimes for product regulation.

#### **(d) Enforceable undertakings**

An enforceable undertaking allows an offender to enter into a binding agreement with the relevant regulator as an alternative to prosecution. The agreement outlines actions the duty holder will undertake to address the infringement. An enforceable undertaking is not imposed on the duty holder. They must express interest and apply. The regulator then considers whether it agrees with the proposal detailed in the application and decide whether to accept the application. The regulator is not compelled to do so. However, once accepted, the undertaking is legally binding – a breach of an enforceable undertaking is a stand-alone offence.

By avoiding the costs associated with taking a prosecution, enforceable undertakings would allow the Authority to divert resources to other initiatives to improve energy efficiency. This would also benefit industry as enforceable undertakings avoid costly and time-consuming legal proceedings. This measure would also allow non-compliant but repentant traders to maintain their reputation. Enforceable undertakings are found in comparable regimes overseas and are a feature of some domestic regimes for product regulation. There may be administration costs associated with monitoring the agreement.

#### **Recommendation 20**

A graduated set of enforcement interventions could be adopted, which may include the ability for the Authority:

- To issue stop notices prohibiting traders from selling non-compliant products while it undertakes an investigation
- To serve infringement notices for minor offences
- To publish the names of non-compliant individuals or businesses
- To enter an enforceable undertaking with a trader who has contravened the Regulations

### 3.3.2.2 Prosecution

Currently, any breach of the Regulations is currently a strict liability criminal offence, and the offender may be liable for a fine of up to \$10,000. Offences relating to the false or misleading representation about the energy performance characteristics of a model may be prosecuted under the Fair Trading Act 1986.

The following issues were identified with the prosecution provisions relating to the criminal nature of the offence and the penalty level:

#### (a) Pecuniary penalties

**Issue:** The Authority is unable to take civil proceedings against an offender, including any company that manufactured, imported or sold non-compliant products.

The penalty provision is expressed as a strict liability criminal offence. In most cases, however, the type of conduct that the regime seeks to address is not “truly criminal” and does not have an element of fault or moral blameworthiness commonly associated with criminal offending.

The regime could include a pecuniary penalty, which is a non-criminal monetary penalty imposed by a court in civil proceedings. Pecuniary penalties are usually found in regulatory regimes targeting commercial behaviour. Civil enforcement would appear to be more appropriate than criminal enforcement in most instances of non-compliance of the Regulations.

The main advantage with taking civil proceedings, as opposed to filing a strict liability criminal offence, is that pecuniary penalties apply to real people (such as a director, manager, secretary or similar position) as well as body corporates. In addition, while the party initiating the proceedings still has the legal burden to prove the elements of the offence, pecuniary penalties apply the civil standard of proof (“balance of probabilities”). The costs to the Authority of investigating and bringing proceedings would be lower than for criminal penalties, with a higher likelihood of success.

#### (b) Penalty level

**Issue:** The current penalty level is not a sufficient deterrent against non-compliance.

Given the lack of testing facilities in New Zealand, most manufacturers are required to use an overseas testing provider. Depending on the product, this could cost several thousand dollars, in addition to delaying the product’s entry to the market. Businesses may prefer to risk a penalty for non-compliance than pay for overseas testing.

The current sanction for offending is a variable penalty of up to \$10,000. This sanction does not appear to be large enough to create a sufficient deterrent, particularly for businesses selling only a small amount of product.

The penalty is also considerably lower than those contained in other regimes regulating products in New Zealand: although most of these regimes are focused on protecting public safety. However, the penalty is the same as that for individuals who breach consumer information standards under the Fair Trading Act 1997 (although a high penalty may be imposed on a body corporate).

### **Recommendation 21**

The enforcement regime could include a pecuniary penalty applicable to both real people (such as a director, manager, secretary or similar position) and body corporates.

### **Recommendation 22**

The Authority could investigate whether the penalty level could be increased so that it acts as a sufficient deterrent against non-compliance.

### **3.3.2.3 Disposal and destruction of non-compliant products**

**Issue:** The Authority is not authorised, upon conviction, to seek a court order to have non-compliant products destroyed.

Including such an enforcement measure would ensure that non-compliant products are not removed from the country and sold to consumers in countries with more lenient energy efficiency regimes. It would also ensure that the destruction takes place in a safe manner. While this enforcement measure is found in comparable regimes overseas, there would be costs for the Authority associated with the storage and subsequent destruction of non-compliant products.



### **Recommendation 23**

The Authority could investigate whether it should be able to seek a court order to have non-compliant products forfeited to the Crown so that they can be destroyed.

### **3.3.3 Process for revising the standards**

**Issue:** The process for revising MEPS and labelling requirements lacks the flexibility to respond to market movement and innovations.

To be effective, MEPS and labelling requirements need to be reviewed at regular intervals to stimulate technical progress and ensure a steady improvement in energy efficiency. This occurs through the E3 programme. Once COAG has agreed to the changes, the New Zealand

Government needs to sign off on any changes before the replacement standards can be introduced.

This takes time and creates an unnecessary burden on the Cabinet decision-making process, particularly for incremental improvements to the standards. It may mean that for a short period the Regulations are out of step with the Australian regime. During this time, there is a risk that New Zealand could become a dumping ground for products that can no longer be sold in Australia. The lack of flexibility also affects the regime's ability to respond effectively to market movement and innovation.

While this is a problem under any regulatory framework, simplifying this process would assist industry, who are impacted by the time taken to replace standards and, at times, government inability to give fixed dates of implementation. This could be done by empowering the Minister to approve the revised standards without taking them through Cabinet.

However, it is not proposed that the process for regulating new product classes be changed.

**Recommendation 24**

A new process could be developed that enables the standards to be revised without amending the Regulations by assigning appropriate decision-making authority with the Minister.

## 4. STRATEGIC OPPORTUNITIES TO PROMOTE ENERGY EFFICIENCY AND CONSERVATION

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The regulatory regime for energy-efficiency in New Zealand is currently focused on the regulation of stand-alone appliances and equipment. At the time the Regulations were introduced, this focus was necessary to overcome various obstacles that impacted on the uptake of energy-efficiency measures, including unreliable and inconsistent information on the energy performance of products, price signals that did not reflect the actual energy cost and a lack of incentives in the market to encourage the purchase of energy-efficient products.

There is a concern that the benefits of the regime are starting to plateau. To ensure the regime remains relevant, it needs to move beyond the current approach of regulating the low-hanging fruit and look at alternative strategies to promote energy efficiency and conservation. Without doing so, it will be difficult to achieve more significant energy efficiency improvements.

The following section examines some opportunities to promote energy efficiency and conservation. The Authority should consider the strategic focus of the regime and decide whether these emerging opportunities would positively impact the future efficacy of the regime, taking into account the partnership New Zealand has with Australia.

### 4.1. Meaning of a product class

**Issue:** 'Product classes' detail the functions that an appliance or product perform, which makes it difficult to capture every type of appliance.

As the product classes revolve around the functions a product performs, many products are challenging to classify, especially those subject to rapid advancements in technology. As these products are not subject to MEPS and labelling requirements, there is no incentive for dealers to remove the supply of poor performing products from the market. This undermines the effectiveness of the regime.

Broadening the definition of a product class beyond the functions a product performs would enable more products to be subject to MEPS and labelling requirements. For instance, the Regulations could define product classes by reference to (i) the size or capacity of the products; or (ii) whether the products contain a particular feature (i.e. a screen) or are capable of operating in different modes (i.e. in standby modes)

This would encourage the removal of a higher number of poorly performing products from the market and help reduce energy consumption.

### 4.2. Performance of Systems

**Issue:** Taking a systems-based approach would encourage innovations leading to improved reliability of products, reduced life-cycle costs and increased energy efficiency.

Whole systems are made up of a range of components. For example, an electric motor driving a pump that circulates a liquid around an industrial site comprises an electric motor, motor controls (switching, speed or torque control), the motor drive system (belts, gearboxes etc), the pump, pipework and demand for the fluid (or in many cases the heat or coolth it carries). While the energy efficiency of individual components within that system can be high, the efficiency of the whole system may be quite low.

The Regulations deal with only some components of the whole system. While increasing the MEPS of individual components has a vital role to play, taking a holistic or systems-based approach to regulation has greater potential for energy savings. This is because savings can be achieved through better installation and more appropriate control systems, accurate design and efficient componentry.



Image 4: Electric motor system

Regulating systems would avoid potential issues for manufacturers, who need to ensure every component of the system complies with the relevant MEPS. While some overseas regimes are moving towards regulating the whole system<sup>16</sup>, most are still focused on regulating products as standalone items because testing the performance of stand-alone items is easier and replicable within a laboratory. There are also difficulties associated with regulating the whole system because the installation of a product can be bespoke or requires an assessment of a combination of separate elements operating together.

**Regulating the performance of buildings/building systems**

One area that would benefit from taking a systems-based approach is the regulation of commercial buildings as it is estimated that such buildings account for at least 21% of energy consumption, which costs business \$800 million every year. In 1999, the NABERSNZ rating system was introduced to assess the operational energy use of office building in New Zealand. While the equivalent scheme in Australia is mandatory, the New Zealand scheme is only voluntary and its application has been limited.

**4.3. Energy Conserving Products**

**Issue:** The current labelling requirements do not apply to energy-conserving products.

The current labelling requirements only apply to energy-using products. They do not cover products that do not use energy themselves but can affect the energy consumption of other products, directly or indirectly. Examples might include smart thermostats, insulation, triple-glazed windows and ducting. These products all affect the amount of energy used by heating and cooling systems.



The mandatory labelling of energy-conserving products would assist consumers by providing them with information about products that support the energy-efficiency of their homes and workspaces.

<sup>16</sup> See, for instance, Regulation (EU) 2017/1369.

This change could be progressed by introducing new regulations, as the existing regulation-making power that prescribe labelling requirements are broadly defined. The definition considers a product's energy efficiency as well as its proficiency in conserving energy. This change would future-proof the regime and better align with that in Australia.<sup>17</sup> However, there would be additional compliance costs for industry associated with testing regulated products against the relevant standard, registering these products, affixing labels and providing sales data.

#### 4.4. Greenhouse gas emissions

**Issue:** The Regulations do not enable the Authority to regulate energy-related greenhouse gas emissions.

Greenhouse gases contribute to global climate change, which is already having a negative impact on New Zealand's economy and environment. While reduced greenhouse gas emissions are an indirect consequence of implementing MEPS, the regime does not enable standards to be imposed that relate specifically to the volume of greenhouse gas that is emitted from operating products. Introducing more flexible statutory language would bring the regime in line with the GEMS Act.<sup>18</sup>

Given the relatively low emissions intensity of New Zealand's electricity generation fleet, it is likely that the impact of this change on New Zealand's greenhouse gas emissions would be minimal.<sup>19</sup> The change may not have a discernible impact on consumers, although it would improve their awareness of the volumes of greenhouse gases a product emits. Such a move would also increase compliance costs for traders as they would be required to test regulated products against the relevant standard, register these products and provide sales data.

#### **Recommendation 25**

The Authority should consider the strategic focus of the regulatory regime and its future efficacy as markets and technology evolve. Issues that could be considered include:

- Broadening the definition of a product class beyond the functions a product performs so that a broader range of energy-using products could be regulated
- Applying a system-based approach to energy efficiency regulation
- Requiring the mandatory labelling of energy-conserving products
- Prescribing specific emission performance standards for energy-using appliances and equipment.

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<sup>17</sup> See Part 1 of the GEMS Act 2012 (Australia)

<sup>18</sup> See Part 1 of the GEMS Act 2012 (Australia). Although the regulations allow the Minister, amongst other matters, to make determinations covering the amount of greenhouse gases resulting from regulated products, the Minister has yet to do so.

<sup>19</sup> The emissions intensity of New Zealand's electricity generation is low by international standards due to the high proportion of demand met by hydro generation. See <https://www.mbie.govt.nz/assets/687c7abf5a/nz-energy-greenhouse-gas-emissions-2015.pdf>



## 5. RECOMMENDATIONS

### 5.1. Summary of recommendations

This section summaries the opportunities to enhance the regime and provide flexibility for the Authority to continue to deliver significant benefits.

Topic	Summary of Recommendations
<b>ISSUES THAT CAN BE ADDRESSED BY AMENDING THE REGULATIONS</b>	
Better alignment with the E3 registration scheme	Set out the requirements importers and New Zealand manufacturers need to meet to register products against the New Zealand standards
	Specify the form and substance of the test report and the length of time it needs to be retained
	Require importers of regulated products to provide the Authority with information about the importation as part of the registration process
Expanding the coverage of the Regulations	Regulate the supply of products for commercial use
	Provide that the display of energy performance labels on products sold online should be mandatory
	Permit the Authority to grant exemptions from providing statistical information about specific products or low-volume sales
	Allow the Authority to grant exemptions from any aspect of the standards on a case-by-case basis, and when doing so may specify conditions relating to the labelling, supply or commercial use of the product
Product standards	Include details about the requirements regulated products need to meet, so that the standards are limited to the technical specifications and testing protocols
	Clarify whether standards include other matters related to the performance of energy-using products
<b>ISSUES THAT COULD BE RESOLVED BY EXPANDING THE REGULATION-MAKING POWERS</b>	
Better alignment with the E3 registration scheme	Investigate whether a fee should be charged to cover the costs of administering the registration process
Monitoring and Inspection	Allow the Authority to enter premises and examine regulated products
	Outline the check testing process, including the dealer's responsibilities when a product fails and the timeframes for the various stages of the process
	Permit the Authority to order the re-testing of products outside the check-testing programme
	Specify who may carry out compliance activities on behalf of the Authority
<b>ISSUES THAT NEED TO BE ADDRESSED THROUGH LEGISLATIVE CHANGE</b>	
Investigation and enforcement	Examine whether the Authority needs enhanced investigation powers, including the ability to apply for a warrant to inspect vehicles and dwellings, and seize non-compliant products
	Allow the Authority to designate suitably trained officers of other agencies as compliance officers

	Provide for a graduated set of enforcement interventions
	Include a pecuniary penalty applicable to both real people and body corporates
	Increase the penalty level so it acts as a sufficient deterrent against non-compliance
	Permit the Authority to seek a court order to have non-compliant products forfeited to the Crown so that they can be destroyed.
Process for revising the standards	Allow the Minister to replace standards without amending the Regulations.

**5.2. Areas of strategic focus**

As the current regime focuses on the regulation of stand-alone appliances and equipment, there is a limit to what the Regulations can deliver in terms of energy efficiency. The review has identified some strategic issues that have the potential to result in greater energy savings and conservation. These include:

- Broadening the definition of a product class beyond the functions a product performs so that a broader range of energy-using products could be regulated
- Applying a system-based approach to energy efficiency regulation
- Requiring the mandatory labelling of energy-conserving products
- Prescribing specific emission performance standards for appliances and equipment

The Authority should consider the strategic focus of the regime and decide whether these emerging opportunities would positively impact the future efficacy of the regime, taking into account the partnership New Zealand has with Australia.



Image 5: Types of energy-using equipment and appliances found in buildings

**5.3. Issues not requiring legislative or regulatory change**

The Authority could address some of the issues identified during the review by making changes to its operational procedures (such as applying an intelligence-led, risk-based approach to check-testing and providing more visibility to industry around its compliance activities).

The Authority could also work more closely with the New Zealand Customs Service to identify ways that it can support the Authority’s compliance activities and the Commerce Commission

to investigate cases where traders are suspected of making a false or misleading statement about the energy efficiency of a product.

Following the GEMS Act review, the Australian Government is likely to undertake policy work in response to certain recommendations, including to identify alternative check testing methods for short market life or bespoke products. Since these issues are pertinent to the New Zealand context, the Authority should work alongside its Australian counterparts to ensure the approach taken to these issues in each jurisdiction is more closely aligned.

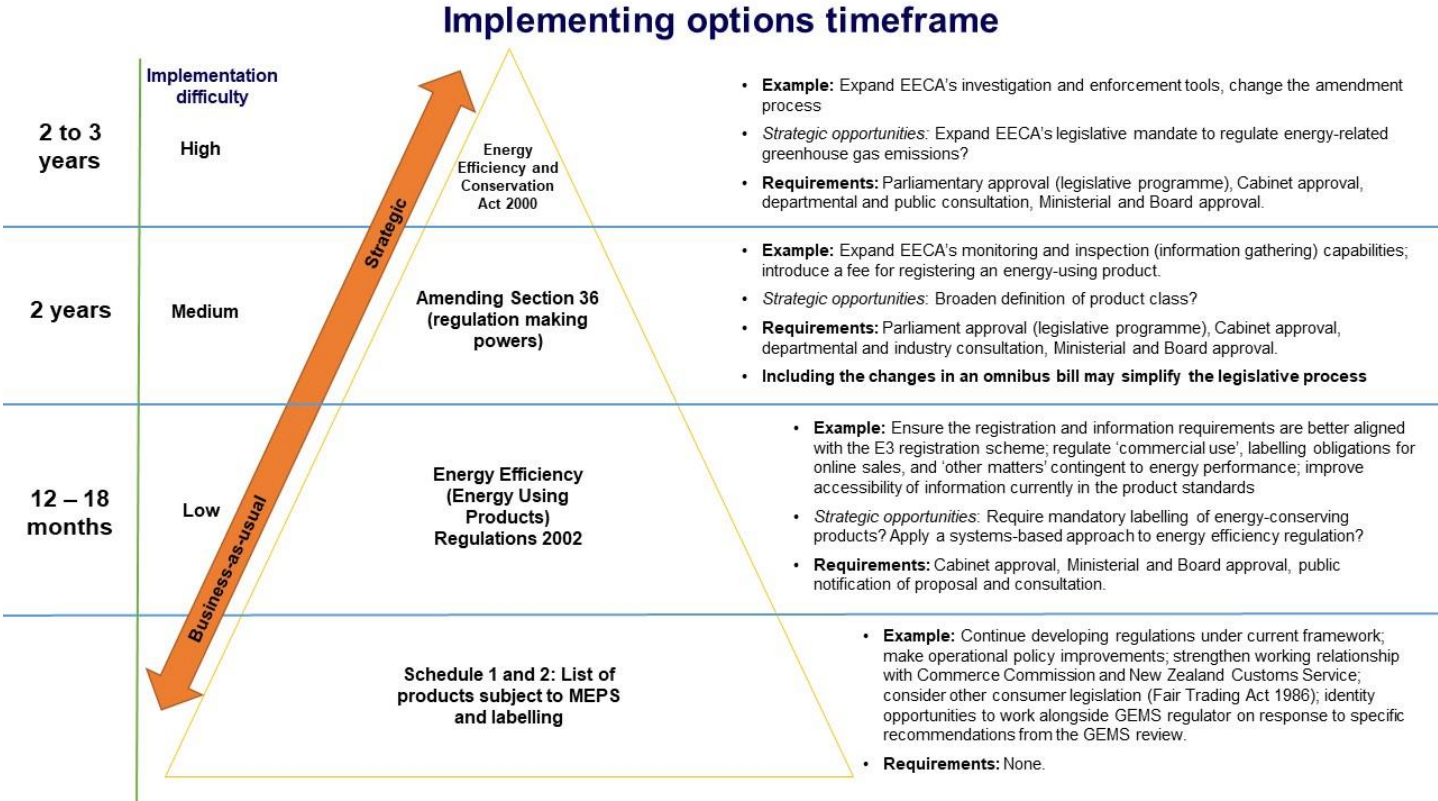


Image 6: Timeframe for implementing options

## Appendix 1: Regulation-making powers

The regulation-making powers are set out in section 36 of the EEC Act, as follows:

### **36 Regulations**

- (1) The Governor-General may from time to time, by Order in Council made on the recommendation of the Minister, make regulations for all or any of the following purposes:
  - (a) prescribing minimum energy performance standards for energy-using products and services, including all vehicles;
  - (b) prescribing requirements in relation to the labelling of products, including all vehicles, in terms of their energy efficiency or proficiency in conserving energy;
  - (c) requiring specified classes of persons to provide, on the request of the Authority, evidence in the specified form that a minimum energy performance standard prescribed under paragraph (a) has been complied with;
  - (d) prescribing, for the purposes of paragraphs (a) to (c), the form and manner of testing or verifying the energy performance of energy-using products and services, including vehicles;
  - (e) requiring, for the purposes of paragraphs (a) to (c), specified classes of persons to certify, in the prescribed form and manner, as to the energy performance of energy-using products and services, including vehicles;
  - (f) requiring specified classes of persons to supply prescribed information to the Authority for the purpose of compiling statistics on energy efficiency, energy conservation, and the use of renewable sources of energy;
  - (g) prescribing offences in respect of the contravention of, or non-compliance with, any provision of any regulations made under this section;
  - (h) prescribing the amount of the fines that may be imposed in respect of any offences against any regulation made under this section, which fines must be an amount not exceeding \$10,000.
- (2) Before making regulations under this section, the Minister must—
  - (a) publicly notify the proposal to make the regulations; and
  - (b) give interested persons a reasonable time, which must be specified in the notice published under paragraph (a), to make submissions on the proposed regulations; and
  - (c) consult with such persons as the Minister in each case considers appropriate.

## Appendix 2: Other amendments to the Regulations

If the regime was amended, the Authority might wish to address the following low-priority issues.

Issue	Problem definition	Discussion
<b>ISSUES THAT CAN BE ADDRESSED BY AMENDING THE REGULATIONS</b>		
<i>Better alignment with the E3 registration scheme</i>		
The regulations only cover the supply of an energy-using product by way of sale, lease, hire or hire purchase	The gifting of a new product (e.g. as part of a sales campaign for existing products) is a marketing tactic to promote the new product to consumers. MEPS and labelling requirements do not cover such promotions.	Ensuring the Regulations include the supply of products by way of exchange, gift or loan would prevent traders dumping inferior products onto unsuspecting consumers.
It is unclear whether the Regulations apply to situations where a trader simply offers to supply a product by exposing, displaying or advertising the product	Consumers are often exposed to products that are not currently for sale in New Zealand: for example, products could be displayed at trade shows or advertised in catalogues from overseas suppliers. They are sometimes encouraged to purchase products directly from the overseas supplier. This may lead to non-compliant products being brought into the country by unsuspecting consumers.	Amending the Regulations to cover such situations would ensure consumers are aware of the operating costs of the product and the likely impact on their electricity bills.
The regulations are unclear what happens when a product is in more than one product class	The market is seeing an emergence of products with multiple functions (such as fridges with TV screens and 'smart' appliances with internet connectivity). These integrated products require additional power and may remain on standby longer than would be needed for just the core product. It is unclear whether such products need to comply with the requirements for each product class and require a separate registration for each.	Clarifying that a single product may be in more than one product class would remove this uncertainty. This would benefit consumers as they would be fully aware of the operating costs of the product and would ensure inefficient functions do not creep back into the market by being integrated into multi-purpose products. However, there would be implications for industry as the products would have to be tested against the standards for both products.
<i>Expanding the coverage of the Regulations</i>		

<p>The exemption for second-hand items appears to cover the importation of second-hand items, which creates a risk that New Zealand could become a dumping ground for non-compliant second-hand appliances.</p>	<p>The exemption for second-hand items recognises that the energy efficiency of a product reduces over time, and it is not practical for businesses to 'test' second-hand items before they are sold. However, it is unclear whether this exemption excludes second-hand products imported with the sole purpose of supplying such products to the retail market.</p>	<p>Clarifying that the exemption applying to second-hand products only applies to products that have been previously sold in New Zealand would ensure New Zealand does not become a dumping ground for non-compliant second-hand appliances.</p>
<p><b><i>Enforcement interventions</i></b></p>		
<p>It is unclear whether the penalty provision allows a monetary penalty to be imposed per non-compliant item or per registration.</p>	<p>The wording used in the Regulations is ambiguous, as the relevant provision simply states that each contravention is a separate offence.</p>	<p>Clarifying that a monetary penalty can be imposed for each infringement founded on the same facts would aid enforcement activities as it would provide certainty to industry and the Authority around the potential liability of an offender.</p>
<p><b>ISSUES THAT COULD BE RESOLVED BY EXPANDING THE REGULATION-MAKING POWERS</b></p>		
<p><b><i>Monitoring and inspection</i></b></p>		
<p>The check testing process can be lengthy, which is an issue for products with a short market life.</p>	<p>Acquiring products, testing the requirements, liaising with dealers, and ensuring procedural fairness can take between three weeks and 15 months, depending on the product and the Stage 1 outcome. The process also does not work for unique or bespoke products.</p>	<p>The Authority could consider alternative approaches to testing such products. For instance, the Authority could adopt a one stage assessment comprising a visual inspection and a review of product literature, certifications and registration information.</p>
<p>There is no requirement for the importer to remove the products from New Zealand.</p>	<p>The Regulations do not explain what happens to non-compliant products that have been imported into New Zealand after the breach has been detected</p>	<p>The ability to order the removal of non-compliant products from New Zealand would ensure that non-compliant products do not enter the market illegally. However, this change may see products exported to countries with more lenient energy efficiency regimes, so should be only be progressed with caution.</p>
<p><b>ISSUES THAT NEED TO BE ADDRESSED THROUGH LEGISLATIVE CHANGE</b></p>		
<p><b><i>Providing information for statistical purposes</i></b></p>		
<p>The Authority is not permitted to share statistical information with other persons (such as agents carrying out functions for the Authority).</p>	<p>The Authority often works with external researchers to identify energy consumption trends associated with specific products, which helps drive energy</p>	<p>Amending the EC Act to allow the Authority to pass on sales data to agents carrying out functions for the</p>

	<p>efficiency going forward. However, the EEC Act prohibits it passing on 'raw' sales data to such persons: requiring it to 'sanitise' the information provided. The researchers often miss things or identify other areas of interest, which results in further information requests to the Authority. This process is time-consuming and inefficient.</p>	<p>Authority would support the purposes of the Authority.</p>
<p><b><i>Process for revising the standards</i></b></p>		
<p>The Regulations lack a straight-forward mechanism for removing products classes that are redundant from the Schedules</p>	<p>Due to improvements in technology, some product classes are no-longer manufactured and sold in New Zealand (for example, set-top boxes). Their presence in the list of regulated products causes confusion, particularly when it comes to collecting statistical information. Redundant product classes may only be removed by amending the Regulations, which takes time and is an unnecessary burden on the Cabinet decision-making process.</p>	<p>Providing a straight-forward mechanism to remove redundant product classes would avoid delays associated with the current process. This could be done by way of a sunset clause or by requiring the Authority to undertake periodic reviews to ensure that standards are fit-for-purpose.</p>
<p>The Regulations are silent on the lead in time for new or revised standards.</p>	<p>Any new or revised standard will come into force on the 28<sup>th</sup> day after the date of its notification in the <i>Gazette</i>. While this ensures standards are publicly available and capable of being ascertained by industry before they take effect, the limited 'four-week' commencement period does not provide enough time for industry to prepare for the changes.</p>	<p>Specifying a longer lead-in time for new or revised standards to come into force would ensure industry has enough time to prepare for the change. However, an appropriate balance would need to be struck between providing certainty to industry and ensuring that the benefits flowing from the new or revised standards are realised as soon as possible.</p>
<p>While the MEPS and labelling requirements are regularly reviewed through the E3 programme (and appropriate changes are made to the relevant standards), there is no requirement to review the Regulations themselves.</p>	<p>The lack of regular reviews creates a risk that the Regulations will become obsolete and fail to keep up with market changes and technological advances. This may weaken the respect regulated parties have for the regime, reduce public confidence and ultimately lead to regulatory failure.</p>	<p>The Regulations could be regularly reviewed to ensure they continue to fulfil their purpose – particularly given the rapid advancements in energy-using technology. Including this requirement in the EEC Act would assure industry they have a process and timeframe within which to raise concerns and improve consumer confidence in the regime's effectiveness.</p>

